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The 2017 military *coup* in Zimbabwe: Implications for human rights and the rule of law

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Summary: *November 2017 saw the Zimbabwean Defence Forces executing a military coup against Mr Robert Mugabe, Zimbabwe's long-serving President. The military sought to justify the coup on the basis that there were divisions in the party in government – ZANU-PF – and that it was stepping in to protect what it called the gains of the liberation struggle. The military demanded, among other things, the reinstatement of those ZANU-PF party members who had been removed from their government and party positions. By brazenly involving itself in politics, let alone aligning itself with a political party, the military violated a number of constitutional provisions that prohibit the involvement of the security services in politics. Several individual freedoms and liberties, including the right to liberty, freedom of expression, freedom of movement and the right to security and freedom from torture, were violated during the coup. There are also allegations that there was loss of life directly linked to the coup. In effecting the coup, the military immobilised the police service and arrogated to itself the role of civilian policing, including the setting up of roadblocks on major roads and arresting and*

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detaining those it identified as 'criminal elements'. The Zimbabwean Defence Forces have a long history of serious human rights violations, including politically-related torture and murder. They also stand accused of chronic involvement in politics, including the unleashing of violence during elections on behalf of ZANU-PF. Therefore, there is no hope that human rights protection and promotion will be on the agenda of the post-coup government – itself consisting of the main coup leaders and most of the ministers that served in the repressive Mugabe government. There is a need to establish mechanisms to ensure that those responsible for the coup and its attendant human rights violations and crimes are brought to account.

Keywords: *Zimbabwe; military coup; Constitution of Zimbabwe; rule of law; human rights protection; accountability*

1 Introduction

At the age of 93 years and having presided over a deeply-divided party with two factions vying for his position in the event of the inevitable, the 37-year one-party state reign of Robert Mugabe and his Zimbabwe African National Union-Patriotic Front (ZANU-PF) was coming to an end, and it seemed as if a genuinely democratic transition was on the horizon.¹ However, although still possible, that no longer seems likely. With Mugabe barely a week before dismissing one of his Vice-Presidents, Mr Emmerson Mnangagwa, the military, brazenly identifying itself as a military wing of ZANU-PF – a political party, rather than a national institution in a constitutional democracy – moved in and executed a *coup* in mid-November 2017. The military effectively placed Mugabe under house arrest; took over the public radio and television stations and public newspapers and dictated news content; arrested some members of the other faction; immobilised the civilian police force and patrolled the streets of the capital city Harare; and mounted roadblocks on all major roads.²

1 As demonstrated in the article, ZANU-PF has used a combination of violence, abuse of state resources and electoral rigging to remain in power.

2 See CNN 'Zimbabwe is under military control after army seizes power from Mugabe', <http://edition.cnn.com/2017/11/14/africa/zimbabwe-military-chief-treasonable-conduct/index.html>, (accessed 11 February 2018); 'The inside story of Zimbabwe *coup* that toppled Robert Mugabe' *Bulawayo 24 News*, <https://bulawayo24.com/index-id-news-sc-national-byo-123086.html> (accessed 7 April 2018); ABC News 'Thousands march in Zimbabwe against President Robert Mugabe after military put longtime ruler under house arrest', <http://abcnews.go.com/International/thousands-march-zimbabwe-president-robert-mugabe-military-put/story?id=51242618>, (accessed 11 February 2018).

There has been considerable debate in various quarters as to whether the political developments of November 2017 in fact were a military *coup*.³ However, it was a *coup* plain and simple, and it was also unlawful in terms of Zimbabwe's legal framework.⁴ It violated the letter and spirit of several African regional instruments regarding unconstitutional changes of government.⁵

Without doubt the military facilitated a change of government through the use of force and the threat of use of force and influenced the composition of the new government which likely will be beholden to it: Emmerson Mnangagwa, whose dismissal as Vice-President triggered the *coup*, subsequently was installed as President; the man who set in motion the *coup* – Commander of the Zimbabwe Defense Forces, General Constantino Chiwenga, became the Vice-President; the face of the *coup*, Lieutenant-General Sibusiso Moyo, became the Minister of Foreign Affairs; while another high-ranking military officer, Air Marshall Perence Shiri, became a cabinet minister in the new government.

While ultimately it was made to appear as if a combination of marches and the threat of impeachment forced Mugabe to resign, the reality is that the military *de facto* had suspended the Constitution and brought a combination of military force and the threat of use of such force to bear on the Zimbabwean nation. The marches themselves were aided, if not engineered and sanctioned, by the military;⁶ and there is no gainsaying that the sudden shift

3 See CNN 'Zimbabwe's military takeover was the world's strangest coup', <https://edition.cnn.com/2017/11/20/africa/zimbabwe-military-takeover-strangest-coup/index.html>, (accessed 11 February 2018); 'Zimbabwe's strange crisis is a very modern kind of *coup*' *The Guardian* 21 November 2017, <https://www.theguardian.com/world/2017/nov/21/zimbabwes-strange-crisis-is-a-very-modern-kind-of-coup> (accessed 7 April 2018). See also, generally, S Hofisi 'Military assisted transition, constitutional order in Africa and transitional justice in Zimbabwe: Towards effective change management' (2019) 6 *Journal of African Foreign Affairs* 139. According to Hofisi, the military has a constitutional right to intervene in the internal affairs of Zimbabwe. As demonstrated in this article, this is a flawed interpretation of the Constitution of Zimbabwe. See also A Magaisa 'Zimbabwe: An opportunity lost' (2019) 30 *Journal of Democracy* 143-144. According to Magaisa, what took place in Zimbabwe in November 2017 in reality was a *coup*, despite the spin that those involved in the *coup* put on it. For the meaning of a *coup*, see T Mahmud 'Jurisprudence of successful treason: *Coup d'état* and common law' (1994) 49 *Cornell International Law Journal* 51. Mahmud defines a *coup d'état* as a change of government that often issues from the threat or use of force against the incumbent regime.

4 As is demonstrated below, the 2013 Zimbabwean Constitution categorically prohibits military involvement in politics.

5 See the 2000 Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government (Lomé Declaration); arts 2(4) & 3(10) of the 2007 African Charter on Democracy, Elections and Governance (Zimbabwe, however, signed this latter instrument (which entered into force on 15 February 2012) in March 2018, after the *coup*); and art 4(p) of the Constitutive Act of the AU.

6 See *ABC News* (n 2).

of allegiance in ZANU-PF was more a matter of coercion than an exercise of free political will.

Mr Mugabe had a bitter taste of his own medicine. For many years he had undermined and ridiculed democratic processes, proclaiming, quite ironically, that the pen (meaning a vote) could never be mightier than the bullet that brought Zimbabwe's independence.⁷ As demonstrated in this article, Mugabe used Zimbabwe's security apparatus, including the military, the police, the Central Intelligence Organisation, and even the prison service, to unleash violence against his perceived political opponents and also to threaten a *coup* in the event of the opposition winning the elections.⁸

However, much of the irony surrounding the *coup* lies in the fact that its engineers and beneficiaries have always been part of ZANU-PF's oppressive, violent regime. This, therefore, raises fundamental questions about the *coup's* implications for democracy and constitutionalism, particularly the protection and promotion of human rights and the rule of law. As such, the celebration of Mugabe's inglorious exit from office – something that was in the offing anyway in view of his advanced age and the divisions within his party – should not be at the expense of safeguarding constitutionalism and the rule of law.

This article discusses the implications of the *coup* for democratisation, the protection and promotion of human rights and the rule of law in Zimbabwe from the perspective of the Zimbabwean constitutional framework. It examines a number of constitutional provisions that were violated and what this means to Zimbabwe's nascent democracy. The article also discusses the challenges now faced by those whose human rights were violated by Mugabe and his ZANU-PF party, assisted by the very military that eventually showed him the door.

