

AN OVERVIEW OF THE HUMAN RIGHTS SITUATION IN ZIMBABWE, WITH SPECIFIC REFERENCE TO REPRESSIVE LEGISLATION, IMPUNITY, THE STATE OF THE ADMINISTRATION OF JUSTICE AND SELECTIVE APPLICATION OF THE LAW. By Arnold Tsunga¹

Introduction

It is not possible to give an overview that covers the themes expected in this paper without giving a broad background of the general human rights environment in Zimbabwe first. I will therefore give a very general but extensive background of the human rights situation in Zimbabwe from about 2000 to date since this places current developments in Zimbabwe into context.

General Background Information

It is necessary to superficially refer to the year 2000 because that is when ZANU PF using its control over national resources initiated a systematic, sustained and calculated process both legislatively and non legislatively of trampling upon and curtailing basic fundamental rights with the objective of retaining political power in Zimbabwe through hook or crook. Unmitigated, nationwide politically motivated organised violence and intimidation was started in earnest in 2000 and merely escalated systematically over the years right through to the present date. In 2000, Zimbabwe had two politically important electoral processes, the constitutional referendum which the Government lost and the parliamentary election which ZANU(PF) claimed to have narrowly won in controversial circumstances albeit allegations of electoral irregularities, including politically motivated violence, torture and intimidation. Indeed subsequent to the election results the High Court has nullified results in 8 constituencies which is a record in Zimbabwe.² The significance of the results of these electoral processes is that for the first time in the history of Zimbabwe, the country found itself with a genuine and credible opposition party with a realistic chance of winning a free and fair election and thus dethroning ZANU (PF) from power. The elections were marred by politically motivated violence with over 200-recorded deaths.³

The government also engineered violent farm invasions which phenomenon it conveniently termed a land reform programme or third chimurenga to disguise the political motives. Soon the rural areas became virtually inaccessible for human rights defenders (“hrds”) after non legislated militias war veterans and the youth brigade were deployed to curtail freedom of movement, assembly, association, and of expression. These militias remain deployed in virtually all-rural areas and reports are that 5000 new recruits were trained and deployed in the last few weeks in order to influence the 2005 parliamentary elections. Certain areas became known to be no go areas for opposition and hrds in general such as Mount Darwin North and South,

¹ Arnold Tsunga is the Executive Director of Zimbabwe Lawyers For Human Rights and delivered this paper in Dublin on 20 February 2004 at a workshop arranged by Trocaire

² All in all the MDC challenged in the High Court results in 38 constituencies as follows; Bikita West, Goromonzi, Guruve South, Gutu North, Gwanda South, Hwedza, Kariba, Makoni East and West, Marondera West and West, Masvingo South, Mazowe East and West, Mberengwa East and West, Mt Darwin South, Murehwa North and South, Mutoko South, Mwenezi, Shurugwi, Zvimba North, and Zvishavane, Bindura, Buhera North, Chegutu, Chikomba, Chiredzi North and South, Chivi North, Gokwe Central, East, North, South and West (See NGO Forum report on Human Rights and Zimbabwe’s June 2000 Election; January 2001)

³ See the NGO Forum reports of 2000

Guruve and Shamva, Uzumba Marambapfungwe, Mashonaland West Province and Midlands province.⁴ In the final report on the Presidential election of March 2002 the Zimbabwe Election Support Network (ZESN) reported that;

“the number of known militia bases were located as follows in the provinces: Mashonaland Central (40); Matabeleland (29); Mashonaland West (23); Masvingo (13); Bulawayo (13); Mashonaland East (9); Chitungwiza (9); and Harare (5). In Masvingo the party militia was camped at vice President Muzenda’s Paradise Motel”

Presently there is still no meaningful human rights activity in virtually all rural areas in Zimbabwe and unless this issue is addressed urgently, the information gap between urban and rural areas will continue which will result in no meaningful changes in the election results to patterns in future elections especially the impending 2005 Parliamentary Elections. Members of the judiciary were not spared either from politically motivated violence as will be evident in this paper.

The government conveniently linked and continues to link human rights defenders and NGOs with the opposition Movement For Democratic Change in order to ostracise them.⁵ Torture as a tool of repression was used extensively with over 1000 documented cases in October 2002.⁶ Teachers who fit the definition of hrds by virtue of their special place in civilisation became targets of politically motivated violence in 2002 with reports of violence against teachers being received in 8 out of the 10 provinces. Over 35 schools were reported closed in Masvingo province alone due to intimidation of teachers. 107 503 teachers were forced to pay protection fees. 20 994 teachers were kidnapped, 15 659 assaulted/harassed, 14 442 displaced, and 4926 received death reports.⁷ Rape was also reported to have been used as a weapon to fight political opponents by ZANU (P.F).⁸

Arbitrary arrest and detention, kidnapping, selective prosecution, denial of fair trial, degrading and inhuman prison conditions, promulgation of repressive legislation such as The Public Order and Security Act (Cap 11:17) and The Access to Information and Protection of Privacy Act (Cap 10:27) were other methods used to curtail enjoyment of fundamental rights and also create a minefield for hrds.⁹

Between 1 January 2002 and 14 April 2002 the total cumulative picture of documented politically motivated violence was as follows; 54 deaths/executions; 48

⁴ Zimbabwe Election Support Network reports on the March 2002 Presidential election at p 36.

