THE STATE OF JUSTICE IN ZIMBABWE

PREFACE

This report has three bases. Firstly, it is based on the experience of five leaders of referral Bars from round the world, who visited Zimbabwe in April 2004. These were Stephen Irwin QC, Chairman of the Bar of England and Wales; Conor Maguire SC, Chairman of the Irish Bar; Glenn Martin SC, President of the Bar Association of Queensland and Treasurer of the Australian Bar Association; Roy Martin QC, Vice-Dean of the Faculty of Advocates of Scotland and Justice Poswa SC, Vice-Chairman of the South African Bar. This group saw a broad range of lawyers, legal academics, students and retired judges during a very intensive visit to Harare. The lawyers included the Acting Attorney-General, Mr Bharat Patel, and lawyers who regularly act for the Zanu-PF government, as well as those who do not.

Secondly, the report is based on extensive published material which has been collated and reviewed. The work of Andrew Moran has been invaluable here.

Thirdly, the report has been reviewed in draft by the President of the Law Society and the Chairman of the Bar of Zimbabwe. They have approved its contents as being an accurate and truthful account of the history and of the state of the legal system in Zimbabwe in 2004.

The Report has been adopted by the International Council of Advocates and Barristers.

Although land redistribution is important to this story, it is not the essence of the story. The essence of the story is that many of the judiciary have been driven from office or have been corrupted, and much of the legal system of Zimbabwe has been subverted, by the Zanu-PF government, in an effort to frustrate the proper working of democracy and to hold on to power. It seems clear they would not have held on to power otherwise. Their efforts are continuing.

Auckland, Belfast, Canberra, Dublin, Edinburgh, Harare, Hong Kong, London

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THE STATE OF JUSTICE IN ZIMBABWE

A Report to the International Council of Advocates and Barristers
by five Common Law Bars into the state of justice in Zimbabwe

(A) Executive Summary

1. It was plain to the members of the delegation both from the interviews and other meetings we conducted during the course of our mission to Zimbabwe and from the other reputable sources we have relied on in the course of the preparation of this report, that the judicial system in Zimbabwe has become profoundly compromised over the past four years.

2. The appointment of the higher judiciary is subject to political interference. This much was directly confirmed to us by the Acting Attorney-General, Bharat Patel, who told us that politics did enter into the appointment of Judges.

3. The provisions of the Constitution safeguarding judicial tenure serve to provide only formal protection for the higher judiciary. In reality, the Executive and ZANU-PF do not observe the constitutional protections for the judiciary but instead enforce the removal of judges whose independence represents an impediment to Government policy or other action. Judges have been removed through a combination of psychological and physical intimidation and threats of violence.

4. The integrity of the Supreme Court and High Court benches has been damaged. Judges reputedly sympathetic to the Government have been appointed and have been promoted above more senior and experienced colleagues. Some Supreme Court and High Court Judges have been allocated land under the Government's commercial farms allocation scheme and hold that land at nominal rents and at the Government's pleasure. The deleterious effect this has for judicial independence is too obvious to require stating.

5. Interference in the provision of justice has extended to the administration of the higher courts. The practice governing the listing of cases has changed. Cases involving sensitive political issues are now listed for hearing by reference not to which Judges are most suitable but by reference to whether a particular Judge is perceived as sympathetic to the Government.

6. The challenges facing the lower reaches of the judicial system, the lower courts and prosecution service, are even greater. Magistrates and prosecutors perceived

to be unsympathetic to the Government face not only psychological and physical intimidation and threats of violence, but actual violence and attacks on their families and property.

7. Further, Zimbabwe's economic situation has brought about a financial crisis in the justice system. Magistrates and prosecutors receive low pay the value of which is then increasingly eroded by high inflation in the economy. Lack of proper budgetary provision and low morale has resulted in many posts for Magistrates and prosecutors being unfilled and increased unacceptable delays in the provision of justice in Magistrates' courts.

8. Members of the legal profession representing politically unpopular causes have suffered psychological and physical intimidation and threats of violence and actual violence and in some cases torture and attacks on their families and property.

9. We have concluded that the Zimbabwean justice system has ceased to be independent and impartial. The legal culture has been subverted for political ends. There are lawyers and judges who have been able to maintain their integrity and independence, but they have often been under great pressure. Many of them have displayed great courage. The system might very well be able to return to an acceptable state if the political pressure were removed from it.

(B) Introduction

1. The International Council of Advocates and Barristers is an organisation formed by the Bar Associations in jurisdictions where there is a separate profession of advocate and barrister. Its members are currently the Bar Associations of Australia, England and Wales, Hong Kong, the Republic of Ireland, New Zealand, Northern Ireland, Scotland, South Africa and Zimbabwe. The objects of the Council include the promotion and maintenance of the rule of law and the effective administration of justice.

2. Having received expressions of concern about the rule of law and the administration of justice in Zimbabwe, a delegation from the Council resolved to carry out an investigation and to prepare a Report to be submitted to the Council. The delegation travelled to Zimbabwe in April 2004 and comprised: Stephen Irwin Q.C. (Chairman, Bar of England and Wales); Conor Maguire S.C. (Chairman, Irish Bar); Glenn Martin S.C. (President of the Bar Association of Queensland); Roy Martin Q.C. (Vice Dean, Scottish Faculty of Advocates); and Justice Poswa S.C. (Deputy Chairman, Bar of South Africa).

3. The delegation was in Harare between 15 and 17 April 2004 and whilst there undertook interviews with a number of individuals including the Acting Attorney-General, Bharat Patel, former President of the Zimbabwean Law Society, Sternford Moyo, former High Court Judge Paradza J., other former judges, members of the Harare Bar and Law Society, academics and students in the law department of the university in Harare.

4. The object of this report is to conduct a review of the state of justice in Zimbabwe as at the date of publication. The introductory section of this report covers briefly the history of Zimbabwe up to independence from the United Kingdom in April 1980, the basic provisions of the Zimbabwean Constitution and the relevant obligations under international law which the Government of Zimbabwe has accepted.

(1) Brief history of the country

5. Primarily of the Bantu group of south and central Africa, black Zimbabweans are divided into two major language groups, which are themselves sub-divided into several ethnic groups. The Mashona (Shona speakers) constitute about 75% of the population, have lived in the area comprising modern Zimbabwe longest and are the majority language group. The Matabele (Sindebele speakers), representing about 20% of the population and located principally in southwest of the country

around Bulawayo, arrived within the last 150 years. The Matabele were part of the South African Zulu group and maintained control over the Mashona until European occupation of modern Zimbabwe in 1890.

6. In 1888, Cecil Rhodes was granted a concession for mineral rights from local chiefs. In the same year, the area of southern Africa which became Southern and Northern Rhodesia was proclaimed a British sphere of influence. The British South Africa Company was granted a charter in 1889 and the settlement of modern Harare was established in 1890. In 1895, modern Zimbabwe was formally named Rhodesia under the British South Africa Company's administration.

7. The British South Africa Company's charter was abrogated in 1923 and Southern Rhodesia's white settlements were offered the choice of being incorporated into the Union of South Africa of becoming a separate entity within the British Empire. The white settlers rejected incorporation into the Union of South Africa and Southern Rhodesia was formally annexed by the United Kingdom that year. Although Rhodesia was not administered directly from London, the United Kingdom retained the right to intervene directly in the affairs of the colony.

8. In September 1953, Southern Rhodesia was joined in a multiracial Central African Federation with the British Protectorate of Northern Rhodesia and Nyasaland in an effort to pool resources and markets. The Federation, whilst successful economically, was opposed by the African population who feared that they would not be able to achieve self-government with the federal structure dominated by white Southern Rhodesians. The Federation was dissolved at the end of 1963. Northern Rhodesia and Nyasaland became the independent states of Zambia and Malawi in 1964.

9. The white electorate in Rhodesia showed no willingness to accede to African demands for increased political participation. In April 1964, Prime Minister Winston Field, criticised for not moving rapidly enough to secure independence from the United Kingdom, was replaced by his deputy Ian Smith. Prime Minister Smith led his Rhodesian Front Party to an emphatic victory in elections held in 1965. The electoral system at this stage was distorted so as to ensure that power remained in white hands.

10. The United Kingdom's position on independence was that any grant of independence should make provision for majority rule within a reasonable period of time. The white Rhodesian minority were unwilling to make such provision. On 11 November 1965, after lengthy and unsuccessful negotiations with the

United Kingdom Government, Prime Minister Smith issued a Unilateral Declaration of Independence (hereafter, "UDI") from the United Kingdom.

11. The United Kingdom Government considered UDI to be unconstitutional and illegal. On 12 November 1965, the United Nations also determined the Rhodesian Government and UDI to be illegal and called on member states to refrain from assisting or recognising the regime. On 16 December 1966, the United Nations Security Council, for the first time in its history, imposed mandatory economic sanctions on a state. Rhodesia's primary exports were placed on a selective sanctions list, as were shipments of arms, aircraft, motor vehicles and petroleum products to Rhodesia. On 29 May the Security Council unanimously voted to broaden the sanctions list by imposing an almost total embargo on all trade with or investments in or transfer of funds to Rhodesia and imposed restrictions on air transport to the territory.

12. In the early 1970's, informal attempts at settlement were renewed between the United Kingdom and the Rhodesian regime. Following the withdrawal of Portuguese government forces from neighbouring Mozambique and Angola, pressure on the Smith regime for a negotiated settlement began to increase. In addition, sporadic guerrilla activity, which began in the late 1960's increased dramatically after 1972 causing major disruption to the Rhodesian economy and a decrease in the morale of the minority white population. In 1974, the major African nationalist groups, the Zimbabwean African People's Union (ZAPU) and the Zimbabwean African National Union (ZANU) which had split away from ZAPU in 1963 were united into the 'Patriotic Front' and notionally combined their military forces (ZIPRA and ZANLA respectively).

13. In 1976, under pressure from the UN sanctions, the guerrilla war and the changes in government in neighbouring Mozambique and Angola, the Smith regime agreed in principle to majority rule and to a meeting in Geneva with black nationalist leaders to negotiate a final settlement. Nationalist leaders present at the talks included ZAPU leader Joshu Nkomo, ZANU leader Robert Mugabe, United African National Council (UANC) leader Bishop Abel Muzorewa and former ZANU leader the Reverend Nadabaningi Sithole. The Geneva talks failed to achieve a settlement.

14. On 3 March 1978, the Smith regime signed an internal settlement with Bichop Muzorewa, Rev. Sithole and Chief Jermeiah Chirau which provided for qualified majority rule and elections with universal suffrage. Elections were held in April 1979 in which the UANC won a majority of seats and Bishop Muzorewa became Zimbabwe-Rhodesia's (as the country was then called) first black Prime Minister

assuming office on 1 June 1978. However, the concessions made by the Smith regime were insufficient to halt the guerrilla war.

15. Further talks between the nationalist groups not part of the internal settlement and the Zimbabwe-Rhodesia government were held in London between September and December 1979. These talks culminated in the Lancaster House agreement which provided for a cease-fire, new elections, a transitional period under British rule, a new Constitution implementing majority rule and protecting minority rights. Elections were scheduled for late February 1980. The results of the elections were that ZANU won an absolute majority and was asked to form Zimbabwe's first government. On 18 April 1980, the United Kingdom government formally granted Zimbabwe independence.

(2) The Constitution of Zimbabwe

16. The Constitution is divided into twelve chapters. Chapter 3 contains the Declaration of Rights; Chapter 4 makes provision for the Executive; Chapter 5 sets out matters relevant to Parliament; Chapter 7 deals with the Public Service; Chapter 8 concerns the Judiciary; and Chapters 9-10A set out the provisions relating to the Police Force, Defence Forces and the Prison Service. The provisions relevant to the Judiciary are dealt with in detail in the next section of this report. We set out below the relevant provisions relating to the Declaration of Rights.

17. Section 3 of the Constitution provides:

> *"**3 Supreme Law***
>
> *This Constitution is the supreme law of Zimbabwe and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void"*

18. Section 11, the Preamble to Chapter 3, *The Declaration of Rights*, states:

> *"**11 Preamble***
>
> *Whereas persons in Zimbabwe are entitled, subject to the provisions of this Constitution, to the fundamental rights and freedoms of the individual specified in this Chapter, and whereas it is the duty of every person to respect and abide by the Constitution and the laws of Zimbabwe, the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations on that protection as are contained herein, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any person does not prejudice the public interest or the rights and freedoms of other persons"*

19. Section 12, *Protection of right to life*, provides, *inter alia*:

"12 ***Protection of right to life***

(1) *No person shall be deprived of his life intentionally save in execution of the sentence of a court in respect of a criminal offence of which he has been convicted.*

(2) *…*

(3) *…"*

20. Section 13, *Protection of right to personal liberty*, provides, *inter alia*:

"13 ***Protection of right to personal liberty***

(1) *No person shall be deprived of his personal liberty save as may be authorised by law in any of the cases specified in subsection (2).*

(2) *The cases referred to in subsection (1) are where a person is deprived of his personal liberty as may be authorised by law –*

(a) *in consequence of his unfitness to plead to a criminal charge or in execution of the sentence or order of a court, whether in Zimbabwe or elsewhere, in respect of a criminal offence of which he has been convicted;*

(b) *in execution of the order of a court punishing him for contempt of that court or of another court or tribunal or in execution of the order of Parliament punishing him for a contempt;*

(c) *in execution of the order of a court made in order to secure the fulfilment of an obligation imposed on him by law;*

(d) *for the purpose of bringing him before a court in execution of the order of a court or an officer of a court or before Parliament in execution of the order of Parliament;*

(e) *upon reasonable suspicion of his having committed, or being about to commit, a criminal offence;*

(f) *in execution of the order of a court or with the consent of his parent or guardian, for the purposes of his education or welfare during a period beginning before he attains the age of twenty-one years and ending not later than the date when he attains the age of twenty-three years;*

(g) *for the purpose of preventing the spread of an infectious or contagious disease;*

(h) *if he is, or is reasonably suspected to be, of unsound mind, addicted to drugs or alcohol, or a vagrant, for the purpose of his care, treatment or rehabilitation or the protection of the community; or*

(i) *for the purpose of preventing his unlawful entry into Zimbabwe or for the purpose of effecting his expulsion, extradition or other lawful removal from Zimbabwe or the taking of proceedings in relation thereto.*

(3) *Any person who is arrested or detained shall be informed as soon as reasonably practicable, in a language that he understands, of the reasons for his arrest or detention and shall be permitted at his own expense to obtain and instruct without delay a legal representative of his own choice and hold communication with him.*

(4) *Any person who is arrested or detained –*

(a) *for the purpose of bringing him before a court in execution of the order of a court or an officer of a court; or*

(b) *upon reasonable suspicion of his having committed, or being about to commit, a criminal offence;*

and who is not released, shall be brought without undue delay before a court; and if any person arrested or detained upon reasonable suspicion of his having committed or being about to commit a criminal offence is not tried within a reasonable time, then, without prejudice to any further proceedings that may be brought against him, he shall be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial.

(5) *Any person who is unlawfully arrested or detained by any other person shall be entitled to compensation therefore from that other person or from any person or authority on whose behalf or in the course of whose employment that other person was acting:*

Provided that –

(a) *any judicial officer acting in his judicial capacity reasonably and in good faith; or*

(b) any other public officer, or person assisting such a public officer, acting reasonably and in good faith and without culpable ignorance or negligence;

may be protected by law from such compensation."

21. Section 15, *Protection from inhuman treatment*, provides, *inter alia*:

*"**15 Protection from inhuman treatment***

(1) No person shall be subjected to torture or to inhuman or degrading punishment or treatment or other such treatment

(2) …

(3) …

(4) …

(5) …

(6) …"

22. Section 17, *Protection from arbitrary search or entry*, provides, *inter alia*:

*"**17 Protection from arbitrary search or entry***

(1) Except with his own consent or by way of parental discipline, no person shall be subjected to the search of his person or his property or the entry by others on his premises.

(2) Nothing contained in or done under the authority of any law shall be held to be in contravention of subsection (1) to the extent that the law in question makes provision –

(a) in the interests of defence, public safety, public order, public morality, public health or town and country planning;

(b) without derogation from the generality of the provisions of paragraph (a), for the enforcement of the law in circumstances where there are reasonable grounds for believing that the search or entry is necessary for the prevention, investigation or detection of a criminal offence, for the seizure of any property which is the subject-matter of a criminal offence or evidence relating to a criminal offence, for the lawful arrest or a person or for the enforcement of any tax or other rate;

(c) for the purposes of a law which provides for the taking of possession or acquisition of any property or interest or right therein and which is not in contravention of section 16;

(d) for the purpose of protecting the rights and freedoms of other persons;

(e) that authorises any local authority or any body corporate established directly by or under an Act of Parliament for a public purpose to enter on the premises of any person in order to inspect those premises or anything thereon for the purpose of any tax or rate or in order to carry out work connected with any property of that authority or body which is lawfully on those premises; or

(f) that authorises, for the purpose of enforcing the judgment or order of a court in any civil proceedings, the search of any person or property by order of a court or the entry upon premises by such order;

except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.

(3) …"

23. Section 18, *Provisions to secure protection of law*, provides, *inter alia*:

*"**18 Provisions to secure protection of law***

(1) Subject to the provisions of this Constitution, every person is entitled to the protection of the law.

(2) If any person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.

(3) Every person who is charged with a criminal offence –

(a) shall be presumed to be innocent until he is proved guilty

(b) shall be informed as soon as reasonably practicable, in a language that he understands and in detail, of the nature of the offence charged;

(c) shall be given adequate time and facilities for the preparation of his defence;

(d) shall be permitted to defend himself in person or, save in proceedings before a local court, at his own expense by a legal representative of his own choice;

(e) shall be afforded facilities to examine in person or, save in proceedings before a local court, by his legal representative the witnesses called by the prosecution before the court and to obtain the attendance and carry out the examination of witnesses to testify on his behalf before the court on the same conditions as those applying to witnesses called by the prosecution; and

(f) shall be permitted to have without payment the assistance of an interpreter if he cannot understand the language used at the trial of the charge;

and, except with his own consent, the trial shall not take place in his absence unless he so conducts himself as to render the continuance of the proceedings in his presence impracticable and the court has ordered him to be removed and the trial to proceed in his absence.

(4) …

(5) …

(6) …

(7) …

(8) …

(9) Subject to the provisions of this Constitution, every person is entitled to be afforded a fair hearing within a reasonable time by an independent and impartial court or other adjudicating authority established by law in the determination of the existence or extent of his civil rights or obligations.

(10) …

(11) …

(12) …

(13) …

(14) …

(15) …"

24. Section 20, *Protection of freedom of expression*, provides, *inter alia*:

*"**20** **Protection of freedom of expression***

(1) Except with his own consent or by way of parental discipline, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions and to receive and impart ideas and information without interference, and freedom from interference with his correspondence.

