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Thesis

By

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**Exploring transitional justice for past human rights violations: The case of
Zimbabwe**

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Dedication

To my late mother, Patricia Chabvuta.

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Abbreviations

ACHPR	African Commission on Human and Peoples' Rights
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICC	International Criminal Court
ICTJ	International Centre for Transitional Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
MDC	Movement for Democratic Change
NGO	Non – Governmental Organisation
POSA	Public Order and Security Act
TRC	Truth and Reconciliation Commission
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNTS	United Nations Treaty Series
ZANU PF	Zimbabwe African National Union – Patriotic Front

Chapter 1 Dealing with the past

1 Introduction

Transitional justice refers to a range of approaches that societies undertake to deal with diverse past political situations such as authoritarianism, totalitarianism, or conflicted democracies¹ to a stable democratic state.² States endeavour to achieve this by taking up a range of mechanisms to reverse a past marked by inter - alia regime illegitimacy, repressive institutions, absence in the rule of law and denial of human rights violations. In responding to the legacies of past widespread or systematic human rights abuse, states may have a number of objectives. These may vary from the need to punish perpetrators, establish the truth about past human rights violations, repair damages and prevent further abuses.³ Other aims include promoting national reconciliation through reversing past social and economic injustices.

Likewise there are a variety of mechanisms implemented to reach these objectives ranging from a forgive - and - forget policy, as in Mozambique. Other mechanisms include holding trials in domestic or international courts, lustration,⁴ creating a commission of inquiry, awarding reparations, building memorials, or putting in place

¹ See C Colm and F Ni Aolian, 'The Paradox of Transition in Conflicted Democracies', (2005) 27 Human Rights Quarterly 172 at 213. Also see RG Teitel, *Transitional Justice* (Oxford University Press 2000) for more detailed discussions on the genealogy of transitional justice.

² SP Huntington, *The Third Wave: Democratisation in the Late Twentieth Century* (University of Oklahoma Press 1991) at xiii.

³ See United Nations Secretary General's Report, *The Rule of Law and Transitional Justice in Conflict and Post Conflict Societies* S/2004/616 para 8.

⁴ UN Commission on Human Rights, *Report of the independent expert to update the Set of principles to combat impunity*, Addendum, *Updated Set of principles for the protection and promotion of human rights through action to combat impunity*, UN Doc. E/CN.4/2005/102/Add.1, 8 February 2005 states that:

'Public officials and employees who are personally responsible for gross violations of human rights, in particular those involved in military, security, police, intelligence and judicial sectors, shall not continue to serve in State institutions. Their removal shall comply with the requirements of due process of law and the principle of non-discrimination. Persons formally charged with individual responsibility for serious crimes under international law shall be suspended from official duties during the criminal or disciplinary proceedings.'

military, police, judicial or other reforms.⁵ South Africa took the way of a Truth Commission,⁶ Rwanda⁷ and the Former Yugoslavia⁸ opted for International Tribunals, there was a Special Court⁹ and Truth Commission¹⁰ established in Sierra Leone and a Historical Clarification Commission in Guatemala.¹¹

However, contentions have always arisen among other issues, on the ethical, legal and political consequences of the choices discussed above.¹² Questions of due process¹³, who will be prosecuted, what crimes will be amnestied, what compensation will be given to victims or survivors, availability of resources, and the very fear of reverting to the status quo ante¹⁴ come to the fore.¹⁵ In some cases, victims have become perpetrators

⁵ See PB Hayner, *Unspeakable Truths: Facing the Challenge of Truth Commissions* (New York and London Routledge 2002) at 11- 12. For a more detailed discussion of transitional justice mechanisms see CT Call, 'Is Transitional Justice Really Just', (2004) 11 Brown Journal of World Affairs, 101.

⁶ See Truth and Reconciliation Commission of South Africa Report 1999; Promotion of National Unity and Reconciliation Act, No. 34 (1995) which established the Truth and Reconciliation Commission. For a historical and what this thesis considers an insider's perspective from the former Deputy Chairperson of the South African Truth and Reconciliation Commission see A Boraine, *A Country Unmasked* (Oxford University Press 2000).

⁷ Statute of International Criminal Tribunal for Rwanda Nov 8, 1994, U.N.Doc.S/RES/827 (1993).

⁸ Statute of International Criminal Tribunal for the Former Yugoslavia, U.N Doc. S/RES/827 (1993).

⁹ Statute of the Special Court for Sierra Leone Aug 14, UN Security Council Resolution 1315 (2000).

¹⁰ Sierra Leone Truth and Reconciliation Commission Act 2000.

¹¹ See generally, Guatemala: Memory of Silence – Report of the Commission for Historical Clarification Conclusions and Recommendations at <http://shr.aas.org/guatemala/ceh/report/english/toc.html> (Last accessed on 5 July 2006).

¹² N Roht-Arriaza and L Gibson, 'The Developing Jurisprudence on Amnesty', (1998) 20 Human Rights Quarterly 843.

¹³ Due process considerations that need to be adhered to in prosecutorial initiatives include: rights of suspects; rights to be promptly informed of charges; legality and conditions of detention; an impartial bench; right to translated documents; right to be tried without delay; right to be present during trial; public trial; presumption of innocence; right to silence; right to appeal and remedies for breaches of due process.

¹⁴ See for example in SP Huntington supra note 2 at 216. General Pinochet when he was still president of Argentina declared that 'the day they touch any of my men will be the end of law'.

¹⁵ See J Sarkin, 'To Prosecute or not to Prosecute? Constitutional and Legal Issues Concerning Criminal Trials', in C Villa – Vicencio and E Doxtader (eds), *The Provocations of Amnesty: Memory, Justice and Impunity* (Institute for Justice and Reconciliation Cape Town 2003) at 240 and B Hamber, 'Rights and Reasons: Challenges for Truth Recovery in South Africa and Northern Ireland' (2003) 26:4 Fordham International Law Journal 1074, at 1084.

such that when the time to hold alleged perpetrators accountable comes, the majority of the population will be both victims and perpetrators.¹⁶

Elin Skaar takes these issues into consideration and persuasively concludes that the choice of instituting truth commissions, trials or nothing for countries wanting to deal with past human rights violations,

‘depends on the relative strength of demands from the public and the outgoing regime, the choice tending towards trials as the outgoing regime becomes weaker and towards nothing as the outgoing regime becomes stronger, with truth commissions being the most likely outcome when the relative strength of the demands is roughly equal’.¹⁷

Zimbabwe has a fateful history of human rights violations and impunity. It is now urgent that measures be taken up to deal with the country’s past and present human rights violations. Redress Trust defines impunity as a concept wherein those that perpetuate human rights abuses are not held to account or are somehow held to be ‘above the law’.¹⁸ Impunity has been used by the colonial and post - colonial state to evade justice for its agents and private individuals allegedly acting with the acquiescence of the state in committing human rights violations.¹⁹ Outstanding in Zimbabwe’s protracted conflicts is the legacy of serious human rights violations of Ian Smith who ruled Rhodesia from 1964 to 1979 and Robert Mugabe who has been in power since independence in 1980. Both leaders have largely engaged in violent activities to proscribe any legal form of dissent

¹⁶ See S Huntington supra note 2 and also V Havel, New Year’s Address, *Uncaptive Minds* 3 (January – February 1990) at 2.

¹⁷ E Skaar, ‘Truth Commissions, Trials – or Nothing? Policy Options in Democratic Transitions’, (1999) 20 *Third World Quarterly* 1109, at 1110. See also RG Teitel, ‘Transitional Justice Genealogy’, (2003) 16 *Harvard Human Rights Journal*, 69. She argues for a theory that a close relationship exists between the type of justice pursued and the relevant limiting political conditions.

¹⁸ Redress Trust, *Implementing Victims’ Rights, A Handbook on the Basic Principles and Guidelines on the Right to a Remedy and Reparation*, March 2006 United Kingdom at 22.

¹⁹ See for example, reports from the Zimbabwe Human Rights NGO Forum, Amnesty International, Human Rights Watch, and the Executive Summary of the Report of the African Commission on Human and Peoples’ Rights Fact finding Mission to Zimbabwe, 24th to 28th June 2002. (Reports on file with author).

from the opposition.²⁰ Notwithstanding the fact that the country has failed to address past human rights crimes, Zimbabwe has a conflict emanating from a failure to resolve the land question and an obliteration of citizens' economic, civil and political rights²¹ by the state with the former stemming from Zimbabwe's unfinished business of decolonization at the Lancaster House negotiations in 1979.²²

1.2 Thesis Synopsis

This thesis comes as a follow up to a number of commentaries that have already been written with regards to the anticipated transition in Zimbabwe. A Symposium on 'Civil Society and Justice In Zimbabwe' was held in Johannesburg, South Africa on 11- 13 August 2003. This thesis believes that the symposium was erroneously held in the hope that the Zimbabwe African National Union Patriotic - Front (ZANU PF)²³ led government would be voted out of power in the 2005 General Elections. This did not materialise as ZANU PF won the highly disputed election.²⁴ However, what remains an important and most significant outcome of this Symposium was its renewal for the calls of the establishment of a 'Truth, Justice and Reconciliation Commission' (TJRC) to deal with the civil, political, social and economic violations in the colonial and post - colonial dispensation in Zimbabwe. The Symposium Declaration recommended amongst other things that the proposed TJRC be able to:

²⁰ E Sharri, 'Gukurahundi' The Need for Truth and Reparation' in B Raftopolous and T Savage (eds), *Zimbabwe Injustice and Political Reconciliation* (Cape Town, Institute for Justice and Reconciliation, 2004) at 43.

²¹ T Savage and SB Chimhini, 'Zimbabwe: A Hundred Years War', in E Doxtader and C Villa – Vicencio (eds), *Through Fire With Water: The Roots of Division and the Potential for Reconciliation in Africa* (Cape Town, Institute for Justice and Reconciliation 2003) at 205.

²² B Kagoro, 'Constitutional Reform as a Social Movement: A Critical narrative of the constitution making debate in Zimbabwe, 1997 – 2000.' In Raftopolous and Savage supra note 19 at 236.

²³ ZANU – PF is the party that has ruled Zimbabwe since independence in 1980: For more information see <http://www.zanupf.gov.zw>.

²⁴ Redress Trust, *The Face of Torture and Organised Violence: Torture and Organised Violence in the Run Up to the 31 March 2005 General Parliamentary Election* (London 2005).

Investigate human rights violations, recommend cases for prosecution, provide for redress and reparations to victims, recommend for the lustration of all those involved in human rights violations, bring out the social and economic human rights violations perpetrated since colonial times and to ensure community reconciliation.²⁵

As Zimbabweans are still negotiating their transition,²⁶ this thesis remains based on a supposition that the present or future government will need to address alleged past human rights violations in one way or the other. However, as Iliff notes, this should not be a hindrance because:

By discussing a hypothetical future transition, one can assess how adequately transitional justice theory responds to a particular set of circumstances conceptually and develop an ideal in theory that may then be adapted to meet political realities and take advantage of unexpected opportunities.²⁷

Moreover, it is important to keep the process of developing a transitional justice policy of dealing with past human rights violations in motion before the start of the transition. This is necessary to avoid situations where politicians or belligerents in the conflict set and determine the type of justice that would suffice to deal with a given conflict without consulting other stakeholders.²⁸

The second chapter of this thesis discusses the options of prosecutions and truth commissions in transitional states. It outlines the pros and cons of having prosecutions as retributive measures as opposed to restorative measures that are arrived at using truth-telling mechanisms such as truth commissions. The idea is to set a benchmark from

²⁵ Declaration of the Johannesburg Symposium, August 2003, in Civil Society and Justice in Zimbabwe Summary of Proceedings of a Symposium held in Johannesburg 11-13 August 2003. <http://www.santep.co.za/satz/zim2003.htm> (last accessed 10 January 2006).

