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# Mugabe's Zimbabwe, 2000–2009: Massive Human Rights Violations and the Failure to Protect

Rhoda E. Howard-Hassmann\*

## ABSTRACT

This article reviews human rights violations in Zimbabwe from 2000 to 2009, under the rule of Robert Mugabe. It argues that these violations, including state-induced famine, illegal mass expulsions, and systemic rape, constituted crimes against humanity. The article considers what African regional organizations, including the African Union and the Southern African Development Community, and various organs of the international community did, and might have done, to restrain Mugabe and his inner circle from committing these violations. It concludes that the lack of forceful action by African and international organizations constituted a failure to protect the people of Zimbabwe.

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## I. INTRODUCTION

This article reviews human rights violations in Zimbabwe from 2000 to 2009 and argues that they constituted crimes against humanity. It considers what African regional organizations and various organs of the international community did, and might have done, to restrain Robert Mugabe and his inner circle from committing these massive human rights violations, and argues that the lack of forceful action by African and international organizations constituted a failure to protect the people of Zimbabwe.

This article does not discuss any events that occurred after 2009.

## II. ROBERT MUGABE AND HUMAN RIGHTS VIOLATIONS IN ZIMBABWE

Robert Mugabe became President of Zimbabwe at independence in 1980: he was also the most prominent leader of the 1972–1980 war of independence against white minority rule. From 1980 to 2000, Zimbabwe was a prosperous country by African standards, in part because of a large commercial farming sector run by white farmers, many of whom were Zimbabwean citizens. In 2000, Mugabe began to encourage “land invasions” of white-owned farms by persons alleged to be veterans of the war of independence, although many were too young to have fought in the war.<sup>1</sup> In 2002, white farm owners were ordered to vacate their farms immediately, and even forbidden to finish cultivating their crops.<sup>2</sup> These large farms produced much of the food that had earlier made Zimbabwe the breadbasket of Eastern Africa. Zimbabwe had produced over 2 million tons of maize in 2000, before the land invasions took effect, but in 2008 was reported to have produced only 450,000 tons.<sup>3</sup> Yet as late as March 2009, one of the few white farmers who remained in Zimbabwe was ordered not to harvest a crop of an estimated 6,000 tons of fruit.<sup>4</sup>

The land invasions were violent: by 2006 about sixty white farmers had been killed and many of their employees had been violently intimidated and tortured.<sup>5</sup> The invasions not only dispossessed members of the white minority in Zimbabwe; they also rendered unemployed about 150,000 to

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1. Masipula Sithole, *Zimbabwe: History and Politics*, in *NEW ENCYCLOPEDIA OF AFRICA* VOL. 5, at 338 (John Middleton & Joseph C. Miller eds., 2007).
  2. Andrew Meldrum, *Zimbabwe's Farmers Ordered to Stop Work*, *GLOBE & MAIL* (Toronto), 25 June 2002, at A13.
  3. *Zimbabwe: Farm Attacks Threaten Food Supply*, *SW RADIO AFR.*, 23 Sept. 2009.
  4. Geoffrey York, *A Country in Ruins: The Last Stand of Zimbabwe's White Farmers*, *GLOBE & MAIL* (Canada), 20 Mar. 2009, at A13.
  5. PETER GODWIN, *WHEN A CROCODILE EATS THE SUN: A MEMOIR OF AFRICA* 81 (2006).

200,000 farm workers, who, with their families, constituted about 1.5 million to 2 million people. Many of these farm workers were immigrants from other African countries, thus not eligible for the land that was ostensibly to be redistributed to black Zimbabwean citizens.<sup>6</sup>

While the ostensible reason for land invasions was that the whites had taken over the land while Zimbabwe was under colonial rule, in fact, over 80 percent of white-owned land had changed hands since independence.<sup>7</sup> Farms offered for sale after independence had by law to be first offered to the government on a willing-seller, willing-buyer basis, and the government had refused the offers.<sup>8</sup> Thus, the government could have acquired 80 percent of white-owned land to redistribute to black Zimbabweans, but had declined to do so. Moreover, many of the large farms taken over after 2000 were distributed to single black owners, not to landless peasants. Mugabe's inner circle and relatives benefited: for example, the Minister of Home Affairs was given five farms, and Mugabe's wife was given two.<sup>9</sup>

By mid-2008, many farms remained empty, not yet allocated to new settlers of any kind.<sup>10</sup> Those few subsistence peasants or urban poor who did receive land were often unable to produce for the market, in part because they did not have access to inputs such as fertilizer. Those who received large farms and actually attempted to farm were also blocked by a government policy that ostensibly gave them ninety-nine-year leases, but that included a clause stipulating that leases could be cancelled at thirty-days notice; thus, the actual guaranteed lease of one month was insufficient to use the land as collateral to obtain bank loans.<sup>11</sup> Land that had previously produced surpluses sufficient not only to feed the entire country but also to export food reverted at best to subsistence production for the new occupiers of the land and their families.

The end of large-scale cash crop production for the internal and external markets caused a general economic crisis in Zimbabwe that also affected peasant farmers who already had plots of land, some distributed to them during the early decades of independence. Inflation eroded farmers' capacity to buy seeds and fertilizers, while price controls imposed ostensibly to prevent profiteering meant that it became unprofitable for small farmers to produce for the internal market.<sup>12</sup> Some women and girls turned to the sex

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6. HUMAN RIGHTS WATCH, *NOT ELIGIBLE: THE POLITICIZATION OF FOOD IN ZIMBABWE* (2003).

7. DAVID BLAIR, *DEGREES IN VIOLENCE: ROBERT MUGABE AND THE STRUGGLE FOR POWER IN ZIMBABWE* 177 (2002).

8. Doris Lessing, *The Jewel of Africa*, N.Y. REV. BOOKS, 10 Apr. 2003, at 8.

9. Samantha Power, *How To Kill a Country*, ATLANTIC MONTHLY, Dec. 2003, at 4.

10. Hany Besada & Nicky Moyo, *Picking Up the Pieces of Zimbabwe's Economy* 11 (Ctr. for Int'l Governance Innovation, Technical Paper No. 5, 2008).

11. INTERNAL DISPLACEMENT MONITORING CTR., *THE MANY FACES OF DISPLACEMENT: IDPs IN ZIMBABWE* 38 n.158 (2008).

12. *Cash Crunch Hits Farmers as Planting Season Nears*, ZIMB. INDEP., 20 Aug. 2009.

trade to support themselves, exacerbating the rate of HIV/AIDS; children's education was also adversely affected as parents could not afford school fees.<sup>13</sup> Extreme poverty caused social breakdown; young men could no longer afford traditional bride wealth payments (payments from the prospective groom to the prospective bride's family) and therefore could not marry.<sup>14</sup> More and more Zimbabweans relied on remittances from relatives abroad to support themselves. In order to evade price controls, many resorted to smuggling goods into and out of the country.<sup>15</sup>

By October 2003, half of Zimbabwe's population was considered "'food-insecure,' living in a household that is unable to obtain enough food to meet basic needs."<sup>16</sup> Despite the unprecedented food shortage, Mugabe distributed state-owned grain only to his political supporters and withheld it from those who he thought might vote against him in the farcical periodic elections still held in Zimbabwe.<sup>17</sup> Mugabe denied international agencies permission to bring food into the country to feed the starving, and he intimidated, threatened, and imprisoned all opposition. The World Food Program (WFP) predicted that 1.4 million people, or 17 percent of the rural population, would need food aid in 2007.<sup>18</sup> In December 2007 it predicted that more than 4.1 million Zimbabweans would need food aid by summer 2008.<sup>19</sup>