The next part sets out the scope of the article. Part 3 three discusses the statements of, and actions by the military during the course of November 2017 and their compatibility with the Constitution. It also addresses the role of a military in a constitutional democracy and the philosophical underpinnings of such role. The part also addresses the impact of the *coup* on a number of constitutional rights, including the right to liberty, freedom of expression, freedom of movement and the

7 T Musavengana 'How can a ballpoint pen fight with a gun?' <http://nehandaradio.com/2011/12/28/how-can-a-ballpoint-pen-fight-with-a-gun/> (accessed 15 January 2018).

8 As above.

right to security and freedom from torture. Part 4 discusses the past human rights records of the major players in the *coup* and what the 'success' of the *coup* means to human rights protection in Zimbabwe, especially the rights to have judicial recourse of those whose human rights have been violated in Zimbabwe under the ZANU-PF government. Part 5 discusses the reaction of the Zimbabwe Human Rights Commission to the *coup*. It discusses how such a reaction, especially the failure to pronounce on the military's blatant breach of the Constitution and the military's violation of several individual freedoms and liberties, might impede the Zimbabwe Human Rights Commission's exercise of its powers in the future. Also discussed is the reaction to the *coup* by the Law Society of Zimbabwe – a quasi-guardian of the rule of law and human rights in Zimbabwe.

Part 6 discusses mechanisms that may be employed to address the challenges posed by the *coup*, especially the need for accountability for the lives that might have been lost as well as freedoms that were violated and the need to ensure that there is no repetition of these events.

2 Scope of the article

Several perspectives may be used by different scholars from diverse academic disciplines to attempt to analyse the 2017 Zimbabwe military *coup*. Indeed, different scholars, past and present, have sought to explain some of the military *coups* that have taken place, including in Africa. For example, Benyera has attempted to explain the recurrence of *coups* in Lesotho from what he calls a de-colonial perspective, in which he seeks to locate the causes of Lesotho's *coups* in the country's colonial history.⁹ Another scholar, Japhet, in seeking to establish the causes of the 1966 military *coup* in Nigeria, identifies a range of possible causes, including tribal tensions and institutional weaknesses of the military establishment.¹⁰ With regard to the 1975 Nigerian *coup*, Japhet puts the blame on General Yakubu Gowon's failure to deliver on his promise to transition to civilian rule, which decision was made against the backdrop of a poorly-performing economy, widespread corruption and industrial unrest, among other challenges.¹¹

9 See, generally, E Benyera 'Towards an explanation of the recurrence of military *coups* in Lesotho' (2017) 8 *Air and Space Power Journal – Africa and Francophone* 56.

10 M Japhet 'Military *coups* and military regimes in Africa' (1978) 8 *Scientia Militaria: South African Journal of Military Studies* 1-3 5.

11 Japhet (n 10) 7.

Yet, other hypotheses have been put forward by scholars to explain the occurrence of *coups*. Abartli and Arbatli, for example, discuss the regional spillover hypothesis which posits that the occurrence of a *coup* in one country affects the subsequent probability of *coups* in other countries. They also advance the foreign linkage and leverage hypothesis.¹²

However, this article narrowly focuses on the subject of the implications of the *coup* for democracy and the rule of law in Zimbabwe. This discussion is made in the context of Zimbabwe's recently-adopted Constitution. The discussion of the *coup* in the context of the Constitution, or rather the *coup's* compatibility with the Constitution, is crucial since, as the article will show, there have been attempts, on the one hand, to deny that there in fact was a *coup* and, on the other, there have been some argument, buttressed by some judicial order, that the actions of the Zimbabwean military were carried out in terms of the Constitution.

3 November events: A legal-historical perspective

In order to put the actions of the military in their proper perspective, it is important to restate what the Constitution says about the Zimbabwe Defence Forces. First, however, in section 208 the Constitution sets out certain principles that relate to the whole security establishment. These principles apply without exception to the Zimbabwe Defence Forces. The section provides:

- (1) Members of the security services must act in accordance with this Constitution and the law.
- (2) Neither the security services nor any of their members may, in the exercise of their functions –
 - (a) act in a partisan manner;
 - (b) further the interests of any political party or cause;
 - (c) prejudice the lawful interests of any political party or cause; or
 - (d) violate the fundamental rights or freedoms of any person.
- (3) Members of the security services must not be active members or office bearers of any political party or organisation.
- (4) Serving members of the security services must not be employed or engaged in civilian institutions except in periods of public emergency.

However, despite the above unequivocal proscriptions, section 208 has been violated routinely without any consequence. For example, serving members of the security services have long been engaged in

¹² E Arbatli & C Arbatli 'The international determinants of military *coup* behaviour' (2017) *Oxford Research Encyclopedia of Politics*.

civilian institutions such as the National Prosecuting Authority and the Zimbabwe Anti-Corruption Commission.¹³ Also, in the aftermath of the 2017 *coup*, the then ambassador to Tanzania, Major-General Edzai Chimonyo, was appointed commander of the Zimbabwe National Army,¹⁴ with the instrument of his appointment indicating that when he was appointed as ambassador, he did not cease to be a serving member of the army as his ambassadorial appointment merely was a secondment to the Ministry of Foreign Affairs.¹⁵

Section 211(3), which deals specifically with the Zimbabwe Defence Forces, provides that '[t]he Defence Forces must respect the fundamental rights and freedoms of all persons and be non-partisan, national in character, patriotic, professional and subordinate to the civilian authority as established by this Constitution.

Further, section 213 provides:

- (1) Subject to this Constitution, only the President, as Commander-in-Chief of the Defence Forces, has power –
 - (a) to authorise the deployment of the Defence Forces; or
 - (b) has power to determine the operational use of the Defence Forces.
- (2) With the authority of the President, the Defence Forces may be deployed in Zimbabwe –
 - (a) in defence of Zimbabwe;
 - (b) in support of the Police Service in the maintenance of public order; or
 - (c) in support of the Police Service and other civilian authorities in the event of an emergency or disaster.

The Constitution therefore only establishes the Zimbabwean Defence Forces,¹⁶ but it also sets out their role and prohibits them, in

13 See 'Goba spells out NPA roadmap' *The Herald* 16 September 2017, <https://www.herald.co.zw/goba-spells-out-mpa-roadmap/> (accessed 7 April 2018). Police officers have also been seconded to the Zimbabwe Anti-Corruption Commission; see also *Moyo v Sgt Chacha & Others* CCZ 19/17 where this became an issue in the constitutional challenge brought by the applicant. It should also be noted that in the case of *Zimbabwe Law Officers Association & Another v National Prosecuting Authority & 4 Others* CC 1/19, the Constitutional Court declared that the engagement of serving members of the security services to perform prosecutorial duties was in contravention of sec 208(4) of the Constitution of Zimbabwe (that section prohibits the employment or engagement of security services in civilian institutions save in periods of public emergency).

14 See the 18 December 2018 press statement by the Chief Secretary to the President and Cabinet, <https://www.zambianobserver.com/here-is-the-official-full-list-of-new-military-promotions-and-retirements-in-zimbabwe/> (accessed 7 April 2018).

15 Major-General Chimonyo was appointed ambassador to Tanzania in December 2007. His continued role in that position after the adoption of the 2013 Constitution was contrary to sec 208(4) of the Constitution.

16 The Zimbabwe Defence Forces are established in terms of sec 211 of the Constitution.

unambiguous language, from involvement in politics. The rationale for this is obvious. It now is a globally-accepted norm that the involvement of the military in politics has a negative bearing on the democratisation process in a country.¹⁷ It has, for example, been argued that the conduct of the military is key to the development of democracy and its robustness.¹⁸ This is because, as Hunter points out, the involvement of soldiers in politics limits ‘popular sovereignty, the guiding principle of democracy’.¹⁹ Some authors have opined that the involvement of the military in politics can ‘impede democracy’s consolidation’, thereby causing ‘democracy to die a slow death’.²⁰ It should, therefore, be obvious that the military’s involvement in politics serves to undermine than enhance and promote democracy.

