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2023

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Malunga, Siphosami Patrick. (2023). Five brigade atrocities in Zimbabwe: categorising international crimes and evaluating the criminal liability of perpetrators [Master's dissertation, University of the Witwatersrand, Johannesburg]. WireDSpace. https://hdl.handle.net/10539/38752

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FIVE BRIGADE ATROCITIES IN ZIMBABWE: CATEGORISING INTERNATIONAL CRIMES AND EVALUATING THE CRIMINAL LIABILITY OF PERPETRATORS

by

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Student Number: 421440

A thesis submitted in fulfilment of the requirements for the degree

Doctor of Philosophy

in the

Faculty of Law
of the University of Witwatersrand

SUPERVISOR: DR. KHULEKANI MOYO

JUNE 2023

PLAGIARISM DECLARATION

'Five Brigade atrocities in Zimbabwe: Categorising international crimes and evaluating the criminal liability of perpetrators' is my own original work and it has never been presented to any institution of higher learning; and where the works of other people have been used, references have been provided. It is in this regard that I declare this work as originally mine. It is hereby presented in fulfilment of the requirements for the award of the Doctor of Philosophy Degree.

Siphosami Patrick Malunga  Date 26 June 2023

ACKNOWLEDGEMENT

It is often said that the PhD journey is a lonely one. I did not find this to be the case. I had many companions on this journey. My supervisor Dr Khulekani Moyo walked with me from start to finish, providing much needed guidance and direction. My family and friends tolerated my many and long periods of seclusion and endless rants and pushed me to keep going. I cannot understate the influence and inspiration of my late father, Sidney Malunga, himself a victim and fearless advocate for justice and accountability for Gukurahundi and other injustices.

DEDICATION

This doctoral study is dedicated to the victims and survivors of Five Brigade atrocities.

ABSTRACT

In virtually every village in the Zimbabwean provinces of Matabeleland and parts of Midlands, there are reminders of heinous atrocities perpetrated against defenceless civilians by the government between 1982 and 1987. These atrocities, commonly known as the 'Gukurahundi,' a moniker for the army brigade that committed them, resulted in the deaths of an estimated 20 000 Ndebele civilians. Many of those killed were abducted and forcibly disappeared, and their bodies thrown into mine shafts or buried secretly in shallow graves. Others were publicly executed and buried in mass graves. Thousands more were starved, tortured, raped, unlawfully detained, and their homes and belongings destroyed during the Gukurahundi operation. Survivors continue to bear physical, emotional and psychological scars while alleged high-level perpetrators continue to rely on their political incumbency to enjoy impunity and remain shielded from accountability for their crimes. This doctoral thesis addresses the existing literature gap on the legal classification of the Gukurahundi atrocities. It seeks to determine whether atrocities committed by Five Brigade of the Zimbabwe National Army (ZNA) and other security agencies against civilians constitute international crimes of genocide, crimes against humanity and war crimes. It assesses the application of international criminal and humanitarian law in Zimbabwe and investigates the status of the Matabeleland Conflict under international humanitarian law. Further, it explores whether alleged perpetrators can be held individually criminally responsible for Gukurahundi atrocities under international law. Finally, the thesis is expected to contribute to understanding the legal nature of Gukurahundi atrocities, the role of alleged perpetrators and the victims' prospects for justice and accountability.

KEYWORDS:

Zimbabwe, Gukurahundi atrocities, international crimes, genocide, crimes against humanity, war crimes, individual criminal responsibility, accountability.

LIST OF ABBREVIATIONS

ANC – African National Congress

AP – Additional Protocol

AU – African Union

BBC – British Broadcasting Corporation

BMATT – British Military Advisory and Training Team

CA3 – Common Article 3

CAH – Crimes Against Humanity

CAT – Commission Against Torture

CBC – Conference of Catholic Bishops

CCJP – Catholic Commission for Justice and Peace

CIO – Central Intelligence Organisation

DASR – Draft Articles on Responsibility of States for Internationally Wrongful Acts

DCT – Direct Criminalisation Thesis

DPRK - Democratic People's Republic of Korea

EAC – East African Chambers

ECCC – Extraordinary Chambers in the Courts of Cambodia

FPLC – Patriotic Forces for the Liberation of Congo

GoZ – Government of Zimbabwe

HCT – Hybrid Criminal Tribunals

IAC – International Armed Conflict

ICC – International Criminal Court

ICCPR – International Covenant on Civil and Political Rights

ICJ – International Court of Justice

ICL – International Criminal Law

ICR – Individual Criminal Responsibility

ICRC – International Committee of the Red Cross

ICTR – International Criminal Tribunal for Rwanda

ICTs – International Criminal Tribunals

ICTY – International Criminal Tribunal for the former Yugoslavia

IHL – International Humanitarian Law

ILC – International Law Commission

IMCT – International Military Criminal Tribunal

IMTFE – International Military Tribunal of the Far East

JCE – Joint Criminal Enterprise

LRF – Legal Resource Foundation

MP – Member of Parliament

NATO – North Atlantic Treaty Organisation

NCT – National Criminalisation Thesis

NIAC – Non-International Armed Conflict

NMT – Nuremberg Military Tribunal NPA – National Prosecuting Authority

OSP – Organised Structure Power

PCNICC – Preparatory Commission for the International Criminal Court

PISI – Police Internal Security and Investigations

RPF – Rwanda Patriotic Front

SADC – Southern Africa Development Community

SADF – South African Defence Forces

SAPS – South African Police Service

SCSL – Special Court of Sierra Leone

UN – United Nations

UNSC – United Nations Security Council

USA – United States of America

USD – United States Dollar

VCLT – Vienna Convention on the Law of Treaties

ZANLA – Zimbabwe African National Liberation Army

ZANU PF – Zimbabwe African National Union – Patriotic Front

ZAPU – Zimbabwe African People's Union

ZIPRA – Zimbabwe People's Revolutionary Army

ZNA – Zimbabwe National Army

ZRP – Zimbabwe Republic Police

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CHAPTER ONE – INTRODUCTION

1.1 Background

In virtually every village in the Zimbabwean provinces of Matabeleland and Midlands,[1] there are constant reminders of heinous atrocities against defenceless civilians between 1982 and 1987.[2] In their wake, these atrocities, allegedly committed by Five Brigade[3] of the Zimbabwe National Army (ZNA) and other security agencies, resulted in the deaths of thousands of civilians.[4] Many of those killed were allegedly forcibly abducted and disappeared and their bodies thrown into mine shafts or buried secretly in shallow graves.[5] Thousands of others were allegedly publicly executed in their villages and buried in mass graves.[6] Entire villages were devastated by the brigade's actions over at least three years.[7] An estimated 20 000 people died, thousands more starved, were tortured, raped, unlawfully detained, and their homes and belongings destroyed during the Gukurahundi operation.[8] Those that survived the atrocities

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[1] Matabeleland and Midlands are provinces in Zimbabwe. The Midlands province is in central Zimbabwe and is made up of both Shona and Ndebele ethnic origin. Matabeleland is in south-western Zimbabwe and is predominantly and historically inhabited by people of Ndebele origin.

[2] Catholic Commission for Justice and Peace in Zimbabwe & Legal Resources Foundation *Breaking the Silence. Building True Peace. A Report on the Disturbances in Matabeleland and the Midlands 1980 – 1988* (1997) 56 [hereinafter *Breaking the Silence*]; see Shari Eppel, *'Gukurahundi: The need for truth and reparation'* in Brian Raftopoulous & Tyrone Savage (eds) *Zimbabwe – Injustice and Political Reconciliation* (2004); Magnus Killander & Mkhululi Nyathi 'Accountability for the Gukurahundi atrocities in Zimbabwe thirty years on: prospects and challenges' (2015) 48 *The Comparative and International Law Journal of Southern Africa* 3 463-487; Bill Berkeley, *Zimbabwe: Wages of War; A Report on Human Rights*, Lawyers Committee for Human Rights (1983); see Stuart Doran *Kingdom, Power, Glory: Mugabe, ZANU and the Quest for Supremacy: 1960-1987* (2017).

[3] The agreement to train Five Brigade was signed by Prime Minister Mugabe and North Korean President Kim Il Sung in October 1980, to 'combat malcontents'. Mugabe announced the brigade would be called 'Gukurahundi', which means the rain which washes away the chaff before the spring rains. Five Brigade was drawn from 3 500 mainly Shona-speaking ex-ZANLA troops at Tongogara Assembly Point. The first Commander of Five Brigade was Colonel Perence Shiri. At the passing out parade, Mugabe instructed the Brigade to go the Matabeleland and Midlands and to 'plough and reconstruct'. Once deployed Five Brigade made little effort to combat dissidents and instead committed atrocities against unarmed civilians. See generally *Breaking the Silence*: Who were the Five Brigade? op cit note 2.

[4] Doran op cit note 2; Sabelo J Ndlovu-Gatsheni 'Rethinking Chimurenga and Gukurahundi in Zimbabwe: A Critique of Partisan National History' (2012) 55 *African Studies Review* 1 at 1-2.

[5] Philip Santos *Representing Conflict: An Analysis of the Chronicle's Coverage of the conflict in Zimbabwe between 1983 and 1986* (unpublished MA thesis, Rhodes University, 2011); David Coltart, *The Struggle Continues: 50 years of tyranny in Zimbabwe* (2016).

[6] Killander & Nyathi op cit note 2; Jocelyn Alexander 'Dissident Perspectives on Zimbabwe's Post-Independence War' (1998) 68 *Journal of the International African Institute* 2.

[7] *Breaking the Silence* op cit note 2 at 45.

[8] Gukurahundi is also commonly used to refer to the campaign by Five Brigade and other security forces within Matabeleland and Midlands.

bear severe emotional and physical scars as a result of the physical and psychological abuse to which they were subjected.[9]

There has been no accountability for the victims of these atrocities, and the alleged perpetrators continue to enjoy impunity.[10] Neither the state nor alleged perpetrators have formally acknowledged the atrocities, and there have been no measures for accountability and redress.[11] Some of the alleged perpetrators of the atrocities have even been rewarded with higher positions in public service, including the military.[12] In fact, at the highest levels, the government still essentially comprises the alleged perpetrators who allegedly oversaw and led the atrocities.[13] This impunity has left victims bitter, helpless, deprived and fearful.[14] Relatives and families of persons that disappeared at the hands of Five Brigade continue to suffer anxiety from not knowing the fate of their loved ones. Victims of torture and sexual violence bear physical and emotional scars with no hope of rehabilitation or treatment.[15] The question of accountability for Five Brigade atrocities has been debated for many years with little

[9] Urther Rwafa 'Representations of Matabeleland and Midlands disturbances through the documentary film Gukurahundi: A Moment of Madness' (2007) 10 *African Identities* 3 at 313–327; Dumisani Ngwenya 'Our Branches Are Broken: Using the Tree of Life Healing Methodology with Victims of Gukurahundi in Matabeleland, Zimbabwe' (2016) 23 *Peace and Conflict Studies* 1.

[10] Killander & Nyathi op cit note 2.

[11] Laura Angela Bagnetti 'Ghosts of Gukurahundi still haunt survivors, as Zimbabwe officials refuse to acknowledge' (2019) *RFI* 12 March 2019.

[12] This includes current President Emmerson Mnangagwa who was Minister of State Security in the Prime Minister's Office and responsible for coordinating the security operations, Sidney Sekeramayi, Minister of State for Defence in the Prime Minister's Office, current Vice President Constantine Chiwenga who was Commander of One Brigade that supplied and supported Five Brigade, late Minister of Agriculture and former Airforce Commander, Perence Shiri who commanded Five Brigade, late Zimbabwe National Army Commander, Lt-General Edzai Chimonyo who was Deputy commander of Five Brigade.

[13] See Killander & Nyathi op cit note 2.

[14] Norman Mlambo 'The Politics of Bitterness: Understanding the Zimbabwean Political Crisis, 1980-2005' (2006) 3 *African Renaissance* 2 at 56.

[15] Ndlovu Duduzile 'Violence and Memory in Breaking the Silence of Gukurahundi: A Case Study of the ZAM in Johannesburg, South Africa' in Ingrid Palmary et al (eds) *Healing and Change in the City of Gold: Case Studies of Coping and Support in Johannesburg* (2014) 59-77 at 63.

progress.[16] The Constitution of Zimbabwe (2013)[17] establishes the National Peace and Reconciliation Commission (NPRC),[18] whose mandate is to address historical crimes and injustices.[19] While the current president of Zimbabwe, President Emmerson Mnangagwa (himself implicated in Five Brigade atrocities),[20] has made some commitments to address the legacy of these Gukurahundi atrocities, there has been no meaningful accountability.[21]

Much of the scholarly research into Five Brigade atrocities has focused on the societal impact of the atrocities, memorialisation, and achieving healing, forgiveness, and reconciliation.[22] There is a gap in research into the categorisation of the atrocities under international criminal law (ICL) and the evaluation of criminal responsibility of the alleged perpetrators. Investigating and categorising Five Brigade crimes under ICL is necessary to evaluate and identify the possible mechanisms of accountability and justice under international law.[23] Evaluating criminal responsibility is essential for attaching individual accountability to alleged perpetrators of these atrocities. Categorising crimes and establishing criminal responsibility will advance the prospects of pursuing accountability and combating the impunity of perpetrators.

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[16] Shari Eppel 'Healing the dead: Exhumation and reburials as a tool to truth telling and reclaiming the past in rural Zimbabwe' in Tristan Anne Borer (ed) *Telling the truths: Truth telling and peace building in post-conflict societies* (2006) 259-288; Ruth Murambadoro 'We cannot reconcile until the past has been acknowledged: Perspectives on Gukurahundi from Matabeleland, Zimbabwe' (2015) 15 *African Journal on Conflict Resolution* 1 at 33-57; Maurice T Vambe 'Zimbabwe genocide: Voices and perceptions from ordinary people in Matabeleland and the Midlands provinces, 30 years on' (2012) 10 *African Identities* 3 at 281-300; Dumisani Ngwenya & Geoff Harris 'The consequences of not healing: Evidence from the Gukurahundi violence in Zimbabwe' 2015 15 *African Journal on Conflict Resolution* 2; Dumisani Ngwenya *Healing the wounds of Gukurahundi: A participatory action research project* (unpublished DTech thesis, Durban University of Technology, 2014); Victor De Waal *The Politics of Reconciliation: Zimbabwe's first decade* (1990); Shepherd Mpofu 'Diasporic New Media and Conversations on Conflict: A Case of Zimbabwe Genocide Debates' in Ola Ogunyemi (ed) *Media, Diaspora and Conflict* (2017) at 204-221.

[17] Constitution of Zimbabwe 2013.

[18] National Peace and Reconciliation Commission, last accessed from http://www.nprc.org.zw/, on 29 February 2020.

[19] Section 253 of Zimbabwe Constitution, 2013; National Peace and Reconciliation Act [Chapter 10:32] 11 of 2017; see National Peace and Reconciliation Commission op cit note 18.

[20] Alison Simon 'Gukurahundi Ghosts Haunt Mnangagwa' *Mail & Guardian* 24 November 2017. Emmerson Mnangagwa was Minister of State Security during Gukurahundi and became President of Zimbabwe in 2017.

[21] Murambadoro op cit note 16 at 33-57.

[22] Murambadoro op cite note 16; Cyprian Muchemwa, Emmaculate Tsitsi Ngwerume & Mediel Hove 'When will the long nightmare come to an end? Challenges to National Healing and Reconciliation in post-colonial Zimbabwe' (2013) 22 *African Security Review* 3 at 145-159; Ngwenya op cit note 16; Mphathisi Ndlovu 'Facing History In the Aftermath of Gukurahundi Atrocities: New Media, Memory and Discourses On Forgiveness On Selected Zimbabwean News Websites' (2017) 24 *Peace and Conflict Studies* 2; Eppel op cit note 16; Maurice T Vambe 'Zimbabwe genocide: Voices and perceptions from ordinary people in Matabeleland and the Midlands provinces, 30 years on' (2012) 10 *African Identities* 3 at 281-300.

[23] Eppel op cit note 2.

1.2 Aims and objectives of the thesis

The overall aim of the study is to examine Five Brigade atrocities, categorise the alleged crimes committed under international law, evaluate and determine the individual criminal responsibility (ICR) attributable to alleged perpetrators under international law. In order to undertake this investigation, the study will analyse the applicability of international law to Zimbabwe, examine and classify the nature of the Matabeleland Conflict under international humanitarian law (IHL) in order to determine the legal nature of crimes that were committed during the conflict. The study will also analyse the conduct of Five Brigade and evaluate whether it constitutes the core international crimes of genocide, crimes against humanity (CAH) and war crimes. Lastly, the study will evaluate the roles and conduct of alleged perpetrators of Five Brigade atrocities to determine whether they can be held individually criminally responsible under international law. The study will be limited to evaluating select illustrative crimes, based on gravity, scale, prevalence and roles and levels of perpetrators, and not all Five Brigade crimes. Categorising crimes and determining ICR attributable to alleged perpetrators will advance knowledge and understanding of the precise nature of crimes committed and the international justice responses required. The study is expected to contribute to the quest for justice for victims and the accountability of alleged perpetrators.

1.3 Significance of the study

Whilst the scale and horror of the atrocities allegedly committed by Five Brigade is generally known and understood by its victims, there has been little or no effort to examine these atrocities from an international criminal justice perspective to determine whether they constitute international crimes. This analysis will facilitate an evaluation and establishment of criminal responsibility to alleged perpetrators based on principles of ICL. This process will contribute towards advancing prospects of justice and accountability for victims.

While there has been significant documentation of Five Brigade atrocities, including by scholars and the media, there is a dearth of scholarly literature regarding whether the atrocities constitute international crimes and the different forms of ICR attributable to alleged perpetrators under international law. To address this scholarly gap, the different crimes committed by Five Brigade require examination from the standpoint of ICL. Additionally, an investigation of whether the atrocities were committed in the context of an international or

internal armed conflict[24] is essential to determining the applicability of IHL, particularly the law of armed conflict, in addition to other international crimes such as CAH[25] and genocide.[26] This investigation will provide a basis for categorising the crimes and evaluating the ICR of alleged perpetrators under ICL. Categorising crimes and attributing criminal responsibility contributes to scholarly knowledge and understanding of the international crimes dimension of Five Brigade atrocities and advances prospects of pursuing ICR of alleged perpetrators and justice under international law.

1.4 Research questions

The main question is:

> What is the nature of the crimes committed by Five Brigade, and how can they be categorised under international law?

This question breaks down into three subsidiary questions:

(a) What is the applicability of international law to the Matabeleland Conflict?

(b) What is the criminal responsibility of the alleged perpetrators under international law?

(c) What are the implications of categorising crimes and criminal liability on the prospects of justice for Five Brigade crimes?

1.5 Theoretical framework

This study is based on the theory of international crimes.[27] The theory provides that the defining feature of the concept of an international crime is that because of its gravity, scale and level of organisation of perpetrators, it warrants conferring on at least some extraterritorial authority

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[24] Theodor Meron 'International Criminalisation of Internal Atrocities' (1995) 89 *American Journal of International Law* 3 at 554-57; Noam Lubell 'Challenges in applying human rights law to armed conflict' (2005) *International Review of the Red Cross* 87 860; Eve La Haye *War Crimes in Internal Armed Conflicts* (2008) 216-316.

[25] Geoffrey Robertson (ed) *Crimes Against Humanity: The Quest for Global Justice* (2006) 3.

[26] Dapo Akande 'Classification of Armed Conflicts: Legal Concepts' in E Wilmhurst (ed) *International Law and the Classification of Conflicts* (2012); Laura Perna, *The Formation of the Treaty Rules Applicable in Non-International Armed Conflict Conflicts* (2006); Emily Crawford *Unequal before the Law: The Case for the Elimination of the Distinction between International and Non-International Armed Conflicts* (2007).

[27] Alejandro Chehtman 'A Theory of International Crimes: Conceptual and Normative Issues' in Kevin Heller et al *The Oxford Handbook of International Criminal Law* (2018).

the power to punish its perpetrators.[28] In other words, the international crimes theory provides for the punishment of international crimes by international and regional tribunals with no traditional connection to the crime, the perpetrators, or the victims' and by extra-territorial courts exercising universal jurisdiction.[29] The theory is supported by scholarly literature,[30] a range of treaties,[31] and customary international law that establishes a duty to investigate, prosecute and punish perpetrators of international crimes under the rubric of universal jurisdiction.[32] Essentially, universal jurisdiction empowers the domestic judicial systems to investigate and prosecute international crimes, even if they were not committed on the territory of a state, by one of its nationals, or against one of its nationals.[33] International crimes, whilst justified and punishable within the domestic jurisdiction where they occur are also considered universal and thus punishable by regional or international tribunals and other extra-territorial courts exercising universal jurisdiction.[34]

An examination of whether Gukurahundi atrocities constitute international crimes that attract criminal liability under international law is based on a theoretical, conceptual and normative

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[28]Alejandro Chehtman, 'A Jurisdictional Theory of International Crimes' in Alejandro Chehtman *Philosophical Foundations of Extraterritorial Punishment* (2010).

[29] William A Schabas 'Punishment of Non-State Actors in Non-International Armed Conflict' (2002) 26 *Fordham International Law Journal* 4 at 907-933; Dieter Fleck (ed) *The Handbook of International Humanitarian Law* (2008) 2; Michael Boothe *The Handbook of International Humanitarian Law* (2013).

30 See Chapter 2 for in-depth analysis of international crimes.

31 See United Nations, Charter of the International Military Tribunal - Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis ('London Agreement'), 8 August 1945, available at: https://www.refworld.org/docid/3ae6b39614.html [accessed 6 June 2023] (hereafter Nuremberg Charter), Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention), 12 August 1949, 75 UNTS 31, available at: https://www.refworld.org/docid/3ae6b3694.html [accessed 6 June 2023]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention), 12 August 1949, 75 UNTS 85, available at: https://www.refworld.org/docid/ 3ae6b37927.html [accessed 6 June 2023];
Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), 12 August 1949, 75 UNTS 135, available at: https://www.refworld.org/docid/3ae6b36c8.html [accessed 6 June 2023]
Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 12 August 1949, 75 UNTS 287, available at: https://www.refworld.org/docid/3ae6b36d2.html [accessed 6 June 2023]; Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, United Nations, Treaty Series, vol. 78, p. 277, available at: https://www.refworld.org/docid/3ae6b3ac0.html [accessed 6 June 2023] (hereafter Genocide Convention), Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998, ISBN No. 92-9227-227-6, available at: https://www.refworld.org/docid /3ae6b3a84.html [accessed 6 June 2023] (hereafter Rome Statute).

32 See Stephen Macedo (eds) *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes Under International Law*, (2006). For some of the limits on universal jurisdiction see Anthony J Colangelo 'The Legal Limits of Universal Jurisdiction' (2006-2007) 7 *Virginia Journal International Law* 149, 160.

[33] Roger O'Keeffe 'Universal jurisdiction: clarifying the basic concept' (2004) 2 *Journal of International Criminal Justice* 735-760; Bartram Brown 'The evolving concept of universal jurisdiction' 35 (2000) *New Eng. L. Rev* 383.

[34] Macedo op cit note 32; Article 12 of the Rome Statute provides for preconditions to the exercise of jurisdiction by the ICC.

understanding and application of international crimes. Chapter 2 discusses and outlines the theoretical, conceptual and normative aspects of international crimes. It also discusses the definition of international crimes and what distinguishes them as such. The study analyses the work of leading scholars and reviews the emergence, evolution and development of contemporary international crimes and ICL from the international military tribunals at Nuremberg, London and Tokyo to the ICC and Rome Statute of the ICC. In summary, the study will evaluate how has the concept of international crimes evolved and developed, the defining or conceptual nature of international crimes, the type of conduct distinguishes international crimes and the normative aspects of an international crime (Chapter 2). The study will also examine the Matabeleland Conflict in order to determine its classification under IHL and as well as the implications of such classification for the crimes committed in that conflict (Chapter 3). The study will investigate whether Five Brigade atrocities constitute international crimes of war crimes, genocide and CAH (Chapter 3,4,5). Additionally, the study will evaluate whether ICR can be established for Five Brigade crimes under international law (Chapter 6) and explore the implications, options and prospects of categorising the crimes for advancing international justice (Chapter 7).

In addressing some of the subsidiary questions, including the classification of the Matabeleland Conflict, and the evaluation of ICR, the author will explore conceptual, normative and doctrinal aspects of applicable relevant international law, IHL and ICL.

1.6 Literature review

This section examines the literature on a range of essential themes applicable to the study, namely: Five Brigade atrocities, the applicability of international law to the Zimbabwean context, international law of armed conflict, international crimes theory, ICL and individual criminal liability under international law as they relate to the Matabeleland Conflict. Although a significant volume of literature was examined, this review focuses only on authors, scholarly work, and material that falls within the scope and definition of this thesis as shown under each respective heading below.

1.6.1 Five Brigade atrocities

The literature on Five Brigade atrocities commonly referred to as Gukurahundi has transcended sociology, politics, memory and trauma, genocide studies, conflict, peace and reconciliation

studies, human rights, media, law, forensics and accountability.[35] The complexity of documentation of Five Brigade atrocities is captured by Yap in his PhD thesis as follows:

> 'During the period between late 1980 and the end of 1987, very little information was available to the Zimbabwean public regarding what in actual fact was happening in Matabeleland and Midlands. During the worst violence, reporters or outside civilians were not allowed to enter the crisis areas in Matabeleland North and South. When a government enquiry did take place, its results were not made public. Local press and media controlled by the government offered a one-sided view of what did and had occurred. Subsequently, at the time, an in-depth analysis was difficult to make due to lack of reliable data as well as the extreme political sensitivity surrounding the issue'.[36]

The study relies on critical human rights reports capturing testimonies from victims of atrocities, corroborated recorded witness accounts and media reportage at the time,[37] and literary works in which the authors provide first-hand accounts of events they witnessed. The study presumes the accuracy of some of these critical reports for analysis. The caveat is that any allegations and evidence of atrocities would invariably have to be subjected to evidential scrutiny required in criminal proceedings. In addition, for the preceding reasons, the thesis refers to media reports to supplement and corroborate other reports and information, especially regarding the events at the time.

Much of the literature has focused on the impact on victims, peace, reconciliation, and healing. Exceptionally, Magnus Killander and Mkhululi Nyathi have explored the issue of legal accountability for Five Brigade atrocities[38] based on a characterisation of the atrocities as war crimes, genocide and CAH, and Zimbabwe's IHL treaty obligations. However, there is a gap in the depth of legal characterisation by Killander and Nyathi and others as well in, classifying the conflict in Matabeleland under IHL and in evaluating the ICR of alleged perpetrators of Five Brigade atrocities under ICL which this current thesis addresses.

The official government reports on the period and atrocities were the Dumbutshena Commission Report on the violence in 1981,[39] an investigation into the Entumbane clashes

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[35] See *Breaking the Silence* op cit note 2; Berkeley op cit note 2; Doran op cit note 2.
[36] Katri Yap *Uprooting the weeds: Power, ethnicity and violence in the Matabeleland conflict* (unpublished PhD thesis, University of Amsterdam (2001) at 4-5; also see Diana Auret *Reaching for Justice: The Catholic Commission for Justice and Peace 1972-1992* (1992) 156.
[37] See *Breaking the Silence* op cit note 2.
[38] Killander & Nyathi op cit note 2.
[39] See The Dumbutshena Report in *Breaking the Silence* op cit note 2 at 58.

between former Zimbabwe African National Liberation Army (ZANLA) and Zimbabwe People's Revolutionary Army (ZIPRA)[40] demobilised combatants in late 1980 and early 1981. The findings of the Dumbutshena Commission were not made public by the government. The second report is the Zimbabwe Commission of Inquiry into the Matabeleland Disturbances Report of 1984.[41] The report is commonly known as the Chihambakwe Commission of Inquiry established by Prime Minister Mugabe to investigate alleged massacres of civilians by Five Brigade that had been deployed to Matabeleland North in January 1983. In 1985, the Minister of Justice in Zimbabwe announced that the report would not be made public.[42] In 1999, human rights organisations took legal action to compel the publication of the reports. The Zimbabwean Supreme Court ruled in 2003 that the President had the prerogative to decide whether or not to release the reports.[43]

The onset of the atrocities was documented by local parish priests, church staff, doctors, teachers and opposition officials in Matabeleland North and South. These reports were compiled by the Conference of Catholic Bishops (CBC) and the Catholic Commission for Justice and Peace (CCJP) and presented to the government. The first such report from this period, titled 'Reconciliation is Still Possible',[44] was compiled by Mike Auret, Director of the Legal Resources Foundation, Bishops Henry Karlen, Helmut Reckter and Patrick Mutume, from the Roman Catholic Church in 1983. The report detailed Five Brigade atrocities based on victim and witness accounts and provided supporting evidence, including places, names, and photographs.[45] On 30 March 1983, the CBC issued a pastoral statement in which it alleged that Five Brigade had 'brought about the maiming and deaths of hundreds and hundreds of innocent people who are neither dissidents nor collaborators'.[46] This report was presented to the then Prime Minister, Robert Mugabe, who angrily dismissed it.[47] In his book, Auret provides a personal account of Five Brigade atrocities, his efforts to document, expose, and ensure

[40] The Zimbabwe National Liberation Army (ZANLA) was the armed military wing of the Zimbabwe African National Union (ZANU). The Zimbabwe Peoples' Revolutionary Army (ZIPRA) was the armed military wing of the Zimbabwe African Peoples' Union (ZAPU).
[41] See Zimbabwe Commission of Inquiry into the Matabeleland Disturbances in *Breaking the Silence* op cit note 2 at 97.
[42] *Breaking the Silence* op cit note 2 at 98.
[43] *Zimbabwe Lawyers for Human Rights and Anor v President of Zimbabwe and Anor* 2003 (2) 444 (S)
[44] Zimbabwe Catholic Bishops' Conference Response 'Reconciliation is Still Possible' in *Breaking the Silence* op cit note 2 at 85.
[45] See 'Chronicles of Events: April 1980 - July 1990' in *Breaking the Silence* op cit note 2.
[46] 'Catholics Report Zimbabwe Atrocities' *New York Times* 30 March 1983.
[47] 'Zimbabwe Assails Bishops' *New York Times* 31 March 1983.

accountability, and his engagement and interaction with then Prime Minister and later President Robert Mugabe.[48]

The second major authoritative report of the atrocities was Zimbabwe: Wages of War; A Report on Human Rights[49] authored in 1986 by Bill Berkeley of the Lawyers Committee for Human Rights following two investigatory missions to Zimbabwe during which he extensively interviewed victims, doctors, church officials, lawyers, political officials in Zimbabwe African People's Union (ZAPU),[50] government ministers and diplomats. The most authoritative report on atrocities is Breaking the Silence. Building True Peace. A Report on the Disturbances in Matabeleland and the Midlands 1980 to 1988,[51] compiled and released in February 1997 jointly by the Catholic Commission for Justice and Peace (CCJP) and the Legal Resources Foundation (LRF). Essentially, the report collated, analysed and compiled a substantial body of hitherto unpublished evidence detailing thousands of atrocities perpetrated by Five Brigade security forces and dissidents.[52] The report relied on direct interviews from victims compiled by the CCJP and the Bulawayo Legal Projects Centre.[53] Together, Breaking the Silence and Wages of War account for the most authoritative real-time factual accounts of Five Brigade atrocities. The former leader of ZAPU, Joshua Nkomo, also provides a persuasive first-hand account of the attacks on ZAPU, its officials and supporters and Five Brigade atrocities in his autobiography.[54]

Jocelyn Alexander[55] provides unique insights on the conflict between ZAPU and Zimbabwe African National Union (ZANU)[56] in the 1980s and the atrocities from the perspective of the ex-ZIPRA members of the ZNA who deserted and became dissidents. This work helps to

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[48] Mike Auret *From Liberator to Dictator: An Insider's Account of Robert Mugabe's Descent into Tyranny,* (2011).
[49] Berkeley op cit note 2.
[50] ZAPU was a Zimbabwean political party that campaigned for black majority rule in Rhodesia, from its founding in 1961 until independence in 1980. On independence, ZAPU became an opposition party.
[51] *Breaking the Silence* op cit note 2.
[52] Dissidents were mainly former ZIPRA liberation war fighters and combatants who had deserted the ZNA due to perceived unfair treatment and alleged threat to their lives.
[53] *Breaking the Silence* report compiled data for all areas in Matabeleland and Midlands but provided a comprehensive and detailed outline of abuses from two regions: Tsholotsho in Matabeleland North and Matobo, Kezi in Matabeleland South. One key source was the Catholic Missions: three in Tsholotsho (Magama Mission, Gwayi Mission and Regina Mundi Mission) and two in Matobo, Kezi (St Joseph's Mission and Minda Mission) whose staff monitored events, received and documented reports and kept records of abuses. *Breaking the Silence* relied on archival material from the CCJP collected in the 1980s, when the atrocities were taking place, archival reports from the BLPC including client records and records of interviews with victims conducted in the 1980s and case studies conducted in 1995 and 1996.
[54] Joshua Nkomo *The Story of my Life* (1984).
[55] Alexander op cit note 6.
[56] ZANU is a political party which has been the ruling party of Zimbabwe since independence in 1980.

understand the nature of the armed groups in Matabeleland to assess and determine whether they meet the requirements of IHL for the classification of armed conflict. Jocelyn Alexander, JoAnn McGregor and Terence Ranger extensively analyse the political violence between ZIPRA and ZANLA in the early 1980s and the Gukurahundi atrocities.[57] Their work considers the background to the political violence in the context of the pre- and post-liberation war period and the impact of the violence on communities. Stuart Doran draws, amongst other key sources, on declassified diplomatic archival material and classified records from Zimbabwe's Central Intelligence Organisation, apartheid South Africa, the United States, Australia, the United Kingdom and Canada to extensively document the political events following the 1980 elections and the build-up to the atrocities.[58] He extensively documents the atrocities highlighting key actors in the planning and execution and providing one of the most in-depth and authoritative accounts of Five Brigade atrocities. David Coltart provides a compelling first-hand account of Five Brigade atrocities from the perspective of a lawyer representing ZAPU officials and leading a human rights organisation that exposed, investigated and led the documentation of the atrocities.[59] Judith Todd writes about her role in exposing the atrocities and the reprisal rape she suffered at the hands of a senior ZNA officer to stop her from reporting them.[60] Peter Godwin writes on his first-hand experience as a journalist covering the atrocities in two books.[61] In Mukiwa,[62] he writes about death threats he received from the then ZNA commander, Solomon Mujuru, for exposing atrocities as an investigative journalist. Blessing-Miles Tendi, through interviews of the former commanders of Five Brigade and other members of the ZNA as well as government officials, gives insight into the operation of the ZNA and the Zimbabwean government at the time of the atrocities.[63]

Several articles by scholars also address different aspects of the atrocities. Timothy Scarnecchia outlines the geopolitical drivers of the atrocities and the role of western powers during the Cold War.[64] He argues that the United Kingdom and the United States of America helped provide

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[57] Jocelyn Alexander, JoAnn McGregor & Terence Ranger *Violence & Memory: One Hundred Years in the 'Dark Forests' of Matabeleland* (2000).
58 Doran op cit note 2.
59 Coltart op cit note 5.
60 Judith Todd *Through the Darkness: A Life in Zimbabwe* (2007).
61 Peter Godwin Mukiwa: *A White Boy in Africa* (1996); Peter Godwin *When a Crocodile Eats the Sun* (2006).
62 Ibid.
63 Blessing-Miles Tendi *The Army and Politics in Zimbabwe: Mujuru, the Liberation Fighter and Kingmaker* (2019).
64 Timothy Scarnecchia 'Rationalizing Gukurahundi: Cold War and South African Foreign Relations with Zimbabwe, 1981-1983' (2011) 37 *Kronos* at 87-103.

cover for the ZNA's Five Brigade campaign of terror and that ZANU-PF rationalised the Gukurahundi violence in international and anti-apartheid circles as a campaign against South African destabilisation.[65] Similarly, Hazel Cameroon explores Five Brigade mass violence and atrocities in Matabeleland South between February and April 1984 during the second phase of the Gukurahundi. Crucially, Cameron concludes that there is evidence of targeting of Ndebeles[66] by Five Brigade and state, that the western diplomatic community was aware of this targeting, and that the deprivation of food supplies was a vital part of the government's deliberate strategy against civilians in Matabeleland, which brought between 350 000 and 400 000 people to the extreme edge of starvation and saw thousands of civilians die[67] in contravention of international law.[68] In a separate article, Cameron describes the complicity of the United Kingdom in the atrocities committed by Five Brigade and the government of Zimbabwe.[69]

Sabelo J Ndlovu-Gatsheni addresses ethnocentric ideologies related to Five Brigade atrocities.[70] Similarly, Ruyedzo Mutizwa addresses ideological issues related to the same concerning Zimbabwe political trajectory.[71] Joost Fontein has written about the residual societal impact of Five Brigade Gukurahundi atrocities manifesting in human remains of killed or disappeared victims.[72] The importance of exhumations of graves, including mass graves of Five Brigade victims, as a tool for healing and truth-telling, has been examined by Shari Eppel.[73] Regarding evidentiary forensic aspects of the atrocities, Keith Silika and Njabulo Chipangura have addressed contested approaches to exhuming mass graves of victims of Gukurahundi and the liberation struggle.[74] In a separate work with Kirsty Squires, Silika

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[65] Ibid.
[66] The Ndebele is the second largest ethnic group in Zimbabwe constituting an estimated 20 per cent of the population.
[67] Hazel Cameron 'State-Organized Starvation: A Weapon of Extreme Mass Violence in Matabeleland South, 1984' (2018) 12 *Genocide Studies International* at 26–47.
[68] Ibid.
[69] Hazel Cameron 'The Matabeleland massacres: Britain's Wilful Blindness' (2018) 40 *The International History Review* at 1-19.
[70] Ndlovu-Gatsheni op cit note 4.
71 Ruyedzo Mutizwa, *Gukurahundi ideology: why Zimbabwe is in crisis* (2008).
72 Joost Fontein 'Between tortured bodies and resurfacing bones: the politics of the dead in Zimbabwe, Remaking the Dead' (2010) *Journal of Material Culture*.
73 Eppel op cit note 16.
74 Keith Silika & Njabulo Chipangura 'Contested archaeological approaches to mass grave exhumations in Zimbabwe' (2020) 14 *Journal of Conflict Archaeology* at 1-18.

address the challenge of ensuring ethical approaches to dealing with human remains including victims of Five Brigade atrocities in Zimbabwe.[75]

A notable study that considers the role of ethnicity in the atrocities is by Katri Yap, whose thesis is critical in the discussion in Chapter 4 whether Five Brigade atrocities constituted genocide.[76] Phillip Santos has addressed the role of state media during the atrocities,[77] whilst Shepherd Mpofu has addressed how the state-controlled media has sought, 30 years on, to control the debate and public discourse on Five Brigade atrocities, , a significant contribution especially when read against the work by Santos.[78]

1.6.2 Applicability of international law to Gukurahundi

The foundational plank of this study is international law and its applicability to Zimbabwe and Five Brigade atrocities. To this extent the author consults major texts of general international law. David John Harris' book is an authoritative seminal text that provides an extensive selection of valuable materials, cases, commentary and expert analysis.[79] In addition to this, Alexander Orakhelashvili's Research Handbook on the Theory and History of International Law[80] gives a comprehensive scholarly framework for analysing the theory and history of international law which is vital for this study. In his book, International Law,[81] Antonio Cassese discusses the limitations of state sovereignty and immunities of individuals such as state officials, a discussion relevant to the question of criminal responsibility vis-à-vis Gukurahundi atrocities addressed in Chapter 6 of the thesis. Additionally, the discussion on immunity of individuals provides a contextual understanding of how alleged Gukurahundi perpetrators can be held accountable under international law. Furthermore, the book also provides insight into custom creation under international law, which is valuable in analysing if certain norms referred to in this study have attained the status of customary international law.

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75 Keith Silika & Kirsty Squires 'Ethical Issues of Working with Human Remains in Zimbabwe' in K Squires et al (eds) *Ethical Approaches to Human Remains* (2019).
76 Yap op cit note 36.
77 Santos op cit note 5.
78 Shepherd Mpofu 'Zimbabwe's state-controlled public media and the mediation of the 1980s genocide 30 years on' (2016) 8 *Journal of African Media Studies* 2 at 145-165.
79 David John Harris *Cases and Materials on International Law* (2015).
80 Alexander Orakhelashvili *Research Handbook on the Theory and History of International Law* (2020).
81 Antonio Cassese (ed) *International Law* (2020).

1.6.3 The international law of armed conflict

The examination of the Matabeleland conflict to determine whether it meets the requirements for an international or non-international armed conflict, or both requires an analysis of IHL- in particular, and the classification and regulation of armed groups. Literature on IHL has grown over the years in response to the global growth of internal armed conflicts.[82] The development of new forms of internal conflicts, new actors and new methods of combat and hostilities has added to the growth in literature on this subject.[83] Dieter Fleck and Michael Boothe provide an authoritative commentary and analysis of IHL applicable in armed conflicts.[84] Robert Kolb and Richard Hyde provide a modern and basic introduction to IHL[85] which gives a useful analysis of the distinguishing features between a non-international armed conflict (NIAC) and an international armed conflict (IAC), relevant to ascertaining whether the Matabeleland armed conflict constituted a NIAC or an IAC.

Lindsay Moir also provides a comprehensive assessment of IHL and traces the development of the law regulating NIAC, leading up to the former Yugoslavia and Rwanda conflicts, and emphasising the importance of human rights protections during NIAC.[86] Marko Milanovic and Vidan Hadzi-Vidanovic explore the challenges surrounding the classification of armed conflicts under IHL[87] and observe that although the distinction between IAC and NIAC is reasonably clear in their primary forms, their boundaries are complex and obscure. The authors also discuss the implications of classification on the legitimacy of parties, risk of non-compliance with IHL and the redundancy of distinguishing what they consider to be universal obligations regardless of the nature of the conflict.[88] Emily Crawford is another leading IHL scholar who argues for the redundancy of the distinction between IAC and NIAC.[89] She examines the possibility of creating a law of armed conflict that could be uniformly applied to

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[82] See Robert Kolb & Richard Hyde *An Introduction to the International Law of Armed Conflict* (2008).
[83] See Lindsay Moir *The Law of Internal Armed Conflict* (2002); Perna op cit note 26; Crawford op cit note 26; David Kretzmer 'Rethinking the application of IHL in non-international armed conflict' (2008) 42 *Israel Law Review* 1 at 8-45; Sandesh Sivakumaran 'Re-Envisaging the International Law of Internal Armed Conflict' (2011) 22 *European Journal of Internal Law* 1 at 219-264.
[84] Dieter Fleck & Michael Boothe (eds) *The Handbook of International Humanitarian Law* (2021).
[85] Kolb & Hyde op cit note 82.
[86] Moir op cit note 83.
[87] Marko Milanovic & Vidan Hadzi-Vidanovic 'A taxonomy of armed conflict,' in Nigel D White & Christian Henderson (eds) *Research Handbook on International Conflict and Security Law: Jus ad Bellum, Jus in Bello and Jus post Bello* (2013).
[88] Ibid.
[89] Crawford op cit note 26.

both IAC and NIAC.[90] Given the prevalence of NIAC, Crawford discusses moves to unify the regulation of such conflict under international law and argues for the complete elimination of the dichotomy or distinction in regulation.[91] She proposes the uniform application of the law of armed conflict to optimise the protection of participants and civilians in armed conflict.

Another valuable scholarly work on conflict classification is the edited volume by Elizabeth Wilmshurst.[92] The book provides a detailed and comprehensive overview of all the legal issues involved in classifying conflicts either as international or non-international, which Dapo Akande does excellently in the chapter on 'Classification of Armed Conflicts: Legal Concepts'.[93] Similarly, Yoram Dinstein gives a critical analysis of the legal implications of NIAC and explores the rules regulating internal hostilities including the implications of intervention by foreign states.[94] Anthony Cullen examines the origins and development of the armed conflict concept and argues that a lower threshold should be set for the application of IHL and that a different approach ought to be taken in relation to NIAC.[95] Liesbeth Zegveld analyses the importance of legally categorising parties to a NIAC under IHL and interrogates the question of accountability for crimes committed by non-state actors as well as the failure to prevent crimes by such groups.[96] Noam Lubell analyses the extra-territorial use of force by states against non-state actors under international law.[97] This analysis is particularly applicable to this study which examines the extra-territorial use of force by apartheid South Africa in Zimbabwe both in support of dissidents and against Umkhonto we Sizwe guerrillas stationed in Zimbabwe during the Matabeleland conflict.

Sandesh Sivakumaran addresses difficult questions regarding the obligations of armed groups to comply with IHL.[98] In a separate article, Sivakumaran addresses the issue of binding armed groups to IHL obligations irrespective of whether they are parties to relevant treaties. He also examines the expressed commitment of armed opposition groups to the rules of IHL.[99] In 'Re-

[90] Ibid.
[91] Ibid.
[92] Elizabeth Wilmshurst *International Law and the Classification of Conflicts* (2012).
[93] Akande op cit note 26.
[94] Yoram Dinstein *Non-International Armed Conflicts in International Law* (2014).
[95] Anthony Cullen *The Concept of Non-International Armed Conflict in International Humanitarian Law* (2010).
[96] Liesbeth Zegveld *Accountability of Armed Opposition Groups in International Law* (2002).
[97] Noam Lubell *Extraterritorial Use of Force Against Non-State Actors* (2010).
[98] Sandesh Sivakumaran *The Law of Non-International Armed Conflict* (2012).
[99] Sandesh Sivakumaran 'Binding Armed Opposition Groups' (2006) 55 *International and Comparative Law Quarterly* 2 at 369-394.

Envisaging the International Law of Internal Armed Conflict,'[100] Sivakumaran engages the rapid evolution of this critical field of law spurred by new forms of groups, organisations and contexts.

Martha M Bradley's unpublished doctoral thesis[101] analyses the conventional requirements for armed groups in the Additional Protocols. She clarifies the minimum threshold requirements inherent in the organisational criteria that non-state armed groups must meet under Article 1(1) of Additional Protocol II (APII).[102] This clarification is pertinent in evaluating whether the dissidents in Matabeleland meet the organisational requirement of an armed group envisaged by APII. Bradley[103] tackles the geographic application requirement in Common Article 3 of the Fourth Geneva Convention.[104] Additionally, Bradley[105] provides an in-depth and illuminating analysis of the application of Common Article 3 to contemporary forms of armed conflict and the evolving nature and types of armed groups. Furthermore, Bradley[106] assesses whether the Rome Statute requires an armed group to meet the organisational criteria in APII. Marko Pedrazzi also unpacks the thresholds envisaged by APII in the rapidly evolving context of actors in modern-day NIAC.[107]

There is a dearth of scholarly literature which analyses the nuances of the required level of control of non-state actors by another state to internationalise a NIAC. The debate on whether

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[100] Sivakumaran op note 83.

101 Martha M Bradley An analysis of the notions of "organised armed groups" and "intensity" in the law of non-international armed conflict (unpublished doctoral thesis, supervised by Professors Erika de Wet and Jann Kleffner and completed at the University of Pretoria in February 2018).

102 Martha M Bradley 'Revisiting the scope of application of Additional Protocol II: Exploring the inherent minimum threshold requirements,' (2019) 81 *African International Yearbook of International Humanitarian Law* 83.

103 Martha M Bradley 'Expanding the Borders of Common Article 3 in Non-International Armed Conflicts: Amending Its Geographical Application Through Subsequent Practice?' (2017) 64 *Neth Int Law Rev* 375–406.

104 See Article 3 Common to the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949) 75 UNTS 31 (First Geneva Convention); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted 12 August 1949), 75 UNTS 85 (Second Geneva Convention); Geneva Convention Relative to the Treatment of Prisoners of War (adopted 12 August 1949) 75 UNTS 135 (Third Geneva Convention); Geneva Convention Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949) 75 UNTS 287 (Fourth Geneva Convention).

105 Martha M Bradley 'Revisiting the Notion of 'Organised Armed Group' in Accordance with Common Article 3: Exploring the Inherent Minimum Threshold Requirements' (2018) 1 *African Yearbook of International Humanitarian Law.*

106 Martha M Bradley 'Protracted Armed Conflict: A conundrum. Does article 8 (2) (f) of the Rome Statute require an organised armed group to meet the organisational criteria of Additional Protocol II' (2019) 3 *South African Journal of Criminal Justice* at 291-323,

107 Marko Pedrazzi 'Additional Protocol II and threshold of application' in F Pocar and GL Berute (eds) International Institute of Humanitarian Law: *The Additional Protocols 40 Years Later: New Conflicts, New Actors, New Perspectives.* San Remo, 7–9 September 2017.

an effective or overall control is required has largely been held by ad hoc tribunals[108] the International Court Justice (ICJ)[109]and the ICC.[110] This study therefore unpacks whether the involvement of the apartheid South African government internationalised the Matabeleland armed conflict.[111] Through this assessment, the study contributes to literature on the level of control required under IHL to internationalise an internal armed conflict.

1.6.4 International crimes and international criminal law

This thesis investigates whether Gukurahundi atrocities constitute international crimes, namely genocide, CAH and war crimes. It therefore examines literature related to the development of ICL. The establishment of the ICC – coupled with the continued perpetration of atrocities on a large scale globally – has catapulted scholarly interest in and engagement with the subject of ICL to new heights, creating an explosion of literature on ICL in general. This includes Geert-Jan Alexander Knoops who gives an overview of the development of ICL through the international criminal tribunals (ICTs) and discusses the main features of ICTs including the definitions of international crimes proffered by the jurisprudence of ICTs.[112] Gerhard Werle and Florian Jessberger assess international crimes contained in the Rome Statute and give a detailed account of the sources and evolution of ICL, demonstrating how the body of law has developed and how its application has changed over the years.[113]

Kriangsak Kittichisaree interrogates the various modes of perpetration giving rise to criminal responsibility, grounds for excluding liability and finally discusses and evaluates available defences.[114] He also discusses some practical procedural or challenges related to

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[108] *Prosecutor v Tadić [Tadić]*, 1999 IT-94-1-A, Appeals Chamber Judgment of 15 July 1999, para 120; *Prosecutor v Sesay et al [Sesay et al]* 2009 SCSL-04-15-T, Trial Chamber Judgment of 2 March 2009, para 975.
109 Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Merits) [Nicaragua] 1986 (ICJ) Judgment of 27 June 1986.
110 *Prosecutor v Bosco Ntaganda [Ntaganda]* 2019 (ICC) ICC-01/04-02/06, Trial Chamber Judgment of 8 July 2019, para 704.
111 Alexander op cit note 6 at 164; Scarnecchia op cit note 64 at 91; Padraig O'Malley 'Chapter 2: The State outside South Africa between 1960 and 1990' South Africa Truth and Reconciliation Reports at 181 and 188, last accessed from https://omalley.nelsonmandela.org/omalley/index.php/site/q/03lv02167/04lv02264/05lv02335/06lv02357/07lv02372/08lv02374.htm on 14 February 2022; Michael Sefali & John Bardill 'Development and Destabilization in Southern Africa' (Report) at 69, last accessed from https://opendocs.ids.ac.uk/opendocs/bitstream/handle/20.500.12413/6211/ISAS_SASS3.pdf?sequence=1 on 9 February 2021; David Martin Phyllis Johnson and J Whitaker Destructive Engagement: Southern Africa at War (1986) 57-58; see Ulf Engel, The Foreign Policy of Zimbabwe (1994) 209.
112 Geert-Jan Alexander Knoops *An Introduction to the Law of the International Criminal Tribunals* (2014).
113 Gerhard Werle & Florian Jessberger *Principles of International Criminal Law* (2014).
114 Kriangsak Kittichisaree *International Criminal Law* (2001).

operationalising or implementing international criminal justice.[115] Carsten Stahn critiques ICL by assessing the contours of criminality and international crimes, examining the tension between individual and collective responsibility, and exploring the challenges faced by international, hybrid as well as regional justice mechanisms.[116] This is particularly relevant to this study which seeks to evaluate the ICR of alleged perpetrators most responsible for Gukurahundi atrocities under the rubric of individual and system or collective criminality under the concepts of joint criminal enterprise. Focusing on CAH, Larry May discusses the philosophical foundations of ICL and justifies the need for ad hoc tribunals to breach state sovereignty in limited circumstances in order to try international crimes.[117] Given the unwillingness by the Zimbabwean government to investigate, prosecute and punish alleged Gukurahundi perpetrators as well as its protection of alleged perpetrators through provision of amnesty among other accountability challenges, May's book is relevant in unpacking why the international community should breach state sovereignty and try alleged Gukurahundi crimes.

Macteld Boot examines the concept of nullum crimen sine lege and whether it applies on the same basis in international law as domestic law. The author also examines how the ICC has interpreted the concept in relation to international crimes such as war crimes, genocide and CAH.[118] Kedia Bineet also examines the principle of nullum crimen sine lege in international law and how the principle is actually implemented.[119] The concept of nullum crimen sine lege is relevant to Zimbabwe's domestic law, particularly Zimbabwe's Genocide Act,[120] which bars prosecution of genocide which occurred Zimbabwe before 2000.[121] The author argues that the implication of the principle is weak, as acts punished by ICTs were of ambiguous legality when they were committed. This is also supported by Beth Van Schaack who argues that ICL has failed to implement this principle despite it being the hallmark of modern national legal systems.[122]

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[115] Ibid.
[116] Carsten Stahn *A Critical Introduction to International Criminal Law* (2019).
117 Larry May *Crimes Against Humanity: A Normative Account* (2005).
118 Macteld Boot *Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court: Genocide, Crimes against Humanity and War Crimes* (2001).
119 Kedia Bineet 'Nullum Crimen Sine lege in International Law: Myth or fact'? (2016) 1 *International Journal of International Law* 2.
120 Zimbabwe Genocide Act [Chapter 9:20].
121 Ibid, Section 4.
122 Beth Van Schaack 'Crimen Sine Lege: Judicial Law making at the Intersection of Law and Morals' (2008) 97 *The Georgetown Law Journal* 1.

In 'International Crimes: Jus Cogens and Obligatio Erga Omnes,' Mahmoud Cherif Bassiouni explains how the prohibition of international crimes had become universal and part of customary international law.[123] Writing in 2008, Bassiouni contended that '[t]he writings of scholars are uncertain, if not tenuous, as to what they deem to be the criteria justifying the establishment of crimes under international law'.[124] The position hardly seems to be the case based on later writings by ICL scholars. Kevin Jon Heller engages the question of what an international crime is and argues that the question has two elements: 'First, it asks us to identify which acts qualify as international crimes.[125] Second, and more fundamentally, it asks us to identify what is distinctive about an international crime'. Heller disagrees with Bassiouni that scholars are uncertain and tenuous and contends that instead, ICL scholars are unanimous on what 'makes an international crime distinctive: namely, that it involves an act that international law deems universally criminal'.[126] In terms of the vital question: what constitutes international crimes, Heller argues for a 'national criminalisation thesis' (hereinafter, NCT) which 'understands international crimes as those which international law obligates every state to criminalise and prosecute under their domestic law'.[127] In his response to Heller, Alejandro Chehtman rejects the NCT and instead advocates for the 'direct criminalisation thesis' (DCT), which claims that international crimes must be understood as directly criminalised under international law (regardless of whether states criminalise them under their domestic laws)'[128] which he argues is supported by mainstream international law. [129] Chehtman argues that the concept of an international crime is better defined doctrinally, not settled by reference to the law itself, be it domestic law, a treaty or a custom.[130] Heller[131] regards Chehtman's proposal on doctrinal development as unsatisfactory because 'it simply outsources international criminalisation to judges. International crimes are what judges say they are, regardless of state

[123] Ibid.
[124] Mahmoud Cherif Bassiouni 'International Crimes: The *Ratione Materiae* of International Criminal Law*'* in *International Criminal Law: Sources, Subjects and Content* (2008).
[125] Kevin Jon Heller 'What Is an International Crime: (A Revisionist History)' (2017) 58 *Harvard International Law Journal* 2 at 353-420.
[126] Ibid.
[127] Ibid.
[128] Alejandro Chehtman, 'What Is an International Crime? What Kind of Question It Is and How We Should Answer It' (2018) *Harvard International Law Journal*.
[129] Ibid.
[130] Ibid.
[131] Kevin Jon Heller 'What Is an International Crime? (A Revisionist History) A Reply to My Critics (2018) *Harvard International Law Journal*; see Astrid Reisinger Coracini 'What is an International Crime? A Response to Kevin Jon Heller' (2018) *HILJ Online Symposium*.

practice and principles of justice'.[132] This author is persuaded and finds resonance in Chehtman's arguments he regards as more grounded and substantiated in practice than Heller's.

In his separate and most recent article, Chehtman goes further to unpack the conceptual and normative elements of international crimes, arguing that gravity, scale and level of organisation are all important distinguishing features.[133] Chetman also tackles the theoretical questions regarding jurisdiction over international crimes.[134] Einarsen examines different ways of classifying international crimes and develops criteria for identifying, evaluating, defining and classifying punishable crimes under international law. Based on these criteria, a comprehensive list of international crimes is compiled.[135] Given the centrality of the evaluative process of determining whether Five Brigade atrocities constitute international crimes in this thesis, Einarsen offers valuable and relevant insights and approaches in that regard.

Naomi Roht-Arriaza uses the arrest and attempted prosecution of former Chilean dictator Augusto Pinochet to examine the applicability of the concept of universal jurisdiction to international crimes.[136] The concept allows any state to investigate and prosecute international crimes such as genocide, CAH and war crimes without the requirement of territorial and personal jurisdiction.[137] Helena Gluzman investigates the scope of universal jurisdiction and distinguishes between two types of universal jurisdiction namely 'conditional universal jurisdiction' and 'absolute universal jurisdiction'.[138] Stephen Macedo argues that although universal jurisdiction is a potent instrument of international law, it remains poorly understood by legal experts.[139] In light of the prevailing accountability challenges for alleged Gukurahundi atrocities, universal jurisdiction could be an avenue for holding alleged Gukurahundi perpetrators accountable.

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[132] Ibid.
[133] Alejandro Chehtman 'A Theory of International Crimes: Conceptual and Normative Issues' In Kevin Jon Heller, Frederic Megret, Sarah MH Nouwen, Jens David Ohlin and Darryl Robinson (eds) *The Oxford Handbook of International Criminal Law* (2020) 317-340.
[134]Alejandro Chehtman 'A Jurisdictional Theory of International Crimes' in Alejandro Chehtman, *Philosophical Foundations of Extraterritorial Punishment* (2011).
[135] Terje Einarsen *The Concept of Universal Crimes in International Law* (2012).
[136] Naomi Roht-Arriaza 'The Pinochet Precedent and Universal Jurisdiction' (2001) 35 *New Eng. L. Rev*. 311.
[137] Roger O'Keeffe 'Universal jurisdiction: clarifying the basic concept' (2004) 2 *Journal of International Criminal Justice* 735-760; Bartram Brown 'The evolving concept of universal jurisdiction' (2000) 35 *New Eng. L. Rev* 383.
[138] Helena Gluzman 'On Universal Jurisdiction – Birth, Life and a Near-Death Experience?' (2009) *Law & Globalisation*.
[139] Macedo op cit note 32.

Marco Odello and Piotr Łubiński examine the concept of genocide under ICL and argue that its definition in the Genocide Convention may need some revision to meet the original ideas espoused by Lemkin who formulated the concept of genocide.[140] Geoffrey Robertson explores the identification of CAH in ICL and how the prosecution of CAH can be utilised by the international community to pierce the veil of state sovereignty and bring tyrants and perpetrators of torture to account.[141] Emma Charlene Lubaale and Ntombizozuko Dyani-Mhango explore the international obligation of domestic African courts to prosecute international crimes and the tension between accountability of alleged perpetrators of international crimes and the need for reconciliation and sustainable peace in post-conflict African states.[142] Finally, Heller provides a comprehensive jurisprudential and historical analysis of the trials and offers both an extensive and masterful case-by-case account of the jurisprudence of the International Military Tribunal at Nuremberg (IMT) and the broader historical context in which these trials took place.[143] This scholarly literature and analysis of the jurisprudence of the ICTs provides a useful basis for a comparative factual and legal evaluation of Gukurahundi atrocities.

1.6.5 Individual criminal responsibility

The ICR of Five Brigade perpetrators is central to this study. Attributing criminal responsibility to individuals for committing international crimes remains one of the most challenging and complex exercises. The issue has attracted scholarly attention in the past 20 years and has featured prominently in the work of the ICTs going back to Nuremberg.[144] Elies V Sliedregt carries out a comprehensive examination of the concept of ICR and the various modes of liability for international crimes.[145] The author also unpacks the concept of collective criminality for international crimes and comprehensively examines superior responsibility in a separate chapter.[146] Sliedgret's compelling, persuasive and authoritative work provides a solid basis to assess the ICR of alleged Five Brigade Gukurahundi perpetrators. Guenael Mettraux

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[140] Marco Odello & Piotr Łubiński (eds) *The Concept of Genocide in International Criminal Law: Developments after Lemkin* (2020).
[141] Robertson op cit note 25.
[142] Emma Charlene Lubaale & Ntombizozuko Dyani-Mhango (eds) *National Accountability for International Crimes in Africa* (2022).
[143] Kevin Jon Heller *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (2011) 403-64.
[144] The Nuremberg Tribunal established that individuals could be held liable for international crimes instead of States.
[145] Elies van Sliedregt *Individual Criminal Responsibility in International Law* (2012).
[146] Ibid.

in The Law of Command Responsibility offers a unique study of ICR through the lens of the concept of command or superior responsibility.[147]

Regarding ICR for war crimes, Yasmin Naqvi argues that international law does not preclude domestic and international courts from recognising certain amnesties limited to those considered 'least responsible' for war crimes provided they are accompanied by other accountability measures aimed at securing sustainable peace.[148] However, Christine Bakker uses the decision of the Argentine Supreme Court which set aside amnesty laws to argue that it is an indicator under international law that amnesties for international crimes are void.[149] Roman Boed analyses the effect of domestic amnesty on the ability of foreign states to prosecute alleged perpetrators of serious human rights violations.[150] Michael Scharf looks at the non-recognition of amnesties by the ICC and examines whether the court requires justice at the expense of peace.[151] In relation to immunity from prosecution, Salvatore Zappalà argues that under customary international law, heads of state and other government officials do not benefit from functional immunity for international crimes.[152] This literature is relevant to this study which also examines the amnesty provided to Gukurahundi perpetrators by the Zimbabwean government.

Andre Nollkaemper and Harmen van der Wilt address the notion of system criminality, which states that international crimes are usually perpetrated by collective entities or groups in which individual authors of these acts are embedded.[153] Related and integral to system criminality are the twin aspects of criminal organisations and conspiracy with origins in Nuremberg. Stanislaw Pomorski comprehensively analyses this history of conspiracy and criminal organisations under international law.[154]

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[147] Guenael Mettraux *The Law of Command Responsibility* (2009).
[148] Yasmin Naqvi 'Amnesty for War Crimes: Defining the Limits of International Recognition' (2003) 85 *IRRC* 851.
[149] Christine Bakker 'A Full Stop to Amnesty in Argentina' (2005) 3 *Journal of International Criminal Justice* 1106.
[150] Roman Boed 'The Effect of a Domestic Amnesty on the Ability of Foreign States to Prosecute Alleged Perpetrators of Serious Human Rights Violations' (2000) 33 *Cornell International Law Journal* 2.
[151] Michael Scharf 'The Amnesty Exception to the Jurisdiction of the International Criminal Court' (1999) 8 *Cornell International Law Journal* 32.
[152] Salvatore Zappalà 'Do Heads of State Enjoy Immunity from Jurisdiction for International Crimes?' (2001) 13 *EJIL* 3.
[153] Andre Nollkaemper '*Introduction*,' in Andre Nollkaemper and Harmen van der Wilt (ed) *System Criminality* (2009) Cambridge University Press.
[154]Stanislaw Pomorski 'Conspiracy and Criminal Organization' in G Ginsburg & V N Kudriavtsev (eds) *The Nuremberg Trial and International Law* (1990) 213–48.

Neha Jain has sought to '[construct] a theoretical framework for distinguishing between parties to an international crime, which yields modes of perpetration and accessorial responsibility that account for the nature of these crimes'.[155] Jain convincingly demonstrates that, unlike domestic crimes, international crimes are 'inherently collective in nature'[156] and involve a wide range of perpetrators at different levels.

While there is a dearth of literature on the systematic classification of Five Brigade crimes as international crimes, there is a significant body of literature on IHL, ICL, international crimes and ICR under international law on which to draw in undertaking an examination of Five Brigade crimes and evaluating the ICR of alleged perpetrators. Therefore, this thesis addresses the critical gap in classifying Five Brigade crimes and attributing criminal responsibility to alleged perpetrators under international law.

1.7 Methodology

The research combines legal and historical analysis to advance a range of objectives, including the nature and scope of international crimes and ICR, and the determination of the applicable law by relying on desk research as the primary methodological approach. The study uses relevant archival literature and material on the background context to the political tensions between ZANU[157] and ZAPU, leading to the formation of Five Brigade. The marriage of legal and historical analysis seeks to advance the assessment of atrocities by Five Brigade and examine whether they constitute international crimes as legally defined under international law, and evaluate and determine the ICR attributable to alleged perpetrators under international law. Relevant literature and reports on Five Brigade atrocities, national legislation and policy, and relevant international legal instruments are analysed. The study also analyses the legal regime, including treaties, literature and case law related to definition and characterisation of international crimes, classification of armed conflict and determination of ICR under international law in order to determine whether Gukurahundi atrocities meet the legal definition of genocide, CAH and genocide under international law.

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[155] Neha Jain 'Perpetrators and Accessories in International Criminal Law: Individual Modes of Responsibility for Collective Crimes' (2015) 13 *Journal of International Criminal Justice* at 896–897.
[156] Ibid.
[157] See Chapter 2 for discussion of ZANU PF and PF ZAPU and contextual background to Gukurahundi atrocities.

The study analyses statutes, jurisprudence and scholarly literature related to the IMCT in Nuremberg, ad hoc tribunals, ICC, International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), the mixed or hybrid tribunals in East Timor,[158] Sierra Leone and Cambodia and the Extraordinary African Chambers (EAC)[159] set up to try the former President of Chad, Hissene Habré. The case law of these ad hoc tribunals constitutes crucial jurisprudence of ICL and customary international law principles and norms which are crucial for unpacking whether the atrocities by Five Brigade constitute international crimes and the required legal standards of ICR applicable to alleged perpetrators. Where relevant, the author references the existing constitutional and legal framework and case law in Zimbabwe in order to assess the applicability of international law.

1.8 Chapter structure

Chapter One: 'Introduction' provides an introduction and general overview of the thesis. The chapter sets out the background, literature, research methodology and legal questions that underpin this doctoral thesis and the roadmap that will be followed to answer them.

Chapter Two: 'International Crimes: Theory, Concepts and Norms' outlines and discusses the theoretical, conceptual and normative aspects of international crimes. It also discusses the definition of international crimes and what distinguishes them as such. It analyses the work of leading scholars and reviews the emergence, evolution and development of contemporary international crimes and ICL. The chapter seeks to answer the following questions: How has the concept of international crimes evolved and developed? What is the defining, conceptual nature of an international crime? Normatively, what type of conduct distinguishes international crimes?

Chapter Three: 'Classification of the Matabeleland Conflict and Crimes Under International Humanitarian Law' evaluates and classifies the Matabeleland Conflict against the criteria set out in the relevant applicable IHL treaties and customary international law as elaborated by various ad hoc international and special tribunals to determine whether it constituted an IAC or/and NIAC. Lastly, the chapter determines whether crimes committed in the context of the conflict constitute war crimes under IHL.

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[158] Caitlin Reiger & Marieke Wierda 'The Serious Crimes Process in East Timor-Leste: In Retrospect' (2006) *International Center for Transitional Justice*.
[159] Thierry Cruvekkier 'The Trial of Hissene Habre' *New York Times* 15 February 2016.

Chapter Four: 'An Examination of Whether the Five Brigade Atrocities Constitute Genocide' examines the Gukurahundi atrocities from the prism of the international crime of genocide. The chapter determines whether the atrocities constitute genocide. The chapter reviews the legal requirements and elements for genocide in evaluating the conduct of Five Brigade.

Chapter Five: 'An Investigation Whether Five Brigade Atrocities Constitute Crimes Against Humanity' examines the Gukurahundi atrocities from the prism of CAH. The chapter determines whether the atrocities constitute CAH. The legal requirements and elements for crime against humanity in evaluating Gukurahundi conduct are reviewed.

Chapter Six: 'An Evaluation of the Individual Criminal Responsibility of Five Brigade Perpetrators Under International Law' evaluates whether ICR is attributable to alleged perpetrators of Gukurahundi international crimes. The chapter reviews the historical development of ICR under international law and examines the theories of criminality under international law. The chapter analyses the forms and modalities of ICR for core international crimes. Also discussed is the concept of superior responsibility and its applicability to Gukurahundi crimes.

Chapter Seven: 'Conclusion: Findings and Recommendations' concludes and summarises the findings of this doctoral study. The chapter also makes recommendations for policy and legal reform and for further research on this and related subjects.

CHAPTER TWO – INTERNATIONAL CRIMES: THEORY, CONCEPTS AND NORMS

2.1 Introduction

This study is based on the theory of international crimes. The theory provides that the defining feature of the concept of an international crime is that it warrants conferring upon at least some extra-territorial authority the power to punish their perpetrators.[1] In other words, the international crimes theory provides for the punishment of international crimes by international and regional tribunals with no traditional connection to the crime, the perpetrators, or the victims' and by extra-territorial courts exercising universal jurisdiction.[2] The theory is supported by scholarly literature,[3] a range of treaties,[4] and customary international law that establishes a duty to investigate, prosecute and punish perpetrators of international crimes under the rubric of universal jurisdiction.[5] Universal jurisdiction empowers the domestic judicial systems to investigate and prosecute certain crimes by one of the nationals of a state, or against a national of a state even if they were not committed on the territory of that state. International crimes are universal and thus fall within the purview of universal jurisdiction.[6] Universal jurisdiction is distinct from the jurisdiction of the ICC and relates to the ability of national courts of states to exercise jurisdiction over extraterritorial crimes and non-nationals.[7]

An examination into whether Gukurahundi atrocities constitute international crimes that attract criminal liability under international law will be based on a theoretical, conceptual and normative understanding and application of international crimes. This chapter will therefore discuss and outline the theoretical, conceptual and normative aspects of international crimes. It will also discuss the definition of international crimes and what distinguishes them as such.

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[1]Alejandro Chehtman 'A Jurisdictional Theory of International Crimes' in Alejandro Chehtman *Philosophical Foundations of Extraterritorial Punishment* (2011).

[2] William A Schabas 'Punishment of Non-State Actors in Non-International Armed Conflict' (2002) 26 *Fordham International Law Journal* 4 at 907-933; Dieter Fleck (ed) *The Handbook of International Humanitarian Law* (2008); Michael Boothe *The Handbook of International Humanitarian Law* (2013).

[3] For a summary discussion of the literature on international crimes theory see Literature Review in Chapter 1.

[4] See Charter of the International Military Tribunal (adopted 8 August 1945, hereafter Nuremberg Charter) 82 UNTS 284; Four Geneva Conventions of 1949; Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948) 78 UNTS 277; Rome Statute of the International Criminal Court (adopted 17 July 1998) UNTS 2187 (hereinafter Rome Statute).

[5] For a comprehensive analysis and review of the application of the concept of universal jurisdiction by national courts see Stephen Macedo (ed), *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes Under International Law*, (2006). For some of the limits on universal jurisdiction see Anthony J Colangelo 'The Legal Limits of Universal Jurisdiction' (2007) 47 *Virginia Journal International Law* 149 at 160.

[6] Ibid.

[7] Ibid.

It will analyse the work of leading scholars, review the emergence, evolution and development of contemporary international crimes and ICL from the International Military Criminal Tribunals (IMCTs) at Nuremberg, London and Tokyo to the ICC and Rome Statute of the ICC (hereinafter Rome Statute).[8] The chapter will review a range of scholarly works, legal instruments, jurisprudence from ad hoc international, regional and national tribunals, treaties and customary international law that establish and implement a duty to investigate, prosecute and punish perpetrators of international crimes. The chapter will answer the following questions: How has the concept of international crimes evolved and developed? What is the defining or conceptual nature of an international crime? What type of conduct distinguishes international crimes?

2.2 The emergence, evolution and development of international criminal law

A crucial turning point in ICL was the establishment of the IMCTs at Nuremberg, London and Tokyo by the Allied Powers to try Nazi war criminals after the end of the Second World War in 1946 for atrocities carried out during the war.[9] Following the defeat of the Nazis in the Second World War, the United States of America (USA) conducted 12 military trials between 1946 and 1948 under the auspices of the Allies Control Council Law No 10.[10] Of the 12 trials involving 177 individuals, six of the trials, referred to as the Nuremberg Trials, were based on themes according to the grouping of individuals tried: Justice, High Command, Medical, Hostage, Ministries and Industrialists.[11]

The concept of international crimes regained traction following at least 50 years of non-action by the international community post the Nuremberg trials.[12] The lack of action was influenced by various factors, including indifference to grave violations of IHL and human rights,

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[8] Rome Statute supra note 4.