By early 2009, approximately 75 percent of the 9 million people left in the country relied on the WFP and other agencies to keep them alive; this was the highest percentage of population needing food aid of any country in the world.<sup>20</sup> Many Zimbabweans were so desperate that they were trading their livestock for maize, making them even more vulnerable to hunger once the maize was gone. Many were eating seeds meant for planting later in 2009; some of these seeds had already been treated with pesticide. Farmers were also eating cattle suspected of being infected with anthrax.<sup>21</sup> Others foraged for wild foods, even eating tree bark and soil, as well as selling all their household assets to buy food.<sup>22</sup> Many people were living on one meal

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13. Allison Goebel, "We Are Working for Nothing": *Livelihoods and Gender Relations in Rural Zimbabwe, 2000–2006*, 41 *CAN. J. AFR. STUD.* 226, 236, 242 (2007).
  14. *Id.* at 243.
  15. Hany Besada & Nicky Moyo, *Zimbabwe in Crisis: Mugabe's Policies and Failures 16* (Ctr. for Int'l Governance Innovation, Working Paper No. 38, 2008).
  16. Press Release, Human Rights Watch, Zimbabwe: Food Used As Political Weapon (24 Oct. 2003), available at <http://www.hrw.org/en/news/2003/10/23/zimbabwe-food-used-political-weapon>.
  17. *Id.*
  18. World Food Programme, Regional Bureau for Southern Africa, 2007 Needs for WFP Projects and Operations 38 (2006).
  19. Besada & Moyo, *Zimbabwe in Crisis*, *supra* note 15, at 11.
  20. U.S. Agency for Int'l Dev. (USAID), *Zimbabwe—Complex Emergency* (13 Feb. 2009).
  21. The Elders' Zimbabwe Initiative, Report on the Visit to Southern Africa 5 (Nov. 2008).
  22. World Food Program, WFP in Zimbabwe—Facts and Figures 24 Feb. 2009, available at <http://www.wfp.org/stories/wfp-facts-and-figures-zimbabwe>.

a day, or even one meal every second day, yet the WFP, lacking resources, had had to reduce its rations to a level below the minimum needed for survival.<sup>23</sup> While the world community called on Mugabe to allow humanitarian agencies access to all of Zimbabwe, he continued to block distribution of food to those who he thought supported the opposition, the Movement for Democratic Change (MDC), led by Morgan Tsvangirai,<sup>24</sup> distributing what state food supply existed to his own supporters. By the end of April 2009, the situation had improved somewhat, as a result in part of some crops having been harvested,<sup>25</sup> but this improvement could not be considered a sign of permanent relief from hunger. International organizations estimated that between 1.4 million<sup>26</sup> and 1.74 million<sup>27</sup> Zimbabweans would need food aid in the peak hunger period of October-December 2009.

Mugabe rendered the Zimbabwean population even more insecure in 2005 when he instigated Operation Murambatsvina (known in English as "Operation Restore Order" or "Operation Drive Out Trash,") the destruction of the homes and small businesses of approximately 700,000 urban Zimbabweans.<sup>28</sup> This destruction severely compromised the housing, nutrition, and health of up to 2.4 million people.<sup>29</sup> Mugabe's motive for this attack on urban dwellers may have been to intimidate or punish supporters of the opposition MDC, although many of those affected were his own supporters. Additionally, he may have been attempting to gain control of the foreign currency that circulated in the informal economy.<sup>30</sup> In November 2006 the government also expelled tens of thousands of gold panners and their families from gold-producing areas. Some of these people had already been displaced by Operation Drive Out Trash, and were trying to eke out a living by looking for gold. The government argued that they were depriving the Zimbabwe Reserve Bank of gold it should be able to sell on the international market.<sup>31</sup>

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23. The Elders' Zimbabwe Initiative, *supra* note 21.

24. HUMAN RIGHTS WATCH, ZIMBABWE: REVERSE BAN ON FOOD AID TO RURAL AREAS (2008).

25. Famine Early Warning Systems Network, *Zimbabwe Food Security Outlook* 1 (Apr. 2009).

26. United Nations Office for the Coordination of Humanitarian Affairs: Zimbabwe, *Monthly Humanitarian Update* 5 (Oct. 2009).

27. Famine Early Warning Systems Network, *Zimbabwe Food Security Update* 1 (Nov. 2009).

28. UN Special Envoy on Zimbabwean Evictions Briefs Security Council, UN NEWS CTR., 27 July 2005, available at <http://www.un.org/apps/news/story.asp?NewsID=15181&Cr=zimbabwe&Cr1=>.

29. Deborah Potts, "Restoring Order": Operation Murambatsvina and the Urban Crisis in Zimbabwe, 32 J. S. AFR. STUD. 273, 276 (2006).

30. Michael Bratton & Eldred Masunungure, *Popular Reactions to State Repression: Murambatsvina in Zimbabwe*, 106 AFR. AFF. 21, 25 (2006).

31. INTERNAL DISPLACEMENT MONITORING CTR., *supra* note 11, at 39.

The result of land seizures and expulsions was an unprecedented social and economic breakdown. Statistical sources on Zimbabwe in the 2000s were inconsistent, some appearing not to reflect the severity of the many problems caused by Mugabe's policies, and so must be treated with caution. What follows are some statistics from reputable sources, although official UN agencies seem to drastically underestimate the rate of decline in all indicators of health and well-being in Zimbabwe, compared to reports from nongovernmental organizations (NGOs). Different agencies of the UN publish different figures. Moreover, statistics from the UN and NGOs are not comparable; sometimes NGOs appear to quote figures from UN agencies and sometimes they appear to generate their own findings. At best, it can be stated that the situation in Zimbabwe from 2000 to 2009 was a "major underreported humanitarian crisis," as Kofi Annan, Jimmy Carter, and Graça Machel, three members of the independent group of Elders, wrote in November 2008.<sup>32</sup>

The unemployment rate in 2005 was estimated at 80 percent, and the real GDP growth rate in 2007 was estimated at the negative rate of -6.1 percent.<sup>33</sup> Life expectancy at birth dropped from 56.4 years from 1990 to 1995 to an estimated 37.3 years in 2005 to 2010.<sup>34</sup> The infant mortality rate rose from 54.3 per thousand live births from 1990 to 1995 to an estimated 58.78 per thousand in 2005 to 2010.<sup>35</sup> Twenty-two percent of children under five were malnourished in 2008.<sup>36</sup> By 2008, the school attendance rate was only 20 percent.<sup>37</sup> The maternal mortality rate rose from 168 per 100,000 live births in 1990 to 1,100 in 2005, the increase caused both by HIV/AIDS and a significant decline in maternal health services.<sup>38</sup> The HIV rate itself dropped, but that was in part because so many HIV/AIDS patients lacking drugs and care died.<sup>39</sup> By 2007 1.3 million children were orphans.<sup>40</sup>

By October 2008, Zimbabwe's economy was in complete chaos; the inflation rate was estimated at 231 million percent per year.<sup>41</sup> By mid-November

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32. The Elders' Zimbabwe Initiative, *supra* note 21, at 1.

33. CENT. INTELLIGENCE AGENCY, *THE WORLD FACTBOOK 2008* (2008).

34. UNITED NATIONS CONFERENCE ON TRADE & DEV., *UNCTAD HANDBOOK OF STATISTICS* (2008).

35. *Id.*

36. According to weight for age indicators. World Bank, World Development Indicators Database (Apr. 2010), available at [http://ddp-ext.worldbank.org/ext/ddpreports/ViewSharedReport?REPORT\\_ID=9147&REQUEST\\_TYPE=VIEWADVANCED](http://ddp-ext.worldbank.org/ext/ddpreports/ViewSharedReport?REPORT_ID=9147&REQUEST_TYPE=VIEWADVANCED).

37. The Elders' Zimbabwe Initiative, *supra* note 21, at 2.

38. PHYSICIANS FOR HUMAN RIGHTS, *HEALTH IN RUINS: A MAN-MADE DISASTER IN ZIMBABWE* (2009).

39. United Kingdom Department for International Development, Zimbabwe: Key Facts, available at <http://www.dfid.gov.uk/Where-we-work/Africa-Eastern--Southern/Zimbabwe/Key-facts/>.

