

**Impunity from accountability for election crimes: Analysis of crimes
committed by Zimbabwe authorities and ZANU-PF militia during the 2008
election**

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Dedication

I dedicate this mini-dissertation to my loving mother, during my studies I had a fatal accident which almost claimed my life but her unwavering support, the moral support and encouragement was overwhelming and revived the urge for me to pursue my studies. Thank you, mama. This journey started when I was pregnant with my son Awande Maphosa, he has been my source of inspiration ever since and completes me in many ways. I will forever cherish all of you.

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List of Abbreviations

ACHPR : African Commission on Human and People's Rights

ACCZ : Apostolic Christian Council of Zimbabwe

ANC : African National Congress

AU : African Union

BAZ : Broadcasting Authority of Zimbabwe

BVR : Biometric Voters Registration

CIBD : Coercion Intimidation Beating Displacement

CIOs : Central Intelligence Officers

CSOs : Civil Society Organisations

DA : Democratic Alliance

DRC : Democratic Republic of Congo

ED : Emmerson Dambudzo

EFF : Economic Freedom Fighters

GNU : Government of National Unity

GPA : Global Political Agreement

HIV : Human Immunodeficiency Virus

ESC : Electoral Supervisory Commission

EU : European Union

FRELIMO: Mozambique Liberation Front, from the Portuguese: Frente de Libertação de Moçambique

ICC : International Criminal Court

ICCPR : International Covenant on Civil and Political Rights

JOC : Joint Operations Command

MDC : Movement for Democratic Change

NARC : National Rainbow Coalition

NDI : National Democratic Institute

NGOs : Nongovernmental Organisations

ODM : Orange Democratic Movement

PF : Patriotic Front

PNU : Party of National Unity

POSA : Public Order and Security Act

PTUZ : Progressive Teachers' Union of Zimbabwe

RENAMO: Mozambican National Resistance, from the Portuguese: *Resistência Nacional Moçambicana*)

RSF : Rhodesian Security Forces

SADC : Southern African Development Committee

SW Radio : Short Wave Radio

UDHR : Universal Declaration of Human Rights

UN : United Nations

US : United States

ZANU-PF : Zimbabwe African National Union - Patriotic Front

ZAPU : Zimbabwe African People's Union

ZBC : Zimbabwe Broadcasting Corporation

ZDF : Zimbabwe Defence Forces

ZEC : Zimbabwe Electoral Committee

ZIMTA : Zimbabwe Teachers' Association

ZINASU : Zimbabwe National Students Union

ZNA : Zimbabwe National Army

Abstract

Impunity and lack of accountability have remained a challenge in Zimbabwe since independence. The government has failed to ensure justice for victims of human rights violations perpetrated by ZANU-PF. The state security organs committed widespread, systematic abuses such as torture and beatings leading to the killing of unarmed civilians in the 1980s in Matabeleland and Midlands, and the death and displacement of opposition supporters in election-related violence in 2008. The perpetrators have not been held accountable, including the former President Mugabe, who was fond of reiterating propaganda, which perpetuated violence among communities. The ruling party ZANU-PF has used systemic violence by intimidating masses to ensure that they vote in their favour. The research analysed the crimes committed by Zimbabwe authorities and ZANU-PF militia during the 2008 election and beyond.

Chapter one covers the background of the research and also gives a general introduction to the crimes committed against humanity.

Chapter two looks at how the ruling party has manipulated and politicised different institutions using some as platforms for a political campaign. It also explains that there is no independence in the judiciary system. The polarised system has remained in favour of ZANU-PF and the perpetrators have continued to walk scot-free, from the elite to ordinary citizens.

Chapter three addresses the degeneration of the rule of law in Zimbabwe. It explains how the law enforcing agents have been complicit in the human rights violations. Furthermore, it discusses the impunity that prevails in the state organs and how they exercise their power to achieve the agenda of the ruling party.

Chapter four discusses the Constitution of Zimbabwe and her electoral law, the principles of free and fair election in those instruments. Included in this chapter, are important Court cases from Zimbabwe where judges pronounced themselves on the freeness and fairness of elections.

Chapter five outlines the international and regional instruments on the right to free and fair elections. It further analyses the right to free and fair trial and how protocols

are being violated by Zimbabwe as a state. It also states how the role of elections observers have been undermined by the state.

Chapter six is the conclusion of the research and articulates how the state has violated the guiding principles to ensure a free and fair election.

Chapter seven elaborates on the key findings and gives recommendations to ensure a free and fair election prevails in Zimbabwe.

CHAPTER 1

Background and Introduction

1.1 General Introduction to the study

The violation of human rights in Zimbabwe dates back to the country's attainment of independence in 1980.¹ Just after independence, the country witnessed mass killings and a violent campaign in the Matabeleland and Midlands provinces better known as *Gukurahundi*.² This violence was done at the behest of the state led by the then-Prime Minister Robert Mugabe as the mastermind, with the now President Emmerson Mnangagwa being the hand man. Similar violent and coercive methods have been used in the country's past elections from 2000-2013 now targeting people who have been supporters of the opposition parties. The current ruling party, Zimbabwe African National Union – Patriotic Front (ZANU-PF) has used systemic violence as a tool for intimidating and forcing citizens to vote in its favour. The violent history of elections in Zimbabwe has gone with impunity, and offenders often walk scot-free, with little, to no accountability despite these gross violations and cases being brought before the country's judiciary. These violations have been regarded as human rights violations, and others are of the view that these violations constitute, to some extent, international law crimes, for example, crimes against humanity.

After the unity accord between ZANU-PF and ZAPU in 1987, there was little electoral contestation hence the violence subsided because the united ZANU-PF was always guaranteed of winning the elections. This semblance of peace during elections, however, changed after ZANU-PF's power was rechallenged by the formation of the MDC in 1999 under the presidency of its former leader Morgan Tsvangirai. Following an unclear or disputed winner of the 27th June 2008 Presidential elections, President Mugabe's ruling party clamped down on perceived opposition supporters. It is widely accepted that the opposition Movement for Democratic Change (MDC-T) candidate Morgan Tsvangirai won the elections, although the Zimbabwe Electoral Commission

¹Zimbabwe 2013 Human Rights Report:Country Reports on Human Rights Practices for 2013 United States Department of State: Bureau of Democracy, Human Rights and Labor.

²The *Gukurahundi* was a series of massacres of Ndebele civilians carried out by the Zimbabwe National Army from early 1983 to late 1987. It derives from a Shona language term which loosely translates to "the early rain which washes away the chaff before the spring rains".

declared that he was not the outright majority winner. According to the electoral laws of the country, the two candidates had to face off in an election run-off.

Ahead of the 2008 June run-off elections, ZANU-PF mobilised young people who were turned into the violent untrained militias. Together with the war veterans, they set up torture bases, unleashing a reign of terror across the country more especially when there was resistance towards ZANU-PF. The bases were set up on locations such as schools, clinics, mountains and shopping centres. Armed soldiers were also used to mete violence on civilians. Night vigils were held, and people who were suspected of not supporting ZANU-PF were beaten, banished, abducted, denied access to food and healthcare, some activists went missing while others died mysteriously.³ People were forced to attend night vigils that were used as indoctrination meetings. Perceived opposition supporters were routinely subjected to torture, humiliation, rape, gun shootings, car accidents and forced defection.⁴ Some had their homes burnt as punishment for being suspected to have voted or supported the opposition party, mainly MDC supporters who had been labelled as traitors and sell outs.

The study addresses the speculation that government officials and law enforcement agents are directly involved in the lack of accountability and impunity in Zimbabwe. The study will also further unveil how the elite (government officials) have used their power to encourage the youth militia in perpetuating violence towards, during and post-election periods. Numerous indicators that the voting system is highly polarised by the state will also be brought to light. From the above information, the study will analyse the lack of accountability on crimes committed during an election. Recommendations on how best to address impunity and lack of accountability in the country will be presented.

1.2 Problem statement

³ Early warning report on political motivated human rights and food –related violations in Zimbabwe (Zimbabwe Peace Project 2008).

⁴ A cursory glance at Zimbabwe reveals the total lack of integration. It is typical across Africa today, even in countries that had no experience of settler communities. The image is identical to the popular conception of apartheid South Africa--rich white suburbs, with large green lawns watered by black staff and black security guards guarding palatial houses with swimming pools and enormous gardens. These areas sit cheek by jowl with sprawling townships and terrible poverty. The lifestyles (and even the attitudes) of those who live like this have not changed substantially since independence.

The problem addressed by this study is based on how lack of accountability and impunity has led to increased political violence during the election periods in Zimbabwe. The election held on 31 July 2018 was of importance to monitor if there was any change post Mugabe era. Ideally, leadership accountability is a tenet of good governance in a functional state that guarantees citizens access to political and socio-economic rights.

In Zimbabwe, scores of people have been displaced, families separated, while others were forced to flee the country into exile. Rape and torture have been used as political weapons by the leadership, curtailing the rights of the citizens.

The study also looks at the citizens' right to participate in the voting process. Without active participation, accountability can never be achieved. Collective citizenship is critical if the ballot is to transform lives in a meaningful way. The research seeks to find if the citizens participate freely in the election process. One notes that accountability in the context of Zimbabwean elections is controversial, with the ruling party affirming that it wins overwhelmingly and hence has a mandate to rule, while the opposition claims elections were stolen or rigged.

1.3 Research methodology

To bring forth a thorough analysis on the lack of accountability and impunity on Zimbabwean election crimes, the research will employ a desktop study by referring to written literature such as journal articles, thesis, newspapers, books, and reports. In addition, the research will make use of already collected video material from a covert human rights organisation. Regional and international laws that offer protection to those that are not protected by domestic laws will be used as a reference. The identified research tools will provide insight referenced from other scholars on how to tackle the study. Informal discussions were conducted to understand the political situation of the country currently.

1.4 Motivation for the study

The history of election violence in Zimbabwe suggests a state-sponsored trend; the government has funds allocated for the youth militias. Political violence cases

brought before courts have not recorded any single meaningful prosecution despite overwhelming evidence. In the few instances where there has been a conviction, the offenders have been given a presidential pardon. This lack of accountability has led to criticism from human rights activists and defenders that the judiciary has lost its independence and is biased towards the political elite who are often regarded as perpetrators of extensive human rights violations. The research aims to expose the link between the elite (government officials and politicians) and the foot soldiers (youth militia and war veterans). Although it is a risky exercise, extra caution will be taken to avoid cases of defamation.

Elections are a valve which nations use to give people a voice in deciding who should govern them. If this right is violated, the nation explodes, resorting to violence, forcing people to seek refuge within the region and beyond. In Zimbabwe, the violations are rife in rural areas, which hold the majority of the voters making it a contested territory for political parties. Political executioners and vigilantes are controlled by the ZANU-PF top brass to strike fear and harm citizens. These armed political executioners work with local informers who patrol villages to monitor the area. These individuals also vet movements of people visiting their areas of operation. They also control the flow of information; censoring perceived hostile news sources, virtually making the rural areas no-go zones for anyone other than the ruling party and those sympathetic to it.

The extrajudicial activities by the political executioners, vigilantes have gone unpunished. They are protected by their superiors (political elite) and are paid salaries for their dirty work from government coffers. This behaviour has led to the rise of ghost workers in Zimbabwe.⁵ If a victim reports to the police, the case is turned in favour of the perpetrators leaving the victims in custody. This protection has resulted in many cases going unreported due to fear of intimidation of people's lives and their families.

The failure to get or to find a fair resolution through the judiciary system has left many victims more vulnerable, and some have been forced to seek political asylum

⁵ A ghost employee is someone recorded on the payroll system, but who does not work for the business. The ghost can be a real person who knowingly or not is placed on the payroll, or a fictitious person invented by the dishonest employee.

in neighbouring countries, which include South Africa, Botswana and as far as the United Kingdom.

1.5 Research Questions

- Are there indeed human rights violations linked to impunity in Zimbabwe as reported by the media and civil society?

1.5.1 Subquestions

-If there are violations, are the perpetrators acting on a directive from the state and/or political elite or are they acting on their own impulse?

-If they are acting independently, are there any remedial measure taken by their superiors or does impunity prevail?

1.6 Limitations

There has been no direct access to victims in the rural areas because of possible security fears. The rural areas are highly polarised by Central Intelligence Officers (CIOs) and callous youth militia who sometimes masquerade as war veterans. These youth militias monitor everyone who comes to the village and ensures non-residents are vetted thoroughly. If the cover stories of researchers or non-residents are not watertight, they risk being abducted and killed for spying on the village. The research is also limited in the sense that there is not enough literature available as some of these issues have not been documented, the figures of victims who have disappeared are unknown, and this includes those who have died. Due to my work commitments and an accident that I was involved in, I was not able to travel to Zimbabwe to conduct some informal interviews that would have assisted with the research. The research also adopted a desktop legal culture and analysis; it is noted that the desktop study might be biased.

1.7 Literature review

According to O' Donnell (1994) accountability can be classified into two aspects, the vertical and horizontal. Vertical accountability is mainly measured through an election which enables citizens the opportunity to reward or punish its incompetent leaders.⁶ It can be argued that vertical accountability is exercised mostly in democratic states. In such jurisdiction, the voters could recall and vote for replacements. South Africa is one of the African states that adhere to democratic governance (though this is subject to debate) where people's choice comes first. This democratic governance was highlighted in the 2016 municipal elections where opposition parties, through coalitions took control of major metros and displaced the ruling ANC who were regarded as corrupt and incompetent. This election saw metropolitans such as Port Elizabeth and Pretoria being dominated by the DA. In Zimbabwe, this is still a pipe dream because even in cases where the opposition had won local council elections they had successive ministers usurping their power or suspending elected mayors. Horizontal accountability as defined by Scott (2000), as the internal mechanisms within government. Some analysts term this social accountability⁷. This type of accountability is controversial, though achievable if the rule of law prevails.

Impunity is defined as the impossibility, in law or in fact, of holding perpetrators of human rights violations accountable. *De facto* impunity takes place when the state fails to prosecute human rights abusers due to lack of capacity or political will. *De jure* impunity occurs when laws or regulations providing immunity or amnesty extend and strengthen the impact of *de facto* impunity by limiting or making it impossible to prosecute a perpetrator for human rights abuses.⁸ Zimbabwe has suffered from both forms of impunity, which has led to grave human rights violations by allowing past perpetrators to commit future crimes, and it has undermined peoples' faith in the government, the security forces, and the criminal justice system.

At times, the rulers encourage impunity to prevail on perpetrators. For example, on April 18, 1988, as part of the Unity Accord between ZANU-PF (as it was known then) and the Zimbabwe African Peoples' Union, the government issued a general amnesty in Clemency Order (1) of 18 April 1988, which provided amnesty to state

⁶O'Donnell, G1994 Delegates Democracy *Journal of Democracy*.

⁷Scott, C. 2000 Accountability in a regulatory state.

⁸Karstedt, S. 2009. *Legal Institutions and Collective Memories*: Bloomsburg.

security forces and the so-called dissidents implicated in human rights abuses between 1982 and the end of 1987 in the Midlands and Matabeleland.⁹

Following politically motivated violence surrounding elections in 2000, President Mugabe proclaimed a Clemency Order that granted indemnity to every person liable to criminal prosecution for political crimes committed during the period January 1, 2000, to July 31, 2000.¹⁰ These excluded the crimes of rape, murder and fraud, but included grievous bodily harm (such as torture).

The ICCPR,¹¹ to which Zimbabwe is a party, requires that states adopt measures, including through the legal system, to protect fundamental rights. According to the UN Human Rights Committee,¹² the independent expert body that monitors compliance with the ICCPR, a state's failure to investigate and bring perpetrators to justice, particularly concerning crimes such as killings, torture and other ill-treatment, could in itself be a violation of the Covenant.¹³ Similarly, the African Charter on Human and Peoples' Rights places obligations on states to ensure the protection of Charter rights, and for individuals to have rights; violations against them are to be heard by competent national institutions.¹⁴

The Zimbabwean Constitution guarantees freedom from torture and inhuman or degrading treatment.¹⁵ Zimbabwe is a party to several international agreements that prohibit the use of torture and other forms of ill-treatment, including the ICCPR,¹⁶ and the African Charter on Human and Peoples' Rights.¹⁷ The African Union Guidelines and Measures for the Prohibition of Torture, Cruel, Inhuman or Degrading Treatment or Punishment in Africa (also known as the Robben Island Guidelines) also state that there should be no immunity from prosecution for nationals suspected of torture and that those responsible for acts of torture or ill-treatment be subject to the legal

⁹ Clemency Order No 1 of 1998. Amnesty International, "The Toll of Impunity," June 25, 2002.

¹⁰ Clemency Order No 1 of 2000. Amnesty International, "The Toll of Impunity," June 25, 2002.

¹¹ The International Covenant on Civil Political Rights 1976.

¹² The United Nations Human Rights Committee.

¹³ See (n 9 above).

¹⁴ The African Charter on Human and Peoples' Rights 1986.

¹⁵ Act 53 of 2013 Zimbabwe Constitution.

¹⁶ The International Covenant on Civil Political Rights 1976: Art 7.

¹⁷ See (n12 above).

process.¹⁸ One can argue that these rights are on paper and not practiced in Zimbabwe.

The police have also routinely arrested human rights activists and journalists and subjected them to torture, cruel, degrading and inhumane treatment. The torture and ill-treatment inflicted include, severe beatings on targeted body parts such as the back, buttocks and feet with blunt objects, forcing victims to sit or stand in uncomfortable positions for hours on end. Some victims have also been subjected to false executions and death threats. The government has repeatedly refused to investigate allegations of torture by police and other state agents, despite court cases compelling the government to act.¹⁹

In October 2009, Manfred Nowak, the then UN Special Rapporteur on torture, and other cruel, inhuman or degrading treatment was deported from Harare International Airport after he was invited by Prime Minister Morgan Tsvangirai to investigate cases of torture. The ZANU-PF wing of government claimed that it had withdrawn its invitation to Nowak because it was engaged in a consultative process in Harare.²⁰

Problems of elections not addressing their intended purposes are rife in the African continent and are not only confined to Zimbabwe. For example, in Kenya after independence in 1963, Jomo Kenyatta and the Kenya African National Union (KANU) quickly consolidated power, at first attempting a nationalist government and ethnic power-sharing between influential groups, but eventually reducing this to a small cadre of co-ethnics that hailed from Kenyatta's home area in Central Province. After Kenyatta's death in 1978, Daniel Arap Moi, of the Kalenjin tribe, became head of state and brought even tighter centralisation and control.

Following a similar pattern from across Africa, the one-party state under Moi committed numerous human rights abuses against political dissidents. Like Kenyatta, Moi failed to address problems of regional inequalities, especially concerning the distribution of land resources that had been used by colonial settlers

¹⁸Robben Island Guidelines for the Prohibition and Prevention of Torture in Africa: Practical Guide for Implementation: Art 1 (b).

¹⁹Zimbabwe: A trail of violence after the ballot: Amnesty International Report 2008.

²⁰ UN torture investigator refused entry to Zimbabwe: The Guardian 29 October 2009.

and taken from the Kikuyu, but not redistributed fairly among the Kikuyu or other communities (Kanyinga 2010).²¹ Although Moi managed to maintain power after political party liberalization in the 1992 and 1997 elections, violent clashes between and within ethnic groups characterised both elections, with many arguing that Moi strategically targeted certain communities in his home Rift Valley region to increase turnout among his co-ethnics and drive away ethnic strangers (Hornsby 2012; Throup and Hornsby 1997).²²

The 2002 election brought to power Mwai Kibaki's NARC coalition, dramatically defeating KANU and Moi's appointed heir, Uhuru Kenyatta (son of the former President). Kibaki's margin of victory was large, and although many feared Moi would cling to power through fraudulent means or resume ethnic targeting in the Rift Valley, the 2002 elections were mostly peaceful. However, between 2002 and 2007 elections, there was an increase in violence. Most important services demanded by Kenyan voters in 2007 involved the local provision of security, something that the central government hold authority over. First, rampant crime, particularly in urban areas, continued from the Moi regime to the Kibaki's regime (Mueller 2008).²³ Second, a simmering insurgency flared up in 2005 in the western Mt. Elgon region led by the irredentist Sabaot Land Defence Forces. Third, continued terror from the outlawed *Mungiki* sect, with historical ties to Mau Mau, targeted co-ethnic Kikuyus and others in urban areas and Central Province, resulting in a heavy-handed state response and human rights violations (including the execution of 500 suspected members of the opposition party in the lead-up to the 2007 election) (Mueller 2008).²⁴ All told, policies pursued first by the colonial state, and then by Kenyatta and Moi, created ethnic resentment and the view on the part of some that leaders favour their own when distributing needed goods and services from the government. Multi-party elections may activate these feelings of social immoderation since they serve as referenda on who governs, and therefore, which groups benefits or not.

²¹Kanyinga, K., et al. (2010). *Tensions and Reversals in Democratic Transitions: the Kenya 2007 General Elections*

²²Throup, D., and C. Hornsby. 1997. *Multi-Party Politics in Kenya*. Athens, OH: Ohio University Press.

²³Mueller, S. 2008. "The Political Economy of Kenya's Crisis." *Journal of Eastern African Studies* 2, 2.

²⁴See (n23 above).