[9] Kevin Jon Heller *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (2011). Heller provides a comprehensive jurisprudential and historical analysis of the trials as well as offering a case-by-case account of the jurisprudence of the NMTs and the broader historical context; see also Yuki Tanaka, Tim McCormack & Gerry Simpson; 'Beyond Victor's Justice - The Tokyo War Crimes Trial Revisited' (2012) 13 *Melbourne Journal of International Law* 1 at 349-357.

[10] 'Control Council Law No. 10: Punishment of Persons Guilty of War Crimes, crimes against Peace and against Humanity' (Germany) (1946) 20 December 1945, 3 Official Gazette Control Council for Germany 50.

[11] See the 12 cases involving a total of 185 defendants (of which 177 stood trial), last accessed from https://casebook.icrc.org/case-study/united-states-military-tribunal-nuremberg-united-states-v-wilhelm-list on 12 January 2023.

[12] Thomas Obel Hansen 'The vertical and horizontal expansion of transitional justice: Explanations and implications for a contested field*'* in Susanne Buckley-Zistel, Teresa Koloma Beck, Christian Braun and Friederike Mieth (eds) *Transitional Justice Theories* (2014) ch 5.

genocide and CAH committed in armed conflict.[13] The re-emergence of the pursuit of accountability for international crimes and international justice was spurred by the wide-scale violations of IHL in the former Yugoslavia,[14] itself related to the break-up of the Soviet Union.[15] The fact that these large-scale atrocities were committed in the full glare of global media and in the heart of Europe is considered as having spurred global action under the auspices of the United Nations, which established the ICTY in 1993.[16] Since its establishment, the ICTY has charged over 161 persons, including heads of state,[17] military and police commanders[18] and politicians[19] from various parties to the Yugoslav conflicts, with 91 convicted and sentenced.[20] The contribution of the ICTY to ICL has been succinctly elaborated by leading ICL scholar and former ICTY judge Antonio Cassese[21] who states that the tribunal has elaborated on IHL and provided definitions of crimes such as genocide, war crimes, and CAH including torture, rape, deportation, enslavement, extermination and persecution. Furthermore, the tribunal spelled out the significance of legal principles such as nullum crime sine lege, among other things.

On 8 November 1994, the Security Council of the United Nations (UNSC) adopted Resolution 955 to establish the ICTR to 'prosecut[e] persons responsible' for genocide and other serious violations of IHL.[22] The Tribunal was precipitated by the killings of between 500 000 and

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[13] Jane E. Stromseth (ed) *'*Accountability for Atrocities*' National and International Responses* (2003) in Cherif Bassiouni M *Post Conflict Justice* (2002) at vii

[14] Ibid; see Thomas Obel Hansen op cit note 12; Patricia B Hayner *Unspeakable Truths: Confronting State Terror and Atrocity* (2001).

[15] Ibid.

[16] 'Statute of the International Criminal Tribunal for the former Yugoslavia' adopted 25 May 1993 by United Nations Security Council Resolution 827.

[17] *Prosecutor v Ratko Mladic*, IT-09-92 Bosnian Serb General of the Army of the Republic of Srpska (VRS) was convicted for genocide, war crimes and CAH and sentenced to life imprisonment. The former President of Republic of Srpska was convicted and sentenced to 40 years for genocide, war crimes and CAH. See *Prosecutor v Slobodan Milosevic* IT-02-54. Former President of the Republic of Yugoslavia, Slobodan Milosevic was tried but died during his trial.

[18] *Prosecutor v Radislav Krstić* IT-98-33-A. Krstić Bosnian Serb Deputy Commander and later Chief of Staff and General of the Drina Corps of the Army of Republika Srpska was convicted for genocide and sentenced to 35 years' imprisonment. *Prosecutor v Gotovina et al* IT-06-90 in which the ICTY convicted but later acquitted on appeal Croatian Army Generals for war crimes.

[19] *Prosecutor v Duško Tadić* IT-94-10. Tadić was a Bosnian Serb politician and former member of the paramilitary forces. He was convicted for CAH, grave breaches of the Geneva Conventions and war crimes and sentenced to 20 years.

[20] See 'Key figures of the ICTY' last accessed from www.icty.org/en/cases/key-figures-cases on 19 February 2022.

[21] Antonio Cassese 'The ICTY: A Living and Vital Reality' (2004) 2 *Journal of International Criminal Justice* 2 at 585-597.

[22] Mariann Meier Wang, 'The International Tribunal for Rwanda: Opportunities for Clarification, Opportunities for Impact' (1995) 27 *Columbia Human Rights Law Review* 1 at 177-226. See Stromseth op cit note 13.

800 000 people (mainly Tutsi) in Rwanda and the displacement of at least 3 million people over three months, whilst the international community watched and did nothing.[23] The killings were sparked by a plane crash, presumably after being shot down, on 6 April 1994, which killed Rwanda's President Juvenal Habyarimana and all passengers, including Burundi's President Cyprian Ntyamira, as it was landing in Kigali, Rwanda.[24]

The ICTR drew on the experiences at Nuremberg 50 years earlier and its immediate predecessor, the ICTY. In establishing the ICTY and ICTR, the UNSC claimed to be '[a]cting under Chapter VII of the Charter of the United Nations',[25] which has been the authority cited for UN military and non-military action over the years,[26] when the UNSC determines that a situation is a 'threat to the peace'.[27] The Statute of the ICTR created an International Tribunal for the Prosecution of Persons Responsible for Genocide, and Other Serious Violations of IHL Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, Between 1 January 1994 and 31 December 1994.[28] The government of Rwanda contested the subject matter, personal, temporal and geographic jurisdictional limits and felt that they were restrictive and thus voted against the resolution to establish the court. Other arguments were that the restriction of the prosecutions to Rwanda nationals was superfluous in a context where non-Rwandans were implicated and where it was unclear how the definition of a Rwandese national could be reached. The narrow temporal jurisdiction – 1 January to 21 December 1994 – was perceived by Rwanda as being inadequate in addressing crimes before this period and related to the Rwandan conflict in which genocidal acts had taken place.[29]

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[23] Preliminary Report of the Independent Commission of Experts Established in Accordance with Security Council Resolution 935 (1994), U.N. SCOR, U.N. Doc. S/1994/1125 (1994) [Preliminary Report]. Human Rights Watch, 'Genocide in Rwanda April-May 1994' (Report), last accessed from https://www.hrw.org/reports/RWANDA945.PDF on 19 February 2022 [Genocide in Rwanda].

[24] Ronald Sullivan 'Juvenal Habyarimana, 57, Ruled Rwanda for 21 Years' *New York Times* 7 April 1994 at A10.

[25] SC Res 955, UN SCOR 49th Sess 3453rd mtg UN Doc. S/1994/1168 (1994). See UN Security Council Resolution 827, UN SCOR, 3217th mtg UN Doc S/RES/827 (1993).

[26] The UN Security Council has resorted to Chapter 7 to authorise military action, to deploy peacekeeping operations and to impose economic and other sanctions.

[27] Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI (UN Charter) Art 39.

[28] Statute of the International Criminal Tribunal for Rwanda.

[29] For Rwanda's objections see UN Secretary-General, Report of the Secretary-General Pursuant to Paragraph 5 of Security Council Resolution 955 12 UN Doc S/1995/134 (February 1995).

Apart from the arguments from the Rwandese government regarding temporal jurisdiction, the limitation also meant that any retaliatory crimes that the new Rwandan Patriotic Front (RPF) government may have committed were excluded from the ICTR's jurisdiction.[30] While pledging to support the tribunal, Rwanda thus voted against its establishment.[31] An essential distinction between ICTR and ICTY is that the ICTR was authorised to apply international treaties and conventions, 'regardless of whether they were considered part of customary international law'.[32]

The ICTR's contribution to the development of ICL is significant. In its first judgment in ICL rendering criminal liability for genocide, the tribunal found Jean-Paul Akayesu, the mayor or bourgmestre of Taba district, guilty of genocide, including facilitating the commission of sexual violence and rape. However, no evidence existed that he had himself committed these crimes.[33] In ground-breaking findings regarding modes of criminal participation and criminal responsibility of superiors, the tribunal found that as such, he was entrusted 'with the performance of executive functions and the maintenance of public order, "exerting" exclusive control over the communal police,' and other public security forces.[34]

Another significant contribution of the ICTR's *Akayesu* judgment to ICL is that it addressed how to distinguish genocide from CAH and war crimes committed in the context of internal armed conflict.[35] Generally, ICL recognises violence based on the victim's ethnicity as genocide and violence based on the victim's political associations as CAH.[36] After reviewing the relevant evidence presented at trial, the ICTR conclusively determined that the 1994 massacres constituted genocide because they 'clearly ... had a specific objective, namely the extermination of the Tutsi, who were targeted especially because of their Tutsi origin and not because they were RPF fighters'.[37] The *Akayesu* judgment also marked the first time in the

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[30] Peter Erlinder 'The UN Security Council Ad Hoc Rwanda Tribunal: International Justice or Juridically-Constructed Victor's Impunity' (2010) 4 *DePaul Journal for Social Justice* 1 at 131-214.
[31] Supra note 29 at 197.
[32] UN Secretary-General 'Report of the Secretary-General Pursuant to Paragraph 5 of Security Council Resolution 955' 12 UN Doc S/1995/134 13 February 1995.
[33] *Prosecutor v Akayesu [Akayesu]* ICTR-96-04.
[34] Ibid para 4.
[35] Ibid paras 112-125.
[36] David Luban 'Calling Genocide by its Rightful Name: Lemkin's Word, Darfur, and the UN Report' (2006) 7 *CHI. J. INT'L L* 303 at 311.
[37] *Akayesu* supra note 33 para 125.

history of ICL that sexual violence was judicially recognised as an act constitutive of genocide.[38]

Another crucial contribution to the development of ICL by the ICTR was its decision on incitement to commit genocide in the *Prosecutor v Nahimana* et al [Media Case] case, commonly known as the 'Media Case'.[39] In 2003, the ICTR convicted three Rwandans for using radio and newspaper media outlets to incite the general Rwandan population to commit mass murder.[40] In this case, the tribunal interrogated the tension between the historically protected right to free speech and the opposite scourge of hate speech and considered the role of cultural nuance in evaluating whether the speech aimed to incite others to commit genocide.[41] Citing *Akayesu*, which had also dealt with the issue of direct incitement, it distinguished between protected free political speech and delineating political advocacy, which is generally protected by the right to free expression and 'direct and public incitement', which gives rise to criminal liability under the ICTR's statute. The court stated that the direct element of incitement should be viewed within the context in which the speech is made and if the audience grasped the implication of the message.[42]

Reminiscent of the Julius Streicher[43] case at Nuremberg, the ICTR set the principle that those who use the media for inciting the public to commit genocide can be punished for their communication because it amounts to persecution as a crime against humanity.[44]Apart from media executives, the ICTR successfully prosecuted and convicted a range of defendants for

[38] Lindsay Peterson 'Shared Dilemmas: Justice for Rape Victims Under International Law and Protection for Rape Victims Seeking Asylum', (2008) 31 *Hastings International and Comparative Law Review* 509 at 515.
[39] *Prosecutor v Nahimana et al [Media Case]*, ICTR-99-52-T, ICTR Trial Judgment and Sentence of 3 December 2003.
[40] Ibid para 55.
[41] The accused Ferdinand Nahimana and Jean-Bosco Barayagwiza controlled the state-controlled RTLM radio station, whilst defendant Hassan Ngeze founded, owned, and edited the Kangura newspaper.
[42] *Media Case* supra note 39 para 557.
[43] Julius Streicher, publisher of *Der Stürmer*, an antisemitic newspaper, was tried in Nuremberg on April 29, 1946. He was found guilty of CAH and sentenced to death.
[44] See Jeremiah Lee 'Justice for Rwanda: ICTR Achievements and Challenges' (legal commentary), last accessed from https://www.jurist.org/commentary/2008/12/justice-for-rwanda-ictr-achievements/ on 19 February 2022.

genocide and CAH, including a former prime minister,[45] mayor,[46] minister,[47] governor,[48] military generals,[49] business executives,[50] senior clergy,[51] and militia leaders.[52]

The 1990s to the mid-2000s also saw the advent of hybrid criminal tribunals (HCT) in East Timor, Sierra Leone and Cambodia, combining international and domestic elements to try international crimes in national settings.[53] In Senegal, the EAC established by the African Union (AU) to try Hissene Habre, former president of Chad for international crimes in 2011, also broke new ground for international crimes accountability in Africa. Habre was tried with genocide, CAH and war crimes, all crimes prohibited by the EAC statute. Based on an agreement between the AU and Senegal, Habre was tried by a Senegalese court incorporating African judges. He was convicted for rape, sexual slavery and murder of up to 40 000 people and sentenced to life imprisonment.[54]

Globally, the most significant development for ICL has been the adoption of the Rome Statute of the ICC in 2002[55] and the establishment and operationalisation of the ICC. The statute prohibits four international crimes: genocide,[56] CAH,[57] war crimes,[58] and aggression.[59] Since its establishment, the ICC has publicly indicted 42 individuals, including heads of states, military commanders and militia leaders, heads of intelligence and politicians.[60]

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[45] *Prosecutor v Jean Kambanda [Kambanda]* ICTR-97-23- A, ICTR Trial Judgment and Sentence of 4 September 1998.
[46] *Akayesu* supra note 33.
[47] *Prosecutor v Pauline Nyiramasuhuko*, ICTR-98-42-T, ICTR Trial Chamber Judgment of 24 June 2011.
[48] *Prosecutor v Clement Kayeshema & Obed Ruzindana [Kayeshema & Ruzindana]* ICTR-95-1- A, Trial Chamber Judgment of 1 June 2001.
[49] *Prosecutor v Augustin Bizimungu [Bizimungu]* ICTR-00-56-B-A and *Prosecutor v Theoneste Bagosora [Bagosora]* (ICTR-98-41-A).
[50] *Prosecutor v Alfred Musema [Musema]* ICTR-96-13. Musema was a director of Gisovu Tea Factory in Kibuye. Obed Ruzindana was a businessman in Kibuye prefecture.
[51] *Prosecutor v Athanase Serombe [Serombe]* ICTR-2001-66-A.
[52] *Prosecutor v Omar Serushago [Serushago]* ICTR-98-39.
[53] Geert-Jan Alexander Knoops *An Introduction to the Law of the International Criminal Tribunals* 14-24 (2014)
[54] *Ministère Public v Hissein Habré [Habré]* Extraordinary African Chambers Judgment of 30 May 2016; see Élise Le Gall 'The Habré Appeals Judgment: A Summary of the Appeals Decision of the EAC' in Sharon Weill et al *The President on Trial: Prosecuting Hissène Habré* (2020).
[55] Rome Statute supra note 4.
[56] Ibid Art 6.
[57] Ibid Art 7.
[58] Ibid Art 8
[59] Ibid Art 8 bis.
[60] See individuals indicted and convicted by the ICC, last accessed from https://www.icc-cpi.int/ on 5 June 2023.

2.3 International crimes theory: conceptual definitions and normative justifications

The theoretical debate on international crimes has two parts. The first, discussed in this section, is: what are the defining conceptual elements of international crimes? The second, which will be discussed in the section that follows, is: what type of conduct normatively justifies a crime being characterised as an international crime? Heller has persuasively reviewed the various perspectives of international scholars regarding the nature of international crimes. One of the oldest international crimes is piracy and individuals engaging in piracy have traditionally been viewed as committing an international crime and outside legal protection. There is consensus among ICL scholars on the four broad categories of international crimes: war crimes, CAH, genocide and aggression,[61] although some scholars also add torture and terrorism to this list.[62] However, leading ICL law scholars disagree on what makes an international crime distinctive from other crimes. Roger O'Keefe argues that 'no common understanding, let alone common definition' of an international crime exists.[63] Bassiouni argues that 'the writings of scholars are uncertain, if not tenuous, as to what they deem to be the criteria justifying the establishment of crimes under international law'.[64]

Heller, however, refutes claims by ICL scholars that there is no agreement on what makes an international crime arguing that consensus exists on what makes an international crime distinctive: namely that it involves an act that international law deems universally criminal.[65] Heller argues that 'what distinguishes an international crime from a domestic one is the international law requirement although some acts that qualify as domestic crimes are universally criminal – murder, for example[66]– their universality derives not from international law, but from the fact that every state has independently decided to criminalise them'. He also argues that the universality requirement distinguishes an international crime from a transnational one.[67] He stresses that although the criminality of a transnational crime emanates from international law, usually a treaty that obliges the domestic criminalisation of a particular act, this in itself does not render a transnational crime as international because the states have

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[61] Kevin Jon Heller op cit note 125 chapter 1. See Terje Einarsen, *The Concept of Universal Crimes in International Law* (2012) 21.
[62] Heller op cit note 9 at 35; Heller op cit note 61 at 353-420.
[63] Roger O'Keefe, *International Criminal Law* (2015) 47.
[64] Mahmoud Cherif Bassiouni 'International Crimes: The Ratione Materiae of International Criminal Law,' in Mahmoud Cherif Bassiouni (eds) *International Criminal Law: Sources, Subjects and Content* (2008) 142.
[65] Heller op cit 61.
[66] John Mikhail 'Is the Prohibition of Homicide Universal?' (2009) 75 *Brook. L.Rev.* 497 at 503.
[67] Heller op cit note 61.

the prerogative to criminalise such acts by ratifying the treaty in question.[68] On the contrary, such a prerogative does not exist concerning international crimes, which are legally binding on all states.[69]

Heller further argues that there is no similar consensus on how crimes become universally criminal, while there is consensus on the universality of international crimes. He proposes two theses in this regard: the direct criminalisation thesis (DCT) supported by all contemporary ICL scholars and provides that certain acts are universally criminal because they are directly criminalised by international law itself regardless of whether states criminalise them.[70] He cites the position of several scholars in this regard: Antonio Cassese, who says that the international crimes are 'premised on the general notion that international legal prescriptions are capable of imposing obligations directly on individuals, without the intermediary of the state wielding authority over such individuals'.[71] Robert Cryer also notes that 'the fundamental point to understand about these crimes' is that 'States have decided that international law, in exceptional circumstances, ought to bypass the domestic legal order, and criminalise behaviour directly'.[72] and Otto Triffterer who says that what is distinctive about international criminality is that 'individuals can be punished even if there exists no corresponding punishability under their domestic law and jurisdiction or any other national legal system purporting to exercise jurisdiction'.[73] The essence of this thesis is that international crimes provide for individual criminal liability for their violation, even in the absence of a domestic prohibition and are therefore directly enforceable at international law.

Heller proposes a second thesis for international criminalisation: the national criminalisation thesis (NCT). This thesis refutes the idea that international law directly criminalises specific acts and bypasses domestic law in doing so. Instead, this thedsis argues that the basis for universal criminalisation of certain acts is the obligation placed on states by international law to criminalise and prosecute such acts, not the direct international criminalisation.[74] Terje

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[68] Ibid.
[69] Ibid.
[70] Ibid.
[71] Antonio Cassese et al (eds) *Cassese's International Criminal Law* (2003) 148.
[72] Robert Cryer 'The Doctrinal Foundations of International Criminalization' in Mahmoud Cherif Bassiouni (eds) *International Criminal Law: Sources, Subjects and Content* (2008) 108.
[73] Otto Triffterer (eds) *Preliminary Remarks, in Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article 25* (2008).
[74] Heller op cit note 61.

Einarsen[75] discusses the idea of a reconceptualisation of international crimes and draws from the statutes of ICTs such as the ICTY, ICTR and ICC, scholarly literature, and the International Law Commission (ILC) to conceptualise international crimes.[76] Like other scholars, he recognises and exposes the fragmentation of ICL and its non-linear evolution and development but addresses the question: what are the relevant crimes that may give rise to criminal liability under international law?[77]

2.3.1 Unpacking universal criminality

Although there is no consensus among scholars on a common definition of international crimes, there is consensus on their universality. While the formulations of an international crime have differed since Nuremberg, there is consensus that what makes an international crime distinctive from domestic or transnational crimes is that it is deemed by international law as universally criminal.[78] Thus, international crimes are universal crimes and are punishable wherever, and by whomever they are committed.[79] Universal jurisdiction empowers the domestic judicial systems to investigate and prosecute certain crimes, even if they were not committed on its territory, by one of its nationals, or against one of its nationals. The universality of crimes is founded on the practice of states, the jurisprudence of international criminal tribunals and the International Court of Justice (ICJ), the affirmation of the ILC, and the writings of ICL scholars.

Their practice demonstrates the widespread and consistent recognition and affirmation of the universality of international crimes by states.[80] To date, nearly 163 of the 193 United Nations member states have adopted legislation that authorises their courts to exercise universal jurisdiction over core international crimes: war crimes, CAH, genocide, or aggression.[81] Universal jurisdiction is, however, distinct from the jurisdiction of the ICC and relates to the

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[75] Einarsen op cit note 61.
[76] Kanya Satwika 31 *Nordic Journal of Human Rights* 1 for a review of Einarsen, Einarsen op cit note 61.
[77] Einarsen op cit note 61.
[78] Carsten Stahn *A Critical Introduction to International Criminal Law* (2019) 17.
[79] Einarsen op cit note 61; see Bassiouni op cit note 68 and Theodor Meron 'International Criminalization of Internal Atrocities' (1995) 89 *American Journal International of Law* 554 at 570.
[80] See 'International Law Commission, Identification of Customary International Law, Text of the Draft Conclusions Provisionally Adopted by the Drafting Committee' 2, 68th Session of the ILC, UN Doc. A/CN.4/ L.872 (May 30, 2016); 'International Law Association, Statement of Principles Applicable to the Formation of General Customary International Law 14, Report of the Sixty-Ninth Conference' (2000).
[81] Amnesty International 'Universal Jurisdiction: A Preliminary Survey of Legislation Around The World – 2012 Update' (Report), last accessed from https://www.amnesty.org/en/wp-content/uploads/2021/06/ior530192012en.pdf on 20 February 2020.

ability of national courts of states to exercise jurisdiction over extraterritorial crimes and non-nationals.[82] Universal jurisdiction contributes directly to the fight against impunity of the most egregious international crimes in states where national authorities are not willing or able to prosecute such crimes.[83] Notably, South Africa has enacted legislation that empowers the country to exercise universal jurisdiction over perpetrators of international crimes.[84] The South African Constitutional Court has also held that South African authorities — the South African Police Service (SAPS) and National Prosecution Authority (NPA) — have a duty to investigate and prosecute international crimes allegedly committed in Zimbabwe.[85] Universal jurisdiction is not without controversy, and the exercise of universal jurisdiction over international crimes is often subject to political and diplomatic standoffs.[86] In response to perceptions of targeting of African State officials by European courts in the exercise of universal jurisdiction, the AU has raised concern over the 'abuse of universal jurisdiction'.[87] To ostensibly pre-empt the invocation of universal jurisdiction by European countries and evade the ICC's increasingly contested jurisdiction in Africa, the AU has expanded the jurisdiction of the African Court of Justice and Human Rights to include international crimes. African heads of states, however, remain immune from prosecution. Immunities from criminal jurisdiction for state officials, heads of states and governments, foreign ministers and diplomatic and consular agents present a significant limitation to universal jurisdiction. In the *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium*,[88] the ICJ held that an arrest warrant issued by Belgian authorities against the Minister of Foreign Affairs of Congo violated international law because he was entitled to diplomatic immunity.

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[82] Buhle Angelo Dube 'Universal jurisdiction in respect of international crimes: theory and practice in Africa' (unpublished PhD thesis) last accessed from 'Universal jurisdiction in respect of international crimes: theory and practice in Africa' (uwc.ac.za) on 14 February 2022.

[83] Valerie Paulet 'Evidentiary challenges in universal jurisdiction cases' (Report), last accessed from Universal_Jurisdiction_Annual_Review2019.pdf (trialinternational.org) on 14 February 2022.

[84] Section 4(3)(c) of the International Criminal Court Act of 2002; Section 7(1) of the Implementation of the Geneva Conventions Act 8 of 2012; Section 6(1) of the Prevention and Combating of Torture of Persons Act 13 of 2013.

[85] *National Police Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre Trust* (CCT 02/14) [2014] ZACC 30. The case included a condition to the exercise of this jurisdiction that the perpetrator must be in the territory of South Africa for this jurisdiction to apply. The South African ICC Act, Implementation of the Geneva Conventions Act, and Prevention and Combating of Torture of Persons Act, however, do not carry such a restriction.

[86] Angela Mudukuti 'Universal Jurisdiction – Opportunities and Hurdles' (Blog), last accessed from http://opiniojuris.org/2019/04/09/universal-jurisdiction-opportunities-and-hurdles/ on 14 February 2022.

[87] See Decision on the Abuse of the Principle of Universal Jurisdiction 1-3 July 2009 Doc Assembly/AU/11(XIII).

[88] *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium*) 2002 ICJ Rep 3.

Heller argues that universal jurisdiction is predicated on the idea of universal criminality,[89] given that it permits all states to prosecute acts 'without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction'.[90] Heller points to the universal condemnation of international crimes by states and the need to use universal jurisdiction to punish such crimes.[91]

Evidence of state practice can be gleaned from the jurisprudence of domestic courts and their application of international law[92] and their treatment of the concept of universal jurisdiction.[93] In *Attorney General v Adolf Eichmann*, the District Court of Jerusalem held that 'the universal character of the crimes in question justify its right to punish Eichmann for CAH committed before the State of Israel even existed'.[94] In *Demjanjuk v Petrovsky*, the US Court of Appeals for the Sixth Circuit held that the crimes for which Israel wanted the defendant extradited have been 'universally recognized and condemned by the community of nations'.[95] In *Reg. v Bow Street Magistrate, Ex p. Pinochet,* Lord BrowneWilkinson held that 'crimes against humanity are crimes not against a state but against individuals and are triable anywhere'.[96] In *United States of America v Wilhelm List et al*, the Nuremberg Military Tribunal held that 'an international crime is such an act universally recognized as criminal'.[97] The ICTY has recognised that international crimes are 'universally condemned wherever they occur'[98] because they are 'peremptory norms of international law or jus cogens'.[99]

The ICC's subject matter jurisdiction for international crimes attests to the universality of the crimes.[100] While the ICC has jurisdiction over state parties, the UNSC's power to refer cases

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[89] Heller op cit note 61at 357.
[90] Macedo op cit note 5.
[91] Heller op cit note 61.
[92] The issue of applicability of international law to Zimbabwe is dealt with in Chapter 3.
[93] Heller op cit note 61 at 358.
[94] *Attorney General v Adolf Eichmann [Eichmann]* CrimC (Jer) 40/61 (Isr) *(Eichmann)* at 11 (1961).
[95] *Demjanjuk v Petrovsky [Petrovsky]* (6th Cit 1985) *(Demjanjuk)* 776 F.2d 571, 582-83.
[96] *Reg v Bow Street Magistrate Ex p. Pinochet [Pinochet]* (No 3) 1 A.C. [2000] 157 (Opinion of Lord Browne-Wilkinson).
[97] *United States of America v Wilhelm List et al [Hostage Case]* 1949 XI Law Reports of Trials of War Criminals 1241.
[98] *Prosecutor v Furundzija [Furundzija]* IT-95-17/1, ICTY Trial Chamber Judgment of 10 December 1998 para 156.
[99] *Prosecutor v Kupreskic [Kupreskic]* IT-95-16-T, ICTY Trial Chamber Judgment, para. 520 'Jus cogens' refers to fundamental norms of international law that are non-derogable that prohibit states from assuming treaty obligations inconsistent with the norm. See Vienna Convention on the Law of Treaties, art 53 and 64.
[100] Rome Statute supra note 4 which provides that the jurisdiction of the court shall be limited to the 'most serious crimes of concern to the international community as a whole'.

of serious violations of international crimes by national from non-state parties to the ICC for investigation reinforces the universality of international crimes.[101] The ICC prosecutor can also proprio motu conduct independent investigations into situations that do not fall into the former two categories.[102] In November 2019, the ICC authorised the prosecutor to investigate the alleged crimes within the ICC's jurisdiction in the *Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar [Situation in Bangladesh/Myanmar]*.[103] On the ICC, William A Schabas has emphasised that the core international crimes, namely war crimes, CAH, and genocide are universally criminal.[104]

The ICJ has pronounced on the universality of international crimes on several occasions. In its 1951 genocide advisory opinion, the court made it clear that in its opinion, genocide is an international crime irrespective of whether there was any treaty obligation in terms of the convention.[105] However, in what appeared to be a setback to universal criminality, in the *Arrest Warrant Case,*[106] concerning the applicability of diplomatic immunity for ministers of foreign affairs, the ICJ found that, in customary international law, there was full immunity accorded to ministers of foreign affairs to ensure the effective performance of their functions on behalf of their respective states. The court also held that on its examination of state practice, it found no exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent ministers of foreign affairs when they were suspected of having committed war crimes or CAH.[107]

What may be considered to have been a doctrinal setback for universal criminality by the ICJ in the majority decision seems to have been somewhat salvaged by the persuasive dissenting opinion by Judges Higgins and Kooijmans who found that 'that the frequently expressed conviction of the international community that perpetrators of grave and inhuman international crimes should not go unpunished does not ipso facto mean that immunities are unavailable

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[101] Art 13 (b) of Rome Statute.
[102] Ibid Arts 13(c), 15 and 53(1). See *Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya* No. ICC-01/09-19-Corr, 31 March 2010, (*Kenya Investigation Authorization Decision*), paras 17-69.
[103] *Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar*, ICC-01/19-27.
[104] William A Schabas (eds) *An Introduction to the International Criminal Court* (2007) 83.
[105] *Reservations to Convention on Prevention and Punishment of Crime of Genocide* (Advisory Opinion) 1951 ICJ Rep 23.
[106] *Case Concerning the Arrest Warrant* supra note 88; See Alexander Orakhelashvili 'Arrest Warrant of 11 April 2000: Democratic Republic of the *Congo v Belgium'* (2002) 96 *The American Journal of International Law* 3 at 677–84.
[107] *Case Concerning Arrest Warrant* supra note 88.

whenever impunity would be the outcome. The nature of such crimes and the circumstances under which they are committed, usually by making use of the State apparatus, makes it less than easy to find a convincing argument for shielding the alleged perpetrator by granting him or her immunity from criminal process'.[108]

Encouragingly, the ICJ reaffirmed universal criminality in a later case almost two decades later. In November 2019, The Gambia filed a case before the ICJ alleging that the crimes against the Rohingya in Rakhine State violate the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention).[109] The Gambia brought the case under Article 9 of the convention, which allows disputes between parties 'relating to the responsibility of a State for genocide' to be submitted to the ICJ. The Gambia also requested the court for provisional measures to 'protect against further, irreparable harm to the Rohingya group's rights under the Genocide Convention'.[110] In January 2020, ICJ issued an order directing Myanmar to 'take all measures within its power' to prevent the commission of acts defined in the Genocide Convention, including ensuring that its military and any irregular armed units refrain from committing these acts.[111] The court also ordered Myanmar to 'take effective measures to prevent the destruction and ensure the preservation of evidence' related to the ICJ proceedings. The ICJ also directed Myanmar to submit regular reports concerning its measures to comply with the order.[112]

The ILC has affirmed the universality of international crimes as 'offences against the peace and security of mankind'.[113] The universality of international crimes was equally foregrounded in Article 19 of the ILC's 1980 version of the Draft Articles on Responsibility of States for Internationally Wrongful Acts.[114]

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[108] Ibid 'Joint Separate Opinion of Judges Higgins, Kooijmans' para 79.
[109] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar)* ICJ Press Release 2019/47 https://www.icj-cij.org/case/178 accessed 8 June 2023.
[110] Ibid
[111] Provisional Order of 23 January 2020 https://www.icj-cij.org/case/178/provisional-measures accessed 11 June 2023
[112] Ibid. 7
[113] 'Second Report on the Draft Code of Offences against the Peace and Security of Mankind' by Doudou Thiam, Special Rapporteur, UN Doc A/CN.4/377 & Cort 1 (1984), reprinted in 1984 2 *Yearbook for International Law Commission*, 89, UN Doc A/CN.4/SER.A/1984/Add.1 (Part 1).
[114] 'Report of the International Law Commission on the Work of Its Thirty-Second Session' Art 19(2), UN Doc. A/35/10 (1980) reprinted in 1980 2 *Yearbook. International Law Commissi*on 1, 38, UN Doc A/CN.4/ SER.A/1980/Add.1 (Part 2). See Georges Abi-Saab 'The Concept of International Crimes and Its Place in Contemporary International Law' in *International Crimes of State: A Critical Analysis of the ILC's Draft Article 19 on State Responsibility* (1989) 141, 147.

ICL scholars are also unanimous on the universality of international crimes.[115] Bassiouni argues that:

'international crimes that rise to the level of jus cogens constitute obligatio erga omnes, which are inderogable Legal obligations which arise from the higher status of such crimes include the duty to prosecute or extradite, the non-applicability of statutes of limitations for such crimes, the non-applicability of any immunities up to and including Heads of State, the non-applicability of the defence of "obedience to superior orders" [save as mitigation of sentence], the universal application of these obligations whether in time of peace or, their non-derogation under "states of emergency," and universal jurisdiction over perpetrators of such crimes'.[116]

May concludes that 'there are some principles that transcend national borders and achieve universal binding force. In international law, some crimes so clearly harm the international community that they must be proscribed in all societies'.[117] Cassese claims that because international crimes involve serious violations of rules 'intended to protect values considered important by the whole international community', they are 'consequently binding on all states and individuals'.[118]

Finally, the Princeton Principles on Universal Jurisdiction have been developed and adopted by leading international law scholars to assist countries to align their laws with international law, to assist judges to interpret and apply international law and determine domestic compliance with international law, and to assist non-state actors and human rights organisations to better understand the requirements of international law regarding universal jurisdiction.[119] A central theme to this scholarly consensus is that international crimes harm the interest of the international community rather than just individual countries or persons. I find this argument compelling and central to the critique of Heller's direct criminalisation theory.[120] The driver of the universality of crimes is the international community. From Nuremberg to ICTY, ICTR

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[115] See Paola Gaeta 'International Criminal Law' *in International Law for International Relations* (2010) 259 and Steven Freeland, 'The Internationalisation of Justice-A Case for the Universal Application of International Criminal Law Norms' (2007) 4 *New Zealand Yearbook of International Law* 45 at 47.
[116] M Cherif Bassiouni 'International Crimes: Jus Cogens and Obligatio Erga Omnes' (1996) 4 *Law and Contemporary Problems* 59 at 63-74.
[117] Larry May *Crimes Against Humanity: A Normative Account* (2005) 24.
[118] Antonio Cassese *International Law* (2005) 436.
[119] Equipo Nizkor 'The Princeton Principles on Universal Jurisdiction', last accessed from https://www.derechos.org/nizkor/icc/princeton.html on 20 February 2022.
[120] Heller op cit note 61 at 358.

and ICC, the international community has determined that atrocities are of international concern despite occurring within the geographic limits of specific states.

2.3.2 The conceptual definition of international crimes

As shown above, there is little debate or argument regarding the 'international' nature of international crimes. The statutes and jurisprudence of the international tribunals reaffirm the international character of international crimes. Scholars agree that international crimes constitute conduct for which there is liability for punishment either via a regional or international tribunal or through extra-territorial courts exercising universal jurisdiction.[121] However, they vehemently disagree on to what the international part of international crimes amount and of what it is comprises.[122] To this extent, Chehtman argues that '[…c]onceptualising international crimes entails distinguishing them from domestic offences. Several people would add that it should also distinguish them from so-called transnational crimes. Accordingly, the task of conceptualising international crimes could be approached as the need to identify the relevant differences with their domestic or transnational counterparts'.[123]

A key feature distinguishing international crimes from domestic crimes relates to the legal consequences for breach. While domestic crimes attract prosecution and punishment by domestic courts of the specific countries in which they are committed, individuals who commit international crimes 'are accountable, i.e., liable, not before the specific political community to which they belong, where their act took place, or which is targeted by their conduct, but before the international community as a whole'.[124] It is inconsequential that domestic law may not recognise these crimes because they are recognised as such by international law.[125] This does not mean that domestic courts with no nexus may not try international crimes because they can and do. Instead, the distinguishing feature is that extra-territorial courts can try these offences irrespective of where and by whom they are committed.[126] The distinction is that unlike with domestic crimes, for international crimes, there is 'no traditional connection (or

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[121] Alejandro Chehtman 'A Theory of International Crimes: Conceptual and Normative Issues' at 317-340 in Kevin Jon Heller, Frederic Megret, Sarah MH Nouwen, Jens David Ohlin & Darryl Robinson (eds) *The Oxford Handbook of International Criminal Law* (2020).
[122] Ibid at 319.
[123] Ibid.
[124] Ibid.
[125] Georg Schwarzenberger 'The Problem of an International Criminal Law' (1950) 3 *Current Legal Problems* 1 263–96.
[126] Chehtman op cit note 1.

nexus) to the crime- i.e., the territory in which it was perpetrated, an important sovereign interest, or the nationality of the perpetrators or victims—as well as by international, hybrid, or internationalised courts'.[127]

Chehtman also argues that international crimes are influenced by the concept of universality of human rights describing human rights as 'simply those that warrant some form of foreign or external intervention'.[128] Chehtman identifies a glaring gap in the theory of international crimes. It fails to account for or explain the conceptual feature related to international law prohibition of particular offences and extra-territorial jurisdiction by courts with no other accepted nexus to the crime. Bassiouni's conceptualisation that 'an international crime is merely a crime defined by international law, whether customary or conventional' is supported by O'Keefe,[129] who reiterates that it is 'the sole characteristic shared by every offence with a claim to the denomination "international crime."'

This concept, according to O'Keefe, includes the core international crimes: CAH, war crimes, genocide, and aggression, but also piracy, jure gentium and torture, which states have recognised via international law as international crimes. Chehtman finds fault with this simplistic and positivist conceptualisation by O'Keefe. It does not reflect the reality of how international crimes have evolved. He argues that the mere fact that states agree that any particular crime is international would not per se mean that it becomes one. O'Keefe's argument suggests that there would have to be something more than just the agreement or decision of states to distinguish an international crime from other crimes. What is that 'something more'? A related but separate point to O'Keefe's is that indeed some of the crimes, like the Nuremberg crimes were not international crimes until the international community decided they were after the Second World War.[130] This assertion assumes an ex-post-facto recognition or consideration of international crimes by states. While Chehtman agrees with O'Keefe's articulation that the overriding conceptual feature of international crimes is that 'they are ultimately defined […as such] under international law', he criticises the 'failure by this conceptualization [...to provide suitable criteria to evaluate the inclusion of new conduct critically] as international crimes, as well as to assess the existing ones and their appropriate

[127] Chehtman op cit note 135 at 320.
[128] Ibid.
[129] O'Keefe op cit note 63.
[130] Heller op cit note 9.

scope'.[131] This simple and positivist conceptualisation does not address what conduct could become international crimes in the future.

Heller proposes the DCT and the NCT theses. The DCT provides that international crimes are directly criminalised by international law. It is consistent with the theories of most scholars, including Bassiouni and O'Keefe. Heller dismisses and rejects it because it does not have any basis in international law. Heller defends the NCT arguing that 'international crimes are those which international law obligates every state to criminalise and prosecute under its own domestic law'.[132] Astrid Reisinger Coracini,[133] Mia Swart,[134] and Chehtman[135] reject Heller's NCT conceptualisation of international crimes.

Chehtman's dispute is based on state practice in which domestic courts have drawn their jurisdiction to try international crimes on international law per se, not necessarily a national obligation to prosecute.[136] Coracini contends that Heller's NCT is unconvincing and that general acceptance of DCT is no accident but reflects the way ICL has evolved since 1945; with the concept of direct criminalisation as a fundamental pillar of an emerging system of international criminal law and justice'.[137] Swart[138] is also unconvinced by Heller's DCT founded on positivism. She argues that 'a purely positivist approach as the basis for international criminalization fails to explain or accommodate the various natural law influences in international criminal law', and that it is impossible to remove 'naturalism out of international criminal law or out of the reasons we believe international crimes are international crimes'.[139] She further rejects Heller's argument for customary law as the basis for criminalisation because it 'injects even more uncertainty than certainty to the debate because of the controversy, subjectivity and politicisation of custom as a source of law'.[140] Chehtman

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[131] Chehtman op cit note 135 at 323.
[132] Heller op cit note 61 at 355.
[133] Astrid Reisinger Coracini, '"What is an International Crime?": A Response to Kevin Jon Heller' (2018) *HILJ*.
[134]Mia Swart 'The Legal Foundation for Criminalising International Crimes: A Response to Kevin Jon Heller' (2018) *HILJ*. Accessed on 5 June 2023 at https://harvardilj.org/2018/03/discussion-what-is-an-international-crime-a-revisionist-history/
[135] See Alejandro Chehtman ' "What Is an International Crime?": What Kind of Question It Is and How We Should Answer It' (2018) *HILJ*. Accessed on 5 June 2023 at https://harvardilj.org/2018/03/discussion-what-is-an-international-crime-a-revisionist-history/
[136] To support his argument, Chehtman relies on cases from Colombian Courts 'which have prosecuted individuals for CAH on the basis of the criminal prohibitions contained in customary international law, as codified under the Rome Statute, even though they lacked a domestic provision criminalising this type of conduct as a matter of Colombian law'; op cit note 135.
[137] Coracini op cit note 133.
[138] Swart op cit note 134.
[139] Ibid.
[140] Ibid.

concludes that there is no support for NCT in international law. He proposes a compelling conceptualisation which is that 'the defining feature of an international crime is that it confers jurisdiction over it also to an extra-territorial authority with no traditional link to the crime, the perpetrators, or the victims'.[141] Having reviewed the theoretical and conceptual definitions of an international crime by contemporary ICL scholars, it is essential to unpack the justification for such crimes. In other words, besides international law prohibiting international crimes as discussed above, what is it that makes particular or given conduct an international crime? This is a valuable enquiry for purposes of this study which seeks to examine the conduct of the Gukurahundi and evaluate whether such conduct constitutes international crimes. Chapters 3, 4, 5 and 6 will undertake a more detailed evaluation of the conduct of Five Brigade. The issue of what conduct can be justified as international crimes will be addressed in the following section.

2.3.3 Normative justifications for international crimes

Besides the defining conceptual element, the second essential part of international crimes theory is the normative element. According to Chehtman, 'normative arguments are about providing sufficiently strong reasons for a certain practice or institution, i.e., they are about justification'.[142] The argument for justification is essential in domestic criminal law, where the pre-condition for punishing someone is that they violate certain conduct. Regarding ICL, it also follows that the basis for punishing international crimes must be founded on that conduct being criminal according to ICL. Heller says, 'in this context, we must also justify the imposition of legal punishment, and the criminalization of certain conducts, vis-à-vis the political community/ies in which the crimes were perpetrated. The reason for this is that the international community is claiming authority to criminalise, prosecute, and ultimately punish these conducts irrespective of the position of the relevant domestic authorities. In particular, international criminalisation must be justified against a background of domestic political authorities enjoying a right to self-government'.[143]

ICL scholars have weighed in on the justification of criminal punishment at an international level – in other words, international criminalisation. This distinction is viewed against domestic

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[141] Chehtman op cit note 135 at 329.
[142] Ibid.
[143] Ibid Chehtman at 329 citing Joseph Raz and Avishai Margalit 'National Self-Determination' in Joseph Raz *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (1996) 126.

criminalisation in which national authorities appropriate the power and authority to punish criminal conduct if it is perpetrated by their nationals, within their territorial borders and against their national interests. Applying the same logic to international crimes, it is necessary to assume a supra-national power, whose personal jurisdiction is supra-national and whose interests in criminalisation go beyond and unrestricted by national borders. Chehtman argues that 'accordingly, international criminalisation needs justifying before these authorities the fact that this type of conduct will be subject to the jurisdiction of the international community'.[144]

This enquiry is essential because it would be inconceivable to consider any investigation, prosecution and punishment of alleged Five Brigade perpetrators for acts that would not constitute crimes in Zimbabwe or under international law. The principle that a person cannot be prosecuted for an act that did not constitute a crime at the time it was committed is settled in domestic criminal law.[145] Under international law, the ICTY Appeals Chamber has reaffirmed the concept of nullum crimen sine lege, where the Court held that international law 'can impose criminal responsibility only if the crime charged was clearly established under customary law at the time the events in issue occurred'.[146]

The rationale for the international criminalisation of conduct has evolved over time. Before Nuremberg, criminalisation was founded on the rights of states, with scholars preoccupied with preventing serious violations of the laws of war, securing peace and preventing conflict.[147] In the aftermath of the Second World War, criminalisation took a human rights approach, with the Allies retroactively prosecuting atrocities and gross violations of human rights by the Nazis.[148] Alexander KA Greenawalt[149] argues that 'the immediate post-war period saw the passage of the Universal Declaration of Human Rights, identifying obligations owed by governments to their own citizens in peacetime,[150] as well the Genocide Convention, which

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[144] Ibid.
[145] Section 70(1)(k) of the Zimbabwe Constitution provides that 'any person accused of an offence has the right not to be convicted of an act or omission that was not an offence when it took place'. Constitution of Zimbabwe Amendment No.20 of 2013.
[146] *Prosecutor v Hadzihasanovic et al [Hadzihasanovic]* IT-01-47-AR72 para 51; see *Prosecutor v Aleksovski [Aleksovski]* IT-95-14/1-A ICTY Trial Chamber Judgment of 24 March 2000 para 38.
[147] Chehtman op cit note 135 at 329 citing Mark Lewis *The Birth of the New Justice* (2014), 84-85.
[148] Tanaka et al op cit note 9 at 349.
[149] Alexander K A Greenawalt 'What is an International Crime?' in *The Oxford Handbook of International Criminal Law* (2021) at 297.
[150] Universal Declaration of Human Rights. Adopted 10 December 194 8 UNGA Res 217 A(III) (UDHR).

extended individual criminal liability to acts of genocide even when committed during peacetime by a government against its own people'.[151]

While there is consensus amongst scholars that ICL is concerned with the gross violation of human rights committed in specific contexts, there is debate regarding whether perpetrators' contextual circumstances, scale, nature, and identity are distinguishing elements. Chehtman argues that considerations include the rights that have been violated, the number of people whose rights have been violated and by whom, and the context these violations occur.[152] With regard to what makes international crimes distinctive from domestic or transnational crimes, almost all scholars agree on at least three key features: the gravity of the crimes,[153] the level and organisation of perpetrators and the scale of the crimes.[154] Thus from a normative perspective, for Gukurahundi crimes to constitute international crimes in addition to satisfying the constituent elements of each requisite crime, they must satisfy the general criteria of gravity, scale, level and organisation of perpetrators discussed in the following section.

2.3.3.1 The gravity of the crimes

One of the primary justifications for universal jurisdiction is that grave crimes should not go unpunished. There is a convergence of opinion regarding the centrality of gravity to international crimes among international scholars and the statutes jurisprudence of international tribunals.[155] In their statutes and decisions, all the international criminal tribunals have expressly reaffirmed a focus on the most serious crimes of international concern or on the most high-level defendants who are most responsible for the commission of international crimes.[156]

There is consensus amongst ICL scholars that extra-territorial jurisdiction, which is a constituent element of international crimes, is founded on the gravity of the crimes.[157] The gravity or heinousness of the crimes is a distinguishing factor that provides the international

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[151] Genocide Convention op cit note 4, Art 1.
[152] Chehtman op cit note 135 at 329.
[153] Greenawalt op cit note 149 at 296 argues that 'the law has, instead, largely coalesced around a so-called 'atrocity' model, focusing on the most severe offences without regard to whether or not their commission crosses state borders'..
[154] *Akayesu* supra note 33 paras 461–69; Rome Statute op cit note 4 Art 7. Chehtman argues that save for the crime of genocide which carries a specific intent requirement, there is no requirement for a discriminatory motivation for an international crime in general.
[155] See Nuremberg Charter op cit note 4, ICTY Statute, ICTR Statute and Rome Statute.
[156] Ibid.
[157] Chehtman op cit note 135 at 323 argues that 'a substantial level of gravity or seriousness is necessary to justify this type of extraterritorial jurisdiction'.

community with the right and obligation to 'override the right to political self-government enjoyed by a state, that constitutes a pro tanto reason to preclude the international community from passing legislation that applies on its territory'.[158] Greenawalt argues that '[…international criminal] law has, instead, largely coalesced around a so-called atrocity model, focusing on the most severe offences without regard to whether or not their commission crosses state borders'.[159] He also contends that 'ICL prioritises the gravest offences for which there is generally little argument against prosecution'.[160]

According to Chehtman, the ICC's admissibility threshold process considers the gravity of crimes as an essential basis for the ICC exercising jurisdiction.[161] Gravity rests on the basis of two different sets of considerations. The first is the gravity related to the type of behaviour forming the offence itself, and the second is related to the contextual element of the offence. Chehtman concludes that 'war crimes seem to require a highly significant gravity threshold that is met through the combination of the gravity of the contextual element together with the gravity of the underlying act'.[162] Finally, Greenawalt also relies on a prioritisation argument for gravity and argues that 'the limited capacity of international institutions—combined with the reticence of states to entrust too much discretion in international prosecutors favours giving priority to only the most serious subset of offences'.[163] Finally, based on the constitutive statutes of international tribunals[164] and their jurisprudence and the writings of ICL scholars such as Chehtman,[165] Greenawalt[166] and Cryer[167] highlighted above, a crime must meet the gravity requirement for it to be characterised as an international crime.

For Gukurahundi crimes to meet the requisite standards of international crimes, it must be demonstrated that they were grave or heinous.[168] As shown, in examining the crimes under the different categories of crimes in Chapters 3, 4 and 5 the Gukurahundi atrocities were especially

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[158] Ibid.
[159] Greenawalt op cit note 149 at 296.
[160] Ibid at 306.
[161] Chehtman op cit note 135 at 336.
[162] Ibid.
[163] Greenawalt op cit note 149 at 313.
[164] The Rome Statute Elements of Crimes provides for example that CAH 'are among the most serious crimes of concern to the international community as a whole, warrant and entail individual criminal responsibility, and require conduct, which is impermissible under generally applicable international law, as recognized by the principal legal systems of the world'. Available at https://www.icc-cpi.int/sites/default/files/NR/rdonlyres/336923D8-A6AD-40EC-AD7B-45BF9DE73D56/0/ElementsOfCrimesEng.pdf.
[165]Chehtman op cit note 135 at 317.
[166] Greenawalt op cit note 149.
[167] Cryer op cit note 72 at 108.
[168] Carsten Stahn, *A Critical Introduction to International Criminal Law* (2019) 19.

heinous. The causalities are estimated to have reached 20 000.[169] The numbers of alleged perpetrators were more than 3 500.[170] As will be shown, the manner of committing the crimes was especially atrocious, including mass murders, mass beatings, severe torture, summary executions, mass rapes, burning of villages,[171] abduction, torture and disappearances of civilians.[172] The gravity of these crimes was compounded by the fact that they were committed against unarmed and defenceless civilians pursuant to a government policy and plan.[173] Survivors describe heinous atrocities committed by the Gukurahundi over several years (1983-1987) and covering a vast geographical area of Matabeleland and Midlands.[174] The following section will discuss the 'scale' requirement of international crimes.

2.3.3.2 The scale of the crimes

The scale of the crimes is an essential element of international crimes that is related and connected to the gravity element. It particularly matters to assessing and determining whether the Gukurahundi atrocities were of such a scale as required to constitute international crimes. There is unanimity from the jurisprudence of international tribunals and ICL scholars that for a crime to qualify or be justified as an international crime, it must be committed on a large scale.[175] Almost all international criminal tribunals have been established to try crimes that have occurred on a large scale. The Nuremberg Tribunal prosecuted the Nazis for waging a global war affecting millions and the systematic murder of 6 million – at least two-thirds of Europe's Jewish population between 1941 and 1945, across German-occupied Europe.[176]

The ICTY was established to prosecute genocide, war crimes and CAH involving hundreds of thousands of victims. The 1994 UN Expert Mission Report estimated that over 200 000 people were killed in the conflict.[177] However, in 2007, the Research and Documentation Centre in Sarajevo placed the number of people killed or missing at less than half (97 207) of the 1994

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[169] Stuart Doran, 'New documents claim to prove Mugabe ordered Gukurahundi killings' *The Guardian* 19 May 2015.
[170] Five Brigade was comprised of at least 3 500 members.
[171] Catholic Commission for Justice and Peace in Zimbabwe & Legal Resources Foundation *Breaking the Silence - Building True Peace: A Report on the Disturbances in Matabeleland and the Midlands 1980 – 1988 [Breaking the Silence]* (1997) 56.
[172] Ibid.
[173] Ibid.
[174] Ibid.
[175] Chehtman op cit note 135 at 167; Robert Cryer op cit note 72; Greenawalt op cit note 149.
[176] Nuremberg Charter op cit note 4 at art 6(c); See Art 5(c) of the Charter for International Military Tribunal for the Far East (IMTFE Charter), 1946.
[177] 'Final Report of the Commission of Experts, established Pursuant to Security Council Resolution 780' (1992), last accessed from https://www.his.com/~twarrick/commxyu1.htm on 21 March 2021.

UN figure.[178] The ICTR was established to try perpetrators of genocide and CAH, resulting in the death of between 500 000 and 800 000 Tutsis and moderate Hutus in 1994.[179] The high numbers of fatalities within just 100 days attest to the scale of the crimes. The ICC has also prioritised crimes of a large scale in its cases.[180]

According to Greenawalt, 'the core international offences generally involve a context of armed conflict and/or the perpetration of large-scale, organised atrocities'.[181] Cryer argues that '[…with] the possible exception of the crime of aggression with its focus on inter-State conflict, the concern of ICL is now with individuals and with their protection from wide-scale atrocities'.[182]

To conclude, based on the constitutive statutes and jurisprudence of international tribunals and the writings of ICL scholars, to be characterised as an international crime, in addition to being serious or grave, such crime must be committed on a large scale. While only some crimes of Five Brigade will be examined in Chapter 3, 4 and 5 as the section above on gravity shows, there is prima facie evidence that the scale of the crimes was especially large. The number of victims murdered, which are estimated to be 20 000, was exceptionally high. The population affected by the atrocities, in the hundreds of thousands, and the area covered in Matabeleland and Midlands was expansive. The duration of the commission of the crimes – over four years – was long and sustained. The crimes were committed with uniform consistency and persistent brutality.[183] As the detailed analysis of the atrocities in the following chapters will show, the Gukurahundi atrocities demonstrably meet the 'scale' requirement of international crimes.

2.3.3.3 Level and organisation of perpetrators

The level of perpetrators and organisation of atrocities forms an essential conceptual element of international crimes. Recognising that the perpetration of international crimes usually requires the mobilisation of a significant amount of resources, individuals, authority and power,

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[178] Institute for War & Peace Report, 'Bosnia's Book of the Dead', (2007) last accessed from https://iwpr.net/global-voices/bosnias-book-dead on 20 February 2022.
[179] Marijke Verpoorten 'The Death Toll of the Rwandan Genocide: A Detailed Analysis for Gikongoro Province' (2005) 60 *Population* 4, 2005 at 331-367; Jens Meierhenrich 'How Many Victims Were There in the Rwandan Genocide? A Statistical Debate' (2020) 22 *Journal of Genocide Research* 1 at 72-82.
[180] See *Prosecutor v Ali Muhammad Ali Abd–Al-Rahman [Abd-Al-Rahman]* ICC-02/05-01/20; *Prosecutor v Germain Katanga [Katanga]* (ICC-01/04-01/07); *Prosecutor v Bosco Ntaganda [Ntaganda]* ICC-01/04-02/06; *Prosecutor v Dominic Ongwen [Ongwen]* ICC-02/04-01/15.
[181] Greenawalt op cit note 149 at 306; See Art 7 of Rome Statute.
[182] Robert Cryer (eds) *An Introduction to International Criminal Law and Procedure* (2014).
[183] For a detailed discussion see Chapter 5 on CAH.

the international criminal tribunals have sought to try those most responsible for the commission of international crimes.

The Nuremberg Tribunal set out to 'try and punish persons who had committed Crimes Against Peace, War Crimes and CAH as defined in the Nuremberg Charter and defendants who had planned and waged aggressive wars....'[184] The Tribunal tried high-level Nazi perpetrators in the government,[185] military,[186] industry,[187] media,[188] and judiciary[189] who had been most responsible for planning and instigating atrocities. The ICTY statute provides that 'the International Tribunal shall have the power to prosecute persons responsible for serious violations of IHL committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute'.[190] The ICTY has tried high-level persons responsible for planning and organising the commission of international crimes, including heads of state, military and police commanders and politicians.[191]

In its Resolution 955 (1994) establishing the ICTR, the UNSC Resolution 955 establishing ICTR statute '[…decided] to establish an international tribunal for the sole purpose of prosecuting persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994'.[192] The ICTR prosecuted and convicted a range of high-level defendants for genocide and CAH, including a former prime minister, mayor, minister, governor, military generals, business executives, media executives, senior clergy, and militia leaders.[193]

The Rome Statute provides the ICC 'shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and

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[184]Nuremberg Charter op cit note 4 at art 6(c); IMTFE Charter op cit note 176.Emphasis added.
[185] *United States v Weizsaecker [Weizsaecker]* supra note 11.
[186] *United States v von Leeb [von Leeb]* supra note 11.
[187] *United States v Flick [Flick]* supra note 11.
[188] In particular *Julius Streicher*; International Military Criminal Tribunal (Nuremberg) Judgment of 1 October 1946.
[189] *United States v Altstoetter [Altstoetter]* supra note 11.
[190] Art 1 of ICTY Statute.Emphasis added.
[191] See individuals indicted and convicted by the ICTY, last accessed from https://www.icty.org/en/cases on 20 February 2022.
[192] Art 1 of ICTR Statute. Emphasis added.
[193] See individuals indicted and convicted by the ICTR, last accessed from https://unictr.irmct.org/en/cases on 20 February 2022.

shall be complementary to national criminal jurisdictions'.[194] The ICC has indicted 38 high-level perpetrators for planning, organising and committing international crimes, including heads of states, military commanders and militia leaders, heads of intelligence, and politicians.[195]

ICL scholars have reaffirmed the importance of the level and organisation of perpetrators to international crimes. Greenawalt argues that the rationale for preferring international courts over domestic ones is that because the perpetrators of international crimes are usually high-level government actors, there are 'special reasons to distrust the adequacy of domestic efforts to punish the crimes.'[196] The core international offences generally involve a context of armed conflict and/or the perpetration of large-scale, organised atrocities.[197] States have proven ineffective at prosecuting these crimes either because 'government actors are themselves the perpetrators, or because extraordinary events—typically the loss of territorial control—have inhibited state prosecution'.[198]

Chehtman argues that 'when wrongs are committed on a large scale, and by sufficiently organised and powerful groups, the fact that the state with traditional jurisdiction over these offences (on the grounds of territoriality, nationality of the victim or the perpetrator, or the protection of a sovereign interest) would either be responsible for perpetrating, instigating or allowing them or is simply unable to do anything about them is the reason why we must provide at least some extra-territorial authority with jurisdiction over them, whether we do so on the basis of universal jurisdiction or by empowering an international court (or both)'.[199] In general terms, most international crimes require a substantial level of organisation. However, the ICC has recently addressed the organisation and policy issue in the *Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali* where the court's presiding pre-Trial Chamber was divided between two different understandings of the policy requirement. According to the dissenting view, Kenya's post-election violence in 2007 and 2008 could not rise to the level of CAH without evidence that it reflected the policy of an

[194] Art 1 of Rome Statute.
[195] See individuals indicted and convicted by the ICC, last accessed from https://www.icc-cpi.int/Pages/cases.aspx on 20 February 2022.
[196] See Andrew Altman and Christopher Heath Wellman 'A Defense of International Criminal Law' (2004) 115 *Ethics* 1 at 35-67.
[197] Cryer op cit note 72.
[198] O'Keefe op cit note 63.
[199] Chehtman op cit note 135 at 337.Emphasis added.

organisation that was, at minimum, a quasi-state entity operating as the functional equivalent of a state.[200]

Chehtman has also revised his support for the argument that the organisation requirement is a necessary element of normative account of international crimes, arguing that this requirement is unnecessarily onerous and fails to account for non-state actors as perpetrators of international crimes.[201] In reality, international crimes are still committed by high-level actors and require and involve substantial organisation. However, the revised articulation of international crimes by Chehtman is supported by the 'current evolution of prevailing patterns of violence, from state or state-controlled acts, towards acts perpetrated by smaller, less formally structured groups, with an ever-increasing capacity to cause harm'.[202]

The Gukurahundi crimes prima facie meet the requirement for level and organisation. As will be illustrated in Chapters 3, 4 5, 6 and 7, the atrocities were planned, organised and committed by high-level government, military and security officials. There is also strong evidence of high-level organisation and extensive mobilisation and deployment of financial, military or other resources. In addition to Five Brigade, the government deployed the Four and Six Brigade, the paratrooper regiment and other ZNA units. According to reports, by 1983, the total military presence in Matabeleland and Midlands reached 5 000 officers. Five Brigade alone was comprised of at least 3 500 soldiers, and by 1984 total troop deployment to Matabeleland South reached 15 000.[203] The Gukurahundi operations in Matabeleland also involved various state security agencies, including police, intelligence and militia groups established by the government.[204] The effort undertaken in mobilising Five Brigade, allocating significant state resources, and contracting the North Korean government to train it,[205] including providing considerable state resources for its accommodation, operations and deploying in Matabeleland and Midlands for a prolonged duration, all highlight the large extent of state, military and other resources that were assigned. It is argued that based on the existence of prima facie evidence, Five Brigade atrocities meet the requirement for level and organisation of international crimes.

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[200] *Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali [Kenya Cases]* 2011 (ICC) (Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, Dissenting Opinion by Judge Hans-Peter Kaul arguing that the 'organisational policy' requirement demands 'an entity which may act like a State or has quasi-State abilities' at para 7.
[201] Chehtman op cit note 135 at 338.
[202] Ibid at 339.
[203] Ibid at 46.
[204] Ibid at 47.
[205] See *Breaking the Silence* op cit note 171.

2.4 Conclusion

This chapter has traced the emergence, evolution and development of international crimes from Nuremberg to the ICC. It has analysed the various theories, concepts, and normative accounts of international crimes based on international criminal tribunals' statutes, jurisprudence, and the writings of leading international criminal law scholars. To this end, it has elaborated a theory and identified and discussed clear conceptual and normative elements of international crimes supported by scholarly literature, a range of instruments, treaties, customary international law, regional and national mechanisms that establish a duty to investigate, prosecute and punish perpetrators of international crimes.[206] This chapter provides a critical and crucial theoretical basis that underpins the rest of this study.

The main findings in this chapter are that international crimes are distinct from domestic crimes in that they are universally criminal. The universality means a universal obligation exists to investigate, prosecute and punish them. Second, the normative requirements for international crimes are gravity, scale and high levels of perpetrators and organisation. Third, Five Brigade atrocities prima facie meet the normative requirements of gravity, scale and level of perpetrators. A detailed examination of the respective conduct of Five Brigade to determine whether it constitutes the core international crimes of genocide, CAH and war crimes will be undertaken in Chapters 3, 4 and 5, while an evaluation of the individual criminal responsibility of alleged perpetrators will be undertaken in Chapter 6. The next chapter will examine the conflict in Matabeleland with a view to classifying it and the crimes committed during that conflict under IHL.

[206] Kriangsak Kittichisaree *International Criminal Law* (2001). See Monique Crettol and Anne-Marie La Rosa 'The missing and transitional justice: the right to know and the fight against impunity' (2006) 88 *International Review of the Red Cross* 862.

CHAPTER THREE –CLASSIFICATION OF THE MATABELELAND CONFLICT AND CRIMES UNDER INTERNATIONAL HUMANITARIAN LAW

3.1 Introduction

Five Brigade atrocities occurred in the context of a conflict in Matabeleland and Midlands. Therefore, any examination of the crimes of Five Brigade must begin with an examination of the conflict itself.[1] The classification of conflict is crucial to adjudicating war crimes because a nexus is required between war crimes and the arena in which they are committed.[2] In order to prosecute war crimes, the preliminary determination is whether or not an armed conflict existed at the time of the alleged crime and to classify such conflict as either international or non-international.[3] In this regard, the classification of the conflict in Matabeleland and Midlands is crucial for several reasons. First, it determines the application of IHL to the situation.[4] Second, it determines the country's international legal obligations and culpability. Third, it determines the individual culpability or criminal responsibility of individual non-state actors implicated in serious violations of ICL.[5] Finally, it determines the legal nature of the atrocities committed, that is, whether they constitute war crimes under ICL.[6]

This chapter evaluates the Matabeleland Conflict against the criteria set out in the relevant applicable IHL treaties and customary international law as elaborated by various tribunals,[7] to determine whether it constituted an IAC or/and NIAC. NIACs are regulated by Common Article 3 (CA3) to the Geneva Conventions of 1949 (CA3),[8] the APII to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts (APII),[9] and customary international law. IACs are, on the other hand,

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[1] Rogier Bartels 'The Classification of Armed Conflicts by International Criminal Courts and Tribunals' (2020) 20 *International Criminal Law Review* 4 at 596.
[2] *Prosecutor v Bosco Ntanganda [Ntanganda]*, ICC-01/04-02/06; *Prosecutor v Zejnil Delalic et al [Zejnil Delalic et al]* IT-96-21-T, ICTY Trial Chamber Decision of 19 November 1998 paras. 182-185 and 193- 195.
[3] Martha Bradley 'Protracted Armed Conflict: A conundrum. Does article 8 (2) (f) of the Rome Statute require an organised armed group to meet the organisational criteria of Additional Protocol II' (2019) 32 *South African Journal of Criminal Justice* 3 at 291-323.
[4] Bartels op cit note 1.
[5] William A Schabas 'Punishment of Non-State Actors in Non-International Armed Conflict' (2002) 26 *Fordham International Law Journal* at 907-933.
[6] Ibid.
[7] *Tadić* infra note 13, para 70.
[8] Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949 (adopted 12 August 1949) 75 UNTS 135 (Geneva Convention III) art 3.
[9] 'Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts' (adopted 8 June 1977) 1125 UNTS 3 (Protocol II).

regulated by CA3, the Geneva Conventions 1949 and customary international law and the additional Protocol I (API) to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (API).[10]

The chapter examines the factual aspects of the conflict against the requirements set out in the Geneva Conventions of 1949, CA3, AP1, APII and customary international law. The chapter considers the definitions of IAC[11] and NIAC[12] as elaborated by the decisions of the ICTY,[13] which are widely accepted as reflecting custom,[14] and other ad hoc international tribunals,[15] the ICC,[16] other international bodies,[17] the International Committee of the Red Cross (ICRC),[18] and IHL scholars.[19] Lastly, based on the determination of the nature, status and classification of the conflict, the chapter determines whether crimes committed in the context of the conflict

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[10] 'Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts' (adopted 8 June 1977) 1125 UNTS 3 (Protocol I).
[11] 'Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949' (adopted 12 August 1949) 75 UNTS 31(Geneva Convention I) art 2.
[12] Marko Milanovic & Vidan Hadzi-Vidanovic 'A taxonomy of armed conflict' in Nigel D White & Christian Henderson *Research Handbook on International Conflict and Security Law: Jus ad Bellum, Jus in Bello and Jus post Bello* (2013) at 256-314.
[13] *Prosecutor v Dusko Tadić* [*Tadić]* 1995 IT-94-1 (ICTY) App. Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction of 2 October 1995 ('*Tadić* Jurisdiction Decision').
[14] Dino Kritsiotis 'The Tremors of Tadić' (2010) 43 *Israel Law Review* 2 262.
[15] Infra note 86, para 619; *Prosecutor v Rutaganda [Rutaganda]*, ICTR-96-3, Trial Chamber Judgment of 6 December 1999, para 92; *Prosecutor v Fofana et al [Fofana et al]* Decision on Appeal against 'Decision on Prosecutor's Motion for Judicial Notice and Admission of Evidence, App. Chamber Decision of the SCSL, Separate Opinion of Justice Robertson', 16 May 2005 para 32.
[16] *Prosecutor v Lubanga [Lubanga]* 2007 ICC-01/04-01/06 (ICC) Decision on the Confirmation of Charges, 29 January 2007, para. 233; *Prosecutor v Bemba Gombo [Goombo]*, ICC-01/05-01/08, Decision on the Confirmation of Charges, 15 June 2006, para. 229.
[17] UN Human Rights Office of the High Commissioner 'Report of the Mapping Exercise documenting the most serious violations of human rights and international humanitarian law committed within the territory of the Democratic Republic of the Congo between March 1993 and June 2003' (Report) at paras 470-1, last accessed from https://www.ohchr.org/Documents/Countries/CD/DRC_MAPPING_REPORT_FINAL_EN.pdf on 4 February 2022; UN Secretary-General 'Report of the Secretary-General's Panel of Experts on Accountability in Sri Lanka'(Report) at para 181, last accessed from https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/POC%20Rep%20on%20Account%20in%20Sri%20Lanka.pdf on 4 February 2022; UN Secretary-General 'Children and Armed Conflict' (Report), para 5, last accessed from https://reliefweb.int/sites/reliefweb.int/files/resources/ACB155BBA8E36696852573DF00773AB4-Full_Report.pdf on 4 February 2022; Lucius Caflisch 'First Report on the Effects of Armed Conflict on Treaties' (Report) at para 30, last accessed from https://legal.un.org/ilc/documentation/english/a_cn4_627.pdf on 4 February 2022.
[18] 'How is the Term "Armed Conflict" Defined in International Humanitarian Law?' (Opinion Paper) at 4, last accessed from http://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf on 4 February 2022.
[19] Leading IHL scholars in this respect see supra note 12; see Bradley infra note 196 at 83; see Martha Bradley *An analysis of the notions of "organised armed groups" and "intensity" in the law of non-international armed conflict* (unpublished doctoral thesis 2018); see Martha Bradley 'Expanding the Borders of Common Article 3 in Non-International Armed Conflicts: Amending Its Geographical Application Through Subsequent Practice? (2017) 64 *Neth Int Law Rev* at 375–406; Antonio Cassese, 'The Status of Rebels under the 1977 Geneva Protocol on Non-International Armed Conflicts' (1981) 30 *ICLQ* 416; Sindesh Sivakumaran, 'Binding Armed Opposition Groups' (2006) 55 *ICLQ* 369; Yoram Dinstein 'Non-International Armed Conflicts' in *International Law* (2014).

constitute war crimes under IHL. This enquiry begins with discussing the factual or contextual background to the Matabeleland Conflict. It is followed by a discussion of international law and its applicability to Zimbabwe. In addition to the Zimbabwe Constitition and legal decisions, this discussion will refer to foreign decisions in particular South Africa- applying similarly worded constitutional provisions as insightful to interpretation of Zimbabwe Constitution. In addition, the Zimbabwe Constitution requires consideration of foreign decisions and Zimbabwe Courts indeed routinely refer to such decisions in their adjudication.[20]After this, there is a discussion and analysis of IHL and its applicability to the situation in Matabeleland. The last section of this chapter classifies the conflict in Matabeleland under IHL. This is followed by an examination of whether Five Brigade atrocities constitute war crimes. The chapter will answer the followings questions: How is the Matabeleland Conflict classified under IHL? What are the implications of such classification for the atrocities committed in that conflict? In other words, do Five Brigade atrocities constitute war crimes? The next section will review the applicability of international law to Zimbabwe.

3.2 Applicability of international law to Zimbabwe

There are two dimensions to the application of international law. The first is the external dimension in which all international law norms (ratified treaties and customary international law) are generally regarded as binding on states. The second is the internal dimension – the applicability of international law norms at the domestic level – regulated by the relevant constitutional law norms or legislation in most states. There are three strands of enquiry regarding the applicability of international law to Zimbabwe. The first is evaluating the Zimbabwean constitutional and legal framework and its provisions on this issue. The second is examining the relevant ICL captured in treaties, customary law and decisions from ad hoc international tribunals. The third and final strand assesses the applicability of the relevant treaties, customary law and precedents from the ad hoc international tribunals to Zimbabwe. The Zimbabwean constitutional and legal framework will be evaluated next.

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[20] Section 233 of the South African Constitution is similarly worded to Section 327 of the Zimbabwean Constitution; see also Section 46(1)(e) of Zimbabwe Constitution which provides that courts may consider relevant foreign law in applying and interpreting declaration of rights; see *Mudzuru and Another v Ministry of Justice, Legal & Parliamentary Affairs N.O. and Others [Mudzuru]* 2016 Constitutional Application 79 of 2014 CC 12 of 2015 ZWCC 12 and *Kachingwe and Others v the Minister of Home Affairs NO and Another [Kachingwe]* 145/04 (SC).

