



enough

The project to end genocide and crimes against humanity



SEEKING JUSTICE FOR ZIMBABWE

A Case for Accountability Against
Robert Mugabe and Others | 1981–2008

PREPARED BY

Professor David M. Crane | Sir Desmond De Silva, QC | Professor Tom Zwart

With the assistance of Anton Altman, Brianna McGonigle, Gentian Zyberi, and others



TABLE OF CONTENTS

- Executive Summary 01
- Mapping the Conflict 04
- Jurisdiction..... 09
- The Crimes 12
- Procedural Options 22

EXECUTIVE SUMMARY

Legal options available in holding accountable President Robert Mugabe for possible international crimes

For almost three decades Robert Mugabe has ruled Zimbabwe. Under his regime Zimbabwe has declined into a state of anarchy. Recent political unrest around the elections for President has resulted in death, destruction of property, persecution of political opponents, and the flight of Zimbabweans out of the country.

This political unrest has caused the withdrawal of the opposition candidate from the run-off election. Mugabe himself has refused to back down and has called for "war". He was recently "elected" and sworn in as President.

These actions have brought condemnation from various capitals, few from Africa. This did not change after the African Union meeting. The withdrawal of the only viable opposition candidate in the run-off election in order to quell the unrest and destruction of life and property appears to have been the line that, when crossed, has now forced the international community to take action. The recent G8 Summit noted the turmoil in Zimbabwe.

There are numerous legal, political and diplomatic options available to the international community which include doing nothing to the creation of a justice mechanism by which Mugabe would be held accountable for alleged domestic and international crimes committed while President of Zimbabwe.

This discussion paper will highlight the parameters of the legal options available to hold President Robert Mugabe accountable for various international crimes. It must be stressed that political and diplomatic options impact on the legal options. To a large degree it will be a political decision as to whether Mugabe should be held accountable, though the

development of an accountability/justice model to be used, should the decision be taken to investigate Mugabe, is appropriate now.

Based on the extant facts and circumstances, Mugabe could either be tried by a hybrid international war crimes tribunal or an internationalized domestic court. The location should be in Harare or within the region. The International Criminal Court has limited jurisdiction as the gravamen of the offenses took place prior to July 2002.

The mandate should be prosecuting either Mugabe himself alone or those who bear the greatest responsibility for the crimes committed in Zimbabwe, to include Mugabe and selected henchmen. The facts will bear out who those possible indictees are.

The crimes committed are both international and domestic in scope. It appears the international crimes are largely crimes against humanity. Using the Rome Statute as a guide, Article 7, crimes against humanity, some charges would include persecution, imprisonment and other severe deprivation of personal liberty, as well as other inhumane acts that intentionally cause great suffering, all pursuant to a state policy.

The practical aspects of this initiative call for local, regional, and international political support and action. At the local level both the people and the Diaspora will need to be a part of the process. At the regional level the African Union, along with the European Union will have to support this effort, calling upon the United Nations Security Council to take appropriate action. The Commonwealth of Nations will also need to step up and endorse the initiative. The African Union will be reluctant to do this, but without their support the effort will be weakened indeed.

It is also important to dialog with and get support from key NGO's, e.g. the International Commission of Jurists, the Venice Commission etc.

At the international level the United Nations Security Council will need to pass a resolution calling for some type of legal sanctions on Mugabe and his henchmen, to include an endorsement of a regional court or a domestic court with international aspects to it to ensure fairness and efficiency.¹

A truth and reconciliation aspect to this overall initiative should be considered, as well, as a way of building a sustainable peace.

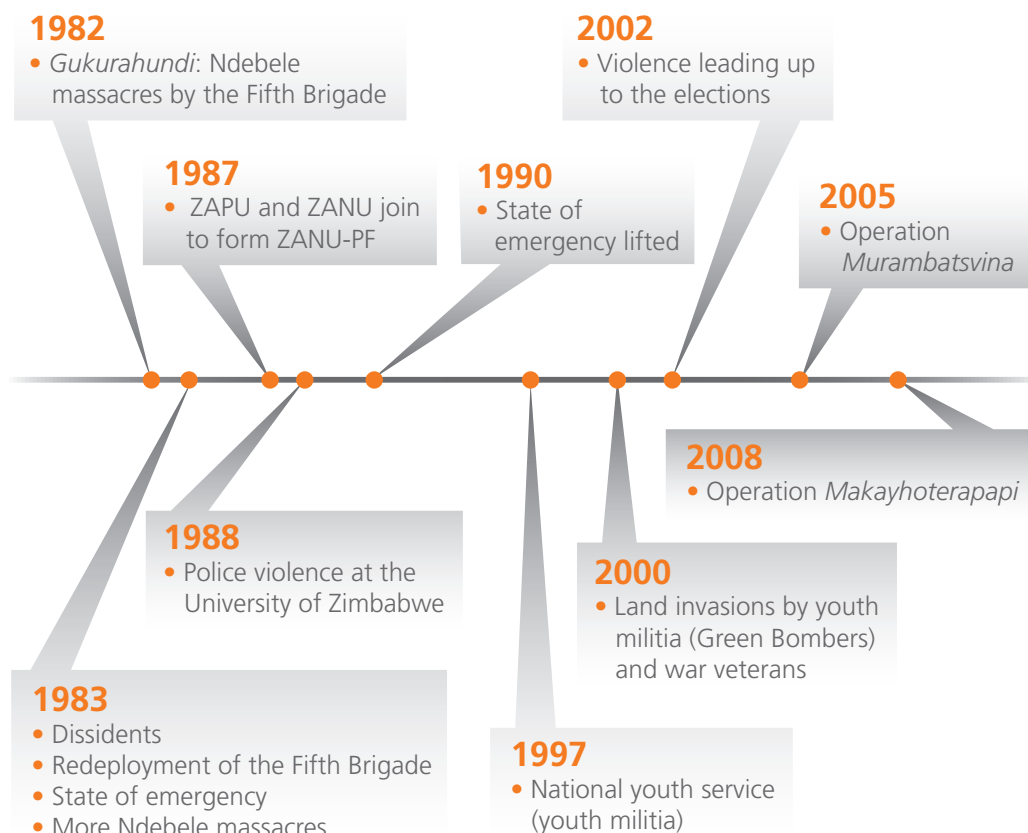
Due to his age, it is realistic to consider an amnesty or a type of immunity arrangement (under the threat of indictment) if he agrees to step aside and leave Zimbabwe for good. This is only an option because

of his advanced age. Other potential indictees should not get the benefit of this amnesty.

The bottom line is that there should be accountability at the local and regional level, with international support, for those who bear the greatest responsibility for the crimes against humanity committed in Zimbabwe over the rein of Robert Mugabe. Due to his age this needs to be done within the next year or two at the latest.

Prepared by: Professors David M. Crane, Syracuse University College of Law and Tom Zwart, School of Human Rights Research, Utrecht, 9 July 2008.

CHRONOLOGY OF POLITICAL UNREST AND ATROCITIES



¹ Russia's and China's decision to veto a recent resolution on Zimbabwe sanctions demonstrates that achieving consensus on accountability measures for Zimbabwe will require concerted international diplomacy

MAP OF ZIMBABWE AND SURROUNDING COUNTRIES



SECTION 1: Mapping the conflict and a discussion of the political aspects and challenges in holding Mugabe accountable for alleged crimes against humanity

INTRODUCTION

This memo serves to outline the reign of the Robert Mugabe as viewed in terms of Zimbabwe's history and challenges, in a bid to assess the politically appropriate approach towards attaining justice for the country of Zimbabwe. This is considered in perspective of the past atrocities prevalent in Zimbabwe since Mugabe's regime was put in place, which has taken a turn for the worst with every passing year. Conflicts and injustice in the form of internal strife and civil unrest, evident country-wide violence, mass torture and summary killings of the masses, capricious arrests and detention; are some of the politically sparked criminal offences prevalent in the country, as will be detailed below. The situation has disintegrated to the extent that those with the responsibility to protect the public have turned a blind eye to the events occurring in the country, even if they themselves are not the perpetrators to the atrocious activities taking place in the country.

The political aspects of Mugabe's reign shall be traced back from the period in which he became the Prime Minister of Zimbabwe upon its attaining independence from the Britain in 1980. Zimbabwe was poised on the path of self-determination to break away from the authoritarian, racist regime that had been in power in the country, in a bid to liberate its population.

DISCUSSION

Domestic law was a device by which the government was able to manipulate the political situation and the varying spheres present in Zimbabwe, from the citizenry to the organs of the state. The Law and Order Maintenance Act² (popularly referred to as The Emergency Powers) essentially stripped the Zimbabweans of constitutional protection of their rights, simultaneously endowing powers to undertake arrest, as well as detention without trial upon the people of Zimbabwe. This state of emergency existed for the first eleven years following Independence in 1980 (period of the State of Emergency). Ironically, the new regime applied this Smith-generated Act diligently, until the State of Emergency was lifted in 1990.³

1. Ndebele massacre

In the early 1980s, from the period of 1982 to 1985, an estimated number of up to 20,000 Ndebele civilians were killed by the Zimbabwe African National Liberation Army (ZANLA's) Fifth Brigade, trained by North Korea's military.⁴ In 1983, the ZANLA unit, comprising of the Shona-speaking ethnic group descended on Matabeleland killing a substantiated number of villagers in the rural areas as well as suspected Zimbabwe African People's Union (ZAPU) supporters, mainly consisting of the Ndebele-speaking ethnic group. The Fifth Brigade was directly accountable

2 Act 53 of 1960

3 www.kubatana.net

4 Mandaza I and Sachikonye LM The One Party State and Democracy: The Zimbabwe Debate at p162

to Mugabe, as the Prime Minister of Zimbabwe,⁵ consequently placing the crimes committed by the military unit squarely on his shoulders. The onus was therefore solely upon him to stop these atrocities had he so wished. His non-action in this case placed him squarely in the centre of the event, as well the military leaders who gave the orders for the crime.