In feeling left out, the opposition at times tend to resort to protest actions. This demonstrates the weight that the opposition places in trying to bargain for positions in a post-election settlement versus having no executive power. Protests showed the opportunity costs of violence relative to exclusion. Rigging, protest, and state repression all require coordination. In the context of elections, parties serve this mechanism. Given their need to mobilise voters for a high turnout, parties are the most likely institutions to clash in the immediate post-election environment (Tucker 2007).²⁵

The Orange Democratic Movement (ODM) protested and claimed that the results had been rigged. The Party of National Unity (PNU) controlled the state security forces and responded violently to ODM protests. A focus on parties underscores the political logic of electoral violence and its contingent nature in the context of elections, especially those parties that rig elections. This helps to explain why even though they coordinate for local collective action, ethnic communities do not provide superior coordination to parties when it comes to electoral behaviour. If they did, post-election violence would correlate more strongly with areas of strong co-ethnic support (in this case, predominately Kikuyu and Luo areas) than areas of strong party support. ODM used the protest to try and bargain for inclusive power. In response, PNU strategically deployed state security apparatus to target the protesters, and the two parties clashed heavily in the post-electoral period. The above discussion alludes that little efforts have been done to achieve accountability on election committed crimes and more must be done.

This lack of prosecutions seems to be a problem of the African continent. The state is under a continuing obligation to provide an effective remedy. However, this is a pipe dream. The superiors are in direct contact with youth militias and war veterans wreaking havoc in affected areas. When the victims take up the matter to courts of law, their plight is crushed and dismissed with no investigations done to curb violence. Impunity has led to increased human right violations in the country.

1.8 Conclusion

²⁵Tucker, J. (2007). "Enough! Electoral Fraud, Collective Action Problems, and Post-Communist Coloured Revolutions." *Perspective on Politics*. 5, 3, 535-551.

For future political stability in the country, it is imperative that Zimbabwe breaks with the past, and investigates and brings to justice all those responsible for serious abuses in the aftermath of the bloody 2008 elections, and any other previous elections. Any future government should not just grant amnesty to perpetrators of serious crimes.

Future governments of Zimbabwe will need to address the issue of accountability for past and recent violations of human rights by high-ranking individuals. Independent, impartial, and transparent investigations will need to be an essential component of this process. Moreover, the people of Zimbabwe will have an important role to play in bringing the tragic facts of this period to the fore, not just for the historical record, but to ensure that justice is served.

Chapter 2

Manipulation of institutions through systemic violations during the 2008 elections

2.1 Roots of Political violence

The colonial state itself was a major problem for the institutions that the colonial state created. It deployed this violence against nationalist organisations such as the National Democratic Party (NDP) and the ZAPU. Detentions of nationalists' leaders and imposing bans on their parties became common methods of the White minority regime to contain nationalism. Violence was deployed through beatings, use of dogs in controlling gatherings, forceful arrests and shootings. The legacy of violence within the liberation movement was pervasive. As reflected in a song "ZANU Ndeyeropa" translated as ZANU has a history of blood, violence was ingrained into the political culture of ZANU-PF.²⁶

Democracy is defined as, "that form of government in which the sovereign power resides in the people and is exercised either directly by them (as in small republics of antiquity) or by officers elected by them". Elections, therefore, are indispensable to any democratic political system, when people vote for their preferred party. Hence democracy in terms of elections can be regarded as the will of the people by the people. However, as with any other mode of succession, in many countries, elections also involve the explicit or implicit use of force either by the political parties contesting the elections themselves or outside agents like the military, labour unions or private militias. This use of force undermines the very premise of an ideal democratic state that rests on freedom of expression and choice.

This includes a wide range of illegal, illicit and violent practices designed to influence the outcome of an election to substitute personal/ partisan benefit for the public

²⁶ http://archive.kubatana.net/html/archive/landr/040630wd.asp?sector=opin&year=2004&range_start=61

interest. Such attempts to influence the outcome of an election may be systemic or an isolated instance and the perpetrators are constantly refining techniques.

As elections increasingly become the legitimate way to acquire political power on the continent, winning votes has become a matter of life and death for the political elite in many countries. Contentious election campaigns, manipulation of electoral processes in favour of incumbent candidates and disputed election results are some of the problems that have sparked election-related conflicts, as highlighted by the 2015 UN peacebuilding review.²⁷

Zimbabwe, whose history is rife with election-related violence, was another hotspot during the July 2018 election. Elections are conventionally regarded as the institutional mechanism at the core of democracy. An election is assumed to make a government accountable to its citizens by conferring legitimacy. Widespread voter intimidation and frequent crackdowns on civil society mean that the chances of free and fair elections in Zimbabwe appear slim. Accusations of rigging of the voter's roll also raise questions about the credibility of the polls. None of these activities come without a price tag and the extent to which diamond revenues may be funding ZANU-PF undemocratic tactics merits further investigation.

2.2 Political intimidation

The rural areas remain the epicentre for violence against MDC supporters. In the 2008 election run-off, MDC supporters were killed by ZANU-PF militias, and this happened mainly in the rural areas. The militia kidnapped and tortured people at centres specifically set up for this purpose (militia bases).²⁸ Women were gang-raped, and homesteads were torched. They assaulted and drove away civil servants (teachers, nurses, doctors) who were suspected to be encouraging people to support MDC. Hospitals and clinics were warned not to treat any MDC supporters injured during the political clashes.

²⁷ 2015 Review: United Nations Peace Building Commission.

²⁸ The Human Rights Watch. (2008), Zimbabwe: ZANU-PF Sets Up 'Torture Camps'. Opposition Voters Tell of Beatings, Intimidation.

Traditional leaders were coerced to become ZANU-PF officials in their areas, responsible for calling ZANU-PF meetings and rallying the villagers to attend the gatherings. Traditional leaders went to the extent of becoming the actual perpetrators of political violence against villagers. Some availed their homesteads for use as ZANU-PF bases where villagers were assaulted while others took an active role in compiling hit lists of suspected MDC supporters in their area. In some of the village meetings, members of the community were forced to give names of MDC members among their families. Trust among the community and family structures were compromised, these lead to break up in family structures.

Section 52(a) of the Constitution of Zimbabwe²⁹ states that ‘every person has the right to bodily and psychological integrity, which includes the right to freedom from all forms of violations from public or private sources.’

The definition of rape in Zimbabwean law is found in section 65(1) of the Criminal Law (Codification and Reform) Act 2004³⁰ and is framed as follows:

If a male person knowingly has sexual intercourse or anal sexual intercourse with a female person and, at the time of the intercourse ... the female person has not consented to it ... and ... he knows that she has not consented to it or realises that there is a real risk or possibility that she may not have consented to it ... he shall be guilty of rape and liable to imprisonment for life or any shorter period.

However, the Act has been ignored, and the citizens remain without the protection of their human rights. In 2008 many women were raped and impregnated some contracted HIV from these militias. As a result, some victims have succumbed to the virus, leaving behind orphans with no one to take care of them. No justice has been brought to the victims of rape; those surviving continue to live with the perpetrators, fearing further victimisation when an election approaches.³¹

²⁹ See (n27 above).

³⁰ The Criminal Law (Codification and Reform) Act, 2004.

³¹ Manyonganise, M. 2017. Invisibilising the victimised: churches in Manicaland and women's experiences of political violence in national healing and reconciliation in Zimbabwe. *Journal for the study of religion*

2.3 Political violence

2.3.1 Untold suffering in Mashonaland East

On 26 May 2012 when the MDC activists were holding a rally at Chimukoko Business Centre, violence broke out. ZANU-PF youths marched towards the venue of the MDC rally. The two groups clashed, and the outnumbered MDC members fled leaving one of their colleagues, Cephas Magura dead. Other MDC activists were severely injured in clashes that involved approximately 300 ZANU-PF youths who had been ferried there by Kachepa (Think Africa Press, 2012).³² ZANU-PF backed militias were given alcohol and drugs and taught how to administer electric shocks to extract information from their victims Child Soldiers Global Report (2004, p1).³³ The youths had been clandestinely recruited to spearhead ZANU-PF's terror campaign. Teachers were among the most targeted victims, and many rural schools were terrorised through the setting up of militia bases at the schools, attacking teachers, and exposing pupils to violence Pswarayi and Reeler (2012, p2).³⁴ Many teachers were victims of various forms of direct violence perpetrated by their former students. The creation of militias violated the African Union's effort towards the establishment of a peaceful continent because it caused human suffering and was a setback to development opportunities in Africa (Govender and Ngandu 2009).³⁵ In light of the deliberately created militias, the execution of transitional justice is important despite the challenges involved, which include the government's unwillingness to pursue wide-ranging initiatives to stop violence (International Centre for Transitional Justice 2009).³⁶ Therefore, it is imperative to halt the creation and training of militia led by war veterans and ZANU-PF supporters (Human Rights Watch 2002: 5). Moreover, it is criminal to intimidate those who are perceived to hold views contrary to government policies.

School children were forced to attend ZANU-PF political gatherings and were socialised on how to perpetuate the unchallenged rule by ZANU-PF. Even at national

³² Think Africa Press. (2012). Political Violence against MDC in Zimbabwe (video online).

³³ Child Soldiers Global Report 2004.

³⁴ Pswarayi, L. and Reeler, T. (2012). 'Fragility' and education in Zimbabwe: Assessing the impact of violence on education.

³⁵ Govender, K. and Ngandu Y. (2009). Towards Enhancing the Capacity of the African Union in Mediation, A report based on a seminar organised by the African Union (AU) Commission.

³⁶ International Center for Transitional Justice. (2009). What is Transitional Justice?.

events such as Independence Day where everyone was supposed to voluntarily and happily attend, some people chose not to attend because of the way ZANU-PF manipulates such gatherings to castigate its political opponents. At Independence Day, celebrations held on 18 April 2012 in Mt. Darwin West, a war veteran by the name Sigauke thanked the famous spirit mediums namely Nehanda and Kaguvi for guiding the African fighters during the country's struggle for independence. He turned to spewing hate speech accusing some people of 'selling out' the liberated country. On the very day at Mutwa Primary School, pupils staged a drama that encouraged violence as they sloganeered: 'Forward with ZANU-PF! Down with Tsvangirai!' Villagers erupted with laughter and enthusiasm seeing the pupils partaking in these propaganda activities. (SW RADIO AFRICA 2011).³⁷

2.4 Political Violence and associated Election Rigging

Mike Campbell Foundation alludes that the former President Mugabe suffered electoral defeat ever since the formation of the MDC Mike Campbell Foundation (2014, p12).³⁸ Evidence on the ground suggests that ZANU-PF lost every election held since 2000 including the disputed presidential poll that paved the way for the Government of National Unity (GNU), and the elections that followed it in July 2013 (Moyo, 2013).³⁹ IbboMandaza, head of a research think tank Sapes Trust, argues that ZANU-PF survived through rigging. At a meeting convened by the civil society organisation Crisis in Zimbabwe Coalition in 2013, Mandaza revealed that President Mugabe lost the presidential elections in 2008 but used rigging instruments such as state security organs and violence to stay in power (Chimoio, 2013).⁴⁰ It is believed that if former President Mugabe had not rigged the 2002 Presidential elections by incarcerating MDC activists, shutting down polling stations in MDC strongholds, and

³⁷ SWRADIOAFRICA. 2011. MDC members in rural Zim face harassment, violence and displacement (video online).

³⁸ Mike Campbell Foundation. (2014). Why the European Union Should Not Lift Restrictive Measures on Zimbabwean Human Rights Abusers. <https://www.mikecampbellfoundation.com/page/debate-re-lifting-of-eu-restrictive-measures>

³⁹ Moyo, N. (2013). 'Top-secret dossier' shows how ZANU PF will steal the election.

⁴⁰ Chimoio, M. (2013). Mandaza claims Mugabe rigged 2002 election. <https://mg.co.za/article/2013-08-08-00-reflections-on-the-2013-zimbabwe-elections>

detaining international election observers, the opposition party would have triumphed. Elections have therefore, not been free and fair for a long time, resulting in voters losing faith in the entire electoral process manifested in disillusionment, pessimism, and apathy (Zimbabwe Institute, 2007).⁴¹

Zimbabweans voted in harmonised elections on 29 March 2008, and this took more than five weeks before the results were announced for the presidential contest. It was announced that Mugabe had been defeated by Morgan Tsvangirai, but the margin was not an outright victory as stipulated by the Zimbabwean Constitution and therefore, had to square off in a run-off. On 30 March 2008, Mugabe held a meeting with his top security leadership to consider his election defeat. According to Timberg 2008, he was ready to concede defeat but was directed by the Zimbabwe Defence Force (ZDF) commander Gen. Constantine Chiwenga to stay in the race, with the senior military officers 'supervising a military-style campaign against the opposition'.⁴² The military plan was directed by Emmerson Mnangagwa, former security chief of the earlier Gukurahundi conflict that was codenamed 'CIBD', which stood for: 'Coercion Intimidation Beating Displacement'.⁴³ These are the same people that facilitated the 2016 coup that removed Mugabe from power. Timberg further asserts that the operation was designed to crush and coerce the opposition MDC party supporters to vote for ZANU-PF. By 20 June 2008, the Zimbabwe Association of Doctors for Human Rights had 'recorded 85 deaths in political violence since the first round of voting'.⁴⁴ As a result, the 27 June 2008 polls were widely condemned because they were not free and fair, and therefore, not credible or legitimate.

Senior army officers coordinated ZANU-PF militias to attack MDC supporters and civil society networks leaving a trail of bloodshed. In the wake of incessant violence, Morgan Tsvangirai sought refuge in a foreign embassy and was forced to withdraw from the race to spare his supporters further death and destruction (Child Soldiers

⁴¹ Zimbabwe Institute. (2007). Restore! Holding Genuine, Democratic Elections in Zimbabwe Essential to Restore True Democracy. Cape Town, South Africa. http://archive.kubatana.net/docs/elec/zi_restore_democratic_elections_071019.pdf

⁴² See (n 41 above)

⁴³ Timberg, C. (2009). Zimbabwe keeps protest music muffled. http://www.genocidewatch.org/images/Zimbabwe_4_Aug_04_Zimbabwe_Keeps_Protest_Music_Muffled.pdf

⁴⁴ Parasram, J. (2008). Mugabe sworn-in after winning no-contest election. Jyoti Communication.

Global Report 2004:2).⁴⁵ The government appointed ZEC failed to address the inaccuracies in the voters' roll that were evident from previous elections. On the eve of the 2008 elections, MDC pointed out that the government had printed nine million ballots, even though there were only 5.9 million registered voters in the voters' registry Ploch (2008, p2).⁴⁶ The 2008 elections impasse compelled SADC at the recommendation of the African Union to step up its efforts to mediate between the conflicting parties. Despite the challenges it faced, the AU has a formal mandate to engage in mediation as a form of peace-making as this was legislated in the 2002 Protocol relating to the Establishment of the Peace and Security Council of the African Union.⁴⁷

According to Sachikonye, 2011, the rigging of the 2008 presidential run-off elections occurred much earlier and not at the ballot box itself, despite ZANU-PF rejecting such allegations.⁴⁸ The unleashing of state-sponsored violence and terror created an uneven playing field because it was part of the vote rigging process. Many people were intimidated, abducted, tortured and even killed. This swayed more of the voters towards ZANU-PF. In ZANU-PF strongholds such as Mudzi and UzumbaMarambaPfungwe, MDC agents and supporters had to flee to save their own lives. A lot of literate and known opposition supporters were instructed to declare they were illiterate and ZANU-PF agents accompanied them to the ballot box where they voted for ZANU-PF under duress. Voters in rural areas were also forced to record the serial numbers of the ballot papers they used and hand them over to the party's leadership after the poll. The strategy was crafted in a way that would supervise and intimidate the electorates.⁴⁹

⁴⁵ZCSVF, (2010), Zimbabwe Child Soldiers Speak Out – Rejoice (video online).

<https://www.youtube.com/watch?v=26GNz8MsvDA>

⁴⁶ Ploch, L. (2008). Zimbabwe: 2008 Elections and Implications for U.S. Policy, Report for Congress. Washington D.C.: Congressional Research Service. <https://fas.org/sgp/crs/row/R44633.pdf>

⁴⁷ Ndinga-Muvumba, A. ed.(2009). Towards Enhancing the Capacity of the African Union in mediation. A report based on a seminar organised by the African Union (AU) Commission, Addis Ababa, Ethiopia.

⁴⁸ Sachikonye, L. (2011). When a state turns on its citizens: Institutionalized violence and political culture. Johannesburg: Jacana Media (Pty) Ltd.

⁴⁹ See (n 45 above).

The Zimbabwean security sector, especially the military is known for having a symbiotic relationship with ZANU-PF. This led them to continuously view the MDC as a front of the West resulting in them refusing to implement government decisions during the Government of National Unity (GNU) and even boycotting the newly established national security organ. This undermined the transition process as the ‘securocrats’ were motivated by: “fear of losing power and its financial benefits, fear of prosecution for political or financial abuses, and a belief that they guard the liberation heritage against Tsvangirai and the MDC...” International Crisis Group (2010, p1).⁵⁰ Key figures from the JOC, led the violence and established ‘bases’ at schools, clinics, once white-owned farms and other places where torture, beatings and intimidation were carried out by the youth militia who were the chief perpetrators of violence since April 2008 up to the polling day, 27 June the same year Alexander and Tendi (2008, p11-13).⁵¹

With the violence turning nasty, the same torture bases were even set up in MDC strongholds in the urban areas, including the leafy suburbs of Harare.⁵² In high-density suburbs, coercion and violence were worse due to human rights violations whereby residents were denied information through an operation code named Burutsa Dish (Operation Take down Your Satellite Dish). This operation forced residents to take down their satellite dishes with the aim of denying them ‘wrong or biased’ news from outside the country. The satellite dishes were perceived by the government as spreading ‘anti-Zimbabwean’ Western propaganda Chitiyo (2009, p6).⁵³ As has always been the case in post-2000 violence, the opposition continued to be considered traitors working in cahoots with foreigners and therefore, not to be protected under the law. MDC politicians, their families, activists and supporters were ruthlessly murdered, abducted, arrested and jailed without any conviction, or on spurious charges; were tortured, beaten and had their property attacked Alexander and Tendi (2008, p12-13).⁵⁴

⁵⁰ International Crisis Group. (2010). Zimbabwe: political and security challenges to the transition.

⁵¹ Alexander, J and Tendi, B. (2008). “ Tale of two elections: Zimbabwe at the polls in 2008”.

⁵² See (n48 above).

⁵³ Chitiyo, K. (2009). The case for security sector reform in Zimbabwe.

⁵⁴ See (n48 above).

The necessity of holding elections was questioned, given the pronouncements after 2002 by some key figures from ZANU- PF and the Joint Operations Committee (JOC) that voting was not all that important as long it was not for ZANU- PF. According to Masunungure, statements by members of the military and other security institutions before the 2008 harmonised elections were tellingly partisan and threatening. For instance, Brigadier-General Sigauke was quoted six months before the elections as saying: 'As soldiers, we have the privilege to defend this task (of guaranteeing Mugabe and ZANU-PF rule) on two fronts: the first being through the ballot box, and second being the use of the barrel of the gun should the worse come to the worst. I may, therefore, urge you as citizens of Zimbabwe to exercise your electoral right wisely in the forthcoming election in 2008, remembering that 'Zimbabwe shall never be a colony again' Masunungure (2009, p69-70).⁵⁵ General Constantine Chiwenga, the Commander of the ZDF, was quoted three weeks before the elections as having said; Elections are coming, and the army will not support or salute sell-outs and agents of the West before, during, and after the presidential elections. We will not support anyone other than President Mugabe who has sacrificed a lot for this country Masunungure (2009, p70).⁵⁶

Retired Major-General Paradzai Zimhondi, Commissioner of Prisons was quoted just a month before the elections saying that he would not salute Tsvangirai or Simba Makoni if they happen to win in the presidential race. He noted, "If the opposition wins the election, I will be the first one to resign from my job and go back to defend my piece of land. I will not let it go....I will only support the leadership of President Mugabe. I will not salute them [Makoni and Tsvangirai]" Masunungure (2009, p71).⁵⁷

In addition, during the run-up to the 27th of June 2008 presidential run-off election other pronouncements included the statements by George Charamba, former spokesperson of the presidency who during the run-up to the run-off election was quoted saying: a "mere" X on a piece of paper, all done in time shorter than life creating ecstasy, can steal a free people, steal a heritage, steal a freedom, steal a land, steal a future ...we will have to shoot – yes shoot – the ballot box for the

⁵⁵ Masunungure, E. V. (2009). Voting for change: The 29 March harmonized elections.

⁵⁶ See (n52 above).