⁵ ZimRights, FIDH and OMCT in their joint report on hrds of February 2002 cite cases from March 2002 to November 2002 where the government used the press to churn out propaganda against human rights groups such as Amani Trust, The Legal Resources Foundation, Amnesty International, ZimRights, ZESN, Catholic Commission for Justice and Peace, the National Constitutional Assembly and the Crisis Coalition.

⁶ NGO Forum October 2002 report; See also ICG report 42 Zimbabwe: The Politics of National Liberation and International Division; See also the Zimbabwe Human Rights Bulletin Issue 7, by Zimbabwe Lawyers for Human Rights p11

⁷ Zimbabwe Human Rights Bulletin issue 7 (pages 11& 98)

⁸ ZESN Presidential report (supra) p45; ICG Report No 42 (supra) p7; Zimbabwe Human Rights Bulletin issue 7 (p 87/8); see also Daily News report where patrons at a night club in Chitungwiza forced to have sex.

⁹ Refer generally to the Zimbabwe Human Rights Bulletin, Issue 7 Baseline report for examples.

schools closed; 229 threats/intimidation; 214 kidnappings; 29 disappearances; 5 rape cases; 241 property damages; 945 cases of torture; and 242 unlawful detentions.¹⁰

The situation has not yet improved with torture, violence, intimidation, and selective prosecution on the increase in 2003. The worrisome factor of the new wave of torture being the involvement of members of the armed forces who raid targeted victims including hrds in the middle of the night.¹¹ Job Sikhala and his lawyer Gabriel Shumba who has since sought political asylum elsewhere were severely tortured in a case well documented in the courts.¹² State agents or die-hard ZANU P.F activists have specifically targeted journalists, lawyers and public prosecutors.¹³ Ordinary activists in communities have been targeted as well throughout the country with MDC members routinely arrested and tortured. About 400 of them were arrested in March and April 2003 alone after the President encouraged state agents to be ruthless with activists during his eulogy at the late Minister of Transport Dr Swithum Mombeshora' burial at the heroes acre. Members and former members of the defence forces and the police have also been specifically targeted for abuse in order to instill fear and discipline to serving members and to make them more susceptible to political control. The political environment in which the hrds have worked since 2000 was therefore very trying and dangerous. With a political environment as volatile and unpredictable like the one prevailing in Zimbabwe presently, the work of a hrd is therefore very risky and tricky.

Outline of Repressive Legislation

There are a number of Acts of parliament that are extremely repressive that the government has promulgated or reactivated in recent years. These include The

¹⁰ ZESN Presidential Report (supra) p 36

¹¹ The IDASA regional human rights defender's Report of 26 March 2003 states "This is the first time in three years that the military have constituted the highest percentage of perpetrators, and also the first time that the majority of the victims have not been able to name the perpetrators. The personnel involved in the torture had the names and addresses of the victims, and in many cases, if the victims were not accessible, the other occupants of the house were assaulted." Netsai Kaitano a ZimRights National Council member was raided at 1.00 am by men in uniform and thoroughly beaten, Men in uniform also gang raped an MDC polling agent's wife in Harare according to reports from the daily News See also the release by ZADHR dated 26/6/03.

¹² On 21 January 2003, Zimbabwe Lawyers for Human Rights (ZLHR) wrote as follows on increase in torture cases; "Zimbabwe Lawyers for Human Rights has read with alarm various reports in the press about the torture being perpetrated by the police, particularly in the Law and Order Section, and other Law Enforcement Agents. In the last week alone there have been several disturbing reports. There were reports of the inhuman treatment and torture of Gabriel Shumba, a legal practitioner, Job Sikhala, an opposition member of parliament, and other people they were arrested with. Their complaints and the medical reports on the injuries they sustained while in police custody are part of the court record. We are unaware that the police have at any time denied the allegations that they assaulted and tortured the accused, and forced Job Sikhala to drink an unidentified substance."

¹³ On 10 April 2003 in a press release ZLHR reiterated its grave concern at the upsurge in threats, harassment and intimidation of prosecutors, lawyers, magistrates and judges, particularly those handling human rights-related cases, and called upon the government to comply with its obligations and responsibilities to guarantee the independence of the Judiciary and to ensure that adequate protection is offered to members of the legal fraternity in the exercise of their judicial functions. In particular ZLHR insisted that all reports of threats, intimidation and harassment of the lawyers and public prosecutors must be promptly investigated and perpetrators prosecuted. The Media Institute of Southern Africa (MISA) at its Media Lawyers Network annual conference at Nyanga on 11-13 April gave out dossier with names of over 27 journalists who have been arrested in the past year some of them more than once. MISA's email is misa@mweb.co.zw

Broadcasting Services Act, The Access To Information And Protection Of Privacy Act (AIPPA), The Public Order And Security Act, The Citizenship Act, The Private Voluntary Organizations Act, The Electoral Act And Regulations, The Labour Relations Act, The Miscellaneous Offences Act (MOA) and The Presidential Powers Act. These Acts of parliament will be looked at very generally in this paper to highlight repressive aspects of the respective legislation that impinge on human rights activism.