Political affiliations in this case were a consequence of the ethnic divide between the Shona and Ndebele, with Mugabe and Joshua Nkomo being the respective leaders of the ethnic derived groups. A number of the Ndebele were tortured, and made to sing Shona liberation struggle songs before being brutally murdered - genocide in the making had reared its head in Zimbabwe in the movement termed *Gukurahundi*.

2. State of emergency (dissidents)

In 1983, the Fifth Brigade, which having been temporarily withdrawn, was redeployed in Matabeleland South, where it combated former ZANLA members (referred to as "dissidents" in that period). It was in this period that the Ndebele population was systematically starved as well as had crimes of rape perpetrated on them by the military.⁶ Curfews were introduced, governing, as well as restricting the movement of the Ndebele in the South Western parts of Zimbabwe.

1984 marked another year of atrocities, fuelled by politics. Dissidents killed two local Zimbabwe African National Union (ZANU) officials, earmarking the period under which rampage attacks on non-ZANU supporters by at least 4,000 ZANU supporters began in Kwekwe.⁷ This period witnessed murders, and the torching of at least 64 suspected opposition's houses. The police did nothing to intervene, or attempt to quell the situation. Their apathetic stance evident during this period is a dominant characteristic in

crimes that are deemed as associated or sparked by politics. Systematic bouts of violence began to spread like wild-fire throughout the country. The escalating violence had risen to such extreme levels that Mugabe was obliged to reprimand his supporters.

The police officials were not liable for the atrocities by omission, but in some circumstances, positively committed, or were accomplices through cooperation with the perpetrators. An example of this is identified in the case in which a suspected member of ZAPU sought refuge at the Kwekwe police station. The police were then demanded to hand over the suspect that had sought refuge in the station, which they adhered to, resulting in the individual's murder by the perpetrators.⁸ The police have a mandate to protect the citizens, but in this case they were the very people who supported and undertook some of the atrocities through their participation.

Following this period of marked violence, ZAPU joined forces with ZANU, forming the Zimbabwe African National Union Patriotic Front (ZANU-PF), on December 22 1987; and consequently, the dissidents who acted under ZAPU were granted amnesty for their crimes, in a bid to national reconciliation, under section 3(1) of the Constitution.⁹

As an aside, various amendments have been made to the Constitution of Zimbabwe since its promulgation related to the political situation. The two sections of primary importance in this case relate to sections 31(H) and (J) of the Constitution, enacted in 1987, dealing with the president and his powers. The former places the executive authority in the president, whereas the latter effectively places him above the law, essentially diminishing the rule of law. The president is therefore not accountable to anyone, and cannot be questioned on his decisions by the powers endowed upon him by this section, leaving Mugabe to his past and current

5 Human Rights Committee South Africa – May 200 Zimbabwe in Focus: The Second Chimurenga/Umvukela at p9

6 Mandaza and Sachikonye The One Party State and Democracy: The Zimbabwe Debate at p163

7 Ibid

8 Ibid

9 Mandaza and Sachikonye The One Party State and Democracy: The Zimbabwe Debate at p166

activities. This is clearly evident from the justification purported by the government for all the violence committed in the country.

Consequently, the judiciary has become increasingly less independent, and is controlled by the executive branch of the state. This oversight has extinguished the concept of checks and balances in Zimbabwe, leading the country down a path of lawlessness and anarchy under the authoritarian iron-fisted rule of the Mugabe regime.

3. National Youth Service

In the late 1990's, the country's prominent leader of the war veterans Association, Joseph Chinotimba, instituted the concept of National Youth Service, which was aimed at training young Zimbabweans in "practical skills" that can be used in the workplace. This training was under the guise of equipping the youth with practical skills such as sewing and carpentry; yet in actual fact, it constituted military training forming a youth wing of the ZANU-PF. Training was undertaken at the Border Gezi camp, producing the ruthless youth militia widely known as "Green Bombers". They were the ones that have been predominantly deemed as War Veterans. This reference to the youth militia as War Veterans has brought about the question of the true intentions behind these "training camps" and ZANU's true intentions behind the land invasions. The original War Veterans who fought in the struggle are of an advanced age, many of which are not participants in the land invasions and systematic violent attacks on the populace. Essentially, this highlights the criminal aspect behind the violence and the land invasions as a whole.

4. Land reform

In 2000, land reform marked a new political path resulting in bloodshed and violence in Zimbabwe.

The systematic invasions of the land were to grab land from the wealthy white minority and "redistribute" it to the black majority.¹⁰ By night, the farms were invaded, and their occupants beaten up to intimidate them and prevent the rapidly increasing support for the Movement for Democratic Change (MDC).¹¹ Busloads full of people were seen leaving the ZANU-PF offices, with people from the rural areas being bussed onto the farms. This event was characterized by the illegal invasions of the farms, resulting in mass killings and abuses of the white farmers and their workers. The War Veterans mostly consisting of youth militia forcefully occupied the farms, without state allocation, and any legal basis, except that which was awarded to them by Mugabe who, through propaganda, explicitly stated that the land belonged to the black majority, and it was now time to take what rightfully belonged to them. This was disseminated on the state-run broadcasting station. Upon lodging complaints, the victim's pleas and cries were not addressed by the police, which could be characterized as a serious injustice to the people of Zimbabwe.

Some land seizures were taken to the courts, with farmers applying for interdicts/injunctions against the occupation. On March 24, the High Court ordered the eviction of the unlawful occupiers, in which they were given 24 hours to vacate. The Mugabe made statements contrary to the implementation of the interdict/injunction, which was defied by the unlawful settlers.¹² It is reported that the Attorney General at that time, Patrick Chinamasa, called for a vacation of the High Court order;¹³ essentially illustrating the non-independence of the judiciary alluded to above.

5. Food shortages

Matabeleland has been deliberately denied of food aid and supplies as a result of their being the territories in which the MDC has a strong foothold.

10 Human Rights Watch, March 2002 vol 14, No 1(A) at p2

11 Human Rights Committee South Africa – May 200 Zimbabwe in Focus: The Second Chimurenga/Umvukela at p35

12 Human Rights Committee South Africa – May 200 Zimbabwe in Focus: The Second Chimurenga/Umvukela at p36

13 The Star, 22 March 2000

Such an action by the government is a strategy aimed at punishing the people of Zimbabwe for owing allegiance to the “wrong” party, resulting in many dying from starvation.

6. More abuses and disappearances

Operation *Murambatvina*¹⁴ in 2005 was an operation aimed at “cleaning” Zimbabwe of all the “filth” – a reference to the country’s informal settlements. The government did not only destroy shacks, and temporary housing created by its incumbents, but also demolished erected structures added to houses, the original structure being the only one recognized by the state. Any additional structure that had not been “state – approved” was demolished, in a bid to displace the masses from the urban areas, sending them off to the rural areas, which were ZANU-PF strongholds at that time. This mechanism was devised to neutralize and create a minority of the opposition in the urban areas prior to the pending elections.¹⁵ Many citizens lost their homes and were displaced and some were killed by their houses being demolished whilst they were inside.

Anyone who openly opposed the government is “dealt with” in the most vicious manner possible. This was evident throughout the period in which the students of the University of Zimbabwe demonstrated against the government for being corrupt. This instigated the army and police force being deployed onto the campus. The students were attacked by tear-gas, shot at with rubber bullets, and beaten up by button sticks and *sjamboks*¹⁶ during the fateful period beginning September 28, 1988, leading to the University being temporarily closed down.¹⁷ A number of the Lecturers and Student Representative Council members “disappeared” mysteriously during this period.

7. Elections

The run up to all of Zimbabwe’s elections from 1992 to the present have been marked by violence, which has intensified over the years. The peak of the violence started in 1999, when the MDC effectively became a strong contender to the ruling party. Any outright opposition to the ruling party has led to arrest, abuse, marked “disappearances” and deaths of those involved. MDC’s leaders for example have been numerously detained, beaten up and tortured by the ruling party. The police have not done anything to intervene in such situations, as they are clearly aligned to ZANU-PF.

Operation *Makavhotarapapi*¹⁸ of 2008 left many Zimbabweans dead, mutilated, severely injured, and displaced/homeless. This operation was a backlash to the March 29, 2008 elections which left the opposition leader, Morgan Tsvangirai apparently in the lead. Citizens were beaten up and abused for “voting wrongly”, and the operation has sought to “re-educate” the people ahead of the 2008 run-off elections which took place on June 27.

A tragic example occurred on May 5 in Chiweshe, when ZANU-PF officials and War Veterans assaulted and murdered 6 men, as well as tortured 70 men and women, including a 76-year-old witnessed by the entire community.¹⁹ Such inhumane and degrading abuse of the population has contributed to dehumanizing the Zimbabweans as a whole, in a bid to effectively impose the violence on the people as a means of punishing them.