⁵⁷ See (n52 above).

preservation of our independence (Alexander and Tendi 2008: 12).⁵⁸ Furthermore, former President Mugabe had declared that: “MDC was never allowed to rule this country – never ever. Only God, who appointed me, will remove me – not the MDC, not the British” Alexander and Tendi (2008, p12).⁵⁹ He was also quoted just 10 days before the run-off election saying, “You can vote for Tsvangirai, but if he brings back the Whites, we will go to war” (Chimunhu,2009).⁶⁰

From the above citations, one can easily glean the degree to which the Zimbabwean politics were, and that violence was sanctioned from the highest office in the land. In essence, the security forces were hostile to an MDC election victory and were determined to subvert it at all cost. To this end, Ndlovu (2004, p217) correctly puts it noting that “a combination of severe repression, patronage through the allocation of land and positions that give access to public resources, and ever more strident racial and xenophobic rhetoric has kept the forces of opposition off balance and out of step”.⁶¹ However, one wonders why elections could proceed before the institutions of violence had been reformed in the country. Considering these glaring undemocratic threats, it was important to address the issue of the security sector before elections could be conducted. Otherwise, the environment under which the elections were held signalled wastage of resources in a process that would return the same party to power, whether it wins or loses.

It was the magnitude of violence that led Tsvangirai to withdraw from participating in the run-off election and subsequently led to the non-recognition of Mugabe’s one-man poll win, which attracted condemnation from all corners of the world, including even the so-called friendly African countries. The mounting pressure of illegitimacy on Mugabe forced him to enter a GNU⁶² with the two MDC formations (MDC-T and MDC- Mutambara). The critical fact is that political violence was used by ZANU-PF

⁵⁸ See (n48 above).

⁵⁹ See (n48 above).

⁶⁰ Chimunhu. J, (2009) “Report says Mugabe is master of hate speech”. *The Zimbabwe Situation*.

⁶¹ Ndlovu, M. (2004), Zimbabwe in March 2004: Four Years on from the Beginning of the Plunge.

⁶² The Government of National Unity refers to Zimbabwe's coalition government that was formed on 13 February 2009 following the inaugurations of Morgan Tsvangirai as Prime Minister and Thokozani Khuphe and Arthur Mutambara as Deputy Prime Ministers. It was a coalition organized among the former President Robert Mugabe's Zimbabwe African National Union – Patriotic Front, the late Morgan Tsvangirai's MDC, and Mutambara's MDC.

to remain in power. Since the beginning of the 2013 election campaign, Mugabe became serious about the legitimacy issue, as he did not want a repeat of the Machiavellian type of politics he had depended on in the previous elections. There has been a continuous breakdown of the rule of law as the security sector deteriorated further into an extremely politicised and partisan institution. In the harmonised elections that were held on 31 July 2013, there is considerable evidence pointing to election rigging.

The most notable were the discrepancies on the voters' roll such as the negligence to register more than 2 million voters under the age of 30 and the appearance of hundreds of thousands of dead people on the voters' roll Global Witness (2013, p2). ZANU-PF was accused of employing a technology company with Israeli links, Nikuv to tamper with the electoral roll Global Witness (2013, p2).⁶³ In this case, funds from the diamond companies in Chiyadzwa were allegedly used to fund the operations of Nikuv which was housed at King George VI barracks. According to a United Kingdom paper, Nikuv was paid \$13 million for its role in tampering with the electoral roll. The Chinese and Israeli firm Nikuv were thus fingered in the electoral fraud that happened in 2013. It is further alleged that ZANU-PF worked with the Registrar-general, Tobaiwa Mudede, to falsify the voters' roll (Moyo, 2013).⁶⁴

According to the Solidarity Peace Trust (2013, p23), ZANU-PF's electoral strategy in 2013 shifted away from its traditional dependence on violence, although selective coercion and intimidation persisted. The late Morgan Tsvangirai highlighted in an interview with Lance Guma on Nehanda Radio that the elections held on 31 July 2013 ran short of credibility because they were militarised (Guma, 2013).⁶⁵ At a press conference held on 3 August 2013, Tsvangirai further stated that the elections were a farce due to the violations which marred the electoral process, and the absence of pre-election reforms. The voters roll, voter registration, special vote, bussing of people, ballot printing, access to the media and the question of assisted voters were all major worries (Zimbabwe Guardian, 2013).⁶⁶ Tsvangirai reported that in Muzarabani, of the 17, 000 voters 10, 500 were assisted voters (Zimbabwe

⁶³ Global Witness. (2013). Zimbabwe's elections: intimidation, vote-rigging and diamonds.

⁶⁴ Moyo, J. (2013). Can the MDC-T still win? Mail and Guardian.

⁶⁵ Guma, L. (2013). Morgan Tsvangirai on Nehanda TV (video online).

⁶⁶ Zimbabwe Guardian. (2013). Morgan Tsvangirai Press Conference - 3rd August 2013.

Guardian 2013). Tsvangirai lamented: 'Our conclusion is that this has been a huge farce. The credibility of this election was marred by administrative and legal violations, which affect the legitimacy of its outcome' (NTDTV, 2013). At the ZANU-PF National Congress in 2014, President Mugabe shockingly revealed that the MDC had won 73% majority in the 29 March 2008 elections (Mbiba, 2014).⁶⁷

2.5 Politicisation of state institutions

Various debates have been generated in Zimbabwe about security sector reforms. The debates emanate from the fact that the formalisation of the alliance between ZANU-PF and the security sector from 2000 was calculated to prevent the MDC's access to the state house Chitiyo (2009, p3).⁶⁸ This was because MDC had gained so much ground, judging by the results of parliamentary and presidential elections in 2000, 2002, 2005 and 2008. In addition, from 2000 until the establishment of the GNU in 2009, the country's political landscape was dominated by military personnel, and the structure has remained to date Nyakudya (2013, p87-90).⁶⁹

In this study, the term militarisation embodies all the observations that are outlined by Alexander, who notes that: Firstly, militarisation referred to the posting of the liberation war veterans and others with strong links to ZANU-PF from senior ranks in the military to senior positions in state institutions. Such postings were used to build and consolidate a partisan state. Secondly, militarisation encompassed the decisive intervention of the military quasi and as part of the state in electoral politics, most dramatically in the run-up to the June 2008 elections. Thirdly, it referred to the entrance of military personnel (former and serving, in and outside the state and party) into lucrative networks of accumulation and patronage, ranging from the award of government contracts and tenders to businesses owned by military and party leaders to the more direct control of production and trade.

⁶⁷ Mbiba, L. (2014). Did Tsvangirai win 73% of 2008 vote? Zimbabwe Situation.

⁶⁸ See (n50 above).

⁶⁹ Nyakudya, M. (2013). SADC's crisis management in Zimbabwe, 2007–2013. In: Van Nieuwkerk, A. and Hofmann, K. eds. Southern African Security Review 2013. Maputo, Mozambique and Johannesburg, South Africa: Friedrich- Ebert-Stiftung and The Centre for Defence and Security Management.

These practices have a long history rooted in the 1970s, but the 1997 military intervention in the DRC marked a new watershed, which minimised the presence of the rebel groups. The military's involvement of the security forces in Zimbabwe's massive diamond fields from 2006 "cemented" their 'role as the dominant class in Zimbabwe's business community'.⁷⁰

Finally, militarisation constituted a style of governance, most clearly embodied in the operation Alexander (2013, p811-812).⁷¹ ZANU-PF interests have become confused and inseparable with the national interest due to the absence of a distinction between party, state and government Chitiyo (2009, p3).⁷² This has ruined good governance and democracy since the police, army and intelligence safeguarded ZANU-PF elite's interests by frustrating, obstructing and intimidating opposition political parties and other non-state actors. State institutions failed to protect individuals and organisations, which engaged in nonviolent methods in having views or standpoints with regards to socio-economic mismanagement and political violations in the country (Raftopoulos, 2006).⁷³ In reality, the police and the judiciary system were unable to provide the vital checks and balances on the government so that the executive arm of the government continued to dominate every sphere in the country. As a result, perpetrators have gone scot-free without being charged.

This dominance of the security sector is indeed connected to the one-party state system prevalent in Africa. Zimbabwe undoubtedly is a one-party state where ZANU-PF philosophy is dominant in state institutions, where the heads are obligated to be part and parcel of the business of the party, even becoming central committee party members Makumbe (201, p16).⁷⁴ The partisan character of the Zimbabwean military dates back to the 1970s liberation war where the party (ZANU-PF) mediated the symbiotic connection between the privileged military and political leaders. After independence in 1980, it was not easy for this bond to end as the liberation war fighters became the new soldiers in a new state; their commanders became part of

⁷⁰ Global Witness. (2006). Zimbabwe: The State, The Security Forces, and a Decade of Disappearing Diamonds.

⁷¹ Alexander, J. (2013). Militarisation and State Institutions: 'Professionals' and 'Soldiers' inside the Zimbabwe Prison Service. *Journal of Southern African Studies*.

⁷² See (n50 above).

⁷³ Raftopoulos, B. (2006). Reflections on Opposition Politics in Zimbabwe: The Politics of the Movement for Democratic Change (MDC). In: Raftopoulos, B. and Alexander, K. eds. *Reflections on democratic politics in Zimbabwe*.

⁷⁴ Makumbe, J. (2011). Zimbabwe: Political context study.

Zimbabwe's military elite. Those who were part of the political wing of the liberation struggle became the new political elite Masunungure (2009, p69-70).⁷⁵

The Zimbabwean military and the whole security sector as developed by several experiences after independence. These embody the 1965-1979 liberation war, Gukurahundi 1981-1987, when the special trained military group killed between 20 000 and 25 000 civilians, the campaign in Mozambique to help FRELIMO against RENAMO, and counter-subversion activities by the CIO and the ZRP against apartheid South African military operatives Chitiyo (2009, p3).⁷⁶Chitiyo further notes that the climax of the politicisation of the security sector was in 1997 when ex-combatants of the liberation war were drawn into an alliance with ZANU-PF to prevent any opposition party from getting into state power. Linked to this, Masunungure further argues that Mugabe, the 'liberation wartime commander-in-chief is still the commander-in-chief in post-independence Zimbabwe' making it difficult to exclude the military from aiding the party when it is in jeopardy. Because of these developments, "it has been difficult, if not impossible, for the military to insulate itself from ZANU-PF's partisan politics" (Masunungure , 2009).⁷⁷

However, partisanship of the state institutions, especially the army, has no space in constitutional democracies because, one of the defining features of constitutional democracies, and a hallmark of democratic politics, is the non-partisanship of the military and security organs of the state. This does not necessarily mean soldiers and those who command them are political eunuchs; it simply means that soldiers are not partisan political animals. (Masunungure , 2009).⁷⁸

In an effort to buy the loyalty of security personnel, the Mugabe regime gave land and houses to the top security personnel and appointed a significant number of serving and retired army officers into leading institutions, which were formerly led by civilians Moss (2007, p140).⁷⁹It is apparent that: current or former military officers currently control the Ministries of Energy and Industry, the Zimbabwe Revenue

⁷⁵ See (n52 above).

⁷⁶ See (n50 above).

⁷⁷ See (n52 above).

⁷⁸ See (n52 above).

⁷⁹ Moss, T. (2007). Zimbabwe's meltdown: anatomy of a peacetime economic collapse. The Fletcher Forum of World Affairs.

Authority (in charge of tax collection), the electoral commission, the state railway, the Grain Marketing Board, and the parks authority, and several are serving in the Senate and ambassadorial posts abroad Ploch (2009, p27).⁸⁰ To weaken civil resistance, several top government positions were occupied by former and serving members of the CIO and the military. Undeniably; since 2000, Zimbabwe's state has been described as increasingly "militarised", with military men being appointed in key positions throughout the state. The expanding range of decisions and actions are being taken by the military, from political strategy to the formulation and implementation of agrarian and economic policy.

Practically, key institutions in the country were and continue to be "policed" by the military, most of whom have retired or are legally expected to have retired Chitiyo (2009, p9-10).⁸¹ However, the top officers instead of retiring from active service have been horizontally transferred to directorships of civilian institutions in a drive to ensure the "political reliability" or "correctness" of the public institutions. A case in point is that of George Chiweshe who was a former judge advocate of the military tribunals in the ZNA and later appointed to the High Court in 2001. He was then moved in 2004 to be the head of the Delimitation Commission responsible for demarcating constituencies before the 2005 parliamentary elections and was accused of gerrymandering constituencies for the benefit of ZANU-PF. He was also the inaugural chair of Zimbabwe Electoral Committee (ZEC) when it was established in 2005 Bratton and Masunungure (2011, p25).⁸² Moreover, the military frequently threatened free and fair elections in instances where the MDC-T was poised for victory. The electoral system was steadily militarised and politicised, and from 2000 to 2008, the military closely monitored the bodies responsible for the conduct of elections.

Former or serving personnel from the military were recruited to lead the ZEC and the Delimitation Commission which is accountable for elections (Pswarayi and Reeler, 2012).⁸³ Major-General Douglas Nyikayaramba once headed the body when it was

⁸⁰ See (n43 above).

⁸¹ See (n50 above).

⁸² Bratton, M. and Masunungure, E. (2011). The anatomy of Political predation: leaders, elites and coalitions in Zimbabwe, 1980-2010.

⁸³ See (n32 above).

still called the ESC (Moyo, 2014). Moreover, SobuzaGula-Ndebele, a retired officer in the ZNA was head of the Electoral Supervisory Commission (ESC) tasked with the administration of the 2002 presidential election (Rupiya n. d.)⁸⁴. After the 2017 coup, the same system of hiring the officers in influential positions has been maintained.

Consequently, ZEC was dominated by well-known ZANU-PF sympathisers who were either serving or retired officers from the military, intelligence and police. In this light, ZEC's secretariat was "problematic, partisan and militarised" (Chivara, 2013).⁸⁵ It was difficult to conduct elections as stipulated by statutory instruments which direct the conduct of elections due to several issues. The Delimitation Commission was accused of gerrymandering constituencies and determining the sizes of each constituency in a manner that disadvantaged the non-state actors. ZEC was also known for not seriously considering election irregularities and was unwilling to investigate electoral fraud. Moreover, the Election Directorate which was wholly composed of government workers who supported the incumbent ZANU-PF party, handled elections secretly, thus violating some laid down ground rules for conducting democratic elections. The Registrar-General of Elections' Office was known for being unable to register voters properly and its head, Tobaiwa Mudede was a known partisan official who is a Provincial Committee member of ZANU-PF. The Registrar's office was largely defensive when responding to media, opposition and independent candidates' queries (Matyszak, 2014).⁸⁶

The ZANU-PF government also politicised previously independent institutions like the University of Zimbabwe, the Zimbabwe Republic Police (ZRP) and even town councils, by appointing its party sympathisers in key management and command positions. Civil society was not spared as parallel organisations were established to rival independent church bodies, labour, student and residents' associations Bratton and Masunungure (2011, p26).⁸⁷ An example is Zimbabwe National Students Union (ZINASU), which was countered by the pro-ZANU-PF group, the Zimbabwe Congress of Students' Union (ZICOSU) (Kachiko, 2015).⁸⁸ Similarly, the Progressive

⁸⁴ Rupiya, M. n. d. The Military Factor in Zimbabwe's Political and Electoral Affairs.

⁸⁵ Chivara N. (2013). ZEC 'threatens validity of polls': report. Mail and Guardian.

⁸⁶ Matyszak, D. (2014). The Zimbabwe Electoral Commission and the 2013 poll: an Appraisal.

⁸⁷ See (n79 above).

⁸⁸ Kachiko, T. (2015). Students form union to rival Zinasu, Zicosu. Newsday.

Teachers Union of Zimbabwe (PTUZ) was formed to counter the pro-ZANU-PF government Zimbabwe Teachers' Association (ZIMTA) as the latter neglected their members by meddling in party politics instead of the teachers' welfare (Newsday Own Correspondent, 2014).⁸⁹

The ZRP officiated at ZANU-PF primary elections, restricting and controlling street demonstrations by non-state actors and ignored violence by ZANU-PF leaders and supporters. ZNA top leaders are known members of ZANU-PF who penalised their junior officers for supporting the opposition parties, CIO monitored non-state actors, alerted ZANU-PF of opposition strategies, harassed and intimidated opposition parties, and threatened civic and opposition leaders Makumbe (2011, p19).⁹⁰

The Public Service Commission (now the Civil Service Commission (CSC)) allocated senior positions to members of ZANU-PF and the then Ministry of National Affairs gave administrative support to ZANU-PF and implemented the party's decisions, trained the youths of the party at vocational training centres, and operated from the ZANU-PF headquarters Makumbe (2011, p19).⁹¹ The ZRP had on several occasions either prevented people who wanted to demonstrate from marching in the streets or dispersed them by using tear-gas and police dogs Makumbe (2011, p19).⁹² Memorable examples include the earlier referred to 11 March 2007 incident when the Save Zimbabwe Campaign 'prayer meeting' which had put together civil society, churches and political parties, including the two MDC formations, was disrupted by riot police. The non-state actors staged a peaceful demonstration against being forbidden to hold a prayer meeting. Some of the peaceful demonstrators were bashed, arrested and detained.

More recently, at Zimbabwe Broadcasting Corporation (ZBC), the former information minister Jonathan Moyo dismissed board members, retired Brigadier Elliot Kasu and retired Brigadier-General Benjamin Mabenge, for supporting the rot in which the ZBC CEO Happison Muchechetere pocketed over US\$40 000 per month while ordinary

⁸⁹ Newsday Own Correspondent. (2014). PTUZ, ZIMTA neglecting rural teachers. Newsday.

⁹⁰ See (n71 above).

⁹¹ See (n71 above).

⁹² See (n71 above).

workers went unpaid for more than seven months (Moyo 2013).⁹³The Zimbabwe Broadcasting Holdings responsible for regulating the national broadcaster was staffed by several former army officers. These comprised three retired brigadier generals Felix Muchemwa, Gilbert Mashingaidze and Benjamin Mabenge. The BAZ responsible for allocating licences to would-be broadcasters has among its board members former army officers, retired Brigadier-General ElastoMadzingira and retired Colonel Reuben Mqwayi (Zhangazha, 2013).⁹⁴ This partisan approach prevented any efforts towards the establishment of independent media. Public-private business partnerships operating in the diamond mining industry were militarised probably to gain protection from the security sector as they enriched themselves and entrenched the existing political elite's power. This was apparent in Mbada Diamonds and Ainjin Investments, which were firmly controlled by former military officers and were accused of non-payment of tax (Zhangazha, 2013).⁹⁵

2.6 Politicisation of the judiciary system

The judiciary was also not exempted from partisan decisions and actions, although it initially retained some degree of autonomy. In this regard, Chitiyo (2009, p17) observes that 'although the judiciary has not been padded with military personnel, many of the judges and magistrates were political appointees who fulfilled a party agenda'.⁹⁶ It can be gleaned from this statement that partisanship perverted the judiciary, just like other institutions in the country. Between 2000 and 2003, 11 of the most experienced Supreme and High Court judges left the bench following the 2000 land invasion and threats by war veterans. Between 2000 and 2005, long-serving Chief Justices, Gubbay and Dumbusthenawere also purged.

Earlier in 1998, a member of the Chiweshe-led Delimitation Commission, Job Wabira, an ex-permanent secretary in the Ministry of Defence, was castigated by ZANU-PF for giving a cold shoulder to a High Court ruling to set free the Standard Newspaper journalists who had been arrested and tortured by the military for

⁹³See (n37 above).

⁹⁴Zhangazha, V. (2013). Payback for Zim's Security chiefs. Mail and Guardian.

⁹⁵See (n 91 above).

⁹⁶See (n50 above).

publishing a story concerning an alleged coup endeavour (Guma, 2012).⁹⁷ The effectiveness of the judiciary support to nonviolent methods or protests was weakened by the fact that Sobuza Gula-Ndebele, a former Attorney General, and his successor Johannes Tomana, and the minister of justice were all ZANU-PF sympathisers Chitiyo (2009, p17).⁹⁸ In addition, Godfrey Chidyausiku, a former minister, Attorney General, and a known supporter of ZANU-PF became the new Supreme Court head Addison and Lakso (2003, p465.)⁹⁹

2.7 Food Manipulation used as a political tool

The government of Zimbabwe persecuted perceived political opponents by denying them access to food programmes (Human Rights Watch, 2003).¹⁰⁰ According to Sachikonye (2012, p58), food was used as a political weapon in both rural and urban areas.¹⁰¹ ZANU-PF, in particular, could manipulate the processes for registering beneficiaries, and in the process, it prohibited non-ZANU-PF supporters from receiving food aid Human Rights Watch (2003, p3).¹⁰² Government food handouts were also used as a political tool during the election campaign when it gave those who supported and promised to vote for ZANU-PF but denied it to MDC supporters.

The Rhodesian Security Forces, especially the Selous Scouts used chemical and biological weapons to kill “terrorists”. However, the civilians were also affected as their animal herds died in large numbers. Cholera and anthrax became more widespread after the government realised that the guerrillas were infiltrating in large numbers Hove (2012, p198-199).¹⁰³ The tactics used included poisoning water wells thus spreading cholera, infected clothes were clandestinely distributed to the guerrillas, and using anthrax to kill cattle and thus deny food supplies to the

⁹⁷ Guma, L. (2012). Key army and CIO figures helping Mugabe stay in power. Nehanda Radio

⁹⁸ See (n50 above).

⁹⁹ Addison, T. and Lakso, L. (2003). The political economy of Zimbabwe’s descent into conflict. *Journal of International Development*.

¹⁰⁰ Human Rights Watch. (2003). *Zimbabwe: Food Used as Political Weapon*.

¹⁰¹ Sachikonye, L. (2012). *Zimbabwe’s Lost Decade: Politics, development and Society*. Harare: Weaver Press.