40. UNICEF HUMANITARIAN ACTION REPORT 2008: ZIMBABWE (2008).

41. Celia W. Dugger, *Mugabe Claims Security Ministries, Jeopardizing Deal*, N.Y. TIMES, 12 Oct. 2008, at A6.

2008, it took only 24.7 hours for prices to double in Zimbabwe,<sup>42</sup> although in early 2009 prices stabilized after the government decided to make US dollars legal tender and pay government employees in dollars, leaving other Zimbabweans to continue relying on barter.<sup>43</sup> Meantime, in late 2008, cholera broke out as a result of the almost complete breakdown of Zimbabwe's sewage systems and clean water supplies; there were over 98,000 cholera cases in Zimbabwe between August 2008 and mid-July 2009.<sup>44</sup>

Not surprisingly, as the economy deteriorated and white farmers were intimidated into abandoning their farms and leaving the country, civil and political rights also entered a tailspin. Mugabe intimidated, threatened, and imprisoned all opposition, as he had been doing during every election, starting in 1980.<sup>45</sup> As early as 1982, Mugabe said, with regard to those who opposed him, "An eye for an eye and an ear for an ear may not be adequate in our circumstances. We may very well demand two ears for one ear and two eyes for one eye."<sup>46</sup> In 1993, Mugabe challenged the courts, saying, "We will not brook any decision by any court [preventing us] from acquiring any land."<sup>47</sup> In 2001, Chief Justice Anthony Gubbay, whom Mugabe himself had appointed, resigned after Mugabe accused him of aiding and abetting racism,<sup>48</sup> and a mob invaded the Supreme Court shouting "Kill the judges."<sup>49</sup> In 2002, the government passed the Public Order and Security Act and the Orwellian-named Access to Information and Protection of Privacy Act, both laws stifled almost all public criticism of Mugabe.<sup>50</sup> In the same year; the government closed and burned offices of independent newspapers.<sup>51</sup> A law against ridiculing Mugabe or bringing him into disrepute mandated two years in jail for those convicted.<sup>52</sup> By 2008, the violations of civil and political rights were so strong that Genocide Watch issued a politicide watch, a warning of political mass murder in Zimbabwe.<sup>53</sup> As the 2008 elections

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42. Steve H. Hanke, R.I.P. Zimbabwe Dollar (5 Feb. 2009), available at <http://www.cato.org/zimbabwe>.

43. Joshua Hammer, *Dictator Mugabe Makes a Comeback*, N.Y. REV. BOOKS, 25 Oct. 2009, at 49.

44. United Nations Office for the Coordination of Humanitarian Affairs, *Zimbabwe: Cholera Update 1* (15 July 2009), available at <http://ochaonline.un.org/OchaLinkClick.aspx?link=ocha&docId=1112226>.

45. Norma Kriger, *Zanu (PF) Strategies in General Elections, 1980–2000: Discourse and Coercion*, 104 AFR. AFF. 1 (2005).

46. AIDS-FREE WORLD, ELECTING TO RAPE: SEXUAL TERROR IN MUGABE'S ZIMBABWE 8 (2009).

47. MARTIN MEREDITH, THE FATE OF AFRICA: A HISTORY OF FIFTY YEARS OF INDEPENDENCE 631 (2005).

48. Robert Martin, *The Rule of Law in Zimbabwe*, 95 ROUND TABLE 239, 251 (2006).

49. MEREDITH, *supra* note 47, at 641.

50. Joshua Hammer, *The Reign of Thuggery*, N.Y. REV. BOOKS, 26 June 2008, at 27.

51. ROBERT CALDERISI, THE TROUBLE WITH AFRICA: WHY FOREIGN AID ISN'T WORKING 93 (2006).

52. GODWIN, *supra* note 5, at 205.

53. GENOCIDE WATCH, POLITICIDE WARNING: ZIMBABWE (2008).

approached, murder, torture, sexual and other dismemberment, and intimidation of members of the MDC and their families were common.

Morgan Tsvangirai, the leader of the MDC, won a plurality of 47.9 percent of the votes in the 29 March 2008 presidential elections,<sup>54</sup> but was too intimidated to stand against Mugabe in the run-off election required when no candidate received a majority of the votes. After pressure from the international community, Mugabe agreed to share power with his opponent; nevertheless, for several months after the 2008 elections, Tsvangirai stayed in South Africa, refusing to return to Zimbabwe, fearing for his life. Torture, beatings, and assaults on ordinary MDC supporters continued, with police refusing to investigate<sup>55</sup>; at least 153 MDC supporters were killed between March and June 2008.<sup>56</sup> In August 2008, several MDC Members of Parliament were arrested as they were entering Parliament to be sworn in, and Tsvangirai's passport was confiscated.<sup>57</sup> Brutal attacks on white commercial farmers also continued.<sup>58</sup> Women who were, or were suspected to be, supporters of the MDC or related to MDC supporters were subjected to a systematic campaign of gang rape after the 2008 election by members of Zimbabwe's Central Intelligence Organization, pro-Mugabe youth militias, and veterans of the war of liberation.<sup>59</sup>

Aside from continuing to intimidate his opponents, Mugabe also retained control of key aspects of the government, refusing to share real power, as he had agreed to do. In early October 2008, Mugabe declared that his party would retain control of the military and police, two key ministries in the supposed coalition government<sup>60</sup>; by late 2009 Mugabe had not relinquished his control of defense, justice, and national security. Mugabe retained control of the courts and jails, as well as the Ministry of Information, responsible for regulating the press.<sup>61</sup> He continued to jail independent journalists in 2009.<sup>62</sup> In August 2009, more than a dozen MDC Members of Parliament were arrested, and one MDC Minister was jailed.<sup>63</sup>

In 2008, upwards of a million Zimbabweans were internally displaced. Those displaced included farm workers displaced from expropriated farms;

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54. PAN-AFRICAN PARLIAMENT, REPORT OF THE PAN AFRICAN PARLIAMENT ELECTION OBSERVER MISSION: PRESIDENTIAL RUN-OFF ELECTION AND HOUSE OF ASSEMBLY BY-ELECTIONS, REPUBLIC OF ZIMBABWE (27 June 2008).

55. HUMAN RIGHTS WATCH, FALSE DAWN: THE ZIMBABWE POWER-SHARING GOVERNMENT'S FAILURE TO DELIVER HUMAN RIGHTS IMPROVEMENTS 5–6 (2009).

56. *Id.* at 8.

57. *Unspeakably Rude to the Old Man*, ECONOMIST, 30 Aug. 2008, at 47.

58. HUMAN RIGHTS WATCH, FALSE DAWN, *supra* note 55, at 11.

59. AIDS-FREE WORLD, *supra* note 46.

60. Dugger, *supra* note 41.

61. Hammer, *Dictator Mugabe Makes a Comeback*, *supra* note 43, at 49.

62. HUMAN RIGHTS WATCH, FALSE DAWN, *supra* note 55, at 4.

63. Hammer, *Dictator Mugabe Makes a Comeback*, *supra* note 43, at 49.

people who could not find new homes after they were displaced by Operation Murambatsvina; and tens of thousands of people were displaced by state-sponsored violence after the March 2008 elections.<sup>64</sup> The motive for these last displacements appears to have been to remove possible opposition voters from their districts; indeed, the expulsions were referred to as “Operation Mayhoterapapi (Where Did you Put Your [Voter] Cross?).”<sup>65</sup> Ironically, in October 2009 Zimbabwe signed the newly-minted African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa.<sup>66</sup>

Moreover, the human rights crisis caused a massive outflow of refugees from Zimbabwe. By 2007 there were an estimated 3 million refugees in South Africa, with another 200,000 in Botswana and many others seeking asylum elsewhere.<sup>67</sup> Botswana had gone so far as to build electric fences to keep out Zimbabwean refugees, while South Africa placed military guards along the Zimbabwean border.<sup>68</sup> The refugees put an enormous strain on the resources of neighboring countries, causing a brief flare-up of ethnic violence against Zimbabwean migrants in South Africa in 2008.<sup>69</sup>

Thus, by late 2009 the crisis had certainly not passed, and the people of Zimbabwe were still subject to the systematic violations of their human rights and crimes against humanity that they had been enduring since 2000.