Since the period of the March 29 elections, violence has been rampant in Zimbabwe, with opposition supporters killed and beaten up. The media has reported several incidents in which MDC supporters have been beaten up at campaign rallies, and prevented from attending them.

14 Literally translated as “removal of filth”

15 http://www.sokwanele.com/articles/sokwanele/opmuramb_overview_18june2005.html

16 Leather whips made of raw animal hide

17 Mandaza and Sachikonye *The One Party State and Democracy: The Zimbabwe Debate* at p167

18 Literally translated as “where did you vote”

19 Human Rights Watch 2008: “Bullets for each of you” at p2

CONCLUSION

In an open letter to Robert Mugabe dated April 18, 2002, Amnesty International aired three areas which were of concern to them.²⁰ These entailed human rights violations which infringed on the freedom of association and assembly as well as the importance of the rule of law, amongst others. This international call for the government to revise its governance alluded to such issues as the land reform program, which has been continuously characterized by atrocities and the lack of legal compliance of court orders by the government as a whole.

Zimbabwe is a signatory to, and has ratified the International Convention on the Suppression and Punishment of the Crime of Apartheid, as well as the Geneva Conventions and their two additional Protocols. Therefore, she is under the obligation to uphold the spirit and purport of these international instruments, through the governing structure of the country. It is evident from the above that Mugabe's regime has contravened Articles I and II a) of the International Convention on the Suppression and Punishment of the Crime of Apartheid through the effects of the land reform program, and a large component of the mandate passed by the Geneva Conventions and its protocols in its commission of the mass atrocities cited.

Zimbabwe has been depleted of its youth and skilled workers, as they are all escaping and seeking refuge in neighboring countries and abroad. This displacement

has largely contributed to an attack on international peace and security as a whole by virtue of the fact that many countries are not accepting Zimbabweans, such as was the case in South Africa in May 2008. Regionally, many Zimbabweans are illegal immigrants, and therefore will seek to find all means necessary and possible for survival, immediately bringing them into clashes with the citizens of the countries to which they have fled. Such conflicts impose instability to the region and should therefore be addressed. The people of Zimbabwe are entitled to return to their country, but cannot do so, until they feel it is "safe" to return, and the situation in the country has been alleviated, as well as intervention and change of the Mugabe regime has been effectuated.

Those that have the responsibility to protect the Zimbabweans, have been the ones perpetrating the violence, and should therefore be held accountable for their actions. Mugabe and his regime need to be held accountable for their violations of both international and domestic law, to include crimes against humanity. Justice for Zimbabwe should be approached with an outward look from the crimes dating from the Ndebele killings in the 1980s, to the present time under the combined efforts of a hybrid international tribunal, or a domestic court with international assistance and support. This facilitates for holding accountable those most responsible. Such a method ensures that those held jointly liable are brought to book, and serves the justice sought by the Zimbabwean populace.

20 AI Index TG/AFR/46/00/15

SECTION 2: Jurisdictional Issues Relating to the Potential Prosecution of Mr. Mugabe and other Zimbabwean Senior State Officials*

SUMMARY

Numerous crimes against the civilian population have been committed by Mugabe's regime. Prosecuting the persons responsible for those crimes would serve a twofold function; first it would provide justice for the victims of these crimes and second it would further strengthen the rule of law and the principle of good governance at an international level. The jurisdictional issues arising in connection with prosecuting Mr. Mugabe and the other persons who bear the greatest responsibility before an existing judicial forum or a judicial forum established especially to this aim are solvable provided there is the willingness of the relevant international actors.

INTRODUCTION

This memo discusses the jurisdictional issues, namely temporal, subject matter, and personal of prosecuting those responsible for the crimes committed in Zimbabwe against the civilian population pursuant to state policy. Jurisdictional issues are among the first to be considered when deciding whether to start prosecuting a person as those usually represent the first line of defense. However, before addressing the jurisdictional issues we will first discuss whether only Mr. Mugabe or those who bear the greatest responsibility should be prosecuted.

1. Who to prosecute

A glance at the prosecution at an international level of persons for internationally recognized crimes since the Second World War (WWII), reveals that it has been usually not only the highest leader, but generally those who bear the greatest responsibility that have been subject to prosecution.²¹ Since then it is generally agreed that such crimes which shock the conscience of humankind can be attributed neither to only one person nor to the whole population. Indeed, history shows that it is usually a close group of persons who are responsible for planning and carrying out such criminal acts on a widespread and systematic scale against the civilian population. For these reasons not only Mugabe, but also his close collaborators should be prosecuted. That group of persons should include members of his government, especially those closely involved in the perpetration of the criminal acts qualifying as crimes against humanity.

2. Jurisdiction *ratione temporis*

Crimes against humanity are not subject to any statute of limitations. However, the issue of temporal jurisdiction could arise in the context of choosing the forum before which the persons who bear the greatest responsibility will be brought. For the International Criminal Court (ICC) the starting date

* Dr. Gentian Zyberi (LL.M) is lecturer in international human rights and humanitarian law at the Netherlands Institute of Human Rights, Utrecht University, The Netherlands

21 The International Military Tribunal (20 November 1945 – 1 October 1946) tried 24 of the most important captured leaders of Nazi Germany (Major War Criminals Trial) while Far East Military Tribunal (3 May 1946 – 12 November 1948) charged 25 Japanese military and civilian leaders with Class A Crimes (crimes against peace); the two ad hoc tribunals, namely the International Criminal Tribunal for former Yugoslavia (ICTY) and that for Rwanda (ICTR) have prosecuted a large number of persons from those who bear the greatest responsibility; same can be said of the internationalized criminal courts such as the Special Court for Sierra Leone and the more recent Extraordinary Chambers for Cambodia. All of these examples taken together support the conclusion that not only one leader but those who bear the greatest responsibility should be prosecuted.

of jurisdiction *ratione temporis* would be 1 July 2002; date when the ICC Statute entered into force. In the event of the establishment of an international/ised court the temporal jurisdiction can be fixed at an appropriate point in time in accordance with the mission of such a court.

3. Jurisdiction *ratione materiae*

If the forum would be the ICC the subject matter jurisdiction could include *inter alia* a number of crimes falling generally under the heading 'crimes against humanity', as enumerated under Article 7 of the ICC Statute. However, in the case of a specifically established court the aforementioned article together with the relevant domestic criminal law of Zimbabwe could provide for its subject matter jurisdiction. The list of the crimes committed against the civilian population in Zimbabwe includes but is not limited to persecution, imprisonment and other severe deprivation of personal liberty, as well as other inhumane acts that intentionally cause great suffering, all pursuant to a state policy.

4. Jurisdiction *ratione personae*

The forum will have jurisdiction over natural persons, namely those who bear the greatest responsibility for the crimes committed. An issue which needs to be addressed here is that of immunity from criminal prosecution. The Third Nuremberg Principle, based on Article 7 of the Charter of the Nuremberg Tribunal and deemed to be part of customary international law, states that the fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law. Further, the interrelationship between the principles of immunity from criminal prosecution and individual criminal responsibility has been clarified by the International Court of Justice (ICJ) in the *Arrest Warrant* case judgment of 2002. In listing four possible scenarios which would ensure accountability for perpetrators of internationally recognized crimes that Court held:

"Accordingly, the immunities enjoyed under international law by an incumbent or former Minister for Foreign Affairs do not represent a bar to criminal prosecution in certain circumstances. *First*, such persons enjoy no criminal immunity under international law in their own countries, and may thus be tried by those countries' courts in accordance with the relevant rules of domestic law. *Secondly*, they will cease to enjoy immunity from foreign jurisdiction if the State which they represent or have represented decides to waive that immunity. *Thirdly*, after a person ceases to hold the office of Minister for Foreign Affairs, he or she will no longer enjoy all of the immunities accorded by international law in other States. Provided that it has jurisdiction under international law, a court of one State may try a former Minister for Foreign Affairs of another State in respect of acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that period of office in a private capacity. *Fourthly*, an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction. Examples include the International Criminal Tribunal for the former Yugoslavia, and the International Criminal Tribunal for Rwanda, established pursuant to Security Council resolutions under Chapter VII of the United Nations Charter, and the future International Criminal Court created by the 1998 Rome Convention. The latter's Statute expressly provides, in Article 27, paragraph 2, that "[i]mmunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person."²²

22 ICJ, *Arrest Warrant* case (Democratic Republic of the Congo v. Belgium), ICJ Reports 2002, pp. 25-26, par. 61

While the first three scenarios listed by the ICJ are difficult to contemplate under the present circumstances in Zimbabwe, an international/ized court seems to represent the best choice.

CONCLUDING REMARKS

Mr. Mugabe and his collaborators need to be brought to account for the crimes committed. Along with providing justice to the victims in Zimbabwe, that would also send a powerful message that those

who commit such horrible crimes sooner or later will have to face the consequences. The establishment by the UN Security Council of a special court to try those who bear the greatest responsibility for the crimes committed against the civilian population in Zimbabwe would be the preferable course of action. In such a case no jurisdictional issues would arise since any possible issues can be dealt with preliminarily.