3.2.1 Applicability of international treaties and conventions

The Constitution of Zimbabwe governs the applicability of international conventions, treaties and agreements. Section 327 of the Constitution provides that a treaty concluded or executed by the President of Zimbabwe is of no force and effect and remains not binding on the country unless and until Parliament approves it and enacts a law to bring it into effect.[21] The provision creates three steps towards ensuring that treaties and conventions are binding on Zimbabwe; signature by the President, approval by Parliament and enactment of legislation by Parliament. It is important to note that treaties that Zimbabwe has signed are binding at an international level and are only applicable within Zimbabwean law when they are ratified and domesticated through an Act of Parliament. This position was reaffirmed in *Gramara (Pvt) Ltd v The Government of Zimbabwe*, in which the Zimbabwe High Court stated that although Zimbabwe had not ratified and subsequently domesticated the SADC Protocol on the Tribunal, it had signed the SADC Treaty which repealed the need for ratification by a two-thirds majority of member states before it become binding and therefore Zimbabwe was bound by this treaty even without ratification.[22] This judgment shows that the signing of a treaty creates obligations and is binding on Zimbabwe at an international level even if the treaty is not domesticated under Zimbabwean law. Finally, when interpreting any legislation, all courts in Zimbabwe must adopt a reasonable interpretation consistent with international treaties, conventions or agreements, which are binding on Zimbabwe in preference to interpretations inconsistent with such treaty, convention or agreement.[23] This provision of the Constitution enjoins Zimbabwean courts to interpret legislation in a manner that does not conflict with Zimbabwe's international obligations that arise from the treaties that have been signed and have not necessarily been codified under Zimbabwe law.

Interpreting a similarly worded provision in the South African Constitution, *Glenister v President of the Republic of South Africa and Others*,[24] is insightful in analysing s46(1) of Zimbabwe's Constitution which provides that when interpreting provisions in the Declaration of Rights, every court, tribunal, or forum must consider international law amongst enumerated

[21] Section 327 of the Constitution of Zimbabwe Amendment (No. 20) Act 2013.
[22] *Gramara (Private) Limited v Government of the Republic of Zimbabwe [Gramara]* HC 33/09. para 12.
[23] Ibid, Section 327 (6).
[24] *Glenister v President of the Republic of South Africa and Others [Glenister]* 2011 6 (ZACC) (17 March 2011) para 189.

sources of law.[25] It can be argued that Zimbabwean courts must not only consider international treaties and agreements that have been domesticated under Zimbabwean law but those where Zimbabwe has not ratified, especially those that give Zimbabwe a positive obligation to realise the rights contained in the Declaration of Rights. For instance, in the case of *Kachingwe and Others v the Minister of Home Affairs and Another*,[26] the Chief Justice of Zimbabwe cited the Convention against Torture to show that torture was prohibited under Zimbabwean law. This was despite the fact that Zimbabwe has only signed and not ratified the Convention against Torture. The decision reaffirms that Zimbabwean courts may rely on treaties that are only binding at an international level to give rights at domestic level.[27] A more nuanced interpretation of the interpretive provision Section 233 in South Africa's Constitution which is similar to Section 327 of the Zimbabwean Constitution is found in *S v Makwanyane and Another* which held that '[…i]international agreements and customary international law accordingly provide a framework within which [the Bill of Rights] can be evaluated and understood, and for that purpose, decisions of tribunals dealing with comparable instruments […] may provide guidance as to the correct interpretation of particular provisions of [the Bill of Rights]'.[28] *Makwanyane* reaffirms that domestic courts need to take into account international law when interpreting domestic human rights provisions within the Declaration of Rights or Bill of Rights.

The zimbabwean Supreme Court has also considered the provisions of Section 327 in *Minister of Foreign Affairs v Michael Jenrich, Standard Chartered Bank Zimbabwe and Sheriff of Zimbabwe*,[29] and interpreted Section 327 taking into account treaties that were already binding on Zimbabwe.[30] The court held that when interpreting provisions of the Constitution, Zimbabwean courts should take into account Zimbabwe's international law obligations, not only those arising from treaties that have been domesticated under Zimbabwean law and

[25] Section 46 (1) (c); see Juha Tuovinen 'What to Do with International Law? Three Flaws in Glenister' (2015) 18 *Constitutional Court Review* at 1-16.
[26] *Kachingwe and Others v the Minister of Home Affairs NO and Another [Kachingwe]* 145/04 (SC).
[27] See Dorothy Pasipanodya 'The Application of International Law in Zimbabwe in light of the New Constitution and the Doctrine of National Sovereignty' last accessed from https://www.academia.edu/4690926/The_Application_of_International_Law_in_Zimbabwe_in_light_of_the_New_Constitution_and_the_Doctrine_of_National_Sovereignity on 9 May 2022.
[28] *S v Makwanyane & Another [Makwanyane]* 1995 (CCT3/94) (ZACC) 3 (6 June 1995) para 35.
[29] *Minister of Foreign Affairs v Michael Jenrich, Standard Chartered Bank Zimbabwe and Sheriff of Zimbabwe, [Jenrich]* 2018 Zimbabwe Supreme Court Judgment No. SC 73/18 (31 October 2018).
[30] Ibid para 35.

therefore have a domestic effect but also treaties that have not been domesticated to which Zimbabwe is only bound at an international level.

Regarding Section 327, a further point must be made is that domestic law cannot prevail over treaty provisions,[31] and 'it is the duty of a state party to a treaty to ensure that the organs of internal law apply and give effect to that treaty. This also applies in respect of the provisions of a constitution'.[32] Although the position under international law is such that international law should take precedence over national law and that states cannot invoke domestic law in a bid to avoid obligations arising from international law, the reality of the matter, as Retselisitsoe Phooko puts it, is that 'the precedence of international law over national law largely depends on how the constitution of a particular country determines the status of international law'.[33] In reality, therefore, international law will only take precedence over domestic law where the Constitution of that land allows it. Article 27 of the Vienna Convention on the Law of Treaties (VCLT),[34] to which Zimbabwe is a state party,[35] provides that where a state party has signed and ratified a treaty, that state party may not invoke the provisions of its internal law as justification for its failure to perform the treaty. This provision seeks to ensure that states do not rely on domestic laws to avoid complying with their international treaty obligations.[36]

Section 34 of the Constitution obligates the state to ensure that all international conventions, treaties and agreements to which Zimbabwe is a party are incorporated into domestic law.[37] Additionally, Section 46 of the Constitution provides that in interpreting the Constitution, all courts of law are obligated to 'take into account the provisions of international law and all treaties to which Zimbabwe is a party'.[38] This provision prioritises and enshrines the importance and primacy of international law in the administration of justice.[39]

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[31] Villiger Mark Eugen, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (2009).
[32] See the 'Treatment of Polish Nationals in Danzig Case' PCIJ (1932) Series A/B no. 44, 24.
[33] Retselisitsoe Phooko 'The Direct Applicability of SADC Community Law in South Africa and Zimbabwe: A Call for Supranationality and the Uniform Application of SADC Community Law' (2018) 21 *PER/PELJ* at 5.
[34] 'Vienna Convention on the Law of Treaties' (adopted 23 May 1969, entered into on 27 January 1980) 1155 UNTS 331 (VCLT), art 27.
[35] See State Parties to the VCLT, last accessed from https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&clang=_en on 3 January 2023.
[36] Schmalenbach K 'Article 27' in O Dörr & K Schmalenbach (eds) *Vienna Convention on the Law of Treaties* (2018) at 493-504.
[37] Section 34 Constitution of Zimbabwe, Amendment No 20 of 2013.
[38] Ibid Section 46.
[39] Admark Moyo 'Constitutional Analysis of the Interpretation Clause of the Zimbabwean Declaration of Rights', last accessed from http://old.zimlii.org/content/constitutional-analysis-interpretation-clause-zimbabwean-declaration-rights on 15 February 2022.

Section 326 (1) of the Constitution provides that customary international law cannot prevail if it is in conflict with the Constitution or an Act of Parliament. In the case of *Gramara* where there was conflict between SADC community law and the Constitution of Zimbabwe, the high court held that the Constitution is the supreme law of the land and any law inconsistent with the Constitution is void.[40] This decision has since been criticised by scholars arguing that such decisions render international law useless as it is understood under international law that states cannot adduce their own constitutions in order to evade obligations arising under international law.[41]

3.2.2 Applicability of customary international law

According to Section 326(1) of the Constitution of Zimbabwe, customary international law is part of the law of Zimbabwe unless it is inconsistent with the Constitution or an Act of Parliament.[42] Section 326(2) requires courts to interpret all legislation consistent with customary international law in preference to an alternative interpretation inconsistent with that law.[43] In the case of *Mudzuru and Another v Ministry of Justice, Legal & Parliamentary Affairs N.O. and Others*,[44] the Constitutional Court held that 'Section 46 of the Constitution requires a court, when interpreting any provision of the Constitution contained in Chapter 4, to take into account international law and all the treaties and conventions to which Zimbabwe is a party'.[45] The court further held that 'regard must be had to the emerging consensus of values in the international community, of which Zimbabwe is a party, and also that the constitutional provisions should be interpreted so as to resonate with the founding values and principles of a democratic society based on openness, justice, human dignity, equality and freedom set out in section 3 of the Constitution, and regional and international human rights law'.[46]

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[40] *Gramara* supra note 22, para 18.
[41] Retselisitsoe Phooko 'The Direct Applicability of SADC Community Law in South Africa and Zimbabwe: A Call for Supranationality and the Uniform Application of SADC Community Law' (2018) 21 *PER/PELJ*.
[42] Section 326 (1) provides that 'Customary international law is part of the law of Zimbabwe, unless it is inconsistent with this Constitution or an Act of Parliament'; *Minister of Foreign Affairs v Michael Jenrich and Others [Jenrich],* supra note 15. See Statute of the International Court of Justice (1945), Art 38 (1) (b): 33 UNTS 993; North Sea Continental Shelf Cases, ICJ, 1969, ICJ Reports 1969: www.icj-cij.org; Antonio Cassese *International Law* at 157; DJ Harris, *Cases and Materials on International Law 6th Ed* (2004) 20.
[43] Section 326 (2) Constitution of Zimbabwe Amendment No 20 of 2013.
[44] *Mudzuru and Another v Ministry of Justice, Legal & Parliamentary Affairs N.O. and Other*s *[Mudzuru]* 2016 Constitutional Application 79 of 2014 CC 12 of 2015 ZWCC 12 (20 January 2016)
[45] Ibid.
[46] Ibid.

The significance of Section 326(2) is that customary international law is automatically applicable within Zimbabwe as long as it is not in conflict with the Constitution or an Act of Parliament. In *Barker McComarc (Pvt) Ltd v Government of Kenya*,[47] the Zimbabwean Supreme Court held that 'there is no doubt that customary international law is part of the law of this country'.[48] The South African courts have also interpreted a similar provision under Section 232 of the South African Constitution. In *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre and Another*,[49] the Court held that national legislation should be interpreted in light of customary international law.[50] In *Minister of Justice and Constitutional Development v The Southern African Litigation Centre*,[51] the court held that this interpretation does not include the development of customary international law but allow the court to 'assess the state of customary international law as it stands at the present time and apply it'.[52]

However, Dire Tladi has argued that domestic courts are more empowered to develop customary international law as domestic court decisions constitute state practice and therefore contribute directly to the development of customary international law as opposed to international courts which are 'in a better position to judge the state of existing customary international law'.[53] In examining the applicability of customary international law to Zimbabwe, one must apply a two-stage approach; first to consider if a norm qualifies as customary international law,[54] there must be generally consistent state practice, and the practice must result from a sense of legal obligation.[55] Such practice can be reflected in official state documents, national legislation or case law. Second, it is necessary to consider if there is no provision of the Constitution or Act of Parliament which conflicts with the said norm. Customary international law is then applicable to Zimbabwe if these two requirements have been satisfied. The international community accepts peremptory norms as binding on every

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[47] *Barker McComarc (Pvt) Ltd v Government of Kenya [McComarc]* 1983 (4) SA 817 (ZS).
[48] Ibid.
[49] *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre and Another* 2014 (ZACC) 30.
[50] Ibid para 24.
[51] *Minister of Justice and Constitutional Development v The Southern African Litigation Centre* 2016 867/15 2016 (ZASCA) 17.
[52] Ibid para 74.
[53] Dire Tladi 'Interpretation and international law in South African courts: The Supreme Court of Appeal and the Al Bashir saga' (2016) 16 *African Human Rights Law Journal* 2 310-338.
[54] Ibid at 315.
[55] Ibid.

state with no derogation being allowed (jus cogens),[56] and prohibition of torture and genocide fall within this ambit.[57] Although the principle of international law is based on the consent of states, once a norm has reached the level of jus cogens, it is binding on all states regardless of consent.[58] In this regard, an Act of Parliament or a provision in the Constitution which subordinates jus cogens could amount to a violation of international law.[59] Consequently, at the time of the Matabeleland Conflict, Zimbabwe had a legal obligation to the international community as a whole to prevent the violation of a jus cogens norm such as genocide, war crimes and torture, regardless of whether Zimbabwe had ratified international conventions and agreements regulating such crimes at the time.

3.2.3 Zimbabwe's IHL Treaty obligations

Zimbabwe acceded to the Geneva Conventions in March 1983.[60] It signed and ratified API and APII[61] on 19 October 1992 and, to date, has not enacted national legislation to domesticate the conventions. The ratification and enactment of implementing legislation for all the four 1949 Geneva Conventions and their 1977 APs, which regulate IAC and NIAC, is relevant for classifying the conflict in Matabeleland and determining the state's obligations to the conflict. Additionally, the four Geneva Conventions and most of the provisions of the 1977 aPs are part of customary international law.[62] The ICJ advisory opinion in relation to the *Construction of a Wall in the Occupied Palestinian Territory*[63] states that the Hague Conventions are part of customary international law[64] and Article 154 of the Fourth Geneva Convention provides that the Fourth Geneva Convention supplements sections II and III of the regulations annexed from the Hague Conventions.[65] Scholars have also observed that the four Geneva conventions have

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[56] VCLT supra note 34, Art 53.
[57] Gerrit Ferreira & Anel Ferreira-Snyman 'The incorporation of public international law into municipal law and regional law against the background of the dichotomy between monism and dualism' (2014) 17 *Potchefstroom Electronic Law Journal* 4 at 1474.
[58] Ibid, see *Barcelona Traction, Light and Power Company, Limited* (*Belgium v Spain*) (New Application: 1962) (ICJ). See East Timor (*Portugal v Australia*), Judgment, I. C.J. Reports 1995, (ICJ) p.90. and Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*The Gambia v Myanmar*).
[59] Ferreira & Ferreira-Snyman op cit note 57.
[60]See UN Treaty Database: accessed on 5 June 2023 at https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=195&Lang=EN.
[61] 'Treaties, States Parties and Commentaries: Geneva Conventions of 1949 and Additional Protocols, and their Commentaries' (ICRC) last accessed from https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/vwTreaties1949.xsp on 5 February 2022.
[62] Jean-Marie Henckaerts & Louise Doswald-Beck *Customary International Humanitarian Law* (2005).
[63] *Legal Consequences of the Construction of a Wall* (Advisory Opinion) 2004 ICJ https://www.icj-cij.org/case/131 accessed 8 June 2023.
[64] Ibid para 89.
[65] Fourth Geneva Convention, Art 154.

been accepted by virtually the whole international community and therefore form part of customary international law.[66] This means that, even if it had not signed and ratified, the four Geneva Conventions at the time of the Matabeleland Conflict, Zimbabwe would still be bound by the Conventions as a matter of customary international law. Classifying the conflict is also essential to determine whether serious violations of the Geneva Conventions, also known as war crimes, were committed, a discussion which will be undertaken under 3.5 below.

Zimbabwe signed the Statute of the International Criminal Court (ICC) in 1998 but has not ratified it.[67] Zimbabwe has not ratified the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention),[68] which was adopted in 1984. The prohibition against torture forms part of customary international law,[69] In *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre and Another*,[70] the court held that '[...t]he ban on torture has the customary international law status of a peremptory norm from which no derogation is permitted'.[71] This means that despite not ratifying the Convention, Zimbabwe is still bound by the prohibition of torture as a matter of customary international law. Unless in conflict with the Constitution and any Act of Parliament, all provisions of the above treaties that constitute customary international law are applicable and binding on the country.[72] This includes the prohibition of genocide under Article I of the Genocide Convention,[73] and Article 5(a) of the Rome Statute,[74] crimes against humanity under Article 5(b) of the Rome Statute,[75] war crimes under the four Geneva Conventions and their Additional Protocols and Article 5(c) of the Rome Statute,[76] and torture under Article 37(a) of the Torture Convention,[77] Article 7 and 8 of the Rome Statute,[78] Article

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[66] Theodor Meron 'The Geneva Conventions as Customary Law' (1987) 81 *The American Journal of International Law* 348-370.
[67] See 'State Parties to the Rome Statute', last accessed from https://asp.icc-cpi.int/states-parties/states-parties-chronological-list on 15 February 2022.
[68] 'Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (adopted 10 December 1984) 1465 UNTS 85 (Torture Convention).
[69] *Haradinaj* infra note 135.
[70] National Commissioner of the South African Police Service supra note 49.
[71] Ibid para 35.
[72] Antonio Cassese *International Law* (2001) 157.
[73] Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948) 78 UNTS 277 (Genocide Convention), art I.; see Rutaganda supra note 15 para 46.
[74] Rome Statute of the International Criminal Court (adopted 17 July 1998) ISBN No. 92-9227-227-6 (Rome Statute) art 5.
[75] Ibid.
[76] Ibid.
[77] 'Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (adopted 10 December 1984) 1465 UNTS 85 (Torture Convention) art 37.
[78] Art 7 and 8 of Rome Statute.

5 of the Universal Declaration of Human Rights[79] and Article 7 of the International Covenant on Civil and Political Rights.[80] It should be noted that although the content of treaty may be similar to the norms of customary international law, what is binding and applicable to a non-state party to the treaty is only the norms that have become part of customary international law. In addition, it should be emphasised that whilst the failure to enact national legislation to domesticate the conventions may affect applicability at domestic level, it does not absolve the state of its international law obligations. The applicability of the Geneva Conventions and Additional Protocols to Zimbabwe at the time of the Matabeleland Conflict will be discussed in the next section.

3.3 Applicability of the four Geneva Conventions and additional protocols to Zimbabwe

The conduct of armed conflict– defined in the *Tadić* case as a resort to armed force between states or protracted armed violence between governmental authorities and organised armed groups or between such groups within a state- is regulated by the Geneva Conventions of 1949 and its APs. The Geneva Conventions, including its CA3, were applicable at the time of the Matabeleland Conflict. International jurisprudence recognises that all parties to an armed conflict have an obligation to respect IHL, as was held by the Special Court for Sierra Leone (SCSL) in *Prosecutor v Sam Hinga Norman*.[81] However, the extent of obligations arising for states and non-state actors differs as both parties have different capabilities. CA1 of the Geneva Conventions imposes an obligation on high contracting parties to respect the four Geneva Conventions, and this requires the state and its organs as stipulated by internal law to prevent any acts or omissions which may amount to the breach of the Conventions. This provision is equally applicable to individuals or groups acting on behalf of the state and armed groups under the control of the state. Article 50(3) of the Second Geneva Convention obligates state parties to 'take measures necessary for the suppression of all acts contrary' to the Convention.

Two requirements must be met before IHL applies to non-state actors, namely, protracted armed violence and some level of organisation of the armed group, as was held in *Prosecutor*

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[79] 'Universal Declaration of Human Rights' (adopted 10 December 1948) 217 A (III), art. 5.
[80] 'International Covenant on Civil and Political Rights' (adopted 16 December 1966) 999 UNTS 171 (ICCPR) art 7.
[81] *Prosecutor v Sam Hinga Norman [Norman]* 2004 SCSL-2004-14-AR72(E) 'Special Court for Sierra Leone App. Chamber Decision on Preliminary Motion Based on Lack of Jurisdiction (Child Recruitment)' of 31 May 2004 para 22.

v Haradinaj.[82] Only after these conditions have been met do obligations for non-state actors arise under CA3 and APII to the Geneva Conventions. The obligation placed on non-state combatants by APII varies depending on the level of organisation and the ability of the armed group to control territory.[83] Armed groups have an obligation to respect the minimum guarantees provided by CA3. Additionally, armed groups are obligated to respect APII provided that this level of organisation and ability to control territory allows the armed group to respect IHL.

3.3.1 Common Article 3 (CA3)

CA3 provides obligations for state and non-state actors and establishes the following non-derogable rules of conduct regarding NIAC: the humane treatment for all persons in enemy hands, without any adverse distinction.[84] It specifically prohibits murder, mutilation, torture, cruel, humiliating and degrading treatment, the taking of hostages and unfair trial; that the wounded, sick and shipwrecked be collected and cared for; grants the ICRC the right to offer its services to the parties to the conflict; that parties to the conflict bring all or parts of the Geneva Conventions into force through so-called special agreements. CA3 forms part of customary international law.[85] In *Prosecutor v Jean-Paul Akayesu*, the ICTR held that the norms of CA3 'have acquired the status of customary law in that most States, by their domestic penal codes, have criminalised acts which if committed during internal armed conflict, would constitute serious violations of Common Article 3'.[86]

CA3 provides that individuals not taking part in hostilities, including hors de combat, should be treated humanely without discrimination based on 'race, colour, religion or faith, sex, birth or wealth, or any other similar criteria'.[87] To this end, CA3 prohibits murder,

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[82] *Prosecutor v Haradinaj [Haradinaj]* 2008 IT-04-84-T (ICTY) para 49; Andrew Clapham 'The Rights and Responsibilities of Armed Non-State Actors: The Legal Landscape & Issues Surrounding Engagement' (Draft for Comment) at 21, last accessed from https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1569636 on 7 February 2022.
[83] Medecins Sans Frontiers 'The Practical Guide to Humanitarian Law' last accessed from https://guide-humanitarian-law.org/content/article/3/non-state-armed-groups/ on 7 February 2022.
[84] See Common Article 3 to the Four Geneva Conventions 1949.
[85] *Prosecutor v Tadić [Tadić]* IT-94-1, (ICTY) App Chamber of October 2, 1995, para 98; *Prosecutor v Kunarac, Kovac & Vokovic [Kunarac, Kovac & Vokovic]* IT-96-23/1, (ICTY) App Chamber of 12 June 2002, para 68; *Prosecutor v Blaškić [Blaškić]*, IT-95-14, (ICTY) App. Chamber of March 3, 2000, para 166; *Prosecutor v Naletilic & Martinovic [Naletilic & Martinovic]* IT-98-34 (ICTY) App Chamber of 31 March 2000 para 228.
[86] *Prosecutor v Jean-Paul Akayesu [Akayesu]* 1998 ICTR-96-04, (ICTR) Trial Chamber Judgment of 2 September 1998 para 608.
[87] Art 3(1) of Common Article 3.

mutilation, cruel treatment, torture, and taking of hostages.[88] Additionally, CA3 prohibits humiliating and degrading treatment and 'the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees that are recognized as indispensable by civilised peoples'.[89] Furthermore, CA3 provides that the wounded and sick be collected and cared for by impartial humanitarian bodies such as the ICRC.[90] CA3 provided a critical 'breakthrough as the first systematic attempt by international law at regulating internal violence'.[91] CA3 does not define a NIAC nor spell out the conditions in which it occurs. The lack of a clear definition reflected a deliberate intention on the part of the drafters[92] and presented a significant challenge for the applicability of IHL in NIACs,[93] which APII eventually addressed.[94]

IAC and NIAC was defined in the *Tadić* case where the court held that 'an armed conflict exists whenever there is a resort to armed force between states or protracted armed violence between governmental authorities and organised armed groups or between such groups within a state'.[95] Two requirements were cited in the *Prosecutor v Ljube Boškoski and Johan Tarčulovski*,[96] case as necessary for an armed conflict to be classified as a NIAC, to which CA3 applies, namely that hostilities must reach a certain level of intensity,[97] and there must be a level of organisation within the armed group to sustain military operations.[98] APII introduces an additional requirement that the armed groups must be under responsible command and exercise territorial control 'as to enable them to carry out sustained and concerted military operations and to implement this Protocol'.[99]

CA3 applies to a NIAC, which occurs in the territory of one of the state parties to the Geneva Conventions.[100] It also applies to a situation where the conflict occurs within the state, between

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[88] Ibid.
[89] Ibid.
[90] Ibid Art 3(2).
[91] See Milanovic & Hadzi-Vidanovic op cit note 12.
[92] Sandesh Sivakumaran *The Law of Non-International Armed Conflict* (2012).
[93] See D.P. Forsythe, 'Legal Management of Internal War: The 1977 Protocol on Non-International Armed Conflicts' (1978) 72 *AJIL* 272 at 273.
[94] APII is discussed in the following section.
[95] *Tadić* supra note 13.
[96] *Prosecutor v Ljube Boškoski and Johan Tarčulovski* (*Boškoski)* 2008 IT-04-82-T (ICTY) Trial Chamber Judgment of 10 July 2008.
[97] Ibid para 77.
[98] Ibid para 194.
[99] Additional Protocol I supra note 10 Art1.
[100] Martha Bradley 'Expanding the Borders of Common Article 3 in Non-International Armed Conflicts: Amending Its Geographical Application Through Subsequent Practice? (2017) 64 *Neth Int Law Rev* at 375–406.

the government and rebel forces or between rebel forces themselves.[101] However, the armed group envisaged in CA3 must have a sufficient level of organisation that would enable it to implement IHL effectively.[102] This requirement is a critical precondition for CA3 to apply and classify the conflict as a NIAC.[103] CA3 offers minimum humanitarian protection to persons taking no active part in hostilities, including members of armed forces in certain situations stated explicitly in the article.[104] CA3 provides that all parties to the conflict should apply humanitarian provisions in regard to persons who are hors de combat. The notion of 'party to the conflict' has been considered by the ICTR, which held that under CA3 and APII, it should not be restricted to individuals under a military command as this would dilute the humanitarian protections provided by both provisions.[105] However, a broad interpretation of 'party to the conflict' should be taken, encompassing 'public officials or agents or persons otherwise holding public authority de facto representing the government to support or fulfil the war efforts'.[106]

An essential element of CA3 is its delineation of the geographical scope of conflict. It provides that the NIAC must occur 'in the territory of one of the High Contracting Party'.[107] However, the requirement that armed conflict must occur within the territory of a high contracting party has lost its significance in practice because the four Geneva Conventions have been ratified universally. The geographical requirement is also a defining feature of all NIACs. The APII provides that the protocol applies to armed conflict 'which takes place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organised armed groups …'.[108] In the *Tadić* and *Musema* cases, it was held that the armed conflict must

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[101] M Gandhi 'Common Article 3 of Geneva Conventions, 1949 in the Era of International Criminal Tribunals' (2001) 1 *ISIL YB Int'l Human & Refugee L* 207; See Martha Bradley 'Revisiting the Notion of 'Organised Armed Group' in Accordance with Common Article 3: Exploring the Inherent Minimum Threshold Requirements' (2018) *African Yearbook of International Humanitarian Law;* Cassese op cit note 19; Sivakumaran op cit note 19; Zegveld infra note 176; see Marco Milanovic, 'Is the Rome Statute Binding on Individuals? (And Why We Should Care)', (2011) 9 *JICJ* 25.

[102] See *Boškoski* supra note 96, para. 197, where the ICTY held that a much lower threshold is acceptable for organised armed groups.

[103] Pejic infra note 125 at 191-192; D Schindler, 'The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols', (1979-II) 163 *RDC* 131, at 147.

[104] M Ghandi 'Common, 'Article 3 of Geneva Conventions, 1949 in 'The Era of International Criminal Tribunals,' *ISIL Yearbook of International Humanitarian and Refugee Law*.

[105] *Akayesu* supra note 86 paras 630 to 634.

[106] *Musema* supra note 180 para 263-265 affirmed in *Rutaganda* supra note 61 and *Kayishema & Ruzindana* supra note 61.

[107] See Common Article 3 supra note 84; see Pejic infra note 125; see Schindler op cit note 103.

[108] Art 1(1) APII relates to conflicts 'which take place in the territory of a High Contracting Party.'

occur within a state.[109] The *Tadić* case further examined the geographical scope of NIACs, stating that the application of CA3 and APII extends throughout the territory of the state involved or the territory under the control of a party to the conflict beyond the vicinity where the hostilities are taking place.[110] The next section evaluates APII and the role it plays in supplementing CA3.

3.3.2 Additional Protocol II (APII) to the Geneva Conventions of 12 August 1949, relating to the protection of victims of non-international armed conflicts.

APII was developed to address the shortcomings of the ineffective CA3 regulatory framework.[111] To that extent, it offered, on the one hand, greater protection in NIAC and, on the other hand, reduced its field application compared to CA3.[112] APII introduced a new threshold for NIAC. This 'threshold consists of two major elements – the intensity of the violence[113] and the quality of the parties'.[114] The parties of the conflict must comprise the governmental forces of a state in which the NIAC occurs on one hand and non-state armed groups that control part of that state's territory on the other hand.[115] The ICTR has elaborated the conditions for the material application of APII as an armed conflict taking part in the territory of a high contracting party between the state and armed group(s) where the armed group was under a responsible command which was organised to the extent that it controlled territory and was able to implement APII.[116]

Unlike CA3, APII does not apply to conflicts between non-state armed groups in which governmental forces are not involved.[117] One of the parties must be a state party to APII,[118] and the armed forces should be organised.[119] There is a presumption that governmental armed

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[109] *Tadić* supra note 13, para 70 which describes NIACs as conflicts which take place 'within a state.'
[110] Ibid.
[111] *Musema* supra note 180 para 252.
[112] Milanovic & Hadzi-Vidanovic op cit note 12.
[113] Bradley op cit note 3.
[114] Ibid; Milanovic & Hadzi-Vidanovic op cit note 12 at 27.
[115] Schindler op cit note 103; See Article 1(1) AP II which provides that the conflict must 'take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organised armed groups'; See Noam Lubell *Extraterritorial Use of Force Against Non-State Actors* (2010) 100.
[116] *Akayesu* supra note 86 para 626.
[117] Ibid.
[118] Schindler op cit note 103.
[119] Art 1(1) of Additional Protocol (II) to the Geneva Conventions 1977.

forces[120] are organised, but for non-state armed groups, the test of organisation is strictly applied.[121] Article 1(1) APII requires an organisational structure with a responsible command,[122] control of a part of state territory,[123] the ability to conduct sustained and concerted military operations,[124] and the ability to implement the protocol.[125]

APII does not specify the size or magnitude of the territory that the armed group should control. Experience from contemporary NIACs has proved this requirement to be most tenuous, with most of the control proving to be unstable or insubstantial.[126] APII does not apply to situations of internal disturbances and tensions such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.[127] IHL scholars have argued that situations of internal disturbances and tensions are situations where the level of violence has not reached the intensity required to meet the threshold set by APII and where the armed group is not sufficiently organised. The ICRC goes on further to give examples of internal disturbances, tensions and riots that APII excludes as 'demonstrations without a concerted plan from the outset' and 'large scale arrests of people for their activities or opinions'.[128] However, it must be noted that the principles of CA3 and the protection of inalienable human rights remain in force. There are two different types of NIAC under CA3 and APII, and the latter seeks to 'distinguish situations of conflict from simple internal unrest or insecurity in which confrontations are not structured, organised, or planned by one or several identifiable commands'.[129] The following section examines the interaction between CA3 and APII.It should be noted that APII does not apply to every NIAC but sets a threshold. Until and unless

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[120] APII does not require a formal military structure. According to the ICRC Commentary of APII, governmental armed forces can include such formations as customs, police forces, national guard etc. See ICRC 'Treaties, States Parties and Commentaries' (Commentary of Additional Protocol II) at 4462 last accessed from http://www.icrc.org/ihl.nsf/COM/475-760004 on 15 February 2022.
[121] Bradley op cit note 3.
[122] Ibid.
[123] Art 1(1) of APII regulates 'the non-international armed conflict which takes place in the territory of a state party to the Geneva Convention between its armed forces and dissident forces or other organised armed groups which, under responsible command, *exercise such control over a part of its territory* as to enable them to carry out sustained and concerted military operations'.
[124] Bradley op cit note 3.
[125] Jelena Pejic 'The protective scope of Common Article 3: more than meets the eye' (2011) 93 *International Review of the Red Cross* 881.
[126] See ICRC Commentary of APII; see *Akayesu* supra note 86.
[127] Art 1 (2) of Additional Protocol (II) to the Geneva Conventions 1977.
[128] Macteld Boot *Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court: Genocide, Crimes against Humanity and War Crimes* (2001) at 573.
[129] Medecins Sans Frontiers op cit note 83.

the threshold is met, only CA3 applies.[130] To that extent, CA3 and APII operate alongside each other, with the *Tadić* Jurisdiction Case articulation bridging the divide or the differences between the two.[131] There is general recognition that even under CA3, some organisation[132] and some protracted violence is at least required.[133] However, this requirement is qualified by the ICTY case of *Boškoski*,[134] which clarified that the violence need not be protracted strictu sensu but could be a lower threshold than that of 'sustained and concerted military operations' provided in APII. The ICTY held that under CA3, the level of organisation does not need to be that of armed forces or that required under APII, which requires a responsible command and control over territory. The court also stated that the degree of organisation to engage in protracted violence under CA3 is lower than that required under APII, which requires carrying out sustained military attacks. The court further stated that the higher threshold imposed by APII on the degree of organisation was reasonable due to the detailed nature of APII, whereas CA3 only provided basic humanitarian protections. The Boškoski decision recognises and opens the way for the more common forms of organisation that have characterised most NIACs in contemporary times. By placing less stringent conditions for fulfilling the organisation requirement, it effectively holds that less organised armed groups than those envisioned by IHL can meet the organisation requirement.

The *Prosecutor v Haradinaj* case sets out some indicative factors for the requisite level of organisation such as 'the existence of a command structure and disciplinary rules and mechanisms within the group; the existence of a headquarters; the fact that the group controls a certain territory; the ability of the group to gain access to weapons, other military equipment, recruits and military training; its ability to plan, coordinate and carry out military operations, including troop movements and logistics; its ability to define a unified military strategy and

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[130] Marco Pedrazzi 'Additional Protocol II and threshold of application' in F Pocar and GL Berute (eds) 'International Institute of Humanitarian Law: 'The Additional Protocols 40 Years Later: New Conflicts, New Actors, New Perspectives; The International Institute of Humanitarian Law 'The Additional Protocols 40 Years Later: New Conflicts, New Actors, New Perspectives' (Discussion Paper) last accessed from https://www.iihl.org/wp-content/uploads/2018/06/The-Additional-Protocols-40-Years-Later-New-Conflicts-New-Actors-New-Perspectives.pdf on 8 February 2022.

[131] *Tadić* supra note 13, para 59. See *Delalic.* (*Celebici* Case) ICTY, above note 65 paras 183-185; *Prosecutor v Milorad Krnojelac [Krnojelac]* IT-97-25, Trial Chamber Judgment, para 51; *Kunarac* supra note 85, para 56.

[132] C Kress 'The 1999 Crisis in East Timor and the Threshold of the Law on War Crimes', (2002) 13 *CrimLF* 409, at 416.

[133] *Tadić* supra note 13, para 70; see Milos Hrnjaz & Janja Simentic Popovic 'Protracted Armed Violence as a Criterion for the Existence of Non-International Armed Conflict: International Humanitarian Law, International Criminal Law and Beyond' (2020) 25 *Journal of Conflict & Security Law* 3 at 473–500.

[134] Boškoski supra note 96, para 197; See A Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law*, (2010) at 128-142.

use military tactics; and its ability to speak with one voice and negotiate and conclude agreements such as cease-fire or peace accords'.[135] The ICC Trial Chamber in *Ntaganda* stated that not all of these factors need to be satisfied, and the existence of some minimum organisation is sufficient to satisfy the organisation requirement.[136] Additionally, the ICC Trial Chamber has stated that the armed group does not necessarily need to control territory to meet the organisation requirement under CA3.[137] This reasoning will also be applied in analysing the degree of organisation of dissidents in the Matabeleland Conflict. There is general acceptance by IHL scholars that Article 1(2) APII analogously applies to CA3 conflicts.[138] The ICRC also argues that rules applicable to IACs also apply to NIAC as custom. As such, it does not distinguish between CA3 and APII NIACs – applying all the rules to CA3 conflicts.[139] The next section will evaluate the applicability of CA3 and APII to the Matabeleland Conflict and determine whether mere disturbances or an armed conflict between the state and dissidents existed and, if so, what provisions of CA3 and APII were violated.

3.3.3 Applying CA3 and APII to the Matabeleland Conflict

CA3 applied to the Matabeleland Conflict by virtue of treaty obligations and the operation of customary international law. Based on *Nicaragua*,[140] CA3 constituted customary international law at the time of the Matabeleland Conflict in 1983. Additionally, *Tadić* held that 'the core of Additional Protocol II of 1977' forms part of customary international law.[141] Core aspects of APII, which are norms of customary international law, include the prohibition against the targeting of civilians, humane treatment of civilians and hors de combat, the prohibition against adverse distinction in the application of IHL, prohibition of murder, torture and cruel, inhuman or degrading as well as corporal punishment among many other things.[142] APII does not apply to the Matabeleland Conflict, which took place between 1983 and 1987, save for provisions of

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[135] *Prosecutor v Haradinaj [Haradinaj]* 2008 IT-04-84-T (ICTY) Trial Chamber Judgment of 3 April 2008 para 60.
[136] *Prosecutor v Bosco Ntaganda [Ntaganda* 2019 ICC-01/04-02/06 (ICC) Trial Chamber Judgment of 8 July 2019 para 704.
[137] Ibid para 717.
[138] Georges Abi-Saab 'Non-International Armed Conflicts' in R Baxter and C Pilloud (eds) *International Dimensions of Humanitarian Law* (1988) at 229; ICRC op cit note 18.
[139] ICRC op cit note 18.
[140] ICJ Judgment infra note 210 para 218.
[141] *Tadić* supra note 13 para 98.
[142] Jean-Marie Henckaerts & Louise Doswald-Beck *Customary International Humanitarian Law Volume I: Rules* (2005).

APII that also comprised customary international law. To ensure completeness of analysis and determine whether the Matabeleland Conflict meets the requirements of a NIAC envisaged by CA3 and APII, it is necessary to apply the requirements set out in both instruments in any event.

This enquiry must rely on the criteria set in Tadić on what constitutes an armed conflict, namely a degree of organisation from the armed group and protracted violence, which entails a certain level of intensity of the armed violence. The fundamental question to be examined and answered concerning the dissidents is: Based on an assessment of the many different contemporary types of armed groups, what is the sufficient level of organisation necessary for recognition as an organised armed group under the law of NIAC? Were dissidents an organised armed group envisaged by IHL? As stated above, the ICTY case of *Boškoski* has also outlined that the threshold for organisation need not be high, a position supported by the ICC in *Ntaganda*. Similarly, in *Prosecutor v Germain Katanga*, the ICC found that a group, at a minimum, needs to be able to organise itself to the extent that it can execute a military attack.[143] Whether the dissidents comprised an organised armed group must be examined considering a range of objective factors. An important starting point is to consider the dissident numbers. It is estimated that at their height, dissidents numbered no more than 400 with a very high attrition and mortality rate of at least 75 per cent.[144] At their peak, dissident numbers in Matabeleland South were around 200, but by the amnesty, this had been reduced to 54. In Matabeleland North, dissidents numbered around 90 at most, but again, by the time of the amnesty in 1988, only 41 remained. In western Matabeleland, dissidents numbered 90 at their peak and around 27 at the amnesty. Ultimately, only 122 dissidents would turn themselves in countrywide.[145]

Another important consideration is the context in which dissidents were created. Katri Yap discusses the motivation and goals of dissidents, who he argues were primarily comprised of ex-ZIPRA members.[146] Alexander concludes that '[…p]olitical repression and escalating violence against both civilians and former ZIPRA guerrillas created the context for dissident

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[143] 'Situation in the Democratic Republic of the Congo in the case of the *Prosecutor v Germain Katanga [Katanga]'* 2014 ICC-01/04-01/07 (ICC) Trial Chamber Judgment of 7 March 2014 para 681.
[144] Catholic Commission for Justice and Peace in Zimbabwe & Legal Resources Foundation *Breaking the Silence - Building True Peace: A Report on the Disturbances in Matabeleland and the Midlands 1980 – 1988 [Breaking the Silence]* (1997) 8
[145] Jocelyn Alexander 'Dissident Perspectives on Zimbabwe's Post-Independence War' (1998) 68 *Journal of the International African Institute* 2; *Breaking the Silence* op cit note 144.
[146] See Katri Yap *Uprooting the weeds: Power, ethnicity and violence in the Matabeleland conflict* (unpublished thesis 2001) where he argues that 'Ex-Zipra combatants constituted the core of the dissidents' at 173.

operations'.[147] ZAPU officers enlisted in the ZNA deserted and individually took up arms and resorted to banditry.[148] The dissidents had various grievances, including the arrest of ZIPRA commanders, Dumiso Dabengwa and Lookout Masuku, mistreatment and targeted attacks, and even killings within the newly formed ZNA.[149] There is, however, no evidence that they were under any organised command.[150] Indeed despite publicly claiming allegiance to the ZAPU and ZIPRA military leadership, the dissidents were disowned by senior ZAPU and ZIPRA leaders.[151]

However, the government insisted that the dissidents operated under ZAPU and ZIPRA, and unarmed civilians provided support to them.[152] Using the pretext of combating dissidents, the government deployed Five Brigade and other units of the ZNA and security agencies[153] Although dissidents deserted the ZNA individually, the threat of Super-ZAPU and the often bloody interaction with this group constituted a critical moment for many ex-ZIPRAs in which they affirmed themselves as 'pure ZIPRA' and sought to reconstitute ZIPRA's operational style.[154] The 'organisation' of the dissidents was greatly influenced by the entry into the conflict of Super-ZAPU in late 1982.[155] Numbering no more than 100, Super-ZAPU was backed by South Africa, which provided arms and logistics.[156] It operated in southern and western Matabeleland for over a year. Super-ZAPU was comprised of disenchanted ex-ZIPRA who had fled to Dukwe Refugee Camp in Botswana and some migrant workers recruited from South Africa. Its primary targets were civilians. Pathisa Nyathi argues that some ex-ZIPRA combatants who ended up in Dukwe Refugee Camp never lost their ideological orientation and flatly rejected approaches to enlist into the reactionary Super-ZAPU and work for the apartheid South Africa regime.[157]

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[147] Ibid.
[148] *Breaking the Silence* op cit note 144 at 56.
[149] Katri op cit note 146 at 169; see Nyathi infra note 157.
[150] Ibid; see Joseph Lelyveld 'The Nkomo Affair: Mistrust Never Died; News Analysis' *New York Times* 12 March 1983.
[151] Ibid.
[152] Prime Minister Mugabe and several government ministers repeatedly accused civilians of supporting and harbouring dissidents. See *Breaking the Silence* op cit note 144; Alexander op cit note 145; Katri op cit note 146.
[153] *Breaking the Silence* op cit note 144 at 56.
[154] Alexander op cit note 145.
[155] Ibid.
[156] Ibid.
[157] Pathisa Nyathi *Dissidents: Creation and Operation in Zimbabwe's Post Independence Era* (2018).

Yap argues that 'opposite to what was first believed in early literature,[158] the ex-ZIPRA dissidents were fairly well organised. With ZIPRA's command structure and geographical organisation as a model, this much smaller group of armed men tried to function structurally as they had done in the liberation war. By having a certain framework including a command, the ex-Zipra dissidents differed significantly from other operating groups'.[159] According to Alexander,

> 'the threat of Super-ZAPU resulted in the formation of regions modelled on those of ZIPRA. There were three: a northern region encompassing Kwekwe, Nkayi, Lupane; a western region which included Tsholotsho and Plumtree; and a southern region covering Kezi, Insiza, Gwanda and Beitbridge. Regions were not strictly sealed off from each other, and some groups did not establish communication with the regional structures until fairly late. Each region had a commander and was broken down into platoons of fifteen to thirty men and sections of around five. As in ZIPRA days, meetings, or Gathering Points, were held within and among regions, reinforcements were sent to weaker areas, code words were established to identify different groups and prevent infiltration, and attempts were made to protect people's families by posting them to areas away from their homes. The first commander of the northern region even took the war name of his 1970s ZIPRA predecessor'.[160]

With no political support from the ZAPU leadership and the population – which faced immense pressure from Five Brigade, the dissidents struggled to be militarily effective.[161] The absence of a political ideology also meant they could not replicate ZIPRA's effectiveness despite mimicking ZIPRA structures.[162] In terms of tactics, dissidents essentially focused on 'economic sabotage of government facilities and targeting civilians'.[163] Although Super-ZAPU carried out most attacks on white farmers, two significant massacres carried out by dissidents at Sweetwater Ranch in Mwenezi, [164] and Cold Comfort Farm in Esigodini,[165] respectively, suggests some form of 'organisation'.[166] In any event, both Five Brigade and dissidents themselves appear to have focused their attacks on civilians and made little effort to confront

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[158] Richard Hodder-Williams *Conflict in Zimbabwe: The Matabeleland Problem*. (1983) 15.
[159] Katri op cit note 146 at 176.
[160] Alexander op cit note 145; Katri op cit note 146 at 176.
[161] Ibid Alexander.
[162] Ibid.
[163] Ibid at 169.
[164] 'Rebels Said to Kill 17 in Zimbabwe', *New York Times*, 31 August 1985. See *Breaking the Silence* op cit note 144.
[165]'Rebels Massacre 16, Including Two Americans' *Associated Press*, 27 November 1987.
[166] Ibid.

each other militarily.[167] The atrocities committed by the dissidents, especially the Sweetwater Ranch and Cold Comfort Farm massacres, would conceivably constitute international crimes.[168]

Based on the preceding evidence, it would appear that dissidents were organised – albeit weakly – as envisaged by IHL. It is useful to draw on the five indicative factors cited in *Ntaganda*,[169] *Haradinaj*,[170] and *Boškoski*[171] to assess whether dissidents were sufficiently organised. However, it should be noted that not all these five indicative factors need to be met to satisfy the 'organisation' requirement. These indicative factors included first, 'the existence of a command structure and disciplinary rules and mechanisms within the group; the existence of a headquarters' – it is evident that dissidents had been rejected and disowned by the leadership in both ZAPU and ZIPRA. However, the effort to organise along the lines of ZIPRA structures indicated some form of command or organisational structure or, at the minimum, a hierarchal structure.The requirement of armed groups under responsible command, also commonly referred to as organised armed groups, is crucial to determining the existence of a NIAC.[172] CA3 and APII regulate the notion of an organised armed group. Article 1(1) of APII expressly provides that the minimum degree of organisation that an organised armed group must meet under Article 1(1) of APII to become a party to an APII-type NIAC is an essential element to the classification of such conflict.[173] This requirement and Article 8 of the ICC statute have received extensive scholarly attention from Martha Bradley,[174] who argues that 'Article 1(1) of Additional Protocol II necessitates a high degree of organisation to be in place for an armed group to qualify as an organised armed group within the scope of application of this treaty. Not every 'band' acting under a 'leader' qualifies as an organised armed group

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[167] Alan Cowell 'Split by Victory in Zimbabwe, Ex-Allies Wage a Bitter War' *New York Times* 18 February 1983; see *Breaking the Silence* op cit note 144 at 56.
[168] Siphosami Malunga 'Unpacking Gukurahundi Atrocities Against the Ndebeles of Zimbabwe: What Are the Possibilities for Individual Criminal Responsibility of the Perpetrators Under International Criminal Law?' in Emma Charlene Lubaale & Ntombizozuko Dyani-Mhango (eds) *National Accountability for International Crimes in Africa* (2022).
[169] *Ntaganda* supra note 136.
[170] *Haradinaj* supra note 135.
[171] *Boškoski* supra note 96 para 199.
[172] *Musema* supra note 180 para 248; *Prosecutor v Boskovski [Boskovski]* IT-04-82-T ICTY Trial Chamber Judgment of 10 July 2008 paras 199 – 203.
[173]See 'Revisiting the scope of application of Additional Protocol II: Exploring the inherent minimum threshold requirements.'
[174] Art 8 (2) (f) the ICC Statute sets out what Bradley argues is a new classification delineating the type of armed conflict that is protracted armed conflict' which is not contained in APII.

under Additional Protocol II as only those armed groups that satisfy certain criteria are considered to be an armed group for the purposes of Additional Protocol II'.[175]

Bradley discusses the contemporary phenomenon of the 'vast variety of non-state armed forces'.[176] These range from de facto regimes[177] resembling states to sophisticated and relatively stable organised armed groups consisting of different factions but lacking territorial control to primitive collectives fighting as a unit.[178] The diverse nature of non-state armed forces (armed groups) necessitates clear benchmark tests to advance an objective assessment of whether such a unit is an organised armed group.[179] The ICTR has addressed the issue of 'organised armed group under responsible command' in *Musema*, where the Trial Chamber held that this requirement does not necessarily mean a hierarchical structure similar to that of regular armed forces but, on the one hand, the ability to continuously carry out concerted military operations according to an agreed plan and on the other, the ability to impose discipline.[180] Additionally, *Musema* indicates that the armed group should be able to control territory to maintain these sustained and concerted military operations and implement APII.[181]

It can be argued that the dissidents in Matabeleland did not meet the organisation requirement under APII. Although they were able to continuously carry out concerted military operations according to an agreed plan as shown by the analysis on the organisation requirement under CA3, there is no evidence that they could impose discipline in the name of de facto authorities. Furthermore, there is no evidence that they controlled any territory in Matabeleland; if anything, the government accused them of blending in with the civilian population where the government had effective control.[182]

Secondly, 'the fact that the group controls a certain territory' also known as the territorial requirement must be considered. According to Article 1 (2) of APII, 'territorial control' is

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[175] Bradley infra note 196; see Bradley op cit note 101.
[176] Jann K Kleffner 'The Collective Accountability of Organized Armed Groups for System Crimes' in Andre Nollkaemper and Harmen van der Wilt (eds) *System Criminality in International Law* (2009) 261; Liesbeth Zegveld *Accountability of Armed Opposition Groups in International Law* (2002) at 133-134.
[177] Hans Kelsen 'Recognition in International Law: Theoretical Observations' (1941) 35 *AJIL* 4; Jonte Van Essen 'De Facto Regimes in International Law' (2012) 28 Merkourios *Utrecht J Int'l & Eur L* 32; Michael Schoiswohl 'De Facto Regimes and Human Rights Obligations: The Twilight Zone of Public International Law?' (2003) 6 *Aus J Pub & Int'l L* 50.
[178] Kleffner op cit note 176.
[179] Bradley op cit note 101 at 50-79.
[180] *Prosecutor v Musema [Musema]* ICTR-96-13-A ICTY Trial Chamber Judgment of 27 January 2000 para 257.
[181] Ibid.
[182] See remarks by Sydney Sekeramayi in Panorama, 'The Matabele Massacre' film documentary aired by BBC, 21 March 1983.

required to determine whether a NIAC exits.[183] Contemporary conflicts present increasingly complex situations that raise significant challenges for conflict classification. NIAC are no longer restricted to the territories of one country but spill over to other countries. They are also not limited to conventional parties offering up a range of complex and numerous combinations of warring parties, including multiple state/non-state actors in single or multiple territories. Recent examples of such complex conflict situations in Africa include the Democratic Republic of Congo, South Sudan, Mali, Central African Republic, Libya. Beyond Africa, Syria, Yemen, Iraq and Afghanistan offer similar complexity. The ICTY also dealt with this complexity in *Tadić*.[184] According to Bradley, 'attaining legal certainty is pivotal with respect to conflict classification because the category of conflict determines the applicable rules of the conventional law of armed conflict'.[185]

Bradley extensively assesses the 'territorial requirement' based on three key questions.[186] The first is an evaluation of whether the term 'territory' in Article 1(1) of APII has a geographical limitation: whether APII is restricted to the territory of a single state or across states where the same group controls both territories. The second evaluates the required degree of control to fulfil the territorial requirement, whether the same standard applies to territorial control by a state or a non-state armed group and what the minimum threshold requirement for control is in such a case. The third assesses and determines whether the organised armed group's territory has met a spatial requirement or minimum size to satisfy the territorial control requirement.[187]

The SCSL has also considered the issue of territorial control in Sierra Leone.[188] In *Musema*,[189] the ICTR Trial Chamber found that the dissident armed forces or other organised armed groups must be capable of dominating a sufficient part of the territory belonging to the high contracting party against which it is fighting. IHL scholars give guidance on the criteria for the control of territory, and they argue that although in some instances, the control of territory may be relative,

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[183] Martha Bradley 'Classifying Non-International Armed Conflicts: The 'Territorial Control' Control Requirement under Additional Protocol II in an Era of Complex Conflicts' (2020) 11 *Journal of International Humanitarian Legal Studies* 2 at 349-384.
[184] *Tadić* at para 72: the Appeal Chamber found that the conflicts in the former Yugoslavia could have been characterised as both internal and international, or as an internal conflict alongside an international one, or as an internal conflict that had become internationalised because of external support, or as an international conflict that had subsequently been replaced by one or more internal conflicts, or some combination.
[185] Bradley op cit note 183.
[186] Ibid.
[187] Ibid.
[188] *Sesay et al* infra note 209 paras 571–4; *Prosecutor v Fofana & Kondewa [Fofana & Kondewa]* SCSL-04-14-T Trial Chamber Judgment of 2 August 2007 para 126.
[189] *Musema* supra note 180 paras 253-258.

'there must be some degree of stability in the control of even a modest area of land for an armed group to be capable of effectively applying the rules of the protocol'.[190]

Applying the territorial control test set out in *Musema* and the criterion by IHL scholars to the dissidents, the Matabeleland Conflict occurred entirely within the geographic borders of Zimbabwe, a state party to the CA3 and APII. It has been shown that the dissidents modelled their operations on ZIPRA's operational zones and deployed in three regions: 'a northern region encompassing Kwekwe, Nkayi, Lupane; a western region which included Tsholotsho and Plumtree; and a southern region covering Kezi, Insiza, Gwanda and Beitbridge'.[191] As earlier explained, each region had a commander and comprised platoons of 15 to 30 men. Notwithstanding this regional deployment, in practical terms, there is no evidence to show that the dissidents acquired and maintained a spatial control of any territory whatsoever. They operated clandestinely and most ineffectively – using sabotage – within territory already controlled by Five Brigade and other units of the ZNA [192] That Five Brigade, ZNA and other security agencies were unable to eradicate dissidents between 1982 and 1987 indicates their ability to operate in the territory of Matabeleland and Midlands.

There is no evidence that dissidents had some degree of stability in the continuous 'physical control' of even a modest area of land in the territory in which they operated and therefore were unable to apply the rules of APII. It is necessary to examine whether the intensity requirement under APII was met and then engage with relevant provisions of CA3 violated in the Matabeleland conflict. However, this requirement was held not necessary in Ntaganda to meet the organisation requirement for CA3. Third, 'the ability of the group to gain access to weapons, other military equipment, recruits and military training' – most dissidents abandoned the ZNA with their weapons and also the ability of dissidents to send reinforcements to weaker areas indicates the ability of the group to gain access to weapons. Furthermore, the small and shrinking number of dissidents from 1983 to 1987 indicates that they could not recruit and train new members. Fourth, the requirement related to the intensity of fighting threshold focuses on

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[190] 'Treaties, States Parties and Commentaries: Commentary of 1987: Material Field of Application' ICRC (Commentary) at 4467, last accessed from https://ihldatabases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=15781C741BA1D4DCC12563CD00439E89 on 13 December 2022.

[191] Katri supra note 146 at 176.

[192] Tim Allen & Jean Seaton, *The Media of Conflict: War Reporting and Representations of Ethnic Violence* (1999) 295.

whether, for a NIAC to be classified as such, it must reach a certain level of intensity.[193] Some scholars suggest that there should be a greater intensity of violence before APII applies, in addition to the requirement that the organised armed group control territory.[194] However, nothing in APII suggests such a requirement is necessary to trigger IHL.

Similarly, ICRC suggests that the level of intensity under APII is not higher than the one required under CA3,[195] and Bradley posits that control over territory 'informs the notion of 'intensity' inherent in Additional Protocol II'.[196] It seems that in analysing the intensity requirement under APII, the ICRC considered the 'sustained' and 'concerted' aspects of the military operations. ICRC states that 'sustained' entails that military operations are kept up continuously, the emphasis being on continuity and persistence, whereas 'concerted' entails that the military operations are 'agreed upon, planned and contrived, done in agreement according to a plan'.[197] It should be noted that APII does not automatically apply because the organisation and the ability to control territory for sustained and concerted military operations requirements have been met, instead the armed group should also indicate a willingness to be bound by APII, and this can be done through applying the provisions of APII or making a declaration to that effect.[198]

The concept of an organised armed group has been discussed above. As indicated, there is no requirement that the intensity must itself be greater to trigger IHL application. In this regard, there would be no basis to disqualify the hostilities in Matabeleland from the operation of both CA3 and the application of core aspects of APII, which form customary international law in meeting the minimum threshold for intensity. In any event, although the campaign waged by dissidents was low intensity and curtailed by Five Brigade, several significantly severe attacks, including the Sweetwater Ranch and Cold Comfort Farm massacres, demonstrate varying levels of intensity.

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[193] Martha Bradley 'Revisiting the Notion of 'Intensity' Inherent in Common Article 3: An Examination of the Minimum Threshold Which Satisfies the Notion of 'Intensity' and a Discussion of the Possibility of Applying a Method of Cumulative Assessment' (2018) 17 *International and Comparative Law Review* 2 at 7-38.
[194] Yves Sandoz, Christophe Swinarski & Bruno Zimmermann (eds) *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987) 1343; Francoise Hampson, 'Direct Participation in Hostilities and the Interoperability of the Law of Armed Conflict and Human Rights Law' 87 *International Law Studies* (2011) 187-213 at 195-7 and 203; Yoram Dinstein op cit note 19.
[195] ICRC op cit note 190.
[196] Martha Bradley 'Revisiting the scope of application of Additional Protocol II: Exploring the inherent minimum threshold requirements' (2019) *African Yearbook on International Humanitarian Law* 81 at 105.
[197] ICRC op cit note 190.
[198] Asser Institute 'International Humanitarian Law Applicable in Non-International Armed Conflicts', last accessed on https://www.asser.nl/media/4092/asser-ihl-13463b.pdf from 13 February 2022.

Applying aspects considered by ICRC in analysing the intensity requirement under APII of sustained and concerted military operations, the fact that dissidents were able to attack different places in Matabeleland for several years between 1982 and 1987 indicates the continuity and persistence of attacks. Furthermore, the ability of dissidents to organise themselves along ZIPRA's operational strategy shows that the attacks by the dissidents were conducted in agreement according to a plan. However, as indicated in the preceding paragraph, APII does not automatically apply even if the dissidents met the organisation requirement under APII; they would need to have applied the provisions of APII or shown a willingness to be bound by it through a declaration to that effect. Having established that the Matabeleland Conflict meets the NIAC requirements under CA3, it is necessary to engage with the relevant provisions of CA3 supplemented by APII that were violated in the conflict. A more detailed discussion of the specific serious violations which amount to war crimes is undertaken in section 3.5 below.

Thus with regards to ex ZIPRA dissidents as a collective, Alexander has argued that 'its ability to plan, coordinate and carry out concerted military operations, including member movements and logistics; its ability to define a unified military strategy and use military tactics'; the deployment to different operational areas in terms of the ZIPRA operational strategy, and the ability to attack in different regions of Matabeleland is sufficient to prove that it had some capacity to plan, coordinate and carry out some 'military' operations and attacks. In fact, there is evidence that due to their military training, it was difficult for the state forces to track down dissidents resulting in them attacking the civilian population.[199] In addition, the attack at Sweetwater Ranch with the intended strategy to force a curfew suggests some level and capacity of planning and coordination.[200]

Finally, 'its ability to speak with one voice and negotiate and conclude agreements such as cease-fire or peace accords' – the establishment of regular communication protocols, including meetings at gathering points between different dissident groups, and code words to avoid infiltration – suggests a willingness to speak with one voice. There is no suggestion that the level of organisation by the dissidents was high, nor that it needed to be. Based on *Boškoski*, the level of organisation to which CA3 applies does not need to be that of government armed forces or that of APII, which requires a responsible command and control over territory.[201]

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[199] Panorama 'The Matabele Massacre' film documentary aired by BBC, 21 March 1983.
[200] Alexander op cit note 145; Katri op cit note 146.
[201] *Boškoski* supra note 96 para 199.

The Matabeleland Conflict appears to more closely meet the lower organisational threshold outlined in *Haradinaj* and *Boškoski* than the higher APII threshold. It also meets the minimal degree of organisation set out in CA3, which is required to trigger the basic humanitarian protections. It is now necessary to analyse the intensity required to trigger the applicability of CA3 to the Matabeleland Conflict. In assessing if the intensity requirement has been met, the ICC Trial Chamber in *Lubanga*,[202] and *Ntaganda* stated that certain factors need to be considered. These factors include 'the seriousness and frequency of attacks and armed clashes […] the type and number of armed forces deployed, including any involvement of the government […] the effects of the violence on the civilian population, including the extent to which civilians left the relevant area, the extent of destruction, and the number of persons killed'.[203]

It is evident that the attacks on the civilian population by both the state armed forces and dissidents were severe, leaving thousands of people dead. Five Brigade, a North Korean trained force drawn from 3 500 ex-ZANLA troops, was deployed among other security agencies, thereby showing a substantial number of armed forces involved.[204] Similarly, the government was heavily involved, as evidenced by statements from the primeminister and various cabinet ministers.[205] The effects of the violence on the civilian population were massive; many civilians left their homes, including commercial farmers who abandoned their farms. Furthermore, 'thousands of innocent civilians in Matabeleland were killed or beaten and had their houses burnt'.[206] Given these considerations, it can be stated that the Matabeleland Conflict meets the intensity requirement for the application of CA3.

3.3.4 Did the involvement of South Africa turn the Matabeleland Conflict into an IAC?

A NIAC can become an IAC where a foreign state has overall control over the armed group involved in the hostilities. *Tadić*[207] held that overall control by the state over organised and hierarchically structured groups, such as military or paramilitary units was sufficient and specific instructions were not required for each individual operation.[208] The appeals chamber

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[202] *Lubanga* supra note 16.
[203] Ibid.
[204] See *Breaking the Silence* op cit note 144.
[205] Ibid.
[206] Ibid.
[207] *Tadić* supra note 13.
[208] Ibid para 120.

said that such overall control could entail equipping, financing or training, providing operational support to the group, and coordinating or helping in the general planning of its military or paramilitary activity.[209] The SCSL affirmed this position in *Prosecutor v Sesay et al*, which stated that two requirements need to be met before finding that another state had overall control of an armed group, namely that it (i) provided financial and training assistance, military equipment and operational support, and (ii) participated in the organisation, coordination or planning of military operations.[210]

In the *Case Concerning Military and Paramilitary Activities in and Against Nicaragua*,[211] the ICJ took a more stringent approach concerning the control exerted by a foreign state on an armed group involved in hostilities. The court took the 'effective control' approach stating that the actions of an armed group could be attributable to a foreign state if that state directed or enforced the perpetration of the acts contrary to humanitarian law.[212] Unlike the 'overall control' test established in Tadić, this requires that the foreign state issued directions on military operations and enforced certain individual military operations. The ICJ and international criminal tribunals have taken different approaches in relation to the level of control required to internationalise a NIAC, the differences have centred around whether the court in question sought to apportion state responsibility or individual criminal responsibility.[213] In the case of *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*,[214] the ICJ maintained the effective control test established in *Nicaragua*, rejecting the 'overall control' test set out in *Tadić*.[215] However, since one of the objectives of this thesis is to narrow down individual criminal responsibility as opposed to state responsibility, the overall control approach will be used to analyse South Africa's involvement in the Matabeleland conflict.

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[209] Ibid paras 131- 137.
[210] *Prosecutor v Sesay et al [Sesay]* 2009 SCSL-04-15-T (SCSL) Trial Chamber Judgment of 2 March 2009, para 975.
[211] *Case Concerning Military and Paramilitary Activities in and Against Nicaragua [Nicaragua]* 1986 (ICJ) (Merits) Judgment of 27 June 1986.
[212] Antonio Cassese 'The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia' (2007) 18 *The European Journal of International Law* 649−668.
[213] Richard Goldstone & Rebecca Hamilton 'Bosnia v Serbia: Lessons from the Encounter of the International Court of Justice with the International Criminal Tribunal for the Former Yugoslavia' 21 (2008) 21 *Leiden Journal of International Law* 1 95-112; see Medecins Sans Frontiers 'The Practical Guide to Humanitarian Law: Jurisprudential Definition: International Armed Conflicts or "Internationalized" Armed Conflicts', last accessed from https://guide-humanitarian-law.org/content/article/3/international-armed-conflict-iac/ on 9 May 2022.
[214] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) [Bosnia v Servia]* 2007 (ICJ) Judgment ICJ Reports 2007 p. 43.
[215] Ibid para 404 – 405.

There is evidence that, through Operation Drama, South Africa equipped Super-ZAPU with training and provided the group with operational support, including providing ammunition,[216] as part of its destabilisation efforts of southern African frontline states. In January 1983 the Zimbabwean Minister of State in the Prime Minister's Office (Security), Emmerson Mnangagwa revealed that South Africa had formed a 'Matabele Brigade, headed by Colonel Brightenberg, to infiltrate bandits into Zimbabwe. The brigade recruited Zimbabweans working in the South African mines and trained them at Spencer, Madhibo, Phalaborwa and Ntabeni camps'.[217] Furthermore, 'after their capture in October 1983, two young Zimbabwean dissidents, Watson Sibanda and Spar Mapula, gave graphic accounts on Zimbabwe Television of South Africa's complicity in encouraging and training dissident activity in the south of the country'.[218] The captured dissidents reported that the 'ex-Zipra dissidents fought Super-Zapu in an effort to stamp out South African involvement because they suspected South Africa to be using them to promote its own interests'.[219] Partly because of the resistance by original ex-ZIPRA combatants, Super-ZAPU never grew much in size, reaching a maximum of 100. The GoZ estimated that no more than 300 Super-ZAPU dissidents were trained.[220]

The first requirement for overall control, which is providing financial and training assistance, military equipment and operational support, has been met because the South African government provided training assistance and military equipment to Super-ZAPU. However, there is no evidence that the second requirement for overall control has been met. The second requirement would entail the organisation, coordination or planning of military operations. It is unclear whether the South African government went beyond training and equipping Super-ZAPU to participate in the organisation, coordination or planning of Super-ZAPU's military operations in Matabeleland. Before the initiation of Operation Drama at the end of 1982, there

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[216] Alexander op cit note 145 at 164; see Timothy Scarnecchia 'Rationalizing Gukurahundi: Cold War and South Africa Foreign Relations with Zimbabwe, 1981 -1983' (2011) 37 *Kronos* 1 at 91; Padraig O'Malley 'Chapter 2: The State outside South Africa between 1960 and 1990' *South Africa Truth and Reconciliation Reports* at 181 and 188, last accessed from https://omalley.nelsonmandela.org/omalley/index.php/site/q/03lv02167/04lv02264/05lv02335/06lv02357/07lv02372/08lv02374.htm on 14 February 2022.

[217] Michael Sefali & John Bardill 'Development and Destabilisation in Southern Africa' (Report) at 69, last accessed from https://opendocs.ids.ac.uk/opendocs/bitstream/handle/20.500.12413/6211/ISAS_SASS3.pdf?sequence=1 on 9 February 2021.

[218] Ibid.

[219] David Martin, Phyllis Johnson & J Whitaker, 'Destructive Engagement: Southern Africa at War' (1986) 57-58; See Ulf Engel, *The Foreign Policy of Zimbabwe* (1994) 209.

[220] Ibid at 209.

is evidence that South Africa had planned and coordinated military operations in Zimbabwe, such as the sabotage at Inkomo Barracks in August 1981, attacks on the Thornhill Airbase in July 1982 and the killing of members of the (SADF) in Zimbabwe between 1981 and 1982,[221] all evidence that South Africa had military operations in Zimbabwe.

However, at the start of the Matabeleland Conflict in 1983, there is no evidence that South Africa continued to plan and coordinate these military operations in Zimbabwe. According to O'Malley, after an incident in 1981 in which four former Rhodesians who were now members of SADF inside Matabeleland were killed, Operation Drama took the 'form of arming, training and infiltrating Zimbabweans for operations primarily in Matabeleland'.[222] Thus, prior to the Matabeleland Conflict in 1983, South Africa was already implementing Operation Drama which included planning and conducting military operations in Zimbabwe. However, at the time of the Matabeleland Conflict in 1983, Operation Drama had been restricted to training and equipping Super-ZAPU only. In light of the preceding analysis, it is argued that the two requirements of overall control necessary to internationalise a NIAC as set out in Tadić and Sesay have not been met. Therefore, it cannot be said that the Matabeleland conflict was also an IAC.

3.4 Evaluating whether Gukurahundi atrocities constitute war crimes

As determined in the section above, the Matabeleland Conflict constituted a NIAC in which CA3 was applicable. For that reason, serious violations of provisions of CA3 – in particular attacks against civilians not taking part in hostilities – constitute war crimes. Article 4 (2) prohibits the followings acts against civilians: 'violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment; collective punishments; taking of hostages; acts of terrorism; outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault; slavery and the slave

[221] Alexander op cit note 145 at 156.
[222] Padraig O'Malley 'Chapter 2: The State outside South Africa between 1960 and 1990' *South Africa Truth and Reconciliation Reports* at 182 and 188, last accessed from https://omalley.nelsonmandela.org/omalley/index.php/site/q/03lv02167/04lv02264/05lv02335/06lv02357/07lv02372/08lv02374.htm on 14 February 2022; see Truth and Reconciliation Commission 'Human Rights Violations: Submissions – Question and Answers', last accessed from https://www.justice.gov.za/trc/hrvtrans/duduza/beech.htm on 14 February 2022.

trade in all their forms; pillage; threats to commit any of the foregoing acts'.[223] The following section will evaluate the conduct of Five Brigade and determine the extent to which it meets the legal requirements of the various war crimes envisaged under Article 4(2) of CA3.

CA3 prohibits violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture. The mental element required for this offence is the intention to cause violence to life or person of the victim as a result of the perpetrators volition or recklessness.[224] With regard to wilful killing, it has been held that it is prohibited to kill […]civilians not taking part in hostilities during internal armed conflict.[225] The crime of wilful killing is also prohibited by Article 8(2)(a)(i) of the ICC statute. The ICTY has held that the purpose of the prohibition is to proscribe the deliberate taking of lives of defenceless and vulnerable persons who fall under the protection of the Geneva Conventions.[226] The actus reus of murder is the taking of lives of persons taking no active part in hostilities in an internal armed conflict. The mens rea is the intention to kill or inflict serious injury, in reckless disregard of human life. Recklessness has been described as the taking of excessive risk.[227] Apart from the contextual element – in particular the nexus to the armed conflict- the elements are similar to those for the crime against humanity of murder.[228] The crime or act of physical mutilation is proscribed in Article 8(2)(c)(i) of the ICC statute, applies to protected victims in a NIAC. The crime of torture under CA3 does not differ in definition from the crime of torture under the grave breaches of the Geneva Conventions and in this case applies to NIAC.[229] The international instruments do not define cruel treatment but in the ICTY the crime was charged as an alternative to torture.[230] The prohibition against cruel treatment under CA3 is aimed at ensuring that persons not taking part in hostilities are treated humanely at all times.[231] In *Blaškić*, the ICTY held that the use of civilians to serve as human shields and to dig trenches in the war front constitutes cruel treatment.[232]

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[223] Art (4) (2) of Common Article 3.
[224] *Prosecutor v Blaškić [Blaškić]* IT-95-14, Trial Chamber Judgment, para 182.
[225] *Prosecutor v Mucic et al [Mucic et al]* IT-96-21 App. Chamber Judgment para 422-3; *Blaškić* supra note 223 para 181.
[226] Ibid *Mucic et al* para 431*; Prosecutor v Jelisić [Jelisić]*, IT-95-10, Trail Chamber Judgment, para 34.
[227] Ibid *Mucic et al* para 431 437-9; Ibid *Jelisić* para 35.
[228] *Musema* supra note 180 para 285; Ibid *Mucic et al* para 423.
[229] *Mucic et al* supra note 224 paras 442-3, 452-74; *Musema* supra note 180 para 285.
[230] Ibid *Mucic et al* para 545.
[231] *Tadić* supra note 85 paras 723-725.
[232] *Blaškić* supra note 223 para 186.