### III. STATE-INDUCED FAMINE AS A CRIME AGAINST HUMANITY

The food crisis in Zimbabwe from 2000 to 2009 was extremely severe: indeed, it could be considered a famine manqué. Only the WFP and its sister agencies, along with many NGOs, prevented this crisis from turning into an actual famine.

If one views famine as a process, rather than a state of mass starvation, then Zimbabwe was well into that process in the early 2000s. Rangasami argues that famine is “a process during which pressure or force (economic, military, political, social, psychological) is exerted upon the victim community, gradually increasing in intensity until the stricken are deprived of all assets including the ability to labour.”<sup>70</sup> Rangasami maintains that

64. INTERNAL DISPLACEMENT MONITORING CTR., *supra* note 11, at 4.

65. *Id.* at 14.

66. African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa, *adopted* 22 Oct. 2009.

67. Kitsepile Nyathi, *Zimbabwe: Refugee Crisis as Citizens Rush To Leave Their Country*, DAILY NATION (Kenya), 22 Mar. 2007.

68. CENT. INTELLIGENCE AGENCY, *supra* note 33.

69. Joshua Hammer, *Will He Rule South Africa?*, N.Y. REV. BOOKS, 12 Feb. 2009, at 28.

70. Amrita Rangasami, “*Failure of Exchange Entitlements*” *Theory of Famine: A Response*, 20 ECON. & POL. WKLY 1747, 1749 (1985).

famine is comprised of three stages: dearth, famishment, and mortality.<sup>71</sup> Zimbabweans suffered for several years from a politically-induced dearth of food that resulted in many of them being famished, even if they were not experiencing widespread starvation. While longevity declined significantly in the 2000s, no international agency appeared to be willing to estimate how many Zimbabweans had actually died from malnutrition, starvation, and diseases related to malnutrition; thus, we do not know how much, if at all, dearth and famishment contributed to mortality.

Zimbabwe could be considered to have endured what Alex De Waal has called “new variant famine,” in which HIV/AIDS is a core aspect of overall famine conditions.<sup>72</sup> The HIV/AIDS rate in 2008 in Zimbabwe for individuals aged fifteen to forty-nine was 15.3 percent,<sup>73</sup> a health catastrophe that was exacerbated by the ruined economy. The severe erosion of health services, incapacity to import necessary drugs, lack of food, poor sanitation, lack of access to clean water, and high rates of emigration of medical personnel combined with this extremely high HIV/AIDS rate to become an example of De Waal’s worst-case scenario. “The recurrent socio-economic shocks combine with the HIV/AIDS epidemic to create a wide, severe and intractable famine, marked by excess adult mortality, widespread social disruption and the establishment of a new and dangerous ecology for infectious disease.”<sup>74</sup>

The policies of the Zimbabwean government from 2000 to 2009 raise the question of whether state-induced famine should be considered a distinct crime. David Marcus compellingly argues that some state policies are “faminogenic.” Marcus identifies four degrees of faminogenic behavior. First-degree faminogenic behavior is intentional: “Governments deliberately use hunger as a tool of extermination.” Second-degree faminogenic behavior is characterized by recklessness: “Governments implement policies that themselves engender famine, then recklessly continue to pursue these policies despite learning that they are causing mass starvation.” Third degree faminogenic behavior is “marked by indifference. Authoritarian governments . . . turn blind eyes to mass hunger.” In the fourth degree, “incompetent or hopelessly corrupt governments, faced with food crises . . . are unable to respond effectively.”<sup>75</sup>

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71. *Id.*

72. Alex De Waal, *AIDS, Hunger And Destitution: Theory And Evidence for the “New Variant Famines” Hypothesis in Africa*, in *THE NEW FAMINES: WHY FAMINES PERSIST IN AN ERA OF GLOBALIZATION 90* (Stephen Devereux ed., 2007).

73. UNAIDS, Zimbabwe, available at <http://www.unaids.org/en/CountryResponses/Countries/zimbabwe.asp>.

74. De Waal, *supra* note 72, at 120.

75. David Marcus, *Famine Crimes in International Law*, 97 *AM. J. INT’L L.* 245, 246–47 (2003).

Robert Mugabe and his colleagues in the government of Zimbabwe were clearly guilty of attempted faminogenesis in the early 2000s. Working forward from Marcus's fourth degree, the least criminal form of faminogenesis, one cannot argue that famine in Zimbabwe was simply caused by incompetence, as might be true in other African nations. Until 2000, despite Mugabe's increasingly repressive rule, the country was not incompetently run. On the contrary, compared to other African countries, the quality of life was good.

Certainly, Mugabe and his colleagues were guilty of the third degree of faminogenesis, indifference. In 2002, faced with accusations that people were starving, Didymus Mutasa, then Minister of National Security and head of the secret police, said "We would be better off with only six million people, with our own people who support the liberation struggle. We don't want all those extra people"<sup>76</sup>; this is a clear indication of indifference. Moreover, Mugabe was not simply indifferent to a famine that was the result of natural causes or of inadvertent political or economic incompetence. Rather, he recklessly pursued his faminogenic policies even when there was clear evidence of their detrimental consequences, thus engaging in second-degree faminogenic behavior. In fact, he pursued first-degree faminogenic policies; the core cause of the food deficit situation in the early years of the twenty-first century was clearly the interest and ambitions of Mugabe and his inner circle.

Mugabe's intent to induce famine can be shown by his deliberate decisions at various times during the decade to stop the WFP from importing grain or distributing it to regions where there were many MDC supporters. His intent to induce famine can also be shown by his deliberate policies to distribute government relief grain only to those who supported him, not to his opponents. Moreover, Mugabe recklessly pursued these faminogenic policies even into 2009, when he was supposed to have agreed to share power with the opposition party, as the order to a white farmer, noted above, not to harvest his fruit, makes clear.

Famines, says Edkins, ought to be considered not natural disasters but crimes caused by human agency.<sup>77</sup> The criminal activities that caused malnourishment in Zimbabwe in the 2000s, and might well have caused an actual famine had not the world community stepped in to distribute food, suggest the need for revisions of international law to name this type of crime, pass laws against it, and mandate punishments for it. An appropriate name

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76. Trevor Grundy, *Whatever Happened to Didymus Mutasa?*, ICC-AFRICA UPDATE NO. 78 (Inst. for War & Peace Reporting), 4 Oct. 2006, available at <http://www.iwpr.net/report-news/whatever-happened-didymus-mutasa>.

77. Jenny Edkins, *The Criminalization of Mass Starvations: From Natural Disaster to Crimes Against Humanity*, in *THE NEW FAMINES*, *supra* note 72, at 50, 57.

for the crime might be “state-induced famine.” The agent causing famine, the state, is clear. “Induced” implies public policies that cause famine, whether deliberately or by recklessness. Public policies by definition imply intent; some human agents must make the policy decisions. State-induced famine could be differentiated from famines caused by incompetence or even by indifference, although the latter should be considered a lesser form of crime.

Until such time as state-induced famine is recognized as a specific crime in international law, it seems to fall under the definition of crimes against humanity in the Rome Statute of the International Criminal Court (ICC), where the definition of crimes against humanity includes “other inhumane acts . . . intentionally causing great suffering, or serious injury to body or to mental or physical health.”<sup>78</sup> Presumably, widespread hunger deliberately or recklessly caused by government actions would qualify as such an “other” inhumane act. “Deportation or forcible transfer of population”<sup>79</sup> is also a crime against humanity: the 2005 evictions could be considered such a crime, although Zimbabwe might argue that the people expelled had not been lawfully present in the areas from which they were evicted, as required by the ICC definition of unlawful deportation.<sup>80</sup> Rape is also a crime against humanity.<sup>81</sup>

Thus, there were several grounds to refer Mugabe to the ICC for trial. Yet, despite the clear evidence that Mugabe was guilty of crimes against humanity, very little was done between 2000 and 2009 by African and international organizations to protect the victims of his crimes.