SECTION 3: Potential International and Domestic Crimes Attributable to Robert Mugabe and Other High Ranking Officials in Zimbabwe*

STATEMENT OF PURPOSE

The purpose of this memorandum is to ascertain what charges could be brought against Robert Mugabe and others who are responsible for the continued acts of violence and aggression in Zimbabwe if they are brought to trial. The memorandum concludes there is sufficient evidence to meet the legal requirements for a determination that there are reasonable grounds to believe that crimes against humanity, war crimes and violations of Zimbabwe's Constitution and domestic criminal laws took place. This memorandum does not examine the individual criminal responsibility of Mugabe or other leaders in Zimbabwe.

INTRODUCTION

There are a number of options for holding Mugabe and others accountable through the initiation of prosecutions against them in courts of law.²³ The first option would be to try those alleged to be the most responsible in a hybrid international criminal tribunal. The second option is to establish an internationalized domestic court. Third, the International Criminal Court (ICC) could also assert jurisdiction, following a Security Council referral, over offences occurring after 1 July 2002. Finally, there can be a combination of purely domestic courts on the one hand and regional/international trials on the other. The ICC

option appears to be the least appealing for the fact that the court can only investigate and prosecute crimes occurring after 1 July 2002. In addition, unlike the other options, this court would not likely be located in Harare or within the region.²⁴

This memorandum seeks to enumerate the possible charges that can be brought against those deemed most responsible for the crimes committed in Zimbabwe. Because the crimes committed are both international and domestic in scope this memorandum will examine both international and domestic law. For the most part, the international crimes are largely crimes against humanity. Using the Rome Statute as a guide, this memorandum will therefore begin by examining crimes within Article 7 of the Statute. Next, using Article 8 of the Rome Statute as a guide this memorandum will look at war crimes charges for crimes taking place in the 1980s when an armed conflict arguably took place between the national army/Mugabe's Zimbabwe African National Union (ZANU) political supporters and Zimbabwe African People's Union (ZAPU) political supporters which ended with a peace accord in 1987 and the absorption of the ZAPU into the ZANU-PF. Finally, this memorandum will look at the Constitution of Zimbabwe and its Criminal Code for crimes attributable to Mugabe and others.

* Brianne N. McGonigle, MA, JD, is a PhD candidate in international criminal law and procedure at Utrecht University's Netherlands Institute of Human Rights

²³ See Section on procedural options available for holding Mugabe and others responsible.

²⁴ Although ICC officials have also flirted with the idea of holding trials in the regions where crimes occur.

1. Crimes against Humanity

Crimes against humanity have existed under international law since the adoption of the Nuremberg Charter in 1945.²⁵ More recently, the charters of the International Criminal Tribunals for Yugoslavia (ICTY) and Rwanda (ICTR) each established definitions for crimes against humanity for their respective jurisdictions.²⁶ Currently, the Rome Statute of the International Criminal Court (“Rome Statute”) defines the elements for crimes against humanity, which generally follows the precedent of the Nuremberg Charter, the ICTY, and the ICTR.

Article 7 of the Rome Statute enumerates the crimes falling under crimes against humanity and lays down the context in which all crimes against humanity have to be committed, namely as part of a widespread or systematic attack directed against a civilian population with knowledge of the attack. ‘Attack directed against any civilian population’ means a course of conduct directed against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.²⁷ Therefore, in order for a crime to qualify as a crime against humanity all three of the contextual elements must be met as well as the specific elements for each offense. This memorandum will first examine the contextual elements that must be met and then list the individual offense that may apply to the situation in Zimbabwe.

2. Contextual Elements

In order for a crime to qualify as a crime against humanity, three contextual elements must be met: (1) the acts must have been part of attacks directed against a civilian population; (2) the attacks directed against the civilian population must have been widespread or systematic and conducted pursuant to or in furtherance of a State or organizational policy; and (3) the acts must have been committed with knowledge of the widespread and systematic nature of the attacks directed against the civilian population.

a) The acts were part of attacks directed against a civilian population

The term civilian covers all non-combatants covered by Common Article 3 of the Geneva Conventions, including individuals not taking active part in the hostilities as well as all military personnel, which are *hors de combat* at the time the attack takes place.²⁸ The presence of combatants within the civilian population targeted does not negate the civilian character of the population.²⁹

The crimes committed in Zimbabwe are attacks by those in control of the government and armed forces upon their fellow citizens. The civilian population which does not support the ZANU-PF has been targeted for years.³⁰

25 Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis and Charter of the International Military Tribunal at Nuremberg, 82 U.N.T.S. 280, entered into force Aug. 8, 1945, available at <http://www.yale.edu/lawweb/avalon/imt/proc/imtconst.htm>.

26 See Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, U.N. Doc. S/25704 at 36, annex (1993) and S/25704/Add.1 (1993), available at <http://www.un.org/icty/legal/doc/index.htm>; See also Statute of the International Tribunal for Rwanda, U.N. Doc. S/RES/955 (1994), 33 I.L.M. 1598 (1994), available at <http://www.ictor.org/ENGLISH/basicdocs/statute.html>.

27 Rome Statute of the International Criminal Court, Article 7(2)(a), adopted 17 July 1998 by the U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, entered into force, 1 July 2002, U.N. Doc. A/CONF.183/9.

28 ICTR, *Prosecutor v. Akayesu*, ICTR-96-4-T, Trial Judgment and Sentence, 2 September 1998, para. 582; ICTY, *Prosecutor v. Jelisić*, IT-95-10, Trial Judgment, 14 December 1999, para. 54.

29 ICTY, *Prosecutor v. Tadić*, IT-94-1-T, Trial Judgment, 7 May 1997, para. 638; ICTR, *Prosecutor v. Akayesu*, ICTR-96-4-T, Trial Judgment and Sentence, 2 September 1998, para. 582.

30 See Human Rights Watch Reports, Fast Track Land Reform in Zimbabwe, Vol. 14, No. 1(A), March 2002, Not Eligible: The Politicization of Food in Zimbabwe, Vol. 15, No. 17(A), October 2003, Zimbabwe: Evicted and Forsaken, Internally displaced persons in the aftermath of Operation Murambatsvina, Vol. 17, No. 16(A), December 2005, You will be Thoroughly Beaten: The Brutal Suppression of Dissent in Zimbabwe, Vol. 18, No. 10(A), November 2006, Bashing Dissent: Escalating Violence and State Repression in Zimbabwe, Vol. 19, No. 6, May 2007, All Over Again: Human Rights Abuses and Flawed Electoral Conditions in Zimbabwe, Vol. 20, No. 2, March 2008, Bullets for Each of You: State Sponsored Violence since Zimbabwe's March 29 [2008] Elections, June 2008; See also, Legal Resources Foundation and the Catholic Commission for Justice and Peace Report, Breaking the Silence, Building True Peace: A report on the disturbances in *Matabeleland* and the Midlands 1980 – 1989, available at: http://www.hrforumzim.com/members_reports/matrep/matrepsumm.htm.

b) The attacks directed against the civilian population were widespread or systematic and conducted pursuant to or in furtherance of a State or organizational policy

In order for suspects to be found guilty of crimes against humanity it must be established that the crimes were a “part of a widespread or systematic attack directed against a civilian population.”³¹ Article 7(2)(a) of the Rome Statute provides that a widespread or systematic attack against a civilian population contains two important elements: (1) the multiple commission of [enumerated] acts and (2) the commission of such acts pursuant to a State or organizational policy to commit such attack[s].³² The term ‘widespread’ requires “massive, frequent, large scale action carried out collectively with considerable seriousness and directed against a multiplicity of victims.”³³ The term ‘systematic’ refers to the “organized nature of the acts of violence and the improbability of their random occurrence.”³⁴ Indeed, in *Tadic* the ICTY stated that the requirement that the acts must be widespread refers to the number of victims and systematic is indicated by a pattern or methodical plan.³⁵ Although there is no specific criteria for concluding that an attack is widespread or systematic, the Trial Chamber in *Jelisi* provided some factors for the Court to take into account, including, *inter alia*, : (1) an acknowledged policy targeting a particular community; (2) parallel institutions meant to implement this policy; (3) political or military authorities involved in this policy; (4) the employment of considerable financial, military or other resources; and (5) the scale or the repeated, unchanging and continuous nature of the violence committed against a particular civilian population.³⁶

The ‘state or organizational policy’ requirement exists in order to distinguish crimes against humanity from isolated and random acts of violence such as riots or internal disturbances. Accordingly, in order for a court to find crimes against humanity a State or organization must “actively promote or encourage such an attack.”³⁷ However, the ICTY has held that the state policy need not be formal, and that the court may assume a policy existed from the way in which the acts occur.³⁸ Furthermore, the ICTY identified several relevant issues, including a “political objective [or] ideology ... to destroy or weaken a community,” “the repeated and continuous commission of inhumane acts linked to one another,” “the preparation and use of significant public or private resources,” and “the implication of high level military and/or military authorities” in order to conclude that a state policy existed.³⁹

The violence against civilians in Zimbabwe has been orchestrated by the Joint Operations Command, headed by senior ZANU-PF officials and includes the heads of the Zimbabwe Defense Forces, police, prison services, and the Central Intelligence Organization, thereby indicating a state policy for the attacks.⁴⁰ Moreover, the attacks against the civilian population are widespread and systematic. They are widespread in the sense that they have been frequent and carried out on a large scale, particularly when preceding an election. In one of the most recent operations, Operation Makavhoterapapi (Operation Where Did You Put Your Vote?), the ruling ZANU-PF party and its supporters have beaten, tortured and killed thousands of civilian non-supporters.⁴¹ Attacks orchestrated by

31 Rome Statute, *supra* note 5, at Article 7(1)

32 Rome Statute, *supra* note 5, Article 7(2)(a).

33 ICTR, *Prosecutor v. Akayesu*, ICTR-96-4-T, Trial Judgment and Sentence, 2 September 1998, para. 580; ICTY, *Prosecutor v. Blaškic*, IT-95-14, Trial Judgment, 3 March 2000, para. 206.