(2) Nothing contained in or done under the authority of any law shall be held to be in contravention of subsection (1) to the extent that the law in question makes provision –

(a) in the interests of defence, public safety, public order, the economic interests of the State, public morality or public health;

(b) for the purpose of –

(i) protecting the reputations, rights and freedoms or other 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 Parliament;

(iv) regulating the technical administration, technical operation or general efficiency of telephony, telegraphy, posts, wireless broadcasting or television or creating or regulating any monopoly in these fields;

(v) in the case of correspondence, preventing the unlawful dispatch therewith of other matter;

or

(c) that imposes restrictions upon public officers;

except so far as that provision or, as the case may be, the thing done under the authority thereof is shown to be reasonably justifiable in a democratic society.

(3) …

(4) *Nothing contained in or done under the authority of any law shall be held to be in contravention of subsection (3) to the extent that the law in question makes provision –*

(a) *in the interests of defence, public safety, public order, public morality, public health or town and country planning; or*

(b) …

except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.

(5) …

(6) …"

25. Section 21, *Protection of freedom of assembly and association*, provides:

> *"**21 Protection of freedom of assembly and association***
>
> *(1)* *Except with his own consent or by way of parental discipline, no person shall be hindered in his freedom of assembly and association, that is to say, his right to assemble freely and associate with other persons and in particular to form or belong to political parties or trade unions or other associations for the protection of his interests.*
>
> *(2)* *The freedom referred to in subsection (1) shall include the right not to be compelled to belong to an association.*
>
> *(3)* *Nothing contained in or done under the authority of any law shall be held to be in contravention of subsection (1) to the extent that the law makes provision –*
>
> *(a)* *in the interests of defence, public safety, public order, public morality or public health;*
>
> *(b)* *for the purpose of protecting the rights or freedom of other persons;*
>
> *(c)* *for the registration of companies, partnerships, societies or other associations of persons, other than political parties, trade unions or employers' organisations; or*
>
> *(d)* *that imposes restrictions upon public officers;*
>
> *except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.*
>
> *(4)* *The provisions of subsection (1) shall not be held to confer on any person a right to exercise his freedom of assembly or association in or on any road, street, lane, path, pavement, side-walk, thoroughfare or similar place which exists for the free passage of persons or vehicles."*

26. Section 23, *Protection from discrimination on the grounds of race, etc.*, provides, *inter alia*:

> *"**23 Protection from discrimination the grounds of race, etc.***
>
> *(1)* *Subject to the provisions of this section –*
>
> *(a)* *no law shall make any provision that is discriminatory either of itself or in its effect; and*
>
> *(b)* *no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority*
>
> *(2)* *For the purposes of subsection (1), a law shall be regarded as making a provision that is discriminatory and a person shall be regarded as having been treated in a discriminatory manner if, as a result of that law or treatment, persons of a particular description by race, tribe, place of origin, political opinions, colour, creed or gender are prejudiced –*
>
> *(a)* *by being subjected to a condition, restriction or disability to which other persons of another description are not made subject; or*
>
> *(b)* *by the according to persons of another such description of a privilege or advantage which is not accorded to persons of the first-mentioned description;*
>
> *and the imposition of that condition, restriction or disability or the according of that privilege or advantage is wholly or mainly attributable to the description by race, tribe, place of origin, political opinions, colour, colour or gender or the persons concerned.*
>
> *(3)* …
>
> *(4)* …
>
> *(5)* …"

27. Section 24, *Enforcement of protective provisions*, provides, *inter alia*:

> *"**24 Enforcement of protective provisions***
>
> *(1) If any person alleges that the Declaration of Rights has been, is being or is likely to be contravened in relation to him (or, in the case of a person detained, if any other person alleges such a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may, subject to the provisions of subsection (3), apply to the Supreme Court for redress.*
>
> *(2) If in any proceedings in the High Court or in any court subordinate to the High Court any question arises as to the contravention of he Declaration of Rights, the person presiding in that court may, and if so requested by any party to the proceedings shall, refer to the question to the Supreme Court unless, in his opinion, the raising of the question is merely frivolous or vexatious.*
>
> *(3) Where in any proceedings such as are mentioned in subsection (2) any such question as is therein mentioned is not referred to the Supreme Court, then, without prejudice to the right to raise that question on any appeal from the determination of the court in those proceedings, no application for the determination of that question shall lie to the Supreme Court under subsection (1).*
>
> *(4) The Supreme Court shall have original jurisdiction –*
>
> *(a) to hear and determine any application made by any person pursuant to subsection (1) or to determine without a hearing any such application which, in its opinion, is merely frivolous or vexatious; and*
>
> *(b) to determine any question arising in the case of any person which is referred to it pursuant to subsection (2);*
>
> *and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of the Declaration of Rights:*
>
> *Provided that the Supreme Court may decline to exercise its powers under this subsection if it is satisfied that adequate means of redress for the contravention alleged are of have been available to the person concerned under other provisions of this Constitution or under any other law.*
>
> *(5) …*
>
> *(6) …*
>
> *(7) …"*

(3) Relevant international law obligations

28. The UN *International Covenant on Civil and Political Rights* [1] (hereafter, "the ICCPR") was acceded to by the Government of Zimbabwe on 13 August 1991.

29. Article 2 of the ICCPR provides, *inter alia*:

> *"**Article 2***
>
> *1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*

[1] Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966. The convention entered into force on 23 March 1976.

2. *Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such law or other measures as may be necessary to give effect to the rights recognised in the present Covenant.*

3. *Each State Party to the present Covenant undertakes:*

   (a) *To ensure that any person whose rights or freedoms as herein recognised are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;*
   (b) *To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or 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;*
   (c) *To ensure that the competent authorities shall enforce such remedies when granted."*

30. Articles 6 and 7 provide, *inter alia*:

*"**Article 6***

1. *Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.*

2. …
3. …
4. …
5. …
6. …"

*"**Article 7***

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."

31. Article 9 concerns deprivation of liberty and provides:

*"**Article 9***

1. *Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law.*

2. *Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.*

3. *Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.*

4. *Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if detention is not lawful.*

5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation."

32. Article 14 provides, *inter alia*:

> *"**Article 14***
>
> *1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law …*
>
> *2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proven guilty according to law.*
>
> *3. …*
> *4. …*
> *5. …*
> *6. …*
> *7. …"*

33. Article 17 concerns the right to privacy and provides:

> *"**Article 17***
>
> *1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.*
>
> *2. Everyone has the right to the protection of the law against such interference or attacks."*

34. Article 19 concerns the right to freedom of expression and provides:

> *"**Article 19***
>
> *1. Everyone shall have the right to hold opinions without interference.*
>
> *2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, it the form of art, or through any other media of his choice.*
>
> *3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:*
>
> *(a) For respect of he rights or reputations of others;*
> *(b) For the protection of national security or of public order (ordre public) or of public health or morals."*

35. Articles 21 and 22 concern the rights of peaceful assembly and association with other and provide, *inter alia*:

> *"**Article 21***
>
> *The right of peaceful assembly shall be recognised. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society*

in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others."

*"**Article 22***

1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.

3. …"

36. Articles 25 and 26 contain provisions regarding participation in public affairs, equality and discrimination and provide:

*"**Article 25***

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;

(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

(c) To have access, on general terms of equality, to public service in his country."

*"**Article 26***

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

37. Zimbabwe has also acceded to the *African (Banjul) Charter on Human and Peoples' Rights*[2], Chapter 1 of which makes provision for Human and Peoples' Rights, *inter alia*:

*"**Article 2***

Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without discrimination of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status."

*"**Article 3***

[2] Adopted 27 June 1981, entered into force 21 October 1986: 21 I.L.M. 58 (1982).

1. Every individual shall be equal before the law.

2. Every individual shall be entitled to equal protection of the law."

*"**Article 4***

Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right."

*"**Article 5***

Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited."

*"**Article 6***

Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for the reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained."

*"**Article 7***

1. Every individual shall have the right to have his cause heard. This comprises:

- *(a) the right to an appeal to competent national organs against acts of violating his fundamental rights as recognised and guaranteed by conventions, laws, regulations and customs in force;*
- *(b) the right to be presumed innocent until proved guilty by a competent court or tribunal;*
- *(c) the right to defence, including the right to be defended by counsel of choice;*
- *(d) the right to be tried within a reasonable time by an impartial court or tribunal.*

2. No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender."

*"**Article 9***

1. Every individual shall have the right to receive information.

2. Every individual shall have the right to express and disseminate his opinions within the law."

*"**Article 10***

1. Every individual shall have the right to free association provided that he abides by the law.

2. Subject to the obligation of solidarity provided for in 29 no one may be compelled to join an association."

*"**Article 11***

Every individual shall have the right to assemble freely with others. The exercise of this right shall be subject only to necessary restrictions provided by law in particular those enacted in the interest of national security, the safety, health, ethics and rights and freedoms of others."

> *"**Article 13***
>
> *1. 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.*
>
> *2. Every citizen shall have the right of equal access to the public service of his country.*
>
> *3. Every individual shall have the right of access to public property and service in strict equality of all persons before the law."*
>
> *"**Article 26***
>
> *State parties to the present Charter shall have the duty to guarantee the independence of the Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter."*

(4) Other relevant international standards

38. In addition to the obligations which the Government of Zimbabwe has assumed under the UN ICCPR and the OAU (now, "AU") Banjul Charter, there are various other standards which apply to Zimbabwe by reason of the government of Zimbabwe having subscribed to them or by reason of their being generally applicable to States, which, whilst not having formal treaty status, nonetheless exert moral force on governments and an internationally accepted standard by which State conduct may be judged.

39. The first of these is *The Harare Commonwealth Declaration, 1991*, signed by the Commonwealth Heads of Government meeting in Zimbabwe on 20 October 1991. The Harare Declaration affirmed the Heads of Government's confidence in the Commonwealth as an association of independent States and their commitment to certain basic principles and stated, *inter alia*:

> *"9. Having reaffirmed the principles to which the Commonwealth is committed, and reviewed the problems and challenges which the world, and the Commonwealth as part of it, face, we pledge that Commonwealth and our countries to work with renewed vigour, concentrating especially in the following areas:*
>
> *the protection and promotion of the fundamental political values of the Commonwealth:*
>
> *democracy, democratic processes and institutions which reflect national circumstances, the rule of law and the independence of the judiciary, just and honest government;*
>
> *…"*

40. The principles set out in the Harare Declaration were affirmed by the Commonwealth Heads of Government at a meeting at Millbrook, New Zealand, in November 1995 by *The Millbrook Commonwealth Action Programme on the Harare Declaration, 1995*. This programme also sets out the procedures to be taken when a

member of the Commonwealth was *"perceived to be clearly in violation of the Harare Commonwealth Declaration"*.

41. Representatives of four Commonwealth Associations (the Commonwealth Parliamentary Association, the Commonwealth Magistrates' and Judges' Association, the Commonwealth Lawyers' Association and the Commonwealth Legal Education Association) met in June 1998 and prepared a set of guidelines for the further implementation of the Harare Declaration and Milbrook Commonwealth Action Programme referred to as *The Latimer House Guidelines for the Commonwealth*, 19 June 1998. The object of the guidelines was to call *"for a commitment, made in the utmost good faith, of the relevant national institutions, in particular, the executive, parliament and the judiciary, to the essential principles of good governance, fundamental human rights and the rule of law, including the independence of the judiciary"*.

42. The Latimer House Guidelines were considered by a meeting of Commonwealth Law Ministers in St Vincent and the Grenadines in November 2002 and, with amendments, agreed by them. The Guidelines were presented to the meeting in Abuja, Nigeria, in December 2003 of the Commonwealth Heads of Government and endorsed by them in paragraph 8 of the Abuja Communiqué.

43. *The Commonwealth (Latimer House) Principles* state the principles applicable to the independence of the judiciary as follows:

> *"**IV Independence of the Judiciary***
>
> *An independent, impartial, honest and competent judiciary is integral to upholding the rule of law, engendering public confidence and dispensing justice. The function of the judiciary is to interpret and apply national constitutions and legislation consistent with international human rights conventions and international law, to the extent permitted by the domestic law of each Commonwealth country.*
>
> *To secure these aims:*
>
> *(a) Judicial appointments should be made on the basis of clearly defined criteria and by a publicly declared process. The process should ensure:*
>
> > *equality of opportunity for all who are eligible for judicial office;*
> >
> > *appointment on merit; and*
> >
> > *that appropriate consideration is given to the need for the progressive attainment of gender equity and the removal of other historic factors of discrimination;*
>
> *(b) Arrangements for appropriate security of tenure and protection of levels of remuneration must be in place;*
>
> *(c) Adequate resources should be provided for the judicial system to operate effectively without any undue constraints which may hamper the independence sought;*
>
> *(d) Interaction, if any, between the executive and the judiciary should not compromise judicial independence.*

Judges should be subject to suspension or removal only for reasons of incapacity or misbehaviour that clearly renders them unfit to discharge their duties.

Court proceedings should, unless the law or overriding public interest dictates, be open to the public. Superior Court decisions should be published and accessible to the public and be given in a timely manner.

An independent, effective and competent legal profession is fundamental to the upholding of the rule of law and the independence of the judiciary."

44. There also exist standards for the independence of the judiciary and the legal profession adopted by the UN although not strictly binding on member States.

45. The first of these is the 1985 UN *Basic Principles on the Independence of the Judiciary*, intended as an elaboration of Article 14 of the ICCPR. These principles state, *inter alia*:

> *"1. The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.*
>
> *2. The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.*
>
> *3. The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.*
>
> *4. There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law."*

46. As regards lawyers, the 1990 UN *Basic Principles on the Role of Lawyers*, guarantee the independent exercise of their profession by requiring States to take the following positive steps, *inter alia*:

> *"16. Governments shall ensure that lawyers*
>
> *(a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference;*
>
> *(b) are able to travel and to consult with their clients freely both within their own country and abroad; and*
>
> *(c) shall not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognised professional duties, standards and ethics.*
>
> *17 Where the security of lawyers is threatened as a result of discharging their functions, they shall be adequately safeguarded by the authorities."*

(C) The justice system in Zimbabwe

47. The justice system in Zimbabwe comprises the following elements: the Supreme Court; the High Court, the Administrative Court; Magistrates' Courts; the system for the administration of the courts; the office of the Attorney-General and associated public prosecutors; and the legal profession[3].

(1) Provisions of the Constitution relevant to the judiciary in general

48. The Constitution contains various provisions which are relevant generally to the judiciary in Zimbabwe and which provide, *inter alia*, for the separation of powers between the executive and the judiciary, the composition of the judiciary and for judicial independence:

> *"**79 Judicial Authority***
>
> *(1) The judicial authority of Zimbabwe shall vest in –*
> *(a) the Supreme Court; and*
> *(b) the High Court; and*
> *(c) such other court subordinate to the Supreme Court and the High Court as may be established by or under an Act of Parliament.*
> *(2) The provisions of subsection (1) shall not be construed as preventing an Act of Parliament from –*
> *(a) vesting adjudicating functions in a person or authority other than a court referred to in subsection (1); or*
> *(b) vesting functions other than adjudicating functions in a court referred to in subsection (1) or in a member of the judiciary."*
>
> *"**79A Judiciary***
>
> *The judiciary of Zimbabwe shall consist of –*
> *(a) the Chief Justice, who shall be the head of the judiciary; and*
> *(b) the judges of the Supreme Court; and*
> *(c) the Judge President and the other judges of the High Court; and*
> *(d) persons presiding over other courts subordinate to the Supreme Court and the High Court that are established by or under an Act of Parliament."*
>
> *"**79B Independence of the judiciary***
>
> *In the exercise of his judicial authority, a member of the judiciary shall not be subject to the direction or control of any person or authority, except to the extent that a written law may place him under the direction or control of another member of the judiciary."*

[3] In addition, there is a system of local courts and other specialist tribunals, such as Labour Courts. These other courts do not call for further examination in this Report.

(2) The Supreme Court and the High Court

49. In common with various other Commonwealth countries [4], under the Constitution of Zimbabwe the process of appointing the senior judiciary is not formally the exclusive preserve of the executive or legislature.

(i) Appointment of judges - the Judicial Service Commission

50. Sections 90 and 91 of the Constitution make provision for a Judicial Service Commission the functions of which are *"to tender such advice and do such things in relation to the judiciary as are provided for by this Constitution or by or under an Act of Parliament"* and to which section 84 of the Constitution gives a rôle in the appointment of senior judges.

51. The Judicial Service Commission comprises the following members: the Chief Justice or acting Chief Justice or most senior judge of the Supreme Court (section 90(1)(a)); the Chairman of the Public Service Commission (section 90(1)(b)); the Attorney-General (section 90(1)(c)); and not less than two or more than three other members appointed by the President (section 90(1)(d)) of which one appointee must be person who is or has been a Supreme or High Court judge, a person who has been qualified as a legal practitioner in Zimbabwe for not less than five years or is a person possessed of such legal qualifications or experience as the President considers suitable and adequate for his appointment to the Judicial Services Commission and the remaining Presidential appointees must be chosen for their ability and experience in administration or their professional qualifications *"or their suitability otherwise for appointment"*.

52. Pursuant to section 74(1) of the Constitution, the Chairman of the Public Service Commission is appointed by the President and, pursuant to section 76(2) of the Constitution, the Attorney-General is appointed by the President after consultation with the Judicial Service Commission.

53. Of the possible six members of the Judicial Services Commission, three are directly appointed to the Commission by the President (section 90(1)(d)), one is directly appointed by the President to an office by virtue of which he is a member of the Commission (section 90(1)(b)) and two are appointed to the Commission by virtue of being holders of offices to which they are appointed by the President after consultation with the Commission (section 90(1)(a) and (c): the Chief Justice or his alternate and the Attorney-General). There is, therefore, no representation

[4] See, for example, the Constitutions of Botswana, Zambia and Uganda.

on the Judicial Services Commission independent of the direct or indirect influence of the executive.

54. Pursuant to section 84(1) of the Constitution, Supreme Court and High Court judges, including the Chief Justice, are appointed by the President after consultation with the Judicial Service Commission established under sections 90 and 91.

55. There are no limits imposed by the Constitution on the number of Supreme Court and High Court judges who may be appointed either in aggregate or at one time by the Judicial Services Commission[5].

56. There is no provision in the Constitution for the procedure by which candidates for the senior judiciary are selected for consideration by the Judicial Service Commission. Further there are no rules or regulations for the conduct of the selection process[6]. The process is subject, therefore, to a high degree of opacity.

57. Section 84(2) provides that if the appointment of the Chief Justice or a judge of the Supreme Court or High Court is inconsistent with any recommendation made by the Judicial Service Commission, the President shall cause Parliament to be informed as soon as is practicable.