#### IV. ACTIONS TAKEN BY THE INTERNATIONAL COMMUNITY

##### A. Regional Africans Organizations

A standard assumption is that in cases of political crisis, those political entities closest to the offending state should take responsibility first, as they are least likely to be seen as outsiders trying to violate sovereignty. The closest regional political entities to Zimbabwe in the early twenty-first century were the Southern African Development Community (SADC) and the continental African Union (AU), but the record of both on Zimbabwe was very uncriti-

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78. Rome Statute of the International Criminal Court, *adopted* 17 July 1998, art. 7(1)(k), U.N. Doc. A/CONF.183/9 (1998), 2187 U.N.T.S. 90 (*entered into force* 1 July 2002).

79. *Id.* art. 7(1)(d).

80. *Id.* art. 7(2)(c).

81. *Id.* art. 7(1)(g).

cal until about 2007; thereafter, both organizations were inconsistently and weakly critical.

Thabo Mbeki, President of South Africa from 1999 to 2008, protected Mugabe from sanctions by the AU.<sup>82</sup> Before the 2005 Zimbabwean elections Mbeki claimed that, "Nobody in Zimbabwe is likely to act in a way that will prevent free and fair elections being held."<sup>83</sup> This reflected a general unwillingness by many presidents of African countries to acknowledge Mugabe's violence. In 2005, the AU resisted calls from the US and Britain to criticize Operation Murambatsvina.<sup>84</sup> In 2006, it refused to make public a report critical of Zimbabwe's human rights record, which had been prepared two years earlier by the AU Commission on Human and People's Rights.<sup>85</sup> In April 2007, leaders at the SADC meeting in Tanzania refused to confront Mugabe, instead "reaffirm[ing] its [SADC's] solidarity with the Government and People of Zimbabwe."<sup>86</sup> In May 2007, the African bloc at the UN successfully nominated Zimbabwe's Environment Minister, Francis Nhema, to Chair the UN Commission on Sustainable Development, despite allegations that he had ruined a previously successful, white-owned farm that had been given to him during Zimbabwe's land redistribution.<sup>87</sup>

However, the attitude among members of the AU began to change in 2007. The president of the AU at that time, John Kufuor of Ghana, called the situation in Zimbabwe "very embarrassing,"<sup>88</sup> and in 2008, Raila Odinga, the Prime Minister of Kenya, similarly referred to Zimbabwe as "a shame and an embarrassment"<sup>89</sup>; Botswana, Zambia, and Tanzania also criticized Mugabe.<sup>90</sup> Botswana may have been influenced in part by the flow of refugees from Zimbabwe, also a concern for South Africa. By late 2008, about 4,000 Zimbabweans per month were being deported from Botswana, and another 10,500 from South Africa.<sup>91</sup>

After the 2008 election, Mbeki, acting for the AU and SADC, urged Tsvangirai to compromise with Mugabe, and Tsvangirai accepted the position of Prime Minister while Mugabe remained president. The AU welcomed Mugabe to its summit in June 2008, issuing a weak statement that it hoped he and

82. Ian Phimister & Brian Raftopoulos, *Mugabe, Mbeki and the Politics of Anti-Imperialism*, 31 REV. AFR. POL. ECON. 385 (2004).

83. Pdraig O'Malley, *South Africa's Failure in Zimbabwe*, BOSTON GLOBE, 30 Mar. 2005.

84. *Africa Rejects Action on Zimbabwe*, BBC NEWS, 24 June 2005.

85. *AU Suspends Report on Zimbabwe Rights Abuses*, IRIN, 8 July 2006.

86. Southern African Development Community, Extra-ordinary SADC Summit of Heads of State and Government, Dar-es-Salaam (29 Mar. 2007), available at <http://www.sadc.int/archives/read/news/984>.

87. *Zimbabwe Chair of UN Green Commission "Destroyed Seized Farm,"* DEUTSCHE PRESSE-AGENTUR, 4 Sept. 2007.

88. *Zimbabwe Situation "Embarrassing": AU Chief*, REUTERS, 14 Mar. 2007.

89. Joshua Hammer, *Scandal in Africa*, N.Y. REV. BOOKS, 14 Aug. 2008, at 4.

90. *Zimbabwe: The Road to Talks*, AFR. RES. BULL., 1-31 July 2008, at 17600.

91. The Elders' Zimbabwe Initiative, *supra* note 21, at 7.

Tsvangirai would successfully come to an agreement on a unity government. At that meeting the AU also reaffirmed its support of SADC facilitation of the negotiations between Mugabe and Tsvangirai, and appealed to all “states and all parties concerned to refrain from any action that may negatively impact on the climate of dialogue.”<sup>92</sup> Zimbabwe was not on the official agenda of the SADC 2009 meeting, despite its continued gross violations of human rights, although there was some informal discussion with Mugabe, who was in attendance.<sup>93</sup> Undermining any implied criticism of Mugabe, however, SADC at its 2009 meeting demanded that the West lift its targeted sanctions (discussed below) against Mugabe and his inner circle.<sup>94</sup>

In September 2008, Mbeki was forced from power in South Africa. Mbeki's opponent for leadership of the ruling African National Congress, and the winner of the April 2009 elections in South Africa, was Jacob Zuma. Zuma originally was quite critical of Zimbabwe; indeed, his supporters in the South African dock workers' union refused to allow a Chinese ship carrying arms and ammunition for Mugabe's security forces to land at Durban in April 2008.<sup>95</sup> However, as the elections approached, Zuma modified his critical stance.<sup>96</sup> Once he was elected president he resumed his criticisms of Mugabe, stressing the importance of respect for human rights and good governance in a visit to Zimbabwe in August 2009.<sup>97</sup> His criticism, however, was muted: at the 2009 SADC summit, he referred to the agreement between Mugabe and Tsvangirai as a “positive development,” without criticizing the continued murders, tortures, and rapes after the 2008 election, or Mugabe's many attempts to keep Tsvangirai from wielding any real power.<sup>98</sup>

The uncritical attitude of Mbeki, SADC, and the AU to Mugabe was in part a reflection of their respect for his leadership in the anti-colonial struggle in Zimbabwe and his support for the anti-apartheid struggle in South Africa, which made him one of the “grand old men” of the African liberation movement. In 2002, Mbeki claimed that attempts in the British Commonwealth (see Section 4.B) to ostracize Mugabe were “inspired by notions of white supremacy.”<sup>99</sup> The AU also condemned what it saw as the

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92. African Union Summit Resolution on Zimbabwe, *adopted* 1 July 2008, Afr. Union 11th Sess.

93. *Mugabe Wiggles off the Hook*, ZIMB. INDEP., 10 Sept. 2009.

94. Jonathan Elliott, *Zimbabwe: Hold the Line*, HUFFINGTON POST, 29 Sept. 2009, available at [http://www.huffingtonpost.com/jonathan-elliott/zimbabwe-hold-the-line\\_b\\_303337.html?view=screen](http://www.huffingtonpost.com/jonathan-elliott/zimbabwe-hold-the-line_b_303337.html?view=screen).

95. Hammer, *Will He Rule South Africa?*, *supra* note 69, at 30.

96. *Id.* at 31.

97. *Robert Mugabe off the Hook as Usual*, ECONOMIST, 12 Sept. 2009, at 52.

98. Jacob Zuma, President, SADC, Opening Speech of the 29th Ordinary Summit of the SADC Heads of States and Government (7 Sept. 2009).