¹⁰² See (n97 above).

¹⁰³ Hove, M. (2012). War legacy: A reflection on the effects of the Rhodesian Security Forces (RSF) in south eastern Zimbabwe during Zimbabwe’s war of liberation 1976-1980. *Journal of African Studies and Development*.

guerrillas Hove (2012, p198-199).¹⁰⁴ It is therefore, apparent that every regime has its own strategies and tactics to survive. For example, donors like Care International that gave food to help the marginalised communities. However, in some areas it was restricted to give food parcels because the people in those areas were anti-ZANU-PF, some families who were expected to receive food were denied due to their direct or indirect link to MDC.

Food was used as a political weapon against vulnerable rural people who had to bow down to ZANU-PF leaders in order to get food. Villagers who were supposed to be free from danger or threat Bastick and Whitman (2013, p4)¹⁰⁵ were at risk, especially those who did not support ZANU-PF. In rural areas, maize was distributed by ZANU-PF councillors and chiefs who employed party politics to discriminate against perceived and known MDC members. Headmen, working in liaison with officials from the ZNA and senior ZANU-PF officials, were in control of Operation Maguta/Inala (Saxon, 2013).¹⁰⁶ Zimbabwe experienced critical food shortages as far back as 2000, and the year 2008 was very bad for Zimbabweans, famine was widespread, and the supermarkets were virtually empty. Inflation levels were very high, and a small tin of scarce shoe polish could cost Zimbabwean \$21 billion (NewsRevue, 2008).¹⁰⁷

The rural dwellers could be seen scavenging for food, specifically wild fruits (*hacha/chakata*) and literally competed with animals. People survived on *hacha* for a whole week. The villagers openly confirmed the shortage of food was due to the economic collapse. Due to the dire food shortage, the late MDC President Morgan Tsvangirai said Zimbabwe's situation in 2008 resembled a country emerging from war because it had many signs of a failed state (NewsRevue, 2008).¹⁰⁸ In fact, there was nothing to eat for breakfast, lunch and supper except *hacha* (Al Jazeera English 2008).¹⁰⁹ People had to rely on food aids, mainly from the World Food Programme via its implementing partners like World Vision, Concern, Goal and Oxfam. These

¹⁰⁴ See (n100 above).

¹⁰⁵ Bastick, M. and Whitman, T. (2013). *A Women's Guide to Security Sector Reform*. Washington, D.C: The Institute for Inclusive Security and DCAF.

¹⁰⁶ Saxon, T. (2013). *Partisan input distribution*. The Zimbabwean.

¹⁰⁷ NewsRevue. (2008). [CNN] *Famine widespread in Zimbabwe 2008.10.18* (video online).

¹⁰⁸ See (n104 above).

¹⁰⁹ Al Jazeera English. (2008). *Zimbabwe still lacking leadership and food - 19 Sept 08* (video online).

NGOs distribution processes relied on the headman's lists of the villagers in a community. As a result, the segregation on a partisan basis continued, and the suspected or MDC members suffered the most. This affected the 2008 election as most people voted for the ZAN-PF, not out of will, but to gain from the food programmes in their respective communities.

The government distributed grain to the people, and one would only obtain some based on their political affiliation. Even essential agricultural input distribution was politicised. This was apparent during the administration of the mechanisation programme and Operation Maguta/Inala. According to the Reserve Bank of Zimbabwe which financed both programmes, the aim was to enhance national food security through increased agricultural production. This was a way of increasing the overall export potential of Zimbabwe's farming community, in a drive towards self-reliance Reserve Bank of Zimbabwe (2008, p17).¹¹⁰

Operation Maguta/Inala was set up in 2005 under the administration of the army and as a government strategy for mobilising and distributing inputs such as seed, fuel and fertiliser to A1 and communal farmers countrywide in an effort to fill the silos of the Grain Marketing Board (Zvauya, 2014).¹¹¹ The ZNA was deployed to perennially dry areas such as Mudzi, Nkayi, Zaka, Gokwe and Gwanda (Nematiyere, 2011).¹¹² Instead of deploying Agricultural Extension Services teams in all parts of the country, the government used soldiers clad in military regalia, especially during the election period as an intimidation and vote buying technique by ZANU-PF in a scheme which benefited its supporters only.

The agricultural input distribution scheme was chaotic in Mhondoro in Mashonaland West province, and this prompted villagers on 12 January 2012 to demonstrate against the councillor after failing to receive seeds and fertiliser, saying "Une vanhuvako" (you have your own people). In a related incident in Mataga, Mberengwa in the Midlands province, on 16 January 2012, a Grain Marketing Board official told people that they were to get inputs after break time provided they have ZANU-PF

¹¹⁰ Reserve Bank of Zimbabwe. (2008). The Farm Mechanisation Programme. Harare: Reserve bank of Zimbabwe.

¹¹¹ Zvauya, . (2014). Parly probes Operation Maguta. Daily News.

¹¹² Nematiyere, S. (2011).Operation Maguta castigated. The Zimbabwean.

cards. Beneficiaries protested the corrupt decision (SW RADIO AFRICA, 2012).¹¹³ In practice, ZANU-PF leaders invited and/or coerced people to attend its meetings and rallies but excluded supporters of other political parties where material benefits lay (SWRADIOAFRICA , 2011).¹¹⁴

The food handouts to the Tokwe-Mukosi (Chivi) flood victims were politicised when government reneged from its obligations of giving four hectares of land and US\$4000 to each of the affected families. Over 18 000 were crowded in Chingwizi Transit Camp in Mwenezi where some victims lived in tents while others slept in the open. One hundred victims were treated for diarrhoea at Chingwizi each day because water was difficult to get, and women waited long hours to get the precious commodity (Marwizi, 2014). Despite the suffering experienced by the flood victims, the former Prime Minister in the GNU, Tsvangirai was barred from assessing the magnitude of the humanitarian crisis and interacting with the victims.

The MDC reported that its members were prevented from getting into the camp because ZANU-PF which used the partisan distribution of food was afraid that this would be exposed to the outside world (Tamborinyoka, 2014).¹¹⁵ The allegations were confirmed by Alfios Chekai who said that some government officials in the province set up tuck shops, flea markets and restaurants at Neshuro Business Centre a few kilometres from the camp to cash in on the donations (Antonio 2014).¹¹⁶ The victims revealed that the then Provincial Affairs minister for Masvingo, Kudakwashe Bhasikiti and other top government officials gave credit to ZANU-PF for the assistance, yet it came from well-wishers (Antonio, 2014).¹¹⁷ One can comment that the ZANU-PF party had manipulated their power and the food distribution process to gain mass votes in most rural communities. Hence the election result is biased as people are coerced to vote for ZANU-PF directly or indirectly through structures designed for this purpose.

¹¹³ SWRADIOAFRICA. (2012). ZANU-PF Control of Distribution of international Food (video online).

¹¹⁴ See (n35 above).

¹¹⁵ Tamborinyoka, L. (2014). Government bars Tsvangirai.

¹¹⁶ Antonio W. (2014). Politicians loot Chingwizi donations. Newsday.

¹¹⁷ See (n113 above).

2.8 Manipulation of religious denominations

The church's participation in post-colonial democratic politics has been both intricate and unclear. At intervals, some quarters of the religious sectors became opposed to government activities while others acknowledged the state's authority in the face of despotism. It is vital to realise that church leaders were divided over violence. Religious institutions were expected to protect people and encourage nonviolence. However, due to politicisation and manipulation, this institution was divided into pro-peace (non-state actors) and pro-violence (ZANU-PF) camps within religious institutions.

In the pro-violence category, was the ACCZ led by Johannes Ndanga, which was the voice of the church of ZANU-PF. ZANU-PF took advantage of its large membership and the 'passive' loyalty of its supporting apostolic sects to fulfil its political ends. The President and his senior lieutenants frequented the gatherings of apostolic churches, especially during the run-up to elections. The ACCZ stance on Mugabe and his party was in sharp contrast with the disposition of Western-oriented mainline churches, which were actively critical of Mugabe's rule. (Mugabe, 2012).¹¹⁸ Ndanga explicitly stated that ZANU-PF, the Apostolic and Zion churches shared certain values, to counter the suspicion that ACCZ was a ZANU-PF project.

However, ZANU-PF and its partisan church leaders embraced ex-communicated Anglican Bishop Nolbert Kunonga, who declared Tsvangirai a 'sell-out' who should not be voted into power. He preached about the holiness of Mugabe and the satanic behaviour of Tsvangirai. Moreover, he attacked Bishops such as Julius Makoni, Chad Gandiya, and any MDC-T sympathisers, as agents who furthered Western interests. He concluded that elections were to grant Zimbabweans a chance to choose between good, Mugabe, and death, Tsvangirai (Guma, 2012).¹¹⁹

According to the Bible, church leaders are supposed to speak on behalf of the voiceless oppressed majority, to limit the powers of leaders, to appoint and denounce leaders considering the gross violations of the guidelines given by God. In the 21st century, leaders are guided by the constitutions designed in their countries

¹¹⁸ Mugabe, T. (2012). We represent churches of Zimbabwe. The Herald.

¹¹⁹ See (n94 above).

and should be criticised if they fail to uphold them. However, in Zimbabwe the leaders have been in constant violation of the constitution and do not take kindly to criticism.

2.9 Conclusion

Manipulation of institutions by ZANU-PF was widely used during the run-up to the 2008 and 2013 elections. Doses of violence and intimidation were applied to ensure victory, while the MDC lacked patience and did too little for nonviolence to succeed. Due to poverty and instability heightening in Zimbabwe, many have found solace in the church. There has been a shift from public campaigns and churches are now used for campaign purposes, especially during the election periods. Propaganda is preached, and public statements denouncing the opposition are uttered ensuring that masses are converted into supporting ZANU-PF and guaranteeing an election victory. The elections in Zimbabwe have remained biased because people are scared to lose their lives, and many have concentrated on what brings food on the table. There is little collective action to ensure that a credible election prevails.

Chapter 3

Degenerating Rule of Law in Zimbabwe

3.1 Introduction

According to Feltoe (2001,131), ‘The rule of law is an essential foundation of any democratic system of governance. It is a complex concept, but its core aspects are straightforward. The rule of law requires that power be exercised in accordance with the law and disallows the arbitrary use of extra-legal power, everyone is equally subject to the law and no-one is above the law. The law enforcement agencies and the courts should enforce and apply the law impartially; the law should protect everyone equally against illegal actions causing harm.’¹²⁰

In Article 7 of the UDHR, the rule of law is defined as equality before the law, including, ‘without any discrimination’, equal protection of the law. Discrimination or incitement to discrimination before the law is prohibited. Thus, no-one is above or exempted from the law, including the President of the country. The public, political parties, ethnic groups, the Government – all must see themselves as equally subjected to the law, and equally punishable if they break it. No-one may break the law with impunity, especially not a State President who is sworn in to uphold State law. No-one is ‘more equal than others’,¹²¹ as George Orwell put it in *Animal Farm*.

The very term “the rule of law” suggests that the law itself is the sovereign, or the ruler, in a society. As an ideal, the rule of law stands for the proposition that no person or branch of government may rise above rules made by elected political officials. These laws reflect the morals of a society. Everyone is subject to their dictates in the same way. The rule of law, therefore, is supposed to promote equality under the law. Critics of the rule of law, however, have noted that this system creates a ruling elite that has the power to manipulate through the law. As Harvard law professor and leader of the critical legal studies movement, Morton J. Horwitz, suggested, “By promoting procedural justice [the rule of law] enables the What Is the Rule of Law, the calculating and the wealthy to manipulate its forms to their own

¹²⁰ Article 7 of the Universal Declaration of Human Rights (UDHR).

¹²¹ George Orwell, (1984).*Animal Farm*: London. Page 112

advantage.”¹²² This statement sees the law as “indeterminate,” meaning that the law has no clear or objective meaning. Consequently, the law cannot possibly serve as an effective barrier to the government’s abuse of power because power structures in society, not the law itself, determine the outcome of legal issues and problems.¹²³ Because judicial interpretation and enforcement of the law are influenced by the ruling elite, the rule of law does nothing more than legitimize already existing legal relationships and power structures.

The absence of predetermined outcomes coupled with the possible influence of the ruling elite means that the obligations of equality and predictability that the rule of law imposes are impossible to achieve. Although the rule of law appears to be “objective,” meaning that it is fairly applied to all people, it is subjective and unfairly applied. The rule of law theory has, therefore, gained an undeserved legitimacy in the modern world. Partly responding to the criticism outlined above, some scholars have commented that part of the problem with the rule of law is its narrow conception.¹²⁴ Instead of viewing the rule of law solely as a judicially focused book of rules, scholars should focus more on the informal and institutional constraints that restrict governments. For example, the moral and tradition-based restraints that societies impose on the government should be given more significant consideration in reforms and the overall conception of the rule of law. These aspects of the rule of law are not subject to the same type of manipulation. This broader conception may help avoid situations in which the legal elite manipulate laws because by its definition, the rule of law is not solely dependent on the judiciary, which often reflects the power of the elite, for its power.¹²⁵

Zimbabwe’s political history is littered with rather shady, third force type militias. From the nationalist parties to Youth wings of the 1960s, through the unarmed *mujibha* and *chimbwidos* (couriers and spies) and armed *pfumorevanhu* (spear of

¹²² Morton J. Horwitz. (1976). “The Rule of Law: An Unqualified Human Good?” Yale Law Journal 86 (1976–77): 561–66.

¹²³ See (n 122 above)

¹²⁴ Paul P. Craig. 1997 Formal and substantive conceptions of the rule of law: an analytical framework: Constitutional Law

¹²⁵ The rule of law does not have a precise definition, and its meaning can vary between different nations and legal traditions. Peter Joyce explained that the rule of law is a fundamental constitutional principle in liberal democracies. It asserts the supremacy of the law as an instrument that governs both the actions of individual citizens in their relations with each other and also controls the conduct of the state towards them.

the people) of the 1970s. From the dissidents of the 1980s to the contemporary war vet and party youths, the privatised use of violence has always threatened the State and the rule of law. It was the forceful politics of the early 1960s that the Law and order, Maintenance Act originated, equating the rule of law with the forceful and undemocratic maintenance of public order. This statute has been used ever since, to stifle dissent that is always seen as potentially if not actually armed. Perhaps no other State is so afraid of armed and unarmed citizens, particularly if they are thought to support opposition parties, as Zimbabwe in its first two decades of independence. Although war-lording has not yet emerged, to judge by its proposed Public Order and Security Act the State clearly fears this possibility. This research seeks to address the lack of the rule of law and impunity that prevails in Zimbabwe. It provides an update on illustrative cases of political killings, torture, and abductions that took place during the presidential election run-off in 2008 and the aftermath of the elections.

3.2 Impunity on democratic participation

"Impunity means the impossibility, *de jure or de facto*, of bringing the perpetrators of human rights violations to account - whether in criminal, civil, administrative or disciplinary proceedings - since they are not subject to any inquiry that might lead to them being accused, arrested, tried and if found guilty, convicted."¹²⁶

The issue of community destruction because of violence is one that has extensive ramifications in Southern Africa. Destroying the functioning of communities has been a deliberate, strategic policy by the governments of many African countries, including Zimbabwe.¹²⁷ A weak community is a politically compliant one. The legacy of this destruction is felt today. Apathy, depression and an unwillingness to assume leadership roles are not untypical in our communities. The chances of promoting democratic participation, and of people standing up for their human rights in the future, are severely diminished in such communities. The perpetrators instil fear in

¹²⁶ ECOSOC (June 29, 1996), *supra* note 4, at 9.

¹²⁷ Gerbian, K and Vanessa, L. (2005), "Africa, a Continent in Crisis: The Economic and Social Implications of Civil War and Unrest Among African Nations", Palo Alto, CA: Stanford University Press.

communities to ensure that the affected communities do not speak out. The task of speaking out is made harder for survivors when impunity exists. In Zimbabwe, perpetrators of violence are still in influential positions, and survivors are often abducted, silenced and afraid for the sake of their lives and families. Many civilians in affected areas believe the massacres could happen again, even if there are reasons why this is unlikely. For victims, this belief seems plausible, considering the politically motivated violence and impunity of 2008.¹²⁸

Two decades of distrust of ZANU-PF, combined with a perception of systematic under-development of Matabeleland, led civilians in rural and urban parts to vote overwhelmingly for the MDC in 2008, despite fear and intimidation.¹²⁹ However, this has also predictably drawn ZANU-PF attention back to the region, and civilians fear massive repression in any future elections, as ZANU-PF attempts to regain lost political space and face in Matabeleland. This was considerably reversed in the subsequent 2013 elections, when the opposition cried foul play and claimed the elections were highly rigged. This research has not validated those claims and therefore, is limited to events prior to that. Considering the failure of their brave anti-ZANU-PF vote in 2000 and 2002 to change the situation in Zimbabwe and the fact that the economic situation and repression have worsened over the last years, very few have faith at this point in the power of their vote to change anything.

The outcome of the 2008 election left many demoralised and disbelieving. By-elections were marred by violence and voter apathy; people were prepared to overcome their fears in the belief that it was possible to vote ZANU-PF out of power. Few MDC supporters believe that elections are free and fairly run now, and they have little faith in their ability to remove this regime democratically. They once more see the state encouraging the torture of its perceived opponents, and impunity being granted to the perpetrators. They, therefore, think twice before placing life and limb at risk to take part in a fraudulent process. Reversing the current voter apathy will be a significant challenge in a new political dispensation. The role of elections in Zimbabwe has only been a symbolic one, which always has the same outcome despite the outcry of ordinary people. With the drastic changes that have seen the

¹²⁸ See (n 122 above)

¹²⁹ The Guardian. (2013). Zimbabwe: rural violence mars peaceful election campaign.

former Zimbabwean President Robert Mugabe being ousted out of power, with his infamous former vice President Emmerson Dambudzo Mnangagwa taking up the presidency in a possible coup, one wonders what the impending elections will be like. Will ZANU-PF campaigns be characterised with the same violence as before? This also poses some questions about the MDC as they lost their party President; will the friction in the party, result in people losing faith in them?

3.3 Amnesty and impunity

It is no coincidence that the 1980s massacres involved deliberate desecration of cultural needs surrounding death, making the honourable public recognition of these deaths almost impossible. Derek Summerfield refers to the need to publicly remember the dead to heal people in situations of mass murder:

Those abusing power typically refuse to acknowledge their dead victims, as if they had never existed and were mere wraiths in the memories of those left behind. This denial, and the impunity of those who maintain it, must be challenged if survivors are to make sense of their losses, and the social fabric is to mend. (Summerfield 1995:495)¹³⁰

Amnesty and *de facto* impunity have caused great suffering, particularly to the families of those murdered or ‘disappeared’. The interim President Mnangagwa has urged the nation to forget the past and focus on the future. This experience was repeated in the post-2000 era, the best-known case being that of Patrick Nabanyama, kidnapped in broad daylight in June 2000 by war veterans and never seen again.¹³¹ His abductors were pardoned. There is little belief among ordinary citizens of Zimbabwe that the courts can deliver justice in relation to state murders. Indeed, there is no living memory of this being possible. The negotiations meant to lead to a 2008 transitional or power-sharing agreement did not ensure an end to the

¹³⁰ Erik Doxtader and Charles Villa-Vincencio. (2004). *To Repair the Irreparable: Reparation and Reconstruction in South Africa*, Institute for Justice: South Africa.

¹³¹ “Playing with fire” Personal accounts of human rights abuses experienced by 50 opposition Members of Parliament in Zimbabwe, and 28 opposition election candidates Commissioned by The Zimbabwe Institute JOHANNESBURG, March 2004.

violence in Zimbabwe. The government of Zimbabwe at the highest levels is responsible for numerous, systematic human rights violations.

The military and the government-backed militia forces have committed and continue to commit serious crimes with the apparent knowledge and at times the involvement of senior government, military and ruling party officials. As recent as November 2017, the political situation changed with the “resignation” of Mugabe in what is clearly perceived as a “military coup”. He was replaced by his former vice President Emmerson Dambudzo Mnangagwa. In the post Mugabe era the influence of the militia has continued to define the politics of Zimbabwe.¹³² The refusal of the Zimbabwean government to prosecute politically motivated crimes reflects the country’s longstanding history of impunity for perpetrators of human rights abuses. The extent to which the highest levels of government, including the former President Mugabe, were responsible for ordering or organising crimes or as a matter of command responsibility, remain to be investigated.

Accountability for serious past crimes is the foundation for a durable transition, and Zimbabwe’s long-term political stability is based on the rule of law and respect for human rights. As the country still stands, many people are in awe as to why the current President Mnangagwa, who has been alleged to have been the right-hand person who was involved in the Gukurahundi, has not addressed or apologised for the crimes committed against humanity. This reflects on how some of the alleged perpetrators can go unpunished, and still maintain prominent positions in government. Impunity for atrocities committed in the past sends the message that such crimes may be tolerated in the future, as this has been ongoing for the past decades. Ending political strife and obtaining justice for past abuses should be complementary, not contradictory. Any future government in Zimbabwe will need to address the issue of accountability for past and recent human rights violations by government officials without any exceptions, including at the highest levels. Independent, impartial and transparent investigations and prosecutions by international fair trial standards and accountability in the justice system are a

¹³² Mail and Guardian. (2017). The three barriers blocking Zimbabwe's progress: ZANU-PF, Mnangagwa and the military.

necessary component to finding justice and ending Zimbabwe's long political nightmare.