58. No provision is made for the resolution of any inconsistency between the appointment of the Chief Justice or a judge of the Supreme Court or High Court and the recommendation of the Judicial Service Commission.

(ii) Judicial tenure and remuneration

59. Judicial tenure is dealt with in section 86 of the Constitution. Supreme Court and High Court judges may sit until they reach the age of sixty-five unless before that age the judge has elected to retire at the age of seventy years (section 86(1)) provided that if a judge elects to retire at the age of seventy such an election shall be subject to the submission to and acceptance by the President, after consultation with the Judicial Service Commission, of a medical report as to the mental and physical fitness of that judge (section 86(1)(a)). The office of a judge

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5 Thus, from independence until March 2001, the numbers of judges appointed to the Supreme Court bench did not exceed five judges. After July 2001, the number of judges appointed to the Supreme Court Bench was rapidly increased by three. This subject is discussed in greater detail below.

6 For example: setting the quorum for the Commission; the establishing for criteria for assessing candidates; procedures for dealing with voting on candidates (unanimity, majority or some other form of voting).

of the Supreme Court or the High Court shall not without his consent be abolished during the currency of his tenure (section 86(3)).

60. Section 88 of the Constitution makes provision for judicial remuneration and allowances such that the salaries of Supreme Court and High Court judges are fixed from time to time by Act of Parliament and are paid out of the Consolidated Revenue Fund and shall not be reduced during a Judge's period of office.

(iii) Removal of a judge from office

61. Section 87 of the Constitution provides for the circumstances in which a judge may be removed from office. Subsection (1) provides that a judge of the Supreme Court or High Court may by removed from office *"only for inability to discharge the functions of his office, whether arising from infirmity of body or mind or any other cause, or for misbehaviour and shall not be so removed except in accordance with the provisions of this section"*. Subsections (2)-(9) set out the procedure for the removal of a judge from office:

> *"**87 Removal of judges from office***
>
> *(1)* …
> *(2)* *If the President considers that the question of the removal from office of the Chief Justice ought to be investigated, the President shall appoint a tribunal to inquire into the matter.*
> *(3)* *If, in the case of a judge of the Supreme Court or the High Court other than the Chief Justice, the Chief Justice advises the President that the question of the removal from office of the judge concerned ought to be investigated, the President shall appoint a tribunal to inquire into the matter.*
> *(4)* *A tribunal appointed under subsection (2) or (3) shall consist of not less than three members selected by the President from the following –*
> *(a)* *persons who have held office as a judge of the Supreme Court or the High Court;*
> *(b)* *persons who hold or have held office as a judge of a court having unlimited jurisdiction in civil or criminal matters in a country in which the common law is Roman-Dutch or English, and English is an official language;*
> *(c)* *legal practitioners of not less than seven years' standing who have been nominated under subsection (5);*
> *(d)* *[repealed 1981];*
> *one of whom shall be designated by the President as chairman.*
> *(4a)* …
> *(5)* *It shall be the duty of the association which is constituted under an Act of Parliament and which represents legal practitioners practising in Zimbabwe to nominate a panel containing the names of not less than three duly qualified legal practitioners for the purposes of subsection (4)(c) when required to do so by the President.*
> *(6)* *A tribunal appointed under subsection (2) or (3) shall inquire into the matter and report on the facts thereof to the President and recommend to the President whether or not he should refer the question of the removal of the judge from office to the Judicial Service Commission, and the President shall act in accordance with such recommendation.*
> *(7)* …
> *(8)* …
> *(9)* *If the question of the removal of a judge has been referred to the Judicial Service Commission in accordance with subsection (6) and the Commission advises that the judge be removed from office, the President shall, by order under the public seal, remove the judge from office."*

62. There are a number of observations which may be made about the provisions in the Constitution providing for procedures for the removal of judges from office. Whilst the President's power of appointment to the tribunal provided for in subsections (2) and (3) is circumscribed by the provisions regarding the qualifications of the appointees provided for in subsection (4), there is no requirement imposed on the President that the tribunal be constituted by representatives from each of the categories of appointee in subsection (4)(a)-(c). There is no requirement that the tribunal conducts its hearings in public or that it should publish its findings[7]. In the event that the tribunal recommends referral of the question of removal of a judge to the Judicial Services Commission, it is the recommendation of the latter body which the President is obliged to follow (subsection (9); as has been noted above, the Judicial Services Commission is appointed directly or indirectly by the President).

63. The process of the removal of judges is, therefore, capable of influence by the executive in both the composition of the tribunal and the Judicial Services Commission which are charged by the Constitution with the task of evaluating the issues regarding the removal of a judge from office.

64. To date only two tribunals have been established under section 87. In 1992, Chambakare J, a High Court Judge, was the subject of an inquiry pursuant to section 87. Chambakare J resigned before the tribunal made its report to the President. In 1995, a tribunal was established to inquire into the conduct of Blackie J, a High Court Judge. Concerns had been raised about the conduct of the judge in the hearing and granting of bail applications on a Sunday at a police station. The tribunal found that there was no misbehaviour within the meaning of section 87(1) such as would justify a recommendation under subsection (6) that the question of removal be referred to the Judicial Service Commission[8].

(3) The Supreme Court

65. Section 80(1) of the Constitution provides for the creation of a Supreme Court *"which shall be the superior court of record and the final court of appeal for Zimbabwe"*. Subsections (2) and (3) provide that the Supreme Court shall consist of: (a) the Chief Justice; (b) *"such other judges of the Supreme Court, being not less than two, as the President may deem necessary"*; and (c) any additional judge or judges appointed for a

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7 Although subsection (7) provides that the *Commissions of Inquiry* Act applies in relation to the tribunal appointed under subsections (2)-(4), that Act does not require public hearings or the publication of the report.

8 Karla Saller, *The Judicial Institution in Zimbabwe*, 2004, page 20.

limited period by the Chief Justice, such additional judges to be serving High Court or former Supreme Court or High Court judges.

66. As has been noted above, the Supreme Court, in addition to appellate jurisdiction, exercises original jurisdiction in cases where *"any person alleges that the Declaration of Rights has been, is being or is likely to be contravened in relation to him (or, in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person)"*[9] that person may apply to the Supreme Court for redress. The Supreme Court therefore has a vital rôle to perform in the enforcement of the Declaration of Rights contained in the Constitution.

67. Ordinary appeals are usually determined by a panel of at least three judges, one of whom may not be an additional judge, and occasionally by a panel of two judges. In constitutional matters, the Justice Minister or the Chief Justice may direct that the case be heard by a panel of at least five judges, in which case only two members of the panel may be additional judges. The Chief Justice may, in his discretion, appoint a larger panel to hear any particular matter[10].

68. Prior to March 2001, the number of Supreme Court Judges did not exceed five. As at March 2001, the sitting Supreme Court Judges were: Gubbay CJ and McNally, Ebrahim, Sandura and Muchechetere JJA.

69. In March 2001, Godfrey Chidyausiku J, then Judge President of the High Court (and formerly deputy Justice Minister[11]), was appointed acting Chief Justice after Gubbay CJ's resignation from office. Chidyausiku J's appointment as Chief Justice was confirmed in August 2001[12].

70. Chidyausiku CJ was appointed as Chief Justice ahead of numerous other, more senior judges and was the first appointment to the office made directly from the

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9 See section 24 of the Constitution.

10 Section 3 of the *Supreme Court* Act.; Karla Saller, *The Judicial Institution in Zimbabwe*, 2004, page 22.

11 Derek Matyszak, *Judicial Selection and Political Crisis in Zimbabwe (2000-2003)*, 2004, footnote 84. See also, Legal Resources Foundation, *Justice in Zimbabwe*, 2002, page 9.

12 Prior to his permanent appointment, the Zimbabwe Law Society, in an open letter to the Judicial Service Commission, Chidyausiku J's legal acumen and personal integrity were questioned in strong terms; at the time of the appointment he was the High Court judge with the greatest number of decisions overturned by the Supreme Court: Karla Saller, *The Judicial Institution in Zimbabwe*, 2004, page 25.

High Court Bench[13]. It has also been reported that Chidyausiku CJ is a beneficiary of the Government's commercial farm allocation scheme. In a report prepared from various sources including lists published by the Ministry of Lands and Agriculture in February and June 2002, Chidyausiku CJ is listed as the owner of 895 hectares known as "Estes Farm" in Mazoe[14].

71. In July 2001, three High Court judges were appointed as judges of the Supreme Court[15]. These were Ziyambi, Cheda and Malaba JJA Of these new appointments, it has been reported that Cheda and Malaba JJA are also beneficiaries of the Government's commercial farm allocation scheme. In a report prepared from official statistics, former ZANU-PF MP, Margaret Dongo, records that by 1999, Cheda J had been allocated 2,039.50 hectares of commercial farmland referred to as "Malaba 38" in Bualalima Mangwe District and Malaba J had been allocated 1,866.00 hectares referred to as "Malaba 35" in the same District[16]. The terms upon which this land is held are not publicly available. However, the holdings of all these judges is common knowledge in legal and judicial circles in Zimbabwe, as well as in the general public. This has an important effect on how these judges are regarded, by other judges and lawyers and by the public.

72. Of the Supreme Court bench in March 2001, only Sandura JA remains. McNally JA retired in 2001, Muchechetere JA died in December 2001 and Ebrahim JA retired in 2002.

(4) The High Court

73. Section 81(1) of the Constitution provides for the creation of a High Court as a superior court of record. Subsections (2) and (3) provide that the High Court

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13 Derek Matyszak in *Judicial Selection and Political Crisis in Zimbabwe (2000-2003)*, 2004, footnote 84, states that participants in a closed seminar organised by Zimbabwe Lawyers for Human Rights reportedly called for judicial appointments to be free of political influence; some 200 black lawyers petitioned the Judicial Service Commission against Chidyausiku CJ's appointment as Chief Justice. The lawyers who protested to the Judicial Service Commission were reportedly described by Information Minister Jonathan Moyo as *"so-called black lawyers ... speaking for Rhodesians"*, *"the usual black Uncle Toms"* fronting for *"the usual white liberal gang in the judiciary"*. See also, Legal Resources Foundation, *Justice in Zimbabwe*, 2002, pages 9-10.

14 See *Confirmed VIP's Allocations – The Landless Poor? –* http://www.swradioafrica.com/pages/farms.htm.

15 In apparent breach of an assurance given by President Mugabe in March 2001 to a mission of international judges and lawyers from the International Bar Association (see the IBA's *Report of Zimbabwe Mission 2001*, para.12.34).

16 Centre for Housing Rights and Evictions, *Land, Housing and Property Rights in Zimbabwe*, Geneva, COHRE, 2001, Annex 2.

shall consist of: (a) the Chief Justice; (b) the Judge President of the High Court who shall, subject to the directions of the Chief Justice, be in charge of the High Court; and (c) *"such other judges of the High Court as may from time to time be appointed"*; and (d) any Supreme Court Judge appointed as an acting High Court Judge by the Chief Justice after consultation with the Judge President.

74. On his permanent appointment to the office of Chief Justice in August 2001, Chidyausiku J was replaced as Judge President of the High Court by Garwe J who was not the most senior judge of the High Court eligible for such an appointment[17].

75. Since 2000, a number of High Court Judges have resigned from the bench: Bartlett, Blackie, Chatikobo, Gillespie and Devittie JJ[18].

76. Also since 2000, a number of appointments have been made to the High Court Bench: Rita Makarau (former ZANU-PF non-constituency MP and member of the Government's Constitutional Commission); Annie Gowora (Rita Makarau's law firm partner); Ben Hlatswayo (former University of Zimbabwe lecturer and member of the Government's Constitutional Commission); Charles Hungwe (former ZANLA combatant); Antonia Guvava (formerly Director of the Legal Advice Division in the Attorney-General's office and Chidyausiku CJ's niece); and George Chiweshe (formerly Judge-Advocate in the Zimbabwe Defence Forces).

(5) The Administrative Court

77. The Administrative Court was established in 1979 by section 3 of the *Administrative Court* Act and has special jurisdiction conferred on it by statute over particular matters but generally, the Court acts as a court of appeal from a wide range of administrative tribunals[19].

78. The Administrative Court is a *"special court"* within the meaning of section 92 of the Constitution. Administrative Court judges, known as "Presidents", are appointed by the President after consultation with the Judicial Service

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17 We were informed in our meeting in Harare in April 2004 that Garwe JP was also a beneficiary of the Government's commercial land allocation programme. This has subsequently been confirmed, amongst others, by the former owner of the land he now holds.

18 Legal Resources Foundation, *Justice in Zimbabwe*, 2002, page 10, footnote x, which records that Adam J was at the time of the Report on leave pending retirement.

19 Karla Saller, *The Judicial Institution in Zimbabwe*, 2004, page 48 fn. 149, citing Professor Geoffrey Feltoe, *A Guide to Administrative Law*, 3rd ed. 1998.

Commission (section 92(1)). The conditions of service of an Administrative Court President may not be amended during his term of office nor may his office be abolished without his consent (section 92(2)). By virtue of the provisions of section 79A(d) and 79B, the judges of special courts such as the Administrative Court are subject to the same constitutional safeguards as regards independence of the judiciary as Supreme Court and High Court judges. However, the safeguards applicable to Supreme Court and High Court judges provided for in sections 86 (tenure) and 87 (removal) do not appear to apply to judges of special courts such as the Administrative Court.

79. The jurisdiction of the Administrative Court includes original jurisdiction in relation to land acquisition cases under the *Land Acquisition* Act and also appellate jurisdiction in matters relating to various publication laws such as the *Access to Information and Protection of Privacy* Act. As a consequence in the past few years, the Administrative Court has been required to enter upon areas of extreme controversy in the exercise of its jurisdiction.

(6) Magistrates' Courts

80. There are approximately 300 magistrates in Zimbabwe. The magistracy is a professional office with magistrates qualifying for the office by obtaining a law degree from the University of Zimbabwe or by graduating from the Judicial College of Zimbabwe. After qualification magistrates must apply to the Public Service Commission for employment[20].

81. The Public Service Commission was created by sections 73 and 74 of the Constitution which provide (under Chapter VII entitled *"The Public Service"*):

> *"73* ***Public service***
>
> *(1) There shall be a Public Service for the administration of the country.*
> *(2) An Act of Parliament shall make provision for the organisation, administration and discipline of the Public Service, including the appointment of persons to posts or grades in the Public Service, their removal from office or reduction in grade, their punishment for misconduct and the fixing of their conditions of service.*
> *(3) [repealed in 1993]"*
>
> *"74* ***Public Service Commission***
>
> *(1) There shall be a Public Service Commission which shall consist of a chairman and not more than seven other members appointed, subject to the provisions of subsection (2), by the President.*
> *(2) The persons to be appointed under subsection (1) shall be chosen for their ability and experience in administration or their professional qualifications or their suitability otherwise*

[20] Augustine Deke, *The Judiciary – open to abuse*, 1997, ANB-BIA Issue 37 (suppl't) 1 January 1998, http://ospiti.peacelink.it/anb-bia/nr337/e23.html.

for appointment, and the chairman and at least one other member shall be persons who have held a post or posts of a senior grade in the Public Service for periods which in the aggregate amount to at least three years.

(3) The chairman may delegate to another member of the Public Service Commission his functions as chairman of the Police Service Commission, the Defence Forces Service Commission or the Prison Service Commission."

82. Magistrates are, upon appointment by the Public Service Commission, civil servants and are assigned to the Ministry of Justice. Magistrates lack most of the basic protections afforded to members of the Supreme Court, High Court and special courts referred to in previous sections of this report[21] including, arguably, that of the independence of the judiciary contained in section 79B of the Constitution[22].

83. As civil servants their conditions of service are fixed by the Public Service Commission and they serve, like any other civil servant, *"at the pleasure"* of the Public Service Commission, *"magistrates can be hired and fired at will"*[23].

84. Magistrates' Courts are the courts of first instance in criminal matters and therefore occupy the important position of deciding on bail and remand of accused persons in most cases. The importance of this position is thrown into relief when the large number of allegations of violence in police custody and the large number of cases in which charges are not preferred or are eventually withdrawn are considered.

(7) The system for the administration of the courts

85. The central figure in the administration of the Zimbabwe court system is the Registrar of the relevant court[24]. The court Registrar is responsible, *inter alia*, for

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21 Magistrates may not have their salaries or salary scales reduced except in the case of misconduct or an offence against discipline: section 109(7) of the Constitution. However, there are no protections for tenure or removal.

22 As a magistrate's appointment takes effect pursuant to the exercise of powers conferred on the Public Service Commission under Chapter VII of the Constitution ("The Executive") and not pursuant to the provisions under Chapter VIII ("The Judiciary"), it is at least arguable that the provisions contained in Chapter VIII do not apply to appointments made pursuant to the provisions contained in Chapter VII.

23 Augustine Deke, *The Judiciary – open to abuse*, 1997, ANB-BIA Issue 37 (suppl't) 1 January 1998, http://ospiti.peacelink.it/anb-bia/nr337/e23.html. Magistrates may be removed from office if the Public Service Commission decides that they are unsuitable or that their removal will "facilitate improvements in the Ministry"; magistrates must accept promotions and may be transferred without their consent to any post in the public service, whether inside or outside Zimbabwe: Karla Saller, *The Judicial Institution in Zimbabwe*, 2004, pages 83-84.

24 Karla Saller, *The Judicial Institution in Zimbabwe*, 2004, page 51.

fixing the amount of security to be lodged by an applicant following the filing of an election petition. The Registrar has discretion as to whether to allow access to court records in the High Court and the Supreme Court[25]. The Registrar is also the person administering the court roll and who is therefore in control of assigning hearing dates for cases.

86. Messengers of the court and sheriffs are responsible for serving court process and enforcing court orders. It is self-evident that without the service of process or the effective enforcement of court orders, much of the purpose of litigation, both civil and criminal, is rendered otiose.

(8) The office of the Attorney-General and public prosecutors

87. The office of the Attorney-General is created by section 76 of the Constitution which provides, *inter alia*, that the Attorney-General is appointed by the President after consultation with the Judicial Service Commission (section 76(2) and is a non-voting member of the Cabinet and of Parliament (section 76(3b)).