²⁶ Zimbabwe Human Rights NGO Forum, Exploring Transitional Justice Options In Contemporary Zimbabwe January 2006 at 4. This report can be accessed at www.hrforumzim.zw (last accessed 11 August 2006).

²⁷ AR Iliff, *'Arresting Impunity: Towards a Transitional Justice Paradigm for Zimbabwe'*, March 2004, Essay presented to the Committee on Degrees in Social Studies Harvard College at 6. (Copy on file with author).

²⁸ C Bell, 'Dealing With the Past in Northern Ireland' (2003) 26 Fordham International Law Journal 1095.

which to tackle Zimbabwe's problem of failing to deal with its past human rights violations.

In a bid to put the Zimbabwe situation in context the third chapter elucidates the problem of impunity in Zimbabwe. It outlines as well as examines the various pardons and amnesties that have been taken up by the pre and post independence Zimbabwean Governments. Furthermore, the chapter discusses various practical issues that the judiciary, survivors, victims and any other stakeholders will have to deal with in Zimbabwe to achieve justice. This chapter interrogates the call for the establishment of a TJRC in Zimbabwe. The main reason for taking such a position is to contribute to the discussions on what advocating for truth, justice, and or reconciliation entails in a transitional setting.

Terms such as justice, amnesty, truth, and reconciliation tend to recur in many discussions on transitional justice in Zimbabwe and elsewhere. Therefore, there is need to explain their meanings. This thesis takes from the diplomatically accommodative definitions given in the UN Secretary General's report that justice is,

‘an ideal of accountability and fairness in the protection and vindication of rights and the prevention and punishment of wrongs. Justice implies regard for the rights of the accused, for the interests of victims and for the well being of society at large’.²⁹

Amnesty in this thesis will be generally understood to be ‘an official act that provide an individual with protection from liability – civil, criminal or both for past acts’.³⁰ Reconciliation, a difficult term to define is generally taken in this thesis to be ‘a cancellation of enmity ...achievable only when perpetrators and beneficiaries of past

²⁹ See UN Report supra note 3 at Para 7.

³⁰ RC Slye, ‘Amnesty, Truth and Reconciliation: Reflections on the South African Amnesty Process’ in R Rotberg and D Thompson (eds), *The Morality of Truth Commissions Truth v. Justice* (Princeton University Press United Kingdom 2000) at 171.

injustice acknowledge collective responsibility for wrong- doing and when victims, through the same process, regain their self - respect'.³¹ Truth as described by Crocker quoting Alex Boraine is: knowing about 'whose moral and legal rights were violated, by whom, how, when and why'.³²

Chapter 4 gives recommendations to the problems of justice and accountability discussed in chapters 2 and 3. This is with anticipation that these recommendations will assist in closing the gaps in previous observations made by other writers already in shaping problems of dealing with the past generally and specifically in Zimbabwe. The thesis concludes in the same chapter by discussing the problem of transitional justice generally and specifically in Zimbabwe. The conclusion endeavours to come up with a position on the need for prosecutions aided by truth telling mechanisms and other transitional justice approaches to deal with the problem of accountability and impunity for past human rights violations in Zimbabwe.

³¹ R Bhargava, 'Restoring Decency to Barbaric Societies' in R Rotberg and D Thompson (eds) *The Morality of Truth Commissions Truth v. Justice* (Princeton University Press United Kingdom 2000) at 60.

³² DA Crocker, Truth Commissions, Transitional Justice, and Civil Society in R Rotberg and D Thompson (eds), *The Morality of Truth Commissions Truth v. Justice* (Princeton University Press United Kingdom 2000) at 100.

Chapter 2 Holding perpetrators of human rights violations accountable

2 Introduction

This chapter discusses two components of transitional justice: prosecutions and truth commissions. This discussion should assist in informing any choices that are made by transitional governments in choosing to go for trials, truth commissions, both or nothing at all. The ideas raised here should also be able to set a benchmark from which to tackle Zimbabwe's problem of failing to deal with its past human rights violations. More importantly, this chapter will begin clarifying the emergence of the calls for accountability and redress of past human rights violations in international human rights law.

2.1 International obligations to holding human rights violators accountable

The need to hold systematic human rights violators accountable is well established in international law. Article 2(3a) of the International Covenant on Civil and Political Rights (ICCPR)³³ obliges state parties to undertake to ensure that victims of human rights violations 'shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity.' The UN Human Rights Committee (HRC) - the interpreter of the ICCPR, has repeatedly held that Article 2(3) does not provide a right in individuals to force a state to investigate, and thereafter to prosecute any suspects who have been convincingly identified.³⁴ However, the HRC has said that blanket amnesty laws and pardons are inconsistent with the ICCPR because they

³³ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

³⁴ For a comprehensive and incisive discussion of this matter see C Jalloh and A Marong, 'Ending Impunity: The Case for War Crimes Trials in Liberia', (2005) *African Journal of Legal Studies* 53 at 62 – 64.

create “a climate of impunity” and deny the victims this right to a remedy”.³⁵ The African Charter to which Zimbabwe acceded in 1989 recognises victims’ rights to redress and accountability. In its article 1, it enjoins states parties to ‘recognise the rights, duties and freedoms enshrined’ therein ‘and shall undertake to adopt legislative or other measures to give effect to them’.³⁶

In addition to these specific purposes some observers argue that finding and making public the truth about abuses is an obligation of the state. Article 19 of the Universal Declaration of Human Rights³⁷ considers that there is a right to know the truth, which is embedded within its “right to seek, receive and impart information”. The African Charter on Human and Peoples Rights³⁸ also cites the ‘right to receive information’. Human rights advocates also point to the ruling of the Inter American Court of Human Rights in the Velasquez Rodriguez³⁹, which concluded that the state has a duty to investigate the fate of the disappeared and disclose the information to relatives.

In international human rights law a state is obliged to carry out a number of tasks in response to past human rights abuses. Mendez reiterates that these tasks are first to investigate, prosecute, and punish the perpetrators. Secondly to disclose to the victims, their families, and society all that can be reliably established about those events. Thirdly

³⁵ Comments of the Human Rights Committee, Consideration of Reports submitted by States Parties under Article 40 of the Covenant, 10 UN. Doc. CCPR IC/79/Add.46 (1995).

³⁶ The African Charter on Human and Peoples’ Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (Banjul Charter).

³⁷ Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Resolution 217 A (III) (UDHR).

³⁸ Ibid, Banjul Charter supra note 36.

³⁹ Velasquez Rodriguez Case, Inter American Commission on Human Rights 35 at 166, OEA/ser. L/V/III.19, doc.13 (1998).

to offer the victims adequate reparations. Lastly to separate known perpetrators from law enforcement bodies and other positions of authority.⁴⁰

Mendez reiterates the position held in international law that the state's obligations to uphold human rights correspond to a set of rights for individuals and groups. The rights are outlined as follows: the right of the victim to see justice done, the right to know the truth; an entitlement to compensation and also to non monetary forms of restitution; and a right to new, reorganised and accountable institutions.⁴¹ Taking from Mendez's analysis, there is reason to believe that international law supports other accountability mechanisms as opposed to solely criminal prosecutions.⁴²

2.2 Reasons for carrying out prosecutions.

This section examines some of the reasons why prosecution of international human rights crimes is necessary.⁴³ This thesis takes Minnow's view that to respond to mass atrocity with legal prosecutions is to embrace the rule of law.⁴⁴ The rule of law ensures administration of justice by a formal system committed to fairness and opportunities for individuals to be heard during trials.⁴⁵

Another objective of criminal prosecutions is to deter future violations. For international crimes, this has an importance extending beyond the borders of the state concerned. The gravity of impunity sends a message to other regimes and other potential

⁴⁰ JE Mendez, 'Accountability for Past Abuses' (1997) 19 Human Rights Quarterly 255 at 260.

⁴¹ See The Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violators of International Humanitarian Law (adopted 16 December 2005 UNGA 60th Session, Resolution 147 (A/Res/60/147))

⁴² P DeGreiff, 'International Courts and Transitions to Democracy', (1998) 12 Public Affairs Quarterly 79, at 79.

⁴³ The reasons for prosecution are canvassed in the groundbreaking article by D Orentlicher 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime' (1991) 100 Yale Law Journal 2551, at 2537, see also SP Huntington *supra* note 2 at 213 - 4 for more discussions on the arguments for and against prosecutions.

⁴⁴ M Minnow, 'Between Vengeance and Forgiveness' (1998) at 25 in HJ Steiner and P Alston (eds), *International Human Rights in Context: Law, Politics, Morals* (2nd Edition Oxford University Press) 1143.

⁴⁵ *Ibid.*

violators that they too cannot continue committing such crimes and hope for amnesty in future.⁴⁶ However, doubts abound as to the extent to which punishment has a deterrent effect in the context of entrenched regimes committing large - scale crimes such as the Zimbabwean government since they do not expect to lose power nor to be punished.⁴⁷

However, Robinson dismisses such criticism as largely circular.⁴⁸ He persuasively argues that the more the international community holds firm in apprehending and punishing those who commit international crimes, the more potential violators will be forced to consider the consequences and start to be dissuaded from launching criminal campaigns.

Furthermore, by individualising guilt and exposing the role of a leadership group in inciting hatred, prosecution helps a society overcome an “us” versus “them” outlook. As the German theologian Karl Jaspers said of the Nuremberg trials in 1946, ‘For us Germans this trial has the advantage that it distinguished between the particular crimes of the leaders and that it does not condemn the Germans collectively’.⁴⁹ In a similar manner, Serbs today might applaud the work of the International Criminal Tribunal for the former Yugoslavia for showing the rest of the world that the horrendous abuses perpetrated during the war in Bosnia war were not committed by the Serbs as a people, but by individual and identifiable concentration camp guards and paramilitary members who

⁴⁶ Deterrence is premised on either the notion that you are likely to be caught and punished for what you do and or that punishment will prevent a rational decision maker from committing the crime. Indeed the fact that large - scale crimes continue to occur worldwide despite several prosecution initiatives for such crimes may show that the threat of prosecution alone may not be an adequate deterrent.

⁴⁷ See C Villa - Vicencio ‘Why Perpetrators Should Not Always Be Prosecuted: Where the ICC and Truth Commissions Meet’ (2000) 49 Emory Law Journal 210.

⁴⁸ D Robinson ‘Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court’ (2003) 14 (3) European Journal of International Law 481 - 505.

