



**International Bar Association's Human Rights Institute
Submission to the UN Universal Periodical Review – Zimbabwe
14 March 2011**

1. Introduction

1.1 The International Bar Association Human Rights Institute (IBAHRI) makes this submission under sections B, C and D as set out in the General Guidelines for the Preparation of the Universal Periodic Review.

In section B, the IBAHRI raises concern over gaps in legislation concerning freedom of expression, freedom of assembly and impartiality of the judiciary. Section C highlights the IBAHRI's concerns over restrictions on freedoms of expression and assembly, independence of the judiciary, fairness of prosecutions, rights to liberty and security of the person and protection from inhuman treatment. The IBAHRI makes recommendations for action by the government in Section D.

2. Methodology

2.1 The IBAHRI conducted its first fact-finding mission to Zimbabwe in March 2001 and issued a report on the situation faced by judges and lawyers.¹ Another IBAHRI delegation went to Zimbabwe in August 2007, with a mandate to look into the rule of law in Zimbabwe and unlawful police action and intimidation of civilians, human rights activists and lawyers. The IBAHRI kept monitoring the situation and conducted a series of trial observations in 2008 and 2009, in cases involving lawyers and human rights activists. The 2007 mission report² and reports from trial observers have been used and updated for the purpose of this submission and conclusions have been drawn on the most relevant and recent information available. The IBAHRI intends to send another fact-finding mission in 2011 to assess the state of the rule of law in the country.

3. Section B: The Legislative Framework

3.1 Zimbabwe has ratified the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of all Forms of Discrimination against Women and the Convention on the Elimination of all Forms of Racial Discrimination. It has also ratified the International Labour Organisation's Freedom of Association and Protection to the Right to Organize Convention³ The country is bound by the Universal Declaration of Human Rights which have been recognised as customary international law⁴ and by the Charter of the

¹ *Report Highlighting the Critical Situation Faced by Judges and Lawyers in Zimbabwe*, International Bar Association's Human Rights Institute (April 2001). Available at http://www.ibanet.org/Human_Rights_Institute/Work_by_regions/Africa/Zimbabwe.aspx.

² *Partisan Policing: An obstacle to human rights and democracy in Zimbabwe*, International Bar Association's Human Rights Institute, October 2007. Available at http://www.ibanet.org/Human_Rights_Institute/Work_by_regions/Africa/Zimbabwe.aspx.

³ Ratified on 9 April 2003. *Convention concerning Freedom of Association and Protection of the Right to Organise*, adopted on 9 July 1948, Convention C087.

⁴ See for example "Statement by the High Commissioner for Human Rights at the European Colloquy Organised by the Council of Europe" by Mary Robinson, Strasbourg, 2 September 1998, available online at: www.unhcr.ch/hurricane/hurricane.nsf/0/8C062FE8D843A200802566740050E0E8?opendocument

United Nations. Zimbabwe is also Party to the Cultural Charter for Africa and the African [Banjul] Charter on Human and Peoples' Rights.

Freedom of Expression

3.2 Section 20 (1) of the Constitution of Zimbabwe⁵ provides for freedom of expression and information. However Section 20 (2) states that “(2) Nothing contained in or done under the authority of any law shall be held to be in contravention of subsection (1) to the extent that the law in question makes provision— (a) in the interests of defence, public safety, public order, the economic interests of the State, public morality or public health.”⁶ Legislation adopted under these powers includes the *Access to Information and Protection of Privacy Act (AIPPA)*, 2002 (amended in 2003 and 2007).⁷ Sections 14 to 25 delineate which types of information are protected under the law. Section 79 deals with licensing for journalists.⁸

Freedom of Assembly

3.3 Section 21 (1) of the Constitution of Zimbabwe⁹ protects the “*right to assemble freely and associate with other persons*”, including the right to “*form or belong to political parties or trade unions or other associations for the protection of his interests*”. The Global Political Agreement (GPA)¹⁰, signed in September 2008 after the elections and providing for power-sharing between the Zimbabwean African National People's Union-Patriotic Front (ZANU-PF) and the Movement for Democratic Change (MDC) factions, also contains a recognition and protection, at article 12, of the freedoms of assembly and association.