It is argued that the requirements of the war crime of violence to life and person, in particular killing, mutilation, cruel treatment and torture are readily satisfied by the facts adduced above under the other core crimes of genocide and crimes against humanity in relation to the conduct of Five Brigade. There are numerous examples illustrated of the Gukurahundi committing acts of violence to the lives and persons including murder, mutilation, cruel treatment and torture of civilians in sections discussed above.[233] What is notable in the case of war crimes is that these crimes were committed in the context of the internal armed conflict, were connected to and had a nexus to the armed conflict. In addition, alleged Five Brigade perpetrators intended to cause death or serious bodily injury and understood that their actions were likely to lead to, and did cause death.[234]

CA3 prohibits outrages upon personal dignity, in particular humiliating and degrading treatment. This crime is proscribed by Article 3 of the ICTY Statute, Article 4(e) of the ICTR Statute[235] and Article 8(2)(c)(i) of the Rome Statute.[236] Committing outrages on personal dignity is 'an act motivated by the contempt on the dignity of another person'.[237] It is considered a form of inhuman treatment which amounts to abominable acts causing serious suffering.[238] The act must be gravely humiliating and degrading to the victim but need not be directed against the physical and mental well-being of the victim. The actus reas of the crime is that the perpetrator must commit a humiliating or degrading act upon the victim to the extent the reasonable man would feel outraged thereby.[239] The mens rea is that the perpetrator must wilfully or intentionally act or omit to act with intent to humiliate or ridicule the victim, being aware of the foreseeable and logical consequences that his act or omission will humiliate or degrade the victim.[240] The 'degree of the gravity of an act and its consequences can depend on the nature or character of the act and its repetition'.[241] The form of violence, its duration, and seriousness and intensity of the physical and moral suffering may be used to determine whether a set of facts in question amount to the crime.[242] In *Akayesu,* the ICTR held that sexual violence

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[233] See evaluation of Genocide, Crimes Against humanity and war crimes in Chapters 3, 4 and 5.
[234] *Blaškić* supra note 223 para. 153.
[235] See Art 4(e) of ICTR Statute.
[236] See Art 8(2)(c) (i) of the Rome Statute.
[237] Kriangsak Kittichaisaree, *International Criminal Law* (2001) 196.
[238] *Prosecutor v Aleksovski [Aleksovski]* IT-95-14/1 Trial Chamber Judgment, para 54; *Kunarac* supra note 85 para 163.
[239] Kittichaisaree op cit note 236 at 197.
[240] *Aleksovski* supra note 237, para 56.
[241] Kittichaisaree op cit note 237 at 197.
[242] *Aleksovski* supra note 238, para 57.

which includes rape, falls within the scope of 'outrages upon personal dignity' envisaged in Article 4(e) of the Statute.[243] In *Musema*, the ICTR defined 'humiliating and degrading treatment' as the act of 'subjecting victims to treatment designed to subvert self-regard'; it may be considered a lesser form of torture but without the motives required for torture or committed under state authority.[244]

The factual arguments on the conduct of Five Brigade presented above under the sections regarding 'cruel and inhuman treatment' and 'wilfully causing great suffering or serious injury to body or health' support a determination that outrages upon personal dignity, in particular humiliating and degrading treatment, were committed against civilians in Matabeleland and Midlands by Five Brigade. Several illustrations of Five Brigade's outrages, humiliating and degrading treatment have been provided in sections above. It is argued that for purposes of war crimes these outrages, humiliation and degrading treatment were committed in the context of the internal armed conflict, were connected to and had a nexus to the armed conflict. In addition, alleged Five Brigade perpetrators wilfully or intentionally acted with intent to humiliate or ridicule their victims, being aware of the foreseeable and logical consequences that their acts or omission will humiliate or degrade the victims.[245] The depraved sexual violence committed against detainees at Bhalagwe would fall within this category as would the rapes and other acts of sexual violence committed at Korodziba and around Matabeleland and Midlands.

CA3 and APII prohibit the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court. This crime is proscribed by the CA3 and APII and was incorporated in Article 8 (2) (c) (iv) of the Rome Statute. The elements of the crimes provide that the perpetrator must have passed sentence or executed one or more persons without any previous judgment pronounced by a court, or if there was a previous judgment the 'court that rendered the judgment did not afford the essential guarantees of independence and impartiality'.[246] With regard to mens rea, the perpetrator must have been aware of the absence of a previous judgment or of the denial of relevant guarantees and the fact that they are essential or indispensable to fair trial.

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[243] Ibid para 688.
[244] *Musema* supra note 180, para 285.
[245] *Aleksovski* supra note 238, para 56.
[246] This language in APII substitutes 'regularly constituted court' in CA3.

As illustrated above under the crime of 'wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial',[247] when it was deployed to Matabeleland and Midlands, Five Brigade modus operandi was to terrorise civilians for allegedly supporting dissidents. Typically, Five Brigade would arrive at a village, at times with lists of names, accuse villagers of supporting, feeding and harbouring dissidents.[248] When villagers denied the allegations, Five Brigade would summarily mete out severe punishment in the forms of beatings, rapes and murders against the villagers.[249] The victims were almost always never provided any opportunity to defend themselves against allegations of supporting dissidents before a regularly constituted court of law. There were never any trials. There are numerous examples of summary executions of civilians in this manner by Five Brigade including the massacres at Silwane,[250] and Mkhonyeni,[251] and the mass killings at Bhalagwe and throughout Matabeleland and Midlands.[252] The abduction and enforced disappearances of the Silobela 11 and 9 men[253] without any trial or judgment also illustrates this point. It is argued that alleged Five Brigade perpetrators were indeed aware that there had been no previous trials and judgments by any court against their victims before they executed their punishments and sentences which included severe beatings, mass detentions, rape and murder.[254] There is therefore sufficient evidence that the Gukurahundi committed serious violations of CA3 and in particular war crimes during the Matabeleland Conflict which has been classified as a NIAC.

3.5 Conclusion

The chapter sought to classify the Matabeleland Conflict and investigate if it was a NIAC, and whether it became an IAC as a result of the involvement of South Africa. As explained above, NIACs are governed by CA3 and APII. Concerning NIAC conflict, APII is more restrictive and certainly more prescriptive than CA3; not all the provisions of APII apply to or regulate every NIAC. Several factors and conditions trigger it. The non-applicability of APII is not a conclusive factor to render or classify a conflict as non-international**.**

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[247] Art 130 of the Third Geneva Convention.
[248] *Breaking the Silence* op cit note 144.
[249] Ibid.
[250] *Breaking the Silence* op cit note 144 at 78.
[251] Ibid at 157.
[252] Ibid at 161.
[253] Ibid at 107.
[254] *Breaking the Silence* op cit note 144.

There is also convergence that some fundamental aspects of APII, including the basic rules enunciated in Article 13 and relating to the conduct of hostilities, entailing the prohibition to attack the civilian population and individual civilians, are part of customary international law. Other fundamental rules outside the APII, such as the prohibition of indiscriminate attacks, would also be proscribed by customary international law. To that extent, customary international law and not the threshold requirement of the APII would be the most definitive or decisive factor. As discussed above, international tribunals have outlined a more uncomplicated and straightforward test for a NIAC in *Tadić*.

This chapter has assessed the conflict in Matabeleland against the requirements set out under IHL applicable to Zimbabwe related to NIAC, including CA3 and APII, as well as the requirements of how a NIAC can be internationalised as set out in Nicaragua, Tadić and Sesay. The chapter has elaborated and applied the various requirements in the IHL necessary to determine a NIAC based on the two critical requirements of organisation and intensity to the Matabeleland Conflict. The chapter found that the Matabeleland Conflict was a NIAC to which CA3 applied but not the provisions of APII, except those that form part of customary international law. Additionally, the chapter found that the involvement of South Africa did not internationalise the conflict as it did not meet the overall control requirements**.**

To that extent, the chapter has determined that under CA3, the Matabeleland Conflict constituted a NIAC as envisaged by IHL. The international law of armed conflict, therefore, applied to the conflict. Consequently, serious crimes committed during this conflict constitute serious violations of the international law of armed conflict, commonly known as war crimes. The chapter evaluated the conduct of the Gukurahundi against the legal requirement of Article 4(2) of CA3 and found that it meets the minimum requirements for war crimes. The next chapter will evaluate whether the atrocities committed during the Matabeleland Conflict constituted the crime of genocide.

CHAPTER FOUR –AN EXAMINATION OF WHETHER FIVE BRIGADE ATROCITIES CONSTITUTE GENOCIDE

4.1 Introduction

Genocide has been committed numerous times in the past hundred or so years. The Herero and Nama Genocide which took place in 1904 to 1907 claiming at least 200 000 lives and 80 per cent of the Herero and 10 per cent of the Nama population,[1] which the Germans acknowledged, and for which offered an apology in 2021, stands out as one of the earliest recorded genocides. The mass killing of between 600 000 and 1.5 million Armenians by the Ottoman Empire in 1915,[2] the mass starvation of almost four million Ukrainians by Stalin in the Holodomor in 1932,[3] the holocaust of six million Jews by the Nazis in Germany between 1941 and 1945,[4] the mass murder of two million Cambodians by the Khmer Rouge in Cambodia in the 1970s,[5] and the mass murder of between 500 000 and 800 000 Tutsis in Rwanda in 1994,[6] are some the world's most shocking genocides.[7] This chapter examines Five Brigade (Gukurahundi) atrocities to determine whether they constitute the international crime of genocide. The chapter analyses the legal requirements – conventions, jurisprudence and scholarly writings – regarding genocide and assesses the Gukurahundi atrocities against these requirements. The first section provides an introduction which highlights some known genocides in history and provides an

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[1] Bracht, Melanie, 'Genocide in German South West Africa & the Herero Reparations Movement' (2015). (Senior Theses. 37. https://scholarcommons.sc.edu/senior_theses/37); see Allan D. Cooper, 'Reparations for the Herero Genocide: Defining the limits of international litigation' 106 *African Affairs* 422, January 2007, Pages 113-126, https://doi.org/10.1093/afraf/adl005; 'Germany officially recognizes colonial-era Namibia genocide' *DW News* 28 May 2021.

[2] Taner Akcam *A Shameful Act: The Armenian Genocide and the Question of Turkish Responsibility* (2006); Taner Akçam *The Young Turks' Crime Against Humanity: The Armenian Genocide and Ethnic Cleansing in the Ottoman Empire* (2012); Jennifer M Dixon 'Norms, Narratives, and Scholarship on the Armenian Genocide' (2015) 47 *International Journal of Middle East Studies* 4 at 796-800; Mark Baker, 'The Armenian Genocide and its denial: A review of recent scholarship' (2015) 53 *New Perspectives on Turkey* at 197-212.

[3] Robert Conquest *The Harvest of Sorrow: Soviet Collectivization and the Terror-Famine* (1986); Andrea Graziosi 'The Soviet 1931–1933 Famines and the Ukrainian Holodomor: Is a New Interpretation Possible, and What Would Its Consequences Be?' (2005) 27 *Harvard Ukrainian Studies* at 97–115; Yurii Shapoval, 'Understanding the Causes and Consequences of the Famine-Genocide of 1932–1933 in Ukraine: The Significance of Newly Discovered Archival Documents'. Originally published in Taras Hunczak and Roman Serbyn (eds) *Famine in Ukraine, 1932–1933: Genocide by Other Means* (2007) 84–97.

[4] The National WWII Museum 'The Holocaust', last accessed from https://www.nationalww2museum.org/war/articles/holocaust on 2 March 2022.

[5] *Prosecutor v Kaing Guek Eav ['Duch']*, Trial Judgment Case No 001/18-07-2007-ECCC/TC, ECCC, T.Ch., 26 July 2010. See 'Khmer Rouge: Cambodia's years of brutality' BBC News 16 November 2018.

[6] Tali Nates 'Remembering the genocide against the Tutsi in Rwanda 27 years later' *UN Africa Renewal* 7 April 2021.

[7] Kriangsak Kittichaisaree, *International Criminal Law* (2001) 69.

outline of the article and contains an overview of the crime of genocide and its prosecution before the ad hoc tribunals. The second unpacks the notion of the four protected membership groups. The third evaluates the physical and mental elements of the crime of genocide. The fourth critically reviews the jurisprudence of the international tribunals. The fifth applies the legal requirements to Five Brigade atrocities. The sixth evaluates enumerated genocidal acts. The seventh examines incitement to genocide and the eighth provides some concluding observations arguing that Five Brigade of the ZNA committed genocide from 1983 to 1987 as envisaged under international law. In each section, Gukurahundi atrocities are evaluated against legal requirements: conventions, jurisprudence and the work of leading scholars. The chapter will review the legal requirements and elements for genocide in evaluating the conduct of Five Brigade to answer the question whether Five Brigade atrocities constitute the international crime of genocide.

4.2 Overview of genocide

The crime of genocide is one of the gravest international crimes.[8] Lemkin created the term 'genocide' by combining the Greek word 'genos' meaning race or tribe and the Latin word '-cide' meaning killing.[9] Although the term gained rapid prominence after the Nuremberg Tribunal, the Charter of the IMCT made no reference to it nor was it prosecuted as such.[10] Instead, the Nuremberg Tribunal (IMT) prosecuted perpetrators for crimes against humanity and much of the crimes related to genocide were subsumed under that charge.[11] Genocide was only first prosecuted as a standalone crime 45 years after Nuremberg by the ICTY[12] and ICTR in the case of Akayesu.[13] The jurisprudence from Nuremberg through the international tribunals reaffirms the commitment to ensuring that there is no impunity for genocide and that every

[8] William Schabas *Genocide in International Law: The Crime of Crimes* (2000).
[9] Raphael Lemkin, 'Genocide as a Crime Under International Law,' (1947) 41 *AJIL* at 145; Marco Odello & Piotr Łubiński (eds) *The Concept of Genocide in International Criminal Law: Developments after Lemkin* (2020); Ion Ristea 'The Concept of Genocide in International Law' (2011) 3 *Geopolitics, History, and International Relations* 1 at 221–26; G J Andreopolous (eds) *Genocide: Conceptual and Historical Dimensions* (1994); Matthew Lippman, 'The Drafting and Development of the 1948 Convention on Genocide and the Politics of International Law' in HG van der Wilt et al (eds) *The Genocide Convention: The Legacy of 60 Years* (2012).
[10] Carsten Stahn, *A Critical Introduction to International Criminal Law* (2019) 33.
[11] Ibid.
[12] The first conviction of genocide came from the case of *Prosecutor v Krstić [Krstić]* 2001 IT-98-33 (ICTY) Trial Chamber of 2 August 2001; see Art 4(2) of ICTY Statute.
[13] *Prosecutor v Akayesu [Akayesu]* ICTR-96-4-A, ICTR Trial Chamber Judgment of 2 September 1998; see Art 2(2) of ICTR Statute; see Payam Akhavan 'The Crime of Genocide in the ICTR Jurisprudence' (2005) 3 *Journal of International Criminal Justice* 4 at 989–1006.

person responsible for committing it – no matter their position, government role or political influence – will be tried and punished.[14] Its prohibition by the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention)[15] is now part of customary international law and a norm of jus cogens.[16] Zimbabwe signed and ratified the Genocide Convention in 1991 and enacted the Genocide Act in 2000.[17] Article 2 of the Genocide Convention defines genocide as follows:

> 'any of the following acts committed with intent to destroy in whole or in part a national, ethnical, racial or religious group, as such:
>
> (a) Killing members of the group;
> (b) Causing serious bodily or mental harm to members of the group;
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
> (d) Imposing measures intended to prevent births within the group;
> (e) Forcibly transferring children of the group to another group.'[18]

The crime of genocide therefore carries three key distinguishing elements. The first is the protected group (national, ethnic, racial and religious), the second is the special intent to destroy the group in 'whole or in part', and the third is the specific genocidal acts enumerated in the definition of genocide.[19] The following section will discuss the notion of protected groups under the Convention.

4.3 Unpacking the notion of the four protected membership groups of genocide

The most important distinguishing aspect of the crime of genocide is that it targets prescribed identity groups for physical destruction. It is settled under international law that the victim of

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[14] See Nuremberg case law here https://nuremberg.law.harvard.edu/
[15] Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948) 78 UNTS 277 (Genocide Convention).
[16] Cherif M Bassiouni 'International crimes: Jus Cogens and Obligatio Erga Omnes' (1996) 59 *Law and Contemporary Problems* 4 at 68; See *Jelisić* supra note 16 para 60.
[17] Genocide Act [9:20] of 2000: The Act reproduces the provisions of the Genocide Convention verbatim.
[18] Art II of the Genocide Convention.
[19] Agnieszka Szpak 'National, Ethnic, Racial, and Religious Groups Protected against Genocide in the Jurisprudence of the ad hoc International Criminal Tribunals,' (2012) 23 *European Journal of International Law* 1 at 155–173.

genocide is the entire protected group itself, not the individual.[20] The individual is targeted for belonging to a group. To this extent, membership of a protected group is a key requirement for the crime. A common criterion in the four types of protected groups (national, racial, ethnic and religious) 'is that membership in such groups would not be challengeable by its members, who belong to it automatically, by birth, in a continuous and often irremediable manner.'[21] Voluntary and 'mobile' groups such as political, professional, or economic groups are excluded.[22] The exclusion of the political group was a deliberate decision in 1948 and again when the Rome Statute was adopted. Some states were reluctant to provide protection to political groups that would open up the possibility for interference with domestic affairs of states and thus undermine national security.[23] Because it sought to codify existing customary law, efforts to include political groups in the Rome Statute also failed.[24] A national group is thus defined as 'a collection of people who are legally defined to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties'.[25] An ethnic group is defined as one whose members share a common language and culture. An ethnic group may identify or distinguish itself as such or may be identified or distinguished by others including perpetrators of genocide as such.[26] A racial group is defined as and distinguished from other racial groups by its hereditary traits frequently identified with geographical areas, irrespective of linguistic, cultural, national or religious factors.[27]

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[20] Alexander Greenawalt 'Rethinking Genocidal Intent: The Case for a Knowledge-Based Interpretation' (1999) 99 *Columbia Law Review* 8 at 2259.
[21] *Akayesu* supra note 13, para 511.
[22] Ibid; *Prosecutor v Clement Kayishema & Obed Ruzindana [Kayishema & Ruzindana]* 1999 ICTR 95-I, (ICTR) Trial Chamber Judgment and Sentence of 21 May 1999, para 118; *Prosecutor v Georges Rutaganda [Rutaganda]*, ICTR-96-3, ICTR Trial Chamber Judgment and Sentence of 6 December 1999, para 147; *Prosecutor v Alfred Musema [Musema]* 2000 ICTR-96-13 (ICTR) Trial Chamber of 27 January 2000, para 153-4, all follow *Akayesu* supra note 13.
[23] UN Secretary-General 'Historical Survey of the Question of International Criminal Jurisdiction' (United Nations, 1949) 42.
[24] William Schabas 'Article 6 Genocide' in O Triffterer (eds) (1999); For further justifications for excluding political groups see Freda Kabatsi 'Defining or Diverting Genocide: Changing the Comportment of Genocide' (2005) 5 *Int'l Crim L Rev* 387.
[25] *Akayesu* supra note 13, para 512; see Szpak op cit note 19 at 155.
[26] Ibid *Akayesu* para 513; *Kayishema & Ruzindana* supra note 22 para 98; Szpak op cit note 19 at 155.
[27] *Akayesu* supra note 13 para 514.

4.4 The 'special intent to destroy' the group in whole or in part

4.4.1 Mental element (mens rea)

The crime of genocide requires a specific intent (dolus specialis) to destroy 'in whole or in part' one of the protected groups.[28] The threshold for proving genocide is exceptionally high and requires an analysis of both the objective and subjective intent of the perpetrators.[29] The necessary element of intent can be inferred from several facts such as words or acts or a pattern of conduct and deliberate and purposeful action that deliberately and consistently and systematically targets victims on account of their membership of a particular group while excluding members of other groups.[30] The test to be applied in establishing genocidal intent was set out in *Akayesu* which held that genocidal intent can be inferred or deduced from the conduct of the perpetrator, the general context, the scale of the atrocities and targeting of a specific group and excluding another.[31]

The complexity of determining intent with regards to genocide was further elaborated in *Prosecutor v Clement Kayishema and Obed Ruzindana* which also held that intent can be inferred from the deeds of the perpetrator including circumstantial evidence.[32] It is clear from *Akayesu* and *Kayishema and Ruzindana* that determining intent of penetrators of genocide is difficult – as indeed perpetrators rarely confess such an intent – but that it requires a contextual assessment and can be inferred from 'presumptions of fact', 'deduced from the general context of the perpetration of other culpable acts targeting the group', and 'the scale and general nature and geographical location of discriminatory attacks.'[33]

Genocide scholars have proposed two approaches to the interpretation of the mental element of genocide. Carsten Stahn argues that there is the purpose-based approach and knowledge-based approach. The purpose-based approach has an objective and subjective interpretation of

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[28] Frank Chalk 'Genocide in the 20th Century: Definitions of Genocide and their Implications for Prediction and Prevention' (1989) 4 *Holocaust and Genocide Studies* 2 at 149–160; G Verdirame 'The Genocide Definition in the Jurisprudence of the Ad Hoc Tribunals' (2000) 49 *International and Comparative Law Quarterly* 3 at 578-598.
[29] Stahn op cit note 10 at 38.
[30] See Kittichaisaree op cit note 7.
[31] *Akayesu* supra note 13 para 523.
[32] *Kayishema & Ruzindana* supra note 22 para 93 cited the Report of the Sub-Commission on Genocide, the Special Rapporteur which stated that 'the relative proportionate scale of the actual or attempted destruction of a group, by any act listed in Articles II and III of the Genocide Convention, is strong evidence to prove the necessary intent to destroy a group in whole or in part'.
[33] *Akayesu* supra note 13 para 523; *Kayishema & Ruzindana* supra note 22 para 93.

the intent required for genocide.[34] The subjective interpretation first looks at whether genocidal acts have been committed and then seeks to establish genocidal intent which is 'the intention to destroy in whole or in part' (special or specific intent).[35] This view seems to be supported by Cecile Aptel who argues that specific intent is not the mental element of genocide but a type of intent which qualifies the crime of genocide.[36] In other words, acts enumerated in the Genocide Convention remain ordinary crimes unless they are qualified by specific intent to amount to genocide.

The objective interpretation looks at objective factors such as a broader genocidal plan or policy going beyond the individual agent[37] and the 'repetition of the destructive and discriminating acts'.[38] Sandra Gagro seems to support the objective interpretation as she argues that due to the gravity and scale of genocide, it is a crime that requires a certain degree of planning and organisation and as result genocidal intent can also be inferred not only from the acts and deeds of perpetrators but also 'the plans, declarations, or written statements'[39] including 'the general political doctrine',[40] a view that is supported by the ICTR Trial Chamber in *Kayishema and Ruzindana*.[41] Devrim Aydin also supports this interpretation arguing that 'one of the criteria applied for the determination of the intent of the crime of genocide is the quantitative characteristics of the destroyed part of the group'.[42] Although scholars agree that genocide is not a game of numbers there is an understanding under the objective interpretation that the quantitative characteristic of the acts can help in the determination of intent for genocide.[43] In *Kayishema and Ruzindana*, the Trial Chamber considering the quantification of the victims paid attention to the quantitative characteristic in the determination of intent for

[34] Stahn op cit note 10 at 38-43.
[35] Ibid at 38.
[36] Cecile Aptel 'The intent to Commit Genocide in the Case of the ICTR' (2002) 13 *Criminal Law Forum* 273 at 277.
[37] Stahn op cit note 10 at 38.
[38] David Nersessian 'The Contours of Genocidal Intent: Troubling Jurisprudence from the International Criminal Tribunals' (2002) 37 *Texas International Law Journal* 231 at 266; *Prosecutor v Karadzic and Mladic [Mladic]* ICTY-95-5-R61 and IT-95-18-R 61 Judgment of 11 July 1996 para 294.
[39] Sandra Fabijanić Gagro 'Mental and Material Elements of Genocide' (2021) 11 *The Lawyer Quarterly* 1-18 at 7.
[40] Ibid.
[41] *Kayishema & Ruzindana* supra note 22 para 94.
[42] Devrim Aydin 'The Interpretation of Genocidal Intent under the Genocide Convention and the Jurisprudence of International Courts' (2014) 78 *The Journal of Criminal Law* 423 at 441.
[43] Stahn op cit note 10 at 37; Aydin op cit note 42.

genocide stating that 'when the number of the killed Tutsi people is considered, it is obvious that the purpose was the destruction of the group'.[44]

The knowledge-based approach holds that genocide has two separate mental elements, namely the general intent and specific intent, and that general intent is codified under Article 30 of the Rome Statute which encompasses intent and knowledge of the crime.[45] The general intent entails that the perpetrator must know that his actions target a protected group and the specific intent is complimentary to general intent where the perpetrator seeks to achieve a certain outcome such as the destruction of a group.[46] Greenawalt argues that 'the knowledge-based approach emphasizes the destructive result of genocidal acts instead of the specific reasons that move particular individuals to perform such acts'.[47] In *Prosecutor v Radovan Karadžić*, the ICTY Trial Chamber held that 'specific intent is distinguished from personal motive; however, the existence of a personal motive does not exclude the possession of genocidal intent'.[48] According to this approach, it is only necessary that a perpetrator supports a campaign targeting members of a protected group with the knowledge of genocidal plan and less relevant if he acted with specific intent to destroy a group in whole or in part. However, the ICC in *Al Bashir* has since stated that those who do not share the specific intent and only have the knowledge of the genocidal plan can only be held accountable as accessories.[49] Therefore the purpose-based approach will guide the evaluation of the Gukurahundi atrocities in the sections below.

4.4.2 Physical element (actus reas)

The objective or physical elements of the crime of genocide include the commission of any of the enumerated acts with the requisite intent.[50] The enumerated acts include 'killing members of a group'; 'causing serious bodily or mental harm to members of the group;' 'deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;' 'imposing measures intended to prevent births within the group;' and

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[44] *Kayishema & Ruzindana* supra note 22, para 533.
[45] Kai Ambos 'What does 'intent to destroy' in genocide mean?' (2009) 91 *International Review of the Red Cross* 876.
[46] Ibid.
[47] Greenawalt op cit note 20 at 2288.
[48] *Prosecutor v Radovan Karadžić* [*Karadžić]* 2016 IT-95-5/18-T (ICTY) Trial Chamber Judgment of 24 March 2016 para 554.
[49] Stahn op cit note 10 at 44.
[50] *Jelisić* supra note 16 para 62; *Akayesu* supra note 13 para 497; see William Schabas 'The physical element or actus reus of genocide.' In *Genocide in International Law: The Crime of Crimes* (2009) 172 -240.

'forcible transfer of children to another group'.[51] The (ICJ in the case of Bosnia v Serbia,[52] recognized that the Genocide Convention gives rise to both the international responsibility of states and the criminal liability of individuals[53] for failure to prevent genocide arguing that where there is a 'capacity to effectively influence genocidal actors and the knowledge that there exists a serious risk that genocide might occur, the individual has a positive legal duty to use his best efforts within the means available to it to prevent the genocide from occurring.'[54] Therefore, failure to prevent the commission of genocide constitutes a crime provided the specific intent to destroy can be proved.[55] A person accused of genocide must be found guilty based on his or her own individual criminal responsibility, without the necessity to establish that genocide has taken place throughout the country.[56] Although the crime of genocide is usually evident from the destruction of many lives, there is no requirement to establish the precise number of victims of an act of genocide attributable to an accused.[57] Unlike the mental element of genocide which must target the group itself, the physical element can be limited to one human being.[58]

The material elements of genocide have been divided into two: namely physical genocide and biological genocide.[59] Physical genocide entails killing members of the group, causing serious bodily or mental harm to members of the group and deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.[60] Regarding the last element, the ICTY Trial Chamber in *Prosecutor v Stakić* held that this is a method of destruction which does not require proof of result or immediate result and revolves around creating circumstances that could lead to slow death.[61] In addition to this, Gagro argues that 'such methods could be subjecting a group of people to a subsistence diet, systematic

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[51] These acts will be discussed in the section below.
[52] 'Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Bosnia and Herzegovina v Serbia and Montenegro Judgment' ICJ Reports 2007 at 43.
[53] Gaeta Paola 'On What Conditions Can a State Be Held Responsible for Genocide?' (2007) 18 *European Journal of International Law* 631–648.
[54] John Heieck *A Duty to Prevent Genocide* (2018) 28.
[55] *Prosecutor v Jean Kambanda* ICTR 97-23-S. Kambada was found guilty of genocide inter alia for his failure to fulfil his duty as Prime Minister of Rwanda to take action to stop on-going massacres.
[56] *Akayesu* supra note 13T.
[57] *Jelisić* supra note 16.
[58] Yusuf Aksar 'The 'victimized group' concept in the Genocide Convention and the development of international humanitarian law through the practice of ad hoc tribunals 1' (2003) 5 *Journal of Genocide Research* 211 at 215.
[59] *Prosecutor v Krstić [Krstić]* Appeals Chamber Judgment of 19 April 2004, para 25; *Prosecutor v Blagojević & Jokić [Blagojević & Jokić]* IT-02-60-T ICTY Trial Chamber Judgment of 17 January 2005 para 658; see 1996 International Law Commission Draft Code.
[60] Art II of the Genocide Convention.
[61] *Prosecutor v Stakić [Stakić]* 2003 IT-97-24-T (ICTY) Trial Chamber Judgment of 31 July 2003 para 517.

expulsion from homes, reduction of essential medical services below the minimum requirement, lack of proper housing, clothing, and hygiene, or excessive work, or physical exertion'.[62] Furthermore, Schabas argues that the phrase 'calculated' indicates intention and premeditation as well as imposing a condition in which it is the principal mechanism to destroy the group.[63]

On the other hand, biological genocide entails imposing measures intended to prevent births within the group, and forcibly transferring children of the group to another group. In relation to imposing measures intended to prevent births within the group, there is a view that this entails an element of coercion and doesn't necessarily need to stop birth totally and that partially prevention of birth is sufficient.[64] Claus Kreb argues that only the intention will suffice.[65] The next section will examine the jurisprudence of the international tribunals in relation to genocide.

4.5 A review of the genocide jurisprudence of the international tribunals

The crime of genocide is prohibited by the statutes of several international criminal tribunals, namely Article 4(2) of the ICTY,[66] Article 2(2) of ICTR,[67] and Article 6 of the ICC Statute.[68] Genocide is distinguished from other international crimes by its 'specific intent to destroy a group' characteristic. However, it bears similarities with other international crimes such as the crime against humanity and the crime of persecution in that it is also committed on a discriminatory basis. The difference is that to qualify persecution as a crime against humanity, there is no requirement to intend to destroy the discriminated group.[69] The purpose of analysing the jurisprudence from the ad hoc tribunals of the ICTY and ICTR regarding genocide is to understand how the courts have interpreted the Genocide Convention and apply those interpretations to examine if genocide was committed in Matabeleland and Midlands.

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[62] Gagro op cit note 39 at 12.
[63] Schabas op cit note 24.
[64] Ibid.
[65] Claus Kreb 'The International Court of Justice and the Elements of the Crime of Genocide' (2007) 18 *The European Journal of International Law* 619 at 625.
[66] See ICTY Statute last accessed from https://legal.un.org/avl/ha/icty/icty.html on 3 March 2022.
[67] See ICTR Statute last accessed from http://www.icls.de/dokumente/ictr_statute.pdf on 3 March 2022.
[68] Rome Statute of the International Criminal Court (adopted 17 July 1998) ISBN No. 92-9227-227-6 (Rome Statute).
[69] *Prosecutor v Kupreskic [Kupreskic]* 2000 IT-95-16-T (ICTY) Trial Chamber Judgment of 14 January 2000 para 2.

4.5.1 Case law from the ICTY

The first genocide trial at the ICTY was Prosecutor v Goran Jelisić .[70] The accused, a former police officer was charged with crimes against humanity and serious violations of the laws and customs of war in 1999.[71] Jelisić denied the genocide allegations but pleaded guilty to crimes against humanity and war crimes.[72] Jelisić was convicted on the crimes against humanity and war crimes charges for which he had pleaded guilty but acquitted for genocide. He was sentenced to 40 years imprisonment.[73]

The ICTY Trial Chamber reviewed the concept of 'group' targeted by genocide and held that it entails the 'stigmatization of a group as a distinct national, ethnical or racial unit by the community[…and] in the eyes of the alleged perpetrators'.[74] The trial chamber outlined two concepts to define a protected group: the first using positive and the second using negative criteria. In the positive approach, the [protected] group is distinguished by perpetrators based on the characteristics which perpetrators deem to be particular to a national, ethnic, racial or religious group. In the negative approach the perpetrators of the crime distinguish their own group identity as being separate from the group to which the victims belong based on specific national, ethnic, racial, or religious characteristics. On this basis, all individuals considered to not fall within the perpetrator group would be considered by them [perpetrators] by virtue of that exclusion to belong to the distinct (protected) group. Applying this reasoning, the Trial Chamber found that the Bosnian Muslim population was the targeted group.[75]

The determination of 'a protected group' in Jelisić is relevant to examining whether Ndebeles can be classified as a protected group for the sake of determining whether genocide was committed in Matabeleland. However, Szpak argues that the negative criterion taken in Jelisić is vague and too broad.[76] The argument is that considering the gravity of genocide, it should not be expanded by taking a broad view of what constitutes a protected group. In fact, the negative criterion in Jelisić has been attacked as failing to answer a question of how a protected

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[70] UN International Residual Mechanism for Criminal Tribunals 'Jelisić Case: Goran Jelisić Acquitted of Genocide and found Guilty of Crimes against Humanity and Violations of Laws or Customs of War', last accessed from https://www.icty.org/en/press/jelisic-case-goran-jelisic-acquitted-genocide-and-found-guilty-crimes-against-humanity-and on 2 March 2022.
[71] *Jelisić* supra note 16.
[72] Ibid paras 8 and 12.
[73] UN op cit note 70.
[74] Ibid at para 70.
[75] Ibid at paras 71–72.
[76] Szpak op cit note 19.

group is to be understood.[77] The negative approach has been consistently rejected due to the fact that it defines the group by what it is not[78] and Kreb has argued that this approach 'would not only circumvent the drafters' decision to confine the protection to certain groups, but would convert the crime of genocide into an unspecific crime of group destruction based on a discriminatory motive.'[79] As case law from the tribunals will show below, the positive approach is the most appropriate approach to take in examining if Ndebeles constitute a protected group.

In *Prosecutor v Krstić*, the ICTY Trial Chamber noted that the Genocide Convention codifies genocidal acts which have since been recognised as peremptory norms of general international law.[80] It confirmed that according to Article 4 of the ICTY Statute, genocide consisted of two key elements: first, the actus reus of the offence, which consists of one or several of the acts listed in Article 4(2) and, second, the mens rea of the offence, which consists of the intent to destroy, in whole or in part, a national, ethnic, racial, or religious group as such.[81] The Trial Chamber held that the 'Genocide Convention seeks to protect the right to life of [protected] human groups which makes genocide an exceptionally grave crime distinguished from….persecution'[82] where the victims are targeted and selected 'because of their membership of a specific community'[83] for attack but not necessarily destruction by the perpetrator.[84] The Trial Chamber reaffirmed that the Genocide Convention protects national, ethnic, racial, or religious groups.[85] Reaffirming the reasoning in Jelisić, the Trial Chamber held that both the objective and subjective criterion of identification of a protected group applied.[86] The Trial Chamber considered the group's cultural, religious, ethnic, or national characteristics within the socio-historic context which it inhabits as objective criterion of a protected group and the 'stigmatization by the perpetrators of the crime, on the basis of its

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[77] Ibid.
[78] Carola Lingaas 'Defining the Protected Groups of Genocide through the case law of International Courts' *ICD Brief* at 15, last accessed from https://internationalcrimesdatabase.org/upload/documents/20151217T122733-Lingaas%20Final%20ICD%20Format.pdf on 31 May 2022.
[79] Claus Kreb 'The Crime of Genocide under International Law' (2006) 6 *International Criminal Law Review* 461 at 474.
[80] *Krstić* supra note 12, para 541.
[81] Ibid para 542.
[82] *Krstić* supra note 12, para 553.
[83] Ibid.
[84] Ibid.
[85] Ibid para 554.
[86] Ibid para 557.

perceived national, ethnic, racial, or religious characteristics' as the subjective criterion. On the basis of this [subjective-objective] concept, as had been held in Jelisić, the Trial Chamber recognized Bosnian Muslims as a national group protected by Article 4 of the ICTY Statute.[87]

It also found evidence that Bosnian Muslims were viewed by the highest levels of Bosnian political authorities and Bosnian military forces operating in Srebrenica as a specific national group. The Yugoslavia Constitution of 1963 also recognised Bosnian Muslims as a 'nation'.[88]

In the ICTY case of *Prosecutor v Popović et al*,[89] the defendants were all former high-ranking Bosnian Serb military and police. The case also concerned the Srebrenica genocide. The Trial Chamber reaffirmed earlier findings in *Jelisić* and *Krstić* that the protected group was defined as Bosnian Muslims from eastern Bosnia who were targeted for attacks as such. As in *Krstić*, the Trial Chamber referred to the Yugoslavian Constitution of 1963 recognising Bosnian Muslims as a nation and endorsed this conclusion.[90] Two defendants, Vujadin Popović and Ljubiša Beara, were found guilty of genocide and conspiracy to commit genocide. In addition to convictions for genocide, the Trial Chamber convicted the defendants for crimes against humanity (extermination, persecution, forcible transfer, and murder); and as serious violations of the laws or customs of war (murder and terrorising civilians) and imposed sentences ranging from five years to life imprisonment.[91]

In *Prosecutor v Karadzic and Mladic*,[92] the ICTY Trial Chamber undertook a comprehensive and extensive analysis of the legal requirements, parameters and aspects of the crime of genocide when it confirmed the indictment for genocide, crimes against humanity and war crimes against Radovan Karadzic and Ratko Mladic.[93] The Trial Chamber noted that a range of acts included in the indictment were genocidal in nature,[94] including the infliction of serious bodily or mental harm, the inhumane treatment, torture, rape and deportation of civilians,[95] the deliberate infliction of substandard living conditions calculated to bring about a group's physical destruction and carried out in detention camps, through the siege and in the shelling

[87] Ibid para 560.
[88] Ibid para 559.
[89] *Prosecutor v Popović et al [Popović et al]* 2010 IT-05-88 (ICTY) Trial Chamber Judgment of 10 June 2010 paras 807–809.
[90] Ibid paras 834 839–840.
[91] Ibid.
[92] See *Prosecutor v Karadzic & Mladic [Karadzic & Mladic]* IT-95-5-R61 and IT-95-18-R61.
[93] See Ibid para 86–88. See Matthew Ross Lippman, 'Genocide: The Crime of the Century; the Jurisprudence of Death at the Dawn of the New Millennium'. 23 *Houston Journal of International Law* (2001) at 467.
[94] Ibid at 134–35.
[95] Ibid.

of cities and protected areas.[96] The Trial Chamber decided that in order to determine the individual criminal responsibility of the two leaders for the crime of genocide the court had to decide whether the pattern of ethnic cleansing which the accused had directed, when viewed in 'its totality', revealed a genocidal intent.[97] The court held that the intention to commit genocide need not be explicitly established,[98] and may be inferred from the general political doctrine that underpinned the acts in the indictment or the repetition of destructive and discriminatory acts.[99] The Trial Chamber observed that it would not have been possible for the perpetrators to implement the premeditated and publicly stated intent of the Serbian Democratic Party in Bosnia and Herzegovina to create an ethnically homogeneous state without excluding Muslims and Croat populations who were not viewed as possessing any valid territorial claims.[100] The court held that the high number of 'protected group' members selected by perpetrators suggested an intent to eliminate the group.[101] In making this determination regarding the underlying intent of the accused persons, the court considered their ideological aspirations and public statements, the scale of the ethnic cleansing, and the fact that various attacks aimed at the foundation of the victim group.

Based on their prominent positions and their roles in designing and presiding over a 'pervasive pattern of pernicious crimes' committed by the Serbian forces against Muslims and Croats,[102] Karadzic and Mladic were also indicted for acts committed by their subordinates.[103] The Trial Chamber found that this systematic strategy necessarily required command coordination and calibration.[104] It also found that genocidal intent was easier to attribute to high-level decision makers than the confined conduct of lower-level defendants.[105] The Trial Chamber held that proof of specific intent to commit genocide was required to establish the crime of genocide.[106] Crucially, genocidal intent could be established circumstantially without any need for independent proof.[107]

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[96] Ibid at 134.
[97] Ibid.
[98] Lippman op cit note 93 at 504.
[99] Ibid at 134
[100] Ibid at 135.
[101] Lippman op cit note 93 at 135 and 505.
[102] Ibid at 119.
[103] Ibid.
[104] Ibid at 119.
[105] Ibid, at 130.
[106] *Kupreskic et al* supra note 69 para 751.
[107] *Prosecutor v Karadzic [Karadzic]* IT-95-5/18; *Prosecutor v Mladic [Mladic]* IT-09-92, Trial Chamber Judgment of 22 November 2017 para 134.

Szpak has analysed *Popovic* and argues that the negative definition of a protected group was also rejected by the Trial Chamber and that a protected group is identified by positive characteristics such as national, ethnic, racial, or religious and not a lack of them.[108] Moving on to *Karadzic* and *Mladic*, the case highlights two key issues in relation to how intent for genocide can be inferred. The case finds that the repetitious nature of the genocidal acts and quantitative characteristics such as the high number of victims can be used as tools to infer intent. This is supported by Nersessian who argues that 'repetition of the destructive and discriminating acts'[109] and 'the quantitative characteristics of the destroyed part of the group'[110] can be used for the determination of the intent of the crime of genocide. Furthermore, the case of *Karadzic* and *Mladic* brings in the element of a general political doctrine underpinning genocidal acts which is relevant for the current analysis. Having looked at the case law from the ICTY mainly assessing what constitutes a protected group, it is necessary to turn to the case law of the ICTR.

4.5.2 Case law from the ICTR

The first individual to be prosecuted for genocide in the ICTR was Jean-Paul Akayesu who was charged with genocide, crimes against humanity and war crimes.[111] He was accused of directly carrying out genocidal acts in Taba including ordering and committing several murders and other crimes.[112] Many Tutsis had sought refuge in the Taba communal offices (under the control of Akayesu), where instead of being protected, they were beaten and killed. At least 2 000 Tutsis were killed in the commune of Taba alone. Many Tutsi women were publicly raped, mutilated and subjected to sexual violence by Hutu troops, reportedly in Akayesu's presence.[113]

In its judgment delivered on 2 September 1998, the ICTR Trial Chamber found that between April–July 1994 genocide was committed in Rwanda. At least between 500 000 and 800 000 civilians are estimated to have been killed. The Trial Chamber found that all the conditions for genocide were satisfied. In particular killings as one of the genocidal acts were perpetrated with

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[108] Szpak op cit note 19 at 172.
[109] Nersessian op cit note 38.
[110] Aydin op cit note 42 at 441.
[111] Szpak op cit note 19 at 155.
[112] See *Akayesu* supra note 13.
[113] Ibid paras 691–93, 731; see Szpak op cit note 19.

the intent to destroy in whole or in part a national, ethnic, racial, or religious group as such, in this case Tutsi.[114] The ICTR noted that the prohibition of genocide is aimed at protecting certain groups from extermination or attempted extermination.[115] The Trial Chamber confirmed that the Genocide Convention is 'undeniably considered part of customary international law'.[116] The court invoked the Advisory Opinion on the Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide 1951 (ICJ), where the ICJ confirmed that 'the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation'.[117]

The Trial Chamber analysed the definition of national, ethnic, racial, and religious group and reaffirmed that a national group is defined as a collection of people who are perceived to share a legal bond based on common citizenship, coupled with reciprocity of rights and duties. An ethnic group is generally defined as a group whose members share a common language or culture. The conventional definition of a racial group is based on the hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national, or religious factors. A religious group is one whose members share the same religion, denomination, or mode of worship.[118]

The Trial Chamber held that Akayesu's presence at the crimes and his orders for crimes to be committed was sufficient to hold him individually responsible for ordering, committing, or otherwise aiding and abetting in the preparation or execution of killings and causing serious bodily or mental harm to civilians.[119] There was evidence of Akayesu taking a direct and active part and in one instance he was found to have removed eight individuals from prison, handed them over to the militia, and ordered their execution.[120] The Trial Chamber also found that Akayesu had addressed a public meeting calling on the population to unite so that it could effectively eliminate the enemy, which referred to and was clearly understood by his audience to mean the Tutsi.[121] During the speech, Akayesu explicitly named and condemned specific

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[114] *Akayesu* supra note 13 paras 111, 112–129.
[115] Ibid paras 469–470.
[116] Ibid paras 492–495.
[117] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion) 1951 ICJ Rep 15 at 23; see Szpak op cit note 19.
[118] *Akayesu* supra note 13 paras 512–515.
[119] Ibid para 704.
[120] Ibid paras 272–80.
[121] Ibid para 311.

Tutsi individuals, thereby placing them in danger of being harmed or killed.[122] Akayesu also urged the killers to expedite their killings quickly and physically watched as the victims were killed with various traditional weapons, which included machetes and axes.[123] In its conviction of Akayesu, the Trial Chamber was able to infer Akayesu's genocidal intent from his public statements that explicitly advocated the genocide of the Tutsi.[124] The Trial Chamber concluded that the high number and widespread nature of atrocities systematically and deliberately directed against Tutsis throughout Rwanda was indicative of Akayesu's genocidal mental state.[125] In a ground-breaking finding, the Trial Chamber held that rape and sexual violence had been directed against Tutsi women with genocidal intent.[126] As indicated earlier the rapes, mutilations and other sexual violence were systematic, publicly committed and humiliating to the Tutsi women victims and intended to destroy them and their families, and communities physically and psychologically.[127] After being raped, sexually abused and subjected to serious bodily and mental harm, many Tutsi women were executed.[128] The Tribunal also found that widespread and organised rape may constitute genocide.[129] Finally, the Trial Chamber concluded that genocide was one of the most malevolent of international crimes, with only few mitigating factors.[130]

Unlike the *Akayesu* case which took the objective approach to determine the concept of protected group, in the *Nchamihigo* case,[131] the ICTR took the subjective approach. In terms of the objective test followed in *Akayesu*, the ICTR reaffirmed that 'the protected group should be regarded as a social fact, a stable and permanent reality.'[132] Membership of the group is automatic and irreversible and based on birth - an objective construct. In the subjective approach followed in *Nchamihigo*, the group exists to the extent that its members perceive themselves as belonging to that group (self-identification) or are perceived as such by the perpetrators of the genocide (identification by others).[133] In the subjective approach, it is

[122] Ibid.
[123] Ibid paras 272–80.
[124] Ibid paras 672–74.
[125] Ibid paras 728–35.
[126] Ibid paras 731–32.
[127] Ibid.
[128] Ibid para 733.
[129] See supra note 380.
[130] See supra note 352.
[131] *Prosecutor v Siméon Nchamihigo [Nchamihigo]* ICTR-01-63-T Trial Chamber Judgment of 12 November 2008.
[132] See Szpak op cit note 19.
[133] Aptel op cit note 36. On this issue see Verdirame op cit note 28.

perception that matters not verifiably objective factors. In *Prosecutor v Siméon Nchamihigo,* the Trial Chamber agreed with the objective test in Akayesu but added that when analysing the intent to destroy a national, ethnic, racial, or religious group in whole or in part, the perception of the perpetrators of the crimes may in some circumstances be taken into account for purposes of determining the membership of a protected group, where the evidence demonstrates that the perpetrators of the crimes perceived Hutu political opponents as Tutsi. The ICTR held that to be convicted of genocide, it is enough for the perpetrator to perceive the victim as belonging to the national, ethnic, racial, or religious group which the perpetrator intended to destroy in whole or in part. It is not necessary for the victim to actually belong to the group.[134] These nuances will be crucial to assessing the status of Gukurahundi victims of genocide.

Siméon Nchamihigo was a public prosecutor, accused of organising and participating in a campaign against the Tutsi population and political enemies in Cyangugu. Nchamihigo was found guilty of genocide and sentenced to life imprisonment.[135]

Stahn contends that the significance of the *Akayesu* and *Nchamihigo* cases was that they initiated a jurisprudential shift from an objective understanding of ethnicity within a protected group to a combination of both objective and subjective elements.[136] However, Carola Lingaas argues that a purely subjective interpretation of protected groups conflicts with the principle of legality.[137] Second, the case of *Akayesu* also established that sexual violence such as rape could be a means of committing genocide.[138] The latter is equally important in analysing the atrocities committed in Matabeleland considering that sexual violence such as rape was significantly used. However, the *Akayesu* decision regarding protected groups is not without criticism and Schabas argues that the decision goes beyond the terms of the Genocide Convention and uses the travaux préparatoires as a justification.[139] Schabas argues that if it was the intention of the drafters of the Genocide Convention to use 'stable and permanent groups' to reflect the protected groups they could have simply used that terminology instead of restricting it to four

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[134] *Akayesu* supra note 13 para 338.
[135] International Crimes Database *Siméon Nchamihigo v The Prosecutor:* ICTR-01-63-T last accessed from https://www.internationalcrimesdatabase.org/Case/108/Nchamihigo/ on 2 March 2022.
[136] Stahn op cit note 10 at 36.
[137] Carola Lingaas 'Imagined Identities: Defining the Racial Group in the Crime of Genocide' (2016) 10 *Genocide Studies and Prevention: An International Journal* 1 at 82.
[138] Stahn op cit note 10 at 37.
[139] William Schabas 'Groups Protected by the Genocide Convention: Conflicting Interpretation from the International Criminal Tribunal for Rwanda' (2000) 6 *ILSA Journal of International & Comparative Law* 2 at 380.

groups.[140] The attack on the *Akayesu* judgment by Schabas is that the Trial Chamber revised the intentions of the drafters.[141]

In *Prosecutor v Kambanda*,[142] the former Prime Minister of the Interim Government of Rwanda and Head of the Council of Ministers pleaded guilty to various stipulated facts related to the commission of genocide, crimes against humanity and war crimes.[143] Pursuant to his plea, the Trial Chamber convicted him for genocide, conspiracy to commit genocide, incitement to commit genocide and complicity in genocide.[144] The Tribunal found that Kambanda had breached his responsibility to maintain peace and security as a public official and had used his position instead to commit genocide.[145] Kambanda was found to have participated in the genocide in various ways including 'by distributing arms, making incendiary speeches, and presiding over cabinet and other meetings' in which exterminations were discussed and planned.[146] The Tribunal found that despite being aware, he nevertheless failed to take necessary and reasonable steps to prevent the massacres of civilians.[147] The Trial Chamber compared Kambanda's genocide of Tutsis to the Jewish Holocaust and ranked genocide and crimes against humanity as higher level crimes than war crimes because genocide and crimes against humanity 'particularly shock the collective conscience'.[148] The Trial Chamber determined that Kambanda's crimes were particularly grave and aggravated because they resulted in the deaths of an estimated 500 000 people in a span of 100 days.[149]

The Trial Chamber sentenced Kambanda to life imprisonment[150] finding that his crimes carried an 'intrinsic gravity, and their widespread atrocious and systematic character is particularly shocking to the human conscience'.[151] *Kambanda* reaffirms that civilian and military leaders who fail to prevent or punish subordinates' illegal acts are liable under the doctrine of superior responsibility. Yael Ronen posits that superior or command responsibility is based on a failure to act and is therefore attributable when there exists a legal duty to prevent the commission of

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[140] Ibid.
[141] Ibid at 382.
[142] *Prosecutor v Kambanda [Kambanda]* ICTR-97-23-S.
[143] Ibid.
[144] Ibid para 1422.
[145] Ibid para 1423.
[146] Ibid para 1420.
[147] Ibid para 1423.
[148] Ibid para 1417.
[149] Ibid para 1423.
[150] Ibid paras 1425–26.
[151] Ibid para 1425.

a crime.'[152] The same duty arises under the Genocide Convention which provides a duty to prevent genocide at both a state and individual level. However, it should be noted that the doctrine of command responsibility 'extends to civilian superiors only to the extent that they exercise a degree of control over their subordinates which is similar to that of military commanders'.[153] *Kambanda* illustrates that civilian and military leaders at the time of the Matabeleland Conflict could be held liable for failure to prevent the crime of genocide. Having reviewed the ICTY and ICTR jurisprudence, it is necessary to apply the legal requirements for genocide to the atrocities committed in Matabeleland.

4.6 Applying the legal requirements and jurisprudence to the Gukurahundi atrocities

As outlined in the section above, the crime of genocide has three key distinguishing elements. The first is the protected group (national, ethnic, racial and religious), the second is the special intent to destroy the group in 'whole or in part', and third is the specific genocidal acts enumerated in the definition of genocide.'[154] The previous section has examined the provisions of the Genocide Convention, the jurisprudence of the international tribunals and the writings of international law scholars regarding these three elements of the crime of genocide. This section will discuss the applicability of the notion of protected groups under the Convention, jurisprudence and scholarly literature to the Gukurahundi atrocities. The section seeks to answer three main questions: Did the civilian victims of the Gukurahundi constitute a protected ethnic group as envisaged by the Genocide Convention, jurisprudence of the international tribunals and the writings of legal scholars? Is 'special intent to destroy the protected group in whole or in part' by the Gukurahundi perpetrators established? Finally, what enumerated acts of genocide can be established? The determination of the protected status of Gukurahundi civilians follows.

4.6.1 Did the Ndebele civilian victims of the Gukurahundi constitute a protected 'ethnic group' envisaged by the Genocide Convention?

As outlined previously, an ethnic group has been defined as one whose members share a common language and culture. An ethnic group may identify or distinguish itself as such or

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[152] Yael Ronen 'Superior Responsibility of Civilians for International Crimes Committed in Civilian Settings' (2010) 43 *Vanderbilt Law Review* 2 313 at 330.
[153] Human Rights Watch 'Command Responsibility' (Report) last accessed from https://www.hrw.org/reports/2004/ij/ictr/7.htm on 31 May 2022.
[154] Szpak op cit note 19.

may be identified or distinguished by others including perpetrators of genocide as such.[155] The ad hoc tribunals have applied both objective and subjective approaches to determine the concept of protected group.[156] The starting point in examining whether the victims were a protected group is to apply the objective test. That the Ndebele ethnic group, comprising about 17-20 per cent of the population in Zimbabwe has long been recognised as a distinct and stable ethnic group is not disputed.[157]

Many different scholars of various disciplines recognise the Ndebele ethnic group in their work. Sabelo J Ndlovu-Gatsheni provides an authoritative account of the Ndebele as an ethnic group.[158] He separately examines the nation building project in the context of the challenges of Ndebele particularism in pre-colonial, colonial and post-colonial eras.[159] Masiphula Sithole explores the role of ethnicity and factionalism in Zimbabwe's nationalist politics and the liberation struggle.[160] Ranger traces the evolution of tribalism in Zimbabwe.[161] In his edited volume, Leroy Vail assembles compelling scholars on ethnicity in Zimbabwe who trace the evolution of ethnic tensions and violence.[162] Khanyisela Moyo has examined the legal and political concerns of the Ndebele ethnic minority in post-colonial Zimbabwe.[163] Enocent Msindo covers the period from the establishment of the Ndebele in modern day Zimbabwe in 1860 to 1990.[164] Clifford Mabhena addresses the question of ethnic marginalisation and domination and its eventual implications on the Gukurahundi atrocities.[165] S Mombeshora examines the relationship between ethnicity and political development in Zimbabwe.[166] James

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[155] *Akayesu* supra note 13 para 513; *Kayishema & Ruzindana* supra note 22 para 98; see Szpak op cit note 19.
[156] See *Jelisić* supra note 160; *Prosecutor v Krstic [Krstic]* IT-98-33; *Prosecutor v Kupreskic [Kupreskic]* IT-95-16; *Akayesu* supra note 13; *Prosecutor v Nchamihigo [Nchamihigo]* ICTR-01-63-T, Prosecutor v Kambanda ICTR 97-23-A, Prosecutor v Kayishema and Ruzindana ICTR-95-1-A.
[157] See Institute for Security Studies 'Country File: Zimbabwe: Ethnic Composition', last accessed from https://issafrica.org/country-file-zimbabwe/society on 3 March 2022.
[158] Sabelo J Ndlovu-Gatsheni *The Ndebele Nation: Reflections on Hegemony, Memory and Historiography* (2009).
[159] Sabelo J Ndlovu-Gatsheni 'Nation Building in Zimbabwe and the Challenges of Ndebele Particularism' (2008) *AJCR* 3.
[160] Masiphula Sithole 'Ethnicity and Factionalism in Zimbabwean Politics, 1957-79' (1980) 3 *Ethnic and Racial Studies* 1 at 181-192.
[161] Terence Ranger *The Invention of Tribalism in Zimbabwe* (1985).
[162] Leroy Vail *The Creation of Tribalism in Southern Africa* (1989).
[163] Khanyisela Moyo 'Minorities in Post-Colonial Transitions: The Ndebele in Zimbabwe' (2011) 4 *African Journal of Legal Studies* at 149-185; see Cyprian Muchemwa *Building Friendships Between Shona and Ndebele Ethnic Groups in Zimbabwe* (unpublished PhD Thesis, July 2015).
[164] Enocent Msindo *Ethnicity in Zimbabwe: Transformations in Kalanga and Ndebele Societies* 1860-1990 (2012).
[165] Clifford Mabhena 'Ethnicity, Development and the Dynamics of Political Domination in Southern Matabeleland' (2014) 19 *IOSR Journal of Humanities and Social Science* 4 at 137-149.
[166] S Mombeshora 'The Salience of Ethnicity in Political Development: The Case of Zimbabwe' (1990) 5 *International Sociology* 4 at 427-444.

Muzondidya and Ndlovu-Gatsheni engage the role and influence of ethnicity in post-colonial Zimbabwe and the reluctance of the Zimbabwe government to address ethnic tension despite its violent manifestations and implications on equality, marginalisation and development.[167] Ranger, Alexander and McGregor unpack ethnic violence between the Zimbabwean government and the Ndebele.[168] Ndlovu-Gatsheni discusses the regional perceptions of civil military relations in Matabeleland in post-colonial Zimbabwe.[169]

The foregoing scholarly works objectively recognise the distinct ethnic identity of the Ndebele as an ethnic group. There are sufficient distinguishing elements of the Ndebele as an ethnic group including its historical evolution from the pre-colonial Ndebele nation that was violently dismantled by the early colonial settlers,[170] throughout colonial rule and in post-colonial Zimbabwe. The Ndebele are also distinguishable by their geographic location, historically occupying the south-western Zimbabwe province aptly called Matabeleland. The Ndebele are also distinguished by their language and culture which is derived from Zulu but has been adapted over time. The objective test for protected group set out in Akayesu, and other cases reviewed in the preceding section, namely that the protected group should be regarded as a social fact, a stable and permanent reality in which members belong to the group automatically and irreversibly on the basis of their birth within the group.[171] In Akayesu, the ICTR found that the question of whether the Tutsi was an ethnic group envisaged by the Genocide Convention had been unequivocally answered despite the fact that Tutsis spoke the same language as Hutus. The subjective test will be examined next.

It will be recalled that in the subjective test elaborated in Jelisić, Akayesu, Krstić, and Nchamihigo above, the group exists to the extent that its members perceive themselves as belonging to that group (self-identification) or are perceived as such by the perpetrators of the genocide (identification by others).[172] In this regard, the subjective perception of the

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[167] James Muzondidya & Sabelo Ndlovu-Gatsheni 'Echoing Silences: Ethnicity in post-colonial Zimbabwe, 1980-2007' (2008) *African Journal on Conflict Resolution* at 275-297.
[168] Jocelyn Alexander and JoAnn McGregor *Violence and Memory: One Hundred Years in the Dark Forests of Matabeleland* (2000).
[169] Sabelo Ndlovu-Gatsheni 'The Post-Colonial State and Matabeleland: Regional Perceptions of Civil Military Relations' 1980-2002 in R Williams et al (eds) *Ourselves to Know: Civil-Military Relations and Defence Transformation in Southern Africa*.
[170] Francis Musoni 'Forced Resettlement, Ethnicity, and the (Un)Making of the Ndebele Identity in Buhera District, Zimbabwe' (2014) 57 *African Review Studies* 3 at 81.
[171] See Szpak op cit note 19.
[172] Aptel op cit note 36. On this issue see Verdirame op cit note 28.

perpetrators of Gukurahundi atrocities is revealing and will be considered in the following section.

4.6.2 Perpetrators' perceptions of Ndebele civilians as an ethnic group (identification by others).

There is overwhelming evidence that the highest level of political and military authorities perceived the victims as belonging to an ethnic group that was targeted for elimination. From the very onset, senior government officials did not hide their view which Doran describes as the 'succinct conflation of the historic and demographic dimensions of the alleged Ndebele sedition.'[173] He cites then Minister of Justice Eddison Zvobgo as saying that 'while some whites were afflicted by the 'withdrawal-from-power syndrome' on the 'other side of the coin, some Ndebele Zimbabweans viewed Mugabe's victory as an unbearable power denial' which had somehow to be reversed'.[174] The inflammatory and incendiary government narrative parroted in the state media was that Ndebele villagers had willingly chosen to aid dissidents by providing food and water and that there was 'blatant cooperation' rather than coercion.[175]

Reporting from Matabeleland during the height of the curfew in 1984, Observer journalist Donald Trelford captured accounts of murder and torture of civilians.[176] In an interview with the Prime Minister, Mugabe informed Trelford that 'the situation in Matabeleland is one that requires change. The people must be reoriented'.[177] Writing on Mugabe's response, Trelford mused that '[h]ere, one suspects, is the real reason for the deployment of the 5th and 6th Brigades- not so much to round up the [dissident] invaders as to re-educate the Ndebele in the reality of power'.[178]

The South Africa mission reached the same conclusion that 'it seems the government has decided to hold the Ndebele as a nation responsible for the dissident problem and act mercilessly against them'.[179] On 2 March 1983, the US Secretary of State, George Shultz, wrote that there were numerous reports of atrocities being perpetrated by 'the all-Shona brigade', including indiscriminate killings, torture, rape, beatings and the destruction of property

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[173] Stuart Doran *Kingdom, Power, Glory: Mugabe, ZANU and the Quest for Supremacy: 1960- 1987* (2017) 403.
[174] 'National unity is the lodestar of our Government' *The Herald* 16 November, 1982.
[175] 'Villagers aided dissident gang: food and water given willingly' *Chronicle* 15 September 1982.
[176] Donald Trelford 'The patter of Tiny's feet' *The Guardian* 12 March 2000.
[177] Doran op cit note 173 at 521.
[178] 'Lost people of Zimbabwe' *Observer* 15 April 1984.
[179] Doran op cit note 173 at 420.

'including, in several instances, entire villages.'[180] Shultz noted that 'there are also reports that as many as 1 000 to 3 000 people have died'.[181] On 4 March 1983, the US Assistant Secretary of State, Africa, Chester Crocker, wrote to a US delegation visiting Zimbabwe describing Mugabe's policy in Matabeleland as 'turning the Fifth Brigade loose on the Ndebele'.[182]

The 'stigmatization of a group as a distinct national, ethnical or racial unit by the community […and] in the eyes of the alleged perpetrators'[183] elaborated by the ICTY in Jelisić was evident in the perception of Ndebele civilians by high-level government perpetrators. This perception which underpinned the genocidal plan was also captured by diplomats in discussions with ZANU and government officials. The Canadian High Commissioner, Robert McLaren, reported from his engagement with the Zimbabwean Minister of Foreign Affairs, Witness Mangwende, that ministry officials are 'divided among those decent ones who refuse to believe what is going on, and Shona hard-liners'[184] one of whom reportedly said to a UK High Commission Officer 'we will kill them - all of them.'[185]

This was apparently the message being delivered by Five Brigade on the ground. Addressing relatives of dead Gukurahundi victims, Five Brigade members informed them that 'we have been deployed to kill…we are not to leave anyone except trees'.[186] In a letter to Mugabe written in 1983, Nkomo argued that Five Brigade had been formed 'outside the structure and command of the National Army' so that it could be used 'as a party and tribal Brigade for eliminating and liquidating, as you have many times said, those you choose to destroy…the ZAPU party structure and those who supported it were said to be sustaining dissidents so as to justify an armed attack on the masses'.[187] Nkomo had also said that it was now clear to him that 'you [Mugabe] support what the 5th Brigade has done and continue to do in Matabeleland' and that with the 1985 election approaching 'some believe that you are doing all this not just for electoral advantage, but that your aim is genocide'.[188]

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[180] Hazel Cameron 'British policy towards Zimbabwe during Matabeleland massacre: Licence to kill' *The Conversation* 17 September 2017.
[181] Ibid.
[182] Timothy Lewis Scarnecchia *Race and Diplomacy in Zimbabwe: The Cold War and Decolonization,1960–1984* (2021).
[183] *Jelisić* supra note 16, paras 8 12 70.
[184] Doran op cit note 173 at 445 citing Telex no WUGR0777 Harare to Ottawa 10 March 1983.
[185] Ibid.
[186] See eyewitness account in Phathisa Nyathi *The Story of a Zipra cadre: Nicholas Macala Ncube- 'Ben Mvelase'* (2014) 251-63.
[187] 'Joshua Nkomo letter to Robert Mugabe from exile in the UK' *Nehanda Radio* 24 December 2013.
[188] Doran op cit note 173 at 496; 'Informational and Proposals letters Nkomo to Mugabe' 7 June 1983, NAA: 190/2/1 part 97.

An evaluation of the subjective view of the Gukurahundi direct perpetrators regarding its victims is illustrative of how they perceived Ndebele civilians as an ethnic group and answers the question whether the victims of Gukurahundi constituted a protected group according to the Genocide Convention. There is evidence that Gukurahundi perpetrators targeted Ndebele civilians from Matabeleland and Midlands, who were also considered as supporters of the opposition ZAPU political party.[189] Doran argues that 'prima facie, many of the elements of the Gukurahundi abuses appear to justify the definition [of genocide]. While the victims were also targeted for their perceived support of ZAPU, their categorisation as such was distinguishable from their ethnicity as Ndebele speakers'.[190] The fact that political considerations formed part of the motive for the operation does not absolve the perpetrators of genocide, with case law asserting that 'the victims of the crime of genocide must be targeted because of their membership in the protected [ethnic] group, although not necessarily solely because of such membership'.[191]

To this extent, ZAPU was considered by Five Brigade and the government as a Ndebele party linking the political objective of destroying ZAPU and creating a one-party state with a genocidal plan to eliminate Ndebele ZAPU supporters.[192] Several factors demonstrate this ethnic targeting by perpetrators. The deliberate segregation and exclusion of Shona speakers from attacks and mass killings demonstrates a specific genocidal intent to destroy Ndebeles.[193] This position is supported by the admission of Colonel Lionel Dyke. He commanded the Paratrooper regiment, which committed widespread atrocities. Dyke acknowledged the targeting of Ndebeles as a deliberate military strategy.[194] Targeting an ethnic group is one of the requirements for the crime of genocide, according to the Genocide Convention.[195] While the Genocide Convention excludes political groups from protected groups, based on the available evidence, including on the methodology of atrocities, the targeting of civilians was multi-dimensional. The ethnic element was prominent, distinguishing and essential. The

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[189] The term Ndebele is used here to describe a group of collective ethnicities from the region of Matabeleland and Midlands including Kalanga, Sotho, Venda and Tonga among others.
[190] Doran op cit note 173 at 536.
[191] Ibid; see *Media Case* supra note 39 para 969.
[192] 'We blame the Ndebele party ZAPU for Gukurahundi, says Mugabe' *SABC News* 18 March 2018.
[193] Survivors report that members of the Gukurahundi would separate Shona speakers and spare them from beatings, torture and death. See Catholic Commission for Justice and Peace in Zimbabwe & Legal Resources Foundation *Breaking the Silence - Building True Peace: A Report on the Disturbances in Matabeleland and the Midlands 1980 – 1988 [Breaking the Silence]* (1997).
[194] Ibid *Breaking the Silence* at 58.
[195] See Genocide Convention.

acknowledgement by Colonel Dyke that the Ndebeles were 'well aware' of the strategy is instructive, whilst the modus operandi of the perpetrators demonstrated an ethnic cleansing agenda.[196]

In many cases, senior Zimbabwean government officials made no pretence of the tribal or ethnic nature of the operation.[197] A stark example is the comments attributable to the then Acting Commissioner of Police, Henry Mukurazhizha that 'this is not [a] political matter but tribal, that [the] Matabele must be crushed'.[198] The genocidal intent of Gukurahundi perpetrators is well captured by Yap in his interview with Five Brigade Commander, Lt Colonel Munemo who concludes that from the overwhelming evidence of Five Brigade operations, the campaign against the Ndebele civilian population was an integral part of army orders.[199] In view of the special intent nature of the crime of genocide, the perspectives of perpetrators are invariably key to determining genocidal intent. The conflation of ZAPU and Ndebele was evident from the onset. To this extent, the views of Five Brigade Commander Lieutenant Colonel Munemo show that 'ethnicity was central'[200] and operations on the ground were 'simply ethnic.'[201] According to Munemo when a victim identified themselves as Shona it led to 'identity confusion' and to Five Brigade soldiers 'losing their steam to hate.' This stark revelation by Five Brigade Commander puts the issue of genocidal intent beyond doubt. There is no question that Five Brigade soldiers targeted Ndebele civilians on the basis of their ethnic identity and this 'indicates the Brigade's ethnic stance'.[202] Ndebele civilians quickly learned that from their experience that being of Ndebele origin meant that they would be targeted unless they were able to prove that they were of Shona origin. The 5th Brigade soldiers reportedly informed villagers that their task was to 'wipe out the Ndebeles', for, among other reasons, the 'crimes' by Ndebele ancestors towards Shona ancestors.[203] In this regard 'notions of generations-old trobal antagonism came to be used by the military during the conflict, and civilians subjected to state violence came to see the war as both political and ethnic'.[204] The

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[196] *Karadzic & Mladic* supra note 92.
[197] Doran op cit note 173 at 584.
[198] Ibid.
[199] Katri Yap *Uprooting the weeds: Power, ethnicity and violence in the Matabeleland conflict* (2001) 222.
[200] See interview Col Munemo in 1996 quoted in Katri op cit note 99 at 206.
[201] Ibid.
[202] See footnote 284 in Katri op cit note 99.
[203] *Breaking the Silence* op cit note 93 at 9; see Katri op cit note 99 at 205; citing Berkley/Schrage 1986:97; Weitzer 1990:180; Werbner 1991:162; Tragedy, 1992:14; Carver 1993:16, Alexander et al, 2000:222).
[204] JA Alexander, AJ McGregor and T Ranger (eds) *Violence and Memory: One Hundred Years in the 'Dark Forests' of Matabeleland* (2000) at 6; T Dube 'Gukurahundi Remembered: The Police, Opacity and the

foregoing evidence of genocidal intent is indicative of the crime of genocide having been committed by the Gukurahundi. The next section will evaluate victim perceptions of belonging to the Ndebele ethnic group.

4.6.3 Victim perceptions of belonging to the Ndebele ethnic group (self-identification)

Many victims and survivors of the Gukurahundi atrocities have reported that the atrocities were connected to an ethnic narrative and agenda. Victims report that in many instances they were identified for atrocity because of their ethnic identity and that the perpetrators made no secret of this underlying motive.[205] In other instances, perpetrators referred to their Shona supremacy. Victims report that in all instances, villagers were forcibly gathered and addressed in Shona not always but sometimes through an interpreter. Also, victims report being forced all night to sing songs in Shona and being beaten if they failed.[206] Villagers who were unable to understand or respond in Shona were targeted for killing or severe beatings. In all instances, where a targeted individual was able to respond or speak in Shona, they were spared and told to go 'home'.[207] There is therefore sufficient evidence that the Ndebele civilian population perceives that it was chosen and targeted by perpetrators on account of its ethnic identity. Both the objective and subjective test for establishing a protected ethnic group in terms of the Genocide Convention are satisfactorily met. The next section will examine whether genocidal intent can be established with regards to the Gukurahundi perpetrators.

4.6.4 Is 'special intent to destroy the protected group in whole or in part' by the Gukurahundi perpetrators established?