⁴⁹ K Jaspers, *The Question of German Guilt* (Dial Press Inc 1948).

happened to be part of the Serbian community.⁵⁰ Mendez maintains that settling criminal responsibility for the very worst crimes is essential to peace, because it ‘separates the responsibility of the individual who exploits the fears of the population for political gain from the collective guilt that is wrongly assigned to collectivities.’⁵¹

The disadvantage with these sorts of accountability measures is that the institutional blame that is supposed to be imputed to the various institutions that supported the conflict will become insignificant. The question goes back to South Africa, for example, where Boer armies used to go to church to seek divine blessing before going to attack black people in the townships. Again, what should happen to all those people who covertly or overtly supported apartheid because the suppression of black South Africans meant their prosperity? Thus in such instances it becomes difficult to impute blame on an individual who was being used as part of a system bent on inflicting human rights violations.

2.3 When not to conduct trials⁵²

Under international law a state is entitled to derogate from its duty to punish when there is an existence of a grave threat to the life of a nation⁵³ and impossibility of performance. Van Zyl explains the conditions for a state to comply with in terms of derogations.⁵⁴ He notes firstly that a state must provide reasons to justify its failure to punish. Secondly, it must outline the exceptional nature of the threat, which prevents punishment. Thirdly, it

⁵⁰ A Rigby, *Justice and Reconciliation After the Violence* (Boulder Co: Lynne Rienner Publishers 2001).

⁵¹ JE Mendez, ‘In Defense of Transitional Justice’, in AJ MacAdam (ed), *Transitional Justice and the Rule of Law in New Democracies* (University of Notre Dame Press, Notre Dame 1997) at 8.

⁵² Ibid Mendez at 17.

⁵³ See ICCPR supra note 33, Article 4 and also a commentary on derogations in *Lawless v Ireland*, Series no. 31 European Human Rights Report 15, (1961), at 31-2.

⁵⁴ P Van Zyl, ‘Justice Without Punishment: guaranteeing human rights in transitional societies’ in C Villa – Vicencio and W Verwoerd (eds), *Looking Back Reaching Forward* (University of Cape Town Press London 2000) at 51.

must demonstrate that the measures taken for example, an amnesty are proportional to the threat posed. Lastly, while it may be permissible, under certain exceptional circumstances, not to punish, it is never permissible to derogate from certain inalienable rights such as the right to life and the right not to be subjected to torture.

Even though there are a number of arguments put forward in favour of prosecution,⁵⁵ states tend to opt for other options not necessarily linked to prosecutions. Landsman notes that their decisions many a times have been spurred by the most compelling of practical considerations.⁵⁶ If for example those who used to hold power ‘are treated too harshly – or if the net of punishment is cast too widely – there may be a backlash that plays into their hands’.⁵⁷ For example in South Africa, ‘although it would have been morally preferable to prosecute human rights violators, this proved impossible given the military stalemate between the state and the liberation movements’.⁵⁸

Furthermore Mendez concedes that generally after a conflict, criminal offences and potential defendants will be so large that it is unrealistic to expect that all or even most will be prosecuted. This thesis concurs with Mendez’s analysis that selectivity by itself does not render the process unfair, unless of course the basis for the selection is deliberately discriminatory, unbalanced, vindictive, or unreasonable.

However in view of the difficulty to prosecute all those involved in the violations Mendez outlines a criteria that can help the public accept the policies on foregoing

⁵⁵ M Aukerman, ‘Extraordinary Evil Ordinary Crime: A Framework for Understanding Transitional Justice’ (2002) 15 Harvard Human Rights Law Journal 39, at 40.

⁵⁶ S Landsman, ‘Alternative Responses to Serious Human Rights Abuses: Of Prosecutions and Truth Commissions’ <<http://www.law.duke.edu/journals/lcp/articles/lcp59dFall19996p1.htm>> (Last accessed 5 January 2006).

⁵⁷ F Marvin, *Out of the Shadow of the Night: The Struggle for International Human Rights* (Delarcote Press, New York 1989).

⁵⁸ See E Kiss, ‘Moral Ambition Within and Beyond Political Constraints: Reflections on Restorative Justice’, in R.I Rotberg and D Thompson (eds), *The Morality of Truth Commissions* (Princeton, NJ: Princeton University Press, 2000) 68.

prosecution. Firstly, he notes that the public will understand if it is clearly explained and if good faith efforts are made to search for evidence by investigatory bodies.⁵⁹ He further notes that the state could legitimise its focus only on the most important cases, while declining to prosecute others because of limited resources.⁶⁰ However, dissenting opinions on the issue of costs for justice argue that,

‘the expense of bringing justice to those most responsible for war crimes pales in comparison to the true cost of the crimes, the lives lost, the communities devastated, the private property ransacked and the cultural monuments and buildings destroyed forever’.⁶¹

The question that arises after such decisions is to determine the importance and type of cases to be dealt with. Dianne Orentlicher discusses this issue and notes that on a practical level, the duty to bring perpetrators to justice in transitional structures arguably extends only to persons most responsible directly or otherwise. She concludes that:

Customary law should ...not require prosecution of every person... Prosecution of those who were most responsible for designing and implementing a system of human rights atrocities or for especially notorious crimes that were emblematic of past violations would seemingly discharge governments’ customary law obligation...provided the criteria used to select potential defendants did not appear to condone or tolerate past abuses.⁶²

Mendez gives pointers to this dilemma raised by Orentlicher and one that will dominate Zimbabwe’s quest for justice. He observes that whilst it is worthwhile focusing on the most responsible there is need to prosecute even the so-called ‘trigger pullers’. He argues that it would be regressive to allow everyone else involved down the chain of

⁵⁹ Ibid Mendez supra note 51.

⁶⁰ Ibid.

⁶¹ International Criminal Tribunal for the former Yugoslavia, ‘1994 – 2004 a Unique decade’ The Hague, The Netherlands 2005 at 14.

⁶² See D Orentlicher supra note 43.

command to escape prosecution on the grounds of having followed orders. In a persuasive argument Mendez advises that:

At least for offences that qualify as crimes against humanity, it would be a tremendous step backward to allow obedience to be used as a valid defence, especially when dealing with orders that exhibited a manifest illegality or when there was a reasonable chance of disobeying these orders without risking limb or life.⁶³

David Gray enhances the debate on which past human rights violators should be held accountable by arguing for what he calls an excuse - based approach. His school of thought departs from Mendez's seemingly confrontational and legalistic one. He argues that abusive regimes do not suddenly find themselves entangled in crime but are usually guided by 'norms, social ontologies, and historical teleologies that operate through official state agents, constructing a public face of law that sanctions and organises violence perpetrated by institutional actors and private citizens'.⁶⁴ Gray notes that the 'public face of law' he refers to encompasses 'formal legislation, executive orders, the body of prevailing public threats, institutional expectations represented by institutional agents, and commonly represented public and legal expectations as they would have been perceived by a reasonable person in the actor's condition and position at the time of his act'.⁶⁵

Gray's excuse based approach supported by the notion of the public face of law can be useful in analysing Zimbabwe's situation. For instance, in Zimbabwe political leaders, military personnel, executive officials and the police but other active and passive

⁶³ Mendez supra note 51 at 18. According to the International Criminal Court, crimes against humanity include crimes such as the extermination of civilians, enslavement, torture, rape, forced pregnancy, deportation, persecution on political, racial, national, ethnic, cultural, religious or gender grounds, and disappearances but only when they are part of a widespread or systematic attack directed against a civilian population.

⁶⁴ DC Gray, 'An Excuse Based Approach to Transitional Justice,' (2006) 74 Ford Law Review, 1 at 3.

⁶⁵ Ibid DC Gray at 35.

supporters in the citizenry can be held accountable for human rights violations. This is due to the fact that the dividing lines on issues of where the Government started and where civilians joined in the violence that has engulfed the country has become blurred. For example, commenting on the state's and private citizens' complicity in the land invasions in 2002 the Fact Finding Mission of the African Commission on Human and Peoples' Rights to Zimbabwe noted that:

The Government cannot wash its hands from responsibility for all the happenings. It is evident that a highly charged atmosphere has been prevailing, many land activists undertook their illegal actions in the expectation that government was understanding and that police would not act against them – many of them, the War Veterans, purported to act as party veterans and activists. Some of the political leaders denounced the opposition activists and expressed understanding for some of the actions of ZANU PF loyalists.⁶⁶

Landsman comes up with one of the less obvious hindrances to prosecutions and notes that citizens themselves might come up with the view that prosecutions will not serve the best interests of society. He notes that when this conclusion is expressed at the ballot box, either through a plebiscite or the election of representatives who have campaigned on such a platform, it is questionable whether a democratic government can ignore popular political sentiment.⁶⁷

Moreover, insisting on prosecutions in the presence of an important legal obstacle like a pre-existing amnesty law that has had firm legal effects would be irresponsible. This is because it would subvert the very rule of law that the human rights movement proclaims by violating the cardinal principle of *nullum crimen, nulla poena sine lege*

⁶⁶ Executive Summary of the Report of the Fact Finding Mission to Zimbabwe 24th to 28th June 2002 EX.CL/109 (V) 17.

⁶⁷ See CS Nino 'The Duty to Punish Past Abuses of Human Rights Put into Context: The Case of Argentina' (1991) 100 Yale Law Journal 2619.

praevia.⁶⁸ This argument raises the need to test the validity and legality of Zimbabwe's amnesty laws.

2.4 Ensuring accountability through truth recovery.

Truth recovery represents another key approach to transitional justice. Aryeh Neier argues in defence of such official enquiries that:

By knowing what happened, a nation is able to debate honestly why and how dreadful crimes came to be committed. To identify those responsible, and to show what they did, is to mark them with a public stigma that is a punishment in itself, and to identify the victims, and recall how they were tortured and killed, is a way of acknowledging their worth and dignity.⁶⁹

Hayner adds that far beyond simply finding and stating the truth, official truth bodies have often been given a wide – ranging mission in conformity with the international norms discussed above. In a number of cases, they have become the most prominent government initiatives dealing with past crimes and the central point out of which other measures for accountability, reparations, and reform programs are developed. The stated reasons behind setting up a truth commission have differed between countries. For example, some stress national reconciliation and the need to close the book on the past; others have framed it as a step toward prosecutions that will follow; yet others see an inquiry into the past as a means to distance the new government's policies from the former regime and to highlight a new rights – respecting era.

Due to the above, truth commissions cover many events that could also be subject to trials. However, truth commissions should not be equated with judicial bodies, nor should they be considered a replacement for trials. On one level, truth commissions

⁶⁸A principle which prevents the use of legislation to punish crimes committed before the passing of the legislation.

⁶⁹A Neier, 'What Should Be Done About the Guilty?', (1990) 37 New York Review Books at 32.

clearly hold fewer powers than courts. They have no powers to try alleged human rights violators and neither do they have powers to compel anyone to come forward to answer questions. To date, the South African TRC was the only one to offer individualised amnesty, thereby motivating some perpetrators into giving full and public accounts of their abuses.