In terms of the Constitution, civilian policing is a mandate that vests in the police service. Section 219 provides:

- (1) There is a Police Service which is responsible for –
 - (a) detecting, investigating and preventing crime;
 - (b) preserving the internal security of Zimbabwe;
 - (c) protecting and securing the lives and property of the people;
 - (d) maintaining law and order; and
 - (e) upholding this Constitution and enforcing the law without fear or favour.

The constitutional hierarchical ordering of the civilian-military relations in Zimbabwe in essence requires the military to be under civilian command. Even when they are deployed together with the police in the fulfillment of their constitutional duties, their role is that of ‘support’ to the civilian police – the police service, also emphasising their subservience to civilian authority.

It is against the above constitutional background that the events of November 2017 are discussed. According to reports, ZANU-PF for a long time had been involved in an internecine factional battle where two factions sought to succeed the aged and increasingly frail

17 See W Hunter ‘Politicians against soldiers: Contesting the military after post-authorization in Brazil’ (1995) 4 *Comparative Politics* 425.

18 As above. See also K Rakson ‘The influence of the military in Thai politics’ (2010) *Asia Research Centre, Working Research Paper 16*, where the author points out that the ‘persistence of the military’s influence has impaired the consolidation of Thai democracy’.

19 Hunter (n 17) 425.

20 Hunter (n 17) 426, where she makes reference to G O’Donnell ‘Challenges to democratization in Brazil’ (1988) 5 *World Policy Journal* 281; F Hagopian ‘Democracy by undemocratic means? Elites, political facts, and regime transition in Brazil’ (1990) 23 *Comparative Political Studies* 147; and TL Karl ‘Dilemmas of democratization in Latin America’ (1990) 23 *Comparative Politics* 1-21 in their analysis of the transition from military to civilian rule in Brazil in 1985.

Robert Mugabe.²¹ The factional wars resulted in then Vice-President Emmerson Mnangagwa being dismissed by Mugabe on 6 November 2017.²² Mnangagwa fled Zimbabwe alleging that threats to his life and security had been made.²³

On 13 November 2017 General Chiwenga, then commander of the Zimbabwe Defence Forces, addressed a press conference where he made a number of unpalatable remarks.²⁴ He stated that there was instability in ZANU-PF, the political party in government.²⁵ He went on to state that the Zimbabwe Defence Forces were the major 'stockholders' in respect of the gains of the liberation struggle, and that the Zimbabwe Defence Forces will take 'corrective measures' when these are threatened.²⁶ He warned that the military was ready to 'step in' to deal with those behind the 'current treacherous shenanigans' so as to protect 'our revolution'.²⁷ Initially having pointed out that simmering differences within ZANU-PF had historically been resolved by military intervention without usurpation of power, General Chiwenga then, chillingly, ordered ZANU-PF to stop the 'purging' of members of the party with 'liberation war credentials' from ZANU-PF.²⁸

Quite interestingly, a few years before the press conference, then Vice-President Mnangagwa had referred to General Chiwenga, contrary to the Zimbabwean constitutional order, as ZANU-PF's foremost political commissar.²⁹

In his statement General Chiwenga was uninhibited not only in the display of his political partisanship, but also in his conflation of party and state: He called ZANU-PF a household name in Zimbabwe³⁰

21 See 'Mugabe, ED feud escalates' *The Standard* 3-9 September 2017; 'Mugabe, Grace bury ED' *The Standard* 5-11 November 2017; 'Mnangagwa's great escape: The details' *Zimbabwe Independent* 10-16 November 2017; 'How succession fallout started' *Zimbabwe Independent* 10-16 November 2017.

22 'Mugabe fires Mnangagwa' *Newsday* 7 November 2017, <https://www.newsday.co.zw/2017/11/mugabe-fires-mnangagwa/> (accessed 2 April 2018).

23 'Mnangagwa goes into hiding' *Newsday* 8 November 2017, <https://www.newsday.co.zw/2017/11/mnangagwa-goes-hiding/> (accessed 21 March 2018).

24 See 'Full text of statement by General Constantino Chiwenga before military coup' Nehanda Radio 16 November 2017, <http://nehandaradio.com/2017/11/16/full-text-statement-general-constantino-chiwenga/> (accessed 5 March 2018).

25 As above.

26 As above.

27 As above.

28 As above.

29 See 'Chiwenga introduced as ZANU-PF commissar' *Bulawayo 24 News* 9 March 2015, <https://bulawayo24.com/index-id-news-sc-national-byo-64011-article-chiwenga+introduced+as+zanu-pf+political+commissar.html> (accessed 5 March 2018). See also 'Chiwenga our commissar – ZANU-PF' *Newsday* 9 March 2015, <https://www.newsday.co.zw/2015/03/chiwenga-our-commissar-zanu-pf/> (accessed 5 March 2018).

30 Statement by General Constantino Chiwenga (n 24).

(this despite the fact that as recently as 2008 it was an opposition in parliament³¹ and had lost the first round of the presidential vote,³² and the victor in the first round, Morgan Tsvangirai of the Movement of Democratic Change (MDC), had to withdraw from the race after ZANU-PF had unleashed violence that left more than 200 MDC members dead),³³ and that whatever affected ZANU-PF's stability by default affected national stability.³⁴

One of the demands made by General Chiwenga was that ZANU-PF members should be allowed to contest for ZANU-PF positions at the forthcoming December 2017 ZANU-PF Extraordinary Congress – an overt demand for the reversal of the dismissal of Mnangagwa and some members of his faction from government and the party.³⁵

It indeed was quite disconcerting that General Chiwenga attempted to base the military's interference in civilian, specifically political party matters, on what he deemed to be the pre-independence tradition of the Zimbabwe African National Liberation Army, the pre-independence military wing of ZANU-PF). In so doing he conveniently ignored the fact that the current Zimbabwe Defence Forces are an integrated institution comprising the Zimbabwe People's Revolutionary Army (the pre-independence military wing of the Zimbabwe African People's Union) and Rhodesian elements as well.³⁶ In any event, the Zimbabwe Defence Forces are and should be viewed as a single, professional national institution and not from the perspective of only one of its historical elements. Also, 37 years into independence, the vast majority of those currently serving should have no experience of the war of liberation and therefore were not part of the integration process at independence. In any event and, most importantly, in a constitutional democracy, historical traditions of a guerilla force should be subordinated to the constitutional norms currently obtaining.

Following the press conference, on 14 November 2017 the army deployed its tanks and other equipment and took over strategic places such as Munhumutapa Building (the seat of government in Harare), the Supreme Court, Parliament and the Zimbabwe

31 The parliamentary election results are available at <http://archive.kubatana.net/html/archive/elec/080329kubres.asp>, (accessed 7 April 2018).

32 The presidential election results are available at <http://archive.kubatana.net/html/archive/elec/080329kubres.asp>, (accessed 7 April 2018).

33 D Coltart *The Struggle Continues, 50 Years of Tyranny in Zimbabwe* (2016) 477.

34 Statement by General Constantino Chiwenga (n 24).

35 As above.

36 K Chitiyo & M Rupiya 'Tracking Zimbabwe's political history: The Zimbabwe Defence Forces from 1980-2005' in M Rupiya (ed) *Evolutions and revolutions: A contemporary history of militaries in Southern Africa* (2005) 338-340.