The **Broadcasting Services Act** virtually creates a monopoly on the part of the state owned Zimbabwe Broadcasting Corporation to be the sole electronic broadcaster in Zimbabwe. In reality it prevents independent electronic broadcasting in Zimbabwe unless certain impossible conditionalities are met. It also creates offences that are vindictive should one attempt to broadcast in violation of the Act, such as fines of millions of dollars and the right of the Minister of Information to confiscate or destroy the broadcasting equipment of the offender. The Act infringes on the right to freedom of expression without which right it is impossible for hrds to operate effectively.

The **POSA** is arguably the most repressive piece of legislation in the history Zimbabwe's jurisprudence. It effectively bans any assembly without police permission, which permission is rarely granted to NGOs, Civil Society, labour unions, other human rights defenders or opposition parties. The Act allows police to use force or to kill to disperse public gatherings. In terms of the Act, the organizer of the public gathering is held personally civilly and criminally liable for any consequences arising from the public gathering or the police breaking the public gathering. The Act also outlaws criticism of the President or gesturing in a manner that brings ridicule to, or engenders feelings of hatred against, the President. Criticism of the police is also banned and so is publication of anything that is likely to engender feelings of hatred against the President.

POSA seriously violates and undermines the rights to freedom of assembly, association, expression, movement, and is not justifiable in a democratic society. Hrds cannot efficiently operate without the enjoyment of such rights. Using POSA the police have found it easy to arbitrary arrest and detain hrds with impunity¹⁴.

The **AIPPA** seeks to place journalists and journalism in Zimbabwe under the actual and effective control of the Minister of Information in the President's department. Journalists must accredit with the Media Commission constituted by appendages of the government if they are to practice journalism in Zimbabwe. Media houses must register with the Media Commission or else they are deemed to be operating unlawfully. The Act creates a minefield for journalists and has been challenged in the Supreme Court in terms of its constitutionality by the Associated Newspapers of Zimbabwe, the publishers of The Daily News and The Daily News on Sunday¹⁵. The Supreme Court made a ruling refusing to give the Daily News audience on the basis that they had approached the court with dirty hands in coming to the Supreme Court without first registering in terms of AIPPA. This ruling has been extensively criticized as showing that the Supreme Court played a complicity role in causing a serious

¹⁴ Zimbabwe lawyers For Human Rights dealt with over 314 cases of hrds who were arbitrarily arrested and detained in 2003 alone. See their reports on hrds obtainable on zlh@icon.co.zw

¹⁵ See Associated Newspapers of Zimbabwe (Pvt) Ltd –v- (1) The Minister of State For Information and Publicity in The President's Office and ors SC 20/03

violation of the right to freedom of expression in Zimbabwe because after its ruling, the Daily News which is the only independent daily newspaper that was circulating in Zimbabwe was forcibly shut by state agents and its equipment seized.¹⁶ Among some of the offences under AIPPA are writing false statements or writing a story where there is a real likelihood that it can be false, or engendering feelings of hatred or hostility towards the President. This Act was signed into law six days after the President claimed victory in the election in March 2002. An unprecedented number of journalists in the history of Zimbabwe's journalism have been arrested have been made under AIPPA. Since the closure of the Daily News, the people of Zimbabwe have been subjected to unlimited doses of state propaganda and hate messages. There are virtually no alternative views that are broadcasts by the state media. In one case the High Court took the fact of belief in hate messages as extenuation in a murder case where ZANU PF youths pleaded that they killed another person genuinely believing that they were involved in a war of acquiring land as a "third chimurenga".¹⁷ AIPPA infringes on the right to freedom of expression, which is vital for the building of democracy and the work of hrds.

The **Electoral Act** and regulations made thereunder have been used to prevent hrds NGOs and Civil society from effective participation in the electoral process through;

- Banning Civil Society, NGOs and hrds from election monitoring
- Banning Civil Society, NGOs, and hrds from participating independently in civic education on electoral processes
- Giving too many arbitrary and discretionary powers to the Minister of Justice to make regulations governing the conduct of elections. This has been abused to create an uneven playfield in elections including making laws a few days and in instances hours before elections.

The PVO Act has been used to threaten NGOs involved in human rights work to register with the Ministry of Public Service Labour and Social Welfare or risk prosecution. Once they register with the Ministry, then the Ministry would have a say in the Board matters of the NGOs as well as in matters of their funding. This threat remains hanging over NGOs and hrds. For example the Ministry of Labour Social Welfare have written to ZLHR insisting that they must register in terms of the PVO Act and this is seen as a preliminary towards clamping down on the organization.