3.4 Accountability

There has been little or no accountability for past crimes, cases of political violence that have been filed by victims or their relatives have been largely ignored by the police or have been stalled in courts.¹³³ The government has failed to respond to calls by local nongovernmental organisations for the government to investigate these violations. Ending impunity for past and ongoing abuses is essential if Zimbabwe is to end violence and firmly establish the rule of law.

The 2008 all-inclusive government which comprised of ZANU-PF and the two MDC factions claimed a commitment to human rights reforms but did not show the political will to address longstanding impunity for human rights violations. With the elections set for July 2018, the lack of accountability and justice for past abuses raises the spectre of persistence in the tradition of violence and poses a significant obstacle to the holding of free, fair, and credible elections.

For more than a decade, elections in Zimbabwe have been marked by widespread human rights violations committed by the security forces and supporters and allies of ZANU-PF, such as "youth militia" and war veterans. Thousands of MDC supporters, officials, and human rights activists have been targets of violence with little or no accountability, encouraging further attacks.

The top leadership of Zimbabwe's security forces, including the armed forces, police, prison service, and Central Intelligence Organisation, remain partisan and aligned to the ruling party ZANU-PF. The leaders of the security forces who previously publically declared their support for ZANU-PF and who were implicated in serious human rights violations associated with electoral violence in 2008 have not been disciplined, removed from their posts, or charged with criminal offences.

¹³³Human Rights Watch. (2008). "They Beat Me Like a Dog": Political Persecution of Opposition Activists and Supporters in Zimbabwe.

Local human rights groups have reported that those who committed serious crimes during the 2008 elections often continue to live in the same communities in which they committed the crimes, sometimes next door to their victims.¹³⁴ In some cases, security agents and ZANU-PF supporters who tortured and beat people during the 2008 election run-off, have threatened victims with further violence, ahead of proposed elections scheduled for 2018.

3.5 Systemic violence by the youth militias

During 2008, the majority of the Zimbabwe National Liberation War Veterans Association (ZNLWVA) appeared to have become private militia operating on behalf of ZANU-PF. Although the political responsibility for genuine war veterans was initially located in the Office of the President and Cabinet, in 2000 responsibility for ZNLWVA as a mobilised reserve army was transferred to the Ministry of Defence.¹³⁵ Many were too young to qualify as war veterans, so they were either thugs or unemployed youths who saw carrying out violence as a means of survival. Even though Zimbabwe is not currently engaged in an active war, the social fabric is being systematically destroyed. Children trained as youth militia by ex-combatants wreaked havoc in their own rural communities. These young people are being taught propaganda, to see anyone who supports MDC as the enemy not only of their party but of the country. MDC supporters have always been considered as sell-outs whose intention has been to give back the country to white monopoly. They were taught to hate and to commit acts of violence against their own families, and community members, whom they believed weresupporters of the opposition.

The common sight of police officers standing on the sidelines while young men beat and harass people became one of the defining images of Zimbabwe in 2008. Far from constituting a legitimate group of genuine war veterans, the perpetrators are the basis for rudimentary militia groups. These perpetrators have targeted Zimbabweans seen as critical by ZANU-PF and the government. Their militia group activities and

¹³⁴ Human Rights Watch. (2011). Impunity and Cycles of Violence in Zimbabwe.

¹³⁵ Southern Africa Report. (2011). Zimbabwe Security Forces: Even under the multi-party government, the armed forces are central to all aspects of life in Zimbabwe.

the political patronage they enjoyed from ZANU-PF, increasingly suggest parallels with the Rwandese *Interahamwe* militia who carried out the 1994 genocide.¹³⁶

ZANU-PF supporters, war veterans, and the armed forces killed up to 200 people following the 2008 general elections. They subjected those accused of supporting the MDC to severe beatings and torture with heavy wooden sticks and iron bars, often resulting in fatal injuries, abductions and in some instances, death. After all these human rights violations, there has not been any prosecutions, let alone serious investigations for the serious crimes that took place during this time.

In addition to the war veterans, thousands of Zimbabwean youths may also need reintegration. Youths as young as 15 are being indoctrinated to perpetrate violence through the 'national youth service training' which is more of a ZANU-PF propaganda school.¹³⁷ Soon after its establishment in 2003, the government had proposed that it be compulsory for all school leavers to undergo a youth training programme. As a matter of fact, national youth service graduates with ordinary level (Form 4) gained automatic entry into nursing schools, agriculture training centres and teachers' colleges. Graduates also found attractive employment in the army, police and prisons, as first preference was given to those who had attended the National Service. War veterans and army personnel trained youth in camps, in various provinces across the country. A number of them were deployed in their own districts to work as ZANU-PF agents and were among the 75 000 ghost workers who remained on the government payroll (Muleya, 2011).¹³⁸ It is, therefore clear that the violence that occurred in Zimbabwe before, during and after elections succeeded because ZANU-PF retained full control of the security apparatus International Crisis Group (2012, p1).¹³⁹

The manipulated unemployed youths, burnt, and looted properties, and lives were lost all in the name of 'protecting the gains of independence'. Added to this, political violence was encouraged by people who occupied leadership positions. An example is when Newton Kachepa, a ZANU-PF Member of Parliament (MP) for Mudzi North

¹³⁶ Human Rights Watch. (2017). Leave None to tell the Story.

¹³⁷ The service was aimed at instilling in young Zimbabweans a sense of national identity and patriotism.

¹³⁸ Muleya, D. 2011. ZANU PF militias among 75 000 ghost workers. Zimbabwe Independent.

¹³⁹ International Crisis Group. (2012). Zimbabwe's Sanctions Standoff, Africa Briefing No. 86. Johannesburg/Brussels: International Crisis Group.

drove a 15 member gang after 9 pm to persecute one of the victims of violence who was accused of supporting the MDC in his constituency.¹⁴⁰ At one of the rallies carried out by Kachepa, the MP confessed his responsibility for the death of four MDC activists namely; Muronde, Tambo, Mweza's son and another victim from Ward Two in his constituency. At the rally, death threats were made by the MP if the people continued to support MDC.

Furthermore, at Dendera Business Centre in Mudzi North on 20 April 2012, Kachepa once again warned; *'Don't be taken away by things that are of sell-outs [MDC]. If you do sell-out things, I am telling you-you will cry... You say ZANU-PF kills? It doesn't kill. If you provoke it, it destroys'* (Think Africa Press 2012).¹⁴¹ From the above assertions, the rule of law in Zimbabwe is limited and its benefit to the people is debatable. In a democratic state, such utterances are forbidden; people are guaranteed the right to political participation and to freely choose their choice of a political party. For example, in South Africa, no one would publicly claim to have killed anyone as they would be charged and thrown in jail.

People in South Africa, since the end of apartheid, have been vocal about their political preferences from ANC, the DA and EFF without fearing for their lives. Currently, the former President Jacob Zuma is facing criminal charges, and there is a good likelihood of President being prosecuted, despite having held an influential position in the country. Members of the public have sued the President in many instances and even during his term of presidency, he was a subject of various debates and even comedy without people fearing for their lives. This is yet a dream to be realised in the context of Zimbabwe. Instead of former President Mugabe facing criminal charges for the atrocities he committed, he is protected by the new government; a clear indication that rule of law is a far cry from the country or an indication that things have not changed.

3.6 Militia bases

¹⁴⁰ Think Africa Press. (2012). Political Violence against MDC in Zimbabwe.

¹⁴¹ See (n133 above).

The militia bases are a significant element of the Liberation War rhetoric, and the guerrillas launched operations against the Rhodesian forces and commercial farms from these bases. The guerrillas were given information about the movement of the RSF and supplies by the young men and women – ‘*mujibas*’ and ‘*chimbwidos*’ at the bases Reeler (2003, p10).¹⁴² Strategically, the militias, CIO operatives, and soldiers intimidated the population to recall the brutalities of the guerrilla operation during the Second Chimurenga. The bases were thus a reminder about the possible return of war because opposition members were tortured at the bases. ZANU-PF viewed the establishment of torture bases as a long-term strategy, critical for coercing people to support it. In the 2008 presidential run-off elections, bases mushroomed in several parts of the country. Human Rights Watch alludes that Zimbabwe’s ZANU-PF party used a network of informal detention centres to beat, torture, and intimidate opposition activists and ordinary Zimbabweans.

Detention centres were set up in the constituencies of Mutoko North, Mutoko South, Mudzi (all in the province of Mashonaland East), and in Bikita West (in the province of Masvingo) to round up and instil fear in suspected political opponents. The group leaders of the militia were largely war veterans who repeatedly threatened the use of violence to prevent the MDC from getting into power in Zimbabwe because they viewed it as a front, bent on protecting the interests of the white minority Reeler (2001, 2003, p2-3, 6).¹⁴³

In addition, George (pseudonym) from Kadoma, Mashonaland West province was forcibly recruited into a ZANU-PF camp called Sanyatonga. He was compelled to beat his parents in public because of supporting the MDC, and as a consequence, his mother died (ZCSVF, 2010).¹⁴⁴ By 2008 bases were already well established in ZANU-PF strongholds. In Mudzi North there was a ZANU-PF base called Sherenje where captured opposition supporters were beaten and even killed. Given this scenario, villagers confessed that between 2008 and 2011 there was no peace in the

¹⁴² Reeler, A. P. (2003). The role of militia groups in maintaining ZANU PF’s political power. Johannesburg, South Africa.

¹⁴³ Reeler, A. P. (2001). State Sponsored Violence in Zimbabwe, Paper presented to “Crisis in Zimbabwe: Implications for South Africa and Southern Africa”. South African Institute of International Affairs, 14 February. Johannesburg, South Africa.

¹⁴⁴ ZCSVF. (2010). Zimbabwe Child Soldiers Speak Out – Rejoice (video online). <https://www.youtube.com/watch?v=G5Ef7LQy170>

area. This was confirmed by one of the victims of violent displacements who said: “As for me, I will never return home. We are always on the run and as we speak our properties have been destroyed. It is better if they [MDC] find safe houses for us. In 2008, we were severely beaten, and my back is still painful” (SW RADIO AFRICA, 2011).¹⁴⁵ In a similar incident, one man interviewed by Short Wave Radio Africa explained how he lost his seven cattle and twelve goats when he escaped from the brutality of the ZANU-PF militia and their supporters. In a related incident, another victim fled for his life when ZANU-PF militias wanted to kill him, and he wondered whether he would recover his property (SW RADIO AFRICA, 2011).¹⁴⁶

3.7 War Veterans and the Youth Militias above the law

The government and the former President Robert Mugabe sent a strong message to war veterans that violent coercion pays and is, in fact, the only law of the land. War veterans have been given immunity over the acts of violence and destruction since 2000, including murder, torture, assault, theft, and the burning of property.¹⁴⁷ The government has failed to compensate the war veterans over the years and putting them above the law was in their mind a form of compensation for their abject poverty. Throughout this sad exercise, leaders in Southern Africa have hesitated to criticise the ZANU-PF government, because it has managed to portray these events as a fight against a renewed threat of colonialism. The government views war veterans as a handy reserve force to do its dirty work and to campaign violently and illegally when elections loom. Unfortunately for them, between elections, they are largely ignored as they prove not to be useful.

3.8 Failure to investigate torture by Law enforcing agents

A democratic state is one in which the government respects human rights, freely allows democratic activity, and whose law enforcement agencies try to protect all

¹⁴⁵ SWRADIOAFRICA. (2011). MDC members in rural Zim face harassment, violence and displacement (video online). Available where?

¹⁴⁶ See (n138 above).

¹⁴⁷ Human Rights Watch. (2008). State-Sponsored Violence since Zimbabwe's March 29 Elections.

persons against violation of their rights, regardless of their political affiliation of the people involved. The role of the police in a democracy is summed up in Article 1 of the United Nations Code of Conduct for Law Enforcement Officials as follows,

*Law enforcement officials shall always fulfil the duty imposed upon them by law, by serving the community and by protecting all persons against illegal acts, consistent with the high degree of responsibility required by their profession.*¹⁴⁸

A repressive regime with no respect for human rights will not allow ordinary democratic activity and will use the law enforcement agencies to stifle dissent and opposition. The law enforcement agencies will themselves become the main human rights violators and a source of fear for those being targeted. A state in which this situation prevails is described pejoratively as “a police state”.

Police officers and other law enforcement agents are obliged to abide by the law in carrying out their duties. Police officers have far-reaching powers, such as the power to arrest and detain criminal suspects, and these powers must be exercised within the confines of the law and must not be abused. Thus, police officers may arrest and detain only those persons whom they know to have committed crimes or whom they have reasonable grounds to suspect of having done so. Any arrest that is not based on a just cause is unlawful both under the criminal and civil law. A police officer may use reasonable force when it is necessary to overcome resistance to an arrest. However, a police officer may not beat an arrested person who has submitted to the arrest and is not resisting. In fact, a police officer is not allowed to beat anyone, unless he is using force that is strictly and reasonably necessary to affect a lawful arrest.

The Constitution of Zimbabwe, the African Charter on Human and People’s Rights and the ICCPR all absolutely prohibit the use of torture or other cruel, inhuman or degrading treatment or punishment.¹⁴⁹ Torture is also prohibited in terms of international customary law where it has the highest status of *jus cogens* (a

¹⁴⁸ Article 1, Code of Conduct for Law Enforcement Officials 1979.

This Code was adopted by General Assembly Resolution 34/169 of 17 December 1979.

¹⁴⁹ Article 7, ICCPR. No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

peremptory norm), meaning a peremptory norm that allows for no derogation. In the Pinochet case, Lord Browne-Wilkinson believed the right against torture was a '*jus cogens*' and so of even higher status than customary international law: in his words, "the '*jus cogens*' nature of the international crime of torture justifies states in taking universal jurisdiction over torture wherever it is committed".¹⁵⁰

It is unlawful under Zimbabwean domestic law for a police officer to torture or assault a prisoner, to force that person to confess to a crime, whether he committed such a crime or not. Such conduct amounts to assault under Zimbabwean law, but in international law, it would constitute torture. The United Nations Code of Conduct for Law Enforcement Officials also prohibits such conduct.¹⁵¹

In Article 1 of the United Nations Convention against Torture, torture is defined as follows:

*... any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third-person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.*¹⁵²

During the 2008 general elections, the army established bases across the country, the hot spots being in the Mashonaland East province. People were tortured; others disappeared, to this day their whereabouts are unknown, and some were killed as a form of punishment for voting MDC.¹⁵³ Contrary to that, the police have also routinely arrested human rights activists and journalists and subjected them to torture and

¹⁵⁰ See Ex Parte Pinochet (Respondent) (On Appeal from a Divisional Court of the Queen's Bench Division) (No. 3), Judgment of 24 March 1999.

¹⁵¹ Principle 21 of this Code reads as follows:

1. It is prohibited to take advantage of the situation of a detained person for the purpose of compelling him to confess, to incriminate himself otherwise or to testify against any other person. 2. No detained person while being interrogated shall be subject to violence, threats or methods of interrogation which will impair his capacity of decision or judgment.

¹⁵² Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1987,

¹⁵³ Human Rights Watch. (2008). "Bullets for Each of You": State-Sponsored Violence since Zimbabwe's March 29 elections.

degrading and inhuman treatment. The government refused to investigate allegations of torture by police and other state agents despite the court orders, an indication that they were directly involved in the violations.

The failure of police to prosecute perpetrators has left many communities around the country vulnerable to further violence. The Zimbabwe Human Rights NGO forum which has filed hundreds of civil lawsuits across the country on behalf of victims of 2008 election-related violence assert that the majority of the perpetrators named in its lawsuits continue to live in the same communities in which they had perpetrated the violence.¹⁵⁴

3.9 Control of Information

Silencing all points of view that deviate from the official version of events has been a longstanding strategy of ZANU-PF. The Zimbabwean government has since the 1980s enacted laws and enforced state repression to make access to any ‘truth’ but theirs almost impossible, daily, within and outside Zimbabwe. In the 1980s, this was comparatively easy; by using roadblocks and movement curfews, hiding behind the rationale of a high-security risk; therefore, news of killings and torture could be controlled.¹⁵⁵ This was a common feature as reported by SW Radio in their footage that roadblocks were still pitched to control movement in the Mudzi, Mashonaland East province. The daily papers were all state-controlled, as were radio and television. Reading archives of the state media of 2008 was a surreal experience; in Mashonaland East, while hundreds were being massacred a few kilometres away. The Chronicle was almost silent except for blaming the MDC for the little violence it acknowledged.

3.10 Freedom of assembly and association

The right to freedom of expression, assembly and association is safeguarded in the Constitution of Zimbabwe. Section 20 of the Constitution defines the freedom of expression as “...*freedom to hold opinions, and to receive and impart ideas and*

¹⁵⁴ See (n146 above).

¹⁵⁵ See (n146 above).

*information without interference, and freedom from interference with his correspondence.*¹⁵⁶

Freedom of assembly and association are defined in Section 21 of the Constitution as the “...*right to assemble freely and associate with other persons and to form or belong to political parties or trade unions or other associations for the protection of his interests.*”¹⁵⁷

*Article 20 (1) states that everyone has a right to freedom of peaceful assembly and association. (2) No one may be compelled to belong to an association.*¹⁵⁸

These rights are an important part of any democratic society. Freedom to assemble allows an individual, group or independent organisation to freely express itself through dialogue, debate with its constituent members and provide these actors with a forum to disseminate information. People are entitled to come together with other individuals collectively to express, promote, pursue and define common interests. Respect for these rights is important as it strengthens democracy, good governance and promotes public transparency and accountability.

The Public Order and Security Act (chapter 11, p17) hereinafter referred to as POSA, promulgated in 2002¹⁵⁹ severely curtailed the right to the free assembly that is articulated in various established human rights instruments to which Zimbabwe is a member of POSA provides that the regulating authority (the police) cannot unilaterally decide to ban a meeting or demonstration claiming they believe that such gathering will result in public disorder. They must first receive credible information on oath that a proposed gathering will result in serious disruption or traffic, injury to participants or others, extensive damage to property or other public disorder.

This provision has, however, been ignored completely as if it does not even exist, when notice/application is made by opposition parties, NGOs. The regulating authority, upon receipt of a notice, takes it as an application, unilaterally and without providing reasons bans it, and sends a communication to the convenor (sometimes

¹⁵⁶ Zimbabwe Constitution 2013.

¹⁵⁷ See (n149 above).

¹⁵⁸ Article 20, UNDHR.

¹⁵⁹The Public Order and Security Act [Chapter 11:17] (hereinafter referred to as POSA),promulgated in 2002.

the decision is not even transmitted to the convenors). This is so, even where the police have not received credible information on oath. They have simply proceeded to ban or ruthlessly disrupt and disband gatherings without just cause, and with ever-increasing impunity.

The police also arbitrarily issued bans of political rallies for periods varying from 1 to 3 months, although legal challenges against such bans and decisions have always succeeded (although after the disruption); this phenomenon is particularly prevalent during election periods.

To prevent the police from illegally disrupting rallies the High Court was approached on several occasions by various political parties. In June 2008, in the case of *MDC v Commissioner General and others (Ref: HH 3262/08)*¹⁶⁰ a court order was issued by the High Court compelling the police not to disrupt a rally at an open space in Harare. On June 21, despite this court order, armed ZANU-PF youths and militias sealed off the ground in violation of the provisions of POSA and the court order. The police failed to enforce provisions of POSA in this matter.

In another case, *MDC v Minister of Home Affairs and others (Ref: HH 2950/08)*¹⁶¹ the opposition party wrote a letter to the police to notify them of their run-off campaign rallies to be conducted on 8 June 2008 in Glen Norah, Mufakose, Kambuzuma and Chitungwiza. The police arbitrarily prohibited the rallies. The main reason for the prohibition was the pending investigations into threats of assassinating the MDC leadership, and as experts in security, the police further advised the MDC that rallies would increase the risk of the assassination. The court allowed the rallies as scheduled and dismissed the arguments from the police. Cognisant of the conduct of the police of disrupting rallies, High Court judge, Justice Chitakunye further held that the police were prohibited from disrupting the rally.¹⁶²

These examples are clear evidence of the police over-reaching their powers under POSA to unnecessarily restrict and prevent public gatherings, and thus violate

¹⁶⁰ *MDC v Commissioner General and others (Ref: HH 3262/08)*.

¹⁶¹ *MDC v Minister of Home affairs and others (Ref: HH 2950/08)*.

¹⁶² *The Zimbabwean*, (2010), POSA and the right to freedom of assembly.

constitutionally protected rights. The practice also usurps the powers of the judiciary, which is and should always be the moderator in such matters.

The judiciary, as an impartial moderator, has the responsibility to ensure that any action is taken in accordance with the law, transparently, and without arbitrariness. The police must always show just cause as to why a public gathering should be prohibited.