34 ICTY, *Prosecutor v. Kunarac*, IT-96-23-T, Trial Judgment, 22 February 2001, para. 429.

35 ICTY, *Prosecutor v. Tadic*, IT-94-1, Trial Judgement, 7 May 1997, para. 648; See also *Prosecutor v. Kunarac*, IT-96-23&23/1, Appeals Chamber, 12 June 2002, para. 94.

36 ICTY, *Prosecutor v. Jelisi*, IT-95-10, Trial Chamber, Judgment, 14 December 1999, at para. 53.

37 International Criminal Court, Elements of Crimes, Article 7, Introduction, available at: http://www.icc-cpi.int/library/about/officialjournal/Element_of_Crimes_English.pdf.

38 ICTY, *Prosecutor v. Tadic*, IT-94-1-T, Trial Judgement, 7 May 1997, para. 653.

39 ICTY, *Prosecutor v. Blaskic*, IT-95-14-T, Trial Judgement, 3 March 2000, para. 203.

40 Human Rights Watch Report, *Bullets for Each of You: State Sponsored Violence since Zimbabwe's March 29 [2008] Elections*, June 2008, at p. 2.

41 See Human Rights Watch Report, *Bullets for Each of You: State Sponsored Violence since Zimbabwe's March 29 [2008] Elections*, June 2008.

the government have also been systematic in that there is a pattern of abuses. There is a long history of serious human rights violations, especially when faced by political opposition, dating back to the 1980s. In particular, violence around election periods is carefully organized.⁴²

c) *The acts were committed with knowledge of the widespread and systematic nature of the attacks directed against the civilian population*

After a finding that the attacks amounted to widespread or systematic attacks against a civilian population, it must be established that the commanders/leaders had the requisite intent/knowledge of the widespread or systematic nature of the attacks. Under *Tadic*, the Trial Chamber at the ICTY found that in order to establish the requisite knowledge/intent it must be shown that, in addition to the establishing the intent to commit the underlying criminal act that (1) the accused knew of the widespread or systematic nature of the attack, and (2) the attack was not carried out for personal reasons and therefore unrelated to the attack.⁴³

Knowledge necessitates that those who perpetrate the acts “knew or had reason to know that by their acts or omissions, they were participating in [an] attack on the population.”⁴⁴ The perpetrators need not identify with any overall plan or policy that may underlie the attack, but rather they must knowingly take the risk of participating in the furtherance of the attack.⁴⁵ Moreover, they need not have knowledge of the specific details of the attack.⁴⁶ A court may infer knowledge of the attack and awareness of participation from circumstantial evidence, such as the

person’s positions in the military or political hierarchy and the extent to which the attacks were reported in the media or were common knowledge. Therefore, courts examine the knowledge requirement on an objective level and can assume knowledge based on the specific circumstances of a case.⁴⁷

In addition to having the intent to target civilian populations opposed to his rule, Mugabe and other high ranking officials in the ZANU-PF are acutely aware of the widespread and systematic nature of the attacks through regional media coverage and reports by NGOs as well as their own planning.

3. Specific Elements

Once the contextual elements are met, the specific elements of each offence must be met. This section will not address the factual circumstances associated with each crime but instead refers the reader to the section detailing with the violence in Zimbabwe.

a) *Murder*

The legal definition of murder under the Rome Statute is relatively straightforward. According to Rome Statute, murder requires that the perpetrator kill one or more persons.⁴⁸ The term “kill” is interchangeable with “caused death.”⁴⁹ Both the ICTY and the ICTR further note that the killing must occur through “an unlawful act or omission of the accused.”⁵⁰

b) *Deportation or forcible transfer of population*

Deportation or forcible transfer of the population means forced displacement of the persons concerned

42 Crimes against humanity are particularly suited to cover crimes of a political nature. See Rome Statute, *supra* note 5, at Art. 7(1)(h).

43 ICTY, *Prosecutor v. Tadic*, IT-94-1-T, Trial Judgment, 7 May 1997, para. 656.

44 ICTY, *Prosecutor v. Tadic*, IT-94-1-T, Trial Judgment, 7 May 1997, para. 626.

45 ICTY, *Prosecutor v. Vasiljevic*, IT-98-32-A, Appeal Judgment, 25 February 2004, para. 30.

46 ICTY, *Prosecutor v. Kunarac*, IT-96-23-T, Trial Judgment, 22 February 2001, para. 434.

47 ICTY, *Prosecutor v. Tadic*, IT-94-1-T, Trial Judgment, 7 May 1997, para. 657.

48 Elements of Crimes, *supra* note 15, Article 7(1)(a).

49 Elements of Crimes, *supra* note 15, Article 7(1)(a), note 7.

50 ICTR, *Prosecutor v. Akayesu*, No. ICTR-96-4-T, para. 589 (Sept. 2, 1998); see also ICTY, *Prosecutor v. Kupreskic*, IT-95-16-T, Trial Chamber Judgment, 14 January 2000, para. 560.

by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law.⁵¹ This definition requires a showing of force, but that force need not be physical or even actual. The threat of force or fear of violence may also suffice.⁵²

c) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law

In regards to this offence, the gravity of the conduct must be such that it was in violation of fundamental rules of international law.⁵³

d) Torture

The requirement for torture is that severe physical or mental pain or suffering is inflicted upon one or more persons. Such persons must have been in the custody or under the control of the perpetrator and the pain or suffering must not have arisen as a result of lawful sanctions.⁵⁴

e) Rape

Rape requires that the perpetrator invades the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body. The invasion must have been committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person,

or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.

f) Persecution in connection with any crime within the jurisdiction of the ICC

Persecution involves the intentional and severe deprivation of fundamental rights contrary to international law because of the identity of the group or collectivity.⁵⁵ According to the Elements of Crimes, the perpetrator must: 1) deprive persons of their rights in violation of international law, 2) target the victims by reason of their group identity, and 3) commit the act in conjunction with another of the enumerated acts under Article 7(1) of the Rome Statute.⁵⁶ The deprivation must not only concern “fundamental rights,” but must also be “intentional and severe.”⁵⁷ The severity of the persecution refers not to the act of persecution, but instead to the nature of the deprivation of rights.⁵⁸

g) Other inhumane acts

‘Other inhumane acts’ requires a perpetrator to inflict great suffering or serious injury to body, mental, or physical health. The act leading to the injury must be of a nature and gravity similar to any of the other acts defined in Article 7(1) of the Statute. Moreover, the perpetrator must be aware of the factual circumstances establishing the character of the act.

Many of the acts and atrocities reported by Human Rights Watch, Amnesty International and other NGOs in Zimbabwe satisfy the requisite contextual

51 Rome Statute, *supra* note 5, at Art. 7(2)(d).

52 Elements of Crimes, *supra* note 15, Article 7(1)(d), note 12.

53 Elements of Crimes, *supra* note 15, Article 7(1)(e).

54 Rome Statute, *supra* note 5, at Article 7(2)(e).

55 Rome Statute, *supra* note 5, at Article 7(2)(g).

56 Elements of Crimes, *supra* note 15, Article 7(1)(h).

57 Rome Statute, *supra* note 5, at Article 7(2)(g).

58 ICTY, *Prosecutor v. Kupreskic*, IT-95-16-T, Trial Chamber Judgment, 14 January 2000, para. 622 (“Although individual acts may not be inhumane, their overall consequences must offend humanity in such a way that they may be determined ‘inhumane.’”).

and specific elements of crimes against humanity. Therefore, there is a high likelihood that Mugabe and other high-ranking officials committed crimes against humanity as defined in Articles 7 of the Rome Statute.

h) War Crimes

As with crimes against humanity, in order to convict an individual of war crimes both the contextual and specific elements of the offenses must be met.

4. Contextual Elements

a) An armed conflict existed at the time when the acts were committed

In order for an offence to qualify as a war crime, there must be an armed conflict. An armed conflict exists “whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.”⁵⁹ The ICTY characterizes an internal armed conflict by protracted armed violence between governmental authorities and organized armed groups or between such groups within the territory of a State.⁶⁰ In *Delalic* the ICTY provided some guidance in determining whether a non-international armed conflict exists. The Court found that “in order to distinguish from cases of civil unrest or terrorist activities, the emphasis is on the protracted extent of the armed violence and the extent of organization of the parties involved.”⁶¹ This appears to indicate that the intensity of the conflict must be capable of being described as ‘protracted’ in order for an internal armed conflict to arise.