Broadcasting Corporation (the public broadcaster) facilities.³⁷ Army tanks also took up positions outside Mugabe's residence.³⁸ By 03:00 on the following day the army had secured all strategic locations, and at 04:00 then Major-General Sibusiso Moyo announced that the Zimbabwe Defence Forces had stepped in to address a degenerating situation,³⁹ stating that Mugabe and his family were safe and their security was guaranteed.⁴⁰ Major-General Moyo went on to state that the military was not taking over power but was after some 'criminals' surrounding the President.⁴¹

The announcement by Major-General Moyo for all intents and purposes was a *coup* announcement.⁴² Other than the fact that it was made against the background of the sound of gunfire and explosions in some parts of Harare,⁴³ the announcement made it clear that the military had taken over the operations of government and was limiting a number of fundamental rights enshrined in the Constitution. Among other things, the announcement made it clear that the freedoms of movement and assembly were being suspended, namely, '[t]o the generality of the people of Zimbabwe, we urge you to remain calm and limit unnecessary movement'.⁴⁴

The deployment of military equipment and personnel outside Mugabe's residence effectively placed him under house arrest as he then had very limited movement, both at a personal level and also officially, to discharge governmental functions as head of state. This, coupled with the presence of soldiers in the streets of Harare and at roadblocks on all major roads in the country, and the immobilisation of civilian police officers, meant that Zimbabwe was effectively under military rule.⁴⁵

37 See 'How army takeover was executed' *Zimbabwe Independent* 17-23 November 2017, <https://www.theindependent.co.zw/2017/11/17/army-takeover-executed/> (accessed 23 November 2017); *ABC News* (n 2).

38 See 'Under military siege for seven days' *Zimbabwe Independent* 24-30 November 2017, <https://www.theindependent.co.zw/2017/11/24/military-siege-seven-days/> (accessed 30 November 2017).

39 See 'Full text of army statement delivered on ZBC TV – "We are targeting criminals around the President"' *Nehanda Radio* 16 November 2017, <http://nehandaradio.com/2017/11/16/full-text-army-statement-delivered-zbc-tv-targeting-criminals-around-president/> (accessed 17 November 2017).

40 As above.

41 As above.

42 See 'What a *coup*? Robert Mugabe "safe and sound" as Zimbabwe military targets "criminals" in government' *Newsweek*, <http://www.newsweek.com/zimbabwe-coup-robert-mugabe-zimbabwe-army-711704> (accessed 11 February 2018).

43 See 'Zimbabwe's crisis: "Moment of hope" as Robert Mugabe's iron grip on power evaporates – Latest news' *Telegraph* 15 November 2017, <https://www.telegraph.co.uk/news/2017/11/14/tanks-seen-heading-towards-zimbabwe-capital-harare/> (accessed 22 March 2018).

44 Army statement (n 39).

45 See '*Coup de Grace*, Zimbabwe's army mounts a *coup* against Robert Mugabe' *The Economist* 15 November 2017, <https://www.economist.com/news/middle->

The military also deployed to the homes of some cabinet ministers. They arrested and detained Finance Minister Ignatious Chombo.⁴⁶ Ministers Jonathan Moyo and Saviour Kasukuwere are said to have escaped bullet fire at their respective homes.⁴⁷ A director of intelligence, one Albert Ngulube, was detained by the army as well as then ZANU-PF youth leader, Kudzanai Chipanga, who had challenged Chiwenga's statement and called it treasonous.⁴⁸ Chipanga later appeared on national television, apparently under duress, profusely apologising to General Chiwenga and dissociating himself from the statement he had previously read condemning the latter's statement.⁴⁹

There was a mass rally in Harare, reportedly organised by the army and the country's war veterans to pile pressure on Mugabe to leave office.⁵⁰ Meanwhile, his party met and resolved to remove him from its leadership, expelled his wife and a number of its members belonging to the vanquished faction and reinstated the previously-expelled Mnangagwa and appointed him its leader.⁵¹

ZANU-PF then announced that Mnangagwa had been chosen to complete Mugabe's presidential term.⁵² It also announced that it would institute impeachment proceedings against Mugabe since he had failed to heed the demand to resign.⁵³ The opposition agreed to support the impeachment motion and seconded the motion when moved.⁵⁴ Amid such process, the powerless and emasculated Mugabe

east-and-africa/21731339-after-37-years-power-game-up-zimbabwes-army-mounts-coup-against (accessed 2 April 2018).

46 *Zimbabwe Independent* (n 37).

47 As above.

48 As above.

49 See 'Chipanga apologises, spills the beans' *Herald* 16 November 2017, <https://www.herald.co.zw/chipanga-apologises-spills-the-beans/> (accessed 10 January 2018).

50 See 'Mugabe's inglorious exit: The timeline' *Zimbabwe Independent* 22-28 December 2017, <https://www.theindependent.co.zw/2017/12/22/mugabes-inglorious-exit-timeline/> (accessed 15 January 2018).

51 See 'Zanu recalls Pres Mugabe' *Herald* 20 November 2017, <http://www.herald.co.zw/zanu-pf-recalls-pres-mugabe/> (accessed 15 January 2018).

52 See 'Zanu-PF Central Committee resolutions' *Herald* 20 December 2017, <http://www.herald.co.zw/zanu-pf-central-committee-resolutions/> (accessed 15 January 2018).

53 The Constitution does not use the word 'impeach' but 'removal'. However, it is clear that the said removal is through an impeachment process. See also Zanu-PF Central Committee resolutions (n 52).

54 Supported by Mabvuku/Tafara MDC MP, James Maridadi. See 'Breaking News: President Mugabe resigns ... Announcement of new leader tomorrow' *Herald* 21 November 2017, <http://www.herald.co.zw/live-parliament-sit-to-impeach-president-mugabe/> (accessed 15 January 2018). See also *Liberal Democrats & 4 Others v President of the Republic of Zimbabwe & 4 Others* CCZ 7/18 pp 20-21 where reference to the *Hansard* is made.

capitulated and on 21 November 2017 tendered his resignation to the Speaker of Parliament.⁵⁵

Mnangagwa returned to Zimbabwe on 22 November 2017,⁵⁶ and addressed a ZANU-PF rally in Harare where he confessed having been in constant communication with the military throughout the whole episode.⁵⁷ He subsequently was sworn into office as President on 24 November.⁵⁸

The Constitution imposes an obligation on the state and every person, including juristic persons, and every institution and agency of government at every level to 'respect, protect, promote and fulfil' the rights and freedoms set out in chapter 4 of the Constitution.⁵⁹ Chapter 4 is binding on the state and all executive, legislative and judicial institutions and agencies of government at every level.⁶⁰ The Zimbabwe Defence Forces, therefore, are bound by the fundamental human rights and freedoms set out in chapter 4.

In this regard, the Zimbabwe Defence Forces cannot abrogate the rights set out in chapter 4 without triggering accountability. The Zimbabwe Defence Forces are bound to respect the right to liberty, freedom of expression, freedom of movement and the right to security and freedom from torture. These rights came into sharp focus in the unfolding *coup* in Zimbabwe. The conduct of the Zimbabwe Defence Forces in the execution of the *coup*, itself being unconstitutional,⁶¹ has had serious implications for the enjoyment of fundamental human rights and freedoms set out above.

The fundamental human rights and freedoms set out in chapter 4 of the Constitution can only be limited in terms of section 86 of the Constitution through a law of general application. In *Brian James v Zimbabwe Electoral Commission & Others*⁶² Patel JA (as he then was), commenting of the application of section 86, opined that '[t]he crux of the present matter is whether or not that derogation

55 As above.

56 See 'Zimbabwe's Mnangagwa promises jobs in "new democracy"' *BBC* 22 November 2017, <http://www.bbc.com/news/world-africa-42077233> (accessed 20 January 2018).

57 See 'Zanu-PF nominates ED Mnangagwa for President' *Herald* 22 November 2017, <http://www.herald.co.zw/just-in-zanu-pf-nominates-ed-mnangagwa-for-president/> (accessed 15 January 2018).

58 See Bill Watch 42/17 by Veritas 'President Mnangagwa sworn in on Friday 24 November 2017', <https://mail.google.com/mail/u/0/#search/veritas%40mango.zw/16002e24db924eb7> (accessed 15 January 2018).