3.11 The right to freedom of expression

The right to the freedom of expression, viewed as a pillar of democracy, is addressed in Article 19 of the *ICCPR* of 1976.¹⁶³ The freedom of expression, opinion and information are also protected in Article 19 of the *UDHR* of 1948, which is a clear indication that freedom of expression is viewed internationally as a fundamental right and a prerequisite in any democracy. Moreover, it is universally accepted that freedom of expression creates a marketplace of ideas and ensures individual development and self-fulfilment.¹⁶⁴ The right to the freedom of expression enables human beings to express new ideas and discoveries, which enhance scientific, artistic or cultural progress. This can be seen as the foundation of the "quest for truth" paradigm.¹⁶⁵

Although Sections 20 and 21 of the Zimbabwean Constitution¹⁶⁶ guarantees the right to freedom of expression, assembly and association, there are certain limitations. For instance, Section 20(1) states that; "no person shall be hindered in the enjoyment of his freedom of expression." However, in terms of section 20(2) of the Constitution, this right can be limited:

- a) in the interests of defence, public safety, public order, the economic interest of the state, public morality or public health.
- b) for the purpose of-

¹⁶³ Article 19, *ICCPR*.

¹⁶⁴ *Abrams v United States* 1919 US 250 616; Clayton and Tomlinson *Privacy and Freedom of Expression*; Currie and De Waal *Bill of Rights Handbook*.

¹⁶⁵ Clayton and Tomlinson *Privacy and Freedom of Expression*.

¹⁶⁶ See (n58 above).

- i. protecting the reputations, rights and freedoms of other persons or the private lives of persons or the private lives of persons concerned in legal proceedings;
- ii. preventing the disclosure of information received in confidence;
- iii. maintaining the authority and independence of the courts or tribunals or the Senate or the House of Assembly;

Zimbabwe's Constitution guarantees freedoms of expression and media, but journalists are subject to arbitrary arrest, harassment and intimidation when reporting on protests.¹⁶⁷

Article 10 protects individual right to hold opinions and to express them freely without government interference. This includes the right to express views loudly, for example, through public address and demonstrations or through:

- a) published articles, books/ leaflets
- b) television or radio broadcasting
- c) works of art
- d) internet and social media

Article 10 clearly states that everyone has a right to the freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

The exercise of these freedoms, since it carries with it duties and responsibilities may be subject to formalities, conditions, or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security territorial disorder/ crime, for the protection of health morals, for the protection of the reputation of rights of others, for preventing the disclosure of information received in confidence or for maintaining the authority and impartiality of the judiciary. In 2016 during the #This-flag campaign the government threatened to ban social media.

¹⁶⁷ Media Institute of Southern Africa, 2016.

3.12 Conclusion

The victims of human rights violations continue to be denied their right to justice and effective remedies, as required under international human rights law. At the same time, perpetrators of such violations enjoy *de facto* immunity from prosecution by their association with the ruling party ZANU-PF. The former President Mugabe, politicised use of the powers during his reign under the Constitution to grant pardons, amnesty, or clemency to those implicated in or convicted of serious human rights violations. Highly partisan police forces, whose members have also been implicated in abuses, leave little hope of justice for victims of abuse. The failure of the power-sharing government to end impunity, the difficulties involved notwithstanding, has further complicated the prospects of restoring the rule of law in Zimbabwe. Unless the new government finds the political will to impartially investigate, prosecute, and ensure appropriate punishment and reparations, human rights violations will continue.

CHAPTER 4

The Constitution of Zimbabwe and her electoral law,

4.1 Introduction

The 2013 Constitution brought a ray of hope to many Zimbabweans as the country had long waited for a Constitution which voiced out the needs and rights of the people. A strong Constitution is regarded as a fundamental aspect of the country and the new Constitution has provided a good foundation for the conduct of elections in Zimbabwe in the future. This constitution was a product of a multiparty and “people driven process” which culminated in its adoption in 2013.¹⁶⁸ Free, fair, regular elections and adequate representation of the electorate is amongst the founding values and principles of good governance where in Zimbabwe is founded on.¹⁶⁹ However, challenges to the conduct of free and fair elections in Zimbabwe encompass implementing existing legislation, administrative and political gaps. For example, since the 2013 Constitution was adopted the Electoral Act¹⁷⁰ has been amended for about five times if not more in a bid to align it with the Constitution. Notwithstanding these amendments the Electoral Act still fails to meet the constitutional muster and to give effect to the constitutional provisions and principles. These include fully aligning the electoral law to the constitution, the impartiality of the Zimbabwe Election Commission (ZEC), and state media partisan. Both ZEC and the state media are continuously being accused by civil society and opposition parties of being biased towards ZANU-PF. While the constitution is debatably progressive and has the potential to establish Zimbabwe as a democratic society where everyone is equal before the law and deserves equal protection of the law, the implementation of the electoral Act falls short of regional and international standards.

4.2 Election Authority

¹⁶⁸Constitution of Zimbabwe Amendment (No. 20) Act 2013. (Hereinafter referred to as the 2013 Constitution)

¹⁶⁹Article 3 (2) (b) (ii) and (iii) of the 2013 Constitution.

¹⁷⁰Electoral Act (Chapter 2:13)

The ZEC is an election authority in the country as stipulated in the constitution and is one of the Chapter 12 independent commissions supporting democracy.¹⁷¹ It is comprised of a chair person and other eight members or commissioners appointed by the President.¹⁷² Its full functions and expectations are listed in Article 239¹⁷³ and Article 5¹⁷⁴ of the Constitution and the Zimbabwe Electoral Act, respectively.

¹⁷¹It is established in terms of Article 238 of the Constitution.

¹⁷² Article 238 (1) (a) and (b) of the Constitution.

¹⁷³The Zimbabwe Electoral Commission has the following functions:

- a. To prepare for, conduct and supervise –
 - i. Elections to the office of President and Parliament;
 - ii. Elections to provincial and metropolitan councils and the governing bodies of local authorities;
 - iii. Elections of members of the National Council of Chiefs established by Section 285; and
 - iv. Referendums;
and to ensure that those elections and referendums are conducted efficiently, freely, fairly, transparently and in accordance with the law;
- b. To supervise elections of the President of the Senate and the Speaker and to ensure that those elections are conducted efficiently and in accordance with the law;
- c. To register voters;
- d. To compile voters' rolls and registers;
- e. To ensure the proper custody and maintenance of voters' rolls and registers;
- f. To delimit constituencies, wards and other electoral boundaries;
- g. To design, print and distribute ballot papers, approve the form of and procure ballot boxes, and establish and operate polling centres;
- h. To conduct and supervise voter education;
- i. To accredit observers of elections and referendums;
- j. To give instructions to persons in the employment of the State or of a local authority for the purpose of ensuring the efficient, free, fair, proper and transparent conduct of any election or referendum; and
- k. To receive and consider complainants from the public and take such action in regard to the complaints as it considers appropriate.

¹⁷⁴In addition to the functions set out in Section 239 of the Constitution, the Commission shall be responsible for –

- a. Undertaking and promoting research into electoral matters; and
- b. Developing expertise and the use of technology in regard to electoral processes; and
- c. Promoting co – operation between the Government, political parties and civil society in regard to elections; and
- d. Keeping the public informed about –
 - i. The times and places where persons can register as voters and the progress of the voter registration exercise; and
 - ii. The delimitation of wards, constituencies and other electoral boundaries; and
 - iii. The location and boundaries of polling stations and when they are open; and
 - iv. Voters rolls and the times and places at which they are open for inspection; and
 - v. Political parties and candidates contesting every election; and
 - vi. Voting; and
 - vii. Generally, all matters relating to the Commission's work and the electoral process; and
- e. Making recommendations to Parliament on appropriate ways to provide public financing for political parties.

4.3 An overview of the electoral legislation

4.3.1 Zimbabwe Constitution 2013

The Constitution is the supreme law of Zimbabwe and every law, practice, custom and conduct should be consistent with it.¹⁷⁵ Owing to the supremacy of the Constitution, the electoral principles and standard should be read in light of constitutional expectations and values. Among the founding values and principles of Zimbabwe is respect to fundamental rights and freedoms as well as good governance.¹⁷⁶ These are also entrenched in the preamble of the Constitution. Good governance in terms of the Constitution includes free, fair and regular elections, the outcome of which is accepted by all contesting candidates and parties. The conduct of elections is covered in great depth in chapter 7 of the Constitution.¹⁷⁷ Chapter 7 mandates the adoption of an Act of Parliament to regulate the conduct of elections. The issues that are identified to be of utmost importance in the conduct of elections are the registration of voters, education of voters, a code of conduct for political parties, role of the Zimbabwean Electoral Commission in the amendment of electoral laws, and nullity of changes to electoral laws after an election has been called.

Every Zimbabwean citizen has the right to free, fair and regular elections for any elective public office and to make political choices freely.¹⁷⁸ It, therefore, follows that the State and every person, including juristic persons, and every institution and agency of the government at every level must respect, protect, promote and fulfil the rights and freedoms¹⁷⁹ in the electoral cycle.

4.3.2 Zimbabwe Electoral Act

This Act contains principles of democratic elections which include efficient, free, fair and transparent elections, the right of political parties to campaign freely, and reasonable access to media by all political parties.¹⁸⁰ It also provides for a Registrar

¹⁷⁵ Article 2 of the 2013 Constitution provides that the Constitution is the Supreme Law of Zimbabwe and any law, practice, custom or conduct inconsistent with it is invalid to the extent of the inconsistency.

¹⁷⁶ Article 3 of the Constitution

¹⁷⁷ Part 1 of Chapter 7 of the Constitution deals with electoral systems and practices, Part 2 of Chapter 7 deals with timing of elections and Part 3 deals with delimitation of electoral boundaries.

¹⁷⁸ Article 67 of the Constitution

¹⁷⁹ Article 44 of the Constitution

¹⁸⁰ Article 3 of the Act

General of Voters who operates under the direction and control of ZEC¹⁸¹, the Registrar General may alter the voters roll where necessary¹⁸², the voters roll must also be readily accessible to the public¹⁸³ and the ZEC must play an important and prominent role in voter education¹⁸⁴ such as ensuring that they understand that they have a democratic right to choose a leader or party of their choice without fear. It also provides for an Observers Accreditation Committee to accredit election observers.¹⁸⁵

The Electoral Act contains provisions that are an affront to the Constitution, whether by design or through lack of insight, has failed or neglected to align such provisions with the Constitution despite the Electoral Amendment Act of 2018. Constitutionally speaking ZEC is an independent Commission and is not subject to the control of anyone.¹⁸⁶ A slow reading of the Electoral Act will show that a Chief elections officer cannot be dismissed without the approval of Minister of Justice, Legal and Parliamentary Affairs.¹⁸⁷ Other provisions state that ZEC can only accept funding from non – governmental sources after the approval of the Minister of Justice, Legal and Parliamentary Affairs¹⁸⁸ and the Minister has to approve regulations made by ZEC regarding electoral procedures.¹⁸⁹ These provisions infringes independence of ZEC and this has led to cadre deployment and the colonisation of an institution which is supposed to be independent and meant to check the exercise of political power.

Article 23¹⁹⁰ of the Act excludes citizens not resident in Zimbabwe from registering as voters and Article 72¹⁹¹ of the Act excludes citizens of Zimbabwe who are not in Government service from exercising their right to vote. In the case of *Shumba &*

¹⁸¹ Article 18 (Ibid)

¹⁸² Article 35 (Ibid)

¹⁸³ Article 21 of the Act.

¹⁸⁴ Article 40B (Ibid)

¹⁸⁵ Article 40 H (Ibid)

¹⁸⁶ Article 235 of the Constitution.

¹⁸⁷ Article 9(5) of the Act

¹⁸⁸ Article 12(1) (Ibid)

¹⁸⁹ Article 192 (4) (Ibid)

¹⁹⁰ This provision states that one must be a resident of a given constituency for him to qualify as a registered voter.

¹⁹¹ This provisions states that a person who is a registered voter shall be entitled to vote by post is he or she is a duty member of a disciplined force, electoral officer, on duty in the service of Government outside Zimbabwe or a spouse of the abovementioned person(s).

*Others v Minister of Justice and Parliamentary Affairs and Others*¹⁹² the Applicants were challenging Article 23 and 72 on the basis that: Article 23 violated Article 68(3)¹⁹³ of the Constitution as read with Paragraph 2 of the 4th Schedule¹⁹⁴ to the Constitution and that Section 72 of the Act violated their rights as enshrined in Articles 56(1), 56 (3), 56 (4)¹⁹⁵ and 67 (3) of the Constitution. In this case none – of the Applicants were disqualified to vote in terms of paragraph 2 of the 4th Schedule to the Constitution, they were and are simply Zimbabweans who are not resident in Zimbabwe. The Respondents argued that the Constitution does not provide for external constituencies, that Zimbabwe has to be guided by the wording of its Constitution which clearly did not anticipate the diaspora vote and that the Applicants should petition Parliament to amend the Constitution.

The Court held that the right alleged to have been violated by the Applicants is not absolute since the same provision is prefixed with the words subject to this Constitution, whose effect is to limit this very right. Further, the Court held that the Constitutional Court remains guided by the wording of the Constitution, and has interpreted its provisions as expressly excluding the diaspora vote and the application was dismissed. The Court ought to have viewed, using the words of Sachs J in *August*¹⁹⁶ case as quoted by O'Regan J, the right to vote as a “badge of dignity” and a “symbol of citizenship.”¹⁹⁷ It, therefore, follows that “*the basic formula*

¹⁹² CCZ 4/18.

¹⁹³ Article 68(3) provides:

3. Subject to this Constitution, every Zimbabwean citizen who is of or over eighteen of age has the right –

a. To vote in all elections and referendums to which this Constitution or any other law applies, and to do so in secret; and;

b. To stand for election for public office and, if elected, to hold office.

¹⁹⁴ (2) A person is disqualified to be a registered as a voter –

a. While he or she is detained as mentally disordered or intellectually handicapped under an Act of Parliament relating to mental health;

b. If he or she has been declared by order of a court to be incapable of managing his or her affairs, for so long as the order remains in force; or

c. If he or she has been convicted of an offence under the Electoral Law and declared by the High Court to be disqualified for registration as a voter or from voting, for the period he or she has been declared disqualified, but the period must not exceed five years.

¹⁹⁵ Article 56 of the Constitution provides for equality and non – discrimination and it states that all persons are equal before the law and have the right to equal protection and benefit of the law.

¹⁹⁶ *August and Another v Electoral Commission and Others* (1999) ZACC 3.

¹⁹⁷ *Richter v Minister of Home Affairs* (2009) ZACC, 3.

*of instant nationhood implied that all voting rights provisions must as far as possible be interpreted to favour the enfranchisement of as many people as possible.*¹⁹⁸

4.3.3 Electoral Amendment Act, 2018

The Electoral Amendment Act, 2018 gives ZEC the sole responsibility to register voters and not Registrar General¹⁹⁹ and the ZEC, therefore, has a responsibility to keep and maintain an up to date voters' roll.²⁰⁰ This is to be achieved through removal of duplicates, dead people and updating where there has been a change in address or migration.²⁰¹ The Act confers an observer status to the Zimbabwe Human Rights Commission²⁰² (section 21) and discourages voter intimidation.²⁰³

Clause 36 of the Amendment Act provides for the Electoral Code of Conduct for Political Parties and Candidates and Other Stakeholders. The purpose of the Code is to promote conditions that are conducive to free and fair elections and a climate of tolerance in which electioneering activity may take place without fear or coercion, intimidation or reprisals.²⁰⁴

4.4 Binding Obligations under SADC principles

SADC has developed principles and guidelines to the conduct of elections to enhance democratic and transparent election outcomes that are acceptable to all contesting parties. SADC together with the AU are among the leading institutions that have to endorse or reject any election outcome in Zimbabwe. Hence, it is important to look at the SADC standard to see if Zimbabwe is in full compliance with the standard. Among other things the SADC Principles provide for freedom of expression, equal media access and political tolerance (arts.2 &7). These are issues that the opposition parties constantly complain about and still need to be addressed in Zimbabwe.

¹⁹⁸Wessel le Roux: Migration, Street Democracy and Expatriate Voting Rights.

¹⁹⁹Article 5.

²⁰⁰Article 6.

²⁰¹Article 32.

²⁰²Article 21.

²⁰³Article 27.

²⁰⁴The Amendment Act is available on www.veritaszim.net (last accessed on the 7th of July 2018)

4.5 Zimbabwe's history of disputed elections

Zimbabwe has a history of disputed election outcomes, with the most recent examples being the 2008 and 2013 general and presidential elections. In 2008, while the election outcomes for the local and house of assembly results were released immediately, the outcome of the presidential election was delayed beyond what was required by law. Counting at polling stations was over and done with within hours and results were generally known within the day, but ZEC said it needs time to collate the results before officially proclaiming victory. The delays in announcing the election results created an undesirable opportunity for tampering with the results of the poll and thereby casting into doubt the authenticity and reliability of the eventual results to be declared. This in addition to being illegal also raised suspicion within the general public and had effect of compromising the fairness of the result. When they were eventually released, there was no outright winner, necessitating a run-off between the top two candidates former President Robert Mugabe and the late MDC leader Mr Morgan Tsvangirai. The opposition MDC-T led by Mr Morgan Tsvangirai cried foul and claimed that according to their information they had won out - rightly.

The run-off witnessed high levels of violence which had a potential impact of negatively on free and fair election. Citing high levels of violence, the opposition MDC-T pulled out and boycotted the elections. The violence had been referred to be as grievous as Gukurahundi as they were led by ZANU-PF against the main opposition party MDC. This was a way of intimidating and instilling fear on people. In 2018 some videos published by Dewa Mavhinga exposing ongoing intimidation has sparked serious debates on social media, with Zanu-PF out rightly denying the allegations saying the videos have been "cooked"²⁰⁵. Clearly there is an indication that ZANU-PF is employing the previous intimidation tactics to ensure victory and retain their legacy after the 2017 alleged coup by Mnangagwa. This lead to negotiations led by former South African president Mr Thabo Mbeki, which culminated in the formation of a government of national unity.

²⁰⁵ <https://www.herald.co.zw/mdc-t-activist-mavhinga-cooks-violence-video-dishes-it-out-on-social-media/>(last accessed on the 7th of July 2018)

4.6 Current perceptions on the conduct of elections

As the country is facing elections the responsibility rests on the current government to ensure that credible and legitimate elections are delivered that will “win” back the international community and investors. The 2018 amendment to the electoral law is a stride towards improving the conduct of elections. The amendment seeks among other things to protect the voter from intimidation, and to promote the human right element of elections by according an observer status to the Zimbabwe Human Rights Commission. Civil Society Organisations (CSOs) and opposition political parties continue to advocate for more reforms and access to the state media. The CSOs often highlight a lack of political will to reform laws and institutions governing the conduct of elections in the country. While attempts have been made to improve the electoral playing field through for example the amendment of the electoral law in 2018 and the introduction of biometric voters registration (BVR), a number of concerns remain on whether the current legal framework is adequate for free and fair elections. There is a general feeling amongst the opposition and CSOs that the constitutional standard and election procedures are yet to be fully complied with.

Various Acts such as the Public Order and Security and section 31 of the Criminal Law (Codification and Reform) need to be amended or repealed before confidence can be placed on free, fair and credible elections. These Acts criminalizes certain acts like the making of statements deemed to be prejudicial to the State. Further, Acts such as the Interception of Communications Act and the Censorship Act have the power to trample upon civil liberties, freedom of assembly and freedom of speech, thereby hindering free and fair elections. While BVR a definitely a good development there are still huge limitations on voter education. A code of conduct for political parties is in place and it remains to be seen if the measures are adequate to enforce strict adherence to the code by all political parties.

4.7 Contribution of courts and other actors

Courts have periodically ruled on election matters to give guidance on the expected election standards and requirements. Before delving into the case law discussion is it imperative to note that the right to vote is a fundamental human right afforded to citizens of a country and according to Article 21(3) of the United Nations Declaration of Human Rights “The will of the people shall be the basis of the authority of

government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.”²⁰⁶ In *Movement for Democratic Change and Others v Zimbabwe Electoral Commission and Others*²⁰⁷ Justice Munangati-Manongwa held that: “*The right to vote lies at the centre of every constitutional democracy. Such a right falls under political rights which a citizen is entitled to enjoy and same are constitutionally protected.*” Civil Society Organisations play an important role in reminding the government and ZEC on their obligations in securing free and fair elections.

This right, in most countries, also extends to citizens who are not within the home country’s borders on Election Day by various mechanisms being put in place such as postal voting or voting at the embassy in the foreign country. This is commonly known as the Diaspora Vote whose first use can be traced back to Roman times under Emperor Augustus²⁰⁸. The Diaspora Vote has been a highly contested issue in recent politics in Zimbabwe as there are no provisions for it in either the Constitution or the Electoral Act.

In 2017 case of *Movement for Democratic Change and Others v Zimbabwe Electoral Commission and Others* the applicants approached the court on an urgent basis alleging that their members (for the political parties) and for the third applicant she herself, their right to vote was in danger of infringement due to the fact that those in

²⁰⁶ Other International instruments on voting rights include: Article 5 of the International Convention on the Elimination of all Forms of Racial Discrimination grants political rights, in particular the right to participate in elections, to vote and to stand for election, on the basis of universal and equal suffrage. Article 7 of the Convention on the Elimination of all Forms of Discrimination against Women provides women the opportunity to participate in the electoral and political process of their respective countries through voting and being voted for and further calls for the equal treatment of both men and women in the mentioned process. Article 13 of the African Charter on Human and People’s Rights provides that every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.