88. Section 76 also sets out the Attorney-General responsibilities and powers in relation to the prosecution of offences:

> *"**76 Attorney-General***
>
> *(1)* …
> *(2)* …
> *(3)* …
> *(4)* *The Attorney-General shall have power in any case in which he considers it desirable so to do –*
>
> *(a) to institute and undertake criminal proceedings before any court, not being a court established by a disciplinary law, and to prosecute or defend an appeal from any determination in such proceedings;*
> *(b) to take over and continue criminal proceedings that have been instituted by any other person or authority before any court, not being a court established by a disciplinary law, and to prosecute or defend an appeal from any determination in proceedings so taken over by him; and*
> *(c) to discontinue at any stage before judgment is delivered any criminal proceedings he has instituted under paragraph (a) or taken over under paragraph (b) or any appeal prosecuted or defended by him from any determination in such proceedings.*
>
> *(4a)* *The Attorney-General may require the Commissioner of Police to investigate and report to him on any matter which, in the Attorney-General's opinion, relates to any criminal offence or alleged offence, and the Commissioner of Police shall comply with that requirement.*
> *(5)* *The powers of the Attorney-General under subsection (4) may be exercised by him in person or through other persons acting in accordance with his general or specific instructions.*
> *(6)* *The powers of the Attorney-General under subsection (4)(b) and (c) shall be vested in him to the exclusion of any other person or authority …*

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25 As Saller states, *op. cit.* at page 51, this function has assumed increasing importance as the reporting of judgments has become erratic since the third quarter of 2000 and ceased entirely after the second quarter of 2001. We have been advised that the situation after the second quarter of 2001 is not as dire as this but has nonetheless deteriorated since then.

(7) *In the exercise of his powers under subsection (4) or (4a), the Attorney-General shall not be subject to the direction or control of any person or authority.*
(8) …
(9) …
(10) …
(11) …
(12) …
(13) …
(14) …
(14a) …
(15) …"

89. The Attorney-General is an independent prosecution authority empowered to order investigations of criminal or alleged criminal offences and bring criminal proceedings and with exclusive power to take over and continue or take over and discontinue prosecutions commenced either by him or by other persons.

90. The present Justice Minister, Patrick Chinamasa, occupied the office of Attorney-General until 2000 when he was appointed Justice Minister and replaced as Attorney-General by Andrew Chigovera who then retired aged 50, in April 2003. Mr Chigovera's deputy, Bharat Patel, was appointed Acting Attorney-General[26]. His appointment has never been confirmed or made substantive.

91. Mr Patel told those who visited him of how under-resourced his office was. Those present formed the clear view that he was under immense pressure from his political masters.

(9) The legal profession

92. The legal profession in Zimbabwe is a fused profession and is regulated by the *Legal Practitioners* Act 1981 which makes provision for the registration of practitioners as well as for legal education. Registration procedures for admission as legal practitioner to the High Court remain in the hands of the court. Requirements for registration are, *inter alia*, that the practitioner should be a *"fit and proper person"* and that the practitioner should be resident in Zimbabwe[27].

93. Candidates are required to have such qualifications as are prescribed in the rules made by the Council for Legal Education. The Council for Legal Education is a body comprising eight members appointed by the Justice Minister. Of the members of the Council, two are direct ministerial appointments, the Chief Justice and Attorney-General each appoint one further member and the

26 Karla Saller, *The Judicial Institution in Zimbabwe*, 2004, page 86.

27 Section 5 of the Act; Karla Saller, *The Judicial Institution in Zimbabwe*, 2004, page 54.

remaining four are selected from nominations of four candidates each made by the Zimbabwe Law Society and the Law Faculty Board of the University of Zimbabwe[28].

94. The majority of lawyers in Zimbabwe are represented by the Zimbabwe Law Society. There is also a Zimbabwe Bar Association which exists for those practitioners who choose to practice solely as advocates. The number of lawyers in Zimbabwe is approximately 600-800 of whom the majority practice in Harare and approximately 80 practice in Bulawayo[29].

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28 Karla Saller, *The Judicial Institution in Zimbabwe*, 2004, page 54.

29 IBA, *Report of Zimbabwe Mission 2001*, para. 3.10.

(D) The state of the justice system in Zimbabwe

95. In recent years concern in the international community generally and in international legal circles in particular at the state of the rule of law and the justice system in Zimbabwe has increased. A number of reports and other works on the subject of the rule of law, the judiciary and human rights in Zimbabwe have been written over the course of the past four years[30]. It is appropriate to quote at this stage the conclusions of two of these reports. First, there is the report of the International Bar Association, *Report of Zimbabwe Mission 2001*, April 2001 (at paragraph 12.1):

> *"The HRI mission to Zimbabwe was particularly prompted by press reports about apparent intimidation of judges and the enforced retirement of the Chief Justice under threats of violence which the Government was not acting to stop. The situation disclosed during the visit has, regrettably, not only disclosed the truth of those allegations but an even more serious situation in which the events of the past 12 months have put the rule of law in Zimbabwe in the gravest peril. The circumstances which have been disclosed show, in our view, conduct committed or encouraged by Government Ministers which puts the very fabric of democracy at risk."*

Second, the report of the United Nations Special Rapporteur, Leandro Despouy, *Civil and Political Rights, including the questions of: independence of the judiciary, administration of justice, impunity*, U.N.E.S.C., 4 March 2004 (at paragraph 126)[31]:

> *"This latest development is but one in a series of institutional and personal attacks on the judiciary and its independent judges over the past two years, which have resulted in the resignations of several senior judges and which have left Zimbabwe's rule of law in tatters. When judges can be set against one another, then intimidated with arrest, detention and criminal prosecution there is no hope for the rule of law, which is the cornerstone of democracy. It paves the way for governmental lawlessness."*

96. Whilst the reports and other works which have been written on the subject of the rule of law, the judiciary and human rights differ in emphasis, they share the sentiments expressed in the conclusions quoted above. These sentiments were echoed in differing words but with identical substance by all those visited in 2004, save for the acting Attorney General and for the lawyers who act for Zanu-PF.

97. The present crisis in the rule of law and the justice system in Zimbabwe is usually taken to have commenced in about late 1999 or early 2000, although a persuasive case has been made identifying incipient governmental lawlessness dating back to 1982[32]. The events which ignited the present crisis are, superficially at least,

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30 A list of these reports and other works appears in the bibliography at the conclusion of this report.

31 United Nations Economic and Social Council, Commission on Human Rights, E/CN.4/2004/60/Add.1

32 The Hon. Anthony Gubbay, *Address delivered for the John Foster Charitable Trust Annual Lecture*, 5 November 2001, pages 4-8. The Hon. Anthony Gubbay dates the present crisis to

concerned with land reform in Zimbabwe and also with a referendum on a proposal for amendments to the Constitution which was voted on by the Zimbabwe electorate in February 2000[33].

98. During the period of European occupation of Zimbabwe, land, and very often the best land, was forcibly taken from the black population and sold or granted to European settlers. During the armed struggle for independence and the negotiations in London which led to the Lancaster House Agreement, the issue of land redistribution was a prominent feature.

99. It is important to note at this point that the necessity for land redistribution is one recognised not merely by the black majority but also by influential members of the white minority and, in particular, by the courts, as Gubbay CJ stated in the *Commercial Farmers' Union* injunction case: *"The order was not meant to prevent the Government from pursuing land resettlement. Not at all. This has never been the aim or policy of the courts, which unhesitatingly accept that the past inequities in the distribution of land must be redressed urgently".* It is certainly the view of all those subscribing to this report that [1] land redistribution is a matter for Zimbabwe and Zimbabweans and [2] the concern underlying this report is not about land reform as such, but rather is about land redistribution as a weapon used to subvert the legal system, for the purpose of maintaining political power.

100. For the first ten years after independence the Government's ability to redistribute land was limited by entrenched provisions of the Constitution which confined land acquisitions to a willing seller/willing buyer transactions. Even so, during this period land was purchased by the Government for redistribution to the black majority population using funds provided in part by the Government of the United Kingdom.

101. On the expiry of the ten year period referred to above, the provisions of the Constitution were amended to permit compulsory acquisition of land for resettlement purposes subject to the payment of fair compensation. The *Land Acquisition* Act 1992 made provision for such acquisitions to take place.

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the abduction and torture of Mark Chavanduka and Ray Choto, respectively the editor of and a reporter on the *Standard* newspaper in January 1999: *op. cit.*, page 18. See also, Martin Meredith, *Our Votes, Our Guns*, 2003, pages 149-156.

33 Events which led to the crisis had been simmering for some time, at least since December 1997 when the Zimbabwe Congress of Trade Unions called a general strike which shut down the country and January 1998 when food riots occurred in Harare. These events were precipitated by increased taxes and a deterioration in the economy, *inter alia*, caused by the Government's capitulation in 1997 to so-called war veterans' demands for compensation and pensions for their service in the war of liberation the total cost of which was in the region of Z$4.2 billion

102. With financial assistance from various countries, including the United Kingdom, between 1980 and 1999 the Government had acquired a total of 3.8 million hectares of land and had resettled 71,000 families. The funds provided by the international community for the purchase of land for resettlement were not exhausted by the time a land resettlement grant signed in 1981 closed in 1996. Early resettlement programmes ran into difficulties due to inadequate planning and a failure to supply effective infrastructure and support systems. Further, land available for redistribution remained unallocated by the Government.

103. In November 1997, probably as a result of pressure from 'war veterans', the Government published in the *Government Gazette* a list of 1,471 white-owned farms for compulsory acquisition. As noted above, the Constitution permitted only acquisition for fair compensation. Further, the Government failed to follow the procedures for acquisition set out in its own legislation. The Government's announcement of compulsory acquisition led to legal challenges and, in February 1999, the Administrative Court refused to confirm the statutory notices giving final notice of the intention to acquire the farms required under section 8 of the *Land Acquisition* Act, declared the notices invalid and dismissed the Government's application with costs[34].

104. In September 1998, an international donors' conference was held in Harare and chaired by President Mugabe. The conference agreed a set of 13 principles on the basis of which the second phase of land reform and resettlement could proceed, including institutional arrangements to enhance transparency and fairness[35].

105. At about this time, the National Constitutional Assembly, an alliance of civil groups advocating changes to the Constitution, *inter alia*, to reduce the power of the executive Presidency, was commanding increasing support among sections of the population. Recognising this, the Government formed a Commission on the Constitution which toured various regional centres to consult with civic groups and the general population.

106. The Commission, which was dominated by members of ZANU-PF, produced a draft amended Constitution which, *inter alia*, retained the extensive powers of the

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34 Karla Saller, *The Judicial Institution in Zimbabwe*, 2004, pages 28-29.

35 There were concerns that land available for redistribution was not being allocated exclusively to landless black farmers or black commercial farmers, but that it was being allocated also to public servants and politicians. The contents of the list of grantees of land compiled by Margaret Dongo appear to confirm this concern: Centre for Housing Rights and Evictions, *Land, Housing and Property Rights in Zimbabwe*, Geneva, COHRE, 2001, Annex 2.

executive Presidency and restricted the President to serving only two terms in office (though, crucially, only with prospective effect). As regards land redistribution, the draft amended Constitution (at clause 57) purported to impose on the Government of the United Kingdom an obligation to establish a fund for the purpose of compensating farmers for land compulsorily acquired by the Government of Zimbabwe and made provision for the compulsory acquisition of land without compensation in the event that the *"former colonial power fails to pay compensation"*.

107. In February 2000, the draft amended Constitution was put to a referendum. The Government actively promoted the draft amended Constitution and backed the "yes" campaign. The referendum was lost by the "yes" campaign and the draft amended Constitution was rejected [36]. Within days of the results of the referendum being announced invasions of white-owned farms by groups of 'war veterans' commenced. The police did not intervene in the farm invasions. The Police Commissioner, Augustine Chihuri, washed his hands of the farm invasions stating that the invasions were *"above the police … it's a political issue"*[37].

108. In early March 2000, the Commercial Farmers Union commenced proceedings in the High Court for declaratory relief that the occupations were unlawful and for orders which would have the effect of requiring the police to act to end the farm occupations [38]. The proceedings were commenced against the Police Commissioner, the leader of the war veterans, Dr Chenjerai Hunzvi, and the Governor of Mashonaland Central, Comrade Border Gezi. On 17 March 2000, the Commercial Farmers Union obtained an order from Garwe J that declared the farm invasions to be illegal[39] and, *inter alia*, ordered the Police Commissioner to evict the unlawful occupiers (and to ignore executive directions to the contrary) in the following terms:

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36 Notwithstanding the results of the referendum, the Government subsequently amended the Constitution on 6 April 2000 to incorporate the provisions of the draft amended Constitution in so far as they related to the compulsory acquisition of land: see section 16A of the Constitution.

37 *The Herald*, 29 February 2000.

38 For a fuller account of these proceedings see: Professor Geoffrey Feltoe, *The onslaught against democracy and the rule of law in Zimbabwe*, 2001, pages 6-7; IBA, *Report of Zimbabwe Mission 2001*, paras. 7.22-7.28.

39 In the IBA, *Report of Zimbabwe Mission 2001*, at para. 7.20, it is stated that: *"There is no doubt that the farm invasions are and were illegal. Both the Minister of Justice and the Attorney-General confirmed unequivocally to us that the Government accepts that the actions of the farm occupiers are illegal. The Minister also made clear that these occupations do not constitute any process of land acquisition authorised by the Constitution and the laws of Zimbabwe. President Mugabe confirmed these statements"*.

"to direct all officers and members of the Zimbabwe Republic Police that … In so far as any person who gained occupation … remains after 72 hours, the [Commissioner] is ordered forthwith to deploy such manpower as is reasonably necessary to evict all such persons from any such land …"

109. Garwe J's order was made by consent of the parties, including Dr Hunzvi and the Police Commissioner, a fact subsequently confirmed to the IBA Mission in 2001 by the Attorney-General himself (at paragraph 7.24.1). Notwithstanding the Police Commissioner's consent to the court's order, the police made no attempt to comply with it.

110. Within a few days of the making of Garwe J's order, the Attorney-General applied for a variation of the order on behalf of the Police Commissioner. The application was heard on 10 April 2000 by Chihengo J. The Police Commissioner was represented at the hearing by the Attorney-General himself, Patrick Chinamasa (now Justice Minister). It was contended on behalf of the Police Commissioner that the police had no resources, no manpower and no equipment to carry out evictions of farm occupiers and that the order made by Garwe J was incapable of enforcement. In his submissions to the Court, Mr Chinamasa stated: *"A law which promotes injustice in society, a law which enforces unjust rights is not in compliance with the rule of law. The rule of law is a political concept. It is a tool which can be used from any political angle"*[40].

111. In rejecting the application for a variation of the Garwe J's order, Chihengo J stated in his judgment dated 13 April 2000, *inter alia*:

"In his answering affidavit [the Police Commissioner] stated:

> *"These are not disputed but suffice to point out that the Rule of Law which is divorced from justice and just laws, becomes a hollow concept. Enforcement of an unjust and an ethically iniquitous land ownership structure, through the application of brutal state power, such as demanded by the respondent, is not promotive [sic] of the Rule of Law"*

These same sentiments were expressed by the Attorney-General in his oral submissions to the Court. I would shudder to think that this perception of the rule of law could have been one of the reasons why the [Commissioner] thought that he may not enforce the order. It is unlikely and unthinkable that it could be so. I acknowledge that at the philosophical level there are different schools of thought as to what the rule of law encompasses. At the practical level, however, where a written constitution, amenable to amendment by the people is in existence, and statute laws, old and new exist, and which the people's representatives can amend or repeal, an argument such as the one advanced by the [Commissioner] in the passage I have quoted is but spurious. There is, in my opinion, a middle view of the rule of law between the two extremes - that the law or the rule of law is partisan on the one hand and that it is neutral on the other hand. That middle view is that that the rule of law represents a norm, a standard which ensures that any person may bring up a claim and have it determined within the framework of a body of principles which are applied to all persons equally … The rule of law means to me that everyone must be subject to a shared set of rules that are applied universally and which deal even-handedly with people and which treat like cases alike. It means that those who are affected by the official inaction should be able to

40 David Blair, *Degrees in Violence*, 2002, page 98.

bring actions, as did the respondent in cause on the basis of the official rule, i.e. the law to protect their interests."

"The farm invasions are illegal and of a riotous nature. The applicant clearly has the public duty to enforce the consent order and to afford the members of the respondent the protection of the law enshrined in section 18(1) of the Constitution. If this Court were to accede to a variation, amendment or other detraction from the order issued by Garwe J it would not be upholding its sworn duty – to uphold the law of Zimbabwe. In independent Zimbabwe, the law should no longer be viewed as being made for us, rather it must be viewed as our law. We have the sovereign right to enact new laws and repeal old laws which we find to be incompatible with the national interest."

112. The Police Commissioner lodged an appeal against Chihengo J's judgment but it was not pursued. The order of Garwe J continued to be deliberately disobeyed by the police.

113. The issue of farm occupations returned to the courts, this time the Supreme Court, towards the end of 2000 when the Commercial Farmers Union commenced two sets of proceedings[41]. The first set of proceedings was brought in mid-September and challenged the constitutional legality of the entire resettlement programme and also contended that the programme had been carried out unlawfully and in a politically and racially discriminatory manner. The second set of proceedings was commenced at the end of October and complained that the Government had failed to follow the correct procedures for land acquisition as set out in the relevant land acquisition legislation.

114. The Supreme Court's decision in the second set of proceedings, in which the respondents were the Ministers responsible for carrying out the resettlement programme, the Provincial Governors and the Police Commissioner, was handed down first on 10 November 2000. The respondents consented to an order that the resettlement programme should not be further implemented until the procedural requirements set out the enabling legislation had been complied with, which requirements were set out in the order itself. In addition, the respondents and the Police Commissioner consented to an order the effect of which was that the police should remove from farms all persons who had unlawfully entered the properties, had breached the peace or who had otherwise conducted themselves in an unlawful manner. No steps were taken by the police to enforce this part of the order.

115. On 21 December 2000, the Supreme Court delivered judgment in the first set of proceedings. The Court found that the Government had failed to act in accordance with the law in that the Government had failed to carry out land

41 For a fuller account of these proceedings see: Professor Geoffrey Feltoe, *The onslaught against democracy and the rule of law in Zimbabwe*, 2001, pages 7-9; IBA, *Report of Zimbabwe Mission 2001*, paras. 7.35-7.47; Legal Resources Foundation, *Justice in Zimbabwe*, September 2002, pages 40-43.

resettlement in accordance with a programme of land reform as required by section 16A of the Constitution, holding that the Government *"has then failed to obey its own law … The courts are doing no more than to insist that the State complies with the law. The procedures under the Land Acquisition Act have been flouted"*.