The Citizenship Act has been used to deprive in some cases people of their citizenship. It is not possible as a hrd to function properly when there is a threat that you could lose your citizenship as a result of your human rights activism. The case of Juddith Todd is a case in point. Even the Supreme Court appeared to have become an unwitting tool of pressurizing the hrd in this case as it gave Judith Todd 48 hours to

¹⁶ See a publication of Zimbabwe Lawyers For Human Rights under their access to justice series titled "Under Siege? Freedom of Expression in Zimbabwe, 'The ANZ Saga'" obtainable through zlhrr@icon.co.zw This publication provides some of the best analysis of the Supreme Court ruling in the Daily News case.

¹⁷ High Court Judge, Justice Moses Chinhengo made the observation in a murder case that he presided over in Masvingo.

renounce a citizenship of New Zealand that she has never claimed having been born and grown in Zimbabwe all her life¹⁸!

The new **labour Relations Act** (LRA) criminalizes strike action on the part of workers. Used in combination with POSA it attempts to paralyse labour movements. It introduces criminal and civil sanctions against the organiser. It therefore infringes on the work and rights of labour movements. As Solomon Sacco¹⁹ observes in his critique of the LRA “In fact, to ensure that the Act had caught everyone in its dragnet, it first sets out those who would normally be involved in a collective action such as individual employees, trade unions and employers’ organisations and then proceeds to say that if anyone not in that list “recommends, advises, encourages, threatens, incite, commands, aids or procures” any unlawful collective action he is also guilty of the offence. Therefore anyone who has anything to do with an unlawful collective action is guilty of a very serious offence.”

The **MOA** is used in conjunction with POSA to create a minefield for human rights activists and ordinary citizens. Virtually any conduct that causes offence to the police in their absolute discretion can result in anyone being arrested for contravening the MOA. One of the wide offences that the MOA creates is that of conduct that is likely to result in a breach of the peace. In real life application, the police have been able to interpret in their own unfettered discretion and depending on what is convenient at a particular time, any human behaviour to be conduct that is likely to result in a breach of the peace. Zimbabwe Lawyers For Human Rights’ experience has been that in the majority of cases where human rights activists have been targeted for persecution, the state initially charges them with violation of POSA and if they meet with resistance, they normally downgrade the charges to violation of a section of the MOA.²⁰

The **Presidential Powers Act (PPA)** allows the President of Zimbabwe to make regulations in circumstances when it appears to the President that-

- a situation has arisen or is likely to arise which needs to be dealt with urgently in the interests of defence, public safety, public order, public morality, public health, the economic interests of Zimbabwe or the general public interest; and
- the situation cannot adequately be dealt with in terms of any other law; and because of the urgency, it is inexpedient to await the passage through Parliament of an Act dealing with the situation;

¹⁸ See Registrar General of Births and Deaths –v- Judith Garfield Todd SC 4/03 where Justice Malaba ordered as follows “For the avoidance of doubt, the respondent has two days, from the handing down of this judgment, within which to renounce her New Zealand citizenship in accordance with the New Zealand Citizenship Act. In the event of her failure to do so, she will lose her Zimbabwean citizenship by operation of the law.”

¹⁹ Solomon Sacco is a member of ZLHR currently studying for a Masters in International Human Rights Law at University of Pretoria.

²⁰ ZLHR records show that in 2003 a total of 332 human rights defenders were arrested and charged under the MOA for peacefully expressing their views.

In practice the PPA has been used by the President to appropriate to himself the powers of the legislature while at the same time ousting the jurisdiction of the court to grant bail. For example using Statutory Instrument I37\04 the President legislated that where there is no *prima facie* case against an accused person in certain cases including charges under POSA, a court can order her/his detention despite there being no *prima facie* case, and a suspect cannot be granted bail for 7 days from the date when the detention is so ordered. The President further legislated that where there is a *prima facie* case, the court shall order that the suspect be held in custody for a period of 21 days and cannot be granted bail for 14 days after the detention is ordered. Such arbitrary legislation, which has been severely criticised²¹ creates a minefield for human rights activists and predictions are that this legislation which appears to be patently unconstitutional will be used increasingly against hrds and opposition politicians as Zimbabwe approaches the 2005 general elections. This type of legislation has been used to undermine the judiciary and in cases to apparently “fix” political opponents within and without ZANU PF.²² In other cases the President has used these powers to legislate legislation that allows for forcible expropriation of movable farming equipment without compensation²³ and to provide for regulations governing elections in which he or his party is a contestant, a few hours before the election.

Impunity Becoming the Norm

There is no doubt that impunity is one of the strong drivers of serious human rights violations in Zimbabwe. It must be stated at the outset that Zimbabwe is capable as a sovereign nation to fight impunity if there is political will. The state is firmly in control of a fairly efficient and loyal police force and army. The judiciary has potential to operate efficiently if it is not manipulated and undermined by the Executive. The problem is that the serious human rights violations are at the instance of the State or with the acquiescence of the state. Human rights groups have recorded that the primary culprits in human rights violations are ZANU PF, the Police, the army, the state security intelligence generally known as the Central Intelligence Organisation (CIO), some War Veterans and the youth brigade operating as militias.²⁴ The limited violence from the opposition has been largely retaliatory. The state however bears the primary responsibility to enforce the rule of law and to fight impunity. A few cases to demonstrate impunity will now be looked at.