Impartiality of the Judiciary

3.4 The Constitution of Zimbabwe provides, at section 79, that “*In the exercise of his judicial authority, a member of the judiciary shall not be subject to the direction or control of any person or authority, except to the extent that a written law may place him under the direction or control of another member of the judiciary*”. The GPA provides at Section 13(1) that: “State organs and institutions do not belong to any political party and should be impartial in the discharge of their duties.”

3.5 According to sections 90 and 91 of the Constitution, senior judges (Supreme Court and High Court) are appointed by a Judicial Service Commission. Magistrates are classified as civil servants and are not appointed by the Judicial Service Commission. However, the composition of the Judicial Commission, under section 90, is such that none of its members is independent of the direct or indirect influence of the Executive.¹¹ The Attorney-General is appointed by the President, after consultation with the Judicial Service Commission (article 76 (10) of the Constitution).

Right to liberty and security of the person

3.6 The Constitution of Zimbabwe, at article 13, guarantees the right to personal liberty and lists the cases where deprivations of liberty are authorized by law.

Protection from inhuman treatment

⁵ As amended 14 September, 2005. Available at: <http://www.parlzim.gov.zw/cms/UsefulResources/ZimbabweConstitution.pdf>

⁶ *Ibid*

⁷ Access to Information and Protection of Privacy Act (AIPPA), 2002 available at: <http://www.kubatana.net/docs/legisl/aippamd030611.pdf>; Access to Information and Protection of Privacy Amendment Act (2007). Available at: http://www.kubatana.net/docs/legisl/aippa_amd_act_080111.pdf,

⁸ *Ibid*

⁹ Available at: <http://www.parlzim.gov.zw/cms/UsefulResources/ZimbabweConstitution.pdf>

¹⁰ *Global Political Agreement: Agreement between the Zimbabwe African National Union-Patriotic Front (ZANU-PF) and the two Movement for Democratic Change (MDC) formations, on resolving the challenges facing Zimbabwe, PREAMBLE*. Available online at: http://www.zimfa.gov.zw/index.php?option=com_docman&task=cat_view&gid=61&Itemid=91

¹¹ “*A Place in the Sun*”: A Report on the state of the rule of law in Zimbabwe after the Global Political Agreement of September 2008 (June 2010), para. 25. Available at: http://www.barcouncil.org.uk/assets/documents/7351_BHRC_Zimbabwe_Report.pdf .

3.7 The Constitution of Zimbabwe, at article 15(1), states that “*No person shall be subjected to torture or to inhuman or degrading punishment or other such treatment*”. Zimbabwe has however not signed nor ratified the Convention against Torture and the Optional Protocol.

4. Section C. Protection and Promotion of Human Rights on the Ground

Freedom of Expression

4.1 The IBAHRI remains concerned regarding the constant intimidation, targeting and detention of individuals viewed as political dissidents by the former-ruling party ZANU-PF supporters. In its 2007 report, the IBAHRI noted the widespread arbitrary arrests made by the Zimbabwe Republic Police (ZRP) and stated that “*It is clear that the majority of victims of this policy of violence and arbitrary detention by the ZRP are those who are seen as: i) resistant to Government policy and/or political dissenters; or ii) any persons associated with them*”.¹²

4.2 The IBAHRI remains concerned with regards to curtailment of freedom of expression by security forces in Zimbabwe. With the GPA having technically expired in February 2011 and President Mugabe calling for elections before the constitutional making process has been completed, political allegiance and dissent is being stifled. A key example of this is found in the case of Owen Maseko, an artist who organised an exhibition on the massacres of Matabeleland in the 1980s, and who was charged with publishing or communicating false statements prejudicial to the state and undermining the authority or insulting the president. The Southern Africa Litigation Centre (SALC) is currently working with the Zimbabwe Lawyers for Human Rights in challenging the constitutionality of sections 31 and 33 of the Zimbabwe Criminal Code in the case, arguing that both provisions violate Maseko's right to freedom of expression and are not justifiable in a democratic society.¹³

4.3 The IBAHRI has concerns over restrictions on freedom of the press and the media. In February 2011, Abel Chikomo, Executive Director of the Zimbabwe Human Rights Forum, was detained and questioned by the Law and Order Section at Harare Central Police Station for conducting a survey on transitional justice.¹⁴