²⁰⁷ Any person born in Zimbabwe who is of over eighteen (18) years with an identification card endorsed alien and a birth certificate showing that such person was born in Zimbabwe and that at least one of the parents of such person was born in Zimbabwe or from the SADC region with proof (that he or she was ordinarily resident in Zimbabwe is forthwith entitled to be registered by the corespondent to vote without any impediment or additional requirement other than requirement relating to all people.

²⁰⁸ *The History And Politics Of Diaspora Voting In Home Country Elections* Prepared by Andy Sundberg, based on information from Andrew Ellis and others sources in: “Voting from Abroad”: The International IDEA Handbook, 2007 : Emperor Augustus “is said to have invented a new kind of suffrage under which the members of the local senate in 28 newly established colonies cast votes for candidates for the city offices of Rome and sent them under seal to Rome for the day of the elections”

possession of identity documents in the form of cards endorsed “alien” were failing to register to vote on account of the endorsement and or that the second respondent²⁰⁹ has either refused to issue them with identity documents endorsed “citizen” or had placed onerous conditions in terms of fees and other requirements for issuing of such identity documents.

This legal issue arose from the historical constituent of the Zimbabwean society which consists of a certain class of persons which the Constitution has acknowledged in Sections 36 and 43(2) to be citizens. These persons had been labelled “aliens” with their identity documents duly endorsed as such. The Court went of state that Shorter Oxford English Dictionary defines an “alien” as a “stranger, a foreigner, a resident of foreign origin.” Given the circumstances of these persons which included their place of birth and parental origins, the label of “alien” was not appropriate given the aforementioned definition. Constitutional intervention brought clarity to the issue of this class of “aliens.”²¹⁰ Put simply section 43(2) provides that any person who was born in Zimbabwe before 22 May 2013 is a citizen by birth if one or both of his parents was a citizen of a SADC member State and he or she was ordinarily resident in Zimbabwe as at that date. The Court held that the so called “aliens” are practically and legally Zimbabwean citizens with every right to enjoy the privileges and constitutionally protected rights attendant to their true status.

In 2002 the late Mr Morgan Tsvangirai, as leader of Movement for Democratic Change, as he was then, brought an application²¹¹ to declare, amongst other things, Statutory Instrument 41D of 2002 to be invalid citing that it violated the Declaration of Rights in the Constitution in respect of himself and those who supported his

²⁰⁹The Second Respondent in that case was the Registrar General cited in his official capacity.

²¹⁰ (1) Persons are Zimbabwean citizens by birth if they were born in Zimbabwe and, when they were born –

(a) Either their mother or their father was a Zimbabwean citizen;

And the relevant section of Section 43 reads

(2) Every person who was born in Zimbabwe before the publication day is a Zimbabwean citizen by birth if—

(a) one or both of his or her parents was a citizen of a country which became a member of the Southern

African Development Community established by the treaty signed at Windhoek in the Republic of Namibia on the 17th August, 1992; and

(b) he or she was ordinarily resident in Zimbabwe on the publication day

²¹¹ *Tsvangirai v Registrar General of Elections and Others* [2002] ZWSC 20 (03 April 2002);

Presidential Campaign. Key to this argument was Article 4 of the statutory instrument which denied postal voting to voters absent from their constituency unless they belonged to a specific class of people which largely excluded people in the Diaspora²¹².

In dismissing the application the Supreme Court, per the majority judgement of Chidyausiku CJ, held that Mr Tsvangirai had no legal right to approach the Court (*locus standi*), being the main issue, as he had not alleged in his papers that he personally was denied a postal ballot and therefore there was no violation of his fundamental rights by the statutory instrument. However, the dissenting judgement of Sandura JA found that Mr Tsvangirai “*had the right to demand that the presidential election be conducted in terms of the Electoral Law passed by Parliament*” and had the right to approach the Court directly meaning he had the *locus standi* to file the application. Furthermore, “*as the applicant had locus standi, the Court should have determined the real issues raised in this application before the presidential election was held.*”

One wonders if the application was brought directly by a citizen who had been denied the postal vote or if the views of Sandura JA were the majority judgement, whether the Court would have found the impugned provisions violated the rights of citizens and thus afforded the Diaspora vote.²¹³ It is imperative to note that the old constitution did not have a specific provision as to who could make applications on enforcement of fundamental rights and freedoms to the Supreme Court. Section 85

²¹²Section of the statutory instrument which provides:

“4(1) Notwithstanding Part XV of the Act, no voter shall be entitled to receive a postal ballot paper unless his absence from his constituency or inability to attend a polling station, as the case may be, is or will be occasioned by –

(a) duty as a member of a disciplined force or as a constituency registrar, presiding officer, polling officer or counting officer; or
(b) absence from Zimbabwe in the service of the Government of Zimbabwe; or
(c) being a spouse of a person referred to in paragraph (a) or (b) who accompanies that person outside Zimbabwe.”

²¹³ However see the case of *Madzingo and Others v Minister of Justice Legal and Parliamentary Affairs and Others* [2005] ZWSC 100 (22 February 2005); in which the applicants complained that the failure by the respondents to put up mechanisms to record their votes in the foreign country is likely to violate their right to freedom of assembly and association (s 21) and the right to freedom of movement (s 22). The Court dismissed the application and held that the right to vote was not a constitutionally protected fundamental human right.

of the new constitution provides that any person acting in their own interests or any person acting on behalf of another person who cannot act for themselves or any person acting as a member, or in the interests, of group or class or class of persons is entitled to approach the Court alleging that a fundamental right is being or is likely to be infringed. Thus, if, hypothetically speaking, Mr Tsvangirai were to approach the court in this new constitutional dispensation and on the basis of Article 85 of the 2013 Constitution: will the Constitutional Court have a different view on his application?

The Constitution of 2013 had to pass the muster of a referendum which required citizens to vote for or against its adoption. Before the referendum, the African Commission on Human and Peoples' Rights (ACHPR) passed a provisional ruling²¹⁴ ordering the Government to allow Zimbabweans living abroad to vote in the referendum and all elections thereafter; to provide all eligible voters abroad the same facilities to vote as those working abroad in the service of the Government; and to Government to give effect to its obligations under the African Charter²¹⁵.

In the same year, the Zimbabwe Constitutional Court dismissed an Application²¹⁶ in which the applicant sought to challenge the constitutional validity of certain sections of the Electoral Act [Cap. 2:31] being: article 23(3), which required that a voter be resident in a constituency in order to vote and that if such voter was absent from the constituency for a period of over twelve months his or her name be removed from the voters roll; and section 71 which provides for postal voting only for persons outside the country while in service of the Government or their spouses.

²¹⁴ *Gabriel Shumba and Others v The Republic of Zimbabwe, Communication 430/2012*, Adopted during the 13th Extraordinary Session of the ACHPR from 19-25 February 2013, Banjul, The Gambia.

²¹⁵ *The African Charter on Human and People's Rights provides in Article 1: "The Member States of the Organisation of African Unity, parties to the present Charter shall recognise the rights, duties and freedoms enshrined in the Charter and shall undertake to adopt legislative or other measures to give effect to them." And Article 13(1) stipulates that "every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law;"*

²¹⁶ *Bukaibenyu v ZEC Chairman & Others* (CCZ 12/17 CONST. APPLICATION NO. SC 126/12) [2017] ZWCC 12 (28 June 2013)

In its decision the Court had to consider the *Richter* case of the South African Constitutional Court²¹⁷ which had held that sections of the Electoral Act of South Africa constituted an unjustifiable limitation in restricting the classes of registered voters who are absent from South Africa on election day from participating in elections. The Zimbabwe Constitutional Court however stated that South African case could not be applied as Zimbabwe had a Constituency based electoral system whereas South Africa had a system based on Proportional Representation²¹⁸. Such a distinction, I humbly submit, does not seem to ventilate the issue of right to vote being extended to include a Diaspora vote as it makes no difference if in exercising the right to vote a person votes for a specific candidate or a political party.

As canvased above the Electoral Act constitutes an unjustified limitation on the right to vote in terms of Article 67 of the Constitution and the right to equality and non – discrimination in terms of Article 56 of the Constitution²¹⁹. Article 44 of the Constitution places a duty on every person, including juristic persons, and every institution and agency of the government at every level to respect, protect, promote and fulfill the rights in Chapter 4 of the Constitution²²⁰.

The former chairperson of the ZEC, Justice Rita Makarau, stated that for the Diaspora Vote to take place the “Electoral Act must be aligned to the constitution and

²¹⁷ *Richter v The Minister of Home Affairs and Others* (with the *Democratic Alliance and Others Intervening and with Afriforum and Another as Amici Curiae*) [2009] ZACC 3.

²¹⁸ In *Bukaibenyu v ZEC Chairman & Others* MALABA DCJ stated that “The *Richter* case *supra* could not be applied to the applicant’s case. Zimbabwe and South Africa have different electoral systems. The South African electoral system is based on the concept of proportional representation. This means that voters vote for a political party, not individuals.... As such, no matter where the voter casts his or her vote from, he or she would not be voting for an individual to represent him or her as a resident of a constituency.

The Zimbabwean electoral system is different. It is based on the concept of constituency representation.... Registered voters vote for individual candidates, even though they may belong to political parties that sponsor them...

Under the Zimbabwean electoral system, a voter votes not only as a citizen of this country but also to protect his or her rights and interests as a resident of the constituency in which he or she is registered. He or she votes for a candidate best suited to address the developmental problems of the constituency.”

²¹⁹ Section 56 provides “All persons are equal before the law and have the right to equal protection and benefit of the law.”

²²⁰ In *Pharmaceutical Manufacturers Association of South Africa and Another: In re Ex Parte President of the Republic of South Africa and Others* (CCT31/99) [2000] ZACC 1 the South African Constitutional Court held “*There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control.*”

provide the mechanism through which the Diaspora vote will be administered.”²²¹ The Electoral Commissions Forum of SADC Countries Election Observation Mission Report on the Harmonised Elections of 2013 called for more work to be done to give effect to the African Commission on Human and People’s Rights ruling which effectively granted the Diaspora vote in Zimbabwe. Thus an amendment to the Electoral Act is necessary to put in place the Diaspora vote and the mechanisms to give effect to such a vote. This will undoubtedly be a mammoth task but comfort can be taken in that other African Countries, such as South Africa and Kenya, have successfully implemented this special form of voting. Both the protection of existing rights and the introduction of reforms must therefore serve the same goal, namely to promote, the spirit, purport and object of Chapter 4 of the Constitution.

In 2018 election held on the 31 July, Mnangagwa was duly elected as the President of Zimbabwe. According to the Nelson Chamisa vs Emmerson Dambudzo Mnangagwa and others²²², Chamisa claimed the elections were flawed and rigged. The applicant was meant to submit the application within the stipulated seven (7) days from the announcement of the results. The applicant can only do so through the Sheriff of Zimbabwe in terms of r 9(7) of the Constitutional Court Rules.²²³ Applicant submitted to the Sherriff on the last day of the stipulated time. The Sherriff had until 10pm the same day to submit the application. The Sherriff submitted the application to the respondents the following morning on 11 August 2018, outside of the timeframes stipulated in the Constitution and contrary to the provisions of the Constitutional Court Rules.

The summary of the defense arguments state that numbers released by ZEC were not tallying up with those displayed at polling stations (V11forms- these are primary documents used to tally consolidated votes at a polling station level), this was castigated by the court and dismissed as fabricated evidence designed to mislead the court. The judges also concluded that this was not proven by Chamisa in the

²²¹ <https://www.dailymaverick.co.za/article/2017-10-30-zimbabwe-what-hope-for-diaspora-vote-in-2018-elections/#.WODn5Nlzbcs> (Last accessed on the 7th of July 2018)

²²² Nelson Chamisa vs EEmmerson Dambudzo Mnangagwa CCZ42/18

²²³ See (n 215 above)

court. The applicant was then faced with a further obligation to serve the process to all the respondents on the same day. This judgement was perceived as biased by Chamisa's supporters from the beginning when South African advocates hired by Chamisa were denied clearance to practice law in Zimbabwe. The judgement also contradicts the Mugabe vs Tsvangirai treason trial where advocate George Bizos from South Africa was cleared to practice in the country.²²⁴

²²⁴ <https://mg.co.za/article/2003-02-06-bizos-puts-zim-treason-trial-witness-to-the-test>

CHAPTER 5

International instruments on the right to free and fair elections

5.1 Introduction

Human rights norms and standards in the administration of criminal justice have been the focus of the United Nations and its various organs. The formulation of these standards and norms is aimed at promoting and ensuring the fair and equitable administration of justice and effective crime prevention. They represent the internationally agreed-upon principles of desirable practice on which governments can assess their own criminal-justice systems and contribute to the development of the concept of the international rule of law. While international instruments such as declarations, principles and guidelines have no legally binding effect, they can provide practical guidance and substance for the elaboration of conventional rights. However, treaties and conventions are binding. This research limits the focus of international instruments in the administration of criminal justice to election committed crimes.

5.2 Tensions

Inherent tensions exist between individual rights and the interests of the society in the administration of criminal-justice systems. The tension is reflected in international human rights instruments, such as in Article 5²²⁵ and 7²²⁶ of the UDHR which sets out both the rights of people to enjoy domestic tranquillity and security of person and property without encroachment of criminal activity, and the rights for equitable systems of justice that protects individual rights and liberties. Striking the appropriate balance between the interests is a complex issue to address. There is a growing awareness of the structural causes of crime, and the recognition that human rights issues are closely linked with justice concerns. As crime becomes complex and difficult to control, the operation of high standards also becomes increasingly

²²⁵ The Universal Declaration of Human Rights, Article 5.

²²⁶ Universal Declaration of Human Rights, Article 7.

important in any society that is governed by the rule of law and democratic principles.

5.3 The UDHR²²⁷

In 1948, member states of the United Nations unanimously proclaimed the adoption of the UDHR, which recognises the independence of human rights and the rule of law. The right to free and fair elections is not specifically set out in the Declaration but can be inferred from Article 21 (3), which states that,

“The will of the people shall be the basis of the authority of government; the will shall be expressed in periodic and genuine elections, which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.”

At the time of the proclamation, the plan was to use the Declaration as the framework for Human Rights Treaties. In the process of drafting these treaties, the Commission on Human Rights recognised the importance of the right to free and fair elections.

Although the UDHR does not directly guarantee the right to free and fair elections, it does recognise the right to free and fair elections and advocates for transparency and accountability.

5.4 The ICCPR

The ICCPR sets out the basic human rights that are to be complied with in criminal procedures and elaborates on the minimum guarantees required for the protection of human rights. On 13 May 1991, Zimbabwe ratified the International Convention on Civil and Political Rights (ICCPR).²²⁸The Convention stresses that the state is under the obligation to uphold the ideal of free human beings enjoying civil and political freedom, but freedom from fear can only be achieved if conditions are created

²²⁷ Universal Declaration of Human Rights General Assembly December 1948.

²²⁸ The International Covenant on Civil and Political Rights, 1976.

whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights.²²⁹ Article 7 clearly states that,

“No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.”²³⁰

The above is further substantiated by the country’s Constitution which states that,

“No person may be subjected to physical or psychological torture or to cruel, inhuman or degrading treatment or punishment.”²³¹

Furthermore, the ICCPR guarantees the citizens the rights to free and fair elections as identified in Article 25(b) which states that,

“To vote and to be elected at genuine periodic elections this shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.”²³²

Clearly, all are equal before the law and are entitled without any discrimination to equal protection of the law. All citizens are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Despite Zimbabwe being a member state of the ICCPR, it has failed to address the fundamental rights of its citizens. Gross human violations are reported, have been reported in pre, during and post-election periods. Under the ICCPR, states have the obligation

“To ensure that any person whose rights or freedoms as herein recognised as violated shall have an effective remedy.”²³³

The ICCPR imposes on states the duty to ensure that any person shall have their right to an effective remedy, “determined by competent judicial, administrative or

²²⁹ The international Covenant on Civil and Political Rights, 1976.

²³⁰ Article 7.

²³¹ See (n220 above).

²³² Article 25 (b).

²³³ The International Covenant on Civil and Political Rights, art.2 (3) (a).

legislative authorities, or by any other competent authority provided for by the legal system of the state, and to develop the possibilities of judicial remedy.”²³⁴

5.5 Regional instruments

Regional instruments on human rights are relatively independent coherent human rights sub-regimes ²³⁵ that are nested within the broader framework of the International human rights practise. The principal regional instruments can be identified as the African Charter on Human and People’s rights, The American Convention on Human Rights and the European Convention on Human Rights.

5.6. African Charter on Human and People’s Rights

The Charter’s adoption²³⁶ was built on the idea that the continent needs an “African Convention on Human Rights” to give full effect to the UDHR and the United Nations Charter.²³⁷ It aimed to provide a normative framework for the African regional human rights system.²³⁸ It stipulates, inter alia, freedom of conscience,²³⁹ rights to receive information,²⁴⁰ free association,²⁴¹ free assembly,²⁴² and to participate freely in the government of one’s country, either directly or indirectly through freely chosen representatives in accordance with the provisions of the law.²⁴³ The African Charter²⁴⁴ indirectly provides for the right to free and fair elections. It fails to neither clearly signify the freeness of elections nor clearly identify the requirements of a free

²³⁴ See (n223 above)

²³⁵ Donnelly, Jack (2003). *Universal human rights in theory and practice* (2nd ed.). Ithaca: Cornell University Press. p. 138. [ISBN 978-0-8014-8776-7](#).

²³⁶ African (Banjul) Charter on Human and Peoples' Rights, 1986.

²³⁷ Human Dimension Program, Mediterranean Academy of Diplomatic Studies in Cooperation with DiploFoundation ‘The African Charter on Human and Peoples’ Rights’.

²³⁸ F Viljoen and L Louw ‘The Status of the African Commission: From Moral Persuasion to Legal Obligation’ (2004) 48:1 *Journal of African Law* 1 1. See generally G Bekker ‘The African Court on Human and Peoples’ Rights: Safeguarding the Interests of African States’ (2007) 51:1 *Journal of African Law* 151 152.

²³⁹ Article 7.

²⁴⁰ Article 8.

²⁴¹ Article 9.

²⁴² Article 10.

²⁴³ Article 13(1).

²⁴⁴ The African Charter, 1986.

and fair election. Hence the right to free and fair elections is not directly protected by the African Charter.

5.7 African Charter on Elections, Democracy and Governance

Zimbabwe has not yet ratified this important Charter. The African Charter being an African Union instrument; it is a very important landmark for Africa and argue the importance of Zimbabwe ratifying it and whether it is successfully discharging its primary mission of consolidating, promoting and protecting democracy in Africa.²⁴⁵ The Preamble of the Charter recognizes this and grounds itself in the existing human rights and democracy order by reference to this history, including the Algiers and Lomé Declarations, the Cairo Agenda, and the relevant articles of the Constitutive Act of the African Union. The Preamble also notes its goals with specific choices in language related to the institutionalization and entrenchment of democratic principles. It seeks to “entrench in the Continent a political culture of change of power based on the holding of regular, free, fair and transparent elections conducted by competent, independent and impartial national electoral bodies.” It is determined “to promote and strengthen good governance through the institutionalization of transparency, accountability and participatory democracy.” Most importantly, perhaps, the ideals contained in the Charter are deemed universal, and thus as wholly applicable in Africa as they are in any existing Western democracy. The substantive portion of the Charter begins with twin articles on the “Objectives” sought to be advanced and the “Principles” that should guide state implementation of the obligations under the Charter.

The Charter “reaffirms” the commitment of African countries to hold free, fair, transparent, and regular elections,²⁴⁶ while seeking the establishment or strengthening of national electoral bodies, mechanisms to settle contested elections, free and equal access for all candidates to media outlets, and a code to govern the conduct of elections, including processes for post-election issue.²⁴⁷ This charter also requires states to provide “a conducive environment for independent and impartial

²⁴⁵ Article 2 of African Charter on Democracy, Elections and Governance.

²⁴⁶ Article 17 of African Charter on Elections, Democracy and Governance

²⁴⁷ Article 17 (Ibid)

national monitoring or observation mechanisms.”²⁴⁸ Beyond the steps that state parties must undertake domestically, the Charter also envisions a potentially prominent role for the African Commission in national electoral processes. AU members may appeal to the Commission for expertise and financial assistance in strengthening and developing the requesting state’s electoral-related institutions.²⁴⁹ The Commission also must be informed of scheduled elections and invited to send an observer mission, which must enjoy “conditions of security, free access to information, non-interference, freedom of movement and full cooperation.”²⁵⁰ An “exploratory mission” under the auspices of the Commission should also pre-date any election, and should deduce “whether the necessary conditions have been established and if the environment is conducive to the holding of transparent, free and fair elections in conformity with the principles of the Union governing democratic elections.”²⁵¹ The Charter also endows the Commission with certain responsibilities in relation to its electoral monitoring role, designed to enhance its legitimacy in acting as an observer of domestic elections. Its missions must be impartial and endowed with sufficient resources to discharge their functions,²⁵² they must be comprised of relevant experts drawn from national electoral bodies, regional bodies, and Pan-African institutions, with concerns of gender and regional equality of representation taken into account,²⁵³ they “shall be conducted in an objective, impartial and transparent manner,”²⁵⁴ and shall timely submit a report to the Commission and the concerned state of its findings.²⁵⁵

5.8 An analysis of the right to free and fair elections

²⁴⁸ Article 22 (Ibid)

²⁴⁹ Article 18 (Ibid)

²⁵⁰ Article 19 (Ibid)

²⁵¹ Article 20 (Ibid)

²⁵² Article 21 (1) (Ibid)

²⁵³ Article 21(2) (Ibid)

²⁵⁴ Article 21 (3) (Ibid)

²⁵⁵ Article 21 (4 and 5) (Ibid)

The protection of this right in the African Charter can be inferred from Article 7 which provides for the protection of the right to freedom of coincidence. Article 13(1)²⁵⁶ protects the right of every citizen by ensuring that,

“Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.”