The most significant case of impunity is the cold-blooded summary execution of two people, Chiminya and Mabika allegedly by two known assailants Joseph Mwale (a CIO operative) and Kitsiyatota (a War veteran). These two were election team of

²¹ See the opinion of Nokuthula Moyo the Chairperson of ZLHR where she states that “The constitution states that a person shall only be arrested where there is reasonable suspicion that he has committed or is about to commit an offence. The constitution further says the accused has to be notified of the reasons for his arrest as soon as possible. If there is no *prima facie* case, then in terms of the constitution he should not be deprived of his liberty; and it follows that where there is no *prima facie* case, there are no grounds for his arrest that he can be notified of. Section 2(a) of SI 37/04 is *ultra vires* the constitution of Zimbabwe.”

²² The latest in those cases is that involving Mr. James Makamba a ZANU PF Central Committee member whose release was ordered by Magistrate Ms Tsamba on 17 March 2004 following a precedent of the High Court in a matter with similar facts. Despite the court ordering his release, Mr. Makamba has remained in detention with the PPA regulations being used to deprive him of liberty.

²³ Presidential Powers Farming Equipment Regulations SI 273A/2003

²⁴ See detailed reports of Zimbabwe Human Rights NGO Forum on www.hrforumzim.com

Morgan Tswangirayi, the MDC President. They were burnt alive in public for supporting the opposition MDC. The named murderers remain free to roam the streets despite a High Court of Zimbabwe judge, Justice Devittie ordering that they be prosecuted.²⁵ In particular Joseph Mwale who was an ordinary operative during the time of the killing of Chiminya and Mabika was subsequently promoted to be the operative in charge of Chimanimani and Chipinge District where many cases of serious human rights violations linked to him were reported to human rights organizations. On 29 September 2002, he arbitrarily arrested and detained the Honourable Member of Parliament from Chimanimani Roy Bennet and two others. They were tortured during detention and a court order for their release had to be obtained. He has orchestrated numerous forcible occupations of Roy Bennet's properties and committed acts of poaching on the Member of Parliament's farm with impunity.

The involvement of the army and the police in acts of impunity and violations of the law can better be explained by the way they have been used to defy the law and court orders in the case involving Roy Bennet the opposition MP at Charleswood Estate. Charleswood Estate is found in Manicaland Province of Zimbabwe and more precisely in the rural Chimanimani electoral constituency. Roy Lesley Bennet is a white farmer who contested the Parliamentary elections in 2000 under the MDC and won the rural constituency, which is predominantly settled by black Zimbabweans. Ever since he won the rural constituency, there have been numerous disruptions on his farm and the Chimanimani constituency in general at the instance of, or with the apparent acquiescence of the state. Widespread organised violence and torture has been reported to human rights organisations. The constituency now has a big number of internally displaced people due to enforced evictions, intimidations, harassment, violence and torture. The police have in a number of cases within the constituency refused to take cases where the complainants are perceived to be supporters of the opposition political parties. There has been selective application of the law with credible complaints of certain members of the constituency being deprived of their right to the protection of the law. The government media quoted the State President as encouraging forcible occupation of the Hon MP's farm. Violence involving the state machinery has taken place on the farm resulting in serious injury to the farm workers. A worker was summarily extra judicially executed and killed in February 2004 by the army while houses were razed to the ground. The state controlled media and the police have covered up for the summary execution suggesting that the unarmed deceased civilian was killed while confronting the police violently. Farm workers have been previously forcibly ejected from the farm only to return after Court orders. There are a number of Court orders that have been issued over the years as the Hon MP tried desperately to seek protection of the law which has continued to be elusive since the principal violator is the state or functionaries of the state operating with the acquiescence of the state. Ordinary members of the constituency who have also been targeted for persecution have also tried to resort to the courts or police for justice to

²⁵In his ruling dated 26 April 2001 on the election petition in HH case No 67/2001 Justice Devittie stated, "The evidence I have narrated above [on the killing of Chiminya and Mabika] in its essential details was not contested... I must stand for the truth. The killing of Chiminya and Mabika was a wicked act... In terms of s. 137 of the Act the record of evidence must be transmitted by the Registrar to the Attorney general 'with a view to the institution of any prosecution proper to be instituted in the circumstances' and the attention of the Attorney General is drawn to the evidence on the killing of Chiminya and Mabika."

no avail since the police routinely refuse to take complaints from the opposition supporters and also ignore or outright defy court orders that are not favourable to the state. Impunity on the part of state agents and functionaries is therefore the order of the day in Chimanimani and seems to be escalating as Zimbabwe approaches the 2005 Parliamentary elections.