However, despite the more limited legal powers of truth commissions, their broader mandate to focus on a pattern of events, including the causes and consequences of the political violence, allows them to go much further in their investigations and conclusions than is generally possible in any trial of individual perpetrators. For example, truth commissions are usually able to reveal the truth about the state and its various institutions that carried out or condoned the repression – including not only the military and the police, but also sometimes the judiciary itself. In addition, by listening to victims' stories, perhaps holding public hearings, and publishing a report that describes a broad array of experiences of suffering, commissions effectively give victims a public voice and bring their suffering to the awareness of the broader public. For some victims and survivors, this process may have a cathartic effect.

Responding to criticism that truth commissions have an inherent weakness of granting amnesty, Albie Sachs notes that:

Most prosecutions involve amnesty anyhow. Without accomplice participation you don't get very far. And how do you get accomplice evidence? The prosecutor tells the accomplice: 'If you tell the truth you may get amnesty.' This wasn't a notion invented just for the TRC. It is one of the core techniques of prosecutions anywhere in the world.⁷⁰

⁷⁰ A Sachs 'Four Sayings and a Denouncement' in Charles Villa Vicencio and Erik Doxtader (eds) *The Provocations of Amnesty: Memory, Justice and Impunity* (Institute for Justice and Reconciliation South Africa 2003) 19.

2.5 Advantages for instituting truth commissions

Much as Hayner is a proponent of truth commissions, she problematises the idea of the truth acquired from truth processes. While not true in every case, in many cases, victimised populations as in Zimbabwe know what happened and who perpetrated the acts. Hayner thus notes that in such circumstances, the importance of truth commissions might be described more accurately as acknowledging the truth rather than finding the truth. ‘Acknowledgement’ implies that the state has admitted its misdeeds and recognised that it was wrong writes Aryeh Neier.⁷¹ Goldstone observes that in the case of South Africa there were denials, which had begun well before the end of apartheid. Many white South Africans believed the security policemen that political activists detained by them had committed suicide. Thus an acknowledgement by the state of these crimes will serve to atone the victims and survivors’ need to know what happened.

Truth commissions can be an important precursor to judicial action, working as an intermediate step for states not ready to endorse full-scale prosecutions such as Zimbabwe thus contributing to the achievement of accountability. As the commission of the Former Yugoslavia illustrates, the authoritative report of a commission can help muster the political will necessary for taking the next step toward bringing perpetrators to justice.⁷² Rather than displacing or replacing justice in the courts, a commission may sometimes help contribute to accountability for perpetrators. Numerous truth commissions pass their files on to the prosecuting authorities, and where there is a functioning judicial system, sufficient evidence, and sufficient political will, trials may

⁷¹ Ibid at 34.

⁷² See Security Council Resolution 827, U.N. SCOR, 48th Session 3217th Meeting, U.N. Doc. S/RES/827 (1993) (establishing Yugoslavia War Crimes Tribunal); S.C Res. 955, 49th Session 3453dmtg., U.N. Doc S/RES/955 (1994) (establishing Rwanda War Crimes Tribunal).

result. The first well-known truth inquiry, Argentina's National Commission on the Disappeared, was popularly understood to be a preliminary step toward prosecutions that would follow, and indeed the information from this commission was critical to later trials.

A few commissions such as in El Salvador and South Africa have named names of wrongdoers, thus providing a moral sanction, at least. Some have recommended other sanctions that might be instituted without a full trial, such as removing abusers from positions in security forces where they might do further harm.⁷³

Just as much as criminal prosecutions can be used contentiously to produce a deterrent effect truth commissions can have the same capacity. Truth commissions are well positioned to evaluate the institutional responsibilities for extensive abuses, and to outline the weaknesses in the institutional structures or existing laws that should be changed to prevent abuses from re-occurring in the future. It is possible that a truth commission might help prevent future abuses simply by publishing an accurate record of past abuses, with the hope that a more knowledgeable citizenry will recognise and resist any sign of return to repressive rule. However, this thesis argues that for a country like Zimbabwe more will depend on changing the institutions which have been accused of carrying out human rights abuses such as the police and military. Changes would also be needed in those institutions responsible for preventing abuses and punishing malefactors such as the judiciary.

The advocates of the truth commission approach argue that truth commissions are central to the promotion of reconciliation in divided societies, healing wounds that trials and purges can deepen. It can as well be that for the family and friends of victims there

⁷³ Hayner *supra* note 5 at 29.

can be no closure, no moving on and leaving the past behind, without knowing what happened to their loved ones. As a bereaved Uruguayan woman would confess, “I am ready to forgive, but I need to know whom to forgive and for what.”⁷⁴

2.6 Limitations to Truth Commissions

In the very process of uncovering a part of the truth and granting it the status of official, and authoritative record can serve to cover up other aspects of the truth. In the cases of the Latin American truth commissions, their official tasks prevented them from naming and identifying the actual individuals responsible for the abuses. From the perspective of the survivors, this meant that the perpetrators continued to enjoy impunity. Not only did they escape any kind of judicial trial, but also they were not even required to acknowledge their shameful deeds. It is thus an unpleasant paradox that truth commissions can in fact cover up exactly those aspects of the past they might be expected to uncover. For this reason some observers have criticised the Latin American type of truth commission as a relatively cost free way to meet popular demands for an accounting, creating the impression that the past has been dealt with, so that people will be prepared to move on and face the future together.⁷⁵

Under the South African model, any perpetrators of human rights abuses who sought amnesty were required to make a full disclosure of all their relevant acts. The Amnesty Committee wanted the alleged perpetrators to prove that their actions had been political in nature and were not committed out of personal malice or for private gain.⁷⁶

⁷⁴ See Rigby supra 50 at 8.

⁷⁵ Ibid Rigby at 9 and CT Call supra note 5 at 105.

⁷⁶ G Robertson, *Crimes Against Humanity The Struggle for Global Justice* (2nd Edition Penguin Books England 2002) 293.

The people did not have to express remorse or regret, but if they were to be free from the fear of prosecution, then they needed to admit to their crimes.

Truth commissions also generally do not investigate current human rights conditions except for the commissions in the Philippines and Rwanda that investigated human rights violations that occurred up until and including the period in which the commissions operated. Therefore truth commissions do not fill the need for a permanent human rights commission or agency responsive to present day rights concerns.

A truth commission is inherently vulnerable to politically imposed limitations. As structure, sponsor, mandate, political support, financial or staff resources, access to information, willingness or ability. To take on sensitive cases and strength of final report will all be largely determined by the political realities in which it operates or the political forces at play when it is created. However, since the judiciary can also be threatened with the same situations it would be mistaken to judge the efficiency of truth commissions based on such criticism.

Hayner believes that a commission can also be set up by a government to manipulate the public perception of its tarnished image, in order to promote a more favourable view of the country's human rights policies and practices.⁷⁷ This is particularly likely when a government is under international pressure to improve its human rights record. Given the mandate of commissions, by definition, to look at the past rather than the present, it is easy for a new government to justify not being subject to the investigations of the commission, while professing improved human rights policies. The commission therefore conveniently overlooks any current abuses. Given this dynamic, it

⁷⁷ PB Hayner 'Fifteen Truth Commissions – 1974 to 1994: A Comparative Study' (1994) 16 Human Rights Quarterly 597 at 608.

is not always immediately clear whether a government's commission is more a political tool or an accurate reflection of change. The first truth commission in Uganda is a case in point. In Uganda, Idi Amin set up a Commission partly in response to pressure from international human rights organisations. But Amin disregarded the Commission's report, and continued his brutal rule.

Few issues have attracted as much controversy around truth commissions as the question of whether a commission should publicly name those individuals found to be responsible for human rights crimes. The debate is between two contradictory principles, both of which can be strongly argued by human rights advocates. One process requires that individuals receive fair treatment and are allowed to defend themselves before being pronounced guilty; due process is violated if a commission report names individuals responsible for certain crimes. Therefore no names should be named. The second is that telling the full truth requires naming persons responsible for human rights crimes when there is absolute evidence of their culpability. Naming names is part of the truth telling process, even more when it is clear the judicial system does not function well enough to expect that they will be prosecuted.

The El Salvador Truth Commission⁷⁸ named high military and judicial figures. All individuals named in the El Salvador Truth Commission report were first interviewed by the Truth Commission and given the opportunity to defend themselves (with the exception of the deceased). In the introductory chapter of the El Salvador report, the commissioners were supportive of naming names.⁷⁹

⁷⁸See, From Madness to Hope: The 12 – Year War in El Salvador at http://www.usip.org/library/tc/doc/reports/el_salvador/tc-es-03.993_toc.html (Last accessed 19 June 2006).

⁷⁹In the peace agreements, the Parties made it quite clear that it was necessary that the “complete truth be made known”, and that was why the Commission was established. Now, the whole truth cannot be told

To the contrary, Zalaquett objects to naming names under all circumstances, considering it a violation of due process rights of the persons so named and also an invasion of judicial functions that truth commissions, by definition, do not exercise.⁸⁰ This thesis disagrees with this stance taken because an absolute position against naming names can in certain circumstances result in an unacceptable limitation of the ‘full truth’ that governments are bound to disclose and that truth commissions are charged with rendering.

The legitimacy of a decision – either to name names or to withhold them – depends on whether prosecutions and trials are available after the truth commission issues its report. If the possibility of trials is open; it is perhaps a good idea to allow the courts to rule on matters of personal criminal liability after a fair trial takes place – a fair trial necessitating the withholding of names in the truth commission report. If, on the other hand, the report is likely to be the last opportunity to air these matters, an honest deference to truth suggests the need to disclose reliable information about the behaviour of certain individuals because they can hide behind the impunity given to them by amnesties or pardons. Even in that case, however, some measure of due process is necessary at the very least, the truth commission is required to give them a chance to rebut the incriminating information. If names are going to be named it is also important

without naming names. After all, the Commission was not asked to write an academic report on El Salvador, it was asked to describe exceptionally important events of violence and to recommend measures to prevent the repetition of such acts. This task cannot be performed in the abstract, suppressing...information...where there is reliable testimony available, especially when the persons identified occupy senior positions and perform official functions directly related to violations or the cover up of violations. Not to name names would be to reinforce the very impunity to which the parties instructed the Commission to put an end.

⁸⁰J Zalaquett, ‘Confronting Human Rights Violations Committed by Former Governments: Principles Applicable and Political Constraints’ in N Kreitz (ed), *Transitional Justice* (Vol 1, United States Institute of Peace, Washington DC 1995).

that the truth commission deal honestly and impartially with the information and be perceived by the public as having done so.

In those countries where there have been criminal prosecutions and truth commissions in which perpetrators have been named, the removal of alleged perpetrators from public office has usually followed. Exposing the nature and extent of human rights violations frequently reveals a systematic and institutional pattern of gross human rights violations. That undoubtedly assist in the identification and dismantling of those institutions and that might well have the effect of deterring similar occurrences in the future. There are instances however where criminal prosecutions and truth commissions can have different effects in terms of delivering accountability. Indeed injustices can be committed under the guise of accountability. For example, 'lustration' laws that followed after criminal prosecutions or truth commissions have become a controversial feature of many attempts in Eastern Europe to reckon with the legacy of human rights abuse by the old communist regimes. To the extent that these laws are narrowly drawn to administer the secret files of these states' extensive domestic intelligence services, they can serve a useful purpose in a democracy. The public is entitled to make informed decisions about elections and public policy alternatives, and to do this, it must exercise its right to know the content of these files. Unfortunately, many of the lustration laws have gone far beyond these valid purposes and have ended up banning persons named in secret police lists from a variety of positions in public life, from elected office, and from such professions as university teaching and journalism. This kind of disqualification is tantamount to a penal sanction, even if it implies lesser severity than a prison term. Such

a process should not be applied under any circumstances without due process of law and fair trial.