In order to determine that the Gukurahundi atrocities constitute genocide, it is necessary to first establish genocidal intent on the part of the perpetrators. The jurisprudence of the international tribunals – in particular Akayesu and Kayishema and Ruzindana – is clear that establishing genocidal intent is especially difficult.[208] The tribunals have held that genocidal intent can

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Gukurahundi Genocide in Bulilimamangwe District, 1982–1988' (2021) *Journal of Asian and African Studies* at 1848-1860; *Akayesu* supra note 13 para 513; *Kayishema & Ruzindana* supra note 22 para 98.
[205] See *Breaking the Silence* op cit note 193.
[206] Pedzisai Maedza 'Mai VaDhikondo: echoes of the requiems from the killing fields' (2017) *Social Dynamics*.
[207] Interview Karlen 1994; interview Dlodlo 1996 quoted in Katri op cit note 99 at 205.
[208] *Akayesu* supra note 13 para 523; *Kayishema & Ruzindana* supra note 22 para. 93

therefore be inferred from a range of circumstances,[209] including the general context of the perpetration of other crimes against the same group,[210] the methodical planning,[211] demonstration of purposeful action,[212] the scale of atrocities,[213] words and actions of perpetrators,[214] the number of victims,[215] the repetitive commission of offences by the same perpetrators,[216] the deliberate and systematic targeting of members of a group and exclusion of other groups,[217] the type of weapons used, the extent of injuries and the use of derogatory language directed at members of the group.[218] This list is indicative and not exhaustive. The genocidal intent of the Gukurahundi perpetrators can be gleaned from a range of available and compelling evidence from victims, perpetrators, witnesses, analysts, media reporters, diplomats and scholars.

It should be noted that 'inferred intent' is not without its critics. For instance, Schabas argues that inferred intent is just an inquiry, and the real subject is state policy or plan. He argues that genocide requires evidence of a state plan or policy and that in the determination of genocide, the starting point should be the existence of a state policy and then relating that policy to individual guilt. He goes on to state that 'following this approach, the first issue to be resolved in a determination as to whether genocide is being committed is whether there exists a State policy'.[219] Aptel has questioned whether intent for genocide should be determined solely at the individual or state 'policy' level[220] and Greenawalt has also criticised inferred intent, arguing that the ICTR jurisprudence 'suggests that courts should presume specific intent largely by virtue of the fact that a perpetrator participates in a genocidal campaign. In this way, it begs the question as to whether the specific intent standard does any work at the individual level'.[221] However, other scholars have rejected this approach, arguing that this would mean non-state actors such as militia and terrorist groups cannot commit genocide due to the absence of a state

[209] Ibid.
[210] Ibid.
[211] Ibid.
[212] Ibid.
[213] Ibid.
[214] Ibid.
[215] Ibid.
[216] Ibid.
[217] Ibid.
[218] Ibid.
[219] William Schabas 'State Policy as an Element of International Crimes' (2008) 98 *Journal of Criminal Law and Criminology* 953 at 971.
[220] Aptel op cit note 36.
[221] Greenawalt op cit note 20.

plan or policy.[222] Notwithstanding its shortcomings, inferring genocidal intent can be justified on the basis that it is the only available judicial strategy for courts to examine cases under the narrow definition of genocide under the Genocide Convention.[223] The various factors indicative of genocidal intent are discussed below.

4.6.5 Factors indicative of Gukurahundi genocidal intent

The context in which the Gukurahundi genocide took place was a conflict situation in which the perpetrators belonged to the Zimbabwe government and military who attacked innocent Ndebele civilians in Matabeleland and Midlands ostensibly on allegations that they were supporters of ZAPU and also of dissidents.[224] Between 1983 and 1987, perpetrators from the Zimbabwean government and military committed genocidal acts including killings, torture, rape, destruction of property, detentions and other persecutory abuses systematically and deliberately targeting the same Ndebele population.[225] The general context of the perpetration of crimes and the systematic targeting of Ndebeles is therefore demonstrated.

With regards to the commission of the same genocidal crimes by the same offenders, there is indisputable evidence that the genocidal acts committed against the Ndebele civilian population was committed by the same perpetrators which included senior level government employees, members of Five Brigade, Central Intelligence Officers (CIO) and other security officers. The same Five Brigade deployed to Matabeleland North attacked dozens of villages in Tsholotsho in 1983.[226] Similarly, Five Brigade, CIO and ZNA was responsible for the mass arrests in Matabeleland and detentions and torture at Stops Camp in Bulawayo and the detentions at Bhalagwe Detention Camp in Kezi, Matobo District.[227]

The issue of the scale of the atrocities is easier to prove. The scale of the genocidal attacks in Matabeleland and Midlands was massive. The genocide lasted a duration of four years during which killings, rapes, torture and other crimes were committed non-stop and without any restraint. An estimated 20 000 – and possibly more – Ndebele civilians were killed in the

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[222] Milena Sterio 'The Karadžić Genocide Conviction: Inferences, Intent, and the Necessity to Redefine Genocide' (2017) 31 *Emory International Law Review* 271 at 289.
[223] Ibid.
[224] See *Breaking the Silence* op cit note 193.
[225] Ibid.
[226] Ibid.
[227] Ibid at 12 and 91.

genocide, with at least 2 000 killed in the first six weeks in Tsholotsho, Matabeleland North.[228] Thousands of Ndebele women were subjected to systematic rapes and thousands more civilians were beaten, tortured and mutilated. The imposition of a food embargo, a region-wide curfew and the burning of food stocks aimed to starve the entire Ndebele population in Matabeleland and Midlands to death to bring about its destruction resulted in the starvation, death and illness of thousands of Ndebele civilians.[229] Thousands of civilians were detained at Bhalagwe and other military camps and detentions facilities in Matabeleland and Midlands.[230]

It is possible to infer genocide from the general nature of the crimes committed against the Ndebele civilians which included mass murders – often publicly executed – mass and systematic rapes -– also often publicly committed. Genocide can also be inferred from the wholesale destruction and burning of villages and property in Matabeleland, mass beatings and torture as well as mass detentions of civilians, accompanied by torture.[231] Other abuses including killings and mass disappearances of Ndebele civilians – especially men[232] – could also be a basis for inferring genocide. The fact that the crimes were restricted to Matabeleland and parts of Midlands inhabited by the Ndebele ethnic group is illustrative of the genocidal targeting of this ethnic group. There are no reports of similar mass murders taking place anywhere else around Zimbabwe at the same time. The specific deployment of Five Brigade, other ZNA and other security agencies to Matabeleland for over four years, accompanied by the relentless and continuous perpetration of atrocities using military grade weapons against unarmed Ndebele civilians throughout this period suggests a targeting of the population of Matabeleland.

The jurisprudence from ad hoc tribunals such as the ICTR and the ICTY reflects that genocide can be inferred from the conduct of the perpetrators.[233] However, in relation to the nature of crimes committed in a specific region the case of *Karadžić* seemed to take a different view. The Trial Chamber held that genocide could not be inferred from the conduct of Karadžić and other members of the joint criminal enterprise and that 'while Karadžić and others may have engaged in ethnic cleansing by attempting to remove Muslim Bosnians from many parts of

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[228] Ibid at 77.
[229] Hazel Cameron 'State-Organized Starvation: A Weapon of Extreme Mass Violence in Matabeleland South, 1984' (2018) 12 *Genocide Studies International Journal* 1 at 26-47.
[230] Ibid at 12 91 and 97.
[231] See *Breaking the Silence* op cit note 193.
[232] Ibid.
[233] See *Jelisić* supra note 16 para 47; *Kayishema & Ruzindana* supra note 22 para 93.

Bosnia, this finding does not lead to the establishment of genocidal intent'.[234] This has been supported by Stahn who argues that inferring 'the intent to ethnically cleanse an area by forcibly removing a protected group as the intent to destroy a protected group stretches the boundaries of genocide'.[235] However, what differentiates *Karadžić* from the atrocities in Matabeleland is that the perpetrators did not seek to cleanse Matabeleland of the Ndebeles but to bring about a destruction of the Ndebeles, which meets the acts enumerated in the Genocide Convention and therefore genocide can be inferred from the actions of Five Brigade.

There is sufficient evidence of the exclusion of members of the Shona ethnic group or persons who spoke the Shona language. Perpetrators from Five Brigade have admitted to targeting Ndebeles and excluding other groups.[236] Victims report that during atrocities, members of the Shona ethnic group who spoke the Shona language were separated and spared.[237] Victims report that at roadblocks, Five Brigade would separate out Ndebele civilians based on the names on their identity card documents. Selected victims would be beaten, tortured, killed or disappeared**.**[238] The exclusion of members of other groups is thus demonstrated.

It is possible to discern genocidal intent from the manner in which the crimes were committed. The Gukurahundi was systematic and consistent in its methods and its targeting of Ndebele victims. It moved from village to village, systematically conducting mass public beatings, mass rapes and mass public executions in addition to burning down whole villages and forcibly moving villages out. It also uniformly and repetitively used especially heinous and sadistic methods to kill civilians including locking dozens of people in huts and setting them alight and shooting any escapees to death. The systematic mass rapes often conducted in front of family members or fellow villagers[239] were clearly pursuant to a purposeful pattern and methodical plan. A pattern of purposeful action is thus demonstrated.

It is also possible to infer genocidal intent from the manner in which the crimes were planned. As early as 1980 – before the country had a dissident problem – Prime Minister Mugabe announced the establishment of Five Brigade.[240] This was followed by an agreement with North Korea and a training programme, equipment and deployment to Matabeleland with

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[234] *Karadžić* supra note 48 paras 2605 2625; Sterio op cit note 222.
[235] Stahn op cit note 10 at 43.
[236] See Panorama 'The Matabele Massacre' film documentary aired by BBC 21 March 1983.
[237] Ibid.
[238] See *Breaking the Silence* op cit note 193.
[239] Ibid.
[240] Ibid at 73.

significant operational support and collaboration from other ZNA, CIO and Police Intelligence Support units.[241] The fact that in many instances Five Brigade and CIO would arrive with lists of people to be killed suggests methodical planning that involved significant pre-meditated preparatory efforts to identify Ndebele civilians considered as being in community or political leadership roles for extermination.[242] Much of the genocidal intent of the Gukurahundi perpetrators can be inferred from their words and deeds. Many senior level government officials including Prime Minister Mugabe and ministers made no secret of their plan to eliminate Ndebeles. As early as 1981, the then Minister of Legal and Parliamentary Affairs, Eddison Zvobgo publicly stated that Ndebeles had a problem with accepting Mugabe's election victory.[243] Zvobgo, a member of the party's 20-member policy-making group, had reportedly told a senior ZAPU leader, Cephas Msipa, of a 'decision of the central committee that there had to be a 'massacre' of Ndebeles'.[244] Prime Minister Robert Mugabe warned that 'Ndebeles must stop voting for ZAPU if they wanted to live'.[245] and in a ZANU meeting spoke of crushing ZAPU and its supporters. Mugabe's senior Minister of Home Affairs, Enos Nkala, threatened villagers with attacks.[246] Security Minister, Emmerson Mnangagwa, threatened villagers with death for supporting dissidents[247] and Defence Minister, Sydney Sekeramayi, brazenly boasted and admitted that the government could not and would not differentiate between dissidents and civilians in its campaign.[248] Tellingly, Mugabe would reaffirm the genocidal intent almost 40 years after the Gukurahundi genocide in responding to a journalist in 2018 that genocide had happened because 'the Ndebele party - ZAPU- wanted to overthrow his government'.[249]

The number of victims affected by the Gukurahundi genocide is indicative of the genocidal intent of the perpetrators.[250] An estimated 20 000 people were killed. Some analysts have argued that this number is conservative.[251] The government imposed a curfew on Matabeleland

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[241] Ibid.
[242] See *Breaking the Silence* op cit note 193; see Bill Berkeley *Zimbabwe Wages of War: A Report on Human Rights* (1986) at 44; see Katri op cit note 99.
[243] Doran op cit note 173 at 416.
[244] Ibid; see Stuart Doran 'New documents claim to prove Mugabe ordered Gukurahundi killings' *The Guardian* 19 May 2015.
[245] Ibid Doran.
[246] On 3 April 1983, Enos Nkala likened dissidents to cockroaches and warned villagers who harboured them that they risked being caught in the crossfire; see 'Reviled in life and death,' *Mail and Guardian*, 30 August 2013.
[247] Stuart Doran 'Mnangagwa and the Gukurahundi: Fact and Fiction' *Daily Maverick* 27 November 2017.
[248] See *Breaking the Silence* op cit note 193; see Doran on inciteful statements by senior government officials.
[249] *SABC News* op cit note 192.
[250] Doran op cit note 244.
[251]Sachikonye, *When a State turns on its Citizens: 60 Years of Institutionalised Violence in Zimbabwe* (2011) at 15 estimates between 10000 and 20000 killed; Eppel, '"Gukurahundi": The Need for Truth and Reparation' in

during the massacres ostensibly to hide the evidence of atrocity. Despite this, news of massacres still emerged. The reports were serious enough for the government to begrudgingly establish a commission of inquiry to investigate reports of abuses by Five Brigade. The refusal by the government to publish the report of the Chihambakwe Commission indicates that the government was aware that genocidal acts had taken place that it was unwilling to publicly acknowledge and take responsibility for.

Five Brigade perpetrators would also refer to victims as Madzviti, a derogatory term for Ndebele in the Shona language – while reminding them that the genocidal attacks were revenge for the pre-colonial Ndebele violence against the Shona. Evidence of the use of derogatory language toward members of the targeted Ndebele group is thus readily established.

4.6.6 A Five Brigade Commander's perspective

The genocidal intent of alleged Gukurahundi perpetrators is well captured by Yap in his interview with Five Brigade Commander, Lt Colonel Munemo.[252] Yap concludes that from the overwhelming evidence of Five Brigade operations, the campaign against the Ndebele civilian population was an integral part of army orders:

> 'The army's unambiguous, indiscriminate and massive targeting of innocent civilians in the conflict, in comparison to the (lesser) military effort in the containment of armed dissidents, has in shock and disbelief been questioned by civilians, clergy, human rights activists, and many others … However, gaining insight into the army's counter insurgency strategy, it is clear that the government fought one battle. That is, the army acted first and foremost from 1981 onwards on the basis to destroy Zapu structures - not eradicate dissidents. Thus, the civilian targeting was not coincidental, or a side event of dissident contacts, nor actions by (as often believed) drunk, undisciplined, or bored soldiers, but a conscious, coherent government choice translated into army orders, as clearly explained by Lt Col Munemo. Furthermore, as the conflict stretched out, on an operational level also the Zapu category of enemy identification faded. By the time the Fifth Brigade deployed, soldiers' targeting had lost specificity and consequently enemy identification encompassed all those considered Ndebele. The same logic of punishing all Matabeleland South residents is also clearly evident by the enforced food embargo. Thus, although the government attempted to justify their actions by dissident destabilisation, it seems here beyond doubt that dissident activity was of a lesser

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Brian Raftopoulos and Tyrone Savage, eds., Zimbabwe: Injustice and Political Reconciliation; Weaver Press, 2005 at 46 estimates over 10000 and tens of thousands tortured and raped.

[252] See interview with Col Munemo in Katri op cit note 99.

concern for the rulers. What was the driving force behind government interventions appears rather to have been the eradication of political opposition'.[253]

In view of the special intent nature of the crime of genocide, the perspectives of Gukurahundi perpetrators are key to determining genocidal intent. The conflation of Zapu and Ndebele was evident from the onset. To this extent, the views of Five Brigade Commander Lieutenant Colonel Munemo[254] are illustrative. In Munemo's opinion 'ethnicity was central'[255] and operations on the ground were 'simply ethnic'.[256] According to Munemo when a victim identified themselves as Shona it led to 'identity confusion' and to Five Brigade soldiers 'losing their steam to hate'. This stark revelation by Five Brigade Commander puts the issue of genocidal intent beyond doubt. There is no question that Five Brigade soldiers targeted Ndebele civilians on the basis of their ethnic identity and this 'indicates the Brigade's ethnic stance'.[257] Ndebele civilians quickly learned that from their experience that being of Ndebele origin meant that they would be targeted unless they were able to prove that they were or Shona origin. As highlighted above, Five Brigade soldiers reportedly informed villagers that their task was to 'wipe out the Ndebeles'.[258] The evidence of genocidal intent is indicative of the crime of genocide having been committed by Five Brigade.[259] The next section will discuss the enumerated genocidal acts of Five Brigade.

4.7 Evaluating enumerated genocidal acts

The crime of genocide also prohibits specific conduct set out in the Genocide Convention, including killing members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group, and forcibly transferring children of the group to another group.

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[253] Ibid Katri at 222.
[254] Lt Col Munemo took over from Perence Shiri as Commander of Five Brigade in April 1983. Munemo was Commander of Five Brigade until July 1983 (Yap interview of Munemo 1996); See Footnote 273 in Katri op cit note 99 at 273.
[255] Interview with Col Munemo in 1996 quoted in Katri op cit note 99 at 206.
[256] Ibid.
[257] See Footnote 284 in Katri op cit note 99.
[258] See *Breaking the Silence* op cit note 93 at 9; see Katri op cit note 99 at 205.
[259] Ranger op cit note 204; Dube op cit note 204; *Akayesu* supra note 13 para 513; *Kayishema* & *Ruzindana* supra note 22 para 98.

It will thus be shown that Five Brigade committed the aforementioned acts. There is compelling evidence that Five Brigade acts of murder torture, rape, arson, and destruction of livestock and property discussed below were conducted as part of a genocidal plan and operation. As stated in *Akayesu*,[260] there is no requirement for the genocide to be carried out throughout the country. Thus, the fact that not all Ndebeles in every part of the country were targeted for killing, torture and other crimes does not change the genocidal nature of the Gukurahundi campaign. In reality, however, Ndebeles suspected of supporting ZAPU were targeted throughout the country.[261]

The genocide was committed in the geographic location inhabited by a majority of the Ndebele ethnic group. Apart from committing individual genocidal acts in designing, planning and executing the Gukurahundi operation, several perpetrators such as the then Prime Minister Robert Mugabe, then Minister for State Security Emmerson Mnangagwa, then Minister for Defence Sydney Sekeramayi, then Minister of Home Affairs Enos Nkala and then Commander of the ZNA Solomon Mujuru can be held culpable due to their failure to prevent the commission of genocide. This failure to act when they could is demonstrative of their specific intent to destroy the Ndebele group.[262] Where an individual has the 'capacity to effectively influence genocidal actors and has knowledge that there exists a serious risk that genocide might occur, that individual has a positive legal duty to use his best efforts within the means available to it to prevent the genocide from occurring'.[263] It can therefore be argued that the aforementioned individuals had the capacity to effectively influence genocidal actors on the ground as they were their subordinates. Additionally, they had the knowledge of the atrocities being committed on the ground as evidenced from the media reports and reports submitted directly to them in government by civil society organisations.[264] Due to their respective positions in government and the military they had a positive legal duty to prevent the atrocities from occurring. Culpability therefore arises from their awareness of the genocidal acts and failure to prevent them.[265] Despite the fact that the precise number of victims of the

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[260] *Nchamihigo* supra note 131.
[261] Jocelyn Alexander 'Dissident Perspectives on Zimbabwe's Post-Independence War' (1998) 68 *Journal of the International African Institute* 2.
[262] *Prosecutor vs Jean Kambanda [Kambanda]* ICTR-97-23-S.
[263] Heieck op cit note 54.
[264] The Catholic Commission for Justice and Peace in Zimbabwe (CCJP) provided a dossier of the atrocities in Matabeleland to the then Prime Minister Robert Mugabe.
[265] In addition to concerns raised by the Catholic Bishops, the commission of atrocities were reported by the ZAPU leaders, Joshua Nkomo and ZAPU Members of Parliament and rubbished by government Ministers; see *Breaking the Silence* op cit note 193. Under pressure, Prime Minister Mugabe appointed the Chihambakwe Commission but ignored its recommendations and refused to publish its findings.

Gukurahundi cannot be explicitly determined, based on the reasoning in *Jelisić*, it is possible to attribute the crime of genocide to the perpetrators identified above.[266] It suffices to show that in the case of Gukurahundi, its genocidal actions resulted in the death of an estimated 20 000 people. The following section will evaluate select enumerated genocidal acts and analyse and apply these to the Gukurahundi atrocities.

4.7.1 'Killing members of the group'

This enumerated act of killing members of a group is quickly established from the conduct of the Gukurahundi. The ICTR held in *Akayesu* that killing is homicide committed with the intent to cause death.[267] By being a specific intent crime, genocide has been held by the ICTR to require premeditation.[268] There is incontrovertible evidence that the Gukurahundi committed acts of killing members of the Ndebele ethnic group. The Siwale massacre in which 55 people were shot dead,[269] the Mkhonyeni massacre in which 22 people were burnt to death and some shot,[270] the Salankomo village killings of over 12 people;[271] the Soloboni village killings of at least 14 villagers,[272] Korodziba killings of five villagers,[273] Nxuma Village killings of 10 villagers,[274] Bhumbu killing of four villagers,[275] one villager in Sandawana village,[276] and three villagers at Mbiriya village.[277] The killings that occurred at Bhalagwe[278] and the disappearance and presumption of death of the Silobela Eleven[279] all constitute 'genocide by killing' members of the Ndebele group prohibited by the Genocide Convention. However, it must be stated that the perpetrators of the genocide comprise the Gukurahundi soldiers deployed to Matabeleland, CIO and police, and all the senior government and military officials who planned, designed, aided, abetted, incited and directly committed any of the enumerated acts based on the

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[266] *Jelisić* supra note 160.
[267] *Akayesu* supra note 13, para 501; see *Rutaganda* supra note 22, para 55*; Musema* supra note 22, para 155.
[268] Ibid *Akayesu* para 501.
[269] *Breaking the Silence* op cit note 193 at 48.
[270] Ibid at 87.
[271] Ibid at 88.
[272] Ibid.
[273] Ibid.
[274] Ibid.
[275] Ibid at 86.
[276] Ibid.
[277] Ibid.
[278] *Breaking the Silence* op cit note 193 at 119-24; see Doran op cit note 173 at 515-516.
[279] See 'A Place for Everybody' CCJP for an account by the surviving spouses or widows of the men.

reasoning of the ICTR Trial Chamber in Kambanda in which the former Prime Minister of Rwanda was found guilty of genocide.

4.7.2 'Causing serious bodily or mental harm to members of the group'

There is no single criteria to determine what constitutes serious bodily harm.[280] It depends on the circumstances and is determined on a case-by-case basis.[281] According to the ICTR in *Kayishema*, causing severe bodily harm can be interpreted as 'harm that seriously injures the health, causes disfigurement, or causes any serious injury to the external, internal organs or senses. It includes torture, inhumane and degrading treatment, rape, sexual violence or persecution'.[282] In particular, rape and sexual violence are considered the worst forms of causing serious bodily and mental harm because the victim suffers both physical and mental harm.[283] In *Akayesu*, the ICTR found that the systematic rape of Tutsi women in 1994 was a strategy aimed at the destruction of the Tutsi group by destroying their spirit, will to live or will to procreate.[284]

There is sufficient documented evidence of the Gukurahundi 'causing serious bodily and mental harm' against its victims. In almost all documented cases, have victims reported severe beatings and torture over long periods, causing extreme physical and mental harm. Apart from beatings, victims have reported burning and other forms of physical and mental torture.[285] Victims have also reported being forced to commit serious crimes against one another, such as relatives forced to rape or even kill each other.[286] The systematic rape of women by the Gukurahundi demonstrated by the mass rapes of young schoolgirls at Korodziba village and female captives at Bhalagwe and throughout Matabeleland and Midlands demonstrates an intention to destroy the Ndebele community by 'destroying its spirit, will to live or its will to procreate', akin to the rape of Tutsi women in Rwanda.[287]

In addition to this, it is evident that the genocidal acts committed in Matabeleland by Five Brigade and other security forces in relation to causing serious bodily harm or mental harm to members of the group meet the interpretation laid out in *Kayishema*. Furthermore, Gagro posits

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[280] Kittichaisaree op cit note 7 at 78.
[281] Ibid.
[282] *Akayesu* supra note 13 para 504; *Rutaganda* supra note 22 para 50; *Musema* supra note 22 para 156.
[283] Kittichaisaree op cit note 7 at 78; see *Kayishema & Ruzindana* supra note 22 para 731.
[284] *Akayesu* supra note 13 para 732.
[285] See *Breaking the Silence* op cit note 193.
[286] Ibid.
[287] *Akayesu* supra note 13 para 504.

that 'causing serious bodily or mental harm to the members of the group does not necessarily mean that the harm is permanent and irremediable. However, it must be intentional and of such a serious nature as to threaten the destruction of the group in whole or in part'.[288] The ICTY jurisprudence also states that causing serious bodily or mental harm to the members of the group must 'go beyond temporary unhappiness, embarrassment or humiliation' and result 'in a grave and long-term disadvantage to a person's ability to lead a normal and constructive life'.[289] The accounts of victims of atrocities in Matabeleland show that the actions by Five Brigade and other security forces put them in a position where they might not be able to lead a normal life, for instance, some became permanently disabled and are unable to fend for themselves or their children.[290]

4.7.3 'Inflicting conditions of life calculated to bring about physical destruction'

This refers to all acts that are calculated to bring about the physical destruction of a group but need not necessarily lead to actual or immediate death or physical destruction of the targeted group.[291] Acts calculated to bring about the destruction of a group are varied and include physical destruction of means of livelihood including food reserves or stocks, starvation, destruction of houses and forcible expulsion from protected shelter. It includes deprivation of clothing, medical care, hygiene and other methods including subjecting members of a group to excessive physical exertion.[292] The ICTY case of *Stakić* held that a 'clear distinction must be drawn between physical destruction and mere dissolution of the group'[293] and that the 'expulsion of a group or part of a group does not in itself suffice for genocide'.[294] Kreb has supported this view arguing that the narrow legal test which requires the destruction of group and not merely dissolving a group as an entity is the correct interpretation of the Genocide Convention.[295]

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[288] Gagro op cit note 39 at 11.
[289] *Krstić* supra note 12 para 513; *Karadžić* supra note 48 para 543.
[290] 'Gukurahundi: The Untold Stories of Women' *Habakkuk Trust* 9 August 2020.
[291] Gregory H Stanton 'What is Genocide?', last accessed from http://genocidewatch.net/genocide-2/what-is-genocide/ on 2 March 2022.
[292] *Kayishema & Ruzindana* supra note 22 para 115-116; *Akayesu* supra note 13 para 505-506; *Musema* supra note 22 para 157.
[293] *Stakić* supra note 61 para 519.
[294] Ibid.
[295] Kreb op cit note 65 at 624.

The commission of this crime by the Gukurahundi is readily demonstrated using several examples. First, the widespread and systematic policy and practice of burning down entire villages and homesteads throughout Matabeleland and Midlands including in the villages of Salankomo, Nxuma, Mbiriya, Korodziba, Bhumbu, Mkhonyeni and Sandawana demonstrates a plan to bring about conditions aimed at destroying the Ndebele group.[296] Second, burning of food stocks belonging to villagers, ostensibly to prevent them from feeding dissidents, was similarly an act calculated to destroy the villagers. Third, the prolonged curfew and food embargo imposed by the government and enforced by the Gukurahundi in Matabeleland during one of the worst droughts was calculated and in fact did starve thousands of Ndebeles.[297] Fourth, the prolonged physical hardships including beatings and refusal of medical care for Ndebele villagers was aimed at ensuring that they succumb to injuries incurred during the attacks by the Gukurahundi.[298] Many victims did die from their injuries as illustrated above.[299] Fifth, the inhumane conditions, beatings and torture imposed on detainees at Bhalagwe Concentration Camp are a clear example of conditions calculated to bring about the destruction of the Ndebele group.[300] There are clear parallels between the forced labour by Nazis[301] and the forced labour at Bhalagwe.[302]The fact that these conditions actually caused many deaths demonstrates not just the intention but the successful commission of this enumerated act.[303]

4.7.4 'Imposing measures intended to prevent births within the group'

The enumerated act of imposing measures intended to prevent birth within the group includes a range of actions such as forced sterilisation, sexual mutilation, forced birth control, forced separation of the sexes, forced impregnation by a member other than from the group.[304] These acts were affirmed by the ICTR Trial Chamber in *Akayesu* including acts aimed at preventing

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[296] *Breaking the Silence* op cit note 193 at 86-9.
[297] See Alexander op cit note 261; see *Breaking the Silence* op cit note 193, cites two children from Korodziba who died of starvation while marching to Ngamo Railway Siding.
[298] See *Breaking the Silence*. Across the entire region, the Gukurahundi prevented villagers from seeking and obtaining medical attention.
[299] Ibid.
[300] See Bhalagwe Detention Atrocities under Chapter 5.
[301] Mark Spoerer & Jochen Fleischhacker 'Forced Laborers in Nazi Germany: Categories, Numbers, and Survivors' (2002) 33 *The Journal of Interdisciplinary History* 2.
[302] *Attorney General of Israel v Eichmann [Eichmann]* Supreme Court of Israel 29 May 1962 (1968) 36 *ILR* 5 at 235-236.
[303] *Breaking the Silence* op cit note 19 at 119-24; see Doran op cit note 173.
[304] *Akayesu* supra note 13 paras 507-508; *Kayishema & Ruzindana* supra note 22 para 117; *Musema* supra note 22 para 156; *Rutaganda* supra note 22 para 52.

births within a group [305]. It also includes physical and mental measures aimed at destroying the will of a group to procreate.[306] In the ICJ case of *Bosnia v Serbia* the applicant argued that the 'forced separations of male and female Muslims in Bosnia and Herzegovina, as systematically practised when various municipalities were occupied by the Serb forces' and which 'in all probability entailed a decline in the birth rate of the group, given the lack of physical contact over many months',[307] but the court rejected this argument stating there was no evidence to support that the measure was aimed at preventing births within the group as there was no evidence of a decline in birth rate.[308] However, Kreb has attacked this judgment by the ICJ, stating the measures aimed at preventing births within a group do not require the actual prevention of births and only an intention to that effect is sufficient.[309] This is also reflected in the Rome Statute which provides that it is not necessary for the measures imposed to actually prevent the births.[310]

Ample examples exist to apply this requirement to the Gukurahundi atrocities. The widespread and systematic rapes and the accompanying physical and mental harm discussed above demonstrate a plan to destroy the will and capacity of Ndebeles to procreate. The targeting of hundreds of young schoolgirls, for example from Korodziba village, for mass rapes illustrates this plan. The deliberate beating of pregnant women on their stomachs,[311] the burning and killing of infants and children,[312] the electrocution, beating and crushing of genitals of male victims during torture,[313] the mutilation of private parts of women using bayonets and sharp objects[314] following rapes demonstrates a clear plan to prevent future births. The rounding up and abduction of women from villages and keeping them overnight at camps during which they were gang raped was aimed at breaking the spirit and destroying the familial and marital relationships and breaking up families.[315] The very common acts of forcing related family

[305] Ibid.
[306] *Akayesu* supra note 13 para 732, related to the widespread and systematic rape of Tutsi women.
[307] Case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v Serbia and Montenegro*) Judgment of 26 February 2007 para 355.
[308] Ibid.
[309] Kreb op cit note 65.
[310] See Art 6 (d) of the Rome Statute.
[311] *Breaking the Silence* op cit note 193 at 87.
[312] Ibid.
[313] *Breaking the Silence* op cit note 193 at 119-24; see Doran op cit note 173.
[314] BLPC: Case no 3672 RASD.JS, Ref Bhalagwe, April 1984.
[315] *Breaking the Silence* op cit note 193 at 86-9.

members to rape each other was also aimed at breaking their spirit and preventing them from procreating.[316] The next section will discuss the crime of incitement to commit genocide.

4.8 Incitement to commit genocide

The first case relating to incitement to mass murder and extermination to be prosecuted is the Nuremberg case of Julius Streicher who was the editor of an anti-Semitic magazine and was convicted for hate propaganda against Jewish people.[317] Following the reasoning in *Akayesu*,[318] the ICTR found in *Prosecutor v Georges Riggiu*[319] that a person who incites another to commit genocide must himself have specific intent to commit genocide. Akayesu was thus found guilty of the crime of direct and public incitement to commit genocide.[320] Public statement amongst others, amounted to the crime of direct and public incitement to commit genocide.[321] Additionally, in *Prosecutor v Bikindi*,[322] the Rwandan singer Simon Bikindi was charged with inciting genocide through anti-Tusti songs and was later on convicted for statements he said as opposed to the songs.[323] In the Rwandan *Media Case*, the ICTR Trial Chamber specified that incitement requires calling on the audience to take action against the protected group.[324]

There is a striking similarity with how the protected group in Rwanda, the Tutsis, were referred to by the convicted perpetrators of the Rwandan genocide to that of the Matabeleland context. In the case of Rwanda, the defendants in the *Media Case* were Ferdinand Nahimana who was the chief executive of RTLM Radio which promoted hatred towards the Tutsi population and Hassan Ngeze who was the owner and editor of Kangura, a newspaper which referred to Tutsis as cockroaches.[325] The *Media Case* established that newspaper editors and broadcast executives could be held liable not only for their statements but the impact of their words.[326] Similarly, referring to Ndebeles as cockroaches, the then Minister of State Security Emmerson

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[316] Ibid at 87-134. In *Akayesu* supra note 13 para 732, related to the widespread and systematic rape of Tutsi women including the similar forced rape within families the court found that it was designed to break their spirit to procreate.
[317] See M Eastwood *The Nuremberg Trial of Julius Streicher: The Crime of 'Incitement to Genocide'* (2011).
[318] *Akayesu* supra note 13 4.
[319] *Prosecutor v Georges Riggiu [Riggiu]* ICTR-97-32-1 ICTR Trial Chamber Judgment of 1 June 2000, para 14.
[320] *Akayesu* supra note 13.
[321] See *Riggiu* supra note 319 para 14.
[322] *Prosecutor v Bikindi [Bikindi]* 2008 ICTR-01-72-T (ICTR) Trial Judgment and Sentence of 2 December 2008.
[323] Ibid para 423.
[324] *Media Case* supra note 39 paras 1015 to 1099.
[325] Stahn op cit note 10 at 48.
[326] Ibid.

Mnangagwa said that '...the campaign against dissidents can only succeed if the infrastructure that nurtures them is destroyed'.[327] The dissidents were, in his words, 'cockroaches' and Five Brigade was the 'DDT' brought in to eradicate them.[328] The most shocking statements in this regard came from the then Prime Minister Robert Mugabe, in a radio speech he said 'go and uproot the weeds from your garden',[329] ZAPU supporters in urban areas being the weed to be uprooted. These statements meet the public element of incitement to genocide as alluded to by the ICTR Trial Chamber in Akayesu which stated that the public element is satisfied if it involves 'a call to criminal action to a number of individuals in a public place or to members of the general public'.[330] The predominantly Shona-speaking composition[331]of Five Brigade which acted on the incitement further demonstrates a tribal or ethnic campaign.[332]

The jurisprudence of the ICTR reaffirms that causation is not a legal requirement for the crime of incitement and therefore regardless of whether genocide occurs, the crime of incitement is still punishable. There are scholars who argue that this view is not universal and that 'criminal liability cannot spring from the mere expression of views that do not result in harm'.[333] Additionally, there is a view that for one to be found liable for incitement, the individual must have specific intent to commit genocide. Furthermore, incitement has a public element which entails a call to action in a public place or members of the general public. However, some scholars have argued that there should be a distinction between hate speech and incitement, and that hate speech entails creating a social environment which is dehumanising and violent for specific groups. Stahn argues that statements like 'Tutsis are cockroaches' constitute hate speech and should be differentiated from incitement which entails calling on the audience to take action against certain group.[334] Going with Stahn's analysis, Mnangagwa's statement which refer to Ndebeles as cockroaches could fall within the bounds of hate speech had he not gone on to call for violence against the Ndebele ethnic group by stating that Five Brigade was the 'DDT' brought in to 'eradicate them'. Susan Benesch has argued that incitement should be

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[327] See *Breaking the Silence* op cit note 93.
[328] Zimbabwe Human Rights NGO Forum 'Their words condemn them: The language of violence, intolerance and despotism in Zimbabwe' (Report) at 5-6, last accessed from https://ntjwg.uwazi.io/api/files/1554966065676eliku1zy8f7.pdf on 2 March 2022.
[329] See Roy Bennett 'Mugabe: Africa's Pol Pot' *Politics Web* 1 December 2010.
[330] *Akayesu* supra note 13.
[331] *Breaking the Silence* op cit note 193 at 48; Doran op cit note 173 at 417.
[332] Phathisa Nyathi *My Story, Joseph Khumo Nyathi: Serving ZIPRA and ZNA's Five Brigade* (2018).
[333] Joshua Wallenstein 'Punishing Words: An Analysis of the Necessity of the Element of Causation in Prosecutions for Incitement to Genocide' (2001) 54 *Stanford Law Review* 351 at 397.
[334] Stahn op cit note 10 at 49.

limited to speech that has a reasonable possibility of leading to genocide, taking into account the authority, influence or power that the speaker has over the audience as well as the capacity of the intended audience to commit violent acts.[335]

4.9 Conclusion

Genocide is one the three core international crimes, alongside crimes against humanity and war crimes. While the debate on the relative gravity or seriousness between genocide and crimes against humanity and war crimes endures,[336] some scholars consider genocide as the 'crime of crimes'[337] since it entails the partial or complete destruction of group of persons based on their identity.

This chapter had several objectives. First, drawing on international conventions, statutes and jurisprudence of international tribunals and scholarly writings by international criminal law scholars it analysed, discussed and defined the international crime of genocide. Second, the chapter examined the Gukurahundi atrocities from the prism of the crime of genocide. Finally, the chapter analysed the specific conduct demonstrative of the broader atrocities committed by the Gukurahundi to determine whether it met the requirements of the definitions and elements of genocide as envisaged by the Genocide Convention, statutes of international and ad hoc tribunals and jurisprudence of international tribunals and writings by international criminal law scholars.

This chapter made several findings. It analysed, discussed and defined the crime of genocide. It affirmed that the international crime of genocide is prohibited by the Genocide Convention,[338] customary international law,[339] and the statutes of international criminal tribunals.[340] The prohibition of genocide carries an international obligation to investigate, prosecute and punish the crime regardless of whoever and wherever it is committed.[341] Genocide has been prosecuted by numerous international criminal tribunals including

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[335] Susan Benesch 'Vile Crime or Inalienable Right: Defining Incitement to Genocide' (2008) 48 *Virginia Journal of International Law* 485.
[336] Steven Ratner 'Can We Compare Evils? The Enduring Debate on Genocide and Crimes Against Humanity' (2007) 6 *Global Studies Review* 3.
[337]Schabas op cit note 8; it should be noted that the adequacy of this characterisation is criticised by some scholars like Philippe Sands and Payam Akhavan.
[338] See Genocide Convention.
[339] Claus Kreb 'The Crime of Genocide under International Law' (2006) 6 *International Criminal Law Review* 461-502.
[340] Art 4 of the ICTY Statute and Art 2 of the ICTR Statute.
[341] See Genocide Convention.

Nuremberg,[342] ICTY,[343] ICTR,[344] and ECCC[345] all established in the wake of the commission of egregious atrocities.[346] The statutes and jurisprudence of these tribunals have clearly articulated and defined the legal and contextual requirements and elements of genocide.[347]

The chapter examined and evaluated Gukurahundi atrocities against the legal requirements, definitions and elements of the genocide and concluded that the atrocities constitute genocide. The chapter concluded that Zimbabwe was bound by its treaty and customary international law obligations.[348] In particular the chapter has found that the Gukurahundi committed the crime of genocide which is the destruction in part or in full of the ethnic Ndebele group.[349]

Having established that genocide was committed by Five Brigade, the individual criminal responsibility attributable to alleged perpetrators of such crimes will be evaluated in Chapter 6 which will examine international legal principles, scholarly work and jurisprudence related to individual, command and superior criminal responsibility for international crimes including genocide and evaluate whether Five Brigade atrocities constitute crimes against humanity under international law.

[342] The mass murder and extermination were prosecuted as crimes against humanity at Nuremberg; See Stahn op cit note 10 at 46.
[343] See ICTY Genocide Cases, last accessed from https://www.icty.org/en/cases on 2 March 2022.
[344] See ICTR Genocide Cases, last accessed from https://unictr.irmct.org/en/cases on 2 March 2022.
[345] ECCC 'First genocide charges to be heard at ECCC', last accessed from https://www.eccc.gov.kh/en/articles/first-genocide-charges-be-heard-eccc on 2 March 2022.
[346] Genocide was prosecuted after mass atrocities in Serbia, Rwanda and Cambodia.
[347] See Art 4 of the ICTY Statute; Art 2 of ICTR Statute; Art 4 of the ECCC Statute.
[348] Section 326 of Zimbabwe Constitution.
[349] See definition of genocide in the 'Convention on the Prevention and Punishment of the Crime of Genocide' (adopted 9 December 1948) 78 UNTS 277 (Genocide Convention).

CHAPTER FIVE – AN INVESTIGATION WHETHER FIVE BRIGADE ATROCITIES CONSTITUTE CRIMES AGAINST HUMANITY

5.1 Introduction

Crimes against humanity (CAH) were first prosecuted as such by the IMT at Nuremberg.[1] There would be a 50-year hiatus before they were again prosecuted by the International Criminal Tribunals for the Former Yugoslavia,[2] and the International Criminal Tribunal for Rwanda,[3] in the 1990s. Since then, their prosecution has become more commonplace with hybrid tribunals in East Timor,[4] Sierra Leone,[5] Cambodia[6] all prosecuting them. Most recently CAH have been prosecuted by the ICC.[7] Although most notable atrocities in history including the genocides highlighted in Chapter 4 would readily qualify as CAH, there is yet to be established a normative treaty proscribing crimes against humanity,[8] much the same way war crimes and genocide are proscribed by treaties.[9] Instead, as will be discussed below, CAH have gained universal acceptance through customay law prohibition.[10] Building on theoretical, conceptual and normative aspects of core international crimes – war crimes genocide and CAH discussed in Chapter 2,[11] this chapter examines Five Brigade atrocities to determine whether they constitute CAH. The chapter analyses the legal requirements –customary law, jurisprudence and scholarly writings – regarding CAH and assesses the Gukurahundi atrocities against these requirements. The first section provides an introduction and provides an outline

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[1] International Military Tribunal (Nuremberg), 'Judgment and Sentences' (1947) 41 *American Journal of International Law* 172 221; see also Robert Dubler & Matthew Kalyk 'Crimes against Humanity under Customary International Law and the ICC: The Chapeau Elements' in *Crimes Against Humanity in the 21st Century: Law, Practice and Threats to International Peace and Security* (2018)

[2] Statute of the International Criminal Tribunal for the former Yugoslavia Security Council resolution 827 (1993), 25 May 1993, Art 7 (hereafter ICTY Statute)

[3] Statute of the International Criminal Tribunal for Rwanda, Security Council Resolution 955 (1994) of 8 November 1994 (hereafter ICTR Statute), Art 3.

[4] See Caitlin Reiger & Marieke Wierda 'The Serious Crimes Process in Timor-Leste: In Retrospect' last accessed from https://www.ictj.org/sites/default/files/ICTJ-TimorLeste-Criminal-Process-2006-English.pdf on 8 March 2022

[5] Statute of the Special Court for Sierra Leone, Security Council resolution 1315 of 16 January 2002, available at: https://www.refworld.org/docid/3dda29f94.html [accessed 5 June 2023] (hereafter SCSL Statute). Art 3.

[6] Law on the Establishment of the Extraordinary Chambers of Cambodia, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006)

[7] Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998, ISBN No. 92-9227-227-6, available at: https://www.refworld.org/docid
/3ae6b3a84.html [accessed 6 June 2023] (hereafter Rome Statute) Art 25.

[8] Dubler & Kalyk op cit note 1.

[9] See generally Geneva Conventions and Genocide Convention.

[10] Dubler & Kalyk op cit note 1.

[11] See Chapter 2 *International Crimes: Theory, Concepts and Norms*.

of the article. The second section provides an overview of CAH, including their origins and historical evolution and development. The third section unpacks the chapeau or contextual elements of CAH whilst the fourth evaluates the physical and mental elements. The fifth section examines the enumerated acts of CAH, and the sixth section concludes the chapter with findings. In every section the author critically reviews the legal requirements, customary international law, jurisprudence of the international tribunals and and scholarly writings in evaluating the conduct of Five Brigade to answer the question whether Five Brigade atrocities constitute the international crime of CAH.

5.2 Overview of crimes against humanity

Essentially 'the primary challenge in defining crimes against humanity is to identify the precise elements that distinguish these offences from crimes subject exclusively to national laws'.[12] The contemporary debate on CAH has been dominated by 'difficult questions about the exact scope and the boundaries of these crimes',[13] and by extension, the role and application of international criminal law. Unlike genocide and war crimes, both of which are underpinned by international conventions such as the Genocide Convention and the Geneva Convention and its APs, there is no treaty that deals exclusively with CAH.[14] Mathias Holvoet observes that 'various definitions of CAH and its contextual and other elements have been developed and used in different national, internationalised and international contexts over the years'.[15] Over time, the absence of a single treaty basis and the differential development by different tribunals has generated an ongoing controversy and debate regarding conceptual, normative and definitional aspects of CAH.[16] Notwithstanding that there is no single treaty that deals

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[12] Mathias Holvoet 'The State or Organisational Policy Requirement within the definition of crimes against humanity in the Rome Statute: An Appraisal of the emerging jurisprudence and the implementation practice by ICC States Parties' (Brief Paper), last accessed from https://www.internationalcrimesdatabase.org/upload/documents/20131111T105507-ICD%20Brief%20%202%20-%20Holvoet.pdf on 6 March 2022.

[13] Darryl Robinson 'Essence of Crimes against Humanity raised by challenges at the ICC' (2011) *EJIL*; last accessed on 5 June 2023 at https://www.ejiltalk.org/essence-of-crimes-against-humanity-raised-by-challenges-at-icc/

[14] Dubler & Kalyk op cit note 1.

[15] Holvoet op cit note 12.

[16] David Luban 'A Theory of Crimes Against Humanity' (2004) 29 *Yale J Int'l L* 85-167; Margaret M De Guzman, 'Crimes Against Humanity' in William A Schabas & N Bernaz *Routledge Handbook of International Criminal Law* (2011) 127; J. Nilsson 'Crimes Against Humanity' in Antonio Cassese *The Oxford Companion to International Criminal Justice* (2009) 287.

exclusively with CAH, they are prohibited by customary international law.[17] Additionally, acts constituting CAH have been included in the Torture Convention[18] and the Rome Statute.[19]

As discussed in Chapter 2, the emergence and evolution of international crimes was influenced by developments in the human rights movement after the atrocities from the Second World War.[20] However, the Nuremberg Tribunal played a crucial role in developing the customary law related to CAH. Historically, with a focus and pre-occupation with state, international law did not envisage individually criminal accountability. Nuremberg led 'radical deviation from the traditional state-based focus of international law to an international custom recognising individual criminal responsibility'.[21] In its judgment, the Nuremberg Tribunal held that 'crimes against international law are committed by men, not abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced'.[22] Individual criminal responsibility for CAH was reaffirmed in the Nuremberg Principles and by the General Assembly in Resolution 95(I) (1946). After *Nuremberg*, the concept of individual criminal responsibility was reaffirmed by the ad hoc international tribunals for the former Yugoslavia,[23] Rwanda,[24] hybrid tribunals in East Timor,[25] Sierra Leone,[26] Cambodia.[27] The International Criminal Court (ICC) also reaffirms individual criminal responsibility for CAH.[28]

CAH are considered 'crimes against humaneness' that offend certain general principles of law and become the international community's concern.[29] They have repercussions beyond international frontiers and exceed any limits tolerated by modern civilisation in magnitude or savagery.[30] Unlike genocide, the offender of CAH does not need to intend to destroy members

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[17] Ibid, Luban.
[18] 'Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' (adopted 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85, art. 1.
[19] Rome Statute Art 7 and Art 7 of the ICC's Elements of International Crimes enumerates acts that constitute CAH.
[20] Antonio Cassese & Paola Gaeta (eds) *Cassese's International Criminal Law* (2013).
[21] Dubler & Kalyk op cit note 1.
[22] International Military Tribunal (Nuremberg), 'Judgment and Sentences' supra note 1 at 221.
[23] Art 7 of ICTY Statute op cit note 2.
[24] Art 6 of ICTR Statute op cit note 3.
[25] See Caitlin Reiger & Marieke Wierda op cit note 4.
[26] Art 6 of the SCSL Statute op cit note 5.
[27] Law on the Establishment of the Extraordinary Chambers of Cambodia op cit note 6.
[28] Rome Statute, Art 25 op cit note 7.
[29] Kriangsak Kittichaisaree *International Criminal Law* (2001) 95.
[30] Egon Schwelb 'Crimes Against Humanity' (1946) 23 *British Yearbook of International Law* 178 at 195-7.

of a particular group.[31] In the case of *Akayesu*,[32] the ICTR set out the difference between genocide and CAH. Essentially, what differentiates them is that for an act to constitute genocide, there must be an intent on the perpetrator's part to target a person on one of the prohibited grounds in the Genocide Convention.[33] Such intent is not required to establish or prove CAH.[34] The prohibition of CAH is now part of customary international law.[35] In addition, they are also prohibited in various international legal instruments, including the Rome Statute.[36]

The following section will examine the chapeau elements of CAH using the Rome Statute, the ICC Elements of Crimes, the jurisprudence of the ICC and ad hoc criminal tribunals on CAH as well as decisions from domestic courts on the same. The section will also evaluate whether Gukurahundi atrocities meet the requirements of CAH.

5.3 Chapeau elements of crimes against humanity

The chapeau element of CAH is that any one or more of the enumerated acts under Article 7 of the ICC Element of Crimes must have been committed as 'part of a widespread and systematic attack directed against the civilian population with knowledge of the attack'.[37] According to Article 7 (2) (a) of the Rome Statute, CAH must be committed in furtherance of a state or organisational policy to commit an attack. To prove that an accused person committed CAH, both the conditions of applicability for CAH – that an enumerated act was committed as part of a widespread or systematic attack, committed in furtherance of a state or organisational policy – as well as the specific elements of each offence must be established.

Under customary international law and the statutes and jurisprudence of the ad hoc international tribunals[38] and ICC, CAH require that an 'underlying crime' be committed in the

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[31] See *Prosecutor v Jean Paul Akayesu [Akayesu]* ICTR-96-4-A, ICTR Trial Chamber Judgment of 2 September 1998.
[32] Ibid.
[33] R Coalson 'What's the Difference Between 'Crimes Against Humanity' and 'Genocide'?' *The Atlantic* 13 March 2013.
[34] PM Wald 'Genocide and Crimes Against Humanity' (2007) 6 *Washington University Global Studies Law Review* 621-633.
[35] Kittichaisaree op cit note 29.
[36] Rome Statute Art 7 op cit note 7
[37] Ibid.
[38] ICTY Statute supra note 2.

context of what is known as the 'chapeau element'.[39] The accused's (or perpetrator's) acts must make up 'part of' that attack (the nexus requirement) as well as possessing a knowledge that their acts constitute part of the attack (the mens rea requirement). The mens rea element does not require 'proof that the perpetrator had knowledge of all characteristics of the attack or the precise details of the plan or policy of the State or organisation'[40] but the mens rea element is 'satisfied if the perpetrator intended to further such an attack'.[41] The mental element does not require the exact details of the attack but the intention to further a widespread or systematic attack on a civilian population. The jurisprudence from the ICTY[42] seems to take the view that the mental element is satisfied if the perpetrator not only knows the context but intends his conduct to form part of a widespread or systematic attack on a civilian population. The ICTR Trial Chamber in *Kayishema* complemented this view holding that the perpetrator must 'understand the overall context of his act'.[43]

5.3.1 What constitutes an 'attack'?

An 'attack' typically constitutes one of the enumerated acts discussed below when committed as part of a widespread attack; that is, murder, torture, rape, inhumane treatment, deportation, enslavement and other forms of attack.[44] It is defined as 'a course of conduct involving the multiple commission of acts against any civilian population, pursuant to or in furtherance of a State or organisational policy to commit such an attack'.[45] An attack is considered an event or occurrence in which the enumerated acts (crimes such as murder, torture, rape, enforced disappearance) may be committed. It has also been described as 'a course of conduct involving the commission of acts of violence'.[46]

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[39] *Prosecutor v Tadić [Tadić]* IT-94-1, (ICTY) App Chamber of October 2, 1995, para 626; *Akayesu* supra note 31 paras 579-582; see Goran Sluiter *Chapeau Elements of Crimes Against Humanity in the Jurisprudence of the UN Ad Hoc Tribunals in Leila Nadya Sadat, Forging a Convention for Crimes against Humanity* (2011).
[40] Art 7 ICC Elements of Crime.
[41] Ibid.
[42] *Tadić* supra note 39 para 248; *Prosecutor v Krnojelac [Krnojelac]* IT-97-25-T ICTY Trial Chamber Judgment of 15 March 2002 para 59; *Prosecutor v Kunarac et al [Kunarac et al]* 2001 IT-96-23-T ICTY Trial Chamber Judgment of 22 February 2001 paras 102-103.
[43] *Prosecutor v Kayishema & Ruzindana [Kayishema & Ruzindana]* ICTR-95-1-T ICTR Trial Chamber Judgment of 21 May 1999 paras 133-134.
[44] Art 7 of the Rome Statute op cit note 7.
[45] Ibid Art 7 (2) (a).
[46] *Kunarac et al* supra note 42.

In the case of attacks committed in the context of armed conflict, under customary international law, 'the attack could precede, outlast or continue during the armed conflict, but it need not be part of it'.[47] In the context of CAH, 'the attack is not limited to armed force but encompasses any mistreatment of the civilian population'.[48] In *Kayishema and Ruzindana*, the ICTR Trial Chamber held that 'the attack is the event of which enumerated crimes must form part. Indeed, within a single attack, there may exist a combination of the enumerated crimes, for example, murder, rape and deportation'.[49] The attack must be carried out as part of an official policy, not for purely personal motives. There is no requirement that the attack must comprise a violent act in all instances.[50] Acts of commission and omission may constitute an attack based on the reasoning of the ICTR,[51] which found former Prime Minister Kambanda guilty of CAH for omitting to fulfil his duty to protect the children and population of Rwanda from the massacres which took place after he had been personally asked to do so.[52]

However, it remains unsettled whether a single act is sufficient to constitute an attack in the context of CAH. In *Akayesu*,[53] the ICTR Trial Chamber held that a single act could constitute an attack, whereas in *Tadić*,[54] the ICTY Trial Chamber found that an attack could not be constituted by 'one particular act' but a course of conduct. This was supported by the SCSL Trial Chamber in *Prosecutor v Sesay Kallon and Gbao* which defined an attack as a 'course of conduct'.[55] Similarly, in *Kunarac*, the ICTY Trial Chamber held that an attack 'will not consist of one particular act but of a course of conduct'.[56] Furthermore, the Rome Statute defines an attack as a course of conduct.[57] However, other decisions from the ICTY have added to the controversy, adopting the view by the ILC that an attack can be 'singular effect of an inhumane act of extraordinary magnitude'.[58] This view has also been supported by the Extraordinary

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[47] *Prosecutor v Radovan Karadžić [Karadžić]* IT-95-5/18 ICTY Trial Chamber Judgment of 24 March 2016 para 473.
[48] Ibid.
[49] *Kayishema & Ruzindana* supra note 33, para 122; *Prosecutor v Rutaganda [Rutaganda]* ICTR-96-3 ICTR Trial Chamber Judgment of 6 December 1999 para 68.
[50] Carsten Stahn *A Critical Introduction to International Criminal Law* (2019) 57.
[51] *Prosecutor v Jean Kambanda [Kambanda]* ICTR 97-23-S ICTR Trial Chamber Judgment of 4 September 1998 para 40.
[52] Ibid para 39.
[53] *Akayesu* supra note 31 para 581.
[54] *Tadić* supra note 39 para 11.
[55] *Prosecutor v Sesay Kallon and Gbao [Sesay et al],* SCSL-04-15-T, SCSL Trial Chamber Judgment of 2 March 2009, para 77.
[56] *Kunarac et al* supra note 42, paras 415-422.
[57] Art 7(2)(a) of the Rome Statute op cit note 7.
[58] 'Report of the International Law Commission on the work of its forty-eighth session' 6 May –26 July 1996, UN GAOR 51st Sess Supp 10 UN Doc A/51/10 (12 November 1996) 94–95; *Prosecutor v Blagojević and Jokić*

African Chambers in *Habré*.[59] ICL scholars argue that it is possible under customary international law that an inhumane act of extraordinary magnitude could amount to CAH.[60] It seems an extraordinary magnitude entails multiple victims and thus implies that a single act with multiple victims is sufficient to constitute an attack. The jurisprudence of the ICC is equally divided, for instance, the Pre-Trial Chamber in the *Kenya Authorisation Decision* seemed to endorse the view by the ILC[61] whereas the Trial Chamber in *Prosecutor v Bemba Gombo* defined an attack as a course of conduct which required 'more than a few', 'several' or 'many' acts.[62]

The issue is moot with regard to Five Brigade which committed multiple enumerated acts elaborated further below, as part of attacks against civilians in Matabeleland and Midlands. Although scholars such as Göran Sluiter argue that what is an 'attack' is not sufficiently defined,[63] it seems the prevailing view is that an attack is any course of conduct that involves the commission of acts of violence. It is apparent that the conduct of Five Brigade involved the commission of acts of violence such as murder, torture, rape and inhumane treatment among others. For instance, Breaking the Silence documents instances of murder in different villages and the campaign of Five Brigade in Matabeleland and Midlands[64] and is estimated to have killed around 20 000 people.[65] In addition to this, the aforementioned report also documents instances of torture at Bhalagwe and Esigodini conducted by the CIO among other state security agencies.[66] Furthermore, rape is reported to have been prevalent during the Gukurahundi campaign in Matabeleland and Midlands as women and girls in different villages were raped by Five Brigade, and even boys were subjected to sexual violence.[67] Also, the treatment of civilians at camps such as Bhalagwe, Stops and Sun Yet Sen indicate the extent of inhumane treatment meted out by Five Brigade among other state security agencies.[68] All

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[Blagojević et al] IT-02-60-A ICTY Trial Chamber Judgment of 17 January 2005 para 545; *Prosecutor v Tihomir Blaskic* (Trial Judgement), IT-95-14 para 206

[59] *Ministère Public v Habré [Habré]* EAC Judgment of 30 May 2016, para 1359.

[60] Dubler & Kalyk op cit note 1 at 646.

[61] *Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya*, ICC-01/09 para 95

[62] See *Prosecutor v Bemba Gombo [Gombo]* ICC-01/05-01/08.

[63] Sluiter op cit note 39 at 122.

[64] Catholic Commission for Justice and Peace in Zimbabwe & Legal Resources Foundation *Breaking the Silence - Building True Peace: A Report on the Disturbances in Matabeleland and the Midlands 1980 – 1988* (1997) at 93 [hereinafter *Breaking the Silence*].

[65] Stuart Doran *Kingdom, Glory: Mugabe, ZANU and the Quest for Supremacy: 1960-1987* (2017) 521.

[66] *Breaking the Silence* op cit note 64 at 106.

[67] Ibid.

[68] Ibid at 106, 312 and 235.

these examples show the course of conduct of Five Brigade which involved the commission of multiple acts of violence and therefore constitute an attack in the context of CAH. In addition to acts of commission enumerated above, the failure to take action to protect civilians, investigate crimes and punish offenders by senior political and military leaders, including Prime Minister Robert Mugabe, who were notified of atrocities[69] and provided with evidence[70] meets the requirement of commission by omission set out in *Kambanda* in which the former Prime Minister of Rwanda was found guilty of CAH for his failure to prevent the commission of atrocities.[71]

5.3.2 What constitutes a widespread or systematic attack?

In *Prosecutor v Gotovina et al*, the ICTY Trial Chamber held that 'widespread' refers to the large-scale nature of the attack and the number of targeted persons. 'Systematic' refers to the 'organised nature of the acts of violence' and that 'the existence of a plan or policy can be indicative of the systematic character of the attack, but it is not a distinct legal element'.[72] Scholars have analysed what constitutes a 'widespread or systematic attack' with the aid of the jurisprudence from ad hoc tribunals. Robert Dubler and Matthew Kalyk posit that an attack will be considered widespread or systemic if it reaches a certain level of scale and seriousness and this entails that atrocities and deaths must reach the thousands for a widespread attack and hundreds for a systematic attack.[73] Although ad hoc Trial Chambers and commentators have alluded to the fact that the term widespread and systematic overlap and are difficult to separate in practise they are essentially not the same.[74] Dubler and Kalyk argue that a widespread attack depends on a large number of victims and Goran Sluiter seems to agree on this definition which includes multiplicity of victims.[75] Apart from the large number of victims, a widespread attack

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[69] Doran op cit note 65.
[70] Ibid.
[71] 'Mugabe Response and denials; Chihambakwe Commission'; Bishops Pastoral Statement; *Kambanda* supra note 91.
[72] *Prosecutor v Gotovina et al [Gotovina]* IT-06-90-T ICTY Trial Judgment of 15 April 2011 para 1703.
[73] Dubler & Kalyk op cit note 1 at 697.
[74] *Prosecutor v Goran Jelisić [Jelisić]* IT-95-10 ICTY Trial Chamber Judgment of 14 December 1999 para 207; see William Schabas *The International Criminal Court: A Commentary on the Rome Statute* (2010) 149; Guénaël Mettraux, *International Crimes and the Ad Hoc Tribunals* (2005) 171.
[75] Dubler & Kalyk op cit note 1 at 700; Leila Nadya Sadat, *Forging a Convention for Crimes against Humanity* (2011) 128.

also depends on a wide geographical area[76] whereas a systematic attack focuses on the organised and repetitious nature of the violence.[77]

In *Prosecutor v Tihomir Blaškić*, the ICTY held that an attack is widespread if it is 'conducted on a large scale and results in a large number of victims'.[78] It should be noted that there is no numerical threshold in this regard. In *Kunarac*, the ICTY Appeals Chamber held that a systematic attack refers to the 'organised nature of the acts of violence, such as repetition of similar criminal conduct on a regular basis'.[79] The ICTY has found that the following factors, discussed below, are indicative of a widespread or systematic attack:

i) the existence of a political agenda or ideology to destroy, persecute or weaken a particular community coupled with the institution of efforts to implement that policy;[80]

ii) the involvement of political and military authorities at a high level;[81]

iii) the extent of financial, military or other means; and[82]

iv) the extent of the repetitious, uniform, and continuous perpetration against the same civilian population.[83]

An evaluation of the applicability of the indicative factors for a 'widespread or systematic attack' to the Gukurahundi atrocities is necessary to determine whether they were widespread or systematic.

5.3.2.1 Existence of a political agenda or ideology to destroy, persecute or weaken a particular community coupled with the institution of efforts to implement that policy

The Gukurahundi atrocities were linked to an unravelling political crisis in the country at the time. Shortly before the atrocities, the government had fallen out with the opposition ZAPU, accusing it of caching arms and planning its violent overthrow.[84] The government's response

[76] Dubler & Kalyk op cit note 1 at 700.
[77] Ibid at 703.
[78] *Blaškić* supra note 58 paras 101, 203 -206; Stahn op cit note 50 at 57.
[79] *Kunarac et al* supra note 42 para 95; see *Blaškić* supra note 58 para 206.
[80] *Jelisić* supra note 74 para 53.
[81] Ibid.
[82] Ibid.
[83] Ibid.
[84] *Breaking the Silence* op cit note 64.

was both political and military: detaining senior opposition, military and political leaders,[85] and targeting the opposition and its civilian support base.[86] The ZANU government made no secret of its plans to establish a one-party state in Zimbabwe as early as 1980.[87] The deployment of Five Brigade to target, persecute and destroy ZAPU and its Ndebele supporters was allegedly part of this strategy. Speaking to a crowd in Victoria Falls, Matabeleland North, in October 1981, Mugabe had bemoaned ZANU's lack of support, saying, 'you masses are the ones troubling us because you keep on fighting [...] for how long will you do that. There should be no more fighting between ZANU and ZAPU people'.[88] In his interview with Prime Minister Mugabe, Donald Trelford of the Observer reported that Mugabe indicated that 'the situation in Matabeleland is one that requires change. The people must be reoriented'.[89] Mugabe had earlier insisted that the 'problem in Matabeleland required a military solution'.[90] Eddison Zvobgo, Justice Minister, had also argued that Ndebele supporters of ZAPU were unwilling to accept the electoral defeat and that they viewed Mugabe's victory as an unbearable 'power denial'.[91] Commander of the Paratrooper Regiment deployed to Matabeleland just before Five Brigade, Retired Colonel Dyke, summed up this political ideology as follows:

> '[I believe the Matabele understand that sort of treatment far better than the treatment I myself was giving them when we would just hunt and kill a man if he was armed] […the] fact is that when the 5th Brigade went in; they did brutally deal with the problem. If you were a dissident sympathiser, you died. And it brought peace very quickly'.[92]

It is evident from the above that there allegedly existed a political agenda or ideology within the ZANU PF-led Zimbabwean government, of a one-party state that sought to weaken the Ndebele community which was the support base of ZAPU, and the stumbling block to a one-party state agenda. State institutions such as government ministries, ZNA and other state security agencies including the Central Intelligence Organisation (CIO), Zimbabwe Republic

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[85] Dumiso Dabengwa, Lookout Masuku, Sydney Malunga, and others. See Ibid at 44 and 71.
[86] Ibid at 54 and 62.
[87] See Masipula Sithole 'Is Zimbabwe Poised on a Liberal Path? The State and Prospects of the Parties' (1993) 21 *A Journal of Opinion* 2 at 35-43.
[88] 'Mugabe warns Smith of jail' *Herald* 22 October 1981.
[89] Doran op cit note 65 at 521.
[90] Stuart Doran 'New documents claim to prove Mugabe ordered Gukurahundi killings' *The Guardian* 19 May 2015.
[91] 'National unity is the lodestar of our Government' *The Herald* 16 November 1982.
[92] *Breaking the Silence* op cit note 64 at 58.

Police (ZRP) and Police Internal Security and Investigation (PISI) were also used to implement the one-party state policy by ZANU PF. This satisfies the first factor which requires the existence of a political agenda or ideology to destroy, persecute or weaken a particular community coupled with the institution of efforts to implement that policy as set out by the ICTY. It is now necessary to look at the involvement of political and military authorities.

5.3.2.2 Involvement of political and military authorities at a high level

There is strong evidence of the alleged personal involvement of the then Prime Minister and Minister of Defence, Robert Mugabe,[93] senior cabinet ministers including Emmerson Mnangagwa (Minister of State Security),[94] Sydney Sekeramayi, (Minister of State), Enos Nkala (Minister of Home Affairs),[95] and senior military officers including Solomon Mujuru, ZNA Commander, Colonel Perence Shiri, Brigadier Dominic Chinenge (now Constantine Chiwenga),[96] high-ranking intelligence officers including Kevin Woods (CIO Director),[97] and police commanders,[98] in the formulation of the plan and its implementation.[99] All these individuals were high ranking political and military authorities hereby satisfying the second factor which is the involvement of political and military authorities at a high level.

5.3.2.3 Extent of financial, military or other means

Prior to deployment of Five Brigade, the government deployed Four and Six Brigades and the paratrooper regiments under Colonel Dyke to engage and combat dissidents actively.[100] With the arrival of Five Brigade in 1983, the total military presence in Matabeleland and Midlands reached 5 000 officers. Five Brigade alone was comprised of at least 3 500 soldiers, and by 1984 total troop deployment to Matabeleland South reached 15 000.[101]

The Gukurahundi operations in Matabeleland also involved various state security agencies, including police, intelligence and militia groups.[102] The effort undertaken in mobilising Five Brigade entailed allocating significant state resources, and contracting the North Korean

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[93] Doran op cit note 65.; Doran op cit note 90.
[94] 'Former CIO Spy, Woods, Implicates Mnangagwa in Gukurahundi' *Pindula News* 14 April 2019.
[95] *Breaking the Silence* op cit note 64 at 45, 53, 67, 72, 84, 87.
[96] Doran op cit note 65.
[97] Kevin Woods *The Kevin Woods Story: In the Shadow of Mugabe's Gallows* (2007) 30.
[98] *Breaking the Silence* op cit note 64.
[99] Ibid.
[100] Ibid at 3 and 69.
[101] Ibid at 90 and 128.
[102] See *Breaking the Silence* op cit note 64.

government to train it,[103] providing considerable state resources for its accommodation, operations and deployment to Matabeleland for a prolonged duration. Miles Tendi alludes to the fact that significant resources were used on North Korean trainers who trained Five Brigade.[104] It is reported that along with the trainers, North Korea donated $13 million worth of military equipment which included 'T54 tanks, armoured personnel carriers, artillery and the 50 trucks' which was used by the Five Brigade on its deployment to Matabeleland and Midlands.[105] Tendi argues that on independence the ZNA did not have many vehicles and relied on donations;[106] it is therefore this military equipment donated by North Korea that was used by Five Brigade in its campaign in Matabeleland and Midlands. Furthermore, Zachary Tambudzai, who has monitored Zimbabwe's military expenditure, argues that in the early 1980s there was a decline in the military expenditure because of 'the end of the guerrilla war against the Smith regime'.[107] However, 'the decline in military burden was short lived and the military burden rose from 5.7% in 1983 to 7.0% in 1987,'[108] as the government embarked on a campaign in Matabeleland and Midlands provinces. This significant deployment of resources is relatable to the findings by the Pre-Trial Chamber in *Prosecutor v Ruto, Koshey and Sang*,[109] which found that there was evidence of planning and significant deployment of resources and implementation of attacks against PNU supporters in Kenya. [110]

Contracting the North Koreans,[111] training the brigade,[112] equipping and deploying it to Matabeleland and Midlands,[113] and logistically supporting,[114] encouraging its work at the highest levels is illustrative of the large extent of financial, military, and other resources that

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[103] Ibid at 73.
[104] Miles Tendi, *The Army and Politics in Zimbabwe: Mujuru, the Liberation Fighter and Kingmaker* (2020) 201.
[105] Glenn Frankel 'Zimbabwe Retrains Brigade After Departure of North Koreans' *The Washington Post* 1 May 1984.
[106] Tendi op cit note 66 at 214.
[107] Zachary Tambudzai 'Determinants of Zimbabwe's Military Expenditure (1980-2003)' (Research Paper) at 4 last accessed from https://www.researchgate.net/publication/237439470_Determinants_of_Zimbabwe's_Military_Expenditure_1980-2003 21 July 2022.
[108] Ibid.
[109] *Prosecutor v Ruto, Koshey & Sang [Ruto, Koshey & Sang]* 2012 ICC-01/09-01/11 ICC Pre-Trial Judgment of 23 January 2012 para 179. Emphasis added
[110] Ibid.
[111] *Breaking the Silence* op cit note 64 at 73; Tendi op cit note 66 at 201-205; supra note 51.
[112] Ibid.
[113] Ibid.
[114] Ibid.

were assigned and demonstrates the extent of the policy and organisation of the state and thus meets the third factor set out by the case law of the ad hoc tribunals.[115]

5.3.2.4 Extent of the repetitious, uniform, and continuous perpetration against the same civilian population

Five Brigade atrocities reveal a pattern of repetitious and expansive commission of crimes using the same methods throughout Matabeleland over a long period. For over four years, Five Brigade targeted unarmed villagers in Matabeleland North and South and Midlands, repeatedly attacking and terrorising the same groups.[116] The standard set out by the ICTY Trial Chamber in Prosecutor v Kunarac et al that:

> 'The widespread or systematic nature of the attack is essentially a relative notion. The Trial Chamber must first identify the population which is the object of the attack and, in light of the means, methods, resources and result of the attack upon this population, ascertain whether the attack was indeed widespread or systematic.'[117]

The population that was the object of the attack by Five Brigade is distinguishable and comprised unarmed Ndebele civilians in Matabeleland and Midlands that were perceived to support ZAPU. The means of attack and the deployment of security agencies are also self-evident.[118] The methods of the Gukurahundi included killings, torture, rapes, enforced disappearances and physical destruction of property.[119] The impact of the attacks on the civilian population in Matabeleland was severe with over 20 000 lives lost, thousands tortured and raped and enforcedly disappeared and thousands of homesteads and property destroyed.[120] In *Kunarac*, the Trial Chamber held that:

> 'The consequences of the attack upon the targeted population, the number of victims, the nature of the acts, the possible participation of officials or authorities or any identifiable patterns of crimes, could be taken into account to determine whether the attack satisfies either or both requirements of a 'widespread' or 'systematic' attack vis-a-vis this civilian population'.[121]

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[115] Ibid.
[116] *Breaking the Silence* op cit note 64.
[117] *Prosecutor v Kunarac et al [Kunarac et al]* 2001 IT-96-23-T ICTY Trial Chamber Judgment of 22 February 2001, para 430.
[118] See *Breaking the Silence* op cit note 64 for a description on the attack on the civilian population.
[119] See Chapters 3 and 4.
[120] *Breaking the Silence* op cit note 64.
[121] *Kunarac et al* supra note 42 para 95; *Prosecutor v Stakić [Stakić]* IT-97-24-T ICTY Trial Chamber Judgment of 31 July 2003 para 625.