Impunity and Defied Court Orders specific to Charleswood Estate

The conduct of the state to maintain a permanent intimidating and harassing military presence and to bring in fresh soldiers and police to forcibly occupy and disrupt farming operations at Charleswood estate is in direct violation and defiance of a number of court orders that have been issued in this case. Some of them are as follows:

25 February 2004; High Court Judge Justice Karwi granted a provisional order which provided that, Bennett Brothers Farming Enterprises (Pvt) Ltd (“Bennett Brothers”) is given leave to remain and carry on its business on Charleswood Estate; the state or its functionaries were interdicted from interfering in any way with the farming and business operations of Bennett Brothers on Charleswood Estate; the state functionaries or other persons occupying the farm at the instance of the state were ordered to immediately vacate the farm. This order was served on the state but the state has chosen to defy and disregard the court order.

18 November 2003; The Magistrate court at Mutare, Manicaland issued a provisional order against functionaries of the state led by Sergeant Nasho and the Agricultural Rural Development Authority (ARDA) to the following effect; that the state functionaries were interdicted from setting foot or entering upon Charleswood Estate; that the state functionaries were interdicted from harassing or assaulting the employees of Charleswood Estate; that the state functionaries were to vacate Charleswood Estate forthwith failing which the messenger of court and the police were directed to eject them; the state functionaries were further ordered to vacate and restore the offices of Charleswood Estate to Bennett Brothers. This order has also been defied and ignored by the state.

8 April 2003; High Court Judge, Justice Karwi granted an order by consent which provided that, the state and its functionaries be interdicted from threatening, abusing, intimidating, harassing assaulting or communicating with the directors, employees and their family members of companies belonging to the Honourable MP Roy Bennet, operating at Charleswood Estate; and that the employees of Charleswood Estate and their families were permitted and directed to return forthwith to their homes on, and continue working for Charleswood Estate. This order has also been ignored.

May 2002; The High Court Harare issued a provisional order that is still standing that barred the state from acquiring Charleswood Estate. Needless to say that such order has also been ignored and completely defied by the state.

One other case, which illustrates impunity and the acquiescence of the state to it is that of the assault of Magistrate Walter Chikwanha of Chipinge who was assaulted for handing down a judgment that did not please the ZANU PF activists in August 2002. Walter Chikwanha was dragged from court at Chipinge in August 2002 by war veterans and publicly assaulted for making a ruling that was deemed to be unfavourable to ZANU PF. He was flogged in the streets of Chipinge town as he was being assaulted. During his assault another magistrate Mr Nkomo was also manhandled together with a number of other court officials. This was in the presence of the police. Walter Chikwanha suffered broken ribs and named not only his

assailants who are well known ZANU PF activists in Chipinge but also the police who were present when he was assaulted. No arrest has been made to date despite the positive identity of the assailants. The Minister of Justice Legal and Parliamentary Affairs has also never publicly condemned the treatment to which Walter Chikwanha was subjected. To the contrary Walter Chikwanha was forcibly transferred from Chipinge Magistrates Court after his assault.

The above cases have just been given in detail as case studies. Similar acts of impunity are currently taking place at Kondozi estate in Odzi, and in many parts of the country. In the majority of cases where there have been organised violence and torture, no one has been arrested or where any one has been arrested and he/she is from the ruling party, usually the cases do not get to be tried. In the over 300 politically related deaths of predominantly blacks that have taken place since 2000, we have not seen any meaningful efforts at investigation of the cases let alone prosecution. The organised violence and torture has therefore had a chilling effect on the citizens of Zimbabwe and currently the nation is facing frozen political activity with fear being the common denominator.

The State of the Administration of Justice

It is submitted that the Executive has undermined and manipulated the Judiciary in the last few years since 2000. There have been massive resignations in the Superior Courts due to direct and indirect pressure being brought to bear upon judicial officers. Of the 5 Supreme Court judges that Zimbabwe had in 2000, only one is left on the bench. The perception is that the President has now packed the Superior Courts with politically compliant judges. This has seriously undermined the public confidence in the justice delivery system. One concern is the increased incidence of harassment and attacks on members of the legal profession. There has also been an increased use of the state controlled public media such as The Herald Newspaper and the Zimbabwe Broadcasting Corporation as instruments to attack members of the judiciary who, in the course of their duties as judicial officers, make rulings that may not be favourable to certain quarters within the state²⁶. Magistrate Judith Tsamba is the latest victim when the Herald of 18 March 2004 reported that

“Magistrate’s ruling sparks outrage - There was outrage within the legal fraternity yesterday after Harare magistrate Ms Judith Tsamba released on bail businessman and politician James Makamba... The courts do not have the capacity and will never have that capacity to say each one of the police officers in the country must first obtain a warrant before they arrest anyone...A highly placed Government source said ‘Ms Tsamba’s ruling was likely to bring chaos in the country’s justice system’”

Such comments are contemptuous, unwarranted and calculated to bring the administration of justice into disrepute. It is also part of a wider, deliberate, systematic and sustained general attack on the judiciary to manipulate it, reduce its independence and weaken national institutions of protection that are vital for the restoration of the rule of law and democracy. Ms Tsamba is the latest victim among members of the legal profession to suffer an attack merely for doing her job as a judicial officer²⁷. The

²⁶ See the ZLHR statements dated 25/11/03 and 19/12/03 when judicial officers Administrative Court Presidents Majuru and Nare were similarly attacked in the Herald