116. The Court also found discrimination in the way that the resettlement had taken place not, as contended for by the Commercial Farmers Union, on the basis of race (which the Court indicated might be a justifiable basis for discrimination) but on the bases that farmers were targeted who were believed to be supporters of the opposition party and that expropriated land went mainly to supporters of ZANU-PF. The Court stated:

> *"If ZANU (PF) party branches or cells or officials are involved in the selection of settlers and the allocation of plots the exercise degenerates from being an historical righting of wrongs into pure discrimination."*

117. The Supreme Court granted various declarations regarding the unlawfulness of the conduct of the Government and injuncted the Government from taking further steps to compulsorily acquire land. The Supreme Court granted a stay of six months to allow Ministers to produce a workable programme of land reform. The Court also ordered immediate compliance with the two consent orders of the Supreme Court itself (dated 10 November 2000) and of Garwe J in the High Court (dated 17 March 2000), this part of the order was not subject to any stay. The Court stated:

> *"It is overwhelmingly obvious that the farm invasions are, have been, and continue to be, unlawful. Each Provincial Governor, each Minister … even the Commissioner of Police has admitted it. They could do nothing else. Wicked things have been done, and continue to be done. They must be stopped. Common law crimes have been, and are being, committed with impunity. The Government has flouted laws made by Parliament. The activities of the past nine months must be condemned."*

118. On 24 and 25 June 2000, Parliamentary elections were held in Zimbabwe. The Movement for Democratic Change[42] contested all of the 120 common roll constituencies and succeeded in winning 57 seats in Parliament[43]. There were allegations that the elections themselves were not free and fair and that the election campaign was marred by violence and intimidation by ZANU-PF supporters and directed at opposition candidates, party members, supporters and

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42 The Movement for Democratic Change grew out of the National Constitutional Assembly and the Zimbabwe Congress of Trade Unions and was formed in September 1999. The MDC was and is led by the former head of the ZCTU, Morgan Tsvangirai.

43 The total number of elected Members of Parliament is supplemented by twenty Presidential appointees and ten Members nominated by tribal chiefs (themselves appointed by the President); see further, IBA, *Report of Zimbabwe Mission 2001*, paras. 8.1-8.16.

the electorate generally, with a view to dissuading voters from supporting the opposition[44].

119. These allegations are broadly supported by two independent reports prepared following international observation of the campaign and the elections themselves. The report of the Commonwealth Observer Group stated:

> *"The campaign was not peaceful. There was violence, intimidation and coercion in many parts of the country, especially in rural areas, both against ordinary voters and against candidates and party supporters. All parties share responsibility in this. There were incidents where opposition parties carried out acts of violence. But it would appear that most of the violence was directed against the opposition parties, especially the Movement for Democratic Change.*
>
> *These violent acts included murders, rapes and beatings and the ransacking and burning of houses of opposition party members and supporters. It was reported that 36 people had been killed, thousands injured and 7,000 displaced, although the levels of violence varied – sometimes considerably – from one part of the country to another.*
>
> *As in many elections, there were occasions when violence was the result of unplanned clashes between groups of party supporters. But for the most part it appears to us that the violence which disfigured this campaign was employed systematically as part of a strategy to diminish support for the opposition parties."*

The European Union's Observation Mission reported:

> *"The election campaign was marred by high levels of violence and intimidation. Most areas of the country were affected.*
>
> *An assessment of political violence since February 2000 made by the EU Observer Mission, together with reports from EU Observers deployed across the country since early June, attributed the bulk of political violence to ZANU-PF.*
>
> *The evidence showed that between February and June ZANU-PF was engaged in a systematic campaign of intimidation aimed at crushing support for opposition parties.*
>
> *Key groups of the electorate whom ZANU-PF deemed to be opposition supporters were targeted by war veterans and other party supporters operating from bases on white-owned farms they had invaded, from militia camps in other rural areas and from Government and party offices in rural towns.*
>
> *Farm labourers on white-owned farms across the country were threatened and abused, forced to attend party meetings and taken off to re-education camps. Thousands of incidents of assault, torture, abduction and rape were recorded. Several prominent MDC organizers were murdered."*

120. These allegations of widespread intimidation and voting irregularities resulted in the Movement for Democratic Change bringing election petitions in the High Court in respect of 37 constituencies seeking to have the results in those constituencies set aside.

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44 Voting irregularities were recorded which resulted in almost 15% of voters being turned away at the polls: US Government Delegation to the 57th Session of the UN Commission on Human Rights, *Department of State Human Rights Reports for 2000 – Zimbabwe*, February 2001.

121. Following the commencement of the electoral petition proceedings by the Movement for Democratic Change, President Mugabe purported to make use of his executive powers conferred under section 158 of the *Electoral* Act to *"make such statutory instruments as he considers necessary or desirable"* (subsection (1)) to provide for *"validating anything done in connection with, arising out of or resulting from any election in contravention of any provision of this Act or any other law"* (subsection (2)(c)) by publishing *Electoral Act (Modification)(No 3)* Notice 2000 on 8 December 2000 which attempted to retroactively remove any challenges to the outcomes of the Parliamentary elections from the jurisdiction of the courts.

122. The validity of this statutory instrument was challenged before the Supreme Court by the Movement for Democratic Change contending, *inter alia*, that the Notice infringed the right to protection of the law and the right to a fair and impartial hearing. The Supreme Court gave judgment on the challenge in January 2001 agreeing with this submission and striking down the Notice as unconstitutional.

123. The farm invasions, together with conduct of the Parliamentary elections held in June 2000, acted as the catalysts for the events described below which are relevant for any assessment of the current state of the justice system in Zimbabwe.

(1) The Supreme Court

124. Even prior to about 1999, vilification of the judiciary by the executive was not unprecedented in Zimbabwe[45]. In the case of the prosecution of the York brothers in January 1982, in which the High Court repeatedly held the Defendants' detention to be unlawful and the police repeatedly rearrested them, the Minister of Home Affairs accused the judiciary of dispensing *"injustice by handing down perverted pieces of judgment which smack of subverting the people's government"*. The Minister went on to attack the legal profession as a whole:

> *"We are aware that certain legal practitioners are in receipt of moneys as paid hirelings, from governments hostile to our own order, in the process of seeking to destabilise us, to create a state of anarchy through the inherited legal apparatus. We promise to handle such lawyers using the appropriate technology that exists in our law and order section. This should succeed in breaking up the unholy alliance between the negative bench, the reactionary legal practitioners and governments hostile to us, some of whose representatives are in this country."*

125. A year later in 1983 in the context of a treason trail which was halted by newly appointed High Court Judge, later Chief Justice, Enoch Dumbutshena, on the

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45 The Hon. Anthony Gubbay, *Address delivered for the John Foster Charitable Trust Annual Lecture*, 5 November 2001, pages 4-8.

grounds that the confessions upon which the State relied had been obtained by torture and were therefore inadmissible, the Minister of Home Affairs accused the Supreme Court bench which rejected the State's appeal of *"class bias and racism"*.

126. However, since about 1999, the frequency and tenor of verbal attacks on the judiciary increased markedly and became *"unrelenting and vicious"*[46]. We set out below a small selection of statements made by members of the Government or ZANU-PF MPs in order to give a flavour of the sort of verbal attacks involved:

> On 28 November 2000, four days after an invasion of the Supreme Court by 'war veterans' (see below), Justice Minster Patrick Chinamasa made a keynote speech and failed to condemn the invasion of the Supreme Court. The Minister pointed out the Gubbay CJ had joined the bench under the Smith regime and asked: *"How can personnel so high up in the pecking order of a regime grounded in racist grundnorm* [sic] *faithfully serve a democratic state?"* adding that he belonged *"to a generation which brought fundamental revolutionary changes not through the law of a legal process but through the barrel of a gun"*. The Minister demanded to know whether Gubbay CJ and the five other white judges on the Supreme and High Court benches had black friends. *"What company they keep, who their friends are, is also our legitimate business". "The justification is we want to know what influences the values and opinions of judges … in a country of 12 million black people, it is unacceptable to get people appointed to the bench who in a year cannot claim to have interacted socially with a single black person."*[47].
>
> On 17 January 2001, the Justice Minister demanded the resignations of Gubbay CJ and every other serving white judge. The Minister stated that the judges *"must be told their continued stay on the bench is no longer at our invitation. Their continued stay is now an albatross around the necks of our population"* and further stated that Gubbay CJ's presence as Chief Justice meant that Zimbabwe was *"a semi-colonial state, half free, half enslaved"*[48].
>
> On 28 February 2001, in Parliament, the Justice Minister called Gubbay CJ *"disgraceful, despicable and not worthy of a man in his position"*[49].
>
> Also on 28 February 2001, in Parliament, ZANU-PF MP Christopher Mushohwe stated that Gubbay CJ *"thinks and behaves as if he is the last British Governor of Zimbabwe"* and that *"the Chief Justice was deliberately planted in the Zimbabwean body politic by Lord Carrington so as to defeat Zimbabwe's independence"*, Gubbay CJ was linked to *"very powerful Jewish financial interests"* and found time to *"manipulate and contaminate the thinking of young law students at the University of Zimbabwe"*, Gubbay CJ was also *"commanding many NGOs and donor agencies which he uses for the purpose of radicalizing Zimbabweans against their own government"* and

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46 IBA, *Report of Zimbabwe Mission 2001*, para. 9.1; and, generally, paras. 9.1-9.7.

47 *The Herald*, 29 November 2000; quoted in David Blair, *Degrees in Violence*, 2002, page 213. Gubbay CJ had been appointed to the High Court bench under the Smith regime but he had been elevated to the Supreme Court and appointed Chief Justice by President Mugabe. The Minister described those decisions (taken by the President) as *"foolish magnanimity on our part"* (*The Herald*, 8 December 2000).

48 *The Herald*, 19 January 2001; quoted in David Blair, *Degrees in Violence*, 2002, page 214.

49 *Hansard*, 28 February 2001, col. 4616; quoted in David Blair, *Degrees in Violence*, 2002, page 217.

asserting that *"the current wave of criticism which the government is facing … is a direct result of a strategy put in place by the Chief Justice in collaboration with his Whitehall handlers"*[50].

127. The leaders of the war veterans also attacked the Supreme Court and High Court bench. Dr Chenjerai Hunzvi, a ZANU-PF MP, stated in Parliament *"We are not afraid of the High Court … this country belongs to us and we will take it whether they like it nor not. The judges must resign. Their days are now numbered as I am talking to you … I am telling you what the comrades want, not what the law says"*, later vowing to oust the entire Supreme Court bench and the four remaining white High Court judges[51]. Another veterans leader, Mike Moyo, deputy Chairman of the ZNLWVA (Zimbabwe National Liberation War Veterans Association) was reported to have stated *"The judiciary must go home or else we will chase them and close the courts indefinitely until President Mugabe appoints replacements"*[52] and *"the judiciary of Ian Smith is still with us now, joined by some black puppet judges who are making their own laws instead of following laws made by Parliament"*[53].

128. In addition to verbal attacks, the Supreme Court was subjected to physical intimidation by 'war veterans' when, on 24 November 2000, a group of approximately 200 'war veterans' invaded the Supreme Court building chanting *"kill the judges"* and occupied the court room[54]. Some of the veterans were armed and beat up a guard. The Supreme Court was prevented from sitting. The police responded much later. No prosecutions were brought against the participants in the occupation and no Government Minister came forward to condemn the action. Since his retirement, the Honourable Anthony Gubbay has referred to the Supreme Court invasion in the following terms[55]:

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50 *Hansard*, 28 February 2001, cols. 4654-4668; quoted in David Blair, *Degrees in Violence*, 2002, page 217.

51 *The Standard*, 4 March 2001.

52 *The Daily News*, 20 November 2000.

53 *The Herald*, 24 January 2001.

54 There is a debate whether the self-styled 'war veterans' were directed by the Government or whether their actions were spontaneous and independent of Governmental influence. It is our view that this debate is irrelevant to the principal issue which is: the Government (any civilised Government) has a duty to defend its judiciary against physical intimidation or, in other words, assault, irrespective of the source of that intimidation. As the IBA Mission noted, intimidation is an offence under section 27 of the *Law and Order Maintenance* Act which the Attorney-General ought to have investigated: IBA, *Report of Zimbabwe Mission 2001*, para. 9.9.

55 The Hon. Anthony Gubbay, *Address delivered for the John Foster Charitable Trust Annual Lecture*, 5 November 2001, page 22.

> *"The invasion of the Supreme Court building on the morning of 24 November by close to two hundred war veterans and followers can only be described as disgraceful. In the course of entry the policeman on guard was assaulted. The mob rushed from the main entrance through the building to the courtroom, where the Judges were about to hear a constitutional application brought by the Commercial Farmers Union. They shouted political slogans and even called for the Judges to be killed. They stood on chairs, benches and tables in a show of absolute contempt for the institution of the courts as the third essential organ of a democratic government. Such deplorable behaviour sent the clearest message that the rule of law was not to be respected."*

129. After the invasion of the Supreme Court, in early December 2000, the Minister of Information announced that he had received information that war veterans were planning to attack judges in their homes to force them to resign[56]. Later in December, special protection from the Police Protection Unit was provided to all judges threatened with attacks on their homes.

130. On 8 January 2001, Gubbay CJ faced an attack from within the judiciary itself. At the commencement of the legal year in 2001, the Judge President of the High Court, Chidyausiku J, as he was then, made a speech in Bulawayo which was widely reported in the media. In his speech Chidyausiku J referred to a speech of Gubbay CJ's in 1991 in which the Chief Justice had been critical of the Government's land redistribution policies and to a judgment of his own in which he had suspended a Supreme Court order and which judgment had subsequently been overruled by the Supreme Court. Chidyausiku J accused Gubbay CJ of bias in favour of white farmers and the Supreme Court of bias against poor people[57]. He described Gubbay CJ's rulings in the land cases as *"hardly tenable"* and *"boggling the mind"*[58].

131. This attack on the head of the judiciary in Zimbabwe by the future head of the judiciary in Zimbabwe was unprecedented and drew a public reprimand and response from Gubbay CJ on 17 January 2001, when he stated, *inter alia*, that the rulings in the land cases for which he had been attacked by Chidyausiku J had

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56 IBA, *Report of Zimbabwe Mission 2001*, para. 9.10. The Permanent Secretary at the Ministry of Justice, Augustine Chikumira, stated that he had handed the matter over to the police and said *"It is a very sad development because judges are defenceless"*. He had received calls from Supreme Court judges that they were concerned about their security and safety after receiving threats from war veterans, *The Daily News*, 14 December 2000, cited in Professor Geoffrey Feltoe, *The onslaught against democracy and the rule of law in Zimbabwe*, 2001, page 9 and IBA, *op. cit.*.

57 IBA, *Report of Zimbabwe Mission 2001*, paras. 9.13-9.18; Professor Geoffrey Feltoe, *The onslaught against democracy and the rule of law in Zimbabwe*, 2001, page 10; in fact, the Supreme Court had rules against white farmers in the past (*Davies and others v. Minister of Lands, Agriculture and Water Development* [1996] 1 ZLR 81, upholding one of Chidyausiku J's own judgments).

58 Speech opening the legal year, Bulawayo, 8 January 2001; quoted in David Blair, *Degrees in Violence*, 2002, page 214.

been made with the consent of the relevant Government departments making his subordinate's assertions *"frankly ridiculous"* and directing Chidyausiku J to *"avoid making inflammatory statements"*.[59] The Honourable Anthony Gubbay has since stated[60]:

> *"In effect the Judge President accused me, and the Supreme Court, of having pre-decided in their favour all the cases brought by the commercial farmers. The accusation is unfounded. In 1996 the Supreme Court decided against the commercial farmers in holding that designation of land for acquisition did not amount to acquisition, thus disentitling them to be compensated in terms of the Constitution. I have dealt with the two other decisions of the Supreme Court. In the one the government consented to the order handed down. In the other the illegality of what was happening was not in dispute. While acknowledging that a programme of land reform is necessary for future peace and prosperity, the Supreme Court (as then composed) could not accept and tolerate the unplanned, chaotic, politically biased and violent nature of the ongoing fast-track programme"*

132. The invasion of the Supreme Court by 'war veterans', the threats to the personal safety of the judiciary and the invective directed at the judiciary by Government Ministers, ZANU-PF MPs and 'war veterans' both before and after the invasion of the Supreme Court should be viewed against the background of undeniable escalating extreme violence during the year 2000 starting with the referendum campaign in February 2000, continuing through the farm invasions and then onto the Parliamentary elections in June that year. Cumulatively, these events led to an environment in which, entirely justifiably and reasonably, many judges were in real fear for their own safety and that of their families.

133. This state of affairs led Gubbay CJ to write to Vice-President Simon Muzenda on 19 January 2001 seeking the protection of the Government for judges: *"We are fearful of our safety and the safety of our families … We find it difficult to carry out our onerous judicial duties when placed under pressure of this nature"*[61]. A meeting was arranged between Gubbay CJ and Sandura JA and the Vice-President and two Cabinet Ministers for 22 January 2001. At this meeting the Vice-President stated, *inter alia*, that the Government had lost confidence in the Chief Justice and accused him of aiding and abetting racism. There were emotionally charged exchanges during the course of which it seems Gubbay CJ stated that he should perhaps resign if that was the attitude of the Government. This was not at the time taken as an offer of resignation by the Vice-President[62].

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59 David Blair, *Degrees in Violence*, 2002, page 214.

60 The Hon. Anthony Gubbay, *Address delivered for the John Foster Charitable Trust Annual Lecture*, 5 November 2001, pages 22-23.

61 Extracts from the letter were carried in *The Herald*, 19 January 2001, and are reproduced in David Blair, *Degrees in Violence*, 2002, pages 214-215.

62 For accounts of this meeting and, generally, on the resignation of Gubbay CJ see: IBA, *Report of Zimbabwe Mission 2001*, paras. 10.1-10.17; Professor Geoffrey Feltoe, *The onslaught*

134. Two weeks after the meeting, on 2 February 2001, Gubbay CJ was visited by the Justice Minister and informed that his offer of resignation had been accepted by the President and would be announced that afternoon. At this meeting an agreement was reached between Gubbay CJ and the Minister that the Chief Justice would retire from his office on 30 June 2001 and would take a leave of absence from 1 March to 30 June 2001. The Minister contends that the appointment of an acting Chief Justice was also discussed and agreed. Gubbay CJ denies that any such discussion took place.

135. On 26 February 2001, Gubbay CJ wrote to the Minister in his capacity as Chairman of the Judicial Service Commission in response to a request from the Minister that a meeting of the Judicial Service Commission be convened with a view to appointing an Acting Chief Justice, informing the Minister that such an appointment would be premature and querying the need for a meeting of the Judicial Service Commission.

136. The Minister responded by letter the same day purporting to dismiss Gubbay CJ as Chief Justice. The Minister relied on the misconduct provisions of section 87(2) of the Constitution for the purported dismissal of Gubbay CJ, notwithstanding that those provisions do not allow for dismissal in this manner and that the purported dismissal was, therefore, unlawful. Gubbay CJ refused to stand aside and arranged for a press release to be made on 27 February 2001 (confirmed in a letter to the Minister dated 28 February 2001) stating, *inter alia,* that he would not retire from office until his term of office was lawfully terminated in April 2002. Gubbay CJ arrived at the Supreme Court as usual on 1 March 2001.