59 Sec 44 of the Constitution.

60 Sec 45(1) of the Constitution.

61 See sec 213 of the Constitution.

62 CCZ 4/13.

falls within the bounds of permissible limitation under s 86(2) of the Constitution’.

As has been held with respect to the Declaration of Rights in the former Constitution, any derogation from a fundamental right or freedom must be strictly and narrowly construed. There must be a rational connection between the objective of the derogation and the implementing law. Moreover, the means employed should not impair the right in question more than is necessary to achieve the declared objective.⁶³

Any limitation of fundamental human rights and freedoms executed outside section 86 of the Constitution therefore is unconstitutional and should trigger legal accountability.

The statement by the military that it was pursuing criminals around Mr Mugabe⁶⁴ meant that the Zimbabwe Defence Forces had arrogated to themselves the role of arresting suspects and defining what constituted a criminal. There is no law that permits the military to arrest civilians. The law reposes that role in a group of people falling within the definition of a ‘peace officer’, all of whom civilians.⁶⁵ In *Wilson v Minister of Defence & Others*,⁶⁶ a case where the army had arrested two journalists and the Court had issued a *habeas corpus* order against the army officials which had been defied whereupon contempt of court proceedings were brought against them, the Court held:⁶⁷

Having once determined that the applicant acted reasonably in instituting proceedings for contempt then I can do no better than respectfully to endorse the unequivocal sentiment expressed by the learned Judge President. Where persons have been unlawfully deprived of their liberty - and despite regrettable equivocation from Mrs Goredema on the point there can be no doubt that the arrest and detention of Mark Chavunduka was unlawful - and it is necessary to resort to litigation, even litigation for contempt, to secure their release.

In executing the *coup*, the Zimbabwe Defence Forces undoubtedly infringed a number of fundamental freedoms of various persons. These include the right of personal liberty;⁶⁸ the rights of arrested

63 *Brian James* (n 62).

64 Army statement (n 39).

65 See secs 24 and 25 of the Criminal Procedure and Evidence Act (Chap 9:07) as read with the definitions section of a peace officer which excludes the military.

66 1999 (1) ZLR 144 (HC).

67 163 para D.

68 Sec 49(1) of the Constitution.

and detained persons;⁶⁹ the right to human dignity;⁷⁰ the right to personal security;⁷¹ freedom from torture or cruel, inhuman or degrading treatment or punishment;⁷² the right to equality and non-discrimination (right to equality before the law and equal protection of the law and benefit of the law);⁷³ the right to privacy;⁷⁴ freedom of assembly and association;⁷⁵ freedom of conscience;⁷⁶ freedom of expression;⁷⁷ political rights;⁷⁸ as well as the right to property.⁷⁹

These violations arose from the illegal arrests, detentions and torture of various persons deemed to be criminals. These persons came to lose the protection and benefit of the law as their rights were trampled upon by the military.⁸⁰

There was also a limitation on the freedom of movement. For some days during and after the *coup*, soldiers set up roadblocks around the country. At these roadblocks they required the travelling public to produce and exhibit to them their personal identity documents.⁸¹ This was against the law as it violated freedom of movement. The Supreme Court in *Elliot v Commissioner of Police & Another* laid down the legal position on identity documents and outlawed the action of arbitrarily stopping and arresting persons not carrying an identity document.⁸²

There is also a possibility of the commission of murder as there are allegations that there was loss of life directly linked to the *coup*.⁸³

69 Sec 50(1) of the Constitution.

70 Sec 51 of the Constitution.

71 Sec 52(a) of the Constitution.

72 Sec 53 of the Constitution.

73 Sec 56(1) of the Constitution.

74 Secs 57(a), (b) and (c) of the Constitution.

75 Sec 58(1) of the Constitution.

76 Secs 60(1)(a) and (b) of the Constitution.

77 Sec 61(1)(a) of the Constitution.

78 Sec 67(1)(b) of the Constitution.

79 Sec 71(2) of the Constitution.

80 See sec 56 which vests in every person the right to protection of the law.

81 The authors personally witnessed this.

82 1997 (1) ZLR 315 (SC) 323B. The requirement to produce an identity document and the criminal liability for not doing so was in terms of s 10(1)(c) of the National Registration Act Chap 10:17 which the Supreme Court held was inconsistent with the then sec 22(1) of the then Constitution of Zimbabwe (the freedom of movement provision).

83 See 'Zimbabweans hold memorial service for CIO boss killed in November military intervention' *Voice of America Zimbabwe Service* 28 January 2018, <https://www.voazimbabwe.com/a/zimbabwe-relatives-of-slain-cio-operative/4228254.html> (accessed 28 April 2018); 'Mugabe one-on-one interview' *Zimbabwe Independent* 23-29 March 2018, where Mugabe alleged that some people were killed during the *coup*; 'Moyo says Zimbabwe army killed dozens during *coup*, shows pictures' *Zimbabwe Mail* 26 December 2017, <http://www.thezimbabwemail.com/zimbabwe/moyo-says-zimbabwe-army-killed-dozens-coup-shows-pictures/> (accessed 27 April 2018).

In a nutshell, the conduct of the military during the *coup* resulted in the nullification of various rights as guaranteed in the Constitution. In effect, the Constitution was overthrown as the conduct of the army could not find any validation in it. This is despite the fickle attempt to sanitise the *coup* by some people approaching the High Court to validate such conduct and that Court in fact agreeing to do so.⁸⁴ Basing its order on the consent of the parties, the High Court held:

- (1) The actions of the Zimbabwe Defence Forces in intervening to stop the take-over of first respondent's constitutional functions by those around him are constitutionally permissible and lawful in terms of section 212 of the Constitution of Zimbabwe in that –
 - (a) they arrest first respondent's abdication of constitutional function, and
 - (b) they ensure that non-elected officials do not exercise executive functions which can only be exercised by elected constitutional functionaries.

The High Court consequently ordered that since the actions of the Zimbabwe Defence Forces were 'constitutionally valid', the Defence Forces therefore had 'the right to take all such measures and undertake all such acts as [would] bring the desired end to its intervention'. The section 212 referred to in the order in fact deals with the functions of the Zimbabwe Defence Forces, which functions are to 'protect Zimbabwe, its people, its national security and interests and its territorial integrity and to uphold this Constitution'. The Court shut its judicial eyes to clear violations of the Constitution and instead went out of its way to read into the Constitution non-existent provisions not even contemplated by the spirit of the Constitution. The Court erred in one main respect, namely, that it ignored clear constitutional provisions dealing with the removal from office of a President who is no longer capable of exercising his or her functions.⁸⁵ It does not matter that the parties who appeared in court consented to the order sought. A court cannot merely issue an order by consent without considering the legality of the order sought.

84 See *Sibanda & Another v President of the Republic of Zimbabwe NO & Others* HC 1082/17. A later attempt to challenge the constitutionality of the conduct of the Zimbabwe Defence Forces in the Constitutional Court was dismissed on procedural technicalities. See *Liberal Democrats & 4 Others v President of the Republic of Zimbabwe & 4 Others* CCZ 7/18 6.

85 See secs 97(1)(a)-(d) of the Constitution. These provisions deal with the removal of the President from office on account of serious misconduct, failure to obey, uphold or defend the Constitution, willful violation of the Constitution, inability to perform functions of the office because of the physical or mental incapacity. The Constitution sets out clear and detailed procedures to be followed by Parliament.