Hayner laments that the most crucial drawback of Truth Commissions is that they so often fail on their own terms, i.e. they fail to achieve even their own chastened aims. They not only fail to do justice, as their proponents readily concede, but also fail to explore key features of historical truth. The reports issued by such commissions are chock full of hundreds of pages of gruesome facts about what was done to whom, where and in what horrendous fashion. But the reports fail to address other factual questions crucial to refuting the perpetrators and their justification of their acts. Indeed, this becomes problematic and pointless to some extent when dealing with countries like Zimbabwe where civil society organisations and citizens at large know who did what to whom and when. A number of facts are particularly conspicuous in their absence from reports like *Nunca Mas*. However, this is a contentious which can be addressed in the mandates of future truth commissions.

2.7 Conclusion

This chapter has discussed the theoretical underpinnings of the discourse of transitional justice in a bid to ascertain the meaning and effect of undertaking prosecutorial or amnesty based forms of justice. The section gives and in the same light exposes the myths that surround the whole discourse of justice in transition with regards to prosecutions and truth commissions. It may well be that the use of prosecutions and truth commissions could give rise to public confusion as to the different goals of these institutions.⁸¹ As the Office of the United Nations High Commissioner for Human Rights

⁸¹ Office of the United Nations High Commissioner for Human Rights, Rule - of - Law Tools for Post – Conflict States: Prosecution Initiatives, United Nations (New York and Geneva 2006) at 10.

notes, this may cause rivalry between those supporting each process. *‘These rivalries in turn, may lead to people involved in various transitional justice efforts to draw unhelpful and overly simplistic conclusions (e.g., truth commissions promote and prioritise forgiveness while trials are essentially divisive).’*⁸² It seeks to add to the debate on the support for truth commissions as a way of instituting restorative justice as opposed to the highly adversarial and legalistic retributive justice method in times of transition. This chapter’s strategic importance in this thesis is to give a universal background to the debate on truth commissions and prosecutions. The discussion is aimed at easing the understanding of transitional justice processes and putting into context Zimbabwe’s situation. Thus any reference to addressing Zimbabwe’s dilemma using a truth commission or prosecutions can be interpreted at some level using the analysis in this chapter. The next chapter discusses and outlines policies that have granted immunity and pardons to human rights violators in Zimbabwe. This seeks to put the present debate in this thesis about finding a lasting solution to Zimbabwe’s justice and accountability problems into context.

⁸² Ibid at 10.

Chapter 3 The culture of impunity in Zimbabwe

3 Introduction

Zimbabwe is a country that has been engulfed by a culture of violence and impunity since pre- colonial times. This phenomenon can be traced to the historical tribal wars during the pre - colonial era. The violence was to be further evidenced in the arrival of the colonial settlers who unleashed violence on the indigenous populations in Zimbabwe up to 1980 when the country gained independence. Moreover, violence was predominant during the war of liberation amongst the black liberation fighters themselves. This has not been well documented. Well - documented evidence is abound for the atrocities in Matabeleland in the 1980s, the violent invasions of farms starting from the year 2000, and in the various elections held in Zimbabwe. Most recently in 2005, the Government of Zimbabwe was involved in serious human rights violations during the controversial clearing up of slums exercise in 2005. Impunity by failing to hold perpetrators accountable has largely prevailed in most of the situations that have been mentioned above.

This chapter discusses this culture of impunity in Zimbabwe. It outlines the long and reprehensible history of impunity abetted by a political culture of blanket amnesties and pardons towards past human rights violations. The aim of this chapter is to juxtapose Zimbabwe's history and the different components of transitional justice discussed in the previous chapter. This should lead to a situation whereby as stated in the first chapter, the theory of transitional justice can be tested on a particular case study, Zimbabwe in this instance. This is in an attempt to ascertain whether the ideas of transitional justice can be implemented in real life situations. A discussion on Zimbabwe's past in this chapter

should be able to draw from the previous chapter in finding out whether the country should take the way of truth commissions or trials or other transitional justice mechanisms.

In addition, this chapter seeks to identify the problem in the country's search for transitional justice. The questions that will be dealt with in this chapter relate to issues of whether the amnesties passed by the Smith and Mugabe governments can be rescinded. Furthermore, there is need to address whether only the sanction of criminal prosecutions can be used to hold accountable those who have committed human rights violations in Zimbabwe. If the answer is in the positive, then another question will be on whether to prosecute those who planned the human rights violations or the so called trigger pullers, who were at the forefront and committed the actual crimes.⁸³ Moreover, if those who planned or carried out the human rights violations were to be prosecuted, would the country be secure and peaceful? Other questions that could prove daunting will be those of compensation and reparations considering that Zimbabwe is a country going through times of economic hardship, with virtually no money to spare even for essentials such as food, health and energy.

3.1 Tracing Policies of Impunity in Zimbabwe

The Lancaster House Constitution that brought independence to Zimbabwe was fraught with agreements that abetted the culture of impunity over human rights violations that had occurred since the colonial days. Silence about the past was supposed to heal the nation and assist the politics of reconciliation that was being advocated for by the

⁸³ R Alfonsin, 'Never Again' in Argentina', in NJ Kritz, *Transitional Justice* (2nd edition, Washington DC. United States Institute of Peace, 1995) 2:379.

Mugabe government at independence. Thus on independence day in 1980, Mugabe persuasively told the nation that:

Henceforth you and I must strive to adapt ourselves intellectually and spiritually to the reality of our political change and relate to each other as brothers bound one to the other by a bond of comradeship. If yesterday I fought you as an enemy, today you have become a friend and ally with the same national interests, loyalty, rights and duties as myself. If yesterday you hated me, today you cannot avoid the love that binds you to me and me to you. Is it not folly, therefore, that in these circumstances anybody should seek to revive the wounds and grievances of the past? The wrongs of the past must now stand forgiven and forgotten.⁸⁴

This strategy by Mugabe drew a veil over the human rights violations of the Rhodesian secret service, army and police. It was at the same time, appreciated by the leaders of the liberation movements because it meant also closing the books on their violence against civilians in Rhodesia and against their rivals in the training camps in Mozambique and Zambia.⁸⁵ Indeed, nowadays this policy looks problematic in terms of condoning impunity. However, this thesis argues that during the 1980s using the peace vs. justice paradigm, this would have been a welcome development in a country emerging from a war. However, it is contentious as to who would welcome such a development – the whites that had inflicted harm on the black population or the black majority population because of their quest for peace.

In the then Rhodesia and Zimbabwe at present, amnesia had its institutional expression in legal immunity and amnesty by the state. In addition, human rights defenders and the independent media have been prevented from documenting the

⁸⁴ “Zimbabwe: A Final Priceless Reward”, *Newsweek*, 28 April 1980, in ‘Foreword’, B Raftopolous and T Savage (eds), *Zimbabwe Injustice and Political Reconciliation* (Cape Town, Institute for Justice and Reconciliation, 2004) supra note 19.

⁸⁵ See NJ Kriger, *Zimbabwe Guerrilla War: Peasant Voices*, (Cambridge, Cambridge University Press, 1992) at 156 and H Luc “Why Reconciliation Failed in Zimbabwe” <http://www.idea.int/publications/reconciliation> (Last accessed 3 June 2006).

activities of perpetrators. The government has also thwarted the prosecution of perpetrators by political manipulation of the police, and by undermining the independence of the judiciary⁸⁶, either through apparent manipulation or by the passage of repressive legislation.

In any case granting amnesty to the Rhodesian police and military personnel for human rights violations was a tradition long before the liberation war was at its height although it abetted impunity. The Indemnity and Compensation Act of 1975 sanctioned this tradition. The legislation, sought to indemnify police and soldiers in advance for any human rights violations they perpetrated. The key provision of this Act was that ‘if any member of the security forces, defined as the army, the police, and the CIO, or if any civil servant or any minister of government, acting in good faith, committed a breach of the law and became liable criminally or civilly, no court of law could hold them accountable.’

As part of the Lancaster House agreement of 1979 that led to Zimbabwe's independence the Amnesty Ordinance (3) of 1979 and the Amnesty (General Pardon) Ordinance (12) of 1980 were legislated to grant an amnesty to all of those who had participated in the struggle for African self-determination or the defence of then-Rhodesia for any human rights violation they had committed such as killings, rape, assault or torture.

3.2 The Matabeleland Massacres

⁸⁶ This can be established by the spate of resignations by senior members of the bench in Zimbabwe and statements by political figures that the Government was in no position to protect judges from the wrath of war veterans if they were to pass unfavourable judgements especially in the land cases. It is alleged that being given farms silenced a number of high profile judges. A long-standing problem can also be discerned from the relationship between magistrates and the state where the former are employees of the latter. This certainly compromises the independence of the judiciary.

Starting in the early 1980s, the purported threat of "dissident" ex - guerrilla fighters in the Matabeleland and Midlands provinces led to a counter-insurgency war commonly known as the Gukurahundi⁸⁷ in which several thousands of civilians were killed or "disappeared".⁸⁸ Mugabe accurately presaged the violence in a 1982 speech to parliament. "An eye for an eye and an ear for an ear may not be adequate in our circumstances. We might very well demand two ears for one ear and two eyes for one eye".⁸⁹ Some estimates put the number of deaths at up to 10,000 civilians. Thousands were arbitrarily detained, beaten and often tortured in official operations by the Zimbabwe National Army's Fifth Brigade that was directly 'answerable to Mugabe himself being outside of the normal army command structures'.⁹⁰ Villagers in rural Matabeleland consistently refer to the violence of the 1980s as far worse than that of the liberation war.⁹¹ Most of the perpetrators of other mass killings and "disappearances" can never conclusively be identified. The Chihambakwe Commission was set up by the government to investigate these events. However, the report of this Commission has never been made public. 'Just as much as the Nazi period was portrayed as an accident of German history',⁹² the 1980s atrocities in Zimbabwe have been portrayed as a regrettable and ugly part of its history that should stand forgiven and forgotten. However, as

⁸⁷ 'Gukurahundi' refers to the first rain of summer that washes away the chaff from the previous season. Mugabe gave this name to 5 Brigade at the passing out parade in December 1982. Civilians in Matabeleland see themselves as the rubbish that had to be washed away. See E Shappel p.59.