99. Ian Taylor & Paul Williams, *The Limits of Engagement: British Foreign Policy and the Crisis in Zimbabwe*, 78 INT'L AFF. 547, 558 (2002).

EU's double standard in denouncing Mugabe while ignoring other abusive African leaders.<sup>100</sup> This is part of a wider politics of resentment against the West for the period of the slave trade, colonialism and, in the South African case, apartheid. Any Western-led organization that attempts to criticize an African leader is suspected of neo-colonialism.

The politics of resentment is easily manipulated as a tool to cover African elites' own interests: Mugabe regularly attributed attempts to force him to change his policies to "white," "Western," or "imperialist" interference. In November 2009, at the UN World Food Summit in Rome, he accused "certain countries whose interests stand opposed to our quest for the equity and justice of our land reforms," claiming that these countries were neo-colonial powers who had imposed unilateral sanctions in order to undermine Zimbabwe's land reforms and make Zimbabwe dependent on food imports; thus, he blamed Western countries for the catastrophe he himself had caused.<sup>101</sup> The fear of being charged with interference in Zimbabwean sovereignty, or with neo-colonialism, may be one of the reasons that Western and UN actions against Mugabe were relatively muted.

## B. States and Organizations outside Africa

Organizations outside Africa took relatively ineffective actions against Mugabe from 2000 to 2009. The Commonwealth Organization is a grouping of countries formerly under British rule, including Zimbabwe at the time of its independence. The Commonwealth suspended Zimbabwe in 2002 and extended that suspension in late 2003: as a result, Mugabe withdrew Zimbabwe from the Commonwealth, charging that his expulsion was caused by white racism.<sup>102</sup> By 2009, Zimbabwe had not returned to the Commonwealth. In March 2004, the European Union imposed a travel ban and asset freeze on ninety-five individuals from Zimbabwe, including Mugabe<sup>103</sup> and by March 2007 then Prime Minister, Tony Blair, of Britain was urging stronger sanctions.<sup>104</sup> The EU extended sanctions in 2008,<sup>105</sup> and

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100. *African Union Denounces EU "Double Standards" over Zimbabwe*, AGENCE FRANCE-PRESSE, 21 Mar. 2007.

101. Robert Gabriel Mugabe, President of the Republic of Zimbabwe, Statement at the United Nations World Food Summit (17 Nov. 2009).

102. CALDERISI, *supra* note 51, at 93.

103. United Kingdom Parliament, House of Commons Hansard Written Answers: Zimbabwe (2 Mar. 2004).

104. Fanuel Jongwe, *Pressure Mounts on Mugabe with Blair Sanctions Call*, AGENCE FRANCE-PRESSE, 21 Mar. 2007.

105. *Zimbabwe: The Road to Talks*, *supra* note 90, at 17602.

also said that Tsvangirai should be president.<sup>106</sup> In 2008, the G8 expressed its “grave concern” about Zimbabwe, especially the violence surrounding elections, as well as its concern about the humanitarian situation and the refusal by Zimbabwean authorities to allow non-discriminatory access to all humanitarian agencies.<sup>107</sup>

Also in 2008, the Bush administration in the United States tightened a travel ban on 250 Zimbabwean individuals and corporations and forbade Americans to do business with them. In 2009, the Obama administration pledged \$73 million to Zimbabwe, but channeled it through aid organizations and UN agencies, refusing to give money directly to the government<sup>108</sup>; Obama also refused to lift the sanctions on Mugabe and other members of his regime.<sup>109</sup>

The US and UK introduced a resolution in 2008 in the United Nations Security Council (UNSC) to freeze the assets of Mugabe and thirteen senior Zimbabwean government and security officials, ban them from travel outside Zimbabwe, and impose an arms embargo on Zimbabwe. Russia and China vetoed the resolution on the grounds that under Chapter VII of the United Nations Charter, the UNSC is supposed to take actions against states only when there is a threat to international peace and security.<sup>110</sup> Russia and China argued that the situation in Zimbabwe did not threaten international peace and stability, despite the spread of cholera to several African states,<sup>111</sup> the contamination of the Limpopo River between Zimbabwe, South Africa, and Botswana by cholera,<sup>112</sup> and the millions of refugees. In vetoing the UNSC Resolution, China and Russia were defending their own interests. China was investing in Zimbabwe and had supported Mugabe by building him a \$9 million palace.<sup>113</sup> Moreover, China opposed military interference in sovereign states because any precedent could affect its own authority in Tibet. Russia, susceptible to criticism of its war in Chechnya, had similar concerns.

South Africa, one of the UNSC non-permanent members at the time, also voted against the US and UK resolution, arguing that problems in Zimbabwe were best left in the hands of regional organizations, and that

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106. *African Union Has Failed the People of Zimbabwe*, GAZETTE (Montreal), 6 July 2008, at A16.

107. G8 Leaders, Statement on Zimbabwe, Hokkaido Toyako Summit (8 July 2008).

108. Hammer, *Dictator Mugabe Makes a Comeback*, *supra* note 43, at 49.

109. *A Warm Welcome but Little Money*, ECONOMIST, 20 June 2009, at 45.

110. Press Release, United Nations Security Council, Security Council Fails To Adopt Sanctions Against Zimbabwe Leadership as Two Permanent Members Cast Negative Votes (11 July 2008), available at <http://www.un.org/News/Press/docs/2008/sc9396.doc.htm>.

111. United Nations Office for the Coordination of Humanitarian Affairs, *Regional Update No. 8—Cholera Outbreaks/Acute Water Diarrhea in Southern Africa* (3 Apr. 2009), available at <http://ochaonline.un.org/OchaLinkClick.aspx?link=ocha&docId=1109530>

112. *Reaching Rock Bottom*, ECONOMIST, 6 Dec. 2008, at 65.

113. Geoffrey York, *China Keeps Bad Company*, GLOBE & MAIL (Canada), 4 Mar. 2006.

the AU summit in 2007 had asked for all sanctions against Zimbabwe to be lifted.<sup>114</sup> Zimbabwe's Minister of Information, Sikhanyiso Ndlovu, claimed that the UNSC resolution was a form of "international racism disguised as multilateral action at the UN."<sup>115</sup> Thus, as of mid-2008, a weak statement from the UNSC deploring violence and denial of civil liberties, and expressing concern about the grave humanitarian situation in Zimbabwe, remained the only official UNSC statement.<sup>116</sup>

By 2009, after nine years of crimes against humanity, the world had done very little that would deter Mugabe from continuing to starve and intimidate his opponents into complete submission.

## V. WHAT COULD HAVE BEEN DONE?

### A. Regional African Organizations

Land could not have been confiscated in Zimbabwe and people deliberately deprived of food without prior undermining of the rule of law and of civil and political liberties. One might think, therefore, that at an early stage in the Zimbabwean tragedy, the AU might have used its 2003 African Peer Review Mechanism (APRM) on political, economic, and corporate governance to criticize Mugabe's violations of human rights. The aims of the APRM did not explicitly include protection of human rights, but human rights were one objective of improved governance, along with constitutional democracy, the rule of law, and promotion of the rights of women,<sup>117</sup> all aspects of the situation in Zimbabwe in dire need of protection. However, as of June 2010, Zimbabwe was not a party to the APRM<sup>118</sup>; thus, the AU could not have used this mechanism to protect Zimbabweans from Mugabe.

Given the absence of rule of law within Zimbabwe, use of pan-African courts might have helped to mitigate the human rights violations. On 28 November 2008, white Zimbabwean farmers won a case at the SADC Tribunal, which decided that the Zimbabwean government had violated the

114. Press Release, United Nations Security Council, *supra* note 110.

115. *Fury as Zimbabwe Sanctions Vetoed*, BBC NEWS, 7 July 2008.

116. Press Release, United Nations Security Council, Security Council Condemns Violent Campaign Against Political Opposition in Zimbabwe; Regrets Failure To Hold Free, Fair Election, in Presidential Statement (23 June 2008), available at <http://www.un.org/News/Press/docs/2008/sc9369.doc.htm>.