²⁷ In 2003 alone members of the legal profession that were attacked or received hostile attention from the state or state controlled organs merely for practicing their profession include Gabriel Shumba (now

government of Zimbabwe however has a history of attacking the judiciary or members of the legal profession each time the Executive is unhappy at certain judicial decisions.²⁸

The phenomenon of defiance of Court orders is also an issue of grave concern that undermines the independence of the judiciary and the due administration of justice. The government of Zimbabwe unfortunately has a well-documented history of being contemptuous to, and defying court orders that it feels are not favourable to the state or the ruling ZANU PF party.²⁹

exiled for fear of his life), Adv Selemani, Gugulethu Moyo, Alec Muchadehama, Andrew Makoni, Levison Chikafu, Perpetua Dube, Ndabezinhle Mazibuko, Thembanzi Mkwanzani, Kucaca Phulu, Chris Ndhlovu, Obey Matizandzo, Muchineripi, Kossam Ncube, Trevor Ndebele, Reginald Chidawanyika, Dumisani Kufaruwengwa, Mpokiseng Dube, Beatrice Mtetwa, Arnold Tsunga, Otto Saki, Advocate Gijima, Lawrence Chibwe, Advocate T Bhatasara and Justice Benjamin Paradza. See the relevant press releases issued by ZLHR obtainable at zlh@icon.co.zw In 2004 Magistrate Mrs Chigumira, public Prosecutor Mrs Blessing Gorejena, Lawyers Alex Mambosasa and Wilson Manase have been arrested for merely doing their job. See also my article titled "The operating Environment of The Legal Profession in the Year 2003 in Zimbabwe. The Legal Profession And The Judiciary As Human Rights Defenders In Zimbabwe In 2003. Separation Or Consolidation Of Powers On The Part Of The State?" obtainable from zlh@ico.co.zw

²⁸ See the Yorke Brothers (supra) a 1982 case where Ushewokunze [Home Affairs Minister then] had this to say about the legal profession " We are aware that certain private legal practitioners are in receipt of money 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 an inherited legal apparatus. We promise to handle such lawyers using the appropriate technology that exists in our law and order section. This should succeed to break the unholy alliance between the negative bench, the reactionary legal practitioners and governments hostile to us, some of whose representatives are in this country." The State President [then Prime Minister] was also quoted as having said the following about the judiciary in the same case on 29 July 1982, "the government cannot allow the technicalities of the law to fetter its hands in what is a very clear task before it, to preserve law and order in the country...We shall therefore proceed as the government in the manner we feel is fitting... and some of the measures we shall take are measures which will be extra legal (See Greg Linnington's Constitutional Law of Zimbabwe LRF Harare 2001); In Mark Chavunduka's case (supra) when judges complained about the non compliance by the Executive with court orders, President Mugabe is reported to have asked the judges to resign and is quoted as having said the following on the national television, " the judiciary has no constitutional right whatsoever to give instructions to the President on any matter as the.. Judges purported to do. Their having done so can clearly be interpreted as an action of utter judicial indiscretion or as one of imprudence, or as, as I regard it, an outrageous and deliberate act of imprudence." *The Herald's* article of 18 July 2002 titled 'Judgment against Minister sinister' is yet another example of the disrespectful and contemptuous manner in which members of the Executive have taken to treating the Judiciary. In that article Minister of Information Jonathan Moyo suggested that contempt charges should never have been laid against Mr. Chinamasa, the Minister of Justice. Moyo further insinuated that the Honourable Justice Blackie had been handing down 'racist' judgments since the Rhodesian days. His Excellency, the President of Zimbabwe Robert G Mugabe appointed Justice Blackie onto the bench.

²⁹ The Executive has not enforced Court orders in the following cases *inter alia*, Mark Chavunduka and Ray Choto –v- Ministry of Defence (1999 case); Andrew Meldrum –v- The Chief Immigration Officer and ors (May 2003); Associated Newspapers Of Zimbabwe Vs Chief Superintendent Madzingo &The Commissioner Of Police HC8191/2003; Dorothy Kumunda &7others –V- District Administrator Chikomba District &Another- HC9481/03; Charles De Kock –v- Mike Madiro and 4 ors HH 217/03, Cuthbert Chivhunze &Others –V- John Chitsoho&Others –Mutare Court Case No.416/02; Commercial Farmers Union –V- Minister Of Lands & Others 2000 (2) ZLR 469 (S); Bennet Brothers Farm Entrprises Pvt Ltd –v-Vs Mupfururirwa &Others Mutare B.O393/03; Commissioner Of Police –V- Commercial Farmers Union 2000(1)ZLR 503 (H); Commecial Farmers Union –V- Mhuriro&Others 2000(1)Zlr 405 (S); Yorke and Another –v- Minister of Home Affairs HC H264/82 HC H 247/82 Bennet Brothers –v- Mwale,Chogugudza, and ors (numerous High Court and Magistrate Court cases), Natalie Dube –v- Commissioner of Police, C/S Mabunda and ors (Mutare Magistrates Court case),

Unfortunately the courts can only go so far in asserting the rights of individuals. Once they make a pronouncement as to the correct legal position, the responsibility to enforce the law immediately shifts to the Executive organ of the state, it being the one that is in charge of the state machinery. In enforcing court orders, the Executive complies with its responsibility to ensure that citizens enjoy the right to the protection of the law which right is provided for in our constitution and other international instruments that the government has acceded to or signed and ratified. A culture of defiance of court orders severely undermines the judiciary and the justice delivery system and entrenches a culture of impunity and lawlessness. There is a strong relationship between rampant corruption, the collapse of the economy and its failure to recover on one hand, and lawlessness and the absence of the rule of law on the other. It is not going to be possible for the government to fight corruption outside the rule of law and human rights. This process entrenches corruption.