⁸⁸ "The antagonisms between the two guerrilla armies hardened into hostilities between the two parties, as ZANU PF became convinced that ZAPU was supporting a new dissident war in order to improve its standing in the country. ZAPU in turn has expressed its belief that ZANU PF used the pretext of the disturbances as a long awaited opportunity to crush ZAPU once and for all." See Catholic Commission for Justice and Peace and the Legal Resources Foundation (CCJP and LRF). *Breaking the Silence, Building True Peace: A Report on the Disturbances in Matabeleland and the Midlands 1980 – 1988*. LRF and CCJP, Harare, 1997

⁸⁹ Quoted by M Meredith, *Our Votes, Our Guns* (New York: Basic books, 2002) 65.

⁹⁰ E Sharri supra note 20 at 45.

⁹¹ Ibid at 46.

⁹² H Adam, *Divided Memories*. Telos, No// 18, Winter 2000, at 90.

Summerfield notes ‘... the denial to acknowledge the dead victims as if they never existed ... must be challenged if survivors are to make sense of their losses and the social fabric is to mend.’⁹³ In 1999 human rights groups initiated court action to compel the government to release the report, however, the government claimed that the report was missing and could not be located.

The culture of impunity originally conceived to deal with the human rights violations of the liberation war period, also became a driving force in the independence era. A Clemency Order of 1998 pardoned all violations committed by all parties between 1982 and the end of 1987 – thus obscuring the Matabeleland atrocities.

Clemency Order (1) of 1995, officially excused the politically-motivated beatings, burning of homes and intimidation perpetrated by supporters of ZANU-PF during the 1995 elections, by granting amnesty to those liable to criminal prosecution for or convicted of these crimes. This set a further precedent for yet another presidential pardon for political violence, Clemency Order (1) of 2000, which was declared after the violent June 2000 parliamentary elections. Once again, those involved in human rights violations - such as kidnapping and torture, but excluding murder, rape and fraud could not be held accountable for criminal or civil claims through the justice system. Contentious questions arise from these situations. Firstly the impunity gap arising from the pardons will need to be addressed somehow. Secondly there is need to establish whether the pardons were in fact legally binding. Questions can be asked as well with regard to whether victims and survivors of pardoned human rights violations can still have recourse to judicial or other mechanisms of redress.

⁹³ D Summerfield ‘Raising the Dead: War, Reparation, and the Politics of Memory’, (1995) *British Medical Journal*, 311 at 495 – 497.

Today, human rights violations occur and the majority of perpetrators mainly aligned to ZANU PF have not been punished and are not likely to be prosecuted or held accountable for their crimes. Names like Detective Constable Henry Dowa.⁹⁴, Joseph Mwale, a CIO operative and many other state agents come to mind as people who continue to commit torture and other serious human rights violations in the name of the state with shocking impunity. Numerous cases of arbitrary arrests, displacement, extra judicial killings, torture and other serious human rights violations have been documented but the perpetrators continue to enjoy de facto impunity.

A highly contentious issue has been the effects and causes of Operation Murambatsvina⁹⁵ wherein the Government demolished slums and other living quarters for people countrywide. The operation conducted by the army, police and other Government agents caused severe human rights violations that it has received international condemnation. According to the United Nations Special Envoy Report⁹⁶ an estimated 700, 000 people in the cities lost 'either their homes, their sources of livelihood or both', while a further 2.4 million people were affected indirectly.

3.3 Applying transitional justice to the Zimbabwe situation – Challenges

To narrow the analysis on whether rescinding past amnesties mentioned in the last section would not be acting legally retroactive, Illiff proposes an analysis that focuses on post independence amnesties. His argument is that the amnesties were passed in a legal

⁹⁴ Detective Inspector Henry Dowa who is based at the Law and Order Section of the Criminal Investigation Department (CID) of the ZRP, Harare Central Police Station has numerous serious allegations of torture linked to him.

⁹⁵ See two different reports by the Zimbabwe Human Rights NGO Forum, 'Order Out of Chaos or Chaos out of Order? A Preliminary Report on Operation Murambatsvina', June 2005 and 'The Aftermath of a Disastrous Venture: A Follow Up Report on Operation Murambatsvina', August 2005.

⁹⁶ See United Nations' Report of the Fact Finding Mission to Zimbabwe to assess the scope and Implementation of Operation Murambatsvina by the United Nations Special Envoy on Human Settlements Issues on Zimbabwe Mrs Anna Kajumulo Tibaijuka, July 2005.

environment that proscribed the same crimes that have been amnestied by the Government.⁹⁷ Whilst this thesis is inclined to follow this line of thinking, it argues for a review of what happened in the early and late 1980s in Latin America before any suggestions to rescind amnesties passed in Zimbabwe. Instructively, in 1985 the Inter - American Commission endorsed amnesty laws provided democratic institutions passed them and some effort was made to discover the truth about human rights abuse.⁹⁸ However judging from what has happened in Zimbabwe, efforts to find the truth, acknowledgement or some form of compensation have been slow and thwarted by the Government institutions such that it becomes difficult to equate the Latin American experiences with that of Zimbabwe on the issue of setting aside the amnesties.

Furthermore, as one school of thought argues, granting pardons and amnesties is not a favourable way to deal with accountability issues. The arguments posited against amnesty are that it fails to deter recidivism; it ignores the obligation to prosecute heinous crimes well established in international law and that it fails to give victims and survivors justice, in terms of information, remedies and fair trials.⁹⁹

Faced with such stern criticism against any form of amnesty there would be need to interrogate the situations that led to the granting of amnesties and pardons. The main idea would be to discern if the amnesties could stand the test that was subjected to the South African amnesty provisions. In Zimbabwe, most of the contested issues centre on the violence and human rights violations that were attendant on the politically laden questions of the Lancaster House Constitution, the Matabeleland “dissident” massacres,

⁹⁷ See Iliff *supra* note 27 at 105.

⁹⁸ Annual Report of the Inter American Commission on Human Rights, 1985 – 1986, 192 - 205.

⁹⁹ See R Slye, ‘Justice and Amnesty’, in C Villa – Vicencio and W Verwoerd (eds), *Looking Back Reaching Forward* (University of Cape Town Press London 2000) at 176 -7.

the various general elections held after every five years, the 2002 Presidential elections, the land redistribution exercise and the 2005 Operation Murambatsvina.

The above discussion inevitably leads to the problematic area that was dealt with in the South African transition. The problem was of qualifying whether the amnesties for the human rights violations were committed for political purposes or were purely criminal acts. South Africa had a condition that amnesty had to be associated with a political objective. The South African amnesty defines an act as political, and thus eligible for amnesty, if it is committed under the orders of, or in furtherance of the goals of a well - established political organisation.¹⁰⁰ This perhaps can be well explained by Gray who argues that,

‘atrocities committed by and under abusive regimes reflect an operating set of socially generated and publicly circulated beliefs that, in combination with institutional practices and government policies form a public face of law that at least does not forbid violence against a victim group, and often actively encourages it.’¹⁰¹

Worse still, as David Gray argues, institutionalised atrocities as those that have occurred in Zimbabwe in the last four decades could not have happened ‘without the support and participation of ‘active supporters, passive supporters, opportunistic profiteers, and those who indulge in naïve denial’.¹⁰² If one were to follow the South African criterion then the need to question whether various acts of gross human rights violations committed in Zimbabwe were politically motivated would arise. For instance, the question of the youth militia that committed serious human rights violations on the public during the 2000 General Elections and 2002 Presidential Elections are clear cases

¹⁰⁰ R Slye ‘Justice and Amnesty’ in Looking Back Reaching Forward supra note 99 at 179.

¹⁰¹ See DC Gray supra note 62.

¹⁰² DC Gray supra note 62 at 14, quotes Frau Maria, mother of the repentant soldier in Simon Wiesenthal’s famous essay The Sunflower, 84-94 (1994) as the paradigmatic example for this class. (Wiesenthal’s essay is on file with the author)

in point. Another challenge would be to establish whether the 1998 land invasions of white owned farms were politically motivated or were criminal acts.¹⁰³ Various offences by the police, army and other state security personnel can be put to the same test.

3.4 Conclusion

This chapter has discussed the different epochs of Zimbabwe's troubled history of human rights violations. Considerations that have continued to run in debates about what to do in Zimbabwe in terms of transitional justice border on two issues.¹⁰⁴ The first one concerns the kind of resistance that might come either from those deposed from power or from victims seeking justice. There are clear dangers of the military usurping power. Zimbabwe's military chiefs have long been overtly aligned to ZANU-PF. This was never more apparent than in January 2002 when they declared they would not salute a president lacking 'liberation credentials'.¹⁰⁵ Already there are clear signs of the army encroaching on social space through various appointments by President Mugabe.¹⁰⁶ The ultimate question therefore would be "what is more just – to consolidate the peace of a country where human rights are guaranteed today or to seek retroactive justice that could compromise

¹⁰³ The land question in Zimbabwe forms the background to most of the troubles that had been dormant since independence up until 2000 when the land redistribution exercise started. There is no doubt that the dispossession of land in the 1890s through to the 1950s by the colonialists caused anguish, and serious economic and social hardships that can still be traced to today. This discussion whilst seeming to divert from the crux of this paper, seeks to shed light on some of the causes of violence in Zimbabwe and puts into perspective why it would be difficult to deal with some politically motivated cases of violence.

¹⁰⁴ TW Pogge, 'Transition to Democracy' (2000) 12:1 Peace Review 23, at 24.

¹⁰⁵ Crisis Group interview, Martin Rupiya, October 2005. See also his analysis, 'Contextualising the military in Zimbabwe between 1999 and 2004 and Beyond', in B Raftopoulos and T Savage *supra* note 1 at 79-98.

¹⁰⁶ The security services now overshadow the cabinet as the country's primary policy-making body, with the National Security Council (NSC), which Mugabe chairs, effectively managing macroeconomic policy. At lower levels, the Joint Operations Command (JOC) chaired by Security Minister Didymus Mutasa and comprising the top commanders of the army, air force, police, intelligence services and prisons supports the NSC. Service chiefs have openly called for open warfare if ever an opposition party were to rule Zimbabwe.

that peace”.¹⁰⁷ On the other hand, victims might cause possible resistance to any policies that seem to be a capitulation to the outgoing regime.¹⁰⁸ They may be strongly opposed to leaving prior abuses unpunished, and their opposition may threaten to destabilise the new democratic order. This has been already noted wherein after an MDC meeting was held in London in May 2006 and suggestions to the effect of granting Mugabe amnesty were suggested by the MDC leadership.¹⁰⁹ Scores of commentaries and outcries were made all over Zimbabwe and in the diaspora about the suggested move. This shows that some sections of the Zimbabwean population still wants some to see some kind of accountability on the part of perpetrators.

The second concern borders on the residual effects of either a policy of retribution or amnesty for past human rights violations if ever they will be taken in Zimbabwe. By leaving the issues unresolved, this might send a message to future dictators that any future abuse of power will not face serious punishment. Dealing ruthlessly with the former dictators might force them to cling on to power using any means necessary thus derailing the intended process of reform.

Taking note of the discussions in this chapter the following one seeks to give recommendations to the problems identified. Numerous problems have been identified. For example, whether rescinding past amnesties would not be acting illegally. Problems

¹⁰⁷ These words of President Sanguinetti of Uruguay, For a detailed analysis of the level of violence throughout the country perpetrated by ZANU PF youth militia trained in national youth service camps established by the Government see Solidarity Peace Trust, ‘Shaping Youths in a Truly Zimbabwean Manner’ <http://www.kubatana.net/docs/chiyoyouth_militia_030905_pix_sml.pdf> quoted in Wechsler, New Yorker, April 3, 1989 at 84.