117. Magnus Killander, *The African Peer Review Mechanism and Human Rights: The First Reviews and the Way Forward*, 30 HUM. RTS. Q. 41, 45 n.25, 55 (2008).

118. African Peer Review Mechanism, Participating Countries, available at <http://www.aprm-international.org/>.

SADC treaty by denying the farmers access to the courts and engaging in racial discrimination.<sup>119</sup> This was a victory only in principle, however, as the government of Zimbabwe did nothing to rectify the injustice. As late as September 2009, Mugabe was still urging his party's youth wing to "protect" their lands against "new" white imperialists, and was prosecuting 170 white farmers for refusing to leave their land; SADC made no mention of this continued disregard of its own Tribunal's judgment at its 2009 meeting.<sup>120</sup> The SADC Tribunal could also have been a site for trials of alleged perpetrators of mass rape in Zimbabwe.<sup>121</sup>

Nor were reports or trials the only mechanism available to African regional organizations to ameliorate the massive human rights abuses in Zimbabwe. Article 4 of the Constitutive Act of the AU refers to the "right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide, and crimes against humanity."<sup>122</sup> Thus, intervention, even armed intervention, was not an unthinkable option. At one point in 2008, Tsvangirai asked for an African police force to be sent to patrol Zimbabwe.<sup>123</sup> Bishop Desmond Tutu of South Africa also said in 2008 that "a very good argument can be made for having an international force to restore peace," in Zimbabwe.<sup>124</sup> Genocide Watch called for African Union troops to intervene in the event that the 2008 elections were followed by mass killings.<sup>125</sup> Some civil society groups in Zimbabwe also called for armed intervention by the AU to control Zimbabwean private militias and security forces.<sup>126</sup> Nevertheless, the AU did not consider the fraudulent 2008 election and the violence that followed to constitute the grave circumstance warranting intervention.

The AU is supposed to have an African Standby Force (ASF), established pursuant to Article 4 (h) of the AU Constitutive Act.<sup>127</sup> The ASF, if established, would consist of five regional brigades totaling between 15,000 and 20,000 troops.<sup>128</sup> As of 2009, there was no evidence that the AU has discussed using

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119. Mike Campbell (Pvt) Ltd v. Republic of Zimbabwe, [2008] SADC (T) Case No. 2/2007.

120. *Out with Those White Farmers; Zimbabwe's Land Invasions*, *ECONOMIST*, 19 Sept. 2009, at 60.

121. *AIDS-FREE WORLD*, *supra* note 46, at 40.

122. Constitutive Act of the African Union, *adopted* 11 July 2000 (*entered into force* 26 May 2001).

123. Sonia Verma, *Mugabe Gets Quiet Nod from African Leaders*, *GLOBE & MAIL* (Canada), 1 July 2008.

124. *Tutu Urges Zimbabwe Intervention*, *BBC NEWS*, 29 June 2008.

125. *GENOCIDE WATCH*, *supra* note 53.

126. Ecumenical Zimbabwe Network, *Call for International Intervention in Zimbabwe*, *PAMBAZUKA NEWS*, 25 June 2008.

127. Dan Kuwali, *The African Union and the Challenges of Implementing the "Responsibility to Protect"*, *POLICY NOTES* 2009/4 (Nordic Afr. Ist.).

128. James E. Shircliffe, Jr., *Tip of the African Spear: Forging an Expeditionary Capability for a Troubled Continent*, *RUSI J.*, Aug. 2007, at 58, 58–59.

the ASF in Zimbabwe, although Raila Odinga of Kenya had urged the AU in December 2008 to either send in its own troops or allow UN troops to enter Zimbabwe.<sup>129</sup> Yet, even if the AU had wished to send in troops, it was already over-stretched, with troops in Burundi and Sudan whose logistical support was paid for by Western powers.<sup>130</sup> The UN was also overstretched in Africa, with troops in Congo, Darfur, and Somalia.<sup>131</sup>

The reluctance to take military action does not mean that there is no precedent for the violent overthrow of abusive regimes in Africa. In several cases since independence, abusive governments were overthrown by former colonial powers. France, for example, intervened to overthrow "Emperor" Bokassa of the then Central African Empire in 1979.<sup>132</sup> More recently, British intervention in Sierra Leone brought peace after a decade of appallingly brutal civil war. These interventions, however, are subject to the charge of neo-colonialism: such is not the case when Africans intervene against Africans.

In 1978, forces of the Ugandan army crossed the border into Tanzania and occupied an 1800-square kilometer strip of territory; Tanzania retaliated by invading Uganda and overthrowing Idi Amin,<sup>133</sup> whose brutal rule in Uganda since 1971 had caused the deaths of about 500,000 people, and whose decision to expel Uganda Asians had resulted in economic catastrophe analogous to the consequences of dispossession of Zimbabwe's white farmers in the 2000s.<sup>134</sup> However, one might argue that this precedent proves the point that military action should not be undertaken. Tanzania's invasion resulted in the return of Milton Obote, Uganda's first president after independence, and a further loss of about 100,000 to 200,000 people in the continued civil war until Obote in his turn was overthrown in 1985.<sup>135</sup> Nevertheless, this independent action by Tanzania against an abusive regime reinforces the principle that the AU could intervene in analogous situations.

As of late 2009, the time for military action by the AU in Zimbabwe was not yet past. Murders and tortures of opposition figures still continued, there were massive food shortages, and there was no rule of law. A threat

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129. Katharine Houreld, *Odinga Calls for Intervention in Zimbabwe*, MAIL & GUARDIAN (S. Afr.), 8 Dec. 2008.

130. Paul D. Williams, *From Non-Intervention to Non-Indifference: The Origins and Development of the African Union's Security Culture*, 106 AFR. AFF. 253, 270 (2007).

131. Int'l Crisis Group, *Ending Zimbabwe's Nightmare: A Possible Way Forward* 10 (16 Dec. 2008).

132. Mario J. Azevedo & Jean-Bédél Bokassa, *Central African Republic: History and Politics*, in NEW ENCYCLOPEDIA OF AFRICA VOL. 1, at 254 (John Middleton & Joseph C. Miller eds., 2007).

133. *Fall of Idi Amin*, 14 ECON. & POL. WKLY 907 (1979); LIBRARY OF CONGRESS, FED. RESEARCH DIVISION, UGANDA: A COUNTRY STUDY (Rita M. Byrnes ed., 2d ed. 1990).

134. RHODA E. HOWARD, HUMAN RIGHTS IN COMMONWEALTH AFRICA 99-107 (1986).

135. *Id.* at 70.

that the AU would consider sending police, or even military, into Zimbabwe might have pressured Mugabe to genuinely share—or better yet, give up—power. Yet the AU was still reluctant to take stronger measures against Mugabe and his clique.

## B. States and Organizations outside Africa

Without any prospect of foreign military intervention as of 2009, forces opposed to Mugabe's rule in Zimbabwe were obliged to rely on the weak sanctions available under international law. In a letter to the *New York Times*, dated 26 December 2008, Gregory Stanton, then President of the International Association of Genocide Scholars, and Helen Fein, then Executive Director of the Institute for the Study of Genocide, argued that the UNSC should refer Mugabe to the ICC for trial on charges of committing crimes against humanity<sup>136</sup>; Zimbabwean NGOs and charities had called for Mugabe's indictment as early as 2006.<sup>137</sup> Australia and New Zealand, both Commonwealth members, had urged in 2005 for Mugabe to be referred to the ICC.<sup>138</sup>

In March 2009, the ICC indicted President Omar Al-Bashir of Sudan for war crimes and crimes against humanity, thus establishing an African precedent for indictment of Mugabe; the ICC had the right to prosecute sitting heads of state.<sup>139</sup> Mugabe was not too old to stand trial; older men than he were tried in Europe for crimes committed during the Second World War.<sup>140</sup> The international consequences of indicting Mugabe, moreover, would have been far less destabilizing than indicting Bashir. Mugabe could not draw on the support—and the danger to the international system that such support implied—of the Arab and Muslim worlds. Moreover, Mugabe could not claim to be fighting a civil war or defending his government against insurgents, as could Bashir; there was no civil war or insurgency in Zimbabwe, merely peaceful political opposition.