After gaining independence in 1980, much infighting between Mugabe (ZANU party) and Joshua Nkomo (ZAPU party) occurred despite attempts of reconciliation. In 1982 Mugabe accused Nkomo of plotting a coup d’état and sent the Fifth Brigade to Nkomo’s Matabeleland homeland in Operation Gukurahundi.⁶² Until an agreement to end the violence was reached, more than 20,000 Ndebele civilians were killed in an attempt to create a one-party state. The protracted nature of the conflict indicates that the violence in the region was in fact an internal armed conflict.

b) There is a nexus between the armed conflict taking place and the acts committed

The nexus requirement for war crimes requires that the acts committed must be ‘closely related to the hostilities.’⁶³ In other words, the armed conflict must have played a substantial part in the perpetrators’ abilities to commit the crime, to decide to commit the crime, the manner in which to commit the crime or the purpose for which to commit the crime.⁶⁴

The killing of the 20,000 Ndebele civilians and ZAPU supporters was directly relating to the conflict between the ZANU and ZAPU political factions.

c) The acts were committed with awareness of factual circumstances that established the existence of an armed conflict

There is no requirement for the perpetrator to carry out a legal evaluation determining the existence of an armed conflict or its character as international or non-international. Therefore there is no requirement that the perpetrator have an awareness of the

59 ICTY, *Prosecutor v. Tadic*, IT-94-1-T, Trial Judgment, 7 May 1997, para. 561.

60 ICTY, *Prosecutor v. Tadic*, IT-94-1-T, Trial Judgment, 7 May 1997, para. 561.

61 ICTY, *Prosecutor v. Delalic*, Trial Chamber, Judgment, 16 November 1998, para. 183-184.

62 The Fifth Brigade was an elite unit of specially-trained Zimbabwean soldiers. Formed in 1981, the Fifth Brigade differed from all other army units in that it was not integrated into the army. Instead, it was answerable only to the Prime Minister, who at the time was Mugabe. In 1984 it was disbanded after allegations of brutality and murder during its occupation of Matabeleland.

63 ICTY, *Prosecutor v. Kunarac*, IT-96-23-T, Trial Judgment, 22 February 2001, para. 402.

64 ICTY, *Prosecutor v. Vasiljevic*, IT-98-32-T, Trial Judgment, 11 November 2002, para. 25; ICTY, *Prosecutor v. Kunarac*, IT-96-23-A, Appeal Chamber Judgment, 12 June 2002, para. 58.

facts that established the character of the conflict as international or non-international. Instead, there is only a requirement for the awareness of the factual circumstances establishing the existence of an armed conflict.

Mugabe and other high ranking officials were most certainly aware of the existence of armed conflict as fighting took place in the region for approximately five years and personally ordered the Fifth Brigade to the region.

5. Specific Elements

Once the contextual elements are met, the specific elements of each offence must be met. This section will not address the factual circumstances associated with each war crime but instead refers the reader to the section detailing with the violence in Zimbabwe.

a) Serious violations of common article 3 to the Geneva Conventions

In the case of an armed conflict not of an international character, serious violations of Article 3 Common to the four Geneva Conventions of 12 August 1949, apply. These can be found in Article 8(2)(c)(i)-(iv) of the Rome Statute.

Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture, Article 8(2)(c)(i): The specific elements of violence to life and person entail that a perpetrator kill, torture, mutilate or subject to other forms of cruel treatment civilians or *hors de combat*. Torture, as a war crime, requires that the perpetrator inflicted severe physical or mental pain or suffering upon one or more persons. The pain or suffering inflicted had to be carried out for such purposes as: obtaining information or a confession, punishment, intimidation or coercion or for any reason based on discrimination of any kind. Cruel treatment requires that the perpetrator inflicted

severe physical or mental pain or suffering upon one or more persons. In addition to the contextual elements, the perpetrators must have been aware of the protected status of the victims.

Outrages upon personal dignity, in particular humiliating and degrading treatment, Article 8(2)(c)(ii): The specific elements for outrages upon personal dignity require that the perpetrator humiliated, degraded or otherwise violated the dignity of either *hors de combat*, civilians, or medical or religious personnel not taking part in hostilities. The severity of the humiliation, degradation or other violation needs to be of such a degree as to be generally recognized as an outrage upon personal dignity.

b) Other serious violations of the laws and customs of internal armed conflict

Intentionally directing attacks against civilian populations: The Rome Statute, customary law and Article 51 of Additional Protocol I and Article 13 of Additional Protocol II of the Geneva Conventions of 1949 recognize unlawful attacks on civilian populations as a violation of the law of wars. Importantly, the concepts of 'attack' and 'armed conflict' are distinct notions despite the fact that an attack on any civilian population may be part of an armed conflict.⁶⁵

Since the events surrounding Operation *Gukurahundi* likely satisfy the requisite contextual and specific elements, there are reasonable grounds to believe that Mugabe and others committed war crimes as defined under Article 8 of the Rome Statute.

6. Domestic Crimes

An increasing number of hybrid and internationalized criminal courts have incorporated crimes found within their domestic legal systems. For example, in addition to international law violations, the Special Court for Sierra Leone has the power to prosecute domestic offences relating to persons who have abused girls

⁶⁵ ICTY, *Prosecutor v. Vasiljevic*, IT-98-32-T, Trial Judgment, 11 November 2002, para. 30; ICTY, *Prosecutor v. Kunarac*, IT-96-23-A, Appeal Chamber Judgment, 12 June 2002, para. 86.

under the Prevention of Cruelty to Children Act (specifically, sections 6, 7 and 12), and offences relating to the wanton destruction of property under the Malicious Damage Act (specifically, sections 2, 5, and 6).⁶⁶

Similarly, at the Extraordinary Chambers in the Courts of Cambodia (ECCC) the Court has the power to try individuals for both international criminal offenses as well as offences set forth in the 1956 Penal Code, and which were committed during the period from 17 April 1975 to 6 January 1979, including Homicide (Article 501, 503, 504, 505, 506, 507 and 508), Torture (Article 500), and Religious Persecution (Articles 209 and 210).⁶⁷ Moreover, the ECCC adapted its application of domestic crimes to fit the special needs of Court. In this sense, the Court extended the statute of limitations for these crimes by an additional 30 years. And the penalty under Articles 209, 500, 506 and 507 of the 1956 Penal Code was limited to a maximum of life imprisonment, in accordance with Article 32 of the Constitution of the Kingdom of Cambodia, and as further stipulated in Articles 38 and 39 of this Law. As with the SCSL and the ECCC, at the Special Panels for Serious Crimes in East Timor (SPSC), the Court had subject matter jurisdiction over provisions of the applicable Penal Code in East Timor relating to the crimes of murder and sexual offences.⁶⁸ In keeping with the trend of combining international and domestic crimes, a potential court for Zimbabwe could incorporate domestic violations of its Constitution or criminal code.

a) The Zimbabwe Constitution

Chapter 3 of the Zimbabwe Constitution refers to the 'Declaration of Rights' for citizens of Zimbabwe. At first glance the enumerated rights appear to conform to international norms; however, many have been

manipulated to such a degree that Mugabe and other officials take life in conformity with the Constitution. Most important for the context of this memorandum are the following rights:

Violation of the Right to Life (Article 12): This provision provides that "No person shall be deprived of his life" except in the execution of a criminal sentence. However, the provision further states that the right is not violated if the life was taken in order to carry out a lawful arrest, for the purpose of suppressing a riot, insurrection or mutiny, dispersing an unlawful gathering, or in order to prevent the commission of a criminal offense by that person. The wide-range of exceptions provided for in this Constitutional provision essentially nullifies this right for citizens of Zimbabwe who disagree with the policies of Mugabe.

Violation of the Right to Personal Liberty (Article 13): This provision provides that "no person shall be deprived of his personal liberty." However it also provides a number of exceptions when authorized by law, including, *inter alia*, situations when ordered by a court, upon reasonable suspicion of his having committed or being about to commit a criminal offense, or for the purpose of preventing the spread of an infectious or contagious disease. Although the provisions states that an individual who was unlawfully detained is entitled to compensation from that person or authority there is an exception when the official acted in good faith and without culpability. Again, the wide-ranging exceptions for subjective determinations by government officials largely waters down this right for citizens of Zimbabwe.

Inhuman treatment (Article 15): Article 15 of the Constitution provides that "no person shall be subjected to torture or to inhuman or degrading

66 Statute for the Special Court for Sierra Leone, 16 January 2002, Article 5, available at: <http://www.sc-sl.org/Documents/scsl-statute.html>.

67 Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006), Article 3 (new), available at: http://www.eccc.gov.kh/english/cabinet/law/4/KR_Law_as_amended_27_Oct_2004_Eng.pdf.

68 Regulation No. 2000/15, On the Establishment of Panels with Exclusive Jurisdiction over Serious Criminal Offences in East Timor, Sections 8 and 9, available at: <http://www.un.org/peace/etimor/untaetR/Reg0015E.pdf>.

punishment or other such treatment.” The provision goes on to exclude moderate forms of corporal punishment. However, forms of inhuman treatment have been well documented by Human Rights Watch and other NGOs, with little to no repercussions for those carrying out the inhuman or degrading treatment.

Importantly, Article 30 of the Constitution provides that while the President resides in office, he shall not be personally liable to any civil or criminal proceedings in any court. However, once that individual is no longer president civil and criminal proceedings may be initiated for acts and omissions predating the Presidency or for acts and omissions done in his personal capacity during the Presidency.

b) The Zimbabwe Criminal Code⁶⁹

Like the SCSL, ECCC and SPSC, the potential court may want to incorporate domestic criminal crimes. Under the domestic criminal code of Zimbabwe, murder and sexual crimes, are the most likely crimes that would apply.