137. The reaction of the Government and ZANU-PF MPs and supporters was vituperative, for example, the Minister of Agriculture, Joseph Made, declared Gubbay CJ *"a liar"* who was *"biased against blacks"* and was *"not fit to be Chief Justice of this country"*[63].

138. On 2 March 2001, matters escalated as a war veteran called Joseph Chinotimba, who had led the invasion of the Supreme Court in November 2000 and was at the time on remand awaiting trial for attempted murder, accompanied by seven henchmen, entered the Supreme Court building and remained inside for over forty minutes. It appears that Chinotimba demanded to see Gubbay CJ and, when

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against democracy and the rule of law in Zimbabwe, 2001, pages 11-12; and Derek Matyszak, *Judicial Selection and Political Crisis in Zimbabwe (2000-2003)*, 2004.

63 David Blair, *Degrees in Violence*, 2002, page 217.

he was unable to do so, took a guard's mobile phone or used an internal phone and spoke to Gubbay CJ. It has been reported that Chinotimba told Gubbay CJ to vacate his office that day and announced outside the building that if he did not then the war veterans would declare war on Gubbay CJ[64].

139. Later that day, lawyers representing Gubbay CJ reached a compromise with the Justice Minister. In the agreement the Justice Minister and Chief Justice both acknowledged the *"importance of the independence of the judiciary"* and affirmed that *"any action by any party that seeks to undermine or interfere with the independence of the judiciary is contrary to the interests of the people of Zimbabwe"*. The agreement further provided[65]:

> *"(1) [for] the withdrawal without reservation of any public statement and pronouncement by the Minister of Justice and any other members of the Government impugning, demeaning or otherwise putting into question the good name, reputation, honour and integrity of the Chief Justice, either in his official or personal capacity;*
> *(2) that the Chief Justice, who would otherwise remain as Chief Justice of Zimbabwe until 26 April 2002, agreed to take early retirement and leave his office with effect from 1 July 2001;*
> *(3) that the Chief Justice will be on leave from 1 March 2001 until the beginning of his early retirement on 1 July 2001;*
> *(4) that while on leave pending retirement, the Chief Justice will remain in Zimbabwe but will not sit as a member of the Supreme Court during his leave;*
> *(5) the Chief Justice will raise no objection to the appointment of an acting Chief Justice during the period of his leave pending retirement; and*
> *(6) the Minister of Justice on behalf of the Government assures the Chief Justice that no steps will be made to unlawfully cause the suspension, removal or resignation of any of the judges of Zimbabwe."*

140. Whilst the events surrounding Gubbay CJ were unfolding, the Justice Minister had visited the remaining two non-black Supreme Court judges, McNally and Ebrahim JJA and tried to persuade them to retire[66]. The Minister 'asked' McNally JA to resign because *"The President does not want you to come to any harm"*[67] Ebrahim JA was given a similar message. Neither of the judges resigned. Such an approach was a clear attempt to put pressure on these Supreme Court judges[68].

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64 IBA, *Report of Zimbabwe Mission 2001*, para. 10.15; David Blair, *Degrees in Violence*, 2002, page 218.

65 IBA, *Report of Zimbabwe Mission 2001*, para. 10.16.

66 This much was admitted by the Minister when asked about this subject by the IBA Mission in April 2001: IBA, *Report of Zimbabwe Mission 2001*, para. 10.18; see also David Blair, *Degrees in Violence*, 2002, page 215.

67 McNally J was reported to have said: *"We were told very nicely and politely we should take our leave and go, otherwise anything could happen. They didn't want me to come to any harm"*, *The Namibian*, 12 February 2001.

68 The attempt to force the resignation of McNally and Ebrahim JJA appears to have been motivated by purely racist considerations: the two black judges on the Supreme Court, Sandura and Muchechetere JJA were not approached even though they had both proven to be

141. Chidyausiku J was sworn in as Acting Chief Justice on 13 March 2001 and his appointment was confirmed in August 2001[69].

142. As has been stated above, Chidyausiku CJ was appointed as Chief Justice ahead of numerous other, more senior judges and was the first appointment to the office made directly from the High Court Bench[70]. It has also been reported that Chidyausiku CJ is a very significant beneficiary of the Government's commercial farm allocation scheme[71].

143. As stated above, in July 2001, three High Court judges were appointed as judges of the Supreme Court[72]. These were Ziyambi, Cheda and Malaba JJA, of whom it has been reported that Cheda and Malaba JJA are also beneficiaries of the Government's commercial farm allocation scheme[73].

144. The terms under which this land is held are not publicly available. It is not an unreasonable assumption to make, in the absence of the public availability of such terms, that the land is held under a revocable licence[74]. These are certainly the terms under which the land-holding was explained by all those who discussed it with the visiting team in Harare.

145. The allocation of land to certain members of the Supreme Court has obvious implications for the independence of these judges in making rulings adverse to the Government's interests.

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as independent as their non-black colleagues and had endorsed every ruling against the Government on the land resettlement issue.

69 Prior to his permanent appointment, the Zimbabwe Law Society, in an open letter to the Judicial Service Commission, Chidyausiku J's legal acumen and personal integrity were questioned in strong terms; at the time of the appointment he was the High Court judge with the greatest number of decisions overturned by the Supreme Court: Karla Saller, *The Judicial Institution in Zimbabwe*, 2004, page 25.

70 Derek Matyszak in *Judicial Selection and Political Crisis in Zimbabwe (2000-2003)*, 2004: see earlier footnotes.

71 See earlier sections of this report for details.

72 In apparent breach of an assurance given by President Mugabe in March 2001 to a mission of international judges and lawyers from the International Bar Association (see the IBA's *Report of Zimbabwe Mission 2001*, para. 12.34).

73 See earlier sections of this report for details.

74 In any event, whatever the *formal* terms of the arrangement under which these judges hold land from the Government, *practically* they hold this land at the Government's pleasure.

146. This state of affairs is illustrative of the subversion of the Zimbabwean legal culture for political ends. A good touchstone demonstrating this may be found in the words of Mr Johannes Tomana, a Zimbabwean lawyer who regularly acts for Zanu-PF, and in particular for the Information Minister Jonathan Moyo. He was asked by the delegation how it could be right for judges to benefit themselves from land redistribution, through controversial legislation which they were being asked to rule was or was not constitutional. This should have been seen by any lawyer as the clearest example of a conflict of interest. After a long pause, Mr Tomana's reply was *"It is unfair to expect judges not to benefit from the liberation"*.

147. As stated in the Preface, land redistribution is important for this story, but not the essence of the story. The essence of the story is the distortion of the rule of law in order to frustrate the proper working of electoral democracy and thereby to maintain Zanu-PF in power.

148. Of the Supreme Court bench in March 2001, only Sandura JA remains. McNally JA retired in 2001, Muchechetere JA died in December 2001 and Ebrahim JA retired in 2002.

149. As at the date of this report, the Supreme Court bench comprises six members: Chidyausiku CJ and Sandura, Ziyambi, Cheda, Malaba and Gwaunza JJA.

(2) The High Court

150. Judges in the High Court fared little better in their treatment by the Government.

151. As has been mentioned earlier in this report, on his permanent appointment as Chief Justice in August 2001, Chidyausiku J was replaced as Judge President of the High Court by Garwe J who was not the most senior judge of the High Court eligible for such an appointment.

152. Since 2000, a number of High Court Judges have resigned from the bench: Bartlett, Blackie, Chatikobo, Gillespie, Devittie, Smith and Chihengo JJ[75].

153. In the case of Devittie J, he was one of the High Court judges assigned by Chidyausiku J (as he was then) together with Garwe and Ziyambi JJ (prior to the

[75] Legal Resources Foundation, *Justice in Zimbabwe*, 2002, page 10, footnote x, which records that Adam J was at the time of that Report on leave pending retirement; Chihengo J resigned in late February 2004. Chihengo J had earlier ruled that the *Zimbabwe Independent* could report allegations that the Minister for Information etc., Jonathan Moyo, was being sued in Kenya by the Ford Foundation for embezzlement of US$100,000.

latter's promotion to the Supreme Court) to hear the opposition's electoral petitions. Devittie J found in favour of the opposition in three of their electoral challenges. This prompted Joseph Chinotimba, the individual who had led the invasion of the Supreme Court in November 2000 and who had spoken to Gubbay CJ on 2 March 2001, the day of his taking a leave of absence, to state: *"Devittie is a judge for opposition political parties. The way Gubbay went is the same way Devittie is going to go"*[76]. Devittie J resigned shortly afterwards.

154. In the case of Chatikobo J., the judge was described by the Information Minister, Jonathan Moyo, as *"a night judge dispensing night justice"*.

155. Notwithstanding his retirement in July 2002, Fergus Blackie was arrested at his home on Friday 13 September 2002 at 4 o'clock in the morning. The charges eventually preferred were of defeating or obstructing the course of justice, alternatively contravening the *Prevention of Corruption* Act. The charges related to a judgment he had delivered in an appeal prior to his retirement concerning a woman called Tara White who was accused of theft. The appeal was due to be heard by Blackie J, as he then was, and Hlatswayo J as one of several appeals from magistrates' courts. On the day of the appeal, Hlatswayo J did not arrive and the Judge President, Garwe J, assigned Makarau J to sit with Blackie J. Since Makarau J had not had the opportunity properly to peruse the papers in the various appeals, Blackie J took the lead rôle during the hearings and also prepared the judgments for the relevant appeals including that of Ms White, whose appeal was allowed. There is some confusion as to whether Makarau J saw and agreed with the judgment delivered by Blackie J, but he received no complaint from Makarau J, or Garwe J or Chidyausiku CJ prior to his arrest[77].

156. Mr Blackie was held at Matapi police station in Mbare and, it is alleged, was deprived of food and of his medication for high blood pressure for thirty hours. He was made to share a cell with seven other detainees in conditions which were described by journalists and opposition political figures who had been to that police station as *"filthy beyond belief"*[78]. On the evening of his arrest, Mr Blackie's lawyers made an application for *habeas corpus* in the High Court. The Judge ordered that he be produced by the police the next morning. Mr Blackie was brought to court handcuffed in the back of an open police land rover. His lawyers

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76 *Eastern Star*, 4 May 2001.

77 Karla Saller, *The Judicial Institution in Zimbabwe*, 2004, page 43.

78 Legal Resources Foundation, *Justice in Zimbabwe*, 2002, page 10.

applied form his immediate release but the Judge, Hlatswayo J, dismissed the application.

157. On Monday 16 September 2002, Mr Blackie was taken to the magistrates' court where he was charged and released on bail. The particulars of the charge were that Blackie J had known Ms White and had for that reason caused the judgment in the matter to be written and handed down without the knowledge or agreement of Makarau J[79]. Charges were also preferred against Ms White and included an allegation of a sexual relationship with Blackie J (although no such allegation was made in court it seems). The charges against Mr Blackie and Ms White appeared at length in the Government controlled *Herald* on 13 September 2002, the day of his arrest. The report in the newspaper contained apparently verbatim quotations from letters and reports on the subject matter of the case written by the Judge President, Makarau J, the State's representative on the original appeal and the Chief Justice[80].

158. All charges were eventually withdrawn against Mr Blackie on 30 June 2003. It is unclear why the charges were preferred in the first place. The arrest on criminal charges of a former High Court judge is a serious matter. Any responsible prosecution authority ought only to pursue such charges in the presence of clear and cogent evidence supporting them which was lacking in this case as is amply demonstrated by the abandonment of the case against Mr Blackie. It was clear to those visiting Harare that no reasoned support could be offered for what happened to Justice Blackie.

159. It may be that Mr Blackie's real offence was to have found the Justice Minister guilty of contempt of court in his final decision prior to retirement in July 2002 and to have fined Mr Chinamasa Z$50,000 and sentenced him to three months imprisonment[81].

160. On 17 February 2003, before the charges against Mr Blackie were withdrawn, Paradza J, a serving High Court judge, was arrested. Such a move was unprecedented in Zimbabwe. Paradza J was arrested in his chambers immediately

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79 In his report to the IBA, Smalberger J's view was that Blackie J's reasons for allowing the appeal appeared to be convincing: Judge J W Smalberger, *In Re: (1) The State v. Mr Justice Fergus Blackie, (2) The State v. Mr Morgan Tsvangirai and two others: Report by Independent Observer to The Forum of Barristers and Advocates of the International Bar Association*, 18 February 2003.

80 Legal Resources Foundation, *Justice in Zimbabwe*, 2002, page 11.

81 The *Capital Radio* case: see Legal Resources Foundation, *Justice in Zimbabwe*, 2002, pages 25-30.

before he was due to hear an urgent application. He was taken to Borrowdale police station in Harare where he was held for twenty-four hours before being released on conditional bail. It has been alleged that the arresting officers told Paradza J that he was being arrested because he had handed down a series of anti-Government decisions although this has been denied in the Government controlled media[82]. It is clearly his own view of the matter that this was the reason for his arrest. Paradza J was eventually charged with obstructing the course of justice in that he had tried to influence another judge of the High Court, Maphios Cheda J to release the passport of a business associate who was remanded on bail at the time[83].

161. The arrest prompted ten High Court judges to put their names to a letter dated 5 March 2003 in which they condemned the way Paradza J had been arrested and in which they stated that the procedure set out in section 87 of the Constitution provided the only procedure for acting against a judge alleged to have been guilty of misconduct. The judges also stated that arrest of a serving judge by the police merely on suspicion of criminal conduct had the effect of intimidating judges and undermining the rule of law. One of the signatories to the letter was Kamocha J, who, it was reported, was expected to give evidence for the State in Paradza J's case[84].

162. The actions of the police were condemned in a joint statement issued on 5 March 2003 by the Chief Justices of Botswana, Malawi, Mauritius, Namibia, South Africa, Swaziland, Tanzania, Uganda and Zambia. The United Nation Special Rapporteur also condemned the police action in the terms set out earlier in this report.

163. Paradza J challenged the constitutionality of his arrest and detention by an application to the Supreme Court. In support of the application Paradza J alleged, *inter alia*, that the Judge President and the Chief Justice had prior knowledge of the intended unlawful arrest and had failed to take steps to prevent it happening or to warn him about it. He further alleged that the Judge President and Chief Justice acted at the direction of the Government. The application to the Supreme Court was accompanied by an application for the recusal of Chidyausiku CJ and

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82 Karla Saller, *The Judicial Institution in Zimbabwe*, 2004, page 44, fn. 131 & 132.

83 Zimbabwe Lawyers for Human Rights, *The inquiry into the conduct of High Court Judge Benjamin Paradza: A brief interim report on the trial observation*, 14 May 2004: http://www.kubutana.net/html/archive/legal/040514zlhr.asp?sector=LEGAL. We have been advised that this version of events is inaccurate in that the business associate was remanded on bail at the time of the alleged incident.

84 Karla Saller, *The Judicial Institution in Zimbabwe*, 2004, page 44, fn. 133.

Cheda JA, the brother of Maphios Cheda J, the judge involved in the allegations against Paradza J. After refusing the recusal application, the Supreme Court relented and the Chief Justice and Cheda JA withdrew from the case.

164. The case was heard on 16 September 2003 by a Supreme Court bench presided over by Sandura JA, the last remaining Supreme Court judge of the Gubbay CJ led bench of 2001. Paradza J contended that his arrest was not reasonably required to secure his attendance at trial and that the arrest was inconsistent with the provisions of section 87 of the Constitution which provided that a tribunal should be established in cases of alleged judicial misconduct. During the course of the hearing the State conceded that there was no reasonable basis for the arrest, imprisonment and remand of Paradza J. This concession was later repeated in substance to those who visited him by acting Attorney-General Patel. Sandura JA gave a judgment declaring the actions by the State unconstitutional and granted Paradza J his costs and returned his bail money to him[85].

165. The charges against Paradza J were withdrawn by the State and no further action was taken against him until February 2004 when it was announced in the *Government Gazette* that a tribunal comprising Supreme Court judges from Malawi (Mtambo JA), Zambia (Chirwa JA) and Tanzania (Mroso JA) had been appointed to inquire into the conduct of Paradza J. The tribunal convened on 5 April 2004 and submissions were made by Paradza J concerning, *inter alia*, the competency of the tribunal to undertake an inquiry into matters which, it was contended, properly fell to be dealt with under the procedures set out in section 87 of the Constitution, to which end an application to the Supreme Court under section 24 of the Constitution was to be made. After adjourning for several days to allow Paradza J to make various applications to the High Court and to the Supreme Court, the tribunal re-convened on 16 April 2004 and announced that it had decided to adjourn the hearing until all matters pending before the Supreme Court had been resolved[86].

166. Since 2000, a number of appointments have been made to the High Court Bench: Rita Makarau (former ZANU-PF non-constituency MP and member of the Government's Constitutional Commission); Annie Gowora (Rita Makarau's law firm partner); Ben Hlatswayo (former University of Zimbabwe lecturer and member of the Government's Constitutional Commission); Charles Hungwe

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85 Karla Saller, *The Judicial Institution in Zimbabwe*, 2004, page 46.

86 Zimbabwe Lawyers for Human Rights, *The inquiry into the conduct of High Court Judge Benjamin Paradza: A brief interim report on the trial observation*, 14 May 2004: http://www.kubutana.net/html/archive/legal/040514zlhr.asp?sector=LEGAL.

(former ZANLA combatant); Antonia Guvava (formerly Director of the Legal Advice Division in the Attorney-General's office and Chidyausiku CJ's niece); and George Chiweshe (formerly Judge-Advocate in the Zimbabwe Defence Forces).

(3) The Administrative Court

167. The Administrative Court has also been placed under extreme Governmental pressure recently. As mentioned above, the Administrative Court is a special court within the meaning of section 92 of the Constitution and has special jurisdiction conferred on it by statute.

168. The Administrative Court is the designated court of appeal under, *inter alia*, the *Access to Information and Protection of Privacy* Act 2002[87] (hereafter, "AIPPA"; a bill amending AIPPA was passed in June 2003). Section 93 of the AIPPA requires mass media services to submit applications for registration with the Media and Information Commission, a body created by that Act (hereafter, "the MIC"). After submission of an application, section 8(2) provides that pending consideration of the application by the MIC, the applicant is permitted to carry on the activities in question. Section 72 of the AIPPA makes it a criminal offence to carry on a mass media service without a valid registration.

169. After the entry into force of the AIPPA, Associated Newspapers of Zimbabwe (Private) Limited (hereafter, "ANZ"), the publishers, *inter alia*, of the *Daily News* newspaper (one of the few remaining genuinely independent newspapers in Zimbabwe) declined to apply for registration under the AIPPA and brought proceedings in the High Court and the Supreme Court to have certain parts of the AIPPA declared unconstitutional as infringing section 20 of the Constitution. These proceedings culminated in the decision of the Supreme Court in *Associated Newspapers of Zimbabwe (Private) Limited v. (1) The Minister for Information and Publicity in the President's Office; (2) Media and Information Commission; (3) The Attorney-General of Zimbabwe*, SC20/03, unrep. 11 September 2003, in which the Supreme Court[88] declined to address ANZ's application on the merits and dismissed the application for declaratory relief on the basis that ANZ, by not registering under the AIPPA had come to court with 'dirty hands' and was not entitled to relief for that reason alone.