¹⁰⁸ Continued calls for justice from victims of different epochs of Zimbabwe’s history have been heard and it would be wishful thinking that these calls will go away after the transition.

¹⁰⁹ See commentaries of a meeting that was held in London in May 2006 to discuss the issue of having Mugabe held accountable for past human rights violations on <http://www.newzimbabwe.com/pages/senate199.142233.html> (last visited 31 July 2006).

also abound in balancing the needs of the outgoing regime to be left alone and aggrieved victims needs for accountability and truth. In cases where human rights violations have been conducted in secret places, it becomes difficult to impute responsibility. In human rights violations such as that attendant on Operation Murambatsvina in Zimbabwe, questions abound as to who should take the blame. Moreover, if there will be any compensation, who should be regarded as a victim and what compensation they will get.

Chapter 4 Recommendations and conclusion

This chapter endeavours to put forward a proposition for countries wanting to deal with past human rights violations. It discusses Zimbabwe in more detail in the conclusion. It will be mentioned from the outset that these recommendations are not meant to be the panacea for all countries that have accountability problems in terms of human rights violations. Different situations require dissimilar solutions.

4.1.1 Criminal justice

This thesis notes without any euphemism that more often the reference to the pursuit of justice for gross human rights violations is mainly related to criminal justice. However, in dealing with past human rights violations states in transition cannot, due to practical realities discussed in chapter 2 prosecute all or even most of those implicated in human rights violations under an abusive regime. This brings up the issue of selectivity that is laden with its own set of problems for transitional justice programmes. Top among these is the reality that most of those involved in past wrongs will not be held responsible.¹¹⁰ Gray notes that,

‘this failure to assign responsibility carries with it the morally disturbing implication that those not punished are not culpable or guilty. Failure to prosecute also represent the possibility that the truth of what happened in the past will never be publicly established, allowing abusers to carry on without consequence.’¹¹¹

The process of criminal justice must therefore be followed to the book in terms of the principles of due process and fair trial guarantees¹¹² for it to assume some legitimacy

¹¹⁰ See DeGreiff supra note 40 at 94- 97.

¹¹¹ DC Gray supra note 63 at 86.

¹¹² These include such aspects as the right to be informed promptly in a language that one understands of the nature and cause of the charge against him; the right to the presumption of innocence until proven guilty, the right of one to be tried in a language that one understands or, or if that is not practicable, to have the proceedings interpreted in that language; and the right to have legal counsel assigned to one by the state

domestically and internationally. Mendez notes that in pursuing criminal prosecutions there must be considerations for traditional forms of justice, such as the Gacaca tribunals in Rwanda.¹¹³ Again, these forms if ever they were to be undertaken in Zimbabwe there would be need to meet the conditions of due process and fair trial guarantees noted above. Thus in any implementation of these efforts, there must be proof that the processes do not impinge on fundamental principles of international human rights law. Thus, for example, traditional methods of reparation through the duty to surrender a female relative as payment for a crime would be unacceptable no matter how steeped in tradition they might be.¹¹⁴

4.1.2 Memorialisation of the colonial past

In dealing with the colonial past, it would be advisable to engage the collective memorialisation of human rights violations in Zimbabwe. This process could be separated into historical and contemporary categories as proposed by Heribert Adam. In defining the historical injustices, Adam notes that this comprises cases where blameless groups have been victims of state aggression a long time ago. Therefore, ‘punishment of guilty perpetrators is no longer possible because maybe, most of the perpetrators have died, direct survivors are numbered and that this would create new injustices and civil strife’.¹¹⁵ Adam further notes that, contemporary abuses call both for justice through legal recourse and for developing new institutions that facilitate reconciliation or perhaps, more realistically, peaceful coexistence. In this case, Truth Commissions, along with

and at the state’s expense if substitute justice would otherwise result, and to be informed promptly of this right.

¹¹³ J Mendez ‘Transitional Justice in Historical Perspective’ Transitional Justice and Human Security Somerset West Conference (Cape Town South Africa 28 March 2005) Inaugural Address at 6.

¹¹⁴ The tradition of paying for crimes using the girl child was and still occurs in a number of countries in Africa.

¹¹⁵ H Adam *supra* note 91 at 205.

trials of alleged perpetrators can vindicate victims, contribute toward curbing impunity and upholding the rule of law.

In deciding what period of history to be considered in any future, the Symposium Declaration recommended for a review of periods of violence most pertinent to ‘living memory’. 1959 was identified as the most plausible year as this year signified the enhancement of state repression by the colonialists and the banning of African political movements.¹¹⁶ This thesis finds this suggestion contentious because there is no explanation as to whose living memory the Symposium Declaration is referring to. Different sections of the Zimbabwean population have different perceptions as to what dates are most important to them. Thus there is need for wide consultation with all stakeholders before a set date is agreed upon.

Furthermore, Iliff observes that Zimbabwean history textbooks make no mention of guerrilla abuses of the civilian population during the liberation struggle or of the Gukurahundi abuses.¹¹⁷ In such a climate, the work of a “historical clarification commission” as in Guatemala would alleviate the problem of the dearth of information with regards to these past situations in Zimbabwe. Moreover, the need to pursue justice through prosecutions for crimes that have outlived their prescription periods, where victims have passed away, or have forgotten exact details is openly problematic. Thus initiatives to further accountability through truth telling should be encouraged in this instance.

¹¹⁶ Executive Summary of the Symposium Declaration 31

¹¹⁷ See Iliff *supra* note 27 at 123. The confusion and battle to know the truth about the murders of prominent Zimbabweans on the eve of independence and even the 1980s massacres still rages in Zimbabwe. Former Defence Minister and founding member of ZANU PF revealed in a Zimbabwe newspaper that he was writing a book naming all these disputed events but would only be published after his death obviously for fear of retribution. See G Gube ‘Nkala to name Tongo, Chitepo murderers’ *The Standard* at <http://www.thezimbabwestandard.com/viewinfo.cfm?linkid=11&id=43928&siteid=1?> (Last visited 1 August 2006).

4.1.3 Reparations

Reparations to victims of human rights are going to be an essential element of any accountability and transitional measures in Zimbabwe. However, this thesis notes that it would be retrogressive for any process that would offer monetary compensation and then suppress all possibilities of justice, truth recovery and institutional reform to be used in any situation. One important point to note will be the need to distinguish between development rights and reparation issues. By keeping the two initiatives separate, in an increasingly poor country like Zimbabwe, there can be avoidance of creating privileges and resentment towards victims. For example, it is clear that Zimbabwe's economy has been in a downward spiral and that any efforts to give out money will cause further damage.¹¹⁸ Thus the kind of resentment that came with the awarding of war veterans gratuities by the Government in 1997 could be made worse this time.

4.1.4 Reform of abusive state security institutions

The reform of abusive public institutions through lustration is one important step in transitional justice.¹¹⁹ Any new democratic dispensation requires that institutions be free from individuals who abused the power of those institutions in the past. Vetting public institutions and excluding abusive individuals serves two purposes: first, it helps to generate civic trust between citizens and their institutions; and second, it increases the State's effectiveness in meeting the challenge of fighting crime and redressing wrongs by allowing it to count on the cooperation of its citizens.

¹¹⁸ For statistics and analysis of the economic situation in Zimbabwe, see <http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/AFRICAEXT/ZIMBABWEEXTN>. (last visited 18 August 2006).

¹¹⁹ See generally on the reform of the police in Northern Ireland, M O'Rawe, 'Transitional Policing Arrangements in Northern Ireland: The Can't and the Won't of the Change Dialectic', (2003) 26 Fordham International Law Journal, 1015 - 1073

4.1.5 Reconciliation

Reconciliation should form the basis of any transitional justice project. If at all people cannot forgive each other as individuals at least they should be able to coexist. However, it should not be allowed to be used as an excuse for impunity. Hamber and Wilson argue against the notion of national reconciliation that, ‘nations do not have collective psyches which can be healed, nor do whole nations suffer post traumatic stress disorder and to assert otherwise is to psychologise an abstract entity which exists primarily in the minds of nation building politicians’.¹²⁰ However, this thesis in concurrence with Hamber and Wilson observes that trust cannot be put in the over stated cathartic effects of truth commissions as this should be largely left to individuals to decide what they want to do with their grief.

Having identified the problems associated with undertaking criminal prosecutions in post transition states, it is proper that Zimbabwe’s situation be dealt with here. The massive numbers of crimes and perpetrators cannot all be addressed judicially.¹²¹ The amount of time, human resources, finance and other resources all militate against such a move. Without any sense of pessimism this writer argues that the need to bring everyone who has committed a human rights offence will certainly arouse so much discontent and distrust from the security services that the whole process might be derailed.

4.2 Responding to the ‘Gukurahundi’

From the onset this thesis notes that an outright policy of criminal prosecutions for the Gukurahundi massacres would not go very far in terms of achieving accountability. Some

¹²⁰ B Hamber and R Wilson “Symbolic Closure Through Memory, Reparation, and Revenge in Post conflict Societies.” 1 Journal of Human Rights (2002) 35 at 36.

¹²¹ See ‘An Analysis of the Zimbabwe Human Rights NGO Forum Legal Cases 1998 – 2006’ Zimbabwe Human Rights NGO Forum June 2006, copy on file with author. The report outlines close to 15 000 cases of human rights violations that have been reported to the organisation since 1998.

kind of conditional amnesty based on the South African model would help alleviate the burden brought about by the nearly impossible task of prosecuting all the perpetrators alleged to have been involved in the massacres. Whilst, bitterness over the lack of any recognition of the Gukurahundi abuses still festers anger and frustration in Matabeleland, this thesis supports Villa – Vicencio’s view that the acknowledgement of past wrongs and a sincere apology, plus the opportunity for victims to relate the stories of their suffering, will be important alternatives to normative forms of retribution.¹²²

What is important is that the citizenry accepts truth telling as a form of justice on its own and not an alternative to justice. Victims and survivors of the Gukurahundi will need to be convinced that ‘truth telling will be an effective means of covering a larger universe of cases than trials, thereby limiting the ‘impunity gap’ that a prosecutions policy will inevitably leave’.¹²³ This effort will help to discover the hidden facts about the Gukurahundi. Priscilla Hayner in this regard advises that these efforts should be ‘comprehensive, impartial, and neutral to political justifications for committing abuses’. Mendez then offers a benchmark that would help any future efforts at seeking the truth about past human rights violations in Zimbabwe. He implores that for truth telling process to be judged successful there should be more knowledge than was originally there otherwise anything else short of that would be the mark of a failed attempt.

Furthermore, a good lustration policy would assist the victims and survivors of the Gukurahundi to deal with their fears and anxieties. Victims and survivors having been made aware that it would be very difficult to get criminal prosecution and individual

¹²² See generally C Villa - Vicencio, ‘Reconciliation’ in C Villa – Vicencio and E Doxtader (eds), *Pieces of the Puzzle: Keywords on Reconciliation and Transitional Justice* (Institute for Justice and Reconciliation Cape Town 2004).