Murder: Should a court be unable to prove murder as part of a widespread or systematic state policy, it should have the option of prosecuting for murder under the Zimbabwe criminal code. Under Chapter V, Part I dealing with Homicide, the Criminal Code for Zimbabwe provides for the crime of murder.⁷⁰ Murder refers to the intentional killing of another person. Under Section 337 of the Criminal Procedure and Evidence Act [chapter 9:07], a convicted person shall be sentenced to death unless that person is under the age of eighteen or the court is of the opinion that there are extenuating circumstances.⁷¹ The Code further states that a person convicted of attempted murder or of incitement or conspiracy to commit

murder shall be liable to be sentenced to death or to imprisonment for life or any shorter period.

The issue of the death penalty, which is available as a form of punishment in Zimbabwe, will most certainly arise during negotiations for a regional, international or internationalized court.

Sexual Offenses: The Criminal Code of Zimbabwe provides for the crimes of rape and aggravated indecent assault.⁷² The crime of rape, however, only applies to the raping of a woman by a man. The rape of a man by another man is found under aggravated indecent assault.

Sexual offenses have not been widely reported in Zimbabwe until very recently.⁷³ For this reason, it may be difficult to secure a conviction for sexual offenses as a crime against humanity despite reports that militia use rape as a weapon. However, this should not foreclose the prosecution of such crimes under the domestic criminal code.

CONCLUSION

This memorandum examined possible criminal charges that can be brought against Mugabe and other high ranking officials in Zimbabwe should they be prosecuted in a court of law. Dating back to the early 1980s, Mugabe and others have committed numerous crimes, both international and domestic in scope, therefore the possible charges range from crimes against humanity to war crimes to domestic law violations.

Many of Mugabe’s crimes have occurred as part of a widespread or systematic attack directed against Zimbabwe’s civilian population with knowledge of the

69 Criminal Law (Codification and Reform) Act, Act 23/2004, Published in *Government Gazette*: 3rd June, 2005 (General Notice 227/2005); Date of commencement: To be fixed in terms of section 2(2) by statutory instrument; Not yet in force as at 22nd June, 2005.

70 Zimbabwe Criminal Code, *supra* note 49, at Article 47.

71 Zimbabwe Criminal Code, *supra* note 49, at Article 47(2)(a)-(b).

72 Zimbabwe Criminal Code, *supra* note 49, at Articles 66 and 67.

73 See Michael Wines, Reports of Rape and Torture inside Zimbabwean Militia, Women’s International League for Peace and Freedom, available at: <http://www.peacewomen.org/news/Zimbabwe/Dec03/reports.html>;

See also, Louis Weston, *Zimbabwe: Mugabe Troops use Rape as Weapon*, Telegraph.co.uk, 22 June 2008,

available at: <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/zimbabwe/2164157/Zimbabwe-Mugabe-troops-use-rape-as-weapon.html>.

attacks. Moreover, the attacks against civilians appear to be part of a government plan or policy. Therefore it is advisable that Mugabe and other high ranking ZANU-PF officials be charged with crimes against humanity, namely for murder, deportation/forcible transfer, imprisonment, torture, rape, persecution and other inhumane acts.

In addition to crimes against humanity, Mugabe and others could be charged with war crimes for acts dating back to the internal conflict that took place in Zimbabwe in the 1980s when government forces brutally suppressed opposition forces as well as a number of civilian populations believed to be supporting the opposition. The charges could include serious violations of Common Article 3 to the Geneva

Conventions as well as other serious violations of the laws and customs of internal armed conflict.

Finally, under the Zimbabwean domestic system, charges stemming from violations of the Zimbabwean Constitution as well as violations of the domestic criminal code could be brought against Mugabe and other high ranking government officials. Despite the fact that the Constitution does not allow sitting presidents to face criminal charges or civil claims for damages, once Mugabe is removed from power domestic charges may be brought in a Zimbabwean court. Therefore, it would be prudent to bring a combination of international and domestic criminal charges against Mugabe as is currently the trend in a number of internationalized courts.

SECTION 4: Procedural Aspects of a Future Tribunal for Zimbabwe Addressing Abuses by Robert Mugabe and Other High Ranking Officials; Possible Locations for This Tribunal’s Chambers⁷⁴

STATEMENT OF PURPOSE

The purpose of this memorandum is to set out the options available to policymakers in the event that judicial proceedings against Robert Mugabe and other high ranking officials of the current Zimbabwean government are brought. Specifically, this memorandum addresses the procedural aspects of a future tribunal and discusses locations where this tribunal could be based.

INTRODUCTION

This memorandum explores the possibility of criminal proceedings against Robert Mugabe and other officials by a hybrid international war crimes tribunal or an internationalized domestic court. After a discussion of the procedural aspects of a future tribunal for Zimbabwe, and an argument for a hybrid international war crimes tribunal instead of an internationalized domestic court, this memorandum proceeds to argue for the advisability of a truth commission in conjunction with formal criminal proceedings. It concludes with a case for basing the tribunal’s chambers in Harare for the purposes of national reconciliation and public accountability.

1. The possibility of an internationalized domestic tribunal

The UN may exercise its mandatory powers under Chapter VII of the Charter to temporarily govern a post-Mugabe Zimbabwe after the Council determines, under Article 39, that there is a “threat to the peace, breach, of the peace, or an act of aggression.”⁷⁵ A determination that the Zimbabwean legal system cannot function independently (this is especially likely if the crisis stretches for an extended period) may also create a need for a UN transitional administration.⁷⁶

The option of an internationalized domestic tribunal suffers from the incomprehensive nature of the Zimbabwean Constitution and Criminal Code, which is marred by indistinct exceptions protecting the Government from allegations of human rights violations.⁷⁷ These exceptions make prosecution under domestic law in the context of an internationalized domestic tribunal unattractive, as Mugabe and those senior members of the Zimbabwe African Unity Party (ZANU-PF) who committed crimes against humanity could escape being brought to justice by employing the escape hatches in the law that they themselves drafted in order to escape criminal responsibility for their actions.

⁷⁴ Anton Altman, J.D. Candidate, American University, Washington College of Law, 2010; Intern, School of Human Rights Research, Utrecht, The Netherlands.

⁷⁵ UN Charter art. 39; Michael J. Matheson, *United Nations Governance of Post-Conflict Societies: East Timor and Kosovo*, published in *Post-Conflict Justice*, (M. Cherif Bassiouni, ed.) (Transnational Publishers 2002), arguing that the UN is traditionally reluctant to assume governmental functions in a sovereign state if this sovereign state’s institutions are functioning.

⁷⁶ Laura A. Dickinson, *The Promise of Hybrid Courts*, 97 *AM. J. INT’L LAW* (2003) 295, 301, outlining the reasons why a domestic legal system post-conflict may lack legitimacy: collapsed physical structures, unqualified judges and lawyers, and, crucially, personnel invariably remaining from the previous regime that endorsed the atrocities. This analysis will likely be applicable to a post-conflict Zimbabwe, as a new government would either clear the legal cadres of ZANU-PF elements—thereby calling the qualifications of the Zimbabwean legal system into question; or, conversely, leave the system be, including the officials who enforced and applied Mugabe’s laws.

⁷⁷ See Brianne N. McGonigle’s discussion of the loopholes that the Zimbabwean Criminal Code and Constitution grant its government, *infra*.

Also, an internationalized domestic tribunal trying Robert Mugabe and senior ZANU-PF officials for crimes against humanity would benefit from experience gained from the Extraordinary Chambers in the Courts of Cambodia (ECCC). Experience with the ECCC has shown that an internationalized domestic tribunal may lead to impunity for egregious offenders when the host government abuses its discretion to influence decisions on whom to prosecute to protect war criminals out of political considerations.⁷⁸ Political realities in a future Zimbabwe will require the participation of former members of ZANU-PF in public life, some of whom may have participated in Mugabe's repression and atrocities. All but the most senior-level members are likely to be granted amnesty.

Furthermore, an internationalized domestic court in the model of the ECCC would be hampered by divided leadership and systemic and administrative difficulties. In short, internationalized domestic tribunals share the shortcomings of wholly domestic and wholly international tribunals: problems of legitimacy, problems of capacity-building, and problems of norm penetration,⁷⁹ when considered with the network of safety measures that Mugabe and ZANU-PF have created in the Zimbabwean Constitution and Criminal Code make these tribunals unattractive when compared with the option of a hybrid court.