5.3.3 What constitutes a 'civilian population'?

The status of the victim as a civilian and the scale on which CAH is committed or its level of organisation characterise CAH.[122] The term 'civilian population' has been defined in *Blaškić*.[123] The Appeals Chamber held that 'there is an absolute prohibition on targeting civilians in customary international law'.[124] In armed conflict, the civilian population consists of all persons not taking part in hostilities.[125] The civilian population does not include members of the armed forces actively taking part in hostilities but also includes persons who may at some time have taken part in hostilities but have laid down their arms or have been captured or injured in battle.[126] The fact that there are belligerents among the civilian population does not alter its nature.

Similarly, 'a civilian who is incorporated in an armed organisation becomes a member of the military and a combatant throughout the duration of the hostilities (or in any case, until he is permanently demobilised by the responsible command, whether or not he is in combat, or for the time being armed'.[127] This is particularly important in assessing the conduct of civilian or political actors in the war effort. In *Tadić* the Trial Chamber held that 'Population does not mean that the entire population of the geographical entity in which the attack is taking place must have been subjected to that attack. It is sufficient to show that enough individuals were targeted in the course of the attack, or that they were targeted in such a way as to satisfy the Chamber that the attack was in fact directed against a civilian population, rather than a limited, randomly selected number of individuals'. [128] In *Kunarac* the ICTR Trial Chamber held that the term 'directed against' a civilian population is an expression which specifies that in the context of CAH, the civilian population is the primary object of the attack. To the extent that the alleged CAH were committed in the course of an armed conflict, the laws of war provide a

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[122] Chile Eboe-Esuji 'Crimes Against Humanity: Directing Attacks Against a Civilian Population' (2008) 2 *African Journal of Legal Studies* 118-129; Rosa Ana Alija Fernandez & Jaume Saura Estapa 'Towards a Single and Comprehensive Notion of Civilian Population in Crimes Against Humanity' (2016) 16 *International Criminal Law Review* 1-31; *Blaškić* supra note 58, para 107; *Prosecutor v Fofana and Kondewa [Fofana]* SCSL-04-14-T SCSL Trial Chamber Judgment of 2 August 2007.
[123] *Blaškić* supra note 58 para 214.
[124] Ibid, para 109-111; *Prosecutor v Dragomir Milosevic [Milosevic]* IT-98-29/1A.
[125] Ibid para 111; Art 50(1) of API.
[126] Ibid.
[127] Ibid.
[128] *Tadić* supra note 39 para 421.

benchmark against which the Chamber may assess the 'nature of the attack and the legality of the acts committed in its midst'.[129]

There is generally no controversy regarding the civilian nature of Five Brigade's victims. There is little or no debate that the majority of the victims of Five Brigade atrocities were civilians. From its deployment to its withdrawal, Five Brigade made no pretence of its strategy to target civilians. Within six weeks of its deployment, over 2 000 civilians had reportedly been killed in Tsholotsho, Matabeleland North.[130] Despite the fact that Five Brigade had ostensibly been assembled and deployed to combat dissidents, it made little effort to combat dissidents and instead devoted most of its energies to targeting and attacking civilians. According to Cameron,[131] Five Brigade 'only very occasionally' engaged dissidents. Units of Five Brigade were deployed across the entire district of Tsholotsho and set about attacking civilians – ordinary villagers, ZAPU party officials and demobilised ZIPRA combatants.[132] Yap also notes that 'civilian targeting was thus clearly part of particularly the Fifth Brigade's goal'[133] and argues that:

> 'It is clear that indiscriminate civilian targeting was a state policy. Thus, the hardship and violence civilians were systematically subjected to was no 'side effect' of the government's efforts to pursue dissidents, as was put forward at the time. Instead, based on government actions and orders, it is argued that the government's focus was on undermining political opposition in Matabeleland and Midlands, whilst the containment of dissident activity was of a relatively lesser concern. Based on the logic to destroy ZAPU structures, civilian targeting was a deliberate policy. Subsequently, the elimination of political structures was executed through army counter-insurgency operations, in which the military enemy identification encompassed not only ZAPU members, but all those considered of Ndebele ethnic origin.'134

Further evidence of Five Brigade targeting attacks on civilians is gleaned from reports by ZAPU officials. Edward Ndlovu, ZAPU MP, questioned Prime Minister Mugabe on 'the politically oriented campaign that branded every Ndebele-speaking person is as a dissident?'.[135] On his part, Prime Minister Robert Mugabe made clear that his government

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[129] *Kunarac et al* supra note 42 para 90-91; *Tadić* supra note 39 para 644.
[130] *Breaking the Silence* op cit note 64 at 77.
[131] Hazel Cameron 'The Matabeleland Massacres: Britain's Wilful Blindness' (2018) 40 *The International History Review* 1 at 13.
[132] *Breaking the Silence* op cit note 64.
[133] Katri Yap *Uprooting the weeds: Power, ethnicity and violence in the Matabeleland conflict* (2001) 201.
[134] Ibid at 194.
[135] Doran op cit note 65.

conflated civilians with dissidents arguing that 'the government is going to track down the dissidents until they are completely wiped out. Those who harbour and support dissidents will, too, be wiped out. We cannot select because dissidents have no distinguishing marks'.[136] In April 1983, at a rally in Zhombe, Midlands Province, Prime Minister Robert Mugabe was quoted as saying, 'When men and women provide food for dissidents when we get there, we eradicate them. We do not select whom we fight because we cannot tell who is a dissident and who is not ...'.[137]

In implementing the policy to target civilians, Five Brigade systematically rounded up civilians (villagers), subjected them to beatings and other forms of torture and rape, followed by mass public executions. At the onset of the atrocities, senior church leaders raised the alarm regarding the disproportionate targeting of civilians. The Zimbabwe Catholic Bishops Conference wrote:

> 'Violent reaction against dissident activity has to our certain knowledge, brought about the maiming and death of hundreds and hundreds of innocent people who are neither dissidents nor collaborators. We are convinced by incontrovertible evidence that many wanton atrocities and brutalities have been and are still being perpetrated.... The facts point to a reign of terror caused by wanton killings, woundings, beatings, burnings and rape. Many homes have been burnt down. People in the rural areas are starving, not only from the drought but also because supplies of food have been deliberately cut off, and in other cases, access to food supplies has been restricted or stopped. The innocent have no recourse or redress, for fear of reprisals.'[138]

The pastoral letter written during the height of the atrocities provides strong evidence of Five Brigade attacks including killings, torture, rape, starvation and destruction of homes targeted against an innocent and unarmed civilian population as early as March 1983, two months after its deployment. Therefore, the civilian status of Five Brigade victims has been established in the preceding section as envisaged by the requirements for CAH. The following section will discuss the physical and mental elements of CAH.

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[136] Katri Pohjolainen Yap 'Sites of Struggle: The Reorientation of Political Values in the Matabeleland Conflict, Zimbabwe 1980-1987' (2002) 6 *African Sociological Review* 17-45.
[137] See Joshua Nkomo Letter written to Prime Minister Robert Mugabe 7 June 1983 quoting *Financial Times*, *Telegraph* and *The Times* of 15 April 1983.
[138] Zimbabwe Catholic Bishops Conference Pastoral Letter published in the state-owned *Herald* on 30 March 1983 CCJP 1983b:4; Diana Auret *Reaching for Justice: The Catholic Commission for Justice and Peace 1972-1992* (1992) at 220.

5.3.4 Unpacking the 'policy element'

As stated above, CAH require that an 'underlying crime' be committed in the context of the chapeau element,[139] namely that there must be a 'widespread or systematic attack directed against any civilian population' and the accused's (or perpetrator's) acts must make up part of that attack (the nexus requirement). The ICC Statute further requires that the attack be pursuant to a 'State or Organisational policy'.[140] Holvoet argues that 'the contextual elements of crimes against humanity requiring that the underlying crimes are committed as part of a widespread or systematic attack against a civilian population pursuant to a State or organisational policy, are the most defining factors'[141] that distinguish CAH from domestic crimes.

For any of the enumerated acts to qualify as CAH, they must be committed as part of a state or organisational policy.[142] The requirement for crimes to be part of a policy emerged at *Nuremberg*, where the Tribunal held that the inhuman acts qualified as CAH 'committed as part of the policy of terror and were in many cases organised and systematic'.[143] The Nuremberg Tribunal held that isolated cases of atrocity or persecution by individuals or government officials did not qualify and that 'there must be proof of conscious participation in systematic government organised or approved procedures amounting to atrocities and offences of the kind specified in the act and committed against populations or amounting to persecution on political, racial or religious grounds'.[144] In *Tadić*, the ICTY Trial Chamber held that:

'It is therefore the desire to exclude isolated or random acts from the notion of crimes against humanity that led to the inclusion of the requirement that the acts must be directed against a civilian "population", and either a finding of widespreadness, which refers to the number of victims, or systematicity, indicating that a pattern or methodical plan is evident, fulfils this requirement'.[145]

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[139] Dubler & Kalyk op cit note 1 at 638.
[140] Dubler & Kalyk op cit note 1.
[141] Holvoet op cit note 12.
[142] Stahn op cit note 50 at 54-55.
[143] Kittichaisaree op cit note 29 at 97.
[144] *Justice Case* TWC, iii, 1951 at 982.
[145] *Tadić* supra note 39, para 648.

The ICC has also considered the issue of organisation in *Kenyatta and Others*.[146] In its two decisions, The *Decision to Authorise an Investigation*[147] and the *Decision on the Confirmation of Charges,*[148] the majority of the judges in the Pre-Trial Chamber took what may be considered to be a progressive and pragmatic approach to the concept of 'organisation,' concluding that the post-electoral violence in Kenya could prima facie amount to CAH. For the majority, the formal nature of a group and the level of its organisation should not be the defining criterion. Instead, a distinction should be drawn on whether a group has the capability to perform acts that infringe on basic human values. The Pre-Trial Chamber listed six indicative factors such as '(i) responsible command or established hierarchy (ii) means to carry out a widespread or systematic attack against civilian population (iii) control over part of the territory of a state (iv) having as a primary purpose criminal activities against the civilian population (v) the articulation, either explicitly or implicitly, of an intention to attack a civilian population or (vi) being part of a larger group which fulfils some or all of the above-mentioned criteria'.[149] The decision by the majority has been criticised as being too broad in that it allows any group that is capable of performing acts that infringe on basic human values to meet the concept of organisation.[150] In his dissenting opinion, Judge Kaul argued for a narrower standard of 'State-like organisations'.[151] Some scholars have also argued that the concept of organisation should take some characteristics of a state.[152] The legal ramifications of the dissenting opinion by Judge Kaul have been examined by Holvoet who argues that although the state-like organisation proposed by Judge Kaul is 'both clearer and more predictable. However it could also be argued that the proposed definition by the dissent is too rigid since it can severely limit the usefulness of the concept of crimes against humanity to respond to mass atrocities'.[153] He argues that if 'organisation [in the Rome Statute] is too narrowly interpreted it will leave

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[146] *Prosecutor v Uhuru Muigai Kenyatta and Others [Kenyatta and Others]* ICC-01/09-02/11.
[147] 'Pre-Trial Chamber Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Kenya of 31 March 2010' ICC para 90.
[148] See Pre-Trial Chamber Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute of 4 February 2012 ICC *Ruto, Koshey & Sang* supra note 71, para 33.
[149] *Ruto, Koshey & Sang* supra note 120 para 93.
[150] Stahn op cit note 50 at 56; Charles Jalloh 'What Makes a Crime Against Humanity a Crime Against Humanity' (2013) 28 *American University International Law Review* 381 at 418.
[151] *Ruto, Koshey & Sang* supra note 120 Dissenting Opinion para 51.
[152] See M Cherif Bassiouni *Crimes against Humanity. Historical Evolution and Contemporary Application* (2011) 12-13; Claus Kress 'On the Outer Limits of Crimes against Humanity: The Concept of Organization within the Policy Requirement: Some Reflections on the March 2010 ICC Kenya Decision' (2010) 23 *Leiden Journal of International Law* 855-873; William Schabas 'State Policy as an Element of International Crimes' (2008) 98 *Journal of Criminal Law and Criminology* 953-982.
[153] Holvoet op cit note 12 at 10.

International Criminal Law unable to respond to many other situations where armed groups - although far from State or State-like organisations and not even necessarily involved in an armed conflict - are nevertheless capable of committing systematic or widespread attacks against a civilian population'.[154] Additionally, Holvoet argues that in practise the state-like criterion for organisation introduces, via the backdoor, the view that CAH can only be committed within the context of armed conflict.[155] In *Katanga,* the ICC Trial Chamber held that the organisation must have 'sufficient resources, means and capacity to bring about the course of conduct or the operation involving the multiple commission of acts referred to article 7(2)(a) of the Statute'.[156]

Stahn argues that the view that CAH can only be committed if there is a close nexus with state policy has been rejected in modern jurisprudence.[157] Recent judicial decisions reaffirm that non-state actors can commit widespread and systematic attacks on a civilian population.[158] This is reflected in the Rome Statute, which requires state or organisational policy for CAH.[159] The Rome Statute states that an 'attack directed against any civilian population means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organisational policy to commit such attack'.[160] It can be argued that this article can be interpreted to encompass non-state actors. As explained in Chapter 3 on conflict classification, the dissidents had a certain level of organisation. For this reason, provided that their attacks on the civilian population in Matabeleland were widespread and systematic, they could also be held liable for CAH.

The state or organisational policy related to Five Brigade atrocities can be readily established from evaluating the political context and background to the atrocities, the conduct of senior military and political authorities and the manner in which the atrocities were perpetrated. As stated above, ZANU PF sought to establish a one-party state in Zimbabwe as early as 1980.[161] In early 1980, the Prime Minister signed an agreement with North Korea to train Five

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[154] Ibid.
[155] Ibid.
[156] *Prosecutor v Germain Katanga [Katanga]* ICC-01/04-01/07, ICC Trial Chamber Judgment of 7 March 2014 para 1119.
[157] Stahn op cit note 50 at 55.
[158] *Katanga* supra note 156; 'Situation in the Republic of Côte d'Ivoire, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire of 3 October 2011' ICC para 99; supra note 120, para 90.
[159] Art 7(2)(a) of the Rome Statute.
[160] Ibid.
[161] Doran op cit note 65.

Brigade.[162] The instructions issued by Prime Minister Robert Mugabe to the Brigade at its passing out parade implicitly sanctioned a policy to attack civilians.[163] The resourcing and deployment of Five Brigade and other security agencies to Matabeleland and Midlands and the subsequent official policy statements by senior government officials either denying or defending the commission of atrocities against civilians is further evidence of the state or organisational policy. The state's failure to act regarding concerns about atrocities raised by religious leaders and diplomats and mainly to prevent, investigate, and punish alleged perpetrators and the granting of an amnesty to Five Brigade perpetrators is also a strong indicator of its policy.[164]

In any event, the ICC Pre-Trial Chamber decisions in *Kenyatta* entails that even if Five Brigade was acting outside a state policy to target civilians in Matabeleland, it would still be held liable for CAH as it met the organisational element. Stahn criticises the approaches taken by the ICC in both cases, arguing that such jurisprudence would render the policy element redundant and that it is the policy requirement that distinguishes a domestic crime from an international crime.[165] The legal ramification of Stahn's criticism is that it puts the exact criteria for the determination of the policy element at the centre of CAH and seeks to restrict the scope of application of CAH in relation non-state actors. Additionally, the criticism contends that courts cannot simply infer policy from the widespread and systematic nature of the attack without a definitive criterion for the policy element. Stahn's argument is persuasive in that it is evident from the ICC jurisprudence that the criterion set out for the policy element is vague, a view supported by Charles Jalloh.[166] However Stahn's critique leaves the issue of expanding criminal responsibility to non-state actors insufficiently addressed. A balanced approach that recognises the importance of the policy element whether by state or non-state actors enables a broader reach of criminal culpability for contemporary CAH.

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[162] *Breaking the Silence* op cit note 64 at 73.
[163] Ibid.
[164] Ibid at xxii 99.
[165] Stahn op cit note 50 at 56.
[166] Charles Jalloh 'What Makes a Crime Against Humanity a Crime Against Humanity' (2013) 28 *American University International Law Review* 381 at 425.

5.4 The physical and mental elements of crimes against humanity

There are three elements to CAH; a physical element, a contextual element and a mental element.[167] The contextual element (widespread or systematic attack pursuant to policy aspects) has been discussed above. This section will discuss the physical and mental elements. Kittisaicharee summarises the critical elements of CAH as follows: 'the act is inhumane in nature and character, causing great suffering or serious injury to body or mental or physical health; the act is committed as part of a widespread or systematic attack, and the act is committed against members of the civilian population'.[168] Besides the constituent elements of CAH elaborated above from the perspective of a perpetrator, the crime comprises a physical and mental element.The elements comprise a physical and mental aspect.

The physical element of CAH comprises the commission of an attack that is inhumane in nature and character that causes great suffering or serious injury to the body or mental or physical health. The act or attack must be committed as part of a widespread or systematic attack and must target a member of a civilian population.[169] In assessing the physical elements of crimes, the inquiry considers physical conduct or acts committed against individuals' mental, physical, and property rights. The context, particularly the widespreadness and systematicity in which the physical act is done is essential to that act being characterised as CAH. In addition, the gravity, scale and organisation related to the crime are central.[170] In determining physical conduct, in addition to specific acts of commission, the failure to act such as where the alleged perpetrator is in a position of military or civilian authority over other alleged perpetrators who commit CAH can constitute a crime giving rise to criminal liability.[171]

The specific factors and evidence that demonstrates widespreadness and systematicity of Five Brigade attacks, namely, the existence of a political agenda or ideology to destroy, persecute or weaken a particular community coupled with the institution of efforts to implement that policy; involvement of political and military authorities at a high level, the extent of financial, military or other means, the extent of the repetitious, uniform, and continuous perpetration

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[167] Dennis Miralis 'Crimes Against humanity' last accessed from https://ngm.com.au/crimes-against-humanity/ on 13 July 2022.
[168] Kittichaisaree op cit note 29 at 90.
[169] *Jelisić* supra note 80 para 53*; Akayesu* supra note 31 para 578; *Prosecutor v Rutaganda* ICTR-96-3-A para 65.
[170] See section above and Chapter 2.
[171] See Chapter 6.

against the same civilian population have already been extensively discussed above. The physical elements of each crime must be considered within this contextual framing.

The mental element of CAH comprises knowledge of the broader context in which the crimes are committed as an essential element to prove intent to commit the crime. Thus, in addition to the intent to commit the underlying crime (such as murder, persecution, torture), an accused must know of the broader context in which his actions occur. An accused must know of the attack directed against the civilian population and know that his criminal act comprises part of that attack or at least take the risk that his acts are part of that attack.[172] CAH are committed in the context of an attack that is well known to an accused who cannot credibly deny knowing about the attack. Even when disputed, knowledge can be proved by drawing inferences from relevant facts and circumstances.[173] The mens rea of CAH must be related to knowledge of the context in which they are committed, not the perpetrator's motive.[174] Massimo Renzo has argued for a more expansive interpretation to include individual violations.[175] The accused need not share the purpose or goal behind the attack. It is irrelevant whether the accused intended his acts to be directed against the targeted population or merely against his victim. It is the general attack, not the specific acts of the accused, which must be directed against the target population, and the accused need only know that his acts are part thereof.[176] Evidence that the acts were committed for purely personal reasons can simply serve to rebut the presumption that an accused was not aware that his acts were part of that attack.[177] Unlike the crime of genocide, a discriminatory intent is not required for CAH in general except for the crime of persecution.[178] This distinction was outlined expansively in *Prosecutor v Kupreskic*,[179] and *Prosecutor v Akayesu*.[180] In view of the genocidal context of Rwanda, the ICTR Statute requires that CAH be committed on discriminatory grounds, a position, which is, however, not supported by customary international law as affirmed in Tadić.[181]

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[172] *Kunarac et al* supra note 42 para 102; *Prosecutor v Brđanin [Brđanin]* IT-99-36 (ICTY) para 138; *Prosecutor v Galic* IT-98-29, ICTY Trial Judgment of 5 December 2003 para 148.
[173] *Prosecutor v Mitar Vasiljevic [Vasiljevic]* IT-98-32-A App Chamber Judgment of 25 February 2004 paras 28 20; 'Elements of Crimes, General Introduction' ICC para 3.
[174] *Tadić* supra note 39, para 271-2.
[175] Massimo Renzo, 'Crimes Against Humanity and the Limits of International Criminal Law' (2012) 31 *Law and Philosophy* 4 at 443-476.
[176] *Krnojelac* supra note 42 at 59.
[177] *Blaškic* supra note 58 para 124; *Kunarac et al* supra note 42 para 103.
[178] *Tadić* supra note 39, paras 282-305; *Blaškic* supra note 58, paras 224, 260.
[179] *Prosecutor v Kupreskic [Kupreskic]* IT-95-16-T Trial Chamber Judgment of 14 January 2000 para 636.
[180] *Akayesu* App Chamber Judgment of 1 June 2001 para 461-9.
[181] *Akayesu* supra note 31; *Tadić* supra note 39 paras 282-302.

It would be difficult to argue that the members of Five Brigade who committed atrocities over a period of several years had no knowledge of the context in which their atrocities were being committed. This knowledge and awareness of the context can also be inferred from the circumstances.[182] Five Brigade had received explicit instructions of its mandate from the Prime Minister Robert Mugabe at its passing out parade. The fact that Five Brigade committed crimes in a repetitious and uniform manner against the same civilian population demonstrates its knowledge and awareness of the context. It is also evident that Five Brigade was aware that it was targeting the civilian population. Five Brigade would attack villages populated by unarmed villagers in all instances reported. It would accuse the villagers of feeding or accommodating dissidents. At times, without any evidence, it would accuse men found in villages of being dissidents.[183]

It can be argued that Five Brigade and other members of the state security apparatus possessed the mens rea for CAH. The mental element for CAH is the knowledge requirement. Kai Ambos argues that the knowledge requirement is a two-fold test, namely that the perpetrator knows the existence of an attack and secondly the perpetrator knows that his individual acts forms part of the attack.[184] As stated above, Five Brigade and other members of the state security apparatus knew of the attack on the Ndebele civilian population, not only as result of the public utterances made by the Prime Minister and his cabinet ministers, but from the orders they were given by their superiors to target this population. It is reported that Five Brigade told locals that they had been ordered to 'wipe out the people [Ndebele] in the area' and to 'kill anything that was human'[185] illustrating that they had knowledge of the attack. Additionally, it can be inferred from the repetitious and uniform nature of the crimes against the Ndebele civilian population that Five Brigade knew that their individual acts formed part of a widespread or systematic attack thereby satisfying the twofold test for the knowledge requirement. The following section will discuss the legal requirements of the various enumerated acts and evaluate the conduct of Five Brigade to determine whether it meets these legal requirements for CAH.

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[182] *Breaking the Silence* op cit note 64
[183] *Kunarac et al* supra note 42, para 102.
[184] Kai Ambos 'Crimes Against Humanity and the International Criminal Court' in Leila Nadya Sadat (eds) *Forging a Convention for Crimes Against Humanity* (2011) 288.
[185] *Breaking the Silence* op cit note 64 at 96.

5.5 Evaluating enumerated acts of crimes against humanity

5.5.1 Murder

'Murder' is defined as 'unlawfully and intentionally causing the death of a human being'.[186] The ICC elements of crimes state that the murder must be 'committed as part of a widespread or systematic attack directed against a civilian population'.[187] The mental element or mens rea for murder is that the perpetrator intends to kill or inflict grievous bodily harm likely to cause death but is reckless as to whether death ensues.[188] The ICC elements of crimes requires the perpetrator to know 'that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population'.[189] In *Katanga*, the ICC Trial Chamber defined murder as a crime against humanity and held that 'it must be proven that an individual, by act or omission, caused the death or one or more persons. The victim's death must be the result of the conduct of the accused in such a way that a causal link is established between the conduct and the result'.[190] The international tribunals have held that intention to commit murder can be either direct or indirect where an accused realises that his actions may lead to death but proceeds regardless of the consequences.[191] In the *Fofana* case, the Special Court of Sierra Leone (SCSL) held that there is no requirement to produce or recover the body to prove beyond a reasonable doubt that a person was murdered. The fact of a victim's death can be inferred circumstantially from other evidence.[192] This is particularly important when victims are abducted by perpetrators and never seen again, which is a standard modus for this type of crime. The ICTY has held that circumstantial evidence is sufficient as long as 'the only reasonable inference is that the victim is dead as a result of the acts or omissions of the accused'.[193]

Murder is one of the most prevalent of Gukurahundi crimes. The death toll of the Gukurahundi is estimated at 20 000, with many victims of enforced disappearances as envisaged in

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[186] *Akayesu* supra note 31 para 589; *Jelisić* supra note 80 para 35; *Kupreskic* supra note 179 para 560-1.
[187] Art 7(1)(a) of ICC Elements of Crimes.
[188] *Prosecutor v Zejnil Delalic* et al IT-96-21-T Trial Chamber Judgment of 16 November 1998 para 439; *Akayesu* supra note 31 para 589; *Prosecutor v Dario Kordic* et al IT-95-14/2-T Trial Chamber Judgment of 26 February 2001 para 236.
[189] Art 7(1)(a) of ICC Elements of Crimes.
[190] *Katanga* supra note 156 para 767.
[191] *Prosecutor v Pavle Strugar* IT-01-42-A App. Chamber Judgment of 17 July 2008 para 270.
[192] *Fofana* supra note 122 para 144; *Krnojelac* supra note 42 para 326.
[193] *Brđanin* supra note 172 para 385.

Prosecutor v Brđanin,[194]. There are many examples of the commission of murder by the Gukurahundi including the Siwale massacre in which 55 people were shot dead,[195] the killing of 50 villagers at Egceni,[196] the Mkhonyeni massacre in which 22 people were burnt to death and some shot,[197] the Salankomo village killings of over 12 people;[198] Soloboni village killings of at least 14 villagers,[199] Korodziba killings of five villagers,[200] Nxuma Village killings of ten villagers, Bhumbu killing of four villagers,[201] one villager in Sandawana village,[202] and three villagers at Mbiriya village.[203] The killings that occurred at Bhalagwe[204] and the disappearance and presumption of death of the Silobela Eleven[205] all constitute murder as envisaged by the ICTY case of *Brđanin*, which held that circumstantial evidence is sufficient as long as 'the only reasonable inference is that the victim is dead as a result of the acts or omissions of the accused'.[206]

The circumstances of their disappearance and the fact that the victims of disappearance have not resurfaced are sufficient circumstantial evidence to draw the inference that they were murdered. There is overwhelming evidence that the murders committed in many different villages highlighted above were all committed as part of a widespread or systematic attack against a civilian population; and that the alleged Five Brigade perpetrators were aware of or had knowledge of this attack. The gravity, scale and repetitious nature of the murders targeting many victims across a large geographic area and over an extensive period of time are self-evident. The factual evidence thus satisfies the legal elements in support of the argument that Five Brigade committed the crime against humanity of murder.

5.5.2 Extermination

Extermination can be described as murder committed on a massive or large scale.[207] The Rome Statute defines extermination as 'the intentional infliction of conditions of life, inter alia the

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[194] *Brđanin* supra note172.
[195] *Breaking the Silence* op cit note 64.
[196] This incident occurred North of Sipepa on 1 February 1983
[197] *Breaking the Silence* op cit note 64 at 87.
[198] Statement to Commission of Enquiry.
[199] *Breaking the Silence* op cit note 64.
[200] Ibid.
[201] Ibid.
[202] Ibid at 88.
[203] Ibid.
[204] Ibid at 119-24.
[205] See 'A Place for Everybody' CCJP for an account by the surviving spouses or widows of the men.
[206] *Brđanin* supra note 172 para 385.
[207] Kittichaisaree op cit note 29 at 104

deprivation of access to food and medicine, calculated to bring about the destruction of part of a population'.[208] The ICC elements of crimes state that the elements of extermination include the killing of 'one or more persons, including by inflicting conditions of life calculated to bring about the destruction of part of a population'.[209] These conditions could include the deprivation of access to food and medicine.[210] A perpetrator who commits the murder of someone within the context of mass killing can be found guilty of extermination.[211] In *Ntakirutimana*, The ICTR held that the key distinction between murder and extermination is that '[…e]xtermination requires an element of mass destruction, which is not required for murder'.[212] Extermination can also be distinguished from genocide in that unlike genocide which does not require the killing of many people but just an intent to destroy a group in whole or in part, for extermination, the killing must be collective and cannot target just an individual. Conversely, for extermination, there is no requirement to have an intent to destroy a group.[213]

Large numbers of fatalities are therefore an essential requirement of extermination. However, there is no requirement for any minimum number of people to be killed to meet the requirement of the crime of extermination. It is enough to show that a significant number of people have been killed or that the killing is on a large scale[214] There is no requirement that victims are killed in a single incident. Extermination can be established by demonstrating an accumulation of separate and unrelated incidents or aggregating separate incidents.[215] However, for a single killing to constitute extermination, it must be shown that it was part of broader mass killing conduct, process or event.[216] A 'killing event' exists when the killings have close proximity in time and space.[217] In order to prove or establish extermination, there is no requirement to precisely describe or designate victims by name.[218]

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[208] Art 7(2)(b) of the Rome Statute.
[209] Art 7(1)(b) of ICC Elements of Crimes.
[210] Ibid.
[211] *Kayishema & Ruzindana* supra note 43 para 147; see Art 7(1)(b)(2) of Rome Statute, ICC Elements of Crimes.
[212] *Prosecutor v Elizaphan Ntakirutimana [Ntakirutimana]* ICTR-96-10-A and ICTR-96-17-A App. Chamber Judgment of 13 December 2004 para 516.
[213] *Brđanin* supra note 162 para 390.
[214] *Stakić* supra note 83 para 260-261; *Ntakirutimana* supra note 202 para 516; *Kayishema & Ruzindana* supra note 33 para 142.
[215] *Brđanin* supra note 172 para 391; *Prosecutor v Radislav Krstic* IT-98-33-T Trial Chamber Judgment of 2 August 2001 para 501.
[216] *Kayishema & Ruzindana* supra note 43 para 147.
[217] Ibid.
[218] *Ntakirutimana* supra note 212 paras 518-9.

The elements of the crime of extermination comprise the following physical element (actus reas): the killing of persons on a massive scale; and mental element (mens rea): the accused's intent, by his acts or omissions of either: killing on a large scale or subjecting a widespread number of people, or the systematic subjection of a number of people to conditions of living that would lead to their deaths.[219] There is no requirement to prove that the extermination was committed as part of a policy or plan or that the state-sanctioned, tolerated or condoned the extermination.[220] Neither is knowledge by a perpetrator of a vast scheme of collective murder a requirement for extermination.[221]

There are several examples of the commission of the crime of extermination by Five Brigade. One of Five Brigade's main strategies was to conduct public mass executions of villagers. The killing of civilians on a massive scale illustrated in Chapters 3 and 4 include the Siwale massacre in which 55 villagers were summarily executed by being shot to death, the massacre in Silwane[222] village where 52 villagers were murdered, the Mkhonyane massacre where 22 villagers were burned to death and shot,[223] the Salankomo village killings of over 12 people;[224] Soloboni village killing of at least 14 villagers, Korodziba killing of five villagers[225] and the Nxuma Village killing of ten villagers[226] all meet the physical requirements (actus rea) for extermination.

Equally, the curfew conditions imposed on the population in Matabeleland and the prevention of food aid which led to the mass starvation and deaths of thousands of civilians already affected by the drought in the region also meet the requirement for extermination.[227] The mental element or intent of the crime is readily met and attributable to alleged Five Brigade perpetrators, who by their acts or omissions of either: killing villagers on a large scale and systematically subjecting a widespread number of people in Matabeleland to conditions of living that would lead to their deaths.[228] In addition, the extermination of civilians by Five

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[219] *Stakić* supra note 121, paras 252, 259 -261, 638, 642; *Brđanin* supra note 172 para 395; *Krstic* supra note 215 para 495.
[220] *Prosecutor v Sylvestre Gacumbitsi [Gacumbitsi]* ICTR-01-64-A App Chamber Judgment of 7 July 2006 para 84.
[221] *Stakić* supra note 121 para 259; *Brđanin* supra note 172 para 394; *Krstic* supra note 215 para 225.
[222] *Breaking the Silence* op cit note 64 at 48.
[223] Ibid at 87.
[224] Statement to Commission of Enquiry.
[225] *Breaking the Silence* op cit note 64 at 88.
[226] Ibid.
[227] *Stakić* supra note 121, paras 252-–261; *Brđanin* supra note 172, para 391; *Krstic* supra note 215 para 501.
[228] *Breaking the Silence* op cit note 64.

Brigade is established and demonstrated by the accumulation of separate, repetitious, unrelated and aggregated incidents.[229]

It is evident that the mass killings of civilians in Matabeleland and Midlands highlighted above was committed by Five Brigade as part of a widespread or systematic attack directed against that civilian population and that the alleged Five Brigade perpetrators knew that its conduct was part of or intended its conduct to be part of a widespread or systematic attack directed against a civilian population as required by law. Based on the foregoing facts, the legal elements have been met that Five Brigade committed the crime against humanity of extermination.

5.5.3 Imprisonment or other severe deprivation of physical liberty

Imprisonment or severe deprivation of liberty as a crime against humanity is considered and understood as the arbitrary imprisonment or deprivation of liberty of an individual without due process of law committed as part of a widespread or systematic attack directed against a civilian population.[230] In *Prosecutor v Ntagerura et al*,[231] the ICTR Trial Chamber held that not every deprivation of liberty without due process during a widespread or systematic attack on the civilian population would constitute the crime of humanity of imprisonment and that the imprisonment or deprivation of liberty should meet certain gravity and seriousness before it would constitute the crime of humanity of imprisonment. Although the Rome Statute does not define imprisonment, the ICC elements of crimes makes mention of this gravity requirement and states the gravity should be such that it is 'in violation of fundamental rules of international law'.[232] The ICC Pre-Trial Chamber in the *Authorization of an Investigation into the Situation in the Republic of Burundi* held that this gravity requirement took into account the length of the detention, the number of people detained, and the conditions of detention.[233]

The elements of imprisonment are the same as those for unlawful confinement as a war crime and comprise the following: an individual is deprived of his liberty; the deprivation of liberty

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[229] *Brđanin* supra note 162 para 391; *Krstic* supra note 215 para 501.
[230] *Prosecutor v Kordić & Čerkez [Kordić & Cerkez]* App Chamber Judgment of 17 December 2004 para 115-6; See *Kordic* supra note 188, para 302; *Krnojelac* supra note 42 para 115.
[231] *Prosecutor v Ntagerura et al [Ntagerura]* ICTR-99-46-T ICTR Trial Chamber Judgment of 25 February 2004 para 702.
[232] Art 7(1)(e) of the ICC Elements of Crime.
[233] 'Pre-Trial Chamber Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi of 9 November 2017', (ICC) para 69.

is imposed arbitrarily, with no legal justification or basis.[234] The specific act or omission by which the individual is deprived of his physical liberty must be performed by the accused or person(s) under the authority of the accused for whom the accused bears criminal responsibility. The accused must intend to deprive the individual arbitrarily of his physical liberty or have reasonable knowledge that his act or omission is likely to cause arbitrary deprivation of physical liberty.[235]

There are numerous illustrations of the commission of this crime by Five Brigade. Most notable is the imprisonment of thousands of civilians at Bhalagwe Detention Camp in Matobo District in Matabeleland South. [236] Bhalagwe was established after 2 February 1984, when Five Brigade was redeployed from Matabeleland North to Matabeleland South.[237] Bhalagwe was notorious for its horrendous and deplorable conditions and the torture, violence and killings of detainees by Five Brigade and other security agencies that oversaw it.[238] Accounts of detainees demonstrate that their imprisonment was arbitrary and without any formal judicial or legal process as held by the ICTY in the *Kordic* case.[239] Up to 10 000 people are reported to have been detained at Bhalagwe during the period of its operation (1984-1987).[240] It is also undisputed that the detention at Bhalagwe was committed as part of a widespread or systematic attack against the civilian population. In the main, the rounding up, detention, torture and murder at Bhalagwe of thousands of civilians from across Matabeleland and Midlands and elsewhere comprised the primary strategy by Five Brigade in Matabeleland South after 1984. The physical elements of the crime are satisfied by the taking into custody of detainees and their imprisonment at the camp. Detainees were not free to leave and were physically kept and secured in guarded sheds and open spaces. The members of Five Brigade, CIO and other security agencies responsible for Bhalagwe detention camp clearly possessed the intent to deprive the individuals detained at the camp arbitrarily of their physical liberty or had reasonable knowledge that their acts or omissions were likely to cause arbitrary deprivation of physical liberty of the civilians detained.

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[234] Ibid 302.
[235] *Kordić & Čerkez* supra note 188 para. 116.
[236] *Breaking the Silence* op cit note 64 at 119-24.
[237] Ibid.
[238] See *Breaking the Silence* op cit note 64: BLPC: Case no 3672 RASD.JS, Ref Bhalagwe, April 1984.
[239] *Kordic & Čerkez* supra note 230 para 115-6; See *Kordic* supra note 188 para 302.
[240] *Breaking the Silence* op cit note 64 at 119-24.

It is evident that the imprisonment or other severe deprivation of physical liberty of civilians in Matabeleland and Midlands highlighted above was allegedly committed by Five Brigade as part of a widespread or systematic attack directed against that civilian population and that the alleged Five Brigade perpetrators knew that its conduct was part of or intended its conduct to be part of a widespread or systematic attack directed against a civilian population as required by law. Considering the length of the detention, the number of people detained, and the conditions of detention at camps such as Bhalagwe it is evident that the deprivation of liberty meets the gravity requirement. The conduct of Five Brigade and other state security agencies such as the CIO thus arguably meets the requirements of the crime against humanity of imprisonment or other severe deprivation of physical liberty.

5.5.4 Torture

The prohibition of torture is provided in Article 1 of the Convention against Torture and Other Cruel and Degrading Treatment or Punishment (Torture Convention).[241] Apart from convention, torture is also prohibited by customary international law and constitutes a norm of jus cogens.[242] Torture is also prohibited by Article II (1) (c) of Control Council Law No 10, Article 5(f) of ICTY Statute, Article 3(f) of ICTR Statutes and Article 7(1)(f) of the Rome Statute.[243] The elements of torture as set out in the Torture Convention are as follows: the infliction, by act or omission, of severe pain or suffering, whether physical or mental; the act or omission must be intentional. The torture must aim to obtain information or a confession or intimidate, humiliate, punish, or coerce the victim or a third person to confess or give information. In the case of persecution, it must be aimed at discriminating against the victim or third person on any prohibited ground.[244] There is no requirement that permanent injury or evidence of same results from torture.[245] The ICC elements of crimes state that the elements of torture include: 'The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons, Such person or persons were in the custody or under the control of the perpetrator'[246] and that 'such pain or suffering did not arise only from, and was not inherent in or incidental to, lawful sanctions'.[247] Unlike the ICTY and ICTR, which require that torture as

[241] Supra note 8.
[242] *Delalic* supra note 188 paras 452-459: *Prosecutor v Anton Furundžija [Furundžija]* IT-95-17/1-T ICTY Trial Chamber Judgment of 10 December 1998 paras 137-146, 153-157.
[243] Art 7 (1) (f) of the Rome Statute.
[244] *Brđanin* supra note 172, para 482.
[245] *Kunarac et al* supra note 42 para 149-150; *Brđanin* supra note 172 para 483-4.
[246] Art 7(1)(f) of ICC Elements of Crimes.
[247] Ibid.

a crime against humanity must be committed with a purpose, the ICC and customary law do not carry such a requirement.[248]

Acts and omissions can constitute torture. Omissions must be intentional and not objectively accidental, and the consequences must lead to severe physical and mental suffering.[249] In *Celebici,* the ICTY Trial Chamber found the following acts to constitute torture:[250] beatings, extraction of nails, teeth, burns, electric shocks, suspension, suffocation, exposure to excessive light or noise, administration of drugs in detention or psychiatric institutions, prolonged denial of rest or sleep, food, sufficient hygiene and medical assistance. This included the total isolation and sensory deprivation of victims, threats of torture, killing of relatives, simulated executions, incommunicado detention, rape, sexual aggression, assault and humiliation.

Sexual offences, assaults or abuses are considered acts of torture when inflicted on the physical and moral integrity of a person by means of coercion, the threat of force or intimidation in a way that is degrading and humiliating for the victim's dignity. Rape, in particular, is considered as meeting the requirement of suffering to qualify as torture on the understanding that once rape is proved, severe pain and suffering is established.[251]

There are many illustrations of Five Brigade committing the crime of torture, [252] and only some illustrative examples are shown here. At the time of the atrocities, the Lawyers Committee for Human Rights, observed that 'much of the evidence of torture came from lawyers, doctors, church officials, the victims themselves and many witnesses [...] The methods of torture include[d] beatings with sticks, clubs, rifle butts, rawhide whips [known as sjamboks], tore irons, fan belts and rubber hoses often on the soles of the feet, electric shock, and perhaps most common, a form of suffocation by submerging the victims' head in a canvas sack filled with water'. In the villages, yet another common method was the burning of plastic and then dripping it over the body of the victim.[253]

Much of what Five Brigade did to civilians in Matabeleland and Midlands involved the infliction of severe physical and mental pain or suffering, usually with the aim of obtaining

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[248] Ibid.
[249] *Delalic* supra note 188, para 468.
[250] Ibid paras 461-469; *Furundžija* supra note 242 para 113.
[251] *Delalic* supra note 188, para 495-496; *Brđanin* supra note 162 para 485; *Kunarac et al* supra note 42 para 150-151; *Akayesu* supra note 31 para 596; *Furundžija* supra note 242 paras 163, 171.
[252] See *Breaking the Silence* op cit note 64 at 87 which discusses the extensive torture at Bhalagwe Detention Camp.
[253] *Breaking the Silence* op cit note 64.

information or a confession about dissidents, or at punishing, intimidating, humiliating or coercing the villagers and discriminating victims on the grounds of supporting ZAPU and being Ndebele. Typically, Five Brigade would arrive at a village, round up villagers, demand information regarding dissidents or accuse them of feeding dissidents. When the villagers denied knowledge of dissidents or feeding them, what would typically follow would be severe public beatings of some or all the villagers. The beatings would cause severe physical and mental harm and would, in some instances, result in death.[254] The excerpt below from a survivor of Bhalagwe detention camp is illustrative:

> 'The people went through hell at Bhalagwe (...) Each day brought one near to death through torture. Electric shocks, simulated drownings and beatings were used by the CIO in its attempts to extract confessions of dissident support or activity, while Five Brigade experimented with a wide variety of tortures... Some prisoners were made to climb trees until their combined weight broke the branches. Another favourite was to force three men into a short pipe, order the two at each end to come out and then beat them so that they kicked and crushed the middle man as he tried to retreat, sometimes resulting in fatalities. Another was to lash prisoners with thorn bushes. Much of the cruelty had a sexual angle to it. Men were forced to attempt sex with donkeys and beaten when they failed to attain erections. A female member of the CIO, who became particularly notorious at Bhalagwe for her 'cruel, ruthless, savage, inhuman' behaviour, would stand astride her victims, asking them what they saw; if too embarrassed to say, they would be 'severely beaten for lying', but if they provided an answer, they would receive the same treatment for failing to become aroused and thus 'saying she was not a woman.' In the words of a detainee: 'One day was like a year in hell…'[255]

Although the preceding examples highlighted above are not exhaustive, they indicate the prevalence of the commission of torture by Five Brigade against civilians. Crucially, the commission of torture at Bhalagwe was confirmed and accepted by the magistrates' court when it acquitted an ex-ZIPRA combatant accused of caching arms. Magistrate Gordon Geddes concluded that:

> 'A few days, you were taken to Bhalagwe camp in Kezi area. You were placed in what you described as an old armoury and subjected to extremely inhuman conditions. You had no blankets, you were unable to wash yourself, and you were only allowed to [relieve] yourself once a week. I would imagine the conditions in that place would be disgusting. Furthermore, you were taken out and given more beatings. You and

[254] Ibid.
[255] Ibid at 48-124.

> others were taken into the bush, put in an anthill, shots fired into this anthill, in another effort to make you talk, to the satisfaction of the police.'[256]

As demonstrated by the examples, the torture was almost always aimed at obtaining information about dissidents but was also aimed at punishing, intimidating, coercing and humiliating victims. It is also evident that the torture caused severe mental and physical pain and suffering to the victims. It is evident that the acts of torture of civilians in Matabeleland and Midlands highlighted above were committed by Five Brigade as part of a widespread or systematic attack directed against that civilian population and that the alleged Five Brigade perpetrators knew that its conduct was part of or intended its conduct to be part of a widespread or systematic attack directed against a civilian population as required by law.

5.5.5 Rape

Rape as a crime against humanity has long been prohibited by international criminal law. The Nuremberg's Control Council Law No 10,[257] ICTY,[258] ICTR,[259] SCSL,[260] and ICC[261] Statutes all proscribe rape.[262] Rape has been defined as 'a physical invasion of a sexual nature, committed on a person under circumstances which are coercive'.[263] The ICC elements of crimes stipulate that rape is an invasion of the body which results in 'penetration of any body part of the victim or of the perpetrator with a sexual organ or of the anal or genital opening of the victim with any object or any other part of the body'.[264] The invasion should be committed with force or 'or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent'.[265] Additionally the ICC elements of crimes state that 'a person may be incapable of giving genuine consent if affected by natural, induced or

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[256] *The State v Abednico Sibindi [Sibindi]* BR 377/84.
[257] Art II (1) (c) Control Council No 10.
[258] Art 5 (g) of ICTY Statute; see Christa Grootveld, *The ICTY and Sexual Violence as a Crime Against Humanity* (unpublished PhD Thesis, January 2012.
[259] Art 3 (g) of ICTR Statute.
[260] Art 2(g) of the SCSL Statute.
[261] Art 7 (1)(g) of Rome Statute.
[262] See Kelly Dawn Askin 'Gender Crimes Jurisprudence in the ICTR: Positive Developments' (2005) 3 *Journal of International Criminal Justice* 4 at 1007–1018.
[263]*Akayesu* supra note 31 para 597-598.
[264] Art 7 (1) (g)-1 of ICC Elements of Crime.
[265] Ibid.

age-related incapacity'.[266] There is no requirement to show physical force, threats, intimidation or extortion. In addition, 'other forms of duress which prey on fear or desperation'[267] may constitute coercion. Rape need not involve sexual intercourse.[268]

The physical element (actus reus) of the crime of rape is the sexual penetration, however slight, of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator or of the mouth of the victim by the penis of the perpetrator,[269] without the consent of the victim.[270] The mental element or (mens rea) is the intention to effect this sexual penetration and the knowledge that it occurs without the consent of the victim.[271] With regard to the ICC, the actus reus of rape is as follows: the perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body,[272] by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.[273] The mens rea is that perpetrator must have acted with intent and knowledge. In other words, the perpetrator must have intended to penetrate the victim's body and was aware that the penetration was by force or threat of force.

Lack of consent is essential for the crime of rape. Consent must be given voluntarily due to the victim's free will, assessed in the context of the surrounding circumstances.[274] While force or threat of force provides clear evidence of non-consent, it is not an element per se of the crime of rape. Force or threat of force may be relevant to demonstrate an apparent lack of consent.[275] Given the generally coercive circumstances in which the crime against humanity of rape is committed, focusing only on force or threat of force would allow perpetrators to evade liability

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[266] Ibid.
[267] Ibid para 688.
[268] Ibid para 597-598; *Prosecutor v Musema [Musema]* Trial Chamber Judgment ICTR-96-13 para 226.
[269] *Kunarac et al*. supra note 42 para 127.
[270] Ibid para 129; See Robert Cryer, *An Introduction to International Criminal Law and Procedure* (2014) 254-255. Early ICTY jurisprudence applied a coercion requirement, but the Appeals Chamber later held that lack of consent was the correct element.
[271]*Kunarac et al* supra note 42 para 127; *Stakić* supra note 121 para 755, *Gacumbitsi* supra note 220 para 147-157.
[272]Art 7(1)(g)-1(1) of ICC Elements of Crime.
[273] Ibid Art 7(1)(g)-2(2).
[274] *Kunarac et al* supra note 42 para 460, 128.
[275] *Kunarac et al* supra note 42 para 129.

for coercive sexual activity to which the other party had not consented by taking advantage of coercive circumstances without relying on physical force.[276] This is especially important when rape is committed in the backdrop of other violent acts or in the context of imprisonment or sexual enslavement. The SCSL followed the approach of the international criminal tribunals in considering the 'very specific circumstances of armed conflict where rapes on a large scale are alleged to have occurred, coupled with social stigma which is borne by victims of rape in certain societies'.[277]

Implied in the consent requirement is that the victim is not required to provide any or continuous resistance or adequate notice to the perpetrator that the sexual activity is non-consensual. However, evidence of resistance could support a finding that the sexual penetration occurred without the victim's consent and that the perpetrator knew it occurred without consent.[278] Rape is one of Five Brigade's most notorious crimes. It is also one of its most sadistic. It features where Five Brigade committed crimes against villagers in almost every instance. The following non-exhaustive examples are illustrative:

This includes the beating and torture of 60 students and rape of 20-30 young girls aged 14-16 years over three hours in February 1983 in Korodziba Village School followed by instructions for schoolboys to rape them while Five Brigade watched.[279] In March 1983, the beating, abduction and rape over several months of 50 school girls at Kapane, 20 kilometres west of Gwayi mission resulting in some girls falling pregnant and leaving school.[280] The daily rape of ten school girls after school in May 1983 at Emkanyeni Village, near Dlamini Rest Camp, 25 kilometres north west of Tsholotsho.[281] The rape of two girls aged 12 and 15 after the torture of their parents at Denge-Jibi Village near Tshabanda and Nkunzi in March 1983.[282] The rape of all the female teachers at Nemane School, Bhanti Kraal, Nanda Area in early 1983, after the rounding up and public killing of several people.[283] The rape of all the women at Gariya Village, 12 kilometres south of Mbiriya and forcing them to cook food in early 1983.[284] The rape of eight girls for several days in Neshango Line next to Ningombeneshango Airstrip by

[276] Ibid.
[277] *Sesay* supra note 55 para 149.
[278] *Kunarac et al* supra note 42 paras 128-129.
[279] *Breaking the Silence* op cit note 64 at 156.
[280] Ibid at 105.
[281] *Breaking the Silence* op cit note 64.
[282] Ibid at 95.
[283] Ibid at 93.
[284] Ibid at 90.

Five Brigade before it left by helicopter in November 1982 and on 3 February 1983. The subsequent shooting to death and bayonnetting of the stomachs open of two pregnant girls raped earlier to reveal still moving foetuses.[285] The severe beating and rape of several girls at Esipongweni Village in March 1983 after the shooting of six people to death.[286] The door-to-door rape of women including six school girls in Sipepa Area in February 1983 followed by a refusal to seek medical treatment.[287] The rape of several women including four 13-year old school girls in front of their families in Gwayi East, near Regina Mundi Mission in February 1983.[288] The rape and shooting to death of three girls at Mahlaba Village, near Gwayi Mission, between 9 and 11 February 1983.[289] In February 1984, the beating and rape of women from Tshipisane at Bhalagwe camp by inserting sticks in their vaginas. [290] The beating and abduction of women from Homestead, 7 kilometres south of Masuna in April 1984 and their detention at Bhalagwe camp where they were given to Five Brigade soldiers as wives and repeatedly raped over several months.[291] In 1984 at Antelope Mine (Maphisa), Five Brigade reportedly killed 22 villagers and 'assaulted' 27 women in two separate incidents.[292]

The preceding illustrative examples demonstrate the satisfaction of the requirements of the crime of rape by Five Brigade. There is no doubt that in all instances indicated above, the conduct of Five Brigade amounted to 'a physical invasion of a sexual nature, committed on victims under circumstances which were unquestionably coercive'.[293] While it is not necessary to show that there was physical force, threats, intimidation or extortion, [294] all these factors were present in each incident. In many cases, rape followed or was accompanied by severe torture, beatings and killings of civilians in the presence and complete view of the rape victims.[295] In other instances, victims were removed from their homes and taken into the custody and control of the alleged perpetrators.[296] In other cases of gratuitous humiliation, victims were raped in front of their family members.[297] In all instances, victims were aware of

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[285] Ibid at 85.
[286] Ibid at 104.
[287] Ibid.
[288] Ibid.
[289] Ibid at 107.
[290] Ibid.
[291] Ibid at 129.
[292] Ibid.
[293] *Akayesu* supra note 31 paras 597-598.
[294] Ibid para 688. It is likely that this mass assault of women is a disguised or unreported rape.
[295]Ibid at 87-134.
[296] Ibid.
[297] Ibid.

the power and capability of the alleged perpetrators over their fate, safety and lives. The desperation of the victims is readily demonstrated. Five Brigade also systematically targeted young schoolgirls for mass rape as well as female school teachers.[298] The conduct of Five Brigade members satisfies the physical elements of the crime against humanity of rape in that they penetrated their victims with their penises[299] without the consent of the victims. [300] There is no doubt that the victims did not consent to the actions of Five Brigade.

Most importantly, the circumstances and the context in which the rapes occurred negate the possibility of any consent being freely given by the victims. This is especially the case with rapes accompanied and preceded by acts of violence and those that occurred during captivity or unlawful detention, such as in Bhalagwe or other Five Brigade camps. It is evident that in raping women in Matabeleland and Midlands, Five Brigade acted with intent and knowledge and that they intended to penetrate their victims' bodies and were aware that the penetration was by force or threat of force.[301] It is also evident that Five Brigade committed these rapes of civilians in Matabeleland and Midlands as part of a widespread or systematic attack directed against that civilian population and that the alleged Five Brigade perpetrators knew that its conduct was part of or intended its conduct to be part of a widespread or systematic attack directed against a civilian population as required by law.

5.5.6 Sexual violence

Apart from rape, other acts of sexual violence are considered CAH and are included in the Rome Statute[302] and the ICC elements of crimes.[303] International criminal tribunals have considered the crime against humanity of sexual violence. The ICTY has categorised 'sexual assault under various provisions safeguarding physical integrity' and also as constituting an 'outrage upon personal dignity',, which was itself 'a violation of a fundamental right'.[304] In *Prosecutor v Milutinovic*, the ICTY Trial Chamber observed that 'sexual assault offences must be serious in order to reach the gravity requirement of CAH enumerated in Article 5 of the ICTY Statute'.[305] The ICTY held that the elements of sexual assault as a form of persecution

[298] Ibid.
[299] *Kunarac et al* supra note 42 para 127.
[300] Supra note 260.
[301] *Breaking the Silence* op cit note 64 at 87 to 134.
[302] Art 7(1)(g) of the Rome Statute.
[303]Art 7(1)(g)-6 of ICC Elements of Crime.
[304] *Prosecutor v Milutinovic [Milutinovic]* IT-99-37 ICTY Trial Chamber Judgment para 192.
[305] Ibid para 193.

as are as follows: the physical perpetrator commits an act of a sexual nature on another, including requiring that person to perform such an act. The perpetrated act infringes the victims' physical integrity or amounts to an outrage over the victim's personal dignity. There is no consent to the act from the victim. The act is committed intentionally by the perpetrator, who is also aware that the victim has not consented to it.[306] In *Rukundo*, the ICTR held that acts of sexual violence are a broader category than rape which is specific.[307] The significance of this finding is that a tribunal can hold a perpetrator liable for sexual violence where it is impossible or difficult to get a conviction on rape. Although, the ICC has yet to find anyone guilty of sexual offences to date,[308] the ICC Statute also prohibits the crime against humanity of "other sexual violence of comparable gravity."[309]

Much of Five Brigade's sexual offences relate to rape, as described in 5.7.5 above. However, there is much evidence of Five Brigade committing sexual offences other than rape. Examples include Five Brigade forcing schoolboys to have sex with young schoolgirls at Korodziba Village,[310] forcing men to have sex with donkeys at Bhalagwe,[311] a female CIO officers forcing men to view her private parts and beating them for not having erections at Bhalagwe and forcing of men to have sex with women (usually family members) throughout the region and at Bhalagwe. The commission of sexual offences is readily established from an analysis of the conduct of Five Brigade. These acts violated the physical integrity of the victims and constituted outrages of their personal integrity, amounting to serious violations of their fundamental rights.[312] It is also evident that Five Brigade committed these acts of sexual violence against civilians in Matabeleland and Midlands as part of a widespread or systematic attack directed against that civilian population and that the alleged Five Brigade perpetrators knew that its conduct was part of or intended its conduct to be part of a widespread or systematic attack directed against a civilian population as required by law.

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[306] Ibid para 201, See para 194 – 201 for a discussion of these elements.
[307] *Prosecutor v Rukundo [Rukundo]* Trial Chamber Judgment para 380.
[308] In *Katanga* (supra note 129) the ICC stated that it was unable to connect Congolese militia leader Germain Katanga to acts of sexual violence.
[309] Art 7(1)(g)-6 of ICC Elements of Crime.
[310] *Breaking the Silence* op cit note 64 at 156.
[311] Ibid at 222.
[312] *Katanga* supra note 156.

5.5.7 Persecution

Often considered closely related to genocide because of its discriminatory quality, persecution is a distinct crime against humanity.[313] It is prohibited by Article 6(c) of the Nuremberg Charter, Article II(1)(c) of Control Council Law No. 10, Article 5 (h) of the ICTY Statute, Article 3 (h) of the ICTR Statute, and Article 7 (1) (h) of the ICC Statute.[314] It is essentially the discriminatory violation of a fundamental right.[315] The ICC Elements of Crimes states that the perpetrator must have severely deprived one or more persons of their fundamental rights contrary to international law.[316] Additionally, the Elements of Crimes provide that "The perpetrator targeted such person or persons by reason of the identity of a group or collectivity or targeted the group or collectivity as such" and the targeting is based on "political, racial, national, ethnic, cultural, religious, gender"[317] or "other grounds that are universally recognized as impermissible under international law."[318] In *Kupreskic*, the ICTY Trial Chamber defined the crime against humanity of persecution as "the gross or blatant denial, on discriminatory grounds, of a fundamental right, laid down in international customary law or treaty law, reaching the same level of gravity as the other CAH.[319] Persecution is thus defined as an act or omission that discriminates and denies or infringes upon a fundamental right laid down in international customary or treaty law (actus reus); and which is carried out deliberately with the intention to discriminate on one of the listed grounds (mens rea).[320] A specific discriminatory intent requirement provides persecution with its unique and distinct character. The accused must consciously intend to discriminate on one of the listed bases for the crime to be committed.[321] It is insufficient for the accused to simply be aware that he is acting in a discriminatory way.

A discriminatory act exists where a person is targeted based on religious, political or racial considerations. This could be related to his membership in a specific victim group that the perpetrator targets. The victim does not need to belong to the group targeted by the

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[313] Andrew Altman 'Genocide and Crimes Against Humanity; Dispelling the Conceptual Fog' (2012) 29 *Social Philosophy and Policy* 1 at 280-308.
[314] Kittichaisaree op cit note 29 at 116.
[315] *Tadić* supra note 39, para 697; *Blaškić* supra note 58, para 220.
[316] Art 7(1)(h) of ICC Elements of Crimes.
[317] Ibid.
[318] Ibid.
[319] Supra note 27.
[320] *Blaškic* supra note 58 para 131; See *Krnojelac* supra note 42 para 185; *Brđanin* supra note 172 para 992.
[321] *Krnojelac* supra note 42 para 435; *Kordic* supra note 188 para 212.

perpetrator.[322] However, it must be established that the act did discriminate against the person based on one of these grounds. The ICTY and ICTR Statutes provide that the grounds for discrimination can be political, racial or religious.[323] The Rome Statute includes national, ethnic, cultural, or gender or "other grounds that are universally recognized as impermissible under international law" in addition to political, racial and religious grounds.[324] There is no requirement that a discriminatory policy exists or that, if such a policy is shown to have existed, the accused needs to have taken part in the formulation of such discriminatory policy or practice.[325]

In most cases, the crime of persecution refers to the perpetration of a series of acts targeting several individuals. However, the ICTY has held that a single act may be sufficient to prove persecution, provided that this act or omission discriminates and is carried out deliberately with the intention to discriminate on one of the listed grounds.[326] With regard to the ICC, its Statute requires that the persecution be committed in connection with at least another crime against humanity or crime within the jurisdiction of the ICC.[327] The ICC Elements of Crimes provide that the crime must be committed in connection with one of the crimes listed in Article 7 of the Rome Statute.[328]

Persecution as a crime against humanity can encompass a range of acts or various forms of conduct, including any of the acts listed as CAH. It can also include any other acts which rise to the same level of gravity or seriousness when committed with discriminatory intent,[329] including other crimes listed in the ICTY statute, as well as acts that are not necessarily crimes in and of themselves. However, the Rome Statute requires a nexus with another crime within the jurisdiction of the ICC.

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[322] Ibid *Krnojelac* para 185; *Brđanin* supra note 172, para 993.
[323] ICTY Statute op cit note 2; ICTR Statute op cit note 3.
[324] Art 7(1)(b) of the Rome Statute.
[325] *Brđanin* supra note 172, para 996.
[326] *Vasiljevic* supra note 173 para 113; *Blaškic* supra note 36, para 135.
[327] Art 7(1)(h) of the Rome Statue.
[328] Art 7 (1) (h) of ICC Elements of Crimes.
[329] *Blaškic* supra note 58 para 138-9.

The international tribunals have found a range of acts[330] as constituting persecution. These acts include deportation,[331] forcible transfer or displacement;[332] destruction of property,[333] towns, and villages.[334] The tribunals also found that the denial of fundamental rights such as freedom of movement, proper judicial process and proper medical care;[335] hate speech;[336] serious violations of human dignity including harassment, humiliation and psychological abuses also constituted persecution.[337] Additionally, the detention of civilians who were beaten, killed,[338] overcrowded,[339] physically or psychologically abused, intimidated, and humiliated was found to constitute persecution. Furthermore, the inhumane treatment and deprivation of adequate food and water whilst in detention;[340] humiliating and degrading treatment;[341] any sexual assault falling short of rape, embracing all severe abuses of a sexual nature was found to constitute persecution.[342] Forced labour[343] including forced labour assignments which require civilians to take part in military operations or which result in exposing civilians to dangerous or humiliating conditions amounting to cruel and inhumane treatment equally constitute persecution.[344]

Before deployment of Five Brigade, the political tensions between ZANU and ZAPU after the 1980 elections, clashes between ZIPRA and ZANLA, the discovery of arms caches on ZAPU farms, the arrest and detention of ex-ZIPRA commanders, the discrimination and attacks of ex-ZIPRA members in the ZNA led to their desertion and joining of dissident ranks. These developments created a context in which all Ndebele civilians in Matabeleland were all

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[330] *Kayishema & Ruindana* supra note 43 para 285; *Blaškic* supra note 58, paras 149, 153, 155, 159; *Stakić* supra note121 para 757.
[331] *Stakić* ibid para 278.
[332] *Prosecutor v Naletilic and Martinovic* [Martinovic] IT-98-34-A, Appeal Judgment; *Blaškić* supra note 36 para 151; *Kordic* supra note 188 para 108.
[333] *Prosecutor v Martic Milan [Milan]* IT-95-11-A Appeal Judgment para 98; *Blaškić* supra note 36 para 148.
[334] *Prosecutor v Popovic et al [Popovic et al]* IT-05-88-A Appeal Judgment para 762.
[335] Ibid.
[336] *Prosecutor v Nahimana et al. (Media case)* (ICTR-99-52) para 22.
[337] *Popovic* supra note 324; *Brđanin* supra note 162 paras 994, 1005-1014, 1023-1049.
[338] *Prosecutor v Krnojelac [Krnojelac]* App. Chamber Judgment para 184.
[339] Ibid.
[340] Art 7 of the Rome Statute; *Tadić* supra note 39; *Blaškić* supra note 58; *Popovic et al* supra note 334.
[341] *Prosecutor v Kvocka et al [Kvocka et al]*, IT-98-30/1-A. Appeals Judgment, para 366
[342] See Valerie Oosterveld 'The Legacy of the ICTY and ICTR on Sexual and Gender –Based Violence.' In Milena Sterio & Michael Scharf (eds) *The Legacy of Ad Hoc Tribunals in International Criminal Law: Assessing the ICTY's and the ICTR's Most Significant Legal Accomplishments* (2019).
[343] See *Tadić* supra note 39 *Prosecutor v Mucic et al [Mucic et al]* IT-96-21 App Chamber Judgment; *Prosecutor v Delacic [Celebici Case]* IT-96-21-A; *Furundzija* supra note 242, *Kunarac* supra note 42 *Krstic* supra note 215 *Akayesu* supra note 31 cases.
[344] European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted on 4 November 1950) ETS 5 art. 4(3); *Krnojelac* supra note 42 para 200; Third Geneva Convention Art 52(2).

considered by the government and consequently Five Brigade as supporters of ZAPU and the dissidents. These civilians were discriminatorily targeted for attacks based on this conflated characterisation and labelling. In many instances, victims report that Five Brigade would use alleged ZAPU leaders or supporters lists to select victims. In other instances, Five Brigade would accuse its victims of supporting ZAPU and dissidents. The following excerpt of an interview of a Mr Ndlovu, a ZAPU driver whom the CIO tortured in January 1984, is illustrative:

> "On the night of January 21, a gang of men came to my home after midnight and knocked on my door. They were speaking Shona. I opened the door, and they grabbed me. They asked me for my ZANU PF card, and I told them I had none. They asked me for my ZAPU card, and I told them I had none at that moment. They told me they were CIO.
>
> There were more than 20 of them. They all had AKs, a few had G-3s. They were wearing civilian clothes. They grabbed me and dragged me into the house. They asked me why I had a ZAPU motor scooter. I told them I was working in the offices of ZAPU as a driver. They took some plastic bags from the cupboard, and some matches, and they lit the matches, letting it drip onto my chest and arms and my back. They took my wife to where the chickens were, and killed seven chickens, and made my wife cook for them.
>
> During the time when the chickens were being cooked, my neighbour (Mr Moyo) was brought into the house. They also kicked us and beat us with sticks. Then they told us to fight each other. They kicked us and beat us and forced us to hit each other. They then tore the foam from the sofa and stuffed it into our mouths. They tore the curtains and gagged us. They then tied our hands behind our backs. They started bayonetting us with knives. From then, I was unconscious thereafter."[345]

This detailed example illustrates the gruesome torture targeting ZAPU supporters or officials. Moyo, tortured together with Ndlovu, reportedly died on the way to Gwanda hospital.[346] In most reported cases, the discrimination would target Ndebele speaking civilians, and Shona speaking or ZANU supporting civilians were routinely and consistently spared, as the case of Ndlovu above demonstrates. The discriminatory attacks by Five Brigade were targeted at civilians based on their Ndebele ethnicity and their perceived political membership of ZAPU, as well as the alleged support of dissidents. That the victims may not have been ZAPU members or dissident supporters is immaterial.[347] The discriminatory acts perpetrated by Five Brigade

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[345] Interview with Mr Ndlovu in Bill Berkeley *Zimbabwe: Wages of War, A Report on Human Rights* at 44.
[346] Ibid.
[347] *Krnojelac* supra note 42 para 185; *Brđanin* supra note 172 para 993.

include forcible transfer or displacement of the population; destruction of property especially burning of homesteads and villages.[348] The acts also include indiscriminate attacks in particular beatings of civilians, harassment, humiliation and psychological abuses; detention of civilians under terrible conditions at Bhalagwe and elsewhere, including deprivation of adequate food and water and sexual assaults including rape.[349] It is also evident that the persecution of civilians by Five Brigade was committed as part of a widespread or systematic attack directed against the civilian population in Matabeleland and Midlands and that the alleged Five Brigade perpetrators knew that its conduct was part of or intended its conduct to be part of a widespread or systematic attack directed against a civilian population as required by law.

5.5.8 Enforced disappearance of persons

The crime against humanity of enforced disappearance is prohibited in several international declarations, conventions and decisions of international criminal tribunals.[350] It is also referred to as a permanent crime.[351] The ICTY and ICTR Statutes do not contain specific provisions related to the crime against humanity of enforced disappearance, although the crime could be prosecuted under "other inhumane acts" pursuant to Article 5 (i) of the ICTY Statute and Article 3 (i) of the ICTR Statute. *In Kupreskic*,[352] the ICTY Trial Chamber held that enforced disappearance could be characterised as 'other inhumane acts' under CAH, although it was not expressly listed in the ICTY Statute.

Article 7 (2) (i) of the Rome Statute has been informed by the international conventions. It defines "enforced disappearance of persons" as "the arrest, detention or abduction of persons by, or with the authorisation, support or acquiescence of, a State or a political organisation, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of these persons, with the intention of removing them from the protection of the law for a prolonged period of time." ICC definition of the crime against humanity of

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[348] The ICTY has been held that destruction of cultural and religious property can constitute persecution even though it is not specifically listed under Art 5 of the ICTY Statute, see *Prosecutor v Vlastimir Đorđevic [Dordevic]* IT-05-87/1-T, Trial Chamber Judgment of 23 February 2011, paras 1770-1774; *Kordic & Cerkez* supra note 220 para 834.

[349] *Milutinovic* supra note 304 paras 194-201.

[350] 'Declaration on the Protection of All Persons from Enforced Disappearances' GA res 47/133 47 UN GAOR Supp (No 49) at 207 UN Doc A/47/49 (1992); 'Inter-American Convention on Forced Disappearance of Persons' 33 ILM 1429 (1994); 'International Convention for the Protection of All Persons from Enforced Disappearance' E/CN.4/2005/WG.22/WP.1/Rev.4 (2005).

[351] This was the characterisation given by the Latin American states, who suffered this phenomenon at the PCNICC.

[352] *Kupreskic* supra note 179 para 566.

enforced disappearance is elaborated in the Elements of Crimes adopted by the Preparatory Commission for the International Criminal Court (PCNICC) reaffirm the requirements and definition in Article 7 (2) (i) of the ICC Statute. The conduct of the perpetrator must be committed as part of a widespread or systematic attack directed against a civilian population and the perpetrator must know that the conduct is part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population" [353]

Enforced disappearance as a crime against humanity consists of two acts, namely (i) the arrest, detention or abduction of a person and (ii) the refusal to acknowledge the deprivation of liberty or to provide information concerning the fate of the person.[354] According to the ICC definition, a perpetrator does not need to be involved in detaining and refusing information about the victim. A perpetrator can be found guilty of enforced disappearance if they directly detained a person, with full knowledge that it was likely that there would be no acknowledgement or information provided, or if after the detention they refused to acknowledge detention or provide information about it, knowing that detention had likely taken place. Consequently, detention includes the act of maintaining detention that has already taken place, which could have been initially lawful. If the perpetrator maintains detention in these circumstances, the perpetrator would have to know that the refusal to acknowledge or give information about the arrest had already occurred.[355]

In *Velasquez Rodriquez*, the Inter-American Court of Human Rights held that when the existence of a policy or practice of disappearance has been shown, the disappearance of a particular individual may be proved "through circumstantial or indirect evidence or by logical inference otherwise it would be impossible to prove that an individual has disappeared because this type of repression is characterised by an attempt to suppress any information about the kidnapping or the whereabouts and fate of the victim."[356] The court upheld "the principle that the silence of the accused or elusive or ambiguous answers on its part may be interpreted as an acknowledgement of the truth of the allegations, so long as the contrary is not indicated by the record or is not compelled as a matter of law."[357]

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[353] See ICC Elements of Crimes.
[354] Stahn op cit note 50 at 66-67; See I Giorgou 'State Involvement in the Perpetration of Enforced Disappearance and the Rome Statute' (2013) 11 *JICJ* 1001.
[355] Art 7 of ICC Elements of Crimes fns 25-28.
[356] 'Inter-American Court of Human Rights' 1988 Ser C No. 4, (1988) 9 Human Rights *L J* 212 para 124-131.
[357] Ibid para 138.