4.4 Although amendments have been made to the Access of Information and Protection of Privacy Act and the Broadcasting Services Act, defamation laws still exist and are heavily utilised. The government has not reviewed criminal defamation laws that impose severe penalties, including prison terms, on journalists.¹⁵ As such, on 17 January 2011, police arrested Barnabas Madzimore and Fortune Mutandiro, two directors of *The Zimbabwean* weekly newspaper. They were later charged with “publishing falsehoods prejudicial to the state” in violation of the Criminal Law (Codification and Reform) Act.¹⁶

Freedom of Assembly

4.5 Although guaranteed by the constitution, freedom of assembly has been repeatedly violated in Zimbabwe. In March 2007, the ZRP prevented a prayer meeting organised by the Save Zimbabwe Campaign and the MDC from taking place. MDC leaders and 50 other people were arrested and assaulted by the police.¹⁷ Before the May 2008 elections, political rallies were prohibited by the authorities. The MDC could not hold its rallies as planned, and even after a court order was issued to protect its right to assemble, armed members of ZANU-PF assaulted participants and prevented the rally from taking place.

¹² International Bar Association's Human Rights Institute, (n 2) p. 27.

¹³ Southern Africa: Litigation Centre- cases- Zimbabwe: *Defending the Right to Freedom of Expression*. Available online at: http://www.southernafricalitigationcentre.org/cases/item/Zimbabwe_Owen_Maseko.

¹⁴ Amnesty International: Public Statement- Zimbabwe: *Urgent Need for Security Sector Reform to Stem Human Rights Abuses*, 11th February 2011. Available at: <http://www.amnesty.org/en/library/asset/AFR46/002/2011/en/e4e3cbd5-f3f5-4fbb-85c0-a0cf83830a89/afr460022011en.pdf>.

¹⁵ Human Rights Watch: *World Report 2011- Zimbabwe*. Available at: <http://www.hrw.org/en/world-report-2011/zimbabwe>.

¹⁶ *Ibid*.

¹⁷ International Bar Association's Human Rights Institute, (n 2) p. 20.

The ZANU-PF supporters involved in the violence have not been arrested or prosecuted.¹⁸ In fact, no action has been taken to remedy the problem of impunity for acts of violence committed around the 2008 elections, despite article 18.5 (c) of the GPA, which stated that the Government “*shall apply the laws and of the country fully and impartially in bringing all perpetrators of politically motivated violence to book*”.

4.6 Since the Constitution-making process began in Zimbabwe in 2009, the community outreach meetings part of the Constitutional Outreach Program, to elicit popular views on a new constitution, have been fraught with violence, reportedly, mainly by ZANU-PF supporters and war veterans allied to ZANU-PF.¹⁹ In February 2011, police disrupted MDC-organized preparatory constitutional reform meetings, beat participants, and arrested 43 people in Binga, 48 in Masvingo, and 52 in Mt. Darwin. It has also been reported that the arrest and detention of gay-rights activists in May 2010 in Zimbabwe were politically motivated.²⁰

Impartiality of the Judiciary

4.7 In its 2001 report, the IBAHRI expressed concern over the independence of the judiciary being undermined by threats to and intimidation of the judges. The IBAHRI also reported a sustained campaign to force the resignation of a number of judges, including by threats of violence.²¹ More recently, the IBAHRI highlighted the fact that judges were given farms and other gifts by the government of President Mugabe, which seriously threatens their independence.²²

Selective Prosecution based on political allegiance

4.8 In 2007, the IBAHRI expressed concern regarding harassment and intimidation of prosecutors by the police, which undermined the independence of the Attorney-General’s office and led to some crimes not being prosecuted.²³

4.9 The appointment and role of the current Attorney-General, Mr Johannes Tomana, is a cause of concern, he was named by the President before the coalition government was formed, in contravention with the GPA. There is evidence of a lack of impartiality from the Attorney-General. An example of this was in November 2010 when the Attorney-General called, through an invalid *subpoena*, Mr Michael Hitschmann as a witness at the trial of Mr Bennett. Mr Mordecai Mahlangu, who was consulting Mr Hitschmann, then wrote to the Attorney-General and explained why the Attorney-General should not be calling Mr Hitschmann as a witness at the trial of Mr Bennett. Consequently, the Attorney-General had Mr Mahlangu arrested, charged with attempting to defeat the course of justice and detained overnight in the cells in Harare’s Central police station.²⁴