2. The possibility of a hybrid international war crimes tribunal

A hybrid international war crimes tribunal is the most promising legal option for bringing Mugabe and senior Zimbabwean officials to account.⁸⁰ A hybrid

tribunal would consist of both international and Zimbabwean judges and could follow the framework of the Special Court for Sierra Leone (SCSL), with Trial and Appeals chambers, and be the result of negotiations between the UN Office of Legal Affairs and the new Government of Zimbabwe which would culminate in a Memorandum of Understanding. A hybrid court would be a *sui generis* court of mixed composition and jurisdiction.⁸¹ The law applicable to a hybrid war crimes tribunal could encompass both international law and Zimbabwean law, crimes against humanity, war crimes, and other serious violations of international humanitarian law inclusive.⁸² The accused shall be entitled to "fair and public hearing[s]" and will be presumed innocent until proven guilty, and will be afforded the requisite minimum guarantees.⁸³

The benefits of a hybrid international war crimes tribunal for addressing the abuses in Zimbabwe are many. First, because a hybrid court may operate in Harare,⁸⁴ it would add to the transparency of the legal process. Second, because a hybrid court would include local judges and personnel, it would allow for local ownership of the proceedings thereby battling against the conception that the tribunal is a post-colonial imposition of non-African values.⁸⁵ Third, a hybrid court would make a significant contribution to long-term capacity-building to the Zimbabwean legal system.⁸⁶ Fourth, the turnaround on establishment of a hybrid court as compared to an *ad hoc* tribunal is favorable—a fraction of the latter's expenses and snail's pace.⁸⁷ Fifth, hybrid courts have a track record of securing indictments and completing trials at a faster pace than purely international courts.⁸⁸

78 Steven R. Ratner, *Accountability for the Khmer Rouge: A (Lack of) Progress Report*, published in *Post-Conflict Justice*, *supra* note 1, at 613

79 See generally, Dickinson, *supra* note 5. An internationalized domestic tribunal would also face claims of paternalism and colonialism—associations from which Mugabe and ZANU-PF and their ideological successors would gain political clout.

80 As in the case of the SCSL, the new Government of Zimbabwe and the UN would have to emphasize the complementary nature of the hybrid court and the need for mutual cooperation in order to avoid the roadblocks suffered at the ECCC.

81 Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, S/2000/915 (200), at ¶ 35.

82 UN Resolution 1315 (2000); an example from the SCSL: Statute of the Special Court for Sierra Leone, art. 14, *cited in* Jennifer L. Poole, *Post-Conflict Justice in Sierra Leone*, published in *Post-Conflict Justice*, *supra* note 1, at 584.

83 See generally Poole, *supra* note 8.

84 See *infra* Part V.

85 See Dickinson, *supra* note 5.

86 Neil J. Kritz, *Progress and Humility: the Ongoing Search for Post-Conflict Justice*, published in *Post-Conflict Justice*, *supra* note 1, at 75.

87 By 2004 UN *ad hoc* tribunals had consumed \$250 million yearly—15% of the UN General Budget; *cited in* Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, Report of the Secretary-General, UN Doc. S/2004/616, ¶ 43.

88 See note 8, *supra*.

3. The possibility of referral to the International Criminal Court

Referral of the Zimbabwean crisis to the International Criminal Court (ICC) may not be advisable as for the purposes of establishing a track record of crimes against humanity by Mugabe and senior members of ZANU-PF, a chain of acts prior to 2002 may be necessary—an option that referral to the ICC would rule out. In addition, referral to the ICC would make it more difficult for the court's chambers to be based in Harare, although Judge Kirsch, President of the ICC, has indicated that the ICC would be interested in holding future hearings on location.⁸⁹

Further, the ICC remains handcuffed by the absence of three permanent members of the Security Council from its membership.

4. Advisability of a truth and reconciliation commission

Sierra Leone exemplifies the advantages of truth-seeking non-criminal proceedings in conjunction with a formal criminal tribunal. A reconciliation commission is an appropriate mechanism for localized resolution of the eternal question of personal accountability vice societal forgiveness and reconciliation.⁹⁰ By exchanging amnesty⁹¹ for an account of localized events, a Zimbabwean truth commission should be mandated with investigating human rights violations during the Mugabe regime. This commission should identify governmental and private sector practices

and policies that contributed to these violations and recommend reforms which would lead to the prevention of a repetition of these human rights violations as well as respond to victims.⁹² A truth and reconciliation commission like the one described could do much to heal Zimbabwean society using native mechanisms to reintegrate mid- and low-level ZANU-PF officials into the community.⁹³

5. Benefits conferred by locating chambers in Harare or the immediate region

If feasible, a tribunal for Zimbabwe should have its chambers located in Harare, as a location in-country would positively influence national reconciliation and public accountability. Locating the tribunal far from the site of the atrocities would likely serve to diminish the impact of the tribunal on national reconciliation, as citizens are unlikely to be informed of proceedings in a far-off location.⁹⁴ Locating the tribunal in The Hague, for example, would disconnect Zimbabweans from the proceedings and serve to disassociate the tribunal from the site of the atrocities.

Moreover, victims' advocates routinely call for access to the justice process, by having trials and hearings *in situ*, closer to victims' populations.⁹⁵ Having the tribunal meet on location would minimize victims' inconvenience in according with the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation.⁹⁶ Additionally, having hearings on site

89 Remarks of Judge Philippe Kirsch, President of the International Criminal Court, to the UN General Assembly, 9 October 2006; "International Criminal Court Considers Holding Trial Hearings in Congo," *International Herald Tribune*, 4 September 2007.

90 See generally, Martha Minow, *Between Vengeance and Forgiveness* (Beacon Press 1998).

91 Amnesty should only be made available to persons in lower rungs of culpability, as under the Rwandan four-rung system to respect victims' rights, see *id.*, see also Kritz, *supra* note 12, at 77.

92 A truth commission could take its cue from the Timor-Leste "Commission for Reception, Truth, and Reconciliation," *UNTAET Regulation No. 2001/10 on the Establishment of a Commission for Reception, Truth and Reconciliation in East Timor* (13 July 2001), Section 21.2, available at <http://www.un.org/peace/etimor/untaetr/Reg10e.pdf>.

93 In addition, non-criminal sanctions could be placed on culpable individuals that would exclude them from elected or appointed offices based on their prior activities, associations, or positions. This would be especially prudent for Mugabe's "War Veterans." See Kritz, *supra* note 12, at 80-81.

94 An empirical study of the perceptions of the ICTY within Bosnia and Herzegovina indicates that a wide cross-section of lawyers and judges were poorly-informed of the Tribunal's work and suspicious of its motives and results. See The Human Rights Center and the International Human Rights Law Clinic, University of California, Berkeley, and the Centre for Human Rights, University of Sarajevo, *Justice, Accountability, and Social Reconstruction: An Interview Study of Bosnian Judges and Prosecutors*, 18 *BERKELEY J. INT'L LAW* 102, 136-40 (2000), cited in Dickinson, *supra* note 2, at 302.

95 The Redress Trust, *Victims, Perpetrators or Heroes? Child Soldiers before the International Criminal Court* (2006), at 51.

96 *Id.*, n. 313.

would assist the judges in understanding the contextual factors in the proceedings, such as geography and local customs.⁹⁷

In the event that the tribunal cannot be placed in Zimbabwe due to political or other concerns, all efforts should be made to place the tribunal in a location as accessible to Zimbabweans as possible, perhaps the Republic of South Africa, where many Zimbabwean refugees have been displaced.

6. Omissions from this memorandum

A political resolution of the Zimbabwean crisis, along with a modicum of internal stability, is necessary before the procedural options available to the international community to hold Robert Mugabe and accomplices may be realized. This memorandum assumes that Robert Mugabe is not Head of Government or State and ZANU-PF in its present form has relinquished power in Zimbabwe. This memorandum also assumes that Mugabe and senior Zimbabwean officials are not granted amnesty in exchange for a withdrawal from power.

An effort to bring Mugabe and senior ZANU-PF officials to justice will likely encounter strong resistance from African governments due to the groundbreaking nature of bringing a Head of Government to account for crimes against humanity, especially if the crimes committed by the Mugabe government are characterized as purely, or mainly, political in nature and are prosecuted as crimes against humanity.⁹⁸

Crimes prosecuted as a result of conflicts in the former Yugoslavia, Rwanda, Cambodia, Timor-Leste, and Sierra Leone are in their nature distinguishable from those in Zimbabwe.⁹⁹ Specifically, colonial and postcolonial Africa is riddled with un-prosecuted politically-motivated violence arising from official state action, actions that arguably rose to international criminal standards for crimes against humanity.¹⁰⁰ Uneven enforcement may prove to be a serious impediment towards bringing Mugabe and ZANU-PF to justice.

97 *Id.*, recalling *The Prosecutor v. Ignace Bagilishema*, Case ICTR-. “[Hearings *in situ*] were found particularly useful . . . in the *Bagilishema* case in response to a request from the defence . . . all parties to the proceedings expressed enthusiasm for the visit in the interests of justice as it assisted understanding of events, and particularly how witnesses could have heard or seen what was happening in neighboring hills.”

98 See M. Cherif Bassiouni, *Accountability for Violations of International Humanitarian Law and Other Serious Violations of Human Rights*, published in *Post-Conflict Justice*, *supra* note 1, at 11-14, mentioning that political abuses are not covered by the customary law of armed conflicts, and that prosecution for crimes against humanity suffers from normative weaknesses and the absence of a specialized convention covering this area.

99 The situation in Timor-Leste is distinguishable from that in Zimbabwe by virtue of the political violence being propagated by a rebel force rather than by the government in power.

100 Teodoro Obiang, President of Equatorial Guinea, is one example.



enough

The project to end genocide and crimes against humanity

1225 Eye Street, NW, Suite 307 | Washington, DC 20005
Phone: 202-682-1611 Fax: 202-682-6140
www.enoughproject.org



Syracuse University College of Law | MacNaughton Hall
Suite 402 | Syracuse, NY 13244-1030
www.impunitywatch.net