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87 See generally, Karla Saller, *The Judicial Institution in Zimbabwe*, 2004, pages 66-74.

88 Chidyausiku CJ, Cheda, Ziyambi, Malaba and Gwaunza JJA. The Chief Justice gave the judgment of the Court.

170. This decision has been the subject of detailed and cogent criticism for, *inter alia*, the Court's misuse of the 'dirty hands' doctrine and the conduct of the proceedings generally[89]. The authority on the basis of which the Supreme Court decided the case (a decision of the English Court of Appeal in *F. Hoffman-La Roche AG and others v. S of S for Trade & Industry* [1975] AC 293) was not relied on by any party at the hearing and was referred to only by the Court. No opportunity was given for submissions to be made by counsel on the relevance of that authority to ANZ's application. This is self-evidently grossly unfair. The Court also disregarded earlier contrary Zimbabwean authority on the application of the 'dirty hands' doctrine (*Minister of Home Affairs v. Bickle* [1983] 1 ZLR 99; as well as authority from other jurisdictions to the contrary).

171. The effect of the decision of the Supreme Court was to require ANZ to comply with the provisions of the AIPPA before it could mount any challenge to the constitutionality of the particular provisions of the AIPPA to which ANZ took exception. This was the course followed by ANZ. It applied, by then out of time, to the MIC for registration and its application was refused. As mentioned above, under the AIPPA, the avenue of appeal from a decision of the MIC was to the Administrative Court. ANZ duly lodged an appeal with that court.

172. On 24 October 2003, ANZ's appeal was allowed by the Administrative Court, the judgment of the Court was given by Majuru P, who ordered the MIC to issue a certificate of registration to the *Daily News*, permitted the newspaper to continue publishing in the interim and declared to have been improperly constituted. The MIC appealed against this decision to the Supreme Court the effect of which was alleged to be to stay the order of the Administrative Court dated 24 October 2003.

173. On 12 November 2003, ANZ brought an application in the Administrative Court for an order that the judgment of that Court dated 24 October 2003 be enforced pending the determination of the MIC's appeal to the Supreme Court. In accordance with the rules of that Court, the case came before the same bench as determined the appeal from the MIC, presided over by Majuru P[90].

174. On 25 November 2003, the Government controlled *Herald* newspaper ran a story on Majuru P with the headline *"Judge under probe – Majuru accused of making pre-determined judgments in ANZ, MIC legal wrangle"*. The report cast serious doubt about the professional integrity of Majuru P alleging that he had made his mind

89 Professor Geoffrey Feltoe, *Whose hands were dirty? An analysis of the Supreme Court Judgment in the ANZ case*, 2004.

90 Karla Saller, *The Judicial Institution in Zimbabwe*, 2004, pages 49-50.

up about the outcome of ANZ's application prior to the hearing and further reporting that Majuru P was under investigation by a number of State agencies for improper conduct. Before an application was made to him by the State, Majuru P recused himself from the case.

175. Later in November 2003 Majuru P and his family fled Zimbabwe for South Africa. Majuru P resigned his office by fax in January 2004. In the first newspaper interview given by Mr Majuru P after his departure from Zimbabwe he is reported to have made the following statements which we quote in full[91]:

> *'Former Administrative Court President Michael Majuru has accused Justice Minister Patrick Chinamasa of interference in the protracted legal wrangle over the closure of the Daily News and Daily News on Sunday.*
> *Majuru, who fled to South Africa last year after being hounded by state security agents and politicians, claimed Chinamasa intervened when he was dealing with the Associated Newspapers of Zimbabwe case.*
> *Contacted for comment yesterday, Chinamasa said he was preparing an appropriate response to Majuru's claims but said it would not be ready by the time of going to press. The minister threatened to sue the Zimbabwe Independent over Majuru's story.*
> *'I thought I should just remind you that it is now a year after he [Majuru] resigned' Chinamasa said. 'You should ask yourself why he is saying this after a year. I do not know what his motive is but you should be prepared to be sued if you publish the story'.*
>
> *In a statement sent to the Independent yesterday, Majuru said Chinamasa tried to dragoon him into making a ruling in favour of the Media and Information Commission (MIC).*
> *He also claimed prominent businessman Enock Kamushinda offered him a farm to influence him to rule against the ANZ.*
> *Majuru said Chinamasa entered the fray after the ANZ had appealed to the Administrative Court against the MIC's refusal to issue the newspaper group with a licence. This followed a Supreme court ruling which ordered ANZ to first seek registration before its constitutional challenge against the Access to Information and Protection of Privacy Act could be heard.*
> *'Chinamasa at this point called a fellow judge that I was working with to his offices. He instructed my colleague on the bench that the application for an urgent appeal hearing was to be refused and that the appeal should only be heard towards the end of January or in early February [2004]' Majuru said.*
> *'The reasons given by Chinamasa were that the paper [Daily News] was British-funded and therefore promoting British interests'*
> *Majuru said Chinamasa also claimed the Daily News would interfere with, and therefore jeopardise, ongoing talks between Zanu PF and the opposition Movement for Democratic Change (MDC) which were said to have reached a 'delicate stage'*
> *'As proof of the delicate stage the talks had reached, the minister showed this fellow judge documents on some of the constitutional amendments allegedly agreed upon between the ruling party and the members of the opposition as aforesaid' Majuru said.*
> *'The instructions of the minister were duly conveyed to me by my fellow judge. As you will recall, I presided over the application for an urgent appeal and granted it, in spite of the pressure from the minister.'*
> *Majuru said 'Kamushinda, who was the chairman of the Metropolitan Bank and Zimpapers, 'invited' me to his offices though an intelligence officer'. He said Kamushinda promised him a farm if he ruled against the ANZ, saying other judges had already been given land. But Majuru said he refused.*
> *'On a Thursday evening at about 9 pm when I was still in the office writing the judgment, minister Chinamasa phoned me from Bulawayo where he was attending a pre-budget seminar' Majuru recalled.*
> *'He demanded to know what my decision was going to be in the matter. He also insisted on knowing whether my decision was not "going to get me into trouble".'*
> *Majuru said he advised Chinamasa that he was almost through with his ruling which would go against the MIC. He said Chinamasa took him to task over the issue, ordering him to give his reasons for the*

[91] The *Zimbabwe Independent*, 23 July 2004.

judgment. He said the minister and intelligence agents continued to put pressure on him, leading to his departure to South Africa."

176. After Majuru P had recused himself from hearing the ANZ application, the case was taken over by Nare P who delivered judgment on 19 December 2003 allowing ANZ's application to continue publishing the *Daily News* pending determination of the MIC's appeal to the Supreme Court. Nare P received a death threat and requested police protection before his judgment was delivered, the threat read: *"any such bad judgment by you tomorrow will result in serious suffering by you personally and members of your family. Take this as a mere threat at your own peril. Signed – War Liberators and sons and daughters of the soil"*[92].

177. On the morning before Nare P delivered his judgment, the Government controlled *Herald* ran a story on the front page under the headline *"Government to resist backdoor approach in ANZ case – Moyo"*[93]. The story contained an attack on Nare P alleging that he was using backdoor methods to administer justice and that he was being political in his dealings. It was alleged that Nare P had written to the Registrar of the Administrative Court in Harare echoing almost word for word the claims of the ANZ lawyers. The Minister of Information was quoted as saying:

> *"We are seriously perturbed by this development which in our respectful and considered view is outrageously political … The reopening of the same matter relying on the same facts and in the same court in order to get a new and different judgment is scandalous and totally unacceptable in terms of the law … This is as clear as daylight and any backdoor approach is clearly political and will be resisted by all available legal means in the interest of upholding the rule of law."*

178. This statement by the Minister of Information misrepresents the nature of the application before Nare P, which was simply that the Court's order of 24 October 2003 should be enforced prior to the hearing of the MIC's appeal from that order. The police did not enforce his order that the *Daily News* be permitted to publish pending determination of the MIC's appeal and actively prevented the newspaper from being published. The newspaper remains out of action at the date of publication of this report.

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92 Arnold Tsunga, *The Legal Profession and the Judiciary as human rights defenders in Zimbabwe in 2003*, 13 July 2004.

93 Arnold Tsunga, *The Legal Profession and the Judiciary as human rights defenders in Zimbabwe in 2003*, 13 July 2004.

(4) Magistrates' Courts

179. There have been credible reports of intimidation of and assaults on magistrates as well as reports of a dramatic decline in the morale of the magistracy.

180. As mentioned earlier in this report, the magistracy is part of the public service which makes it particularly vulnerable to intimidation, especially in smaller population centres which lack the infrastructure for reporting and relaying to the public information concerning such intimidation. It has been reported that in smaller population centres the magistrates' general tendency is to deal with politically sensitive cases by remitting them to other courts[94]. Magistrates hear the vast majority of criminal (and some civil) cases and have come under increasing political pressure[95].

181. The Justice Minister has refused to provide magistrates with police protection despite threats to their safety and magistrates have been transferred from their districts at the request of 'war veterans'. In August 2001, a large crowd, reportedly of ZANU-PF supporters, demonstrated for three days against Mr Sikhumbuzo Nyathi, a magistrate in Karoi, after he had bailed 106 farm workers on charges of public violence in attempting to evict 'war veterans' from land the latter had occupied. Mr Nyathi was reportedly transferred to Kadoma following Ministerial intervention and forbidden to speak to the press[96].

182. In September 2001, Bindura magistrate Mr Tito Feyi Gweshuruo sentenced 17 ZANU-PF supporters each to three years' imprisonment for public violence offences associated with a July 2001 by-election in Bindura. ZANU-PF supporters held 'an all-night vigil' outside his home and intimidated his wife[97].

183. In November 2001, ZANU-PF supporters assaulted Mr Douglas Chikwekwe, a senior magistrate in Gokwe, after he convicted a ruling party supporter on a charge of robbery and sentenced him to eight years imprisonment. The magistrate

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94 Zimbabwe Human Rights NGO Forum, *Enforcing the Rule of Law in Zimbabwe*, September 2001, page 45.

95 US State Department, *Country Reports on Human Rights Practices 2002 – Zimbabwe*, 31 March 2003, page 10.

96 *The Daily News*, 28 August 2001; Zimbabwe Human Rights NGO Forum, *Enforcing the Rule of Law in Zimbabwe*, September 2001, page 46; Legal Resources Foundation, *Justice in Zimbabwe*, 2002, page 11.

97 The *Standard*, 9 September 2001; Zimbabwe Human Rights NGO Forum, *Enforcing the Rule of Law in Zimbabwe*, September 2001, page 46; Legal Resources Foundation, *Justice in Zimbabwe*, 2002, page 12.

subsequently fled from his office and, after ZANU-PF supporters attacked his home over the weekend, destroying furniture and breaking windows, he fled from the area[98].

184. In January 2002, Mr Godfrey Macheyo, a magistrate, sentenced 'war veteran' leader Joseph Chinotimba (see earlier sections of this report dealing with the invasion of the Supreme Court) to an effective term of two months imprisonment for illegal possession of a firearm. A crowd of about 200 ZANU-PF supporters who were present in court threatened to 'deal with' the magistrate after he pronounced sentence[99].

185. On 16 August 2002, a crowd of 150 to 200 ZANU-PF supporters and 'war veterans' dragged Chipinge presiding magistrate Mr Walter Chikwanha out of his court and beat him after he had granted bail to five MDC officials accused of burning two Government tractors in Chipinge. Mr Chikwanha sustained broken ribs and a fractured collarbone. The police were present at the time of the assault and took no action. They then paraded him round Chipinge forcing him to chant ZANU-PF slogans. Several other court officials were assaulted and one of these required hospital treatment. This incident led to magistrates and prosecutors in Manicaland abandoning work in protest. Newspaper reports quoted a prosecutor as saying[100]: *"This is unheard of. It is a total breakdown of the rule of law in the country and we cannot be seen to condone it. How on earth can people just walk into a courtroom, drag the presiding magistrate out and assault him?".*

186. On 28 August 2002, Mr Godfrey Gwaka, the Zaka district resident magistrate, was stabbed in the chest and back while in the company of another court official. The court official identified one of the two assailants whom the police arrested. During the March 2002 Presidential election campaign, Mr Gwaka had heard cases involving political violence and deaths in Zaka. Observers intimated that Gwaka had been assaulted for remarks made and judgments given in favour of MDC supporters in those cases[101].

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98 *Cape Times*, 12 November 2001; Legal Resources Foundation, *Justice in Zimbabwe*, 2002, page 12.

99 The *Daily News*, 16 January 2002; Legal Resources Foundation, *Justice in Zimbabwe*, 2002, page 12.

100 The *Daily News*, 20 August 2002; US State Department, *Country Reports on Human Rights Practices 2002 – Zimbabwe*, 31 March 2003, page 10; Legal Resources Foundation, *Justice in Zimbabwe*, 2002, page 12.

101 US State Department, *Country Reports on Human Rights Practices 2002 – Zimbabwe*, 31 March 2003, page 10; Legal Resources Foundation, *Justice in Zimbabwe*, 2002, page 15.

187. In June 2003, it was reported that a serious shortage of magistrates had developed which had contributed to bringing the functions of the courts to a near halt. The backlog of work for magistrates was by that time approximately 60,000 cases. The backlog in Harare alone stood at 3,200 criminal cases and 12,000 civil cases. By April 2003, there were vacancies for 59 magistrates' posts[102].

188. By February 2004, the backlog of cases had not improved. Chief Magistrate Samuel Kudya was reported as stating that persons accused of crimes were spending up to four years on remand in custody awaiting trial and that there were 60 vacancies for magistrates' posts[103].

(5) The system for the administration of the courts

189. As mentioned above, like magistrates, court administrators are part of the public service. As such, since about 2000, the court service has undergone a process of politicisation. From 1 January 2000, SI 1/2000 prohibited civil servants from participating in party political activity. The Speaker of Parliament, Emmerson Mnangagwa, was reported to have told civil servants: *"You are being paid by a Zanu-PF Government to effectively implement its policies for the benefit of the people. But if you decide to belong to an opposition political party, you cannot discharge your duties professionally"*[104].

190. Governmental influence in the justice system has recently extended into the administration of the courts. Of great significance has been the change in the method of allocating cases to judges in the High Court. Previously, cases had been assigned by the Registrar of the Court on a roster basis with regard to the special expertise of the various High Court judges available at any given time. In 2000, Chidyausiku J, as Judge President of the High Court, altered this procedure and took charge of allocating cases himself, a system which continued after Chidyausiku J was appointed Chief Justice and Garwe J was appointed Judge President. The outcome of this change in practice was that cases with important political implications were allocated to judges considered sympathetic to the Government[105]. This is a highly significant development so far as the legitimacy

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102 UN Office for the coordination of humanitarian affairs, IRIN news report, 23 June 2003.

103 UN Office for the coordination of humanitarian affairs, IRIN news report, 5 February 2004.

104 *The Herald*, 2 October 2000; Zimbabwe Human Rights NGO Forum, *Enforcing the Rule of Law in Zimbabwe*, September 2001, pages 27-28.

105 Derek Matyszak, *Judicial Selection and Political Crisis in Zimbabwe (2000-2003)*, 2004; the *Daily News*, 20 July 2004.

of the Zimbabwean legal system is concerned. The importance of control of listing and case allocation was emphasised by many of those visited in Harare.

191. A further intrusion into the administration of the courts by the Government was made in the listing of the electoral petition cases brought by the opposition parties in the wake of the Parliamentary elections in 2000. After the petitions were lodged with the High Court in July 2000, it was the duty of the Registrar of the High Court, Jacob Manzunzu[106], and the parties to ensure that the petitions were disposed of as soon as possible[107]. This did not happen. It seems that the petition cases were not immediately allocated to judges for hearing as they should have been. As a result of this delay, hearings were scheduled to commence six months later in January 2001. The President purported to oust the jurisdiction of the courts to hear the electoral petitions by the Notice made under section 158 of the Electoral Act referred to in an earlier section of this report. The Supreme Court's judgment finding the Notice unconstitutional was delivered at the end of January 2001, beyond the date by which hearings ought to have commenced. The petitions were finally allocated by Chidyausiku J as Judge President and (by then) Acting Chief Justice, for hearing in 2001 by three High Court judges: Devittie, Garwe and Ziyambi JJ[108].

192. Hearings commenced and some petitions were dealt with promptly, but the majority were not, for example, the Mberengwa West election petition was heard in July 2001, over a year after the election, and the court's order dismissing the petition was made on 6 March 2002. Appeals to the Supreme Court have also encountered delays. The way in which the Parliamentary electoral petition cases have been dealt with enabled the Justice Minister to speculate, in July 2004, that if all the petitions had not been heard and determined by the time of the next Parliamentary elections in June 2005, they would all be automatically dropped as Parliament would have been dissolved. As at July 2004, 30 cases remained unresolved, some four years after the election[109]. As far as we have been able to ascertain, this remains the position at the date of publication.

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106 Karla Saller, *The Judicial Institution in Zimbabwe*, 2004, at page 52, refers to reports of corruption charges levelled against Mr Manzunzu in respect of alleged profiteering from his position in acquiring properties auctioned by his office.

107 Section 31 of the *Electoral (Applications, Appeals and Petitions)* Rules 1994 (SI 74A of 1995).

108 Zimbabwe Human Rights NGO Forum, *Enforcing the Rule of Law in Zimbabwe*, September 2001, page 44; Karla Saller, *The Judicial Institution in Zimbabwe*, 2004, page 38; Legal Resources Foundation, *Justice in Zimbabwe*, 2002, page 71 (which refers to four judges being appointed).

109 Report in the *Zimbabwe Situation*, 29 July 2004, by a staff reporter http://www.zimbabwesituation.com/jul29a_2004.html.

193. This development is crucial in understanding the relationship between judicial actions and political power. It seems clear that had even a significant minority of the petitions been heard, or heard fairly, the Parliamentary majority of Zanu-PF would have been reversed.

194. A further example of Governmental influence in the listing of cases is provided by the Presidential electoral petition case[110]. In these proceedings, Garwe JP considered it necessary on 15 January 2003 to order the Registrar to set down the matter for hearing. On an urgent application by the MDC for enrolment of the matter, the Registrar took the exceptional step of opposing the application instead of complying with Garwe JP's order. In February 2003, an official of the Registrar's office in Harare stated that the matter would be heard in April 2003 (more than a year after the election). A further application was made by the MDC in June 2003 which the Registrar opposed and at which he was represented by the same individuals as the respondents. On 4 July 2003, Hlatswayo J ordered that the matter be set down for hearing in accordance with the order of Garwe JP. The matter was eventually set down for hearing in November 2003[111]. Hlatswayo J heard the matter over two days in early November 2003. On 10 June 2004, Hlatswayo J dismissed the Presidential electoral petition without giving reasons[112].