The threat of indictment by the ICC might have aided SADC and the AU in their efforts to persuade Mugabe to share power. They could have

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136. Gregory Stanton & Helen Fein, Int'l Ass'n of Genocide Scholars, Letter to the Editor of the *New York Times* (26 Dec. 2008) (unpublished).

137. Tino Zhakata, *ICC Prosecution of Mugabe Urged*, ICC-AFRICA UPDATE NO. 51 (Inst. for War & Peace Reporting), 27 Jan. 2006, available at <http://www.iwpr.net/report-news/icc-prosecution-mugabe-urged>.

138. *Australia Joins NZ on Push over Zimbabwe*, NZHERALD, 2 July 2005.

139. Press Release, International Criminal Court, ICC Issues a Warrant of Arrest for Omar Al Bashir, President of Sudan (4 Mar. 2009).

140. Henry Rousso, *Justice, History and Memory in France: Reflections on the Papon Trial*, in *POLITICS AND THE PAST: ON REPAIRING HISTORICAL INJUSTICES* 227 (John Torpey ed., 2003).

promised him a comfortable retirement and no referral for trial at the ICC, or protection from actual transport to the Court, in return from his immediate resignation. Mugabe was already laboring under a travel ban to the EU and the US, and was threatened by the principle of universal jurisdiction, which asserts that states can try individuals for certain crimes, even if they were not committed on the state's territory or against or by that state's citizens. In 2006, a Canadian Member of Parliament, Keith Martin, introduced a bill to make it possible to arrest Mugabe for crimes against humanity, if he were to set foot in Canada.<sup>141</sup>

Zimbabwe also seemed to be a good candidate to implement the principle of the responsibility to protect (R2P). In 2001, the Canadian government sponsored the International Commission on Intervention and State Sovereignty.<sup>142</sup> This Commission of twelve distinguished individuals, including one South African, concluded that there was sometimes just cause for military intervention against a sovereign state. The threshold for such intervention was "serious and irreparable harm," defined as large scale loss of life or large-scale ethnic cleansing, whether or not with genocidal intent, as the product of state action, state neglect, or state failure.<sup>143</sup> Like the ICC, however, R2P failed to identify state-induced famine as a specific crime. In 2006, the UNSC adopted a resolution on R2P, but most of the resolution referred to the responsibility of a state to protect its own people. Only one clause referred to the United Nations responsibility. Clause 26 noted that "the deliberate targeting of civilians and other protected persons, and the commission of systematic, flagrant and widespread violations of international humanitarian and human rights law in situations of armed conflict, may constitute a threat to international peace and security" and reaffirmed the readiness of the UNSC, "to consider such situations and, where necessary, to adopt appropriate steps."<sup>144</sup> As noted above, however, Russia and China, with South African support, vetoed the very weak measures to punish Mugabe proposed by the US and UK in the UNSC in 2008.

By 2009, Zimbabwe certainly fit the criteria of R2P; the harm that had been done to its population was serious and irreparable, and was the product of state action. Yet despite the rhetoric about the responsibility to protect people from their own abusive governments, there seemed to be no responsibility to protect the people of Zimbabwe. Commentators who discussed R2P in Africa consistently mentioned Burundi, Congo, Somalia,

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141. Brian Adeba, *MP's Motion Would Indict Mugabe*, EMBASSY: CANADA'S FOREIGN POLICY NEWS-PAPER, 5 Apr. 2006, at 1, 12.

142. INT'L COMM'N ON INTERVENTION & STATE SOVEREIGNTY, *THE RESPONSIBILITY TO PROTECT* (2001).

143. *Id.* at xii.

144. *Protection of Civilians in Armed Conflict*, adopted 28 Apr. 2006, S.C. Res. 1674, U.N. SCOR, 5430th mtg., ¶ 26, U.N. Doc. S/RES/1674 (2006).

and Darfur,<sup>145</sup> but ignored Zimbabwe. Speakers at a seminar in January 2009, organized by the Global Centre for the Responsibility to Protect, concluded that military intervention was not an effective means to protect in Zimbabwe, although they did urge other measures such as referring some members of the regime to the ICC.<sup>146</sup> The reluctance to invoke R2P was in part a result of the fact that the principle was meant—in so far as it was taken seriously at all—to apply only to conflict zones, as clause 26 of the 2006 UNSC Resolution noted, not to countries where people quietly starved without any open warfare.

Thus, international armed intervention to overthrow Mugabe was not under serious consideration as of late 2009. The Commonwealth Organization was not meant to maintain a military force, and had never intervened as such in Africa. By 2004 the EU had begun to establish a rapid reaction force, intended to be used in failed or failing states,<sup>147</sup> but had not yet used that army in any country. If there were armed intervention in Zimbabwe from outside Africa, it is not clear that the AU would support it. Rather, the AU might try to defend Zimbabwe, asserting the principles of state sovereignty and African solutions for African problems, although it would not be strong enough to defeat a multinational force sent in to remove Mugabe from power. However, without actual civil war and the threat not only of regional spillovers but of spillovers to the Western world such as piracy, terrorism, or uncontrollable refugee flows, it was highly unlikely that any non-African military force would intervene to protect Zimbabweans from their oppressive government.

## VI. FAILURE TO PROTECT

The situation in Zimbabwe in the early twenty-first century showed how far both the African and international communities were from a genuine responsibility to protect citizens against governments that committed massive crimes against humanity. The principle of state sovereignty continued to be almost unassailable. There was no suggestion that regional organizations or the international community should be willing to remove leaders engaged in state-induced famine, as they should be willing to remove leaders engaged in genocide or ethnic cleansing.

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145. Kuwali, *supra* note 127; KRISTIANA POWELL & STEPHEN BARANYI, NORTH-SOUTH INST., *DELIVERING ON THE RESPONSIBILITY TO PROTECT IN AFRICA* (2005).

146. Global Ctr. for the Responsibility to Protect, *Zimbabwe: What Can Be Done, Who Must Act? Meeting Summary* (30 Jan. 2009), available at <http://globalr2p.org/media/pdf/MtgSummZimJan2009.pdf>.

147. Edward B. Davis, Sheila M. Davis & Terry Mays, *The Immediate Response Forces of the European Union and NATO* 15 (Montreal, Int'l Studies Assn. 17 Mar. 2004).

The almost-famine in Zimbabwe was not a result of natural disasters; nor was it a result, as polite commentators suggested, of policy “failure.”<sup>148</sup> It was the result of policy success; the policy was to maintain Mugabe and his inner circle in power. Nor was the situation in Zimbabwe merely a “complex emergency,” as a result of “poor governance.”<sup>149</sup> The emergency was a consequence of the decisions of active political agents engaged in successful governance strategies advancing their own interests; while its consequences were complex, its causes were not. Others referred to Zimbabwe as a failing state,<sup>150</sup> as if lack of professional capacity and physical resources were the cause of the disaster, rather than decisions made by a coterie of utterly self-interested, exceptionally cruel men and women. Zimbabwe was not a failed state: it was a deliberately destroyed state.

Euphemistic descriptions of Zimbabwe from 2000 to 2009 protected Mugabe and his regime from punishment for crimes against humanity. Meantime, millions of Zimbabweans either fled the country, or risked malnutrition and disease, from which they were protected only by the good offices of international agencies. Those who are ruled by criminals deserve better.

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148. The Elders, *supra* note 21, at 3.

149. USAID, *supra* note 20.

150. Int'l Crisis Group, *supra* note 131, at 8.