The abduction and subsequent disappearance of civilians is one of the most prevalent Five Brigade crimes. Thousands of civilians were reportedly arrested or taken into custody by Five Brigade and other security agencies like the CIO and never seen again. Berkeley addressed this issue as follows:

> "The emergence of political kidnappings in the first four months of 1985 was a wholly new development in the struggle for Matabeleland. Between mid-January and the end of April, with tension between ZAPU and ZANU PF intensifying in an election year, at least 80 local ZAPU officials and supporters, perhaps as many as 400, were abducted from their homes by unidentified gunmen. Few have been seen or heard from since; most are presumed dead. One diplomat likened the abductions to the work of Latin American "death squads."[358]

For its part, the government denied abducting civilians at the time. The Minister of State Security, Emmerson Mnangagwa, stated that:

> "The government categorically refutes any suggestion that its forces were responsible for these alleged abductions. The abductions are the subject of an ongoing investigation, and to date, there is little evidence to support the claims that such a number of people have, in fact, vanished. Rumours of mass graves in Matabeleland have been thoroughly investigated and proved to be false. However, it is known that many Zimbabweans, persuaded by the dissident rhetoric, have fled the country to Botswana and the Republic of South Africa, and it is the government's opinion that a large number of missing people can be accounted for in this way."359

However, the evidence of abduction of the victims' relatives pointed to a systematic plan and organisational policy by Five Brigade and other security agencies. In almost all instances, the abducted individuals were "ZAPU chairmen, party organisers, village headmen, schoolteachers, hospital administrators, church pastors and district officials…were elderly men in their 60s and 70s (...) and unlikely recruits for a fledgling guerrilla insurgency."[360]

Concerning the elements of the crime against humanity of enforced disappearance, it is evident from the examples below that Five Brigade arrested, detained and abducted many civilians in Matabeleland and Midlands. Five Brigade, together with the CIO, was allegedly aware and

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[358] Bill Berkeley *Zimbabwe: Wages of War, A Report on Human Rights* Lawyers Committee for Human Rights (1986).
[359] Ibid at 60.
[360] Ibid at 60.

intended to enforcedly disappear its victims. The involvement of other state security agencies and police in the disappearances suggests an intention and their complicity to remove the abductees from the protection of the law as envisaged by the requirements for the crime against humanity of enforced disappearances. The pattern of abductions was consistent with many victims taken under cover of darkness from areas in Matabeleland North such as Gwayi, Lupane, Tsholotsho and Nkayi; Matabeleland South- Kezi; Bulawayo and Midlands- Zhombe, Silobela and Regina Mundi. Typically, the abductors would arrive in the middle of the night, demand to see the head of the household, sometimes pretend to be dissidents and simply take the victim – who would never be seen again.[361] The targeting of ZAPU officials, itself a persecutory strategy, was ostensibly aimed at destroying the ZAPU structures as parliamentary elections approached in 1985.[362]

To date, former members of Five Brigade and the government have refused to acknowledge the arrest, detention or abduction or give information on the fate or whereabouts of such persons. There is overwhelming evidence that victims were first unlawfully deprived of their liberty prior to being disappeared. In addition, there is evidence that the enforced disappearance was carried out with the authorisation, support, or acquiescence of the Zimbabwean government, which has refused to investigate or acknowledge the disappearances conducted by Five Brigade and other security agencies, including the CIO. The following two non-exhaustive examples illustrate this point.

Among the well-documented case of enforced disappearances is that of 11 men who were abducted from Silobela in the Midlands on 30 January 1985.[363] The CIO abducted another nine men from the same area in August 1985. The wife of one of the nine victims, Mr B, a ZAPU Branch Vice-Chairman, aged 70 and abducted on 30 January 1985 reported:

> 'They came in the middle of the night. The gunmen asked me to cook for them. Then they asked [my husband] to accompany them to a meeting in Nkayi. When he refused, they forced him to come with them. They dragged him out of the hut. That was the last I saw of him. I saw the lights of the vehicles. We stood in the yard expecting to hear gunshots. From the distance, we heard someone cry in pain, but just briefly. Sometime after the incident, there was the sound of a car. [The following day], my son followed the foot tracks, until he came to a spot where there were some car marks and a lot of footprints.'[364]

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[361] Ibid at 62.
[362] Ibid.
[363] See *A Place for Everybody* CCJP for an account by the surviving spouses or widows of the men.
[364] Berkeley op cit note 345.

Another wife of one of the 9 Silobela abductees, a former ZAPU Branch Chairman from Silobela stated that:

> 'They came around midnight, when we were asleep. The gunmen were many, maybe 10, all armed. They spoke Shona mainly and some broken Sindebele. My husband was dragged away. When they had gone, I took my children and stood in the yard, waiting and expecting to hear a gunshot, because I thought they would kill him. We waited there for almost an hour. Then we heard the sound of a car in the direction they had gone. There we saw cars pass by on the road. They were jipis. Land Rovers. It was dark, and we could not see their colour, but they were certainly government trucks. The police never came to my house to investigate. My husband had eleven children.'[365]

The most significant number of disappearances reportedly took place in Tsholotsho, with an estimated 120 abducted in the first week of February.[366] This included Mr G, 64 and Mr H in his 60's from Magama Village in Tsholotsho.[367] Although there was a sharp rise in abductions ahead of the elections in 1985, they had started as early as 1983 when Five Brigade arrived in Tsholotsho. At the end of January 1983, a councillor and man back from working in South Africa were shot dead in Bhumbu Village. Eleven homesteads were torched to the ground. When the villagers saw the fires, they ran away, but Five Brigade forced them back. One man was forced to bury the dead, and another was taken away and never seen again. Another man trying to return to Harare for work disappeared and was never seen again.[368] All the abductees mentioned above were never seen again. The CCJP pursued the Missing Persons cases in court but could not hold the CIO accountable.[369] The Silobela 9 were subsequently declared "Missing, Presumed Dead" by the courts.[370]

It is evident that the enforced disappearance of civilians by Five Brigade was committed as part of a widespread or systematic attack directed against the civilian population in Matabeleland and Midlands and that the alleged Five Brigade perpetrators knew that its conduct was part of or intended its conduct to be part of a widespread or systematic attack directed against a civilian population as required by law. In denying responsibility the Zimbabwean government implies

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[365] Ibid at 64.
[366] Ibid at 64.
[367] Ibid at 66.
[368] *Breaking the Silence* op cit note 64 at 89.
[369] Ibid 107.
[370] Ibid; Stahn op cit note 50 at 67 regarding state obligation to investigate, prosecute and punish disappearances.

that non-state actors were responsible. Stahn argues that State agents could face responsibility for failure to investigate and prosecute criminal acts in relation to enforced disappearance by non-state actors.[371] However, in the case of Gukurahundi's enforced disappearances, the role of the state and its agents is beyond dispute.

5.6 Conclusion

This chapter had several objectives. First, drawing on international conventions, statutes and jurisprudence of international tribunals and scholarly writings by international criminal law scholars, it sought to analyse, discuss and define the core international crimes of CAH. Second, the chapter sought to examine Five Brigade atrocities from the prism of CAH. Finally, the chapter sought to analyse the specific conduct of Five Brigade to determine whether it meets the requirements of the definitions and elements of CAH.

This chapter made several findings. It analysed, discussed and defined the core CAH. CAH are subject to prohibition by international law based on customary international law[372] and the statutes of international criminal tribunals[373] and jurisprudence of the international courts and ad hoc tribunals.[374] The prohibition of CAH carries an international obligation to investigate, prosecute and punish the crimes regardless of whoever and wherever they are committed.[375] CAH have been prosecuted by numerous international criminal tribunals, including Nuremberg,[376] ICTY,[377] ICTR,[378] SCSL,[379] and ICC.[380] The statutes and jurisprudence of these tribunals have clearly articulated and defined the legal and contextual requirements and elements of CAH.[381]

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[371] Stahn op cit note 50 at 67.
[372] See UN Office on Genocide Prevention and the Responsibility to Protect, 'Crimes Against Humanity' last accessed from https://www.un.org/en/genocideprevention/crimes-against-humanity.shtml on 7 March 2022.
[373] See Art 2 of the SCSL Statute; Art 5 of the ICTY Statute; Art 3 ICTR Statute; Art 7 of the Rome Statute.
[374] See cases of the ICTY ICTR the SCSL ECCC and ICC which prosecuted CAH.
[375] Genocide CAH and War Crimes attract universal jurisdiction.
[376] IMT Judgement op cit note 1.
[377] See *Tadić* supra note 39; *Blaškic* supra note 58; *Krnojelac* supra note 42; *Brđanin* supra note 172; *Vasiljevic* supra note 173; *Kupreskic* supra note 179.
[378] *Kambanda* supra note 51; *Musema* supra note 268; *Kayishema & Ruindana* supra note 43; *Akayesu* supra note 31, *Rukundo* supra note 307; *Gacumbitsi* supra note 220; *Ntakirutimana* supra note 212; *Rutaganda* supra note 169.
[379] *Fofana et al* supra note 122; *Sesay et al* supra note 55; *Prosecutor v. Charles Ghankay Taylor,* SCSL-03-1-T.
[380] *Katanga* supra note 156, *Prosecutor v Bosco Ntaganda* ICC-01/04-02/06*; Prosecutor v Dominic Ongwen,* ICC-02/04-01/15.
[381] See Section 5.2 *Overview of CAH.*

The chapter examined and evaluated Five Brigade atrocities against the legal requirements, definitions and elements of the CAH and concluded that the atrocities constitute CAH. In particular, the chapter found that Five Brigade committed CAH, which is a "widespread or systematic attack against a civilian population with knowledge of that attack."[382] The next chapter will evaluate the individual criminal responsibility of alleged Five Brigade perpetrators of war crimes, genocide and CAH discussed and established in Chapters 3, 4 and 5 respectively.

[382] See Art 7 of the Rome Statute.

CHAPTER SIX – AN EVALUATION OF THE INDIVIDUAL CRIMINAL RESPONSIBILITY OF FIVE BRIGADE PERPETRATORS UNDER INTERNATIONAL LAW

6.1 Introduction

Whilst it is influenced by and modelled on domestic notions of criminal liability, individual criminal responsibility (ICR) in international law is unique.[1] Despite the significant domestic criminal law doctrinal influences ICR under international law can be distinguished from its domestic concepts.[2] Scholars have analysed the intrinsic and extrinsic characteristics of ICR under international law.[3] Intrinsically, ICR is shaped by the unique nature of international crimes. Extrinsically, it is influenced by the continuous development of international criminal law (ICL) jurisprudence from the international criminal tribunals (ICTs). A crucial feature of ICL is the overriding imperative to hold perpetrators of international crimes personally culpable and to explore the different ways in which this can be achieved drawing from domestic notions of criminal liability but also applying new unique forms based on ICL. The jurisprudence of the international courts, from Nuremberg to the International Criminal Court (ICC) supports this overriding objective.[4]

Chapters 3, 4 and 5 argued and presented prima facie evidence that international crimes were committed by Five Brigade in Zimbabwe.[5] In light of this argument, what are the implications of such findings under international law? Under national law, including Zimbabwean law,[6] the position is straightforward: the 1988 Amnesty that was issued following the atrocities notwithstanding,[7] if proved, all serious violations of national criminal law by the Gukurahundi perpetrators would attract ICR subject to permissible defences.[8] The 1988 Amnesty aimed at

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[1] Carsten Stahn *A Critical Introduction to International Criminal Law* (2019) 119.
[2] Ciara Damgaard *Individual Criminal Responsibility for Core International Crimes* (2008) 87–90.
[3] Iryna Marchuk *The Fundamental Concept of Crime in International Criminal Law: A Comparative Law Analysis* (2014) 159; Elies van Sliedregt 'The Curious Case of International Criminal Liability' (2012) 10 *Journal of International Criminal Justice* at 1171–1188.
[4] This is discussed in greater detail in the section 6.2 below.
[5] Chapter 3, 4 and 5 argues that Five Brigade committed genocide, crimes against humanity and war crimes in Matabeleland.
[6] Almost all the crimes are criminalised under the Zimbabwean Criminal Code.
[7] Clemency Order No 1 of April 18, 1988, 'with respect to all human rights violations committed by the state security forces and so-called dissidents between 1982 and the end of 1987' gave amnesty without trial to both the dissidents and members of Five Brigade and members other security sectors that committed crimes.
[8] Grounds for excluding criminal responsibility for international crimes includes mental incapacity, intoxication, self-defence, duress and necessity, mistake of fact and law, and superior orders.

shielding perpetrators from any criminal responsibility.[9] International law provides for the ICR of perpetrators of international crimes[10] and the aim of this chapter is therefore to evaluate whether ICR exists for alleged Gukurahundi perpetrators for the international crimes (war crimes, genocide and crimes against humanity (CAH)) established in Chapters 3, 4 and 5 respectively.[11]

This chapter will analyse the concept of ICR under international law and evaluate its applicability to the alleged Gukurahundi perpetrators. The Chapter will begin with an overview of ICR under international law, followed by a review of the historical development of ICR under international law. An examination of the theories of criminality under international law follows. An analysis of the forms and modalities of ICR is then undertaken. An evaluation of the individual and superior responsibility of alleged Gukurahundi perpetrators based on the key legal concepts, principles and legal precedent is undertaken. evaluates whether ICR is attributable to alleged perpetrators of Gukurahundi international crimes. The chapter will answer the following questions: How has ICR developed under international law? What are the various theories of criminality under international criminal law? What are forms and modalities of ICR for core international crimes? Based on legal requirements, international jurisprudence and scholarly writings, can ICR be attributed to Five Brigade perpetrators for crimes committed in Zimbabwe? An overview of ICR will follow in the next section.

6.2 An overview of ICR

Under ICL, accountability for international crimes requires that ICR be established with respect to alleged perpetrators.[12] The nature of involvement in perpetrating international crimes is vital in weighing various levels of criminal responsibility, establishing guilt and meeting appropriate punishment. ICL sets out two forms of criminal responsibility: individual responsibility and command or superior responsibility.[13] ICR is established for any individual who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or

[9] Clemency Order supra note 7.
[10] 'Individual Criminal Responsibility' ICRC last accessed from https://casebook.icrc.org/glossary/individual-criminal-responsibility on 27 March 2022.
[11] Ibid; Chapter 3, 4 and 5 argued that Five Brigade and other state security sectors committed genocide, CAH and war crimes in Matabeleland from 1982 to 1987.
[12] Stahn op cit note 1 at 117.
[13] Rome Statute of the International Criminal Court (adopted 17 July 1998) UNTS 2187, Arts 25 and 28.

execution of an international crime.[14] The concept of commission will be discussed further in section 6.5 below.

The objective elements for establishing ICR for international crimes are that any of the prohibited acts must be committed with knowledge and intent.[15] While each international crime carries its distinct elements or requirements for ICR, there is a common subjective requirement for all crimes. The subjective element requires that the perpetrator knowingly commits the crime in the sense that he/she must understand the overall context in which his/her act occurs.[16] In order to be liable, the perpetrator must have actual and constructive knowledge that his act(s) is or are part of a widespread or systematic attack on a civilian population and pursuant to a plan; or that it is designed to bring about the destruction of a group, and that the crime is committed against civilians for CAH, genocide and war crimes, respectively.[17] Such knowledge can be inferred or implied from circumstances, and it is not necessary to prove that the perpetrator was aware of the policy or plan. Knowledge can also be inferred from a variety of factors, including political and historical circumstances in which the acts occur, the role and functions of the perpetrator at the time of the commission of the crimes in question, their rank and responsibilities in the political and military hierarchy, the widespread nature and seriousness of the crimes committed, the nature of the crimes and their notoriety.[18]

Applying this to the Gukurahundi international crimes, members of Five Brigade who allegedly directly committed atrocities, government, intelligence and military officials at all levels who designed, planned, ordered and directly or indirectly aided or encouraged the operation could be held liable under this requirement. This category of alleged perpetrators would include all ministers and military commanders involved in conceiving and executing the operation. The criminal responsibility of different actors ranging from political, military, paramilitary, intelligence and civilian will be discussed in relation to each specific international crime committed by the Gukurahundi.

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[14] Art 25 of Rome Statute; Art 7(1) of ICTY Statute; Art 6(1) of ICTR Statute; Elies Van Sliedregt *Individual Criminal Responsibility in International Law* (2012) at 45.
[15] *Prosecutor v Tadić [Tadić]* IT-94-1 (ICTY) App Chamber of 2 October 1995 para 692.
[16] *Prosecutor vs Jean Paul Akayesu [Akayesu]* ICTR-96-4-A ICTR Trial Chamber Judgment of 2 September 1998 para 469.
[17] Ibid para 479.
[18] *Prosecutor v Tihomir Blaškić [Blaškić]* 2000 IT-95-14 ICTY Trial Chamber Judgment of 3 March 2000 para 259.

6.3 Development of the doctrine of individual criminal responsibility under international law

Various scholars,[19] provide an authoritative, compelling and comprehensive analysis of the doctrine of ICR under international law, highlighting its important origins and foundation in national criminal legal systems,[20] and discussing its historical development.[21] At an international level, the adoption of the doctrine signalled a break with the long-held doctrine of state responsibility enshrined in the Act of State doctrine. This break was facilitated by the International Military Tribunal (IMT) at Nuremberg which abandoned the concept of immunity of state officials in favour of ICR.[22]

The adoption of ICR was encapsulated by the IMT at Nuremberg in its judgment that 'crimes against international law are committed by men, not by abstract legal entities.'[23] The United Nations unanimously adopted a resolution affirming the principles of international law acknowledged in the Charter of the IMT Tribunal and in the Judgment of this Tribunal.[24] Four years later in 1950 the International Law Commission (ILC)[25] reaffirmed ICR under international law by presenting seven principles. The principles underscored ICR to be observed in the drafting of the Code of Crimes Against Peace and Security of Mankind.[26]

The aforementioned principles have codified to a certain extent the concept of ICR and some scholars have also argued that the promulgation of the seven Nuremberg principles by the ILC signalled that they had formed part of customary international law and therefore become binding on the international community.[27] Furthermore, the Nuremberg principles have been used as a foundation by statutes of ad hoc tribunals[28] and treaties such as the Rome Statute which has entrenched ICR in the text of the Statute with content substantially expanded and

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[19] Sliedregt op cit note 14; Stahn op cit note 1 at 117; Damgaard op cit note 2.
[20] Sliedregt op cit note 14 at 23.
[21] Ibid at 17 'No one can escape criminal liability for international crimes, not even a head of state.'
[22] Stahn op cit note 1.
[23] 'Judgment of 1 October 1946 Trial of the Major War Criminals before the International Military Tribunal' Nuremberg 1947 Vol 1 171-367.
[24] See 'Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal' GA Res 95 (I) UN GAOR, 1st Sess pt 2 at 1144 UN Doc A/236 (1946).
[25] The International Law Commission is a body of 34 experts who assist in the development and codification of international law.
[26] 'Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal: Report of the International Law Commission on the Work of its Second Session' UN GAOR, 5th Sess Supp No 12 UN Doc.A/1316 (1950).
[27] Ibid at 411.
[28] Art 7 of ICTY Statute; Art 6 of ICTR State; *Prosecutor v Kambanda [Kambanda*] ICTR 97-23-S (ICTR) 1998 para 663.

clearer on the concept.[29] Finally, some scholars have argued that the principles have played a guiding role in the development of the concept of universal jurisdiction under international law.[30]

Yet another key development for ICR was the adoption of the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention)[31] in 1948 which provided for ICR under Article 3 and 4. This entails that ICR is applicable to everyone and reaffirms the findings at IMT that heads of state and government as well as other government officials cannot hide behind the state for international crimes such as genocide. Next to reaffirm ICR were the 1949 Geneva Conventions and the 1977 First Additional Protocol (AP I) which create an obligation on States to punish serious violations of international humanitarian law (IHL) amounting to "grave breaches"[32] and requires State parties to "enact legislation to provide effective penal sanctions for persons" who violate the Geneva Conventions."[33] Further affirmation came from the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention) which provides for ICR under Article 4. The Committee against Torture (CAT)[34] in its general comment reaffirms that it recognises ICR, as this a key aspect of the non-derogability of the prohibition of torture.[35] CAT states that in relation to torture "subordinates may not seek refuge in superior authority and should be held to account individually."[36] Additionally, Article 5 of the Torture Convention requires states to either prosecute or extradite an alleged offender and this supplements Article 4 in the sense that is provides for universal jurisdiction which in itself a manifestation of ICR.

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[29] Art 25 of Rome Statute.
[30] Mariam Bezhanishvili, 'Relevance of the Nuremberg Principles Today and in the Future' (2021) *Academia Letter* at 5.
[31] Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948) 78 UNTS 277 (Genocide Convention).
[32] The 'grave breaches provisions' are 'Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field' (adopted 12 August 1949) 75 UNTS 31 art 50 (hereinafter First Geneva Convention); 'Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea' (adopted 12 August 1949) 75 UNTS 85 art 51 (hereinafter Second Geneva Convention); 'Geneva Convention Relative to the Treatment of Prisoners of War' (adopted 12 August 1949) 75 UNTS 135 art 130 (hereinafter Third Geneva Convention); 'Geneva Convention Relative to the Protection of Civilian Persons in Time of War' (adopted 12 August 1949) 75 UNTS 287 art 147 (Fourth Geneva Convention) and Art 85 of Additional Protocol I.
[33] Art 49 of the First Geneva Convention; Article 50 of the Second Geneva Convention; Article 129 of the Third Geneva Convention and Article 146 of the Fourth Geneva Convention; see Sliedregt op cit note 14 at 41.
[34] The Committee against Torture is the treaty body which monitors States' implementation of their international obligations under the Torture Convention.
[35] See Committee Against Torture General Comment No 2 on Implementation of Article 2 by State parties.
[36] Ibid.

Most recently, the Statutes of the ad hoc tribunals[37] have reaffirmed the concept of ICR, whilst the jurisprudence of the Tribunals helped further "codify"[38] the doctrine. Article 6 of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and Article 7(2) the International Criminal Tribunal for Rwanda (ICTR) Statutes respectively provide for ICR. Crucially, the adoption of the doctrine in the ICTY Statute was influenced by the Report of the Secretary-General of the United Nations which serves as a Commentary to the ICTY Statute.[39]

Article 6(1) of the Statute of the Special Court for Sierra Leone (SCSL) and Article 29(1) of the Law of the Extraordinary Chambers of the Court of Cambodia (ECCC) also provide for ICR. The most recent significant reaffirmation of the doctrine of ICR can be found in the Article 1 and 25 of the Rome Statute.

The aforementioned international treaties and conventions and statutes setting up the ad hoc tribunals as well as the ICC demonstrate the gradual universal codification of the concept of ICR under international law. Although the concept of ICR is now undisputed under international law,[40] it remains unsettled whether there are any exceptions to this concept. On one hand, there is a view that there are no exceptions to ICR for international crimes and individuals cannot use amnesties granted by states or immunity as a result of the offices they occupy to evade accountability.[41] On the other hand, there is a view that functional immunity, which is immunity granted to heads of states and state officials acting on behalf of the state in the course of their duties, extends to all international crimes without exception thereby shielding the perpetrator from ICR. The International Court of Justice (ICJ)[42] and other domestic courts have often rejected to apply universal jurisdiction to international crimes on the basis of such immunity.[43] However,while other internationseal tribunals and how ICL has

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[37] Art 6 of ICTY Statute; Art 7(1) of ICTR Statute.
[38] Sliedregt op cit note 14 at 41.
[39] 'Report of the UN Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808' (1993) 3 May 1993 UN Doc S/25704 at paras 54-5.
[40] William Edward Adjei 'The Development of Individual Criminal Responsibility under International Law: Lessons from Nuremberg and Tokyo War Crimes Tribunal' (2020) 25 *Journal of Legal Studies* 69.
[41] Salvatore Zappalà 'Do Heads of State Enjoy Immunity from Jurisdiction for International Crimes?' (2001) 13 *EJIL* 3
[42] Case Concerning the Arrest Warrant of 11 April 2000 (*Democratic Republic of the Congo v Belgium*), International Court of Justice 14 February 2002 Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal
[43] See criminal proceedings against Ghaddafi cited in Zappalà op cit note 41 at 601; see Fidel Castro [Spain, Audiencia Nacional] No 1999/2723, 4 March 1999; see *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development and Others* (27740/2015) [2015] ZAGPPHC 402,

developed confirms waiver of personal immunity for international crimes before international courts, it is recognised under customary international law and before the African regional level (under the African Criminal Court once it comes into operation) and domestic courts, which will thus shield sitting heads of states from ICR. The South African High Court has held in *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development and Others, (Al Bashir case*),[44] that ordinarily heads of state enjoy immunity under customary international law but that this immunity is excluded or waived in relation to crimes and obligations under the Rome Statute and waiver by the UNSC.

In this regard, it can be argued that with respect to *Al-Bashir*, where the ICC also found that he did not possess personal immunity that the UNSC in referring Bashir, a sitting head of state to the ICC, removed his personal immunity.The ICC Pre-Trial Chamber in *Al-Bashir* held that it was 'unable to identify a rule in customary international law that would exclude immunity for Heads of State when their arrest is sought for international crimes by another State, even when the arrest is sought on behalf of an international court, including, specifically, this Court'.[45] However, it is clear that from the inception of the concept of ICR at IMT that such immunity in relation to international crimes had been rejected, a position affirmed by the subsequent Nuremberg principles by the ILC.[46]

As the foregoing section shows, the doctrine of ICR is undisputed under international law and now constitutes customary international law as was held by the SCSL in *Fofana and Kondewa*.[47] IHL scholars also argue that from state practice that ICR for international crimes is part of customary international law.[48] For this reason, its applicability is therefore universally recognised. Both state and ICR may be triggered by state officials who violate international

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[44] *Southern Africa Litigation Centre v Minister of Justice and Constitutional Development and Others, (Al Bashir case*) (27740/2015) [2015], para 28.8.

[45] *Prosecutor v Omar Hassan Ahmad Al-Bashir [Al-Bashir]* ICC-02/05-01/09 ICC Pre-Trial Chamber Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the court for the arrest and surrender of Omar Al-Bashir of 6 July 2017 para 68; see also Terzian, D, Personal Immunity and President Omar al Bashir: An Analysis under Customary International Law and Security Council Resolution 1593, (2011) 16 (2) *UCLA Journal of International Law and Foreign Affairs*, 279–310, http://www.jstor.org/stable/45302248 accessed on 14 June 2023.

[46] Principle III of 'Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal: Report of the International Law Commission on the Work of its Second Session' UN GAOR 5th. Sess. Supp. No. 12 UN Doc.A/1316 (1950).

[47] *Prosecutor v Fofana and Kondewa [Fofana]* SCSL-04-14-T Trial Chamber Judgment of 2 August 2007 para 178.

[48] See ICRC 'Rule 151. Individual Responsibility', last accessed from https://ihl-databases.icrc.org/customary-ihl/eng/docindex/v1_rul_rule151 on 26 March 2022.

law as determined by the ICTY Trial Chamber in *Furundžija* which held that, 'in addition to individual criminal liability, State responsibility may ensue as a result of State officials engaging in torture or failing to prevent torture or punish torturers'[49].

Sliedregt identifies three major developments in the trajectory of criminal responsibility and argues that there has been a shift from focusing on the perpetrator's state of mind to the perpetrator's conduct and hereby embracing concepts such as strict and vicarious liability where the accused is held liable for the conduct itself regardless of the state of mind.[50] Additionally, Sliedregt posits that criminal responsibility has broadened from the perpetrator being held accountable for committing the act himself to committing through another.[51] This entails that criminal responsibility no longer requires that the accused must have physically committed the crime but may be held accountable for committing the crime through another person. In this regard, non-tangible support may also suffice as the actus reus of the crime.[52] Having established, in broad terms, of ICR with its collective elements has been adopted and affirmed on the international level, we have to briefly interrogate the concept of 'system criminality', a term that is often used when discussing ICR in international law.

6.4. System criminality

The genesis of the concept of system criminality emerged at Nuremberg which faced unprecedented crimes with complex matrices of involvement. What was clear from Nuremberg was that the majority of the heinous crimes had required the involvement of multiple individuals with a multiplicity of roles and contributions. The task of articulating an approach to address this fell on Colonel Murray Bernays who felt that the Nazi crimes were so unique in magnitude, complexity and implication of the state that they required a special theoretical approach to criminal responsibility if justice were to be served. In his memorandum entitled 'Trial of European War Criminals', Bernays proposed a trial that dealt with pre-war as well as with wartime atrocities.[53] Bernays argued that:

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[49] *Prosecutor v Furundzija [Furundzija]* IT-95-17/1-T Trial Chamber Judgment of 10 December 1998 para. 142; See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* which held that 'the ILC Articles on State Responsibility' are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State.' Judgment of 26 February 2007 ICJ Reports 2007 para 43.
[50] H L A Hart *Punishment and Responsibility: Essays in the Philosophy of Law* (1968) 183-209.
[51] Sliedregt op cit note 14 at 23.
[52] Ibid.
[53] B F Smith *The American Road to Nuremberg: The Documentary Record 1944–1945* (1982) 33-7.

> 'The basic difficulty with the suggestions heretofore considered is in the approach. It will neverbe possible to catch and convict every Axis war criminal, or even any great number of them, under the old concepts and procedures. The ultimate offence, for example, in the case of [the village of] Lidice, is not alone the obliteration of the village, but even more, the assertion of the right to do it. Behind each Axis war criminal, however, lies the basic criminal instigation of the Nazi doctrine and policy. It is the guilty nature of this instigation that must be established, for only thus will the conviction and punishment of the individuals concerned achieve their moral and juristic significance. In turn, this approach throws light on the nature of the individual's guilt, which is not dependent on the commission of specific criminal acts but follows inevitably from the mere fact of voluntary membership in organisations devised solely to commit such acts'.[54]

In Bernays' theory 'both crimes and criminals were collectivised'.[55] Bernays saw Nazi crimes as the product of criminal enterprise by both people and organisations in which both were criminally culpable. He considered organisations or groupings of people such as the Gestapo and the Nazi cabinet as being culpable through their representatives. In his view the representatives would be seen as the masterminds of the criminal conspiracy of the organisation. Interesting parallels can be drawn with latter day mass crimes in the former Yugoslavia, Rwanda and more pertinently Five Brigade crimes. With regard to Five Brigade crimes, the Zimbabwe Cabinet, ZNA, ZANU PF leadership structures like the central committee and politburo would fall into this category envisaged by Bernays who proposed that:

> 'The judgment should adjudicate: [...] that every member of the Government and organisations on trial is guilty of the same offence. Such adjudication of guilt would require no proof that the individuals affected participated ("affected participation") in any overt act other than membership in the conspiracy'.[56]

In Bernays' proposal, the concept of conspiracy and the notion of criminal organisations were two pillars of the 'theory of collective criminality'. An international tribunal would be established to try major perpetrators of war crimes and it would start by adjudicating on and declaring key Nazi organisations including the 'government, the Nazi party, Gestapo, SS, and SA to be criminal. Once this declaration was made, national courts of the Allied Powers would

[54] Ibid at 35; Van Sliedregt op cit note 14 at 22.
[55] Van Sliedregt op cit note 14 at 22-26.
[56] Smith, *Reaching Judgment at Nuremberg* (1977) 36.

try individual members of the criminal organisations already declared criminal by the IMT, proof of membership being sufficient for establishing guilt'.[57]

Post Nuremberg, the issue of collective criminality has also received scholarly attention. Roling first used the term 'system criminality' in reference to international crimes in 1979.[58] The term 'system' distinguished international crimes from other crimes because of the context, climate or conditions,[59] in which they were committed by the state or governmental system.[60] Sliedregt has argued that 'Typical for system criminality is that governments order, encourage, favour or tolerate the commission of crimes. This serves the system, and is caused by the system'.[61] Roling's system criminality was focused on state or state affiliated actors. Nollkaemper expanded it to non-state entities, such as 'armed groups (e.g. the Lord's Resistance Army in central Africa), political parties (e.g. the Nazi party in Germany), regimes (e.g. the Ba'ath party in Iraq) and, under certain circumstances, even international organisations (e.g. UN and NATO forces)'.[62] System criminality crimes are sometimes referred to as 'crimes of obedience' denoting 'acts performed in response to orders from authority that is considered illegal or immoral by the larger community'.[63]

Another important distinguishing feature of system criminality that makes it systemic is the fact that the crimes are committed not by one individual, but by a group of individuals. The multiplicity of actors, each performing a part in the crime make international crimes systemic and distinguishes them from common crimes.[64]

Sliedregt sums up contemporary system criminality arguing that reconciling the mastermind and the foot solider of the crime is often a herculean task as traditional modes of liabilities such as direct commission, instigation, aiding and abetting/complicity liability do not always meet this objective and therefore inchoate forms of liability that encompass indirect co-perpetration, JCE and superior responsibility may be used to achieve this objective.[65]

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[57] Sliedregt op cit note 14 at 25 citing Pomorski, 'Conspiracy and Criminal Organization' in Ginsburg and Kudriavtsev *The Nuremberg Trial* at 215-16.
[58] B V A Röling 'Aspects of the Criminal Responsibility for Violations of the Laws of War' in A Cassese (ed) *The New Humanitarian Law of Armed Conflict* (1979) at 138, 203.
[59] A Nollkaemper 'Introduction' in A Nollkaemper & H G van der Wilt (eds) *System Criminality* (2009) 1–25.
[60] Röling op cit note 57 at 138.
[61] Sliedregt op cit note 14 at 21.
[62] Nollkaemper supra note 59 at 16.
[63] H C Kelman & V L Hamilton *Crimes of Obedience: Toward a Social Psychology of Authority and Responsibility* (1989) at 307.
[64] A N Trainin *Hitlerite Responsibility under International Law* (1944) 79.
[65] Sliedregt op cit note 14 at 24.

This approach to criminality at the international level helps address what would otherwise be an intractable problem that ordinary concepts of criminal responsibility under national law cannot and would not be able to address. Specific crimes are often planned and directly committed by separate individuals. The planners or architects are often nowhere to be found at the scene of the crime and the direct killers are often not in the boardrooms where the crimes are planned or designed. This conundrum apparently plagues Five Brigade international crimes.[66] How can the foot soldiers, including Five Brigade members that committed international crimes, be linked or connected to the commanders and political leaders that planned them? This challenge of linking the crimes committed by foot soldiers to the masterminds was acknowledged at Nuremberg.[67] The aim is to cast the net such that it would catch all the perpetrators of these heinous crimes that would otherwise escape criminal liability if the normal or ordinary and outdated rules of criminality were applied.

The system criminality theory is a useful lens through which Five Brigade international crimes can be evaluated. It can be argued that the ZANU-led government planned, organised, incentivised, tolerated and even encouraged and ordered the commission of crimes against ZAPU political support base in Matabeleland and Midlands. Notably, commanders of Five Brigade such as Perrance Shiri accused of atrocities were promoted within the ZNA following their commission of atrocities.[68] Also, Röling noted that the characteristic feature of system criminality is that it corresponds with the 'prevailing climate in the system'.[69] It can be argued that the prevailing climate in the ZANU-led government was that ZAPU and its support base was an enemy of the state and ought to be destroyed or better still assimilated into ZANU to form a one-party state. The desire to assimilate ZAPU into ZANU had been long thought after before independence, for instance, Maurice Nyagumbo in a letter to ZANU leadership in 1979 reveals that the senior members in the party were advocating for the annihilation of ZAPU.[70] Nyagumbo writes that 'No useful purpose can be saved by uniting with ZAPU for they are a spent force who should be absorbed individually into ZANU'.[71] The aforementioned examples

[66] The main architects of Five Brigades crimes were the top political leadership of ZANU but who were not necessarily at the scene of the crimes.
[67] International Military Tribunal (Nuremberg) 'Judgment and Sentences' (1947) 41 *American Journal of International Law* 172 and 221.
[68] Perrance Shiri commanded Five Brigade at the time of the atrocities in Matabeleland and was promoted as the head of the Air Force of Zimbabwe in 1992.
[69] Röling op cit note 57 at 138.
[70] Maurice Nyagumbo was ZANU's Organising Secretary at the time of the letter.
[71] Aluka 'Letter from Maurice Nyagumbo to Robert Mugabe and the ZANU Central Committee' last accessed from http://psimg.jstor.org/fsi/img/pdf/t0/10.5555/al.sff.document.ranger00103_final.pdf on 9 September 2022.

speak to a ZANU system that resorted to criminal means to achieve a one-party state. Evidently and invariably, the atrocities required many different individuals to design, plan and execute. Although the atrocities were directly committed by rank-and-file members of Five Brigade, CIO, ZANU Youth Brigade and ZRP, several *high-ranking* government officials, political and military leaders were involved in the design, planning and execution of Five Brigade campaign in Matabeleland and Midlands. Having explored the genesis, rationale and content of criminality theories that underlie ICR in this section, the next section will address the issue of participation models or the different roles that perpetrators play in the commission of crimes and will evaluate the ICR of the Gukurahundi perpetrators against the specific forms and modalities of ICR based on the contemporary doctrine of the international tribunals.

6.5 Evaluating the jurisprudence of the international criminal tribunals (ICTs) on forms of participation and its applicability to alleged Gukurahundi perpetrators.

As outlined in 6.2, the forms of criminal responsibility under international law comprise the commission or direct and indirect perpetration, co-perpetration, instigation, including ordering, soliciting, and inducing, planning, and aiding or abetting.[72] All are drawn from domestic criminal codes. Also, ICR envisages unique forms of responsibility such as command and superior responsibility.

6.5.1. Commission

Commission as mode of liability is provided for in the statutes of the ICTY,[73] ICTR,[74] SCSL,[75] ECCC,[76] and ICC.[77] The ICTY Appeals Chamber has held that 'commission covers physical perpetration of a crime by the offender himself, or the culpable omission of an act.[78] 'Committing' is regarded a more serious form of criminal responsibility than, for instance, instigating or aiding and abetting.[79] The commission may also occur through participation in the realisation of a common design of purpose'.[80] The SCSL has reaffirmed the decisions of

[72] Sliedregt op cit note 14 at 52.
[73] Art 7 of ICTY Statute.
[74] Art 6 of ICTR Statute.
[75] Art 6 of SCSL Statute.
[76] Art 6 of ECCC Statute.
[77] Art 25 of Rome Statute.
[78] *Tadić* supra note 15 para 188.
[79] Manuel J Ventura 'Aiding and Abetting' in J De Hemptinne R Roth et al (eds) *Modes of Liability in International Criminal Law* (2019).
[80] *Tadić* infra note 15 para 188.

the ICTY in several cases.[81] In addition, the ECCC has also followed the reasoning of the ICTY on the concept of commission.[82] The ECCC has used exactly the similar language to the SCSL case of *Kamara* in finding that 'committing extends to physical perpetration or a culpable omission of an act, and commission through the participation in a joint criminal enterprise'. The ICTR has however taken a slightly different approach to commission. In *Gacumbitsi*, which dealt with commission of genocide, the Appeals Chamber held that:

> 'direct and physical perpetration' need not mean physical killing; other acts can constitute direct participation in the actus reus of the crime. […] It was [the accused] who personally directed the Tutsi and Hutu refugees to separate—and that action, which is not adequately described by any other mode of Article 6(1) liability, was as much an integral part of the genocide as were the killings which it enabled.'[83]

In *Gacumbitsi*, the accused had been instrumental in planning, organising and overseeing an attack on Tutsi refugees in which thousands were killed. There was no evidence that he had actually killed any himself although he was said to have killed one person, which killing was unfortunately not charged in the indictment. In taking a surprisingly broad approach to the concept of 'committing', the Trial Chamber found that although he had not killed anyone, he could still be found guilty of committing the crime of genocide.[84] This finding divided the Trial Chamber judges.[85] The ICTR Appeals Chamber reaffirmed the reasoning in Gacumbitsi in Seromba.[86] A priest, Seromba was accused of supervising the bulldozing of a church with 1 500 Tutsi who had taken refuge. The ICTR held that by approving the use of the bulldozer, and by virtue of his authority over the driver of the bulldozer, '[the accused's] acts cannot be adequately described by any other mode of liability pursuant to Article 6(1) of the Statute than 'committing', indeed were as much as an integral part of the crime of genocide as the killings of the Tutsi refugees'. In his dissenting judgment, Judge Liu found that the broad approach to

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[81] The SCSL has relied on the articulation of commission as including culpable omission in violation of ICL. See *Prosecutor v Brima, Kamara and Kanu,* SCSL-04-16-T, Trial Chamber Judgment of 20 June 2007 para. 762; *Prosecutor v Sesay, Kallon and Gbao,* SCSL-04-15-T, Trial Chamber Judgment of 2 March 2009 para. 249.
[82] *Prosecutor v Kaing Guek Eav* 001/18-07-2007-ECCC/TC Trial Chamber Judgment of 26 July 2010 para 479.
[83] *Prosecutor v Gacumbitsi [Gacumbitsi]* App Chamber Judgment para 60.
[84] Ibid.
[85] See *Separate Opinion of Judge Shahabuddeen* paras 87–98: Judge Shahabuddeen felt that, although it was not clearly pleaded in the indictment, the appellant's responsibility amounted to participation in a JCE, the only other modality that falls under 'committing' alongside physical commission. See *Separate Opinion Judge Schomburg* paras 17–23: Schomburg emphasised that 'committing' should be understood to include co-perpetration and indirect perpetration.
[86] *Prosecutor v Seromba [Seromba]* ICTR-2001-66-A App Chamber Judgment of 12 March 2008 para 171.

'commission' was inconsistent with the jurisprudence of the ICTs, particularly the *Stakić* Appeals Judgment, which held that co-perpetration is not part of customary international law and tribunal law.[87] The broad approach to 'committing' taken by the ICTR has been criticised by Giustiniani who argues that the reasoning was misplaced and that the facts of the case were better suited to a finding of instigation than committing despite the possible desire by the ICTR to demonstrate its disapproval of Seromba's conduct.[88] Giustiniani criticises the Appeals Chamber for not explaining why Seromba's conduct was qualified as committing instead of instigation.[89]

Although Giustiniani's criticism on the ICTR is merited, his conclusion that 'the facts of the case were better suited to a finding of instigation' is rather flawed. In both *Seromba* and *Gacumbitsi*, a finding of aiding and abetting would make sense. Manuel Ventura posits that aiding and abetting is '[a] mode of liability in international criminal law which refers to acts or omissions that assist, encourage or lend moral support to a crime and substantially contribute to its commission'.[90] It is evident that the actions of the accused in the aforementioned cases assisted in the commission of the crime and therefore a finding of aiding and abetting would have been better suited.

The ICC also envisages 'commission' under Article 25 of the Rome Statute which takes a broad approach to commission to include perpetration and other forms of participation as well as omission.[91] In *Lubanga*, the ICC Pre-Trial Chamber held that 'committing' in Article 58(1)(a) is broader than direct/physical perpetration. It includes modes of liability, attempt, incitement and superior responsibility.[92] The ICC has interpreted indirect or co-perpetration expansively with regard to crimes committed by organisations or multiple perpetrators. In *Katanga*, the ICC Pre-Trial Chamber found that indirect or co-perpetration goes to committing the crime through another person and extends to 'control over troops' who implemented a criminal plan.[93]

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[87] Dissenting Opinion of Judge Liu to *Seromba* Appeals Judgment para 9 referring to *Prosecutor v Stakić [Stakić]* IT-97-24-A App Chamber Judgment of 22 March 2006 para 62.
[88] Sliedregt op cit note 14 at 93.
[89] Ibid.
[90] Ventura op cit note 78 at 173-256.
[91] William Schabas; *Commentary* at 430; argues that '[o]mission is at the heart of the concept of superior responsibility, which is addressed in article 28 (...) This does not mean that in specific circumstances (...) failure to act may amount to more than a violation of article 28, and may indeed be prosecuted under the provisions of article 25'.
[92] *Prosecutor v Lubanga [Lubanga]* ICC-01/04-01/06 Pre-Trial Chamber Decision on the Issuance of a Warrant of Arrest of 10 February 2006 para 78, 320.
[93] *Prosecutor v Germain Katanga [Katanga]* ICC-01/04-01/07, ICC Trial Chamber Judgment of 7 March 2014 paras 574–80.

Although there are questions regarding the propriety of this reasoning and its legal basis, its application to Gukurahundi offers unique opportunity to hold the civilian and military leaders who had control over Five Brigade and other ZNA troops and other security forces in Matabeleland and Midlands liable as indirect or co-perpetrators of all their crimes.

Commission is defined as the physical perpetration, it means that every member of Five Brigade, CIO, ZNA, ZRP and other security and government agencies who physically committed or culpably omitted to act would be liable for commission. Based on the *Tadić* Appeals Decision which held that 'the commission may occur through participation in the realisation of a common design of purpose',[94] every individual who participated in the realisation of the common criminal (genocidal) plan either to destroy in whole or in part the Ndebele civilian population; or the plan to systematically attack civilian Ndebele ZAPU supporters and their leaders, in furtherance of the ZANU PF one-party state agenda and ideology, committed CAH. Similarly, the participation in the common plan to conflate and attack civilians as part of the military operations in Matabeleland and Midlands would constitute the commission of war crimes. In the case of *Kordic and Cerkez*, the ICTY Trial Chamber held that '[A] person found to have committed crime will not be found responsible for planning the same crime'.[95] Therefore it is important and necessary to distinguish perpetrators who physically committed the crime and those perpetrators who planned the crime.

6.5.2 Co-perpetration, multiple perpetrators, complicity and common purpose

As discussed in 6.4, Nuremberg relied on Bernays theory of collective criminality to address the issue of multiple perpetrators of international crimes. Bernays envisaged that Nazi crimes were the result of organisations comprising of several individuals coming together to design and execute a criminal plan to exterminate Jews.[96] Thus the initial step was identifying and categorising these criminal groups. The second was identifying the actors and the different roles they had played. Membership of a criminal organisation raised a prima facie (albeit rebuttable) presumption of participation in the criminal plan of the organisation.[97] In the post-Nuremberg era, the ICTs have embraced collective and system criminality under the concepts of common purpose and complicity. The ICTR and ICTY distinguishes participation in

[94] *Tadić* supra note 15.
[95] *Prosecutor v Kordić & Čerkez [Kordić & Čerkez]*, IT-95-14/2, Trial Chamber Judgment of February 26 2001 para 386.
[96] Sliedregt op cit note 14 at 52.
[97] See discussion on collective and system criminality in 6.4 above.

international crimes based on the dichotomy between principal and accessories. The approach has been that there are principals to crimes who are assisted by accessories. In general terms, the ICTs do not adopt the concept of co-perpetration opting instead for 'joint criminal enterprise (JCE)' (discussed in the following section). But in *Stakić* the ICTY attempted to conflate co-perpetration with principal perpetration or liability.[98] This approach was rejected by the Appeals Chamber which held that instead of co-perpetration, the appropriate approach to attributing criminal liability should have been JCE which the Appeals Chamber held was 'firmly established under customary international law'.[99] Unlike the ICTY, the ICTR has been ambivalent on the issue of co-perpetration. The broadening of the approach to commission by the Appeals Chamber in *Gacumbitsi* and *Seromba* discussed in 6.5.1 expanded perpetration beyond direct perpetration and JCE to co-perpetration. *Seromba* was reaffirmed by the ICTY in *Lukic and Lukic*.[100] Notably in *Seromba* the ICTR Appeals Chamber held that direct perpetration of commission is not the only criteria for determining participation. The Court held that:

> '…whether a person 'acts with his own hands, e.g. when killing people, is not the only relevant criterion' when assessing whether that person committed the crime. Further, for the actus reus of murder, it is sufficient that the 'perpetrator's conduct contributed substantially to the death of that person,' and that [a] person who plays a central role in the commission of the crime of murder and embraces and approves as his own the decision to commit murder is not adequately described as an aider and abettor but qualifies as a direct perpetrator who committed the crime'.[101]

The net result in summary is therefore that co-perpetration is unsupported by customary law and has been rejected by the Appeals Chambers at the ICTY in *Stakić* and embraced by the ICTR Appeals Chamber in *Gacumbitsi* and Seromba.[102] Co-perpetration is an accepted and

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[98] In *takić* supra note 85 para 440, the ICTY Trial Chamber held that 'for co-perpetration it suffices that there was an explicit agreement or silent consent to reach a common goal by coordinated cooperation and joint control over the criminal conduct (...) These can be described as shared acts which when brought together achieve the shared goals based on the same degree of control over the execution of the common acts'.
[99] *Stakić* supra note 85 para 62.
[100] *Prosecutor v Lukić & Lukić [Lukić]* IT-98-32/1-T Trial Chamber Judgment of 20 July 2009.
[101] Ibid para 899.
[102] Ibid para 75; *Prosecutor v Krnojelac [Krnojelac]* IT-97-25-T Trial Chamber Judgment of 25 March 2002, para 77, the Trial Chamber held that it did '[n]ot accept the validity of the distinction (…) between a co-perpetrator and an accomplice' but it adopted the expression co-perpetrator 'for convenience' when referring to a participant in a JCE.

autonomous form of criminal responsibility at the ICC. Article 25(3)(a) of the Rome Statute provides for perpetration 'jointly with another'.

The ICC Pre-Trial has outlined the concept of co-perpetration in *Lubanga Confirmation Decision*.[103] Relying on the 'control of the crime' theory which provides that a perpetrator has control over an offence committed with others by virtue of the 'essential tasks assigned to them'.[104] Co-perpetration implies a 'division of the essential tasks for the purpose of committing a crime between two or more persons in a concerted manner'.[105] Finally, essentiality of contribution is key and a person can be held accountable as co-perpetrator when he/she "could frustrate the commission of the crime by not carrying out his or her task."[106] Most significantly, the ICC concluded that a perpetrators' contribution to a crime can be at earlier parts including instigating, planning and inciting and need not be related specifically to execution.[107] Reaffirming this reasoning, the ICC held in *Katanga* that contributions including designing an attack, supplying the weapons and ammunitions, exercising power to move troops to the field, coordinating and monitoring the activities of these troops, may all constitute contributions that amount to co-perpetration.[108] The ICC has held that an essential prerequisite for co-perpetration is a 'common plan or agreement'[109] to commit a crime,[110] but need not be directed at the commission of that crime.[111] In *Katanga,* however, the ICTR Pre-Trial Chamber held that 'the common plan must include the commission of a crime'.[112]

With regard to whether the contribution by a co-perpetrator must be related to the commission of a crime, the ICTY Appeals Chamber has held that an accused's contribution to a JCE need not be criminal in and of itself, and may consist of acts that might be regarded as neutral political or military activity.[113] As long as the acts significantly contribute to the common

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[103] *Lubanga* supra note 91.
[104] Ibid para 332.
[105] Ibid para 342.
[106] Ibid.
[107] Ibid para 348.
[108] *Katanga et al* supra note 92 para 526.
[109] *Lubanga* supra note 92 para 343–5.
[110] Ibid, para 344.
[111] Ibid. The Pre-Trial Chamber held that it suffices that (1) the co-perpetrators have agreed (a) to start the implementation of the common plan to achieve a non-criminal goal, and (b) to only commit the crime if certain conditions are met; or (2) the co-perpetrators (a) are aware of the risk that implementing the common plan (which is specifically directed at the achievement of a non-criminal goal) will result in the commission of the crime, and (b) accept such an outcome.
[112] *Katanga* supra note 92 para 523; Sliedregt op cit note 14 at 56.
[113] *Prosecutor v Krajisnik [Krajisnik]* IT-00-39-A App Chamber of 17 March 2009 para 218.

criminal objective they can generate criminal liability.[114] Sliedregt makes a compelling argument that this approach could apply in the context of co-perpetration at the ICC and bring into conformity the *Lubanga* and *Katanga* et al rulings that at present seem inconsistent on this point. Affirming the ICTY Appeals Chamber decision in *Krajisnik*,[115] the ICC Pre-Trial Chamber, has held in *Lubanga* that a common plan need not be explicit; and that its existence can be inferred from the concerted action of the co-perpetrators.[116] *Lubanga* outlines the mental or subjective requirements for perpetration as (1) awareness of the offence to be committed and acceptance of it, and (2) awareness of an essential role in the common plan.[117] The ICC took an expansive approach to "awareness" finding that it is enough for a perpetrator to be merely 'aware of the risk that the objective elements of the crime result from his or her actions or omissions and accepts such an outcome by reconciling himself or herself with it or consenting to it'.[118]

Applying a very expansive interpretation to co-perpetration, the ICC Pre-Trial Chamber in *Katanga et al* found that although unlike in *Lubanga*, 'the defendants were thought not to have carried out any of the objective elements of the crimes directly; they used others to do that, through an Organized Structure of Power (OSP) in which they exercised control of the will and acts of the physical perpetrators'.[119] The expansive approach to co-perpetration taken by the ICC in *Lubanga* and *Katanga*, which includes planning and designing an attack, supplying the weapons and ammunitions, exercising power to move troops to the field, coordinating and monitoring the activities of these troops implicates the top political and military leadership in ZANU and ZNA. The Ministry of Defence headed by Sydney Sekeramayi supplied the weapons and ammunition used by Five Brigade in committing atrocities. Also, the military leadership in the ZNA, such as the then Lieutenant Colonel Perence Shiri who commanded Five Brigade and was deputised by Lieutenant-General Edzai Chimonyo as well as Senior Assistant Police Commissioner Emelio Svaruka and subsequently succeeded by Brigadier General Emilio Munemo, exercised power to move Five Brigade troops to the field.

The fact that after a meeting between the CCJP and Mugabe where a dossier of atrocities being committed by Five Brigade was allegedly presented, there was a change in Five Brigade tactics

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[114] Ibid.
[115] Ibid paras 192–4.
[116] *Lubanga* supra note 91 para 345.
[117] Ibid para 350.
[118] Ibid para 352.
[119] Sliedregt op cit note 14 at 56; *Lubanga* supra note 91.

which saw a decline in atrocities[120] indicates the degree of control that Mugabe had on the actions of Five Brigade. The prerequisite for co-perpetration is a common plan or agreement to commit a crime. In this regard it has been shown that the political leadership of ZANU sought to establish a one-party state and in the process eliminate ZAPU political support which was the biggest stumbling block to this objective. This entails individuals such as the then Prime Minister Mugabe, and senior cabinet ministers such as the then Minister of Defence Sidney Sekeramayi and military leadership such the then Lieutenant Colonel Perence Shiri, Lieutenant-General Edzai Chimonyo, Senior Assistant Police Commissioner Emelio Svaruka and Brigadier General Emilio Munemo who allegedly designed and exercised a degree of control of the actions of Five Brigade pursuant to a common plan to eradicate ZAPU's political support and establish a one-party state are liable for co-perpetration of the crimes committed by Five Brigade.

6.5.3 Instigation

The ICTY Trial Chamber has defined instigation as 'prompting' another person to commit a crime,[121] whilst the ICTR describes it as 'urging or encouraging' another to commit a crime.[122] Instigation requires that the instigator actually influences the perpetrator of the crime.[123] A causal link is therefore required between the actions of the instigator and the actual commission of the crime or the criminal actions of the direct perpetrator.[124] Implied in the definition is the sense that 'instigate' relates to negative or pernicious encouragement.[125] For this reason, under international law, the punishment of instigation has been based on the imperative to hold accountable individuals who, despite not carrying out any elements of the crime themselves, have psychologically prompted other people to perpetrate such crimes.[126] By virtue of the organised, widespread and systematic nature of international crimes, instigators of these crimes play a central role in their commission.[127]

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[120] Catholic Commission for Justice and Peace in Zimbabwe & Legal Resources Foundation *Breaking the Silence - Building True Peace: A Report on the Disturbances in Matabeleland and the Midlands 1980 – 1988* (1997) 85 [*Breaking the Silence*].
[121] *Prosecutor v Kvočka [Kvočka]* IT-98-30/I-T Trial Chamber Judgment of 2 November 2001 para 390.
[122] *Prosecutor v Ndindabahizi [Ndindabahizi]* ICTR-2001-74, Trial Chamber Judgment of 15 July 2004 held that this encouragement and urging 'substantially contributed to the crime'.
[123] *Prosecutor v Orić [Orić]* IT-03-68-T Trial Chamber Judgment of 30 June 2006 para 27 held that [instigation] requires 'some kind of influencing the principal perpetrator'.
[124] *Blaškić* supra note 18 para 270.
[125] A Coco 'Instigation' in J De Hemptinne op cit 78 at 257-283.
[126] Ibid.
[127] Ibid.

There is no requirement for the instigator to be the architect, planner or primary designer of the crime, but it is necessary that the crime be committed as a result of the strong encouragement or persuasion by the instigator.[128] To be punishable, instigation must constitute 'a clear contributing factor to conduct of the direct perpetrator of the crime'.[129] In *Blaškić*,[130] and *Akayesu*,[131] the ICTY, and ICTR, respectively held that instigation can be implicit, can entail both acts and omissions and unlike incitement to genocide does not have to be public. The mens rea for instigation as set out in *Oric* is that the perpetrator must 'directly or indirectly intend that the crime in question be committed'.[132] The mens rea includes dolus eventualis and recklessness and requires acceptance of a risk that the crime will more likely than not follow.[133] The ICTY Trial Chamber concluded that the instigator must be aware that the commission of the crime will more likely than not result from his conduct.[134]

There is a close relationship and overlap between instigation and aiding and abetting, which essentially means providing assistance, encouragement or moral support to the principal offender discussed in 6.5.6 below, but the forms of participation are markedly different in legal terms.[135] It is clear that the top political leadership in ZANU instigated the attacks on the civilian Ndebele population by Five Brigade. Statements by senior cabinet ministers and most importantly the then Prime Minister Mugabe encouraged Five Brigade to go into the Ndebele civilian population and 'plough and re-construct'.[136] Taken together with the meaning of Gukurahundi, which is 'the rain that blows away the chaff before the spring rains' this suggests that the Ndebele population was the rubbish which Five Brigade were intent on ploughing or washing away. Also, after the 1985 election in which ZAPU garnered 15 parliamentary seats, Mugabe told his supporters to 'go and uproot weeds from your garden'[137] and this statement was followed by mass violence towards ZAPU supporters in Harare.[138] Statements by the then Minister of State Security Emmerson Mnangagwa in which he said that 'the campaign against

[128] *Orić* supra note 122.
[129] *Kvočka* supra note 120 para 390.
[130] *Blaškić* supra note 18 para 270.
[131] *Akayesu* supra note 16 paras 478–82.
[132] *Blaškić* supra note 18 para 270.
[133] *Orić* supra note 122 para 279.
[134] Ibid; Sliedregt op cit note 14 at 58.
[135] *Tadić* supra note 15 para 229; *Prosecutor v Delalić et al [Delalić et al]* IT-96-21-A, Trial Chamber Judgment of 20 February 2001, para 352; *Blaškić* supra note 18 para. 46.
[136] *Breaking the Silence* op cit note 119 at 76.
[137] Ibid at 105.
[138] Ibid.

dissidents can only succeed if the infrastructure that nurtures them is destroyed'[139] saw Five Brigade attacking the Ndebele civilian population as the perceived infrastructure that nurtured dissidents. The then Minister of Home Affairs Enos Nkala also threatened to wipe out the ZAPU leadership stating that the '…leadership must be hit so hard…'.[140]

Statements by Mugabe and his cabinet ministers influenced Five Brigade and ZANU supporters to commit crimes against the Ndebele civilian population and a causal link has been established between the statements and the violence that ensued. Having shown that the actus reus element for instigation was satisfied by such conduct, it is imperative to turn to men rea element. It can be inferred from Mugabe, Mnangagwa, Sekeramayi and Nkala's[141] conduct, among others, that they intended the crimes by Five Brigade to be committed, and in satisfying this element it is imperative to rely on the conditions cited in *Orić* above, namely that Mugabe, Mnangagwa and Nkala were aware of the influencing effect that their words had on the alleged direct perpetrators and this can be seen by the verbs they used in instructing the audience such as 'go and uproot weeds from your garden' and go and 'plough and re-construct'. Mugabe, Mnangagwa and Nkala also impliedly had knowledge of the crimes committed by Five Brigade as government was made aware of them by the CCJP and subsequently set up the Chihambakwe Commission, and they encouraged such crimes as evidenced by their failure to stop them and even going further to say that 'the 5 Brigade does not differentiate between the civilian population and dissidents'.[142] It is not necessary for Mugabe, Mnangagwa and Nkala to have precisely foreseen by whom and under which circumstances the crime will be committed. It is only required to show that they must have at least been aware of the type and the essential elements of the crime to be committed by Five Brigade.

6.5.4 Ordering

'Ordering' as a form of participation or mode of liability is both uncontroversial and under-scrutinised under ICL.[143] It is found in the statutes of all ICTs.[144] The ICTY Trial Chamber held in *Blaškić* that like other modes of participation, ordering requires intent on the part of the

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[139] Ibid at 86.
[140] Zimbabwe Human Rights NGO Forum 'Their words condemn them: The language of violence, intolerance and despotism in Zimbabwe' (Report) at 6 last accessed from https://ntjwg.uwazi.io/api/files/1554966065676eliku1zy8f7.pdf on 21 March 2022.
[141] Enos Nkala was one of the founders of ZANU PF and Minister of Home Affairs in 1985 and Minister of Defence after the 1985 elections.
[142] *Breaking the Silence* op cit note 119 at 71.
[143] M Ventura 'Ordering' in J De Hemptinne op cit note 78 284-306.
[144] Art 7 of ICTY Statute; Art 6 of ICTR Statute; Art 25(3)(b) Rome Statute.

accused and that the accused's actions contribute to the relevant crime.[145] Ordering has its origins in IHL.[146] The ICTY Trial Chamber has described 'ordering' as implying a superior–subordinate relationship between the person giving the order and the person executing it.[147] The ICTY and ICTR have held in *Blaškić*,[148] and *Akayesu*,[149] that 'ordering constitutes an abuse of power in that a person occupying a position of power abuses his authority by ordering others to commit [crimes]'.[150] There is no requirement under international law for a formal relationship between the person who issues the order and the one who receives and carries it out.[151] The case of *Kordic and Cerkez* also held that '[N]o formal superior-subordinate relationship is required for a finding of 'ordering' so long as it is demonstrated that the accused possessed the authority to order'.[152]

The ICTR Appeals Chamber held in *Gacumbitsi* that unlike superior responsibility, discussed below in 6.7 which requires effective control of the subordinate by the superior, there is no such requirement for ordering. Ventura interrogates the question related to the level of control required when ordering.[153] The question emanates from the fact that some ICTY and ICTR judgments have implied that 'a direct relationship between the individual who gives the order and the one who physically executes it' is required.[154] However, Ventura rejects this and argues that this is not reflected in modern jurisprudence and would entail that when an order is passed down, transmitted or reissued the 'person who gives the original order would – at most – be liable for instigating, since he or she would not have a direct line of authority to the physical perpetrators'.[155] Furthermore, he argues that direct relationship requirement would also conflict with the actus reus of ordering which recognises an indirect relationship between the individual who gives the order and the one who physically executes it.[156]

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[145] *Blaškić* supra note 18 para 474; Ventura op cit note 142.
[146] Art 50 of the First Geneva Convention; Art 51 of the Second Geneva Convention; Art 130 of the Third Geneva Convention; Art 147 of the Fourth Geneva Convention and Art 85 of AP I.
[147] *Blaškić* supra note 18 para 474.
[148] Ibid para 601.
[149] *Akayesu* supra note 16 paras 474, 483.
[150] Ibid.
[151] *Gacumbitsi* supra note 82 para 182.
[152] *Kordić & Čerkez* supra note 94 para 388.
[153] Ventura op cit note 142.
[154] *Prosecutor v Strugar [Strugar]* IT-01-42-T Trial Chamber Judgment of 31 January 2005 para 332.
[155] Ventura op cit note 142.
[156] Ibid.

In *Blaškić*, the ICTY Appeals Chamber held that ordering merely 'requires authority to order, a more subjective criterion that depends on the circumstances and the perceptions of the listener'.[157]. Embracing dolus eventualis, the Appeals Chamber found that:

> 'A person who orders an act or omission with the awareness of the substantial likelihood that a crime will be committed in the execution of that order, has the requisite mens rea for establishing liability under article 7(1) pursuant to ordering. Ordering with such awareness has to be regarded as accepting that crime.'[158]

The *Blaškić* Appeals Chamber decision implies that the accused is criminally liable not just for the crimes he specifically orders but for any other crimes that are committed as a likely consequence of his order because he is deemed to have accepted their commission as a likely consequence.[159] Finally, the Rome statute also provides that a person is criminally responsible if he 'orders, solicits or induces the commission of such a crime'.[160] It should however be noted that the ICC differs from the ad hoc tribunals in its approach to ordering as a mode of liability. At the ICC, there is no requirement that the crime is committed and it is sufficient that a crime is attempted pursuant to the order.[161] The jurisprudence of the ad hoc tribunals requires that the crime must be actually committed.[162] The ICC Pre-Trial Chamber has held in *Katanga* et al that 'ordering' is different from indirect perpetration and that 'The highest authority does not merely order the commission of a crime, but through his control over the organisation, essentially decides whether and how the crime would be committed'.[163] Contrary to the view of the ICC, some scholars have argued that ordering is akin to indirect perpetration as '[a] person who orders a crime is not a mere accomplice but rather an indirect perpetrator, abusing his position of authority to force a subordinate to commit a crime'.[164] However, Ventura posits that the level of control over the subordinate or the person who physically commits the crime

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[157] *Blaskić* supra note 18 para 42.
[158] Ibid.
[159] Ibid.
[160] Art 25(3)(b) of Rome Statute.
[161] Art 25(3)(b) of Rome Statute; *Prosecutor v Ntaganda [Ntaganda]* ICC-01/04-02/06 Pre-Trial Chamber Confirmation of Charges Decision of 9 June 2014 para 145; *Prosecutor v Gbagbo [Gbagbo]* ICC-02/11-01/11 Pre-Trial Chamber Confirmation of Charges Decision of 12 June 2014 para 242.
[162] *Kordić & Čerkez* supra note 94, para 30; *Prosecutor v Ntagerura et al [Media case]* App Chamber Judgment, para 365; *Prosecutor v Nahimana et al [Nahimana et al]* App Chamber Judgment para 481.
[163] *Katanga* supra note 92, para 518.
[164] K Ambos *Treatise on International Criminal Law – Volume I: Foundations and General Part* (2013) at 163; see A Eser 'Individual Criminal Responsibility' in A Cassese P Gaeta, J R W D Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (2002) at 796.

differentiates ordering from indirect perpetration. He argues that although the difference is subtle, ordering can only equate to indirect perpetration if the person ordering has effective control over the subordinate to ensure automatic compliance.[165]

Ventura argues that there are some discrepancies in the jurisprudence of ordering which have the potential to raise debate.[166] He identifies what seems to be a subtle difference in the elements of ordering as some judgments have held the order should 'have had a substantial effect on or substantially contributed to the commission of crimes'[167] while 'others appear to add an additional requirement: that the acts must have a "direct and substantial effect" on the commission of the illegal act'.[168] The latter has added a 'directness requirement' and Ventura goes on to unpack this requirement in two ways, firstly arguing that the directness requirement might entail that the order must have been directly transmitted to the physical perpetrator whereas the second interpretation might entail that the order must have been directly aimed at the commission of the crime.[169]

In relation to the first interpretation, he argues that it clashes with established jurisprudence which has accepted that 'an accused need not give the order directly to the physical perpetrators and, in addition, that ordering liability may ensue from the passing down, transmitting or reissuing of orders'.[170] On this basis it is sufficient to dismiss this interpretation. In relation to the second interpretation, Ventura relying on the SCSL's *Taylor* Appeal Judgment[171] seems to argue that the directness requirement entails that ordering should have a substantial effect on to the commission of the crime. Surprisingly, he seems to conclude that the directness requirement is redundant. This seems to be a reasonable conclusion as the correct interpretation of the directness requirement would mean employing the 'but for' test which entails that, if it were not for the order, the crime would not been committed. However, even this interpretation clashes with established jurisprudence that requires a lesser threshold which is a substantial effect on or that the order substantially contributed to the commission of crimes.

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[165] Ventura op cit note 142.
[166] Ibid.
[167] *Blaskić* supra note 18 paras 42 345 428 468 481 517 543 600 645; *Kordić & Čerkez* supra note 94 para 30; *Prosecutor v Taylor [Taylor]* SCSL-03-01-A App Chamber Judgment of 26 September 2013 paras 368, 589, 592.
[168] *Prosecutor v Kamuhanda*, ICTR-99-54A-A, App. Chamber Judgment of 19 September 2005, para 75; *Prosecutor v Popović et al.*, IT-05-88-T, Trial Chamber Judgment of 10 June 2010, para 1013.
[169] Ventura op cit note 142.
[170] Ibid.
[171] *Taylor* supra note 166 para 368.

It is evident that Mugabe had the authority to give Five Brigade orders as envisaged in Gacumbitsi, and did give orders as supported by various accounts by cabinet ministers and military leaders such as the then Minister of Women Affairs and Community Development Joyce Mujuru[172] and the then Deputy Minister of Youth, Sport and Recreation and later Minister of Water Resources and Development, Cephas Msipa who said that Five Brigade operated under Mugabe's explicit orders.[173] Brigadier General Emilio Munemo who was the deputy commander of Five Brigade from December 1982 to April 1983, after which he became Five Brigade commander from April to July 1983 also confirmed that he reported directly to Mugabe.[174] Since they received orders directly from Mugabe, he is therefore liable for the crimes that the brigade committed. Five Brigade itself reportedly told the local population that they had been ordered to 'wipe out the people [Ndebele] in the area' and to 'kill anything that was human'.[175] However, even if Mugabe had not ordered Five Brigade to commit crimes, the case of *Blaškić* is illustrative of the fact that he is still liable for the crimes that were committed as a likely consequence of his orders. The case for the then Minister of State Security, Emmerson Mnangagwa and the Ministers of Home Affairs from 1982 to 1984, Herbert Ushewokunze, and Enos Nkala from 1985 onwards, requires discussion. Miles Tendi contends that there was discord within Five Brigade partly because of the conflicting orders received from the Ministry of State Security and the Ministry of Home Affairs. Quoting from an interview with an officer who served in Five Brigade, Tendi states that:

> 'Home Affairs would go to Five Brigade soldiers with orders from the minister. The next day state security comes with orders from Mnangagwa direct to the soldiers. It was confusing for Svaruka and Shiri [Svaruka served as Shiri's officer when Five Brigade was carrying out its operations]. There was chaos. Things slid badly, so badly. Shiri lost control of his command post.'[176] [T]he brigade was deployed without proper logistical support. It received competing, contradictory and morally reprehensible instructions from the Home Affairs and State Security Ministries, which were duelling for control of 5 Brigade.'[177]

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[172] Anne-Sophie Brändlin 'Did Zimbabwe's former VP Joyce Mujuru turn a blind eye on human rights violations?' *DW News* 10 March 2017.
[173] Stuart Doran 'New documents claim to prove Mugabe ordered Gukurahundi killings' *The Guardian* 19 May 2015.
[174] Blessing-Miles Tendi *Army and Politics in Zimbabwe: Mujuru, the Liberation Fighter and Kingmaker* (2020) 200.
[175] Jocelyn Alexander, Joanne McGregor & Terence O Ranger *Violence and Memory: One Hundred Years in the 'Dark Forests' of Matabeleland, Zimbabwe* (2000) 222.
[176] Tendi op cit note 173 at 202.
[177] Ibid at 203.

It can be inferred that both ministries and ministers (reporting directly to Mugabe) had the authority to gives orders to Five Brigade as required by *Gacumbitsi*, in particular because Five Brigade reported directly to Mugabe. It was held in Gacumbitsi that a more subjective criterion on the authority to order depends on the circumstances and the perceptions of the listener, therefore this element on the authority to order might be satisfied provided Five Brigade perceived that then Minister of State Security Emmerson Mnangagwa and the then Ministers of Home Affairs Herbert Ushewokunze and Enos Nkala had the authority to give them orders. Additionally, in the case of *Blaškić* it was held that 'it is irrelevant whether the illegality of the order was apparent on its face'.[178] It is therefore irrelevant whether these ministers had the legal authority to give Five Brigade orders. They may still be held liable not only for the crimes they ordered Five Brigade to commit but for the crimes committed as a consequence of their orders. In addition, consistent with the jurisprudence, and despite this being the actual case, there is no requirement that Mugabe or any of the alleged high-level perpetrators should have given the orders directly to the actual physical perpetrators. It is enough that any orders given to higher level commanders would have been and were in fact transmitted or re-issued downwards to lower ranking members of Five Brigade, ZNA, CIO and other alleged direct perpetrators.[179] There is sufficient evidence that the orders by Mugabe and other alleged high level Gukurahundi perpetrators had a substantial effect on or substantially contributed to the commission of crimes as envisaged by the jurisprudence of the ad hoc tribunals discussed above.[180]

6.5.5 Planning

The criminalisation of planning, designing and organising international crimes as a mode of liability has its origin in the Nuremberg and the Tokyo's International Military Tribunal of the Far East (IMTFE).[181]Article 6 of the Nuremberg Statute, discussed in 6.3 above, and Article 5 of the IMTFE Statutes, which criminalised the planning, complicity, conspiracy or preparing a war of aggression provided that:

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[178] *Blaškić* supra note 18, para 282.
[179] Ibid.
[180] *Blaškić* supra note 18; M Ventura 'Ordering' in J De Hemptinneop cit note 78 284-306.
[181] See 'Judgment of the Nuremberg International Military Tribunal' 1946 (1947) 41 *AJIL* 172; 'Judgment of the International Military Tribunal for the Far East' 1946 (1948) 73 AJIL 313.