The unfortunate decision of the High Court of Zimbabwe on the legality of the *coup* is not an isolated act by a court faced with such a situation. Mahmud records a history of validation and legitimisation of *coups* by the courts in several countries.⁸⁶ The Pakistani case of *State v Dosso* is a good example.⁸⁷ In that case the Pakistani Supreme Court relied on the Hans Kelsen theory of revolutionary legality to validate the *coup*.⁸⁸ In that decision the Court held that the efficacy of the *coup* was the basis of its validity.⁸⁹ Mahmud, however, argues that no evidence was relied upon by the Court to conclude that the *coup* was efficacious.⁹⁰

In the Ugandan case of *Uganda v Matovu* the Court had the opportunity to consider the validity of the new regime.⁹¹ Prime Minister Milton Obote had suspended the Constitution together with Parliament in 1962. In 1966 he came up with another Constitution, recalled Parliament to pass it to create an executive presidency and a unitary state. In the same year Obote declared martial law. Matovu, a Buganda chief, was served with a detention order in terms of the 1966 Constitution and he instituted *habeas corpus* proceedings, arguing the detention order under the 1966 Constitution violated fundamental rights provisions in the 1962 Constitution.⁹² Relying on the Kelsen theory and on *Dosso*, the Court concluded that the regime was efficacious.⁹³ However, unlike in *Dosso*, the Court had regard to a number of affidavits of officials as evidence to prove that the 1966 Constitution was efficacious.⁹⁴ The Court thus validated and legitimised the new regime that had overthrown an existing constitution.

In the Rhodesian cases of *Madzimbamuto v Lardner-Burke*⁹⁵ and *Regina v Ndhlovu*,⁹⁶ a similar reasoning was ultimately followed in the determination of the legality of a new regime arising out of an overthrow of the 1961 Constitution and the adoption of another in 1965, accompanied with a Unilateral Declaration of Independence (from Britain).

86 Mahmud (n 3) 54.

87 PLD 1958 SC 553.

88 Mahmud (n 3) 54.

89 Mahmud 55.

90 Mahmud 56.

91 1966 E Afr LR 514.

92 Mahmud (n 3) 57-58.

93 Mahmud 59.

94 As above.

95 [1968] 2 SALR 284 (Rhodesia Appellate Division).

96 [1968] 4 SALR 555 (Rhodesia Appellate Division).

However, the above cases clearly are distinguishable from the Zimbabwean case since they deal with the question of effectiveness of a new regime where the old constitutional order had been overthrown. The Zimbabwean High Court based its decision on a wrong interpretation of an extant Constitution, not on the legal status of a new regime.

The duty to respect, protect, promote and fulfill the fundamental human rights and freedoms by the three arms of the state, as enunciated in section 44 of the Constitution, was thrown out the window. Distressingly, when the High Court was presented with an opportunity to assert the provisions of the Constitution (assuming that the whole litigation process was not a choreographed charade) it slipped. The High Court order makes it difficult for potential litigants in matters dealing with the protection of fundamental human rights and freedoms to repose their faith in Zimbabwean judicial institutions. The future looks bleak from the perspective of the protection of fundamental human rights and freedoms. Unless the Constitutional Court steps in (if it is called upon to do so in the future) to assert the supremacy of the Constitution and overturn the High Court order, democracy, human rights and the rule of law are on the knife edge in Zimbabwe.

The chilling effect of the military's conduct cannot be underestimated. It now is probable that should their 'political' interests again be threatened, the Zimbabwe Defence Forces would readily execute another *coup*, suspend the Constitution, and brazenly violate people's rights.

4 Major players in the *coup* and their past human rights records

This part of the article discusses the major players in the *coup*, both as a collective and as individuals, and their past human rights records. This is important because, while the process of the transition itself may not necessarily define the outcome of the transition, where both the process undermines democracy and violates fundamental rights and the people behind the process have a record of consistently violating human rights and undermining democratic processes, the prospect of the *coup* ushering in democracy lessens.

The players involved in the *coup* are institutions and individuals that have been implicated in a number of past human rights abuses and violations. The entirety of the high command of the Zimbabwe Defence Forces apparently was involved in the process, projecting an

appearance of unity of purpose.⁹⁷ The commander of the air force at the time of the *coup*, Air Marshall Perence Shiri, was the commander of the 5 Brigade at the time it is alleged to have committed the *Gukurahundi* atrocities in Matabeleland and the Midlands provinces.⁹⁸ These atrocities left an estimated 20 000 innocent civilians dead, many raped and severely tortured and an unknown but significant number of missing persons.⁹⁹ The 5 Brigade has long been accused of being the main military unit behind the *Gukurahundi* atrocities. In the aftermath of the *coup* Perence Shiri was appointed Minister of Lands and Agriculture, and was always accused of the actual execution of the *Gukurahundi* atrocities.¹⁰⁰

Emmerson Mnangagwa, whose dismissal from the position of Vice-President appears to have triggered the *coup*, and who in fact confessed to have maintained constant communication with the military throughout the *coup*, likewise has been implicated as one of the leading figures in the execution of *Gukurahundi*.¹⁰¹

The atrocities themselves were egregious and were carried out in the most inhuman, barbaric and gruesome fashion: Tens of thousands of unarmed civilians, who were supporters of the strongest opposition party at the time – PF-ZAPU – or who happened to be in areas deemed to be PF-ZAPU strongholds were subjected to extra-judicial cold-blooded killings, with a number of them being buried alive and others burnt to death; pregnant women had their stomachs slit open with bayonets to reveal still moving fetuses, some being forced to kill and eat their own infant babies; some women had sharp objects inserted into their genitals leading them to adopting a painful, wide-legged gait; and men would receive blows on their testicles from rubber truncheons (on one occasion the victim's scrotum burst open

97 L Msipa 'The Chipanga and Simon Khaya Moyo – Implications', <http://www.thezimbabwe.com/opinion/chipanga-simon-khaya-moyo-implications/> (accessed 10 March 2018).

98 D Masunda "'You must thank your ancestors": My strange encounter dinner with Perrance Shiri' *NewZWire* 3 August 2020, <https://newswire.live/you-must-thank-your-ancestors-my-strange-dinner-with-perrance-shiri/> (accessed 29 September 2020).

99 See 'Breaking the silence: Building true peace: A report on the disturbances in Matabeleland and the Midlands, 1980-1988: A summary' Catholic Commission for Justice and Peace and Legal Resources Foundations (summary of the 1997 version of the same report), <http://hrforumzim.org/wp-content/uploads/2010/06/breaking-the-silence.pdf> (accessed 7 April 2018).

100 Coltart (n 33) 133 as read with the chapter on *Gukurahundi* in the same book.

101 Other names that feature prominently in the CCJP report are those of Robert Mugabe and Dr Sydney Sekeramayi, former Minister of Defence. See S Eppel "'Gukurahundi": The need for truth and reparation' in B Raftopoulos & T Savage (eds) *Zimbabwe – Injustice and political reconciliation* (2004) 62; see also M Killander & M Nyathi *Accountability for Gukurahundi atrocities thirty years on: Prospects and challenges* (2015) 158 *CILSA* 463.

and he died);¹⁰² school children were forced to publicly engage in sexual intercourse with one another;¹⁰³ many victims disappeared without a trace and nothing is known of what befell them;¹⁰⁴ yet many more were subjected to assaults and torture¹⁰⁵ while others were raped,¹⁰⁶ arbitrarily detained,¹⁰⁷ had their property destroyed, or were deliberately starved as food access was completely cut off in some areas.¹⁰⁸

Of course, the ultimate responsibility for *Gukurahundi* should fall on former President Mugabe who at the time was the executive head of government. However, this should in no way lessen the responsibility of the others who were involved, especially those who at the time held relevant high military and political positions.¹⁰⁹ There has been no legal accountability for the *Gukurahundi* atrocities owing largely to the fact that those accused of it have escaped due process due to the fact that they have continued to have control of the entire political, military and intelligence infrastructure in Zimbabwe, and some of them have since died.