Selective Application of the law

In all the cases of defending human rights defenders that ZLHR has been involved in, it is clear that the hrds and the members of the opposition party are the ones who are subjected to the majority of prosecutions under the repressive legislation. In other words all the cases referred to above where charges have been preferred under either POSA or MOA, there has never been an activist arrested who belongs to ZANU PF. The application of POSA to prevent assembly, association and movement has also been selectively applied towards NGOs, Civil Society Organisations, the labour movement and the opposition political parties. As ZESN observe “ whilst the ruling party is free to campaign, the opposition candidates often complain that they are often refused police clearance under the notorious POSA. Where rallies are held, a number have been disrupted by ZANU PF youths.”³⁰ The Media Institute of Southern Africa (MISA) and the Media Monitoring Project of Zimbabwe (MMPZ) have also reported that virtually all the arrests under AIPPA of media practitioners from the independent media. In one case a reporter from the state media The Herald was arrested together with two reporters from the independent media while covering a Zimbabwe Congress of Trade Unions protest in November 2003. When the police discovered that one of the journalists was from the government media, they promptly released him and Blessing Zulu and Andrew Moyse from the independent media remained detained under POSA. On the labour front POSA has been applied exclusively against the independent labour movement, the Zimbabwe Congress of Trade Union and not the government controlled Zimbabwe Federation of Trade Unions. In October and November 2003, ZLHR represented over 455 members of the ZCTU who had been

Morgan Tsvangirayi’s Electoral challenge in the High Court at Harare where Justice Devittee directed that Joseph Mwale and another be prosecuted for allegedly torching to death Talent Mabika and Tichaona Chiminya, election agents for Morgan Tsvangirayi the MDC leader. The Zimbabwe NGO Human Rights Forum in its September 2003 report on the The Abuja Agreement quote the state President as follows “*[the Government would] respect judgments where the judgments are true judgments. We do not expect that judges will use subjectivity in interpreting the law. We expect judges to be objective. We may not understand them in some cases but when a judge sits alone in his house or with his wife and says ‘this one is guilty of contempt’ that judgment should never be obeyed. I am not saying this because we would want to defy judges. In fact we have increased their salaries recently. We want them to be happy. But if they are not objective, don’t blame us when we defy them.*” www.hrforumzim.com

³⁰ See ZESN report titled “ The Zimbabwe Electoral Environment post March 2002- Any Change For the Better or Worse?” www.zesn.org.co.zw

arrested under POSA and MOA while in the same period not a single person from the ZFTU was arrested as the ZFTU was allowed to engage in its activities without interference from the state.³¹ There is no doubt therefore that the phenomenon of selective application of the law especially repressive law is rife in Zimbabwe. This unfortunately again undermines the public confidence in the judiciary and the justice delivery system. It also fuels impunity and lawlessness.

Conclusion

It is quite clear therefore that the situation of human rights in Zimbabwe is of grave concern. There are serious human rights violations that are taking place in Zimbabwe. Zimbabwe has promulgated repressive pieces of legislation, which violate its commitments to the international community and its citizens in terms of the international instruments that it has signed and ratified or acceded to. Such legislation as POSA and AIPPA is not justifiable in a democratic society. The phenomenon of selective application of the law in Zimbabwe needs to be stopped. It undermines the judiciary and the justice delivery system. Impunity levels have reached dangerous proportions and the government of Zimbabwe needs to tackle this quite emphatically. As the impunity is strongly linked to the state desire to maintain power, it is quite evident that there is no political will to contain impunity. This is however dangerous as the state actors ultimately will have to be held accountable for the serious human rights violations that are taking place. It is critical that the principle of separation of powers be adhered to if democracy is to work in Zimbabwe. It is quite self evident that there is an unhealthy level of political interference with the judiciary and the justice delivery system in Zimbabwe. Judges and lawyers need to operate in a safe and free environment so as to strengthen justice delivery and improve the integrity of the courts. The responsibility to ensure the safety of judges and lawyers rests with the authorities. It is regrettable that the authorities in some cases are at the forefront of the attack of the legal profession. It is important for the international community to continue applying pressure on the Zimbabwean government to take steps to change direction. Support of human rights groups and humanitarian aid must be maintained while selective punitive measures maintained against those who bear the greatest responsibility for the sorry state of affairs in Zimbabwe.

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³¹ See the ZLHR hrds report for the period September to December 2003 obtainable on zlhrr@icon.co.zw