> 'Leaders, organisers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan'.[182]

The statutes of the ICTY,[183] ICTR,[184] SCSL,[185] and ECCC,[186] provide that, 'a person who planned a crime shall be individually responsible for the crime'. The jurisprudence of the ICTs has reaffirmed the significance of the concept of planning. In *Akayesu*, the ICTR determined that:

> 'The first form of liability set forth in Article 6 (1) is planning of a crime. Planning can thus be defined as implying that one or several persons contemplate designing the commission of a crime at both the preparatory and execution phases.'[187]

The ICTY has adopted and reaffirmed this definition of planning in *Blaskić,*[188] *Kordić and Cerkez*,[189] and *Krstić*.[190] In *Kordić and Cerkez*, the ICTY Appeals Chamber held that 'The actus reus of 'planning' requires that one or more persons design the criminal conduct constituting one or more statutory crimes that are later perpetrated'.[191] A planner need not plan with other perpetrators to incur liability. The ICTY Trial Chamber held that planning is a 'discrete form of responsibility',[192] reaffirming that planning can be a solitary enterprise. There is no requirement for a direct causal link between the planning and the crime. It is enough to show that the planning was a significant and substantial contributory factor to the crime.[193] A perpetrator who plans and also directly executes a crime can be found criminally liable for committing that crime.[194] The mens rea for planning is similar to that of instigation namely that '[…a] person who plans an act or omission with the awareness of the substantial likelihood

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[182] Art 6(c) of Nuremberg Statute.
[183] Art 6 of ICTY Statute.
[184] Art 7(1) of ICTR Statute.
[185] Art 6(1) of SCSL Statute.
[186] Art 29(1) of Law of ECCC.
[187] *Akayesu* supra note 16 para 480.
[188] *Blaškić* supra note 18 para 279. The Trial Chamber held that 'a person other than the person who planned [...] must have acted in furtherance of a plan or order'.
[189] *Kordić & Čerkez* supra note 94 para 386.
[190] *Prosecutor v Krstić,* Trial Chamber Judgment, IT-98-33-T, Trial Chamber Judgment of 2 August 2001, para 601.
[191] *Kordić & Cerkez* supra note 94 para 26.
[192] *Kordić & Čerkez* supra note 94 para 386.
[193] Ibid *Kordić & Čerkez* para 26.
[194] Guenael Mettraux International Crimes and the Ad Hoc Tribunals (2005).

that a crime will be committed in the execution of that plan [...]; planning with such awareness has to be regarded as accepting that crime'.[195] It can therefore be safely accepted that dolus eventualis is encapsulated in planning.[196] Notably, the Rome Statute does not provide for planning as a form of criminal responsibility. Article 2 (3) (e) of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind stipulates that an individual shall be responsible for a crime if that individual 'directly participates in planning or conspiring to commit such a crime, which in fact occurs'.[197]

It has already been argued that Mugabe sought to establish a one-party state in Zimbabwe after independence in 1980. This contention was reaffirmed by the then Minister of Legal and Parliamentary Affairs Eddison Zvobgo.[198] In pursuance of a one-party state, Mugabe orchestrated a plan to eliminate all opposition to this idea including ZAPU political leadership and its supporters in Matabeleland and even members of his own party such as the then ZANU PF Secretary General and Minister of Manpower Planning Edgar Tekere.[199]

There is indisputable evidence that Mugabe decided to establish Five Brigade as early as 1980, before the emergence of dissidents in Matabeleland and Midlands.[200] This demonstrates that as early as 1980, Mugabe prepared and planned to deal with any opposition to his idea and aspiration for a one-party state. In this regard, Mugabe's conduct satisfies the actus reus of planning as set out in *Kordić and Cerkez*, which requires that he designed the criminal conduct constituting one or more statutory crimes that are later perpetrated by Five Brigade. As outlined above, it is not necessary to establish a direct causal link between Mugabe's plan to eradicate opposition to the idea of a one-party state and the atrocities committed by Five Brigade. It is enough to show that Mugabe's plan was a significant and substantial contributory factor to Five Brigade atrocities. The conduct of Five Brigade, which targeted ZAPU supporters in Midlands and Matabeleland, is evidence of Mugabe's plan to eradicate opposition to the idea of a one-party state and was a significant and substantial contributory factor to this conduct.

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[195] *Kordić & Čerkez* supra note 94 para 31.
[196] *Orić* supra note 122; *Blaškić* supra note 18
[197] As was submitted in the ILC Commentary: 'the criminal responsibility of an individual who, acting alone or with other individuals, participates in planning a crime (...) in which the criminal plan is actually carried out'. Commentary 1996 ILC Draft Art 2 para 13.
[198] William Shaw 'Towards the One-Party State in Zimbabwe: A Study in African Political Thought' (1986) 24 *The Journal of Modern African Studies* 3 at 378.
[199] Ibid at 375.
[200] *Breaking the Silence* op cit note 119 at XXV

Furthermore, it can be argued that Mugabe satisfies the mens rea element of planning as he was aware that there was a substantial likelihood that a crime will be committed in the execution of his plan to eradicate opposition to the idea of a one-party state. This mental element can be inferred from his statements, the most illustrative of which is a speech he gave to a rural Ndebele audience near Nkayi in April 1983 when he said, 'We have to deal with this problem quite ruthlessly. Don't cry if your relatives get killed in the process ...'[201] This illustrates that he was aware that substantial likelihood that civilians were going to be killed in the execution of his plan. Mugabe's conduct satisfies both the actus reus and mens rea for planning and he can therefore be held liable for planning the crimes committed by Five Brigade in Midlands and Matabeleland.

6.5.6 Aiding and abetting

The concept has its origins in the post-Nuremberg *Industrialists Case*, where the IMT convicted two industrialists for supplying the poison that the SS used in the gas chambers to exterminate Jews.[202] The Statutes of the ICTY[203] and ICTR[204] provide for 'aiding and abetting' as a mode of criminal participation or liability. Article 25(3) (c) of the Rome Statute also provides for aiding and abetting. The ICTY and ICTR have elaborated the concept of aiding and abetting in their jurisprudence.[205] Aiding means 'giving assistance to someone' and abetting involves 'facilitating the commission of a crime by being sympathetic thereto'.[206]

Despite being two distinct modes of liability or participation, aiding and abetting are often charged in juxtaposition.[207] In *Tadić,* the Appeals Chamber held 'the aider and abettor is always an accessory to a crime perpetrated by another person, the principal'.[208] In *Vasiljevic* the Appeals Chamber held that within a JCE, the aider and abettor carries out acts aimed at assisting, encouraging and lending moral support to the commission of specific crimes. [209] The Appeals Chamber findings in the *Tadić* and *Vasiljevic* cases reaffirm that whatever support is provided by the aider and abettor, it should be directed at the commission of the crime. This

[201] Zimbabwe Human Rights NGO Forum op cit note 139.
[202] The Zyklon B, Case; Trial of Bruno Tesch and Two Others; British Military Court Hamburg 1-8 March 1946; Complicity of German industrialists in the murder of interned allied civilians by means of poison gas.
[203] Art 7(1) of ICTY Statute.
[204] Art 6 of ICTR Statute.
[205] *Kambanda* supra note 28 paras 675–86; *Furundzija* supra note 48 paras 190–249.
[206] Smith & Hogan *Criminal Law* 165–70.
[207] *Akayesu* supra note 16 para 484.
[208] *Tadić* supra note 15 para 229.
[209] *Prosecutor v Mitar Vasiljevic [Vasiljevic]* IT-98-32-A App Chamber Judgment of 25 February 2004 para 102.

entails any support which may assist, encourage or lend moral support but not directed against the commission of the crime may not suffice as aiding and abetting.

In *Prosecutor v Emmanuel Rukundo*, the ICTR Appeals Chamber held that an 'aider and abettor commit[s] acts specifically aimed at assisting, encouraging, or lending moral support for the perpetration of a specific crime, and that this support had a substantial effect on the perpetration of the crime'.[210] The Appeals Chamber held that the mens rea required for aiding and abetting is knowledge that the acts performed assist the commission of the specific crime of the principal perpetrator. Specific intent crimes such as genocide also require that 'the aider and abettor must know of the principal perpetrator's specific intent'.[211] The ICTR Appeals Chamber made a similar finding in *Prosecutor v Dominique Ntawukulilyayo*.[212] The ICTR Appeals Chamber recalled that 'theactus reus of aiding and abetting is constituted by acts or omissions specifically aimed at assisting, encouraging, or lending moral support to the perpetration of a specific crime, and which have a substantial effect upon the perpetration of the crime (...) whether a particular contribution qualifies as "substantial" is a "fact-based inquiry", and need not "serve as condition precedent for the commission of the crime'.[213] The ICTR concluded that the accused had 'substantially contributed to the Kabuye hill killings by encouraging Tutsis to seek refuge there and then providing reinforcements to those attempting to kill them. These acts alone suffice to constitute the actus reus of aiding and abetting'.[214]

An important consideration relates to specific intent crimes such as persecution and genocide. With regard to the crime of persecution, an offence with a specific intent, an aider and abettor must thus be aware not only of the crime whose perpetration he is facilitating but also of the discriminatory context in which the crime is to be committed and know that his support or encouragement has a substantial effect on its perpetration. However, he or she need not know either the precise crime that was intended or eventually committed. This means that an individual may be found liable for aiding and abetting if he or she is aware that one of a number of crimes will probably be committed as a result of his or her assistance.[215]

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[210] *Prosecutor v Emmanuel Rukundo [Rukundo]* ICTR-2001-70-A ICTR App Chamber Judgment para 52.
[211] Ibid para 53.
[212] *Prosecutor v Dominique Ntawukulilyayo [Ntawukulilyayo]* ICTR-05-82-A ICTR App Chamber Judgment para 222.
[213] Ibid para 222.
[214] Ibid para 216.
[215] Sliedregt op cit note 14 at 65; *Prosecutor v Simić [Simić]* IT-95-9-A App. Chamber Judgment of 28 November 2006 para 85 reaffirmed in *Blaskić* supra note 18 paras 45, 46; *Vasiljevic* supra note 208 para 102.

The aider and abettor need not possess genocidal or discriminatory intent respectively.[216] But the aider and abettor's mens rea must be distinguished from that of the principal. Participatory liability has its own mental element through which the mental element of the underlying crime is established. Judge Shahabuddeen's partial dissenting opinion in *Krstić* is compellingly persuasive in this regard. Judge Shahabuddeen held that the intent of the aider and abettor is not the same as the perpetrator and the intent of the aider and abettor is to provide means by which the perpetrator can commit the crime. This provides a clear distinction of the mental element requirement between the principal and the accessory.[217]

There are two elements of aiding and abetting: 'first, the accused must lend practical assistance, encouragement, or moral support, and second, which must have had substantial effect. As to the first, aiding/abetting may occur at one or more of the three possible stages of the crime, planning, preparation, or execution'.[218] In the case of *Prosecutor v Kvočka* et al, the ICTY held that an aider and abettor may also become a co-perpetrator if their assistance lasts for an extensive period of time. The Trial Chamber held that an aider and abettor may eventually become an accomplice, even without physically committing crimes, if their participation lasts for a long time or becomes more directly involved in sustaining the functioning of the enterprise. However, this raises the questions of what constitutes an extensive or long time, and also what does maintaining the functioning of the enterprise entail.[219]

Scholars posit that the manner in which the ad hoc tribunals and the ICC have dealt with aiding and abetting is fragmented. They argue that the definition of actus reus and mens rea for aiding and abetting has varied between the tribunals and the ICC and that the latter has set different standards for satisfying aiding and abetting.[220] In relation to the actus reus, the ICTY, ICTR, SCSL and ECCC all require that the alleged act of aiding or abetting has a 'substantial effect'[221] on the commission of the principal crime whereas the ICC requires the assistance to have 'an

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[216] *Krnojelac* supra note 101 para 153, affirmed on appeal para 52 where the accused, a warden of a prison at which Muslim civilians were illegally detained, was guilty as an aider and abettor of persecution since he had knowledge that his acts substantially contributed to the offence of imprisonment and that the principal perpetrators imprisoned the Muslim population on religious and political grounds.
[217] *Prosecutor v Krstić [Krstić]* App Chamber Judgment para 143 Partial Dissenting Opinion of Judge Shahabuddeen.
[218] Sliedregt op cit note 14 at 65; *Simić* supra note 214 para. 86; *Vasiljevic* supra note 208 para 102.
[219] *Kvočka* supra note 120 paras 284-285.
[220] Oona A Hathaway et al 'Aiding and Abetting in International Criminal Law' (2020) 104 *Cornell L Rev* 1593 at 1609.
[221] *Blaskić* supra note 18 para 46; *Rukundo* supra note 209 para 52; *Taylor* supra note 166 para 482.

effect' on the principal crime and not necessarily a substantial effect.[222] This suggests that the ICC sets a lower bar compared to the ad hoc tribunals. The substantiality requirement has also been a subject of debate among scholars particularly in relation to the ICC. Finnin has argued that the ICC should follow the substantial effect standard set out by the ad hoc tribunals[223] despite the Rome Statute not explicitly providing for this, whereas Kai Ambos has argued that the terminology 'facilitating' under Article 25(3)(c) entails that direct and substantial assistance is not necessary.[224]

However, what constitutes a substantial effect remains unsettled, even though there been judgments to this effect, for instance, in *Furundzija*,[225] the ICTY Trial Chamber held that "any marginal participation" will not satisfy the substantiality requirement[226] and in *Nyiramasuhuko,* the ICTR Appeals Chamber held that the substantiality requirement does not entail a causal relationship.[227] This is also supported by Ambos who argues that a causal relationship does not need to be established.[228] However, the ICC Trial Chamber in *Prosecutor v Bemba* et al has held that a general causal requirement or link is required.[229] Despite this emphasis, it seems the substantiality requirement does not carry much weight in practice as only two individuals were acquitted by the ad hoc tribunals for the lack of the substantiality requirement.[230] Similarly, in relation to the mens rea, the ad hoc tribunals require 'knowledge' that the acts assist in the commission of the principal crime[231] whereas the ICC requires 'purpose' to facilitate the commission of the principal crime.[232] This shows that the ICC requires a higher mens rea standard for aiding and abetting compared to the ad hoc tribunals.

The elements of aiding and abetting as summarised above implicate the top political and military leadership in ZANU and ZNA. As outlined above, the accused must lend practical

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[222] *Prosecutor v Bemba et al [Bemba et al]* ICC-01/05-01/13 Trial Chamber Judgment of 19 October 2016 para 90.
[223] Sarah Finnin *Elements of accessorial modes of liability: Article 25 (3)(b) and (c) of the Rome Statute of the International Criminal Court* (2012) 147.
[224] Kai Ambos 'Article 25: Individual Criminal Responsibility' in Otto Triffterer (eds) *Commentary on the Rome Statute of the International Criminal Court* (2008) 757.
[225] *Furundzija* supra note 48.
[226] *Furundzija* supra note 48 para 231.
[227] *Prosecutor v Nyiramasuhuko [Nyiramasuhuko]* ICTR-98-42-A App Chamber Judgment of 14 December 2015 para 2083.
[228] Ambos op cit note 223.
[229] *Bemba* et al supra note 221 para 90.
[230] *Prosecutor v Kupreškic [Kupreškic]* IT-95-16-A App Chamber Judgment of 23 October 2001 para 277; *Prosecutor v Sainovi [Sainovi]* IT-05-87-A App. Chamber Judgment of 23 January 2014, paras 1676 1679-82.
[231] *Tadić* supra note 15 para 229; *Prosecutor v Karera [Karera]* ICTR-01-74-A App Chamber Judgment of 2 February 2009 para 321; *Taylor* supra note 166 para 487.
[232] Art 25(3)(c) of the Rome Statue.

assistance, encouragement, or moral support at one or more of the three possible stages of the crime namely planning, preparation, or execution. As already indicated in 6.5.5, the then Minister of Legal and Parliamentary Affairs, Eddison Zvobgo supported Mugabe's plan to eradicate opposition to the idea of a one-party state and therefore provided moral support at the planning stage of the crime. Additionally, Doran notes that Zvobgo who was a member of the ZANU PF central committee spoke of a 'decision of the central committee that there had to be a massacre of Ndebeles'.[233] The central committee of ZANU PF is a principal organ and acts on behalf of the congress when it is not in session and implements all policies, resolutions, directives and decisions as enunciated by congress.[234] This means that the support of Mugabe's plan by the central committee was akin to support by congress. At the time the central committee was a 20-member group, and Zvobgo's support of Mugabe's plan in this committee illustrates the substantial effect and impact on the commission of the crimes committed by Five Brigade. Without the support of key members in the central committee, it would have been difficult for Mugabe to carry out his plan.

Additionally, it can be argued that the then commander of the ZNA General Solomon Mujuru provided practical assistance at the preparation stage of crime. Mujuru used his position as the commander of the ZNA to purge former ZIPRA combatants in the army that were aligned to ZAPU leadership[235] and this conduct had substantial effect to the commission of the crime as it set the ground for the elimination of former ZIPRA combatants by Five Brigade under the guise of combatting dissidents. In addition, the then Air Vice-Marshall Josiah Tungamirai provided practical assistance at the execution stage of the crime. As the acting commander of ZNA, he established the ZNA task force deployed to Matabeleland to counter growing dissident activity and also continued the purging of former ZIPRA combatants from the army in a 'accelerated policy of de-Ziprafication and concomitant Zanlafication' within the ZNA.[236] Tendi notes that the British Military Advisory and Training Team (BMATT) in Zimbabwe was also complicit in this design.[237] Furthermore, the then Brigadier Constantine Chiwenga who commanded the One Brigade in Matabeleland at the time of Five Brigade incursions, who was later succeeded by Lieutenant-General Edzai Chimonyo, and Lieutenant Colonel Lionel Dyck

[233] Doran op cit note 172.
[234] ZANU 'The Party Organs', last accessed from https://www.zanupf.org.zw/party-organs on 23 March 2022.
[235] Tendi op cit note 173 at 192.
[236] Ibid at 193.
[237] Ibid at 174.

who commanded the parachute battalion as well as Ken Flower who headed the CIO, provided practical support at the execution stage of the crime by providing military, logistical and intelligence support to Five Brigade which contributed and had substantial effect to the commission of the crime.[238]

6.5.7 Joint criminal enterprise

Section 6.4 above discussed the significance of the concept of collective or system criminality to international crimes going back to Bernays' theory at Nuremberg. The Nuremberg Tribunal and military commissions that followed relied on the concept of group, system or universal criminality to address the complexity of multiple individuals engaged in the perpetration of a crime committed in furtherance of a common criminal purpose and design. The theory of pursuing a 'common design' was used to convict concentration camp personnel and those involved in mob violence.[239] In the post-Nuremberg era most international crimes have been committed by groups of individuals acting as part of 'collective criminal enterprises pursuant to a common criminal design'.[240] In contemporary ICL, these concepts are captured under the principle of 'common purpose liability' described by the ICTY as JCE.[241] Marchuk observes that this form of liability has its origins in Anglo-American complicity law which is based on the premise that the perpetrator is the one who most immediately or directly causes the actus reus.[242] However, in situations where a group commits a crime and it may not always be clear who caused the actus reus and whether and how each of the other supporting participants contributed to its commission. In such instances, it may be immaterial who is a principal and who is an accessory given that every participant is involved in ensuring that the crime is effected with all participants referred to as 'parties to a joint enterprise'.[243] Under civil law, the

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[238] Ibid at 202.
[239] *Trial of Martin Gottfried Weiss and Thirty-Nine Others* UN War Crimes Comm'n XI *Law Reports of Trials of War Criminals* 5–17 (1949) (General Military Government Court of the United States Zone Dachau Germany 1945) [*Dachau Concentration Camp case].*
[240] Kriangsak Kittichaisaree *International Criminal Law* (2001) 237.
[241] *Prosecutor v Popovic* et al App. Chamber Judgment para 1615 where it was held that 'the participation of an accused in a JCE need not involve the commission of a crime, but that it may take the form of assistance in, or contribution to, the execution of the common objective or purpose. Moreover, it has previously held that 'the fact that [the] participation [of an accused] amounted to no more than his or her ''routine duties'' will not exculpate the accused'.
[242] Marchuk op cit note 3 at 168.
[243] Sliedregt op cit note 54 at 69.

counterpart for common purpose liability is co-perpetration which is concerned with the attribution of liability for crimes that ensue from a common agreement.[244]

The rationale for holding each individual who participates in a JCE criminally liable as a principal in that crime not an aider and abettor was explained by the ICTY in the *Tadić*[245] case where it was held that the participation of each member is vital to the commission of the crime and to hold them only as aiders and abettors might understate the degree of criminal responsibility.[246]

Essentially, the ICTY has held that the role that the collective membership of the JCE plays in the commission of the crime is so vital that even those who do not physically commit the crime should be held liable as co-perpetrators and that holding them liable as aiders and abettors will understate their criminal responsibility. The central question in this regard is whether and under what circumstances an individual can be held criminally liable for the actions of another in a case where both individuals participate in a common criminal plan? If yes, what are the requisite elements (mens rea and actus reas) for such criminal liability? At Nuremberg and the military commissions, common design liability, was interpreted as requiring proof of knowledge on the part of the defendant (mens rea) that in some way his/her conduct contributed to the crime (actus reus).[247] However, the Tribunals did not fully interrogate the issue of individual contribution to the crime regarding all defendants as equal participants and simply concluded that the condition for co-perpetration in the war machine was that it should have a 'real bearing' on the crime.[248]

To answer the question, of requisite mens rea and actus reas for common purpose, Sliedregt argues that the ICTY relied on customary international law and domestic concepts of common purpose.[249] Sliedregt, argues that common purpose liability shows traits of the 'Pinkerton Doctrine' developed by the United States Supreme Court.[250] Based on the 'Pinkerton Doctrine,' each member of a conspiracy can be liable for substantive offences carried out by co-

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[244] See Dutch Supreme Court 18 November 1997 *Nederlandse Jurisprudentie* 1998 225 cited in Sliedregt op cit note 54 at 70.
[245] *Tadić* supra note 93 para 191.
[246] Ibid para 192.
[247] *Trial of Otto Sandrock and Three Others*, UN War Crimes Comm'n, I Law Reports of Trials of War Criminals 35, 40 (1947) (British Military Court, Almelo, Holland 1945); *Trial of Erich Heyer and Six Others (The Essen Lynching case)* cited in Tadić, Appeals Judgment, paras 204–9; *Trial of Kurt Goebell et al. (The Borkum Island cases)* cited in Tadić, Appeals Judgment, paras 210–13.
[248] Sliedregt op cit note 54 at 70.
[249] Ibid.
[250] Pinkerton v Unites States 328 US 640 (1946).

conspirators in furtherance of the conspiracy, even when there is no evidence of their direct participation in, or knowledge of such offences. Liability extends to offences that are 'reasonably foreseen as a necessary or natural consequence of the unlawful agreement'.[251] So common purpose liability and Pinkerton conspiracy, like complicity liability, makes the person liable for the crime that is committed as a result of pursuing the common criminal purpose.[252]

Tadić addressed the question of actus reas and mens rea for JCE.[253] The actus reas has three elements. First, the crime must be committed by more than one individual. Thus, a plurality of perpetrators is required. There is no requirement that the group be organised in any structure whether military, political or administrative. A useful example of a group that lacks organisation or structure but acts together in perpetrating a crime with common purpose is mob violence.[254] Second, there must be a common plan, design or purpose which involves, is related to and equates to the commission of a crime. There is no requirement for the plan, design or purpose to have been arranged or formulated prior to the commission of the crime.[255] Thus the plan design can unravel, materialise or develop extemporaneously. It can be inferred after the fact that a group or plurality of individuals acted together to carry out a joint criminal enterprise.[256] Third, there must be participation by the perpetrator in the common design, which must involve and entail the commission of a crime. There is no requirement that such participation relate to the commission of a specific crime but the participation, contribution or assistance may relate to the execution of the common plan or purpose.[257] There is no requirement to show causation between the accused's actions and the commission of the crime, so the participation of an accused is not a pre-condition for the crime to be committed nor is it necessary to show that had the accused not participated, the crime would not have been committed.[258]

The mens rea for common design differs depending on the category of the common design. There are three categories of common design. In the first category, also known as co-

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[251] Ibid; Sliedregt op cit note 54 at 69.
[252] Sliedregt op cit note 54 at 70.
[253] *Tadić* supra note 93, para 227.
[254] Ibid *Tadić*, para 199 cited the 're Heyer and Others ('Essen Lynching' Case), British military Court, Essen, Germany 22 December 1945' (1951) 13 *Ann. Digest* 287.
[255] Marchuk op cit note 3 at 174.
[256] Ibid at 175.
[257] Ibid.
[258] *Tadić* supra note 93, para 199 citing with approval *Trial of Feuerstein and Others (Ponzano Case)* Proceedings of a War Crimes Trial held at Hamburg Germany Judgment of 24 August 1948 at 7-8.

perpetration, the requirement is intent to commit a certain crime (all the perpetrators must share this intent). Thus, to hold a person who cannot be shown to have directly committed the crime liable it must be shown that:

i. That the person participated in one aspect of the criminal design (whether by providing or furnishing the material, intellectual or other means to facilitate the activities of his co-perpetrators), and
ii. That the person, although not personally committing the crime himself, must intend the result of the action taken by the group of perpetrators.[259]

This reasoning is derived from the post-Nuremberg, United States Tribunal Case of Einsatzgruppen which held that members of the Einstz had an express mission [common design] to carry out a large-scale programme of murder.[260]

In the *Tadić* Decision, the Appeals Chamber did not decide on the requirement for knowledge of the common criminal plan or design by the perpetrator in this category of common design but approved the articulation from the post-Nuremberg Tribunal Cases,[261] which stressed the necessity of knowledge on the part of the accused as to the intended purpose of the criminal enterprise.[262]

In the second category of common design, offences are allegedly committed by members of military or administrative units acting pursuant to a concerted plan, such as running concentration camps. In such a case, the actus reas comprises the active participation of the perpetrator in the enforcement of the concerted plan (establishing and operating the camp). This actus reas can be inferred from the position of authority and specific functions held by each accused.

Under this category, the mens rea for common design is personal knowledge of the nature of the system of ill-treatment. This knowledge can be proved by adducing evidence of witnesses, or drawing reasonable inferences based on the position and authority of the accused. Additionally, it must be shown that the accused intended to further the design and/or

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[259] Marchuk op cit note 3 at 175 - 177.
[260] *United States of America v Otto Ohlendorf et al [Ohlendorf]* TWC iv 3 at 373 cited by Kriangsak Kittichaisaree *International Criminal Law* (2001) at 239.
[261] Damgaard op cit note 2 at 139.
[262] *Tadić* supra note 15 paras 199-200.

implementation of the concerted system of mistreatment.[263] This intent can also be inferred from the position of authority of each accused.[264]

In the third category of common design cases, one of the perpetrators commits an act that is outside the common design, but that was nevertheless a foreseeable and natural consequence of the implementation of that common purpose. In this category, an accused is guilty if it can be shown that he had the 'intent to participate in and further (individually or with others), the criminal purpose or activity of the group and to facilitate and contribute to the joint criminal enterprise or in any event to the commission of a crime by that group'.[265] A member of the group shall only be responsible for a crime that is agreed in the common design or plan of the group 'if it was foreseeable that such a crime might be committed by one or other member of the group'; and 'the accused willingly took that risk'.[266] This is a dolus eventualis test. In order for an individual member's crime to be imputable to others in the group, every other member of the group must have been 'able to predict the results of the risk', going beyond being simply negligent that it could materialise.[267]

Tadić was found guilty of the killing by his group of five men in Jaskici Village, despite the fact that he himself had not participated in the killing.[268] He was convicted because he had intent to further the common criminal purpose and recognisable plan of the group which was a policy of ethnic cleansing. Although the common plan may not have been explicitly to kill all non-Serb men, it was foreseeable that as part of the ethnic cleansing,[269] and inhuman treatment, killings could be carried out by one or more members of the group and did in fact occur frequently. In this regard, the fact that it was foreseeable that non-Serbs could be killed as part of implementing the ethnic cleansing operation, and that Tadić was aware of both the common plan and operation of the criminal group which he was a member of, but nonetheless willingly participated and took the risk.[270]

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[263] *Kambanda* infra note 288, para 714.
[264] *Tadić* supra note 93, paras 202-203; 220 and 228.
[265] Kittichaisaree op cit note 239 at 240.
[266] Ibid at 240 citing *Tadić* supra note 15, para 228.
[267] *Tadić* supra note 15, para 220.
[268] Ibid.
[269] *Prosecutor v Martić [Martić]* IT-95-11-A App Chamber Judgment of 8 October 2008 para 445 found that the common plan for 'the establishment of an ethnically Serb territory through the displacement of the Croat and other non-Serb population', meant that other crimes were foreseeable.
[270] Ibid paras 183 230-237.

In the earlier case of *Furundžija*, discussed in 6.5.6 above under aiding and abetting, the ICTY Trial Chamber relied on the notion of common purpose/JCE as 'co-perpetration involving a group of persons pursuing a common design to commit crimes'[271] where 'the accused must participate in an integral part of the torture and partake of the purpose behind the torture',[272] which is the first category of common design in Tadić above. The *Furundžija* Trial Chamber reaffirmed and endorsed the '…criminal law maxim quis per alium facit per se ipsum facere viderus (he who acts through others is regarded as acting himself)'.[273]

In *Kayishema,* the ICTR interpreted the mens rea and actus reas for common design as being the same as that envisaged by Article 25 (3) (d) of the Rome Statute and that the prosecutor must demonstrate participation and knowledge or intent, in other words awareness by the accused of his participation in the crime.[274] Although it has generated controversy and criticism, JCE as enunciated in Tadić has survived. At the ICTY, the 'jurisprudence has clearly reaffirmed that participants in a JCE commit crimes and are generally regarded as more culpable than aiders and abettors'.[275] Beyond ICTY and apart from *Kayishema,*[276] the ICTR has considered JCE in several cases including *Ntakirutimana et al* where it was rejected;[277] *Karemera et al*.,[278] *Mpambara*,[279] where the ICTR Trial Chamber found that the accused did not have the requisite intent for a participant in a genocidal JCE category one and acquitted

[271] *Trial of Max Wielen and Seventeen Others [Stalag Luft III]* UN War Crimes Comm'n XI Law Reports of Trials of War Criminals 33 46 (1949) (British Military Court Hamburg Germany 1947).
[272] *Furundzija* supra note 48 para 210. *Furundzija* was extensively reviewed by the *Tadić* Appeals Chamber.
[273] Ibid para 257(ii). Part of the analysis is drawn from Sliedregt op cit note 14 at 70.
[274] *Prosecutor v Kayishema & Ruzindana [Kayishema & Ruzindana]* ICTR-95-1-T ICTR Trial Chamber Judgment of 21 May 1999 paras 198 and 207.
[275] Sliedregt op cit note 14 at 73.
[276] *Kayishema & Ruzindana* supra note 273. The ICTR Appeals Chamber endorsed the conviction of *Ruzindana* explicitly on the basis of a (genocidal) JCE.
[277] *Ntakirutimana* supra note 202.
[278] *Prosecutor v Karemera et al [Karemera et al]* ICTR-98-44-T Trial Chamber Judgment of 11 May 2004 where the ICTR Trial Chamber concluded that JCE has a firm grounding in customary international law and subsequently that its application was not a violation of the nullum crimen sine lege principle. *Decision on the Preliminary Motion by the Defence of Joseph Nzirorera, Édoarad Karemera, André Rwamakuba and Mathieu Ngirompatse Challenging Jurisdiction in Relation to Joint Criminal Enterprise*; cited in Sliedregt op cit note 14 at 74.
[279] *Prosecutor v Mpambara [Mpambara]* ICTR 01-65-T Trial Judgment of 11 September 2006.

him. In *Rwamakuba*,[280] and *Simba*[281] the accused were convicted on the basis of participation in a JCE.

The first category of the common design for JCE relates to co-perpetration and all the perpetrators must share the intent to commit a crime although each participant may have different roles and contribute to that crime in different ways. Co-perpetration has already been discussed in 6.5.2. It has been shown how alleged perpetrators such as Prime Minister Robert Mugabe, Minister of Defence Sydney Sekeramayi and Minister of State Security, Emmerson Mnangagwa who provided material, physical, psychological and operational support to Five Brigade; as well Lieutenant Colonel Perence Shiri, Lieutenant-General Edzai Chimonyo, Brigadier General Emilio Munemo and Senior Assistant Police Commissioner Emelio Svaruka participated in one aspect or the other of the criminal design to eliminate the Ndebele population pursuant to a one-party state. However, for this category it is necessary to establish that the aforementioned individuals shared the same intent to commit the crime. In the above section, this intent has already been inferred from statements made by political leaders such as Mugabe, Sekeramayi and Mnangagwa. As for the military leaders such as Shiri, Chimonyo, Munemo and Svaruka this intent can be inferred from their conduct which assisted in enabling Five Brigade to function and operate, knowing what was afoot. With this, it can be argued that both the actus reus and mens rea for the first category of JCE has been satisfied.

The second category of JCE captures the military leadership within the ZNA and other administrative and law enforcement units such as PISI and the CIO. The offences were committed by members of the military (Five Brigade) as well as the CIO and PISI pursuant to a plan to eradicate ZAPU's political support base in Matabeleland and Midlands and by extension the Ndebele civilian population. Members of the military and CIO that, together with Five Brigade, established and ran concentration camps such as Bhalagwe. Breaking the Silence notes that 'The CIO played a major role at Bhalagwe camp in early 1984. They interrogated all detainees, in the presence of Five Brigade. The CIO also administered the more sophisticated forms of torture here, including submarine (i.e. asphyxiation by submersion in water) and

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[280] *Prosecutor v Rwamakuba [Rwamakuba]* ICTR-98-44-A72.4 App. Chamber of 22 October 2004 paras 19-21 31-2 Decision on Interlocutory Appeal Regarding Application of Joint Criminal Enterprise to the Crime of Genocide, where the Appeals Chamber, held that 'customary international law criminalized intentional participation in a common plan to commit genocide prior to 1992'.

[281] *Prosecutor v Simba [Simba]* ICTR-2001-76-T Trial Chamber Judgment of 13 December 2005 where the accused was convicted on the basis of JCE which was upheld by the Appeals Chamber in *Prosecutor v Simba* ICTR-2001-76-A App Chamber Judgment of 27 November 2007.

electric shocks…'.[282] It is evident from the above sections that members of the military such as General Solomon Mujuru, Air Vice-Marshal Josiah Tungamirai, Lieutenant Colonel Perence Shiri, Brigadier General Emile Munemo, Lieutenant-General Edzai Chimonyo, Brigadier Constantine Chiwenga and Lieutenant Colonel Lionel Dyck played an active role in the enforcement of the concerted plan to mistreat, abuse and eradicate the Ndebele civilian population and ZAPU supporters at Bhalagwe and other detention camps.

Additionally, other members in the security service sector such as Emmerson Mnangagwa, the minister responsible for CIO, head of CIO Ken Flower, Commissioners of Police Wiridzayi Nguruve and Henry Mkurazhizha as well as Senior Assistant Police Commissioner Emelio Svaruka also played an active role in the enforcement of the concerted plan to mistreat, abuse and eradicate the Ndebele civilian population and ZAPU supporters at Bhalagwe and other detention camps. Furthermore, the actus reas can be inferred from the position of authority and specific functions held by the aforementioned individuals and therefore, it can be argued that the actus reus of JCE has been satisfied. Also, under this category it may be argued that the mens rea of JCE is satisfied as illustrated from the preceding sections that the aforementioned individuals had personal knowledge of the nature of the system of ill-treatment being meted out towards the Ndebele civilian population.

The third category relates to the crimes committed by Five Brigade outside the common design as a result of indiscipline or banditry. This includes any killing, torture and rape by the Gukurahundi but not necessarily as part of its campaign. The crimes committed by Five Brigade as a result of indiscipline or banditry are captured by Tendi who observes that the '5 Brigade was out of control. They were doing as they wanted. They were just beating and killing people randomly'.[283] Tendi goes on to state that even military leaders such as Shiri, Chiwenga and Brigadier General Felix Muchemwa who commanded the Presidential Guard's operations against dissidents in Matabeleland in 1987 acknowledged the indiscipline and banditry of Five Brigade.[284] Tendi further notes that some military leaders blocked access to food to Five Brigade in response to the Brigade's indiscipline and banditry.[285] Under the third category, as seen in *Tadić*, military leaders of Five Brigade and those that provided military support from the ZNA, and senior government ministers, who did not participate in the crimes of Five

[282] *Breaking the Silence* op cit note 119 at 138.
[283] Tendi op cit note 173 at 203.
[284] Ibid.
[285] Ibid.

Brigade would be held liable for the crimes committed by Five Brigade outside the common design as a result of indiscipline and banditry.

6.6 Command and superior responsibility

The principle of command or superior responsibility is well established in international law.[286] Under the principle, a superior or commander is criminally responsible for acts committed by their subordinates if they knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.[287] Command responsibility is founded on the failure to act in breach of a clear legal duty or moral obligation imposed by international law upon those in authority to act.[288] A person can be found criminally responsible as a superior additionally or alternatively to being individually responsible if the requirements of both forms of responsibility are established. The principle of superior responsibility also applies to political leaders, civilian leaders,[289] or non-military leaders who wield the required authority. International and national tribunals have found a former civilian prime minister,[290] government ministers, politicians and business leaders or industrialists[291] guilty under this principle for crimes committed by their subordinates. In determining this level or type of responsibility, it is not the civilian or military status of the superior that matters but the degree of control or authority that such superior exercises or exercised over their subordinates.[292] All that would have to be established in order to impute liability under this category is that the respective political or civilian leader was in a position of authority over the direct perpetrators and exercised effective control and authority, and the perpetrators were their subordinates; and that such commander or superior was aware that their subordinates were about to commit or had committed atrocities and had failed to stop the commission of the crimes or to punish them. In Rwanda, the ICTR found the former prime minister, Kambanda, responsible for genocide and

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[286] Art 28 of the Rome Statute; Art 7(3) of ICTY Statute; see I Bantekas *Principles of Direct and Superior Responsibility in International Humanitarian Law* (2002); G Mettraux *The Law of Command Responsibility* (2009).
[287] Art 6(3) of the Rome Statute.
[288] Ibid.
[289] *Prosecutor v Delacic [Celebici Case]* Trial Chamber Judgment, paras 356–363; *Prosecutor v Musema [Musema]* Trial Chamber Judgment paras 136 146–148.
[290] *Kambanda* supra note 28.
[291] *Kayishema & Ruzindana* supra note 273 paras 213-215.
[292] *Prosecutor v Aleksovski [Aleksovski]* Trial Chamber Judgment paras 75-78; *Kayishema & Ruzindana* supra note 273 para 216; *Akayesu* supra note 16 para 491.

CAH for failing to prevent and punish genocide of hundreds of thousands of Tutsis.[293] The ICTR also found Kayishema,[294] a civilian head of a tea factory and mayor, Jean Paul Akayesu,[295] criminally responsible under the principle of command or superior responsibility.

Applying the elements and requirements of command or superior responsibility to Gukurahundi atrocities implicates all civilian, political and military leaders that wielded effective control over the members of Five Brigade who would be liable for all their crimes (genocide, CAH and war crimes) under international law. Command or superior responsibility essentially has three elements namely (i) the existence of a superior-subordinate relationship of effective control, (ii) knowledge or constructive knowledge that the crime was about to be or was being or had been committed and (iii) the failure to take necessary and reasonable measures to prevent or stop the crime, or to punish the perpetrator. There have been arguments that ZNA leaders such as the then ZNA commander General Solomon Mujuru and the then Air Vice-Marshall Josiah Tungamirai did not have effective control over Five Brigade which was reportedly created outside normal army command structures and therefore did not report to those structures but directly reported to the then Prime Minister Robert Mugabe.[296] As outlined in 6.5.4, the control over Five Brigade was also embattled between the Ministry of State Security and Ministry of Home Affairs.

However, ZNA battalions also provided military support to Five Brigade, and military leaders such as Mujuru and Tungamirai[297] can be held liable for the crimes committed by those ZNA battalions as Mujuru and Tungamirai exercised effective control over ZNA structures. As illustrated in 6.5.7, Mujuru and Tungamirai had knowledge that crimes were being committed in Matabeleland and Midlands but failed to take necessary and reasonable measures to prevent or stop the crimes, or to punish the alleged perpetrators within the ZNA. Similarly, commanders and superiors of other state security agencies which committed crimes in Matabeleland and Midlands such as CIO headed by Ken Flower who reported to the then Minister of State Security Emmerson Mnangagwa and PISI which fell under the command of ZRP headed by

[293] *Akayesu*, supra note 16.
[294] *Kambanda* supra note 28.
[295] *Akayesu* supra note 16 para 491.
[296] Tendi op cit note 173 argues that Solomon Mujuru and Josiah Tungamirai did not have effective control over Five Brigade.
[297] Solomon Mujuru was commander of ZNA 1981-1992; Josiah Tungamirai was commander of ZNA's Air Force 1982-1992.

Commissioners of Police, Wiridzayi Nguruve and Henry Mkurazhizha, exercised control over their subordinates who committed crimes.

In relation to Five Brigade, it can be inferred that the Ministry of Defence, the Ministry of State Security and the Ministry of Home Affairs had effective control as both reported directly to Mugabe and both purportedly gave instructions and exercised oversight over Five Brigade. In addition, the fact that Five Brigade was reportedly in disarray as a result of conflicting orders from the Ministry of State Security and the Ministry of Home Affairs demonstrates that these ministries had de facto control over Five Brigade. In *Kayishema and Ruzindana*, the ICTR Trial Chamber held that it is 'under a duty […] to consider the responsibility of all individuals who exercised effective control, whether that control be de jure or de facto [...]. The doctrine of command responsibility is ultimately predicated upon the power of the superior to control the acts of his subordinates'.[298] The ICTR Trial Chamber went on to state that it was prepared 'to pierce such veils of formalism that may shield those individuals carrying the greatest responsibility'.[299] The ICTR Trial Chamber noted that concentrating upon the de jure powers of the accused would improperly represent the situation at the time, and could prejudice either side by improperly representing the authority of the accused and that 'where it can be shown that the accused was the de jure or de facto superior and that pursuant to his orders the atrocities were committed, then the Chamber considers that this must suffice to [find] command responsibility'.[300]

This approach and reasoning implicate the then Prime Minister, Robert Mugabe and Commander of Five Brigade, and the then Lieutenant Colonel Perence Shiri who had de jure powers over Five Brigade. Mugabe and Shiri also had knowledge of the crimes being committed as demonstrated in preceding sections and failed to take necessary and reasonable measures to prevent or stop the crimes, or to punish the perpetrators. Enos Nkala, the then Minister of Home Affairs has also implicated Mugabe stating that Mugabe owned Gukurahundi.[301] In fact, instead of punishing the perpetrators, Mugabe went on to grant them amnesty and even promoted some within the ZNA.[302] The then Minister of State Security Emmerson Mnangagwa and the then Ministers of Home Affairs, Enos Nkala and Herbert

[298] *Kayishema & Ruzindana* supra note 273.
[299] Ibid.
[300] Ibid.
[301] Lance Guma 'Enos Nkala says Mugabe owned Gukurahundi' *Nehanda Radio* (Harare 20 October 2011).
[302] Amnesty Ordinance 11 of 1988.

Ushewokunze can also be held liable as it has been shown that they had de facto control over Five Brigade and had knowledge of the crimes committed by Five Brigade in Matabeleland as seen through their public statements. On 12 February 1983, Nkala was quoted by the Chronicle as telling villagers at Makwe Irrigation Scheme that: 'People who supported dissidents in their murderous acts, mayhem and rape risked the wrath of the government. If you are one of them, you shall die or be sent to prison'.[303] Such statements demonstrate that senior Zanu PF and government officials such as Nkala were part of decision makers and to some extent had de jure or de facto authority over state security agencies including Five Brigade. Mnangagwa, Nkala and Ushewokunze, among others, also failed to take necessary and reasonable measures to prevent or stop the crimes, or to punish the perpetrators.

6.7 Conclusion

This chapter sought to evaluate the ICR of Gukurahundi perpetrators under international law. Although rooted in domestic law, the sui generis nature of ICR to international law has been explained as well as the influence it has had on ICL jurisprudence through the decisions of ICTs. System criminality theory was used to explore the international crimes committed by Five Brigade and other state security agencies. The international nature of the crimes committed in Matabeleland and Midlands between 1982 to 1987 means that perpetrators can be held individually criminally liable under ICL and that amnesties granted under national law cannot shield perpetrators from prosecution. In evaluating ICR, this chapter has assessed different modes of liability under ICL which include commission, co-perpetration, instigation, ordering, planning, aiding and abetting, participation in a JCE and superior or command responsibility, and applied the elements of these modes of liabilities to the perpetrators and atrocities committed in Matabeleland and Midlands. The chapter demonstrated that the top leadership in ZANU, the Zimbabwean government and military were all liable for co-perpetration, instigation, ordering, planning, aiding and abetting the genocide, CAH and war crimes as well as participating in a JCE with a common design that sought to eradicate the Ndebele civilian population and ZAPU supporters pursuant to a desire to establish a one-party state.

[303] See *Breaking the Silence* op cit note 119.

Finally, the chapter evaluated superior or command responsibility and found that all identified civilian, political and military leaders that had effective control over the actions of Five Brigade, the PISI and CIO could also be held liable for the crimes committed by these security agencies as they had the authority to prevent and punish the commission of these crimes but failed to do so. The consequence of the establishment of ICR and superior and command responsibility for Gukurahundi pereptrators is the existence of an international obligation to investigate, prosecute and punish them for these international crimes. The next chapter will address this and also provide a summary of conclusions and findings of the study and proffer recommendations based on the findings.

CHAPTER SEVEN – CONCLUSION: FINDINGS AND RECOMMENDATIONS

This doctoral study investigated whether the atrocities committed by the Gukurahundi in Zimbabwe constitute international crimes concerning which ICR is attributable to perpetrators. The study critically analysed the theory and practice regarding the application of international crimes and ICR to the Gukurahundi atrocities in Zimbabwe. In doing this, available literature such as several human rights reports and other publications of the Gukurahundi atrocities, international conventions and treaties, jurisprudence of ICTs and writings of (ICL scholars were reviewed.

7.1 Research findings

Chapter 1 set the stage and background to the study, that is the perpetration of atrocities in Matabeleland and Midlands in Zimbabwe by Five Brigade of the ZNA and other security agencies between 1982 and 1987, which resulted in the deaths of an estimated 20 000 people and the starvation, torture, rape, unlawful detention and destruction of homes of thousands of civilians.[1] To date, there has been no accountability for the atrocities,[2] and perpetrators continue to enjoy impunity.[3] The chapter outlined a gap in research into the categorisation of the Gukurahundi atrocities under ICL and the evaluation of criminal responsibility of the alleged Gukurahundi perpetrators.[4] It set out the aims and objectives of the study namely, to analyse the applicability of international law to Zimbabwe and classify the Matabeleland Conflict under IHL; to examine Five Brigade atrocities and categorise the crimes committed under ICL; and to evaluate and determine the ICR attributable to alleged perpetrators under international law.

As indicated in Chapter 1, the thesis set out to answer, and indeed answered, the following main question:

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[1] Catholic Commission for Justice and Peace in Zimbabwe & Legal Resources Foundation *Breaking the Silence - Building True Peace: A Report on the Disturbances in Matabeleland and the Midlands 1980 – 1988* (1997) 56 [hereinafter *Breaking the Silence*].

[2] Laura Angela Bagnetti 'Ghosts of Gukurahundi still haunt survivors, as Zimbabwe officials refuse to acknowledge' *RFI* 12 March 2019.

[3] Killander Magnus & Nyathi Mkhululi 'Accountability for the Gukurahundi Atrocities thirty years on: Prospects and Challenges' (2015) 48 *Comparative and International Law Journal of Southern Africa* 3.

[4] See Literature Review Chapter 1.

What is the nature of the crimes committed by Five Brigade, and how can they be categorised under international law?

This thesis alsoanswered the following three subsidiary questions:

1. What is the applicability of international law to the Matabeleland Conflict?
2. What is the criminal responsibility of the alleged perpetrators under international law?
3. What are the implications of categorising crimes and criminal liability on the prospects of justice for Five Brigade crimes?

In relation to the main question, it has been established in chapters 3, 4 and 5 that the Gukurahundi atrocities constitute core international crimes of war crimes, genocide and CAH. In relation subsidiary question (1), the study concluded in chapter 3 that IHL is directly applicable to Zimbabwe and to the Matabeleland Conflict which was classified as an internal armed conflict. Consequently, crimes committed during the conflict were classified as war crimes in chapter 3. In relation to subsidiary question (2) it was established that based on the finding that international crimes were committed, ICR exists and has been established in chapter 6 for perpetrators of Gukurahundi atrocities. With regard to subsidiary question (3), it was demonstrated that having determined that international crimes were committed by the Gukurahundi perpetrators, who were also shown to be individually criminally responsible under international law, there exists an international obligation to investigate, prosecute and punish known perpetrators of these international crimes. Chapter 7 makes recommendations in this regard.

Chapter 2 traced the emergence, evolution and development of international crimes from the International Military Tribunal at Nuremberg (IMT) to the ICC.[5] It analysed the various theories, concepts, and normative accounts of international crimes based on ICTs' statutes, jurisprudence, and the writings of leading ICL scholars. The main findings in this chapter are that international crimes are distinct from domestic crimes in that they are universally criminal. The universality means a universal obligation exists to investigate, prosecute and punish them. Second, the normative requirements for international crimes are gravity, scale and high levels of perpetrators and organisation. Third, Five Brigade atrocities prima facie meet the normative requirements of gravity, scale and level of perpetrators.

[5] Rome Statute of the International Criminal Court (adopted 17 July 1998) UNTS 2187.

Chapter 3 sought to classify the Matabeleland Conflict and investigate whether it was a NIAC, an International Armed Conflict (IAC) or both. The chapter evaluated the conflict in Matabeleland against the requirements set out under IHL applicable to Zimbabwe and related to NIAC, including CA 3 of the four Geneva Conventions (CA3) and its APII, as well as the requirements of how a NIAC can be internationalised as set out in *Nicaragua*,[6] *Tadić* [7] and *Sesay et al*.[8] The chapter also elaborated and applied the various requirements in the IHL necessary to determine a NIAC based on the two critical requirements of organisation and intensity to the Matabeleland Conflict. The chapter found that the Matabeleland Conflict was a NIAC to which CA3 applied but not the provisions of APII, except those that form part of customary international law. Additionally, the chapter found that the involvement of South Africa did not internationalise the conflict as it did not meet the overall control requirements**.** In summary, the chapter found that under CA3, the Matabeleland Conflict constituted a NIAC as envisaged by IHL. Consequently, crimes committed during this conflict constituted serious violations of IHL, commonly known as war crimes. In particular, the chapter evaluated the conduct of the Gukurahundi against the legal requirement of Article 4(2) of CA3 and found that it meets the minimum requirements for war crimes.

Chapter 4 sought to analyse, discuss and define the international crime of genocide. The chapter sought to analyse the specific conduct of the Gukurahundi perpetrators to determine whether it meets the requirements of the definitions and elements of genocide as envisaged by the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention),[9] statutes of international and ad hoc tribunals and jurisprudence of international tribunals and writings by ICL scholars.

The chapter made several findings. The chapter found that genocide is prohibited by the Genocide Convention,[10] customary international law[11] and the statutes of ICTs.[12] The chapter found that the prohibition of genocide crimes includes an international obligation to investigate,

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[6] 'Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Merits) (ICJ) Judgment of 27 June 1986.
[7] *Prosecutor v Tadić [Tadić]* IT-94-1-A Appeals Chamber Judgment of 15 July 1999 para 120.
[8] *Prosecutor v Sesay et al [Sesay et al]* SCSL-04-15-T Trial Chamber Judgment of 2 March 2009 para 975.
[9] 'Convention on the Prevention and Punishment of the Crime of Genocide' (adopted 9 December 1948) 78 UNTS 277 (Genocide Convention).
[10] Ibid.
[11] Claus Kreb 'The Crime of Genocide under International Law' (2006) 6 *International Criminal Law Review* 461-502.
[12] Art 4 of the ICTY Statute and Art 2 of the ICTR Statute.

prosecute and punish the crime regardless of whoever and wherever it is committed.[13] The chapter also found that genocide has been prosecuted by numerous ICTs including Nuremberg Tribunal,[14] the ICTY,[15] the ICTR,[16] and the ECCC,[17] established in the wake of egregious atrocities.[18] The chapter examined and evaluated Gukurahundi atrocities against the legal requirements, definitions and elements of the CAH and found that Gukurahundi atrocities constitute genocide. The chapter concluded and found that Zimbabwe was bound by international law obligations based on its treaty (in particular the Genocide Convention) and customary international law obligations.[19] Finally, the chapter found that the Gukurahundi committed the crime of genocide against the Ndebele ethnic group in Zimbabwe.[20]

Chapter 5 sought to analyse, discuss and define CAH. The chapter observed and noted that CAH have been prosecuted by numerous ICTs, including Nuremberg,[21] ICTY,[22] ICTR,[23] SCSL,[24] and ECCC.[25] Additionally, the chapter examined Gukurahundi atrocities from the prism of CAH, and analysed the specific conduct of the Gukurahundi to determine whether it meets the requirements of the definitions and elements of CAH. This chapter reached several conclusions and findings. The main finding and conclusion is that the Gukurahundi atrocities constitute CAH. It concluded that CAH are prohibited by international law based on customary international law,[26] the statutes of ICTs,[27] and jurisprudence of the international courts and ad hoc tribunals.[28] The prohibition of CAH carries an international obligation to investigate, prosecute and punish the crimes regardless of whoever and wherever they are committed.[29]

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[13] See 'Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Gambia v Myanmar*)' (ICJ) Judgment on Preliminary Objections (July 22, 2022).
[14] The mass murder and extermination were prosecuted as CAH at Nuremberg; see Carsten Stahn, *A Critical Introduction to International Criminal Law* (2019) 46.
[15] See ICTY Genocide Cases last accessed from https://www.icty.org/en/cases on 2 October 2022.
[16] See ICTR Genocide Cases last accessed from https://unictr.irmct.org/en/cases on 2 October 2022.
[17] ECCC 'First genocide charges to be heard at ECCC', last accessed from https://www.eccc.gov.kh/en/articles/first-genocide-charges-be-heard-eccc on 2 October 2022.
[18] Genocide was prosecuted after mass atrocities in Serbia, Rwanda and Cambodia.
[19] Section 326 of Zimbabwe Constitution, 2013.
[20] See definition of genocide in the Genocide Convention.
[21] See cases of the Nuremberg Tribunal, the ICTY, the ICTR, the SCSL, ECCC and ICC which prosecuted CAH.
[22] Ibid.
[23] Ibid.
[24] Ibid.
[25] Ibid.
[26] See UN Office on Genocide Prevention and the Responsibility to Protect, 'Crimes Against Humanity', last accessed from https://www.un.org/en/genocideprevention/crimes-against-humanity.shtml on 2 October 2022.
[27] See Art 2 of the SCSL Statute, Art 5 of the ICTY Statute, Art 3 ICTR Statute, Arti 7 of the Rome Statute.
[28] See cases of the ICTY, ICTR, the SCSL, ECCC and ICC which prosecuted CAH.
[29] Genocide, CAH and war crimes attract universal jurisdiction which imposes an obligation on the international community to investigate and prosecute.

The chapter also found that international law obligations bound Zimbabwe based on its customary international law obligations related to CAH.[30]

The primary aim of Chapter 6 was to evaluate whether ICR exists for alleged Gukurahundi perpetrators for the international crimes (war crimes, genocide and CAH) established in Chapters 3, 4 and 5 respectively.[31] The chapter analysed the concept of ICR under international law and evaluated its applicability to alleged Gukurahundi perpetrators. The chapter further evaluated the forms and modalities of ICR and participation under ICL, including for relevant specific intent crimes. Finally, the chapter evaluated the individual and superior responsibility of alleged Gukurahundi perpetrators based on international conventions, statutes and jurisprudence of international tribunals and scholarly writings by ICL scholars.

The main conclusion and finding of Chapter 6 is that alleged Gukurahundi perpetrators of genocide, CAH and war crimes are individually criminally responsible according to ICL. In addition, the chapter found that command and superior responsibility is established for some alleged Gukurahundi perpetrators. The chapter found that alleged perpetrators who committed, ordered, planned, aided and abetted Gukurahundi international crimes or failed to prevent them are individually criminally responsible under international law. In addition, and crucially, the chapter found that Gukurahundi crimes constituted a joint criminal enterprise in relation to which all alleged perpetrators to the common criminal enterprise were individually liable for the actions of all other members of the criminal group. The chapter evaluated the conduct of senior political and military leaders in Zimbabwe and concluded that they failed to prevent the atrocities and found that it met the requirements for superior or command responsibility.[32]

7.2 Recommendations

7.2.1 Establishment of the Gukurahundi Special Tribunal (GST) in Zimbabwe.

The finding that international crimes were committed by Five Brigade which bears ICR under international law triggers a responsibility to investigate, prosecture and punish both crimes and perepetrators. The Genocide Act of Zimbabwe contains clear, sufficient and substantive

[30] Section 326 of the Constitution of Zimbabwe.
[31] See Chapters 3, 4 and 5.
[32] See Chapter 6 section on Command or Superior Responsibility.

provisions for the prosecution of perpetrators of the Gukurahundi genocide outlined. It is possible to prosecute alleged Gukurahundi perpetrators based on the current law. In order to simultaneously implement the Genocide Act and deliver on the international obligation to investigate, prosecute and punish the perpetration of genocide, a Gukurahundi Special Tribunal should be established in Zimbabwe. The tribunal's jurisdiction should be expanded to include CAH and war crimes. The tribunal can take either of two forms: national and fully integrated into the national criminal justice system or hybrid or mixed.

A hybrid tribunal combines national with either regional or international justice.[33] Hybrid tribunals are often the outcome of negotiation between national authorities and the international or regional community.[34] Hybrid hribunals have been established as a balance or alternative between a fully international or domestic judicial process to hold perpetrators of atrocities accountable.[35] They provide a bridge that combines national and international elements and offers the required flexibility to respond to complex international crimes within a national context.[36] They also provide an opportunity to strengthen the capacity of the national justice system to manage complex international crimes by facilitating collaboration between international and national actors (investigators, prosecutors and judges) in the investigation, prosecution and defence of international crimes.[37]

Hybrid tribunals provide a negotiated compromise that often allays the concerns of countries reluctant to completely cede sovereignty over the accountability process and of perpetrators reluctant to face justice in international courts.[38] They also provide an opportunity for victims to participate in proceedings conducted in the country's territory directly and more broadly respond to the needs of victims.[39] Recent examples of hybrid tribunals include the Serious

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[33] Caitlin E Carroll, 'Hybrid Tribunals are the Most Effective Structure for Adjudicating International Crimes Occurring Within a Domestic State' (2013) *Student Works* 90 last accessed from https://scholarship.shu.edu/student_scholarship/90 on 4 October 2022.

[34] The Sierra Leone, Cambodia, Lebanon, Senegal and East Timor Tribunals were all products of negotiation between the United Nations and the relevant countries including the African Union in the case of the Senegal Tribunal.

[35] Sarah MH Nouwen 'Hybrid Courts' The Hybrid Category of a New Type of International Crimes Courts' (2006) 2 *Utrecht Law Review* 2.

[36] Elena Naughton 'Committing to justice for Serious Human Rights Violations: Lessons from Hybrid Tribunals', (Report) last accessed from https://www.ictj.org/sites/default/files/ICTJ_Report_Hybrid_Tribunals.pdf on 5 October 2022.

[37] Ibid.

[38] This would be especially important in the light of the resistance of African countries to the ICC and the geopolitical issues between Zimbabwe and western countries.

[39] The hybrid tribunals in Sierra Leone, East Timor, Cambodia and Lebanon have provided an unprecedented opportunity for victims to participate unlike the cases in the ICC in The Hague.

Crimes Panel in East Timor,[40] the SCSL,[41] the Extraordinary African Chambers in Senegal,[42] the Special Tribunal for Lebanon,[43] War Crimes Chamber in Bosnia and Herzegovina,[44] the Special Criminal Court of the Central African Republic[45] and the internationalised panels in Kosovo,[46] the ECCC.[47] Given the limitations of the Zimbabwean national justice system to effectively hold perpetrators of international crimes accountable —described above – a hybrid tribunal provides a strong alternative. The current major constraint to this option is that currently perpetrators remain in power and are unlikely to agree to any accountability process whatsoever. A hybrid tribunal remains an option once perpetrators are no longer in power and initiated and supported by the international or regional community.

7.2.2 Enactment of national legislation to implement IHL in Zimbabwe.

There is currently no legislation to implement the Geneva Conventions and their APs in Zimbabwe. There is also no legislation for the implementation of the customary law prohibition of CAH. Zimbabwe should enact legislation prohibiting the commission of CAH and war crimes in this regard. This can be done by either amending the Genocide Act to include the other two core international crimes or by enacting separate legislation related to war crimes and CAH. Yet another option is to enact two separate pieces of legislation – one for war crimes and another for CAH.

In addition to establishing a Gukurahundi Special Tribunal, the Genocide Act must be amended to remove the provision regarding non-retroactive application. This amendment will bring the

[40] See Special Panel of the Dili District Court last accessed from https://hybridjustice.com/special-panels-of-the-dili-district-court/ on 4 October 2022.
[41] See SCSL last accessed from http://www.rscsl.org/ on 15 January 2023.
[42] See Statute of the Extraordinary African Chambers in Senegal last accessed from https://www.hrw.org/news/2013/09/02/statute-extraordinary-african-chambers last accessed on 15 January 2023.
[43] See Special Tribunal for Lebanon last accessed from https://www.stl-tsl.org/en on 15 January 2023.
[44] See War Crimes Chamber in Bosnia and Herzegovina last accessed from https://hybridjustice.com/the-war-crimes-chamber-in-bosnia-and-herzegovina/ on 15 January 2023.
[45] See the Special Criminal Court of the Central African Republic last accessed from https://hybridjustice.com/special-criminal-court-in-central-african-republic/ on 15 Januray 2023.
[46] See Kosovo Specialist Chambers last accessed from https://hybridjustice.com/kosovo-specialist-chambers-and-the-specialist-prosecutors-office/ on 15 January 2023.
[47] See ECCC last accessed from https://hybridjustice.com/extraordinary-chambers-in-the-court-of-cambodia/ on 15 January 2023.

Act into consistency with the Genocide Convention,[48] customary international law,[49] and the jurisprudence of the international tribunals,[50] as required by Section 2 (2) of the Genocide Act which provides that 'any word or expression to which a meaning has been assigned— (a) in the Convention; or (b) by an international tribunal interpreting the Convention; shall bear the same meaning when used in this Act'.

Additionally, Section 4(e)(i) and Section 4(e)(ii) of the Genocide Act must be amended to remove the provisions regarding the prescription of penalties for genocide and attempts to commit genocide. This amendment should be aimed at demonstrating the higher gravity of the crime of genocide as the 'crime of crimes' as opposed to murder with which the Act has equated it. The penalties for genocide should therefore be more stringent than those for ordinary murder. Section 5 of the Genocide Act should be amended to remove the requirement for the Attorney General and Prosecutor General to authorise any prosecution for genocide or attempted genocide respectively. This provision is ultra vires conventional, customary and jurisprudential provisions of international law. It is also aimed at obstructing the international obligation to investigate, prosecute and punish international crimes and seeks to shield high-level perpetrators to whom the Attorney General may be answerable, from accountability. It is therefore recommended that enabling legislation to give effect to the provision of IHL treaties aimed at domestically addressing serious violations of IHL should be passed.

7.2.3 Repudiation of amnesties granted to Five Brigade soldiers and dissidents.

Following the signing of the Unity Accord in November 1987, Prime Minister Mugabe announced an amnesty for all dissidents on 18 April 1988. This amnesty was promulgated as

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[48] William A. Schabas, 'Retroactive Application of the Genocide Convention,' 4 *University St.Thomas Journal of Law & Public Policy* (2010) 36. Whilst Art 28 of the Vienna Convention prohibits retroactive application of treaties, it is widely recognized that the Genocide Convention itself was developed and applied retroactive to the Nazi holocaust. There is general recognition of the *nullum crime sine lege* principle especially with regards to criminal justice. However, in the case of the Genocide Act, genocide was already prohibited by the Genocide Convention at the time of the crime, so the issue of retroactive application does not arise. See also fn 50 below.

[49] In view of the customary international law prohibition of genocide, the question of retroactivity of the Genocide Act, enacted when genocide was already a crime via the Genocide Convention and customary international law is rendered moot.

[50] In *Hissein Habré c. République du Sénégal* (ECW/CCJ/JUD/06/10) ('ECOWAS Judgment'), Judgment of 18 November 2010 the court held that Senegal was precluded from retroactively trying Habre. This decision has been criticized because the crimes were already criminalized by international at the time they were committed. See Valentina Spiga, Non-retroactivity of Criminal Law: A New Chapter in the Hissène Habré Saga, 2011 (9) 1 *Journal of International Criminal Justice* at 5–23

Clemency Order No 1 of 1988 on 28 April 1988.[51] It provided a full pardon for any crimes – including murder, rape, robbery – committed by any dissidents who reported to the police between 19 April and 31 May 1988. In July 1990, the amnesty was extended to include all members of the security forces who had committed serious human rights violations; all army personnel serving prison sentences for crimes committed in the 1980s were released from prison.[52] The implication or import of the sweeping amnesty and clemency order was to completely indemnify the Gukurahundi and dissidents for all the crimes they committed.

The legality of this amnesty is, however, questionable and challengeable. Although amnesties feature commonly in domestic or national legal systems, their applicability to international crimes is unsettled, and there is a growing trend and practice towards restricting their applicability. An amnesty granted to individuals accused or convicted of committing grave international crimes such as genocide, CAH and war crimes is invalid under customary international law.[53] In *Furundžija*,[54] the ICTY held that amnesties in relation to torture were invalid under international law and that beneficiaries of such amnesty would be held liable for torture by foreign courts. Some national courts have found amnesties conferred to perpetrators of serious human rights violations to be in violation of international law and the duty to prosecute serious international crimes.[55] Despite amnesties being a central feature of peace agreements, in *Kallon et al, (Lome Amnesty Case)*,[56] the SCSL found that there is a 'crystallising international norm that a government cannot grant amnesty for serious violations of crimes under international law.' The SCSL also found that although states have the sovereign right to confer amnesties, such right does not limit the right of other countries to exercise universal jurisdiction over international crimes. The amnesty conferred by the Lome Peace Agreement was found by the SCSL as not applicable or binding on other states, especially on

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[51] See Zimbabwean Government Gazette last accessed from https://gazettes.africa/archive/zw/1988/zw-government-gazette-dated-1988-05-03-no-25.pdf on 15 January 2023.
[52] Magnus & Nyathi op cit note 3 at 477.
[53] *Prosecutor v Anto Furundžija* IT-95 17/1-T, Trial Judgment of 10 December 1998 para 155. See *Prosecutor v Karadzic* IT-95-5/18-PT, Trial Chamber Decision on Accused's Second Motion for Inspection and Disclosure: Immunity Issue of 17 December 2008, para 25. See ICJ, 'Questions Relating to the Obligation to Prosecute or Extradite (*Belgium v Senegal*)' Judgment of 20 July 2012. *Prosecutor v Kallon* et *al*, SCSL-2004-15/16-AR72(E) Appeals Chamber Decision of 13 March 2004, *(Lome Amnesty Case)* para 82; see Antonio Cassese *International Criminal Law* (2003) 315.
[54] *Furundzija* Ibid para 155.
[55] *Simón Case*, Argentine Supreme Court, causa No 17.768 (14 June 2005). See also Bakker, C. 'A Full Stop to Amnesty in Argentina' (2005) 3 *Journal of International Criminal Justice*, pp. 1106.
[56] *Prosecutor v Kallon* et *al*, SCSL-2004-15/16-AR72(E) Appeals Chamber Decision of 13 March 2004, *(Lome Amnesty Case)* para 82.

international or hybrid tribunals tasked with pursuing international justice.[57] Notably, Article 10 of the Statute of the SCSL precludes amnesties for crimes within its jurisdiction. International scholars have also argued for the growing presumption against amnesties.[58] ICRC states that under customary international humanitarian law, individuals suspected, accused or sentenced to war crimes are excluded from amnesty granted by Article 6(5) of Additional Protocol II of 1977.

It is recommended that the 1988 Amnesty should be repudiated. Even if not repudiated the 1988 Amnesty should not be considered as applicable for international crimes of Gukurahundi, in line with ICL developments.

7.2.4 A Truth and Reconciliation Commission for low-ranking perpetrators.

By virtue of their gravity, scale and level of perpetrators, the atrocities involved a large range of perpetrators in political, civilian and military or security sectors. While many perpetrators played leading or key roles in perpetrating atrocities, there are some low-level perpetrators who played less prominent roles. The lower-level perpetrators can provide valuable, hitherto suppressed information and evidence regarding the atrocities and the roles of those most responsible for orchestrating and committing them. The approach of international justice mechanisms has always been to target those persons most responsible for serious violations of international crimes.[59] To this end the demand for justice for the atrocities and the need to hold all perpetrators accountable should be carefully balanced. In other countries that have suffered

[57] Meisenberg, M.S. 'Legality of amnesties in international humanitarian law: The Lomé Amnesty Decision of the Special Court for Sierra Leone', (2004) 86 *Revue Internationale De La Croix-Rouge/International Review of the Red Cross*, pp. 837-851.
[58] Gavron, J. 'Amnesties in the Light of Developments in International Law and the Establishment of the International Criminal Court', (2002) 51 (91) *International and Comparative Law Quarterly*, pp. 116-117.
[59] From the Nuremberg Tribunal, ICTY, ICTR, SCSL to the ICC the approach has been to hold accountable those that bear the most responsibility.

atrocities such as Rwanda,[60] South Africa,[61] Sierra Leone,[62] East Timor,[63] Liberia,[64] Cambodia[65] and others, this has been achieved by establishing truth and reconciliation commissions that facilitate and enable low ranking perpetrators to confess their role in exchange for immunity from any criminal prosecutions alongside criminal prosecutions of higher-level perpetrators only. To this end criminal prosecution would only be reserved for only high-ranking officials (military and civilian) who played cardinal roles in the perpetration of international crimes. The rationale for offering amnesties for low ranking Gukurahundi perpetrators in exchange for truth-telling would be to facilitate and enable the punishment of those most high-level perpetrators responsible for committing Gukurahundi international crimes. This logic is consistent with the ethos of ICTs and the ICC which focuses on gravity, scale and level of perpetrators and organisation,[66] as a yardstick. It would also help address the evidence gap given the many years since the commission of the crimes. In many instances where international crimes have occurred, Truth Commission have been established alongside prosecutorial responses.[67]

7.2.5 Viabilibity of ICC

Zimbabwe signed the Statute of the ICC in 1998, but it has not ratified it. The ICC has jurisdiction over nationals of State parties or international crimes of genocide, CAH and war crimes that occur in the territory of State parties (Rome Statute 1998). In addition, the temporal jurisdiction is restricted to crimes that occurred after the Statute of the ICC came into force- 1

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[60] Rwanda set up the National Unity and Reconciliation Commission last accessed from https://www.nurc.gov.rw on 19 January 2023.
[61] South Africa set up the Truth and Reconciliation Commission, last accessed from https://www.justice.gov.za/trc/ on 19 January 2023.
[62] See the Sierra Leone Truth and Reconciliation Commission last accessed from https://www.sierraleonetrc.org/ on 19 January 2023.
[63] See the Indonesia–Timor Leste Commission on Truth and Friendship last accessed from https://www.ictj.org/sites/default/files/ICTJ-TimorLeste-Unfinished-Truth-2009-English.pdf on 19 January 2023.
[64] Truth and Reconciliation Commission of Liberia last accessed from https://www.trcofliberia.org/ on 19 January 2023.
[65] Cambodia set up a Truth and Reconciliation Commission.
[66] See Chapter 2.
[67] For example the East Timor Truth and Reconciliation Commission, Sierra Leone Truth and Reconciliation Commission targeted low level perpetrators were established alongside criminal tribunals.see Jenkins, C. (2002). A Truth Commission for East Timor: Lessons from South Africa? *Journal of Conflict & Security Law*, *7*(2), 233–251. http://www.jstor.org/stable/26294422; see also Beth K. Dougherty, Searching for Answers: Sierra Leone's Truth & Reconciliation Commission, (2004) 8 (1) *African Studies Quarterly*.

July 2002. Jurisdiction of the ICC can also be established via UN Security Council referral in terms of Chapter VII of the UN Charter, regardless of whether the person investigated is a national of a state party (Rome Statute 1998). The ICC does not provide any viable option for accountability for Gukurahundi atrocities. First, Zimbabwe is not a state party to the Rome Statute, having signed but not ratified the treaty. Additionally, the atrocities occurred between 1983 and 1987- before the court was established.

7.3 Proposals for further research

This study has been the first extensive enquiry into the legal classification of the Gukurahundi atrocities. Legal classification of the crimes is important but only a first step. Once classified options of mechanisms for pursuing individual criminal responsibility must be fully explored through research. In addition, the prospects of successful prosecution including probity and credibility of available evidence must be evaluated through rigorous academic research to inform future criminal investigation and prosecution.

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