The military as an institution has been implicated in a number of post-*Gukurahundi* human rights violations. These include Operation Murambatsvina and Operation Maguta. The UN Special Envoy, Mrs Anna Tibaijuka, in her 2005 report titled Report of the Fact-Finding Mission to Zimbabwe to Assess the Scope and Impact of Operation Murambatsvina by the UN Special Envoy on Settlements Issues in Zimbabwe,¹¹⁰ where she investigated the massive displacement of urban dwellers in Zimbabwe at the behest of President Mugabe, states the following:¹¹¹

On 19 May 2005, with little or no warning, a military-style 'clean-up' operation started in the Zimbabwe capital, Harare. It quickly developed into a deliberate nationwide campaign, destroying what the Government termed illegal vending sites, structures, other informal business premises and homes, literally displacing hundreds of thousands of people. Termed 'Operation Murambatsvina' by the Government (hereafter referred to as Operation Restore Order), and

102 Killander & Nyathi (n 101) 467.

103 Killander & Nyathi 466.

104 Coltart (n 33) 141.

105 Killander & Nyathi (n 101) 466.

106 Killander & Nyathi 467.

107 Coltart (n 33) 140.

108 See Killander & Nyathi (n 101) 466 and the references therein.

109 For a discussion of accountability for the *Gukurahundi* atrocities, see generally Killander & Nyathi (n 101).

110 Available at http://www.un.org/News/dh/infocus/zimbabwe/zimbabwe_rpt.pdf (accessed 2 February 2018).

111 See Introduction (12 of the report) (our emphasis).

commonly referred to by the people as 'Operation Tsunami', the army and police were mobilised to carry out the demolitions and evictions.

Operation Maguta is another example of the Zimbabwean military's penchant for human rights violations. This was an army-headed operation designed to 'boost agriculture production and food security'.¹¹² Government sought to initially bring 250 000 hectares under irrigation and then expanded it to 800 000 hectares.¹¹³ Ironically, and contrary to its stated aims, the operation was characterised by massive human rights violations by the army. In Insiza District in the Matabeleland South Province there were reports of villagers being subjected to forced labour where they were forced-marched to the irrigation sites and forced to work.¹¹⁴ These villagers were subjected to punishing working conditions.¹¹⁵ They were forced to start work at 06:00, denied water and only allowed a break at 12:00 for a pathetic lunch of 'a plate of boiled vegetables and stale [cooked maize paste]'.¹¹⁶ According to *The Zimbabwean*:¹¹⁷

Reports that the soldiers were flogging 'defiant and lazy' farm workers using sjamboks could not be independently verified. But the forced labour gave a graphic illustration of the true horror of the army-led Operation Maguta, which is deliberately fostering a situation where notions of human decency are debased, and where this debasement is celebrated.

Also, ZANU-PF and the military have since independence worked hand-in-glove in using violence and the threat of violence as a means to win elections.¹¹⁸ In 2002 General Vitalis Zvinvashe issued a threat that the Zimbabwe Defence Forces would not salute anyone without liberation credentials, declaring the office of President 'a strait-jacket office'.¹¹⁹ In 2008 when President Mugabe lost the first round of elections to Morgan Tsvangirai, the army deployed and unleashed violence against opposition members and thus forced Tsvangirai to pull out of the run-off poll, thus handing Mugabe an automatic victory.¹²⁰ In 2008 the violence meted out by ZANU-PF, the military

112 C Mutami 'Smallholder agriculture production in Zimbabwe: A survey' (2015) 14 *Consilience: The Journal of Sustainable Development* 140.

113 Mutami (n 112) 149.

114 See 'Operation Maguta – State-sanctioned slavery' *The Zimbabwean* 27 July 2006, <http://www.thezimbabwean.co/2006/07/operation-maguta-state-sanctioned-slavery/> (accessed 2 February 2018).

115 Villagers would be required to use short hoes to weed the crops, wearing tattered clothing, during winter in biting cold conditions.

116 *The Zimbabwean* (n 114).

117 As above.

118 See J Nkomo, *Nkomo: The story of my life* (2001) 206 207.

119 Musavengana (n 7).

120 See CRS Report for Congress, Zimbabwe: 2008 Elections and Implications for US Policy, updated 10 July 2008, https://digital.library.unt.edu/ark:/67531/metadc700870/m1/1/high_res_d/RL34509_2008Jul10.pdf (accessed 2 April 2018).

and other state agents is estimated to have resulted in the death of approximately 200 people, mostly MDC-T election agents.¹²¹ These killings were accompanied by mass assaults, rapes, displacements and arson.¹²²

One prominent ZANU-PF politician recounts that in the 2008 presidential election run-off he was shocked to find himself sharing a platform with military commanders in the mining town of Zvishavane.¹²³ One of them was addressing the crowd, a gun in one hand and a pen in the other; telling the crowd that if they did not vote for ZANU-PF 'they had better flee from their homes because the army would come looking for them'.¹²⁴

The military has also been fingered in farm invasions during the 'land reform' programme.¹²⁵ Following the defeat of the ZANU-PF government by popular vote in the 2000 constitutional referendum, farm invasions by war veterans commenced and the military was implicated in the coordination and facilitation of the illegal land invasion.¹²⁶ For example, prominent human rights lawyer and former Minister of Education and Senator, David Coltart, points out the extra-judicial execution of Martin Olds, a farmer, by a group of invaders, some of whom had AK-47 assault rifles, who apparently were highly trained and drove in 13 trucks past a police roadblock.¹²⁷ In order to conceal the involvement of the military, Coltart points out that those involved in the Olds murder were all dressed (obviously to conceal their identity) in civilian attire but their weapons and conduct on the day gave them away as military men.¹²⁸

In the past, while the involvement of the military in politics and in political violence has been widely known, there were attempts to either make their involvement as covert as possible and, where this was not possible, to at least attempt to justify their involvement

121 Coltart (n 33) 477.

122 See 'Zimbabwe: The elections on 29 March and the later runoff event and by-elections on 27 June 2008: Report by Kare Vollan' *Nordem Report* 8/2008 38, <http://www.jus.uio.no/smr/english/about/programmes/nordem/publications/2008/0808.pdf> (accessed 10 March 2018).

123 CG Msipa *In pursuit of freedom and justice, A memoir* (2015) 172 173.

124 Msipa (n 123) 173.

125 See 'Fast track land reform in Zimbabwe – Land reform in the twenty years after independence – Human Rights', <https://www.hrw.org/reports/2002/zimbabwe/ZimLand0302-02.htm> (accessed 10 March 2018). See also 'Zimbabwe: Army steps up role in farm invasions', <http://allafrica.com/stories/200005050126.html> (accessed 10 February 2018).

126 Coltart (n 33) 278.

127 Coltart (n 33) 277 278, where he points out that Olds assailants 'used military weapons and acted with military planning and discipline'. This implicates the army in the murder.

128 Coltart (n 33) 278.

in order to give it a veneer of legality. This time, the military's involvement in politics and in the violation of human rights has been so overt and brazen that it needs no speculation.

Also, the Zimbabwean political and socio-economic landscape for some time now has been subjected to the militarisation of civilian institutions. Serving soldiers have been deployed in parastatals,¹²⁹ independent institutions such as the Zimbabwe Electoral Commission,¹³⁰ the National Prosecuting Authority,¹³¹ and in corrupt mining ventures.¹³² A Zimbabwean scholar, Musavengana, observes that the past few years have 'witnessed the *Zanufication* of the public service, traditional leadership structures, youth training centres and the militarisation of public institutions. Musavengana points out that this pervasive conduct has extended to 'electoral commission, strategic grain reserve, the judiciary, prison services, permanent secretary positions in government ministries and heads of state enterprises (parastatals)'.¹³³

With the military so involved in the daily affairs of Zimbabwe and its penchant for the violation of human rights, the protection of fundamental freedoms may have reached a nadir. Where the courts have come in to rubber stamp and thus lend legitimacy to a straightforward illegality, there is very little hope that the Zimbabwean human rights landscape may improve. Indeed, human rights violations are likely to continue, with the courts cowering, if not actively aiding, such violations.