4.10 In 2008 and 2009, the IBAHRI conducted separate trial observations in Zimbabwe to monitor the proceedings against three human rights lawyers, Mr Innocent Chagonda, Mr Harrison Nkomo and Mr Alec Muchadehama. The observations concluded that although the trials were generally conducted in a fair manner and that the courts observed nationally and internationally recognised standards of judicial conduct, it is nonetheless evident that the law, under these circumstances, was applied in a partisan and unlawful manner whereby the human rights lawyers were arrested due the political sympathies of their clients who were MDC activists. Proceedings against lawyer Alec Muchadehama, for example, amounted to harassment, as he was arrested on charges of obstruction of justice when he tried to secure bail for his three clients, all MDC activists. At the Harare’s Magistrate Court, the magistrate found that no reasonable

¹⁸ *Zimbabwe geared up for another election? Then and now: 2008 Elections in retrospect*, Zimbabwe Lawyers for Human Rights, Institutional Reform Series no 1, December 2010.

¹⁹ *Human Rights Watch: World Report 2011- Zimbabwe*, (n 15).

²⁰ *Ibid*

²¹ International Bar Association’s Human Rights Institute (n 1) p 53-60.

²² “IBAHRI expresses concern at the presence of Judge Gwaunza on the bench of the ICTY”, International Bar Association’s Human Rights Institute, press release (3 November 2008). Available at <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=811B4E19-8A01-4455-AE0B-1DB9DCB24D47>.

²³ International Bar Association’s Human Rights Institute, (n 3) p. 30.

²⁴ “*A Place in the Sun*” (n 11).

evidence had been provided by the state. Despite this ruling, Mr Muchadehama was served with summons to appear in court again on the same charges.

The IBAHRI is also concerned about the use made by the Attorney-General's office of section 121 of the Criminal Procedure and Evidence Act, which amounts to a practice of automatic opposition to bail so as to secure a further seven days' detention.

Right to liberty and security and person

4.11 In its 2007 report, the IBAHRI noted numerous reports of arrests and excessive use of force by the police. Impunity for these arbitrary arrests was prevalent.²⁵ Such arbitrary arrests and ill-treatment by the police and other agents of the state are on-going. The IBAHRI conducted a trial observation in the case of human rights activist Jestina Mukoko, who was abducted from her home in the middle of the night on 3 December 2008 by agents of the state and detained incommunicado in a number of undisclosed venues, in contravention with the provisions of the Constitution.

Protection from inhuman treatment

4.12 The IBAHRI reported acts of torture by the police in its 2007 report. The IBAHRI delegation that visited Zimbabwe was given copies of letter written by a group of civilians arrested in March 2007. They describe physical and psychological suffering at the hands of the police.²⁶ Similarly, Jestina Mukoko described beatings and ill-treatment she suffered in detention. The Supreme Court recognised on 28 September 2009 that Ms Mukoko's constitutional rights, including the protection from inhuman treatment, had been breached and ordered a stay of the proceedings against her. However, the perpetrators have not been prosecuted.

4.13 Not only is Zimbabwe not a party to the Convention against Torture, but it should also be noted that it refused entry to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Mr Manfred Nowak, in October 2009.

5. SECTION D: RECOMMENDATIONS

- 5.1 The Attorney-General and his representatives should discharge their duties fairly and impartially and in the interests of justice. The practice of automatic opposition to bail so as to secure a further seven days' detention under section 121 of the Criminal Procedure and Evidence Act should be ended.
- 5.2 The Judicial Service Commission should be entirely independent of the Executive as to both its membership and its financing. A transparent nominations process should promote judicial appointments against agreed criteria based on merit.
- 5.3 The IBAHRI strongly recommends the immediate implementation of the GPA provisions and support of the National Constitutional Assembly by the Zimbabwe government so that that Constitutional Making Process can go ahead in order that free and fair elections may be made possible in the future.
- 5.4 Zimbabwe should ratify the Convention against Torture and its Optional Protocol, and issue an invitation to the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment.
- 5.5 Impunity for acts of violence committed during the 2008 elections should be addressed.
- 5.6 Police officers should put an end to arbitrary arrests and stop any excessive use of force. Perpetrators of such acts should be duly disciplined and/or prosecuted.
- 5.7 Guarantees of freedom of expression and assembly under the Constitution should be upheld.

²⁵ International Bar Association's Human Rights Institute, (n 2) p. 31.

²⁶ Ibid. p.28.