None of these articles specifically contains provisions relating to the right to free and fair elections. However, The African Commission on Human and People’s Rights is mandated by Article 45 (1) (b)²⁵⁷ of the Charter to formulate and lay down principles and rules aimed at solving legal problems relating to human rights and freedoms. These principles have persuasive value in the African Courts on Human and People’s rights. In these principles and guidelines, the right to free and fair elections is expressly provided.

The principle provides as follows: Individuals who engage in terrorism-related criminal activity may be prosecuted under domestic law and must be held criminally liable for serious human rights abuses but not limited to, murder, torture, sexual violence, kidnapping and hostage-taking, forced recruitment, war crimes, and crimes against humanity, or maybe extradited to face trial in another jurisdiction. The criminalisation and sanctioning of terrorism-related activities must be done in accordance with international human rights law.

From the above, the right to free and fair elections is protected, and no adverse interferences can be drawn.

5.9 Role of election observers

Monitoring and observation of elections is a process through which an election is scrutinised and evaluated “for purposes of determining its impartiality in terms of organisation and administration”. It involves “stationing of independent missions, officials or individuals representing international or local organisations for a specified

²⁵⁶ Article 13(1).

²⁵⁷ Article 45 (1) (b).

time in a country which is in the process of organising a national election with a mandate to closely observe and pronounce on the entire process and outcome”.²⁵⁸

Electoral observation and monitoring are “designed to boost confidence in the fairness of the electoral process, to help deter fraud in the balloting and counting procedures, and to report to the country’s citizens and the international community on the overall integrity of the elections. They also assist in making sure that elections run smoothly, fairly and freely through the ballot procedure. In addition, if requested and if appropriate, observers can mediate disputes between competing political groups to reduce tensions before, during and after elections.”²⁵⁹ Election monitoring is essentially an impartial third-party role to ensure free and fair elections. The development of the idea of election monitoring is tied to the recent resurgence of civil society and its continuing role in the engineering of democratic rule to that extent. Election observation could be a reflection of a particular stage of the involvement of civil society in the democratisation process. Its success in that regard is also suggestive of its claim to legitimacy. The whole phenomenon of international observation does not only underline that legitimacy, but it also indicates the extent civil society has become internationalised.

It will not be out of place to say that elections in Africa, from colonial days, have always been the subject of some sort of monitoring and observation. Local and international journalists have always observed elections to report on them. Security agencies have equally been deployed not only to maintain law and order during elections but also to ensure that electoral rules and regulations are adhered to by electoral officials and voters. Political parties usually send their agents to monitor voting in virtually all voting booths in any constituency in which they field a candidate.

In the context of the Zimbabwean independence elections of 1980, the first contemporary election monitoring in Africa could be seen primarily as being within a post-conflict situation. Other notable examples include the Namibian elections of 1989, and the South African Election of 1994. In most cases, international observer

²⁵⁸ Chipfunde, R. (2002). “Lesotho elections 2002: The Importance of Drawing election Observers from Civil Society”. Paper presented at EISA Seminar on the Role of Election Observers in the SADC Region, 8 May 2002.

²⁵⁹ Bjornland, E, et al. (1992). “Observing Multi-Party Elections in Africa: Lessons from Zambia”, *Africa Affairs*, Vol. 91, P.406.

teams come from the Commonwealth, the United Nations, African Union, the European Union and smaller groups from NGOs, and individual country missions. As the EU reported concerning the South African first general election in 1994, coordination, sorely needed among all these groups was “virtually impossible”, while “there was a tendency towards election tourism.”²⁶⁰ Coordination was required to optimally deploy available personnel from otherwise independent organisations, determine a common code of conduct, operational rules, and reporting standards.²⁶¹ Considered more objective and all-embracing, the task of coordination fell to the UN, but its highly bureaucratic nature led to delay in deployment of observers. At the end of the exercise, a list of imperfections and irregularities came out in the reports, but one problem that was again visible at this point was that the joint-mission statements issued by the UN and the pronouncements of the EU expressed a somewhat divergent view on the elections, with the former depicting the elections in more favourable terms. The most important thing, however, was that the outcome was accepted by all parties.

A notable case is that of Zimbabwe’s parliamentary elections of 2008 as well as the presidential elections of 2013 which were held against the background of the acrimonious relationship between Britain and Zimbabwe over the latter’s land policy. The opposition party’s allegation of widespread human rights violations on the part of the ZANU-PF Government clearly created a charged atmosphere in the run-up to the elections. This was not in any way helped by the fact that a few days before the elections, the government amended the electoral law, making the appointment of observers and monitors the responsibility of the Electoral Supervisory Commission (ESC). In addition, a condition of accreditation for foreign observers was the payment of a fee. Local monitors were expected to pay an accreditation fee. Matlosa suggests that these were meant to “control and regulate observers with a view to

²⁶⁰ Tostensen, A, D.C.Faber and K.De Jong, (1997). ‘Towards an Integrated Approach to Election Observation? Professionalising European Long-Term Election Observation Missions’. Policy Management Report No. 7. Maarstricht: European Centre for Development Policy Management.

²⁶¹See (n250 above)

protecting the political integrity of the election and guarding against the possible erosion of national sovereignty.”²⁶²

However, this was perceived by the international observers as well as the opposition parties as a deliberate attempt to reduce the scope and visibility of observer missions and therefore, create opportunities for irregularities. Pre-election remarks such as the ones made by the US-based National Democratic Institute (NDI) stated that the election process was fraudulently led to charges of bias by the Government of Zimbabwe. The consequence was a ban on foreign NGOs from mounting observer missions. Included in this ban were the NDI, the International Republican Institute, and observers from the UK and selected observers from other countries, including Kenya and Nigeria.²⁶³ The NDI commented that: “The refusal to accredit certain observers violates international standards for democratic elections and is counter to the practice of Zimbabwe’s neighbours and virtually all democratic countries.”²⁶⁴

The NDI, which had earlier sent a pre-election team to Zimbabwe, further commented that from its own experience, was the second time that the country had refused to accredit observers from recognised international nongovernmental organisations. The first time Zimbabwe attempted to prohibit observers of specific nationalities. These negative practices isolated Zimbabwe from other countries in the region and beyond.”²⁶⁵ The fact of the ban did not prevent the NDI from reiterating its pre-election verdict. It maintained that with just four days to the election, the conditions for democratic elections did not exist in Zimbabwe. Irreparable damage had been done to the electoral process, particularly because of politically motivated violence. The lack of effective government action against such violence created an air of impunity that further harms the election environment-an environment that is marred by anxiety and fear.

²⁶²Matlosa. K, (2002) “ Election monitoring and observation in Zimbabwe: hegemony versus sovereignty”, African Association of Political Science.

²⁶³ “Zimbabwe: Government Refuses NGOs Observation of the Elections” afrol.com, 21 June 2000.

²⁶⁴ See (n253 above)

²⁶⁵ See (n253 above)

The SADC Parliamentary Forum Election Observation Mission which sent 70 observers described the climate of the elections as being characterised by “high levels of polarisation and intolerance” and the election campaign “marred by incidents of violence”. The SADC observers did not only witness these acts but, “its mission members were also targets of an orchestrated attack 10 kilometres out of Chinhoyi.”²⁶⁶ It noted accusations of partnership against the police, the predominance of opposition supporters among victims of electoral violence and intimidation, the absence of an independent electoral commission, and the virtual lack of access to the public media by political parties other than the ruling party. The SADC observers’ mission concluded that the climate of insecurity in Zimbabwe since the 2000 parliamentary elections was such that the electoral process could not be said to adequately comply with the norms and standards of the SADC region.²⁶⁷ This position was clearly supported by the United States Election Observer Team which found out that ZANU-PF “the party of the former President Mugabe”, massively deployed youth militias in the countdown to the election. They engaged in a violent campaign of intimidation, often with the assistance of the police, to deny voters for the opposition MDC access to rallies and polling stations. The ZANU-PF, predominantly the government, did not only fail to provide security to the main opposition presidential candidate, but it also supported or tolerated assaults by ZANU-PF youth militia.²⁶⁸

In the days leading to the elections, the US noted that “only those who could show ZANU-PF party cards could purchase the scarce maize meal.” It concluded that “the groundwork for the flawed March 9/10 elections was laid over the last two years, a period during which the Government of Zimbabwe developed and employed an aggressive strategy designed to cripple political opposition. This strategy was marked by a collapse in the rule of law, serious human rights abuses, and the subversion of democratic institutions, including the judiciary and independent media. At the same time, the Government of Zimbabwe pursued economic policies, including violent and a chaotic land redistribution program that resulted in

²⁶⁶ Statement by The SADC Parliamentary Forum Election Observation Mission: Zimbabwe Presidential Elections 9-10 March, 2002.

²⁶⁷ (see n140 above).

²⁶⁸ US Findings on Zimbabwe Election, March 16, 2002 (online).
<http://www.marekinc.com/USpolicy031601.html>.

Zimbabwe's downward economic spiral.²⁶⁹ This spiral has resulted in the collapse of the country's economy, agricultural sector and the industrial sector. The Report of the South African Parliamentary Observer Mission was more circumspect in its verdict on the elections. The 2002 elections were pronounced "as a credible expression of the will of the people."²⁷⁰ Of course, it noted the oppositions parties' concerns that there were widespread acts of violence, the existence of "no-go" areas, partisanship on the part of the police, denial of access to public media to the opposition parties, and the unfair advantage which the legal-constitutional framework conferred on the ruling party. It further documented 12 legal constraints, which should ordinarily be seen to have adversely affected the free and fair conduct of the election but shied away from drawing that conclusion.

Election observation and monitoring have been vital to the consolidation and sustainability of democracy in Africa. The requirements that the instruments and processes that define the electoral process need to be designed and operated by an impartial agency is not contested. But that impartiality is not to be taken for granted, nor the good intentions of ruling regimes are assumed in matters of elections (whether their stake in such election is direct or indirect) in the context of Africa where democratic elections as the preferred means of political succession are yet to take firm root. African states have embraced election observation and monitoring with varying degrees of enthusiasm. In fact, most African countries have had one election or the other subjected to processes of third-party observation and monitoring in the past two decades. This has certainly not prevented electoral irregularities, sometimes, even on a massive scale. The pronouncements of observer teams, even when affirming the conduct of elections as free and fair, have not always led to their general acceptability, nor prevented the results of such elections from being annulled by unscrupulous regimes. These are problems that can be tackled within the framework of institutionalised observation and monitoring in which the collective definitions of the rules of observation are ensured by peer review.

²⁶⁹ See (n140 above).

²⁷⁰ See Report of the South African Parliamentary Observer Mission: Zimbabwe Presidential Elections, 9-11 March, 2002.)

Chapter 6

6.1 Conclusion

The run-up to Zimbabwe's elections since 1980 to the present have always been marked with violence, which has intensified over the years, this has been marked by various disappearances of people and alleged orchestrated accidents. In the July 2018 elections civilians were injured and some shot dead for protesting for their rights. Operation *Makavhoterapapi* (which party did you vote for?) of 2008 left many dead, mutilated, severely injured, displaced or missing to this day. This operation was a backlash to the 29 March 2008 elections which saw the late opposition leader, Morgan Tsvangirai leading by a margin that necessitated a run-off. MDC supporters were beaten up, abused and assaulted for "voting wrongly", and this operation sought to "re-educate" the people ahead of the 27 June 2008 run-off elections, to vote for ZANU PF. Such inhuman and degrading abuse of civilian population for making political choices is dehumanising to the Zimbabweans as a whole. Since the 29th of March 2008 an election, violence has been rampant in Zimbabwe, with opposition supporters being beaten up, killed, or disappearing. To this day, the whereabouts of Itai Dzamara, a prominent activist who was against the Mugabe regime are unknown, with various assumptions circulating about him being dead as his body has not been recovered.²⁷¹ The media has reported several incidents whereby MDC supporters have been beaten up at campaign rallies, or even prevented from attending them.

Zimbabwe is a signatory to and has ratified the International Convention on the Suppression and Punishment of the Crime of Apartheid²⁷², as well as the Geneva Conventions and their two additional protocols. Therefore, Zimbabwe is obligated to uphold these international instruments through the governing structure of the country by ensuring that all perpetrators are brought to justice.

²⁷¹ Gift P. (2015). "The case of the disappeared activist in Zimbabwe Officials deny any knowledge after gunmen hauled away an opposition supporter who hasn't been seen since", Aljazeera.

²⁷²General Assembly of the United Nations agreed on the text of the International Convention on the Suppression and Punishment of the Crime of Apartheid 1973.

It is evident that the government has contravened Articles I and II a) of the International Convention on the Suppression and Punishment of the Crime of Apartheid through election crimes, and a large component of the mandate passed by the Geneva Conventions, and its protocols in its commission of the mass atrocities cited. Zimbabwe's industry has taken a knock as youth and skilled workers have left the country in droves seeking refuge in neighbouring countries and abroad such as South Africa, America and Australia. This has led to most of them pursuing any available opportunity to eke out a living, seeing qualified graduates opting for low income jobs or unprofessional jobs to sustain their living and families back at home. This has set them at loggerheads with citizens of host countries leading to clashes over resources and opportunities. This has affected the regional and international stability due to the competition for resources. This has been more pronounced in the neighbouring country South Africa, where in May 2008 there were xenophobic attacks, mainly on Zimbabweans. Such conflicts pose a security threat to the region and should be addressed as a matter of urgency.

The people of Zimbabwe are entitled to return to their country, but they are constrained due to the feeling of insecurity and fear of ongoing intimidation. Despite the call for International investors by the current President, many are still hesitant about going back because of his previous affiliation to the Mugabe regime. Significant measures towards good governance, respect for human rights and opportunities to earn a living are some of the fundamental expectations required for the citizens to return. The custodians of citizens' protection are ironically responsible for their torment and should, therefore, be held accountable for their actions. Former President Mugabe and his regime need to be held accountable for the violations under the international and domestic laws, including crimes against humanity.

Justice for Zimbabweans should be approached with an outward look from the crimes dating back to the Ndebele killings in the 1980s known as *Gukurahundi*, to the present time under the combined efforts of a hybrid international tribunal, or a domestic court with international assistance and support. This will ensure that those responsible are held to account and held liable, and serves the justice sought by the Zimbabwean populace.

It has been established in this research that elections serve an essential role in resolving conflict and introducing a government that has the mandate to rule from the people. It is only through such governments that democratic principles and human rights can be respected. The international community is generally agreed that those who head governments should receive a mandate from people through elections. African leaders are fully aware that elections provide legitimacy and have thus resorted to a manipulation of the ballot system. It is this manipulation that has led some critics to proclaim elections as not being free and fair. In the case of Zimbabwean, foreign based Zimbabweans have been denied the right to vote in the various countries that they are based in, except for those on missions. It is the minority that have remained in the country and are further intimidated to vote for the ZANU-PF party. Hence the election results to this date have been viewed as flawed.

The first chapter showed that Zimbabwe has a long history of political violence and human rights violations which dates to the country's attainment of independence. This chapter has been analysing the problem to this research. There is no accountability to the election violations and impunity prevails amongst the perpetrators. As a result, the Zimbabwean elections have remained controversial to date.

Chapter two outlined the root causes of violence and proved how state institutions are manipulated through systemic violence by the current ruling party. It further analysed the different forms of violations such as food manipulation, church politicisation, political intimidation, politicisation of the judiciary which are used by the elite/ruling party to ensure victory in different places in the country.

Chapter three looked at the degeneration of rule of law in Zimbabwe, impunity and lack of accountability and how past and current crimes including torture and human rights violations are ignored by the police and the court rulings are in favour of the perpetrators if they are affiliated to the ruling party. There is lack of capacity by the human rights commission which is government arm in ensuring that the investigations of human rights violations take place. Control of information is filtered, for example prior to the 2018 elections the Human Rights Watch posted intimidation

footage on twitter²⁷³ that were openly castigated by the government newspaper (the Herald) as it claimed that evidence was fabricated.²⁷⁴ Freedom of Assembly and Association remains an issue as seen post 2018 election where police disrupted a press conference that was to be held by the opposition party MDC. Zimbabwe continues to be in violation of human rights despite the global statutes it has ratified.

Chapter four looked at the constitution of Zimbabwe and the electoral law, which clearly states that every citizen has a right to free and fair elections. However, the electoral Act contains provisions that are affront to the constitution, as the Act has failed to align such provisions with the constitution despite the Electoral Amendment Act of 2018.

Chapter five was an evaluation and analysis of the regional and international instruments on the right to free and fair elections. It concluded that, despite Zimbabwe having ratified the ICCPR which guarantees the citizens the rights to free and fair elections, this is yet to be realised in the country. It showed that election crimes have been in existence since independence and the perpetrators have been immune to laws and statutes, thus non-have been held accountable to the election crimes. Furthermore, the African Charter on Human and People's Rights stipulates the right to free association, free assembly and encourages citizens to participate freely in the government. Election observers play a crucial role in monitoring the fairness of the election process. In past elections the government has been selective about observers; international observers have been prevented from monitoring the election process. In 2018 the election observers were invited however they witnessed serious clashes which resulted in lives being lost. They openly condemned the violence and intimidation, and whether the 2018 election was free and fair is debatable, as the opposition has launched a court challenge alleging rigging by ZEC.

6.2 Recommendations

²⁷³ <https://twitter.com/dewamavhinga/status/1006133296680579072> (accessed 11 June 2018)

²⁷⁴ <https://www.herald.co.zw/mdc-t-activist-mavhinga-cooks-violence-video-dishes-it-out-on-social-media/> (accessed 12 June 2018)

The research detailed the impunity and lack accountability that prevails in Zimbabwe. It addresses how lack of accountability and impunity has led to increased political violence during the election periods in Zimbabwe. It also highlighted on possible measure to be implanted for free and fair elections to prevail and possibly stop the ongoing human violations. A commission of enquiry should be established to address human rights violations such as the 2008 violations. This may also include preferential development of the area which lacked on development and infrastructure during those periods. It may also include financial compensation or free education for the survivors who lost their parents and bread winners. Fresh policy frameworks and programmes should be introduced and implemented to combat further election and human rights violations. This research makes the following recommendations to help address the challenges associated with election violence and human rights abuses in Zimbabwe.

- Prevention of electoral fraud such as ballot stuffing, multiple voting/ voter impersonations that can stem from an incomplete, inaccurate or falsified voter registry. The electoral management body (ZEC) might take steps to ensure accuracy in the voters' roll through an audit and making it open to public scrutiny. This would allow the political parties and civil societies to conduct their own audits and challenge any inaccuracies or duplications. The judiciary would then play a role in adjudicating these challenges. While ensuring an accurate voters' roll makes it harder to conduct certain types of fraud, this effort will also enhance the credibility of the final list.
- To mitigate abuse of campaign finance, political finance regulators might undertake the regular collection and auditing of campaign financial reports that are disclosed to the public. Media, civil society groups and political parties could then review the reports and could lodge official complaints with the appropriate bodies.
- Implementation of institutional and technical measures to ensure that future elections have integrity, and that they meet both regional and international standards. This may include but not limited to implementation of biometrics technology.

- To increase the independence of the courts, the government can provide them with funding that will allow them to make their own financial and administrative decisions.
- Ensure full accountability, including prosecutions, for the perpetrators of serious human rights violations, regardless of position or rank, and press for an appropriate body that monitors and investigates the crimes committed to humanity.
- Take all necessary measures to end impunity. Set up an independent Commission of Inquiry, with credible civil society panel members, to investigate serious past human rights violations, including those committed during the 2008 election period. There should be a commission of enquiry to address human rights violations such as 2008 violations, etc. This may also include preferential development of the area which lacked on development and infrastructure during those periods. It may also include financial compensation or free education for the survivors who lost their parents and bread winners.
- Take all necessary measures to end the involvement of security forces in extrajudicial executions, torture and ill-treatment, and other violations of human rights.
- Establishing an effective, adequately resourced and independent civilian authority charged with receiving complaints and investigating allegations of crimes committed by members of the police, military, and other armed forces.
- Ensuring that administrative and judicial proceedings regarding alleged violations of human rights are open to the public as provided by international law.
- Ensuring that Zimbabwe ratifies and rigorously implements the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or punishment.
- Inviting relevant United Nations special mechanisms, such as the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or

Punishment and the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, to Zimbabwe to investigate and make recommendations.

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