129 G Moyo, 'The curse of military commercialisation in state enterprises and parastatals in Zimbabwe', (2016) 42 *Journal of Southern African Studies* 351 Volume 42, 2016, Issue 2. See also 'Deployment of personnel to parastatals to continue' *Chronicle*, 26 August 2013, available at <https://www.tandfonline.com/doi/abs/10.1080/03057070.2016.1145981?src=recsys&journalCode=cjss20> (accessed 7 January 2018); 'Top military officers to run NRZ', *The Zimbabwean*, 25 May 2006, available at <http://www.thezimbabwean.co/2006/05/top-military-officers-to-run-nrz/> (accessed 8 January 2018).

130 See 'Mugabe succession: Military involvement raises the stakes', *Zimbabwe Independent*, 17 July 2017, available at <https://www.theindependent.co.zw/2017/07/17/mugabe-succession-military-involvement-raises-stakes/> (accessed 8 January 2018).

131 See 'Military takes over prosecuting authority' *Zimbabwe Independent* 28 October 2016, <https://www.theindependent.co.zw/2016/10/28/military-takes-prosecuting-authority/> (accessed 8 January 2018).

132 See 'Military looted diamonds – Report' 15 September 2017, <https://www.theindependent.co.zw/2017/09/15/military-looted-diamonds-report/> (accessed 10 January 2018).

133 Musavengana (n 7).

5 Reactions of Zimbabwe's institutions to the *coup*

Chapter 12 of the Constitution establishes independent commissions supporting democracy. One of these is the Zimbabwe Human Rights Commission (ZHRC). The ZHRC has a duty to monitor, assess and ensure the observance of human rights and freedoms.¹³⁴ Second, it has an obligation to protect the public against the abuse of power and maladministration by the state and public institutions and by officers of all those institutions.¹³⁵ Third, it has a duty to 'secure appropriate redress, including recommending the prosecution of offenders, where human rights or freedoms have been violated'.¹³⁶ Finally, the ZHRC has a duty to visit and inspect places of detention in order to ascertain the conditions under which persons are kept and thus make recommendations to the minister responsible for administering the law relating to such places.¹³⁷

In the wake of the *coup* the ZHRC issued a lackluster one-page statement.¹³⁸ In the statement the Commission noted the political situation obtaining in the country. It then proceeded to point out its role as being to 'support and entrench human rights and democracy, to protect sovereignty and interests of the people and to promote constitutionalism'.¹³⁹ The ZHRC then lauded the military's assurances to uphold 'constitutionalism, values of justice, non-violence, human rights and freedoms in resolving the current political situation'.¹⁴⁰ The ZHRC then noted further assurances made by the military and then bizarrely implored a return to constitutionalism, when it had previously lauded the military for assurances to 'uphold constitutionalism'.¹⁴¹ The ZHRC did not at all condemn the military action as being in violation of the Constitution.

The ZHRC did not act on its mandate as is required by the Constitution. It did not undertake the monitoring and assessment of the *coup* and its effects so as to ensure that human rights in fact were respected. It did not protect the public against human rights abuses by the military. The ZHRC did not 'secure appropriate redress, including recommending the prosecution of offenders, where human

134 Sec 243(1)(c) of the Constitution.

135 Sec 243(1)(e) of the Constitution.

136 Sec 243(1)(g) of the Constitution.

137 Sec 243(1)(k)(i) of the Constitution.

138 See 'ZHRC: Press Statement by the Zimbabwe Human Rights Commission (ZHRC) on the political situation in Zimbabwe' 16 November 2017, <https://minbane.wordpress.com/2017/11/16/https-wp-me-p1xtjg-5uo/> (accessed 3 February 2018).

139 As above.

140 As above.

141 As above.

rights or freedoms have been violated' as rights of various persons were violated, as indicated above.

The Law Society of Zimbabwe (LSZ) is another important body in Zimbabwe with its stated commitment to justice and the rule of law in Zimbabwe.¹⁴² While not a Chapter 12 institution, the LSZ is a creature of statute – the Legal Practitioners Act, Chapter 27:07.¹⁴³ One mandate of the LSZ is ensuring that the rule of law is upheld. In the wake of the *coup*, the LSZ on 15 November 2017 issued a short, terse and lukewarm statement, which it circulated to its membership where it noted the 'current developments in the country'.¹⁴⁴ It noted the assurances of peace and calm made by the military and that 'constitutional order will be respected' while asserting its commitment to justice and the rule of law.¹⁴⁵ It further expressed its encouragement on the undertaking not to interfere with judicial independence.¹⁴⁶

The statement of the LSZ was severely criticised in some quarters. An organisation calling itself Open Parly stated that the LSZ refused to condemn the military *coup*.¹⁴⁷ Open Parly further pointed out that the move by the LSZ was strange but might have been in keeping with the mood then obtaining in Zimbabwe which seemed to embrace anything that brought to an end Mugabe's 37-year reign.¹⁴⁸ However, the LSZ lost its moral high ground of being the organisation that is at the forefront of ensuring observance of the rule of law in Zimbabwe. At a critical moment the LSZ, being the foremost law-based organisation, failed to provide leadership on the legality of the conduct of the military where such conduct clearly was contrary to the Constitution.

6 Accountability for the *coup*

This article has outlined the legal and constitutional challenges that have arisen as a result of the *coup*. Mechanisms therefore needed to be put in place to address the challenges posed by the *coup*. One of

142 See the vision of the LSZ, <http://lawsociety.org.zw/AboutUs> (accessed 10 March 2018).

143 Sec 51 of the Act.

144 See 'The Law Society calls for a quick return to constitutional order' by Wisdom Murema of Open Parly, <https://openparly.co.zw/2017/11/16/law-society-of-zimbabwe-calls-for-a-quick-return-to-constitutional-order/> (accessed 14 February 2018).

145 The full statement by the Law Society is not available on its website but was circulated within its membership on 15 November 2017.

146 The 15 November 2017 statement by the Law Society.

147 Law Society (n 144).

148 As above.

the most important of these is accountability of those involved in the violation of rights and freedoms and the need to ensure that there is no repetition of these events. The military should always be confined to the barracks and should submit itself to civilian control.

There is a need to institute an independent, impartial and competent judicial commission of inquiry into the *coup* and the underreported constitutional violations that occurred during its execution, including extra-judicial killings that may have occurred. Specifically, the inquiry would have to examine the circumstances that led to the *coup*; the causes of the failure of civilian leadership over the military; human rights violations that occurred as a result of the *coup*; the lives that may have been lost as a consequence of the *coup* and the circumstances of such loss of life; the persons responsible for such loss of life as well as recommendations as to what has to be done to redress such violations; and recommendations to ensure the non-recurrence of such violations in the future.

7 Conclusion

As demonstrated above, the 2017 *coup* in Zimbabwe was unconstitutional. There therefore is a need for urgent accountability for the *coup* and for all the crimes and delicts or torts that were committed during its execution. Responsibility for the crimes and wrongful acts should not only apply to those directly responsible, but should extend to those in military command positions and their civilian co-conspirators who are established to have played a role in the commission of crimes.

The *coup* has brought to the fore the partisan nature of Zimbabwe's military. The conflation of political party internal affairs with those of the state in flagrant violation of the Constitution is as unacceptable as it is dangerous in a democratic constitutional state. It embarrasses and violates those professional men and women in the Zimbabwe Defence Forces who are committed to serving the country, not a political party. In short, the *coup* has been one of the crudest and most severe assaults on Zimbabwean constitutionalism so far, or what is left of it.

It is also safe to conclude that the *coup* might have planted poisonous seeds of mistrust between and among Zimbabwe's security apparatus which might in the long term lead to disunity, instability and insecurity. The immobilisation of the civilian police force and the usurpation of its powers by the military were unfortunate and dangerous.

By adopting a new Constitution in May 2013, Zimbabweans made a bold statement about a clear break from a past characterised by the lawlessness of the state and public institutions. They sought to found a state based on the rule of law. This lofty goal came under attack during the *coup* which undermined the very essence of a constitutional state.