195. It has also been recently reported that the President's Office must now approve urgent applications before a judge will be allocated by the High Court to hear the application. Papers presented to the High Court as urgent applications are taken across the road to the President's Office for 'clearance'[113]. This new procedure, if it becomes established, has grave implication for the rule of law in Zimbabwe.

196. Finally, the position of sheriffs and messengers of the court has been affected by recent circumstances. As early as 1999, Harare's acting messenger of the court referred to the difficulties he encountered in performing his duties and attributed this to *"flagrant disregard of the law"* and a *"loss of respect for the courts"*. The police repeatedly failed to protect messengers of court in the performance of their duties.

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110 For a clear exposition of these procedurally complicated proceedings see: Karla Saller, *The Judicial Institution in Zimbabwe*, 2004, pages 34-37 and 39-40.

111 Karla Saller, *The Judicial Institution in Zimbabwe*, 2004, pages 39 and 52.

112 *The Witness*, 11 June 2004; IBA, *Legal Brief*, 11 June 2004.

113 *Zimbabwe Independent*, 8 April 2004, Beatrice Mtetwa, *Judicial system under siege*; at our meeting with Ms Mtetwa on 16 April 2004, we were told that, at that stage, access to the High Court had to be cleared by Garwe JP.

In 2001, a group called the Affirmative Action Group, with the assistance of 'war veterans' attempted to harass the white Deputy Sheriffs of both Bulawayo and Mutare into early retirement[114].

(6) The office of the Attorney-General and public prosecutors

197. It has already been mentioned that in 2000, Patrick Chinamasa was appointed Justice Minister and was succeeded as Attorney-General by Andrew Chigovera. Whilst Attorney-General, Mr Chinamasa was widely considered to have supported the cause of ZANU-PF whilst in office. Mr Chigovera resigned as Attorney-General in April 2003. One commentator has stated: *"The move was generally interpreted as a capitulation to government pressure after repeated attacks by the government, which felt that his office was not prosecuting opposition members vigorously enough"*[115].

198. There have been concerns expressed regarding selective prosecution by the Attorney-General's office where cases against ZANU-PF supporters or sympathisers have been discontinued or not actively pursued for no apparent good reason or where cases of criminal activity have not been investigated at all and the Attorney-General's office has failed to require the Police Commissioner to investigate that activity pursuant to section 76(4a) of the Constitution.

199. An example of the former is provided by the murders in Buhera of Mr Tichaona Chiminya and Ms Talent Mabika on 15 April 2000. The killers, one of whom was alleged to be a Central Intelligence Organisation operative named Joseph Mwale, were known to the police. The victims were burnt to death in an attack which was witnessed by a number of people and the police were at the time parked less than 100 metres from the scene. Neither Mwale nor his accomplice, Kainos Zimunya, were arrested by the police, notwithstanding that Devittie J referred to the matter to the Attorney-General's office after evidence of the deaths had been led in an election petition hearing in the High Court. Eventually, the Attorney-General ordered an investigation in July 2001, over a year after the deaths. The investigation has yielded no prosecution of the perpetrators of these murders[116].

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114 Zimbabwe Human Rights NGO Forum, *Enforcing the Rule of Law in Zimbabwe*, September 2001, page 46.

115 Karla Saller, *The Judicial Institution in Zimbabwe*, 2004, page 86; this view was also expressed to us by Sternford Moyo in his meeting with us on 15 April 2004 who stated that Mr Chigovera had been criticised for being *"soft on opposition elements"*; but see Zimbabwe Human Rights NGO Forum, *Enforcing the Rule of Law in Zimbabwe*, September 2001, page 36, for an account with a different emphasis.

116 Legal Resources Foundation, *Justice in Zimbabwe*, 2002, pages 18-21. We have, however, been informed that arrests relating to these murders have been made.

200. An example of the latter is provided by the invasion of the Supreme Court led by Joseph Chinotimba in November 2000. The decision not to order an investigation into the invasion of the Supreme Court was raised with Mr Chigovera, then the Attorney-General, by the IBA Mission in 2001. The IBA Mission recorded the Attorney-General's justification for inaction that as he had seen only press reports and had received no official complaint he was powerless to do anything and described it as *"extraordinary"*[117].

201. Apart from State inspired influence effecting the investigation and prosecution of offences, the Attorney-General's office has also come under attack from the Government. In December 2003, the Police Commissioner published a report which contained passages which were highly critical of the prosecution service[118].

202. There have also been cases of corruption of prosecutors reported. In one case, a prosecutor was jailed for four years after being convicted of soliciting a bribe of Z$50,000 to drop charges against two accused. There have been reports of 'missing' police dockets in Harare Magistrates' Court[119].

203. It has also been reported that *"the past two years have seen the Attorney-General's office depleted of independently minded prosecutors, mainly through intimidation leading to large scale resignations"*[120]. A senior prosecutor at Mutare Magistrates' Court, Levinson Chikafu, complained that 'war veterans' threatened him in his office after a group of opposition supporters were granted bail.

204. Saller sums up the position as follows[121]:

> *"There can be no doubt that the attorney-general's office is facing very real challenges. These include a high staff turnover, the pressure of political interference, and scarcity of resources. Police are also using arrest and detention as tools of immediate repression rather than with a view to trial and conviction. Prosecutors are faced daily with the task of defending trumped-up charges, the absence of evidence and policing that is hampered by the scarcity of resources even when it is not politically motivated."*

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117 IBA, *Report of Zimbabwe Mission 2001*, para. 9.9.

118 Karla Saller, *The Judicial Institution in Zimbabwe*, 2004, page 87.

119 Zimbabwe Human Rights NGO Forum, *Enforcing the Rule of Law in Zimbabwe*, September 2001, page 36

120 Karla Saller, *The Judicial Institution in Zimbabwe*, 2004, page 87.

121 Karla Saller, *The Judicial Institution in Zimbabwe*, 2004, page 87.

205. Saller's conclusions regarding scarcity of resources were confirmed to us by Acting Attorney-General Bharat Patel in our meeting with him on 15 April 2004 when he complained of gross under-manning in the prosecution service and in him own office. The Acting Attorney-General informed us that of posts for 240 prosecutors nationally, only 180 were filled. We were in no doubt as to the pressure he was under from his political masters.

(7) The legal profession

206. Members of the legal profession engaged in human rights law or cases touching upon politically sensitive areas have been under profound pressure in Zimbabwe in recent years.

207. The IBA Mission was able to report in April 2001 that, with respect to interference with lawyers, *"The Delegation is pleased to report that, with certain exceptions, there is no evidence of such interference. The lawyers of the country are able to go about their business which include, for some, representing white farmers"*[122]. Regrettably, the situation has deteriorated dramatically since that time.

208. On 7 April 2001, Tawanda Hondora, a lawyer and chairman of Zimbabwe Lawyers for Human Rights was attacked by ZANU-PF supporters in full view of the police, who did not intervene. Mr Hondora had travelled to a rural area to investigate allegations of witness intimidation in the electoral challenge cases and on his arrival observed a witness being assaulted by ZANU-PF supporters. The supporters saw Mr Hondora and assaulted him. He was taken to the police station where he was further assaulted in the presence of an Assistant Inspector Majora. Two other lawyers arrived at the police station to secure Mr Hondora's release and were detained by Assistant Inspector Majora[123].

209. On 28 April 2002, two Mutare lawyers who had gone to represent opposition supporters were arrested for allegedly petrol-bombing the house of a Central Intelligence Organisation operative, Joseph Mwale (see the previous section of this report). The lawyers are reported to have stated: "It was a nightmare. They labelled us terrorists and threatened to physically harm us if we pursued the case.

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122 IBA, *Report of Zimbabwe Mission 2001*, para. 11.11, although the Delegation also made the point that lawyers in rural areas had been the subject of harassment and intimidation (para. 11.15).

123 Legal Resources Foundation, *Justice in Zimbabwe*, 2002, pages 15-16.

I will never go back there. I will never return to that police station on any case involving Mwale. He is bad news"[124].

210. On 3 June 2002, ten policemen searched the offices of the Zimbabwe Law Society and arrested its Secretary, Wilbert Mapombere. Later that day Sternford Moyo, President of the Law Society, was also arrested by the police at the law firm where Mr Moyo practised law. Mr Moyo was taken to Harare Central Police Station and interviewed. Mr Moyo was shown two letters which formed the basis of the allegations against him and Mr Mapombere. One letter purported to be on Law Society headed notepaper, was addressed to the British High Commission and purported to have been signed by Mr Mapombere. The second letter purported to be from Mr Moyo to the Secretary-General of the MDC. The letters were crude forgeries.

211. Mr Moyo was also taken to a National Park by police officers whilst under arrest. He was taken on foot and interrogated out of sight of the road in the midst of bushes. It was suggested he had conspired to subvert the National Government. This represented conduct of an extremely intimidating kind.

212. Mr Moyo and Mr Mapombere were released shortly before midnight on 3 June. Shortly after that, a senior police officer appeared at Mr Moyo's house to re-arrest him. During the course of 3 June, lawyers representing Mr Moyo and Mr Mapombere applied to the High Court for an order that they be released from police detention. Garwe J heard the application. Eventually the judge issued a writ of *habeas corpus* ordering that Mr Moyo and Mr Mapombere be produced before the court on the morning of 4 June. No charges against them were ever pursued[125].

213. Harassment and intimidation of and assaults on lawyers continued throughout 2003. A few examples from the numerous recorded cases illustrate the difficulties facing lawyers in Zimbabwe. In January 2003, Gabriel Shumba was arrested and detained whilst trying to represent his client the MDC MP Job Sikhala. Mr Shumba was tortured by the police and fled the country[126].

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124 Legal Resources Foundation, *Justice in Zimbabwe*, 2002, page 16.

125 Legal Resources Foundation, *Justice in Zimbabwe*, 2002, pages 76-84. Charges against Mr Moyo and Mr Mapombere were preferred, but were withdrawn, we understand, in 2003.

126 Arnold Tsunga, *The Legal Profession and the Judiciary as human rights defenders in Zimbabwe in 2003*, 13 July 2004; see also Mr Shumba's evidence to the US Congress, House Committee on International Relations, 10 March 2004, http://www.house.gov/international_relations/108/shu031004.htm.

214. In March 2003, Gugulethu Moyo, a lawyer instructed by ANZ, and a colleague Alec Muchadehama, were seriously assaulted in separate incidents at Glenview police station in Harare and arrested and detained for 48 hours whilst attempting to represent their clients. Ms Moyo required hospital treatment[127].

215. On 12 October 2003, Beatrice Mtetwa, a highly regarded human rights lawyer who was until 1989 a Government prosecutor and who then entered private practice, was assaulted by a member of the police after having reported an attempted carjacking. Ms Mtetwa was arrested and assaulted on route to Borrowdale police station[128].

216. We met with Sternford Moyo on 14 April 2004. Mr Moyo confirmed to us that pressure on the legal profession paralleled pressure on the higher judiciary. Mr Moyo also confirmed to us that since about 2001 the Government had actively discriminated against lawyers who were or were perceived to be opponents of the Government in the placing of Government work (a process referred to as "listing"). Mr Moyo considered that this was a clear attempt by the Government to destroy the independence of the legal profession. Since this policy was initiated, Mr Moyo's firm had received no instructions from the Government or from any major agency of the Government. Mr Moyo stated that the impact of this policy on his firm had been limited, but that other firms had experienced a considerable impact on their revenues.

217. The use by the Government of listing to discriminate against lawyers who were or were perceived to be opponents of the Government was further confirmed to us by Beatrice Mtetwa. Ms Mtetwa was the lawyer for the Zimbabwe Broadcasting Corporation from 1991 until 2000, when she was listed as an unacceptable lawyer since when she has received no further work from ZBC.

218. That the legal profession was under extreme pressure was confirmed to us at a meeting we held on 16 April 2004 at the Advocates Library in central Harare. We met members of the Harare Bar of various ages, colours, male and female. We were told that there had been no prosecutions in relation to the deaths of MDC opposition election workers save for one. We were given an example of intimidation of advocates where an advocate had been harassed at home by police officers trying to enter his house within hours of the advocate having achieved

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127 The *Daily News*, 8 April 2003; Arnold Tsunga, *The Legal Profession and the Judiciary as human rights defenders in Zimbabwe in 2003*, 13 July 2004.

128 Arnold Tsunga, *The Legal Profession and the Judiciary as human rights defenders in Zimbabwe in 2003*, 13 July 2004.

the dismissal of a charge against a client. We undertook to those whom we met not to publish all that was said to us or to ascribe to individuals particular statements and so are unable to expand upon the brief summary of what was said set out in this paragraph. This itself speaks powerfully to the fear under which certain lawyers practice in Zimbabwe.

Conclusion

The legal system in Zimbabwe remains in form a civilised and developed, if under-resourced, legal system. In substance, it has been distorted and subverted for the illegitimate maintenance of political power. Many of those within the system have been driven out by pressure of one kind or another. Some of those remaining in the country and working within the system display courage and integrity of the highest order, in their efforts to act properly as judges, magistrates or lawyers.

Bibliography

1. *Breaking the Silence – Building True Peace*, Catholic Commission for Justice and Peace in Zimbabwe, April 1999

2. *The Judiciary – Promoting Justice?*, National Constitutional Assembly, 1999

3. *The onslaught against democracy and rule of law in Zimbabwe*, Prof. G. Feltoe, 2001

4. *Report of the Special Rapporteur on the independence of judges and lawyers*, United Nations, Economic and Social Council, E/CN.4/2001/65, Dato'Param Cumaraswamy, 1 February 2001

5. *Report on Zimbabwe Mission 2001*, International Bar Association, 23 April 2001

6. *Enforcing the Rule of Law in Zimbabwe*, Zimbabwe Human Rights NGO Forum, September 2001

7. *Land, Housing and Property Rights in Zimbabwe*, Centre for Housing Rights and Evictions, C.O.H.R.E., Geneva, 2001

8. *Report of the Special Rapporteur on the independence of judges and lawyers*, United Nations, Economic and Social Council, E/CN.4/2002/72, Dato'Param Cumaraswamy, 11 February 2002

9. *Zimbabwe – The toll of impunity*, Amnesty International, 25 June 2002

10. *The Challenge of Independence*, Hon. Anthony Gubbay, World Bar Conference, 28 June 2002

11. *Executive Summary of the Report of the Fact-finding Mission to Zimbabwe*, African Commission on Human and Peoples Rights, June 2002

12. *Justice in Zimbabwe*, Legal Resources Foundation, 30 September 2002

13. *Degrees in Violence*, David Blair, 2002

14. *Report by Independent Observer to the I.B.A.*, Mr Justice Friedman, 15 January 2003

15. *Report of the Special Rapporteur on the independence of judges and lawyers*, United Nations, Economic and Social Council, E/CN.4/2003/65/Add.1, Dato'Param Cumaraswamy, 23 February 2003

16. *Secretary-General's Report to the Commonwealth Chairperson's Committee on Zimbabwe*, Commonwealth, March 2003

17. *Associated Newspapers of Zimbabwe (Private) Ltd. v. The Minister of State for Information and Publicity in the President's Office and others*, Supreme Court of Zimbabwe, 11 September 2003

18. *Our Votes, Our Guns*, Martin Meredith, 2003

19. *The Battle for Zimbabwe*, Geoff Hill, 2003

20. *The Case of Henry Dowa*, Redress Trust, January 2004

21. *Evaluation Mission – 2003: systematic repression of human rights defenders in Zimbabwe*, The Observatory for the Protection of Human Rights Defenders, 2 February 2004

22. *The State v. Masera and others*, High Court of Zimbabwe, Mungwira J., 2 March 2004

23. *Report of the Special Rapporteur on the independence of judges and lawyers*, United Nations, Economic and Social Council, E/CN.4/2004/60/Add.1, Leandro Despouy, 4 March 2004

24. *Zimbabwe: From Impunity to Accountability*, Redress Trust, March 2004

25. *Playing with Fire*, The Zimbabwe Institute, March 2004

26. *Interim Report on trial observations: Inquiry into the conduct of Paradza J.*, Zimbabwe Lawyers for Human Rights, 14 May 2004

27. *Zimbabwe Country Report*, Home Office, Country Information & Policy Unit, April 2004

28. *The Legal Profession and the Judiciary as human rights defenders in Zimbabwe in 2003*, Arnold Tsunga, 1 July 2004

29. *The Judicial Institution in Zimbabwe*, Karla Saller, 2004

30. Various news features reported by I.R.I.N. news, U.N. Office for the Coordination of Humanitarian Affairs: *Zimbabwe – Election Result still in the balance*, 5 November 2003; *Zimbabwe – Judicial system under strain*, 23 June 2003; *Zimbabwe – Overcrowding leads to prison crisis*, 5 February 2004; *Opposition crys* [sic] *foul over legal delays to electoral disputes*, 23 June 2004

31. U.S. Department of State: *Statement on Election Results in Zimbabwe*, S. of S. Colin Powell, 13 March 2002; *Country Report on Human Rights Practices 1999*, 23 February 2003; *On the record briefing: the situation in Zimbabwe and steps toward implementing U.S. sanctions*, 12 March 2003; *Zimbabwe's Manmade Crisis*, 12 March 2003; *Country Report on Human Rights Practices 2002*, 31 March 2003; *Background Note: Zimbabwe*, November 2003; *Supporting Human Rights and Democracy: the U.S. Record 2003-2004*, 17 May 2004

32. *Where we have hope*, Andrew Meldrum, 2004

33. *Confirmed: VIPs Allocations – The Landless Poor?*, Lists published by the Ministry of Lands, various dates, 2004

34. *Whose hands were dirty? An analysis of the Supreme Court Judgment in the ANZ case*, Prof. G. Feltoe, 2004

35. *Judicial Selection and Political Crisis in Zimbabwe (2000-2003)*, Derek Matyszak, 2004

36. *International Covenant on Civil and Political Rights*, U.N., adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entered into force 23 March 1976

37. *The Constitution of Zimbabwe*, 1981

38. *Basic Principles on the Independence of the Judiciary*, U.N., 1985

39. *African [Banjul] Charter on Human and Peoples' Rights*, O.A.U., adopted June 1981, entered into force 21 October 1986

40. *Basic Principles on the Role of Lawyers*, U.N., 1990

41. *The Harare Declaration*, C.H.O.G., 1991

42. *The Millbrook Commonwealth Action Programme on the Harare Declaration*, C.H.O.G., 1995

43. *The Latimer House Guidelines for the Commonwealth*, C.H.O.G., June 1998

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