¹²³ J Mendez, ‘Transitional Justice in Historical Perspective’ Transitional Justice and Human Security Somerset West Conference, Inaugural Address (Cape Town South Africa 28 March 2005) at 9.

monetary reparations, they would be relieved to know that those who tortured them have been removed from positions of authority. Such a lustration policy should be carried out with reasonable publicity, with lists of names in the press. Lustration would serve to replace the need for dozens of trials of middle – ranking officials. Eppel proposes that criminal justice could be directed at those most responsible for the crimes in Matabeleland. However, this writer suggests that rather than prosecute them it would be helpful for the most responsible to be fined substantively and contribute to a Victims or Survivors Fund which would assist in paying for the reparations.

Amounts and types of reparations should be such that they help to restore civic trust between citizens and the State and between citizens themselves, as well as uphold the dignity of victims. Reparations should be designed to signify that the victims' status as citizens is now fully restored and recognized. It is also advisable to include non - monetary reparations in any program, such as official apologies, memory preservation initiatives, and the promotion of cultural manifestations of memory. Eppel has suggested the unearthing of mass graves of which some work has already been started by Amani Trust, a Zimbabwean NGO. A call has also been made for a memorial at Bhalagwe Camp amongst other sites to commemorate those who were tortured and died in the Matabeleland Massacres.¹²⁴

4.3 Dealing with human rights violations since 2000

Pre - transition or past transitional Zimbabwe remains in a precarious position unless the past is dealt with objectivity. The current ruling ZANU PF party and other opposition parties but mainly the two factions of the MDC pose the greatest danger to the new transition. Indeed there is a real possibility that ZANU PF could be reflected by

¹²⁴ E Sharri supra note 19.

democratically or otherwise raising the question of recurrence of the old system. Rather in a more pessimistic tone, Iliff highlights the danger of lenient penalties arguing that the opposition may follow in the footsteps of ZANU PF abuses if they do not believe they will be made to pay a high cost for committing human rights violations.

Since the 1998 Food Riots information on the human rights situation is abundantly and publicly available. Thus as Illif observes ‘the disclosure of a perpetrator becomes proportionately less valuable to the extent that the perpetrators offences are already known by the majority of society locally and internationally’.¹²⁵

Human rights advocates continue to affirm that Mugabe can be indicted for gross human rights violations under international law, impliedly at the International Criminal Court.¹²⁶ However, the temporal jurisdiction of the ICC is limited to crimes committed after the entry into force of the Rome Statute (July 1 2002), some time after the commission of most grave crimes documented in Zimbabwe.¹²⁷ Under the ICC Statute Article 12 (3) a state, which is not yet a party to the Statute ‘may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question’. This implies that a post Mugabe government could immediately accept the jurisdiction of the ICC and so sanction full investigation and indictment of Mugabe for human rights crimes committed under his rule since July 2002.¹²⁸ However,

¹²⁵ See Iliff *supra* note 27 at 6.

¹²⁶ MS Ellis, *Justice and Accountability*, International Bar Association, 10 December 2005. (copy on file with author).

¹²⁷ See Jalloh and Marong *supra* note 34 at 73.

¹²⁸ Whilst the Zimbabwean Government could be held liable for human rights violations committed before a number of international treaties were acceded to, it could prove difficult to hold the Government accountable using the same treaties or ones that have not yet been ratified such as the Convention Against Torture which would cover numerous violations committed by the Zimbabwe Government. See article 28 of the Vienna Convention on the Law of Treaties:

though the human rights violations in Zimbabwe have received international criticism, it will be immensely difficult to have international prosecutions.¹²⁹ Without wanting to trivialise the human rights violations that have occurred in Zimbabwe, the crimes under consideration, though severe, are substantially less horrific and pervasive than the outright slaughter and genocide of Rwanda, and are therefore less likely to provoke the international community to institute an ad-hoc tribunal as in Rwanda. The international community has had disagreements on whether to classify the conflict in Darfur as genocide.¹³⁰ Indeed what chance does Zimbabwe have where only a handful compared to Rwanda or Darfur has been killed? The bulk of the crimes that have been committed in Zimbabwe were before 1 July 2002. This severely limits the hope for prosecuting those most responsible and militates against prosecuting the crimes which were committed before this day.

During Alfonsín's time, Argentina proposed three categories to choose those who to prosecute. The categories were divided among those who gave the orders to violate human rights, those who carried out the orders and those who engaged in human rights violations beyond the actions they were ordered to take.¹³¹ Illiff adds that the probability of conviction for the offender should be added as well. Illiff argues that as a result of this assessment it may be decided that Mugabe should stand trial as he may be seen by many

Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.
See also United Nations Committee Against Torture, Communication against Argentina, Inadmissible Ratione Temporis, (1990) 11 Human Rights Quarterly Law Journal 134, 137. However, this writer could argue that Zimbabwe is party to the African Charter which allows no derogations and proscribes torture and other serious human rights violations, thus rendering the above excuse null and void.

¹²⁹ See generally Illiff supra note 27.

¹³⁰ See for example, the clash between views by the United States of America government that the conflict in Darfur does not amount to a genocide and the views of other countries such as China which have argued otherwise on <http://www.globalpolicy.org/security/issues/sudan/2005/013/semantics.htm-10k>. (last accessed 1 September 2006).

¹³¹ See SP Huntington supra note 2 at 219.

as the greatest contributor to the undermining of the social order. However, this thesis argues that a prosecutorial case against Mugabe as for the violence perpetrated by groups affiliated with ZANU PF may be difficult to sustain and the case might become highly politicised.¹³² Taking Mugabe to an international or domestic tribunal might undermine social stability in Zimbabwe. This is because he was one of the drivers and initiators of the liberation struggle in Zimbabwe. Moreover, Mugabe is seen as the architect of the land redistribution exercise in Zimbabwe. It can be tentatively argued that some Zimbabweans and Africans see Mugabe as a bulwark against neo colonialism. Thus any efforts to bring him to account could be taken by his supporters as retribution for his policies against neo colonialism, white supremacy and land repossession. Worse still, taking Mugabe to the International Criminal Court might run the risk of invoking the circus that attended Slobodan Milosevic's case at the ICTY.

With respect to the prosecution of perpetrators of human rights violations, Gray argues that 'given that mass atrocities enjoy state support with the prevailing public face of law, broad criminal prosecutions in transitions would violate the principle of legality with respect to most who might be targeted for prosecution'.¹³³ Gray notes that law enforcement agents have a right to know, beforehand that their acts are punishable under the law. If there is no law, or if the law is too vague and ambiguous, then it is not fair to punish an agent who had no warning that his actions would be punished.¹³⁴ Gray further outlines that, it is an affirmative defence for the actor engaged in the conduct charged to constitute an offence if the act reflects a reasonable interpretation of the prevailing public face of law. Extension of the excuse to agents of pre transitional abuse recognises that

¹³² See CT Call supra note 5 at 105.

¹³³ DC Gray supra note 64 at 22.

¹³⁴ Ibid at 27.

many, if not most, pre - transitional wrongful acts were committed by individuals who, given the nature of the public face of law under the abusive regime, were justified in believing that what they did was right, necessary, or at least not subject to legal punishment.¹³⁵ However, this argument goes contrary to emerging norms in international law. The ICTY has stated that because of the internationally recognised status of the prohibition of torture, ‘torture may not be covered by a statute of limitation’.¹³⁶

While crimes against humanity represent a critical advance in international human rights law, their presence on the international scene does not solve legality concerns in the unique circumstances of abusive states. Gray argues again in favour of law enforcement agents in pre - transition states that just as abusive regimes operate to obscure the demands of natural right, they also hide from domestic view the threats and demands of international law. This has two consequences. First, as heir to abusive regimes, transitional governments have no more moral authority to punish based on international law than natural law. Second, abusers living under an abusive public face of law, because insulated from the body of threats maintained by the international community, are not subject to the fair warning required by legality.¹³⁷

In arguing for the prosecution of leaders, Gray notes that rather than living under an abusive public face of law, high-level leaders have a duty to conform to domestic law and to the core demands of international human rights law.¹³⁸ As opposed to their subjects, leaders are exposed directly to the international community. They may not claim

¹³⁵ Ibid at 35.

¹³⁶ Anto Furundzija case, Judgement of 10 December 1998, IT – 95 – 17/1, paragraph 157.

¹³⁷ DC Gray supra note 64 at 55.

¹³⁸ Vienna Convention of the Law of Treaties, art 26, 27, 1155 United Nations Treaty Series 331, International Covenant on Civil and Political Rights, art 2(2) 999 U.N.T.S. 171.

ignorance of or insulation from threats of punishment posed by prosecutions for crimes against humanity.¹³⁹

The perception of the collective in the human rights violations since 2000 by groups such as the youth militia, ZANU PF supporters, war veterans and other vigilante groups will only foster new cycles of retribution and therefore it is imperative that the individual offenders be prosecuted.¹⁴⁰ These criminal prosecutions would again assist in ensuring a return to the rule of law, reducing the possibility of revenge and a notion that perpetrators can not get away with their past crimes.

This chapter has discussed the myriad problems attendant on Zimbabwe's path to ensure accountability for past human rights violations. In addition, it has given wide-ranging recommendations to these problems. Problems which would be reminiscent of other states that have tried to institute some form of accountability are evident even in Zimbabwe's case. It is always going to be difficult to strike a balance between the opposing interests of victims and alleged perpetrators. Thus whatever form justice is going to take in Zimbabwe, some of the issues discussed in this thesis will have to be taken into consideration. For example, one issue concerns the time frame for a proposed truth commission. How will people agree on the dates to be investigated? How would the victims of the Matabeleland massacres react to suggestions of amnesty for truth to a situation when they know who did what when and how to them? All these questions seem to be prevalent in other situations not necessarily Zimbabwe. They are difficult to

¹³⁹ DC Gray supra note 64 at 56.

¹⁴⁰ For a detailed analysis of the level of violence throughout the country perpetrated by ZANU PF youth militia trained in national youth service camps established by the Government see Solidarity Peace Trust, 'Shaping Youths in a Truly Zimbabwean Manner' <http://www.kubatana.net.docs/chiyu/youth_militia_030905_pix_sml.pdf>

contend with. However, as long as debates like this one continue to happen, the closer people might get to finding remedies.

4.4 Conclusion

Since the end of the Second World War transitional justice has emerged albeit with its successes and failures as the way to deal with past human rights violations for states emerging out of conflict. Although not flawless in its analysis Skaar's interpretation of what mechanisms states take after the conflict seems to be more common to most situations. In situations of outright victory by the opponents, states have leaned more towards prosecutions. Where there have been agreed settlements, countries have settled for various forms of accountability measures. Chief among these are truth commissions and other piecemeal solutions. These include among others lustration, reparations, and compensation. The case study in this thesis, Zimbabwe although offering peculiar distinctions would be no exception in this case. Most of the problems highlighted in instituting accountability measures in this thesis are common to other countries seeking the same goals.

This thesis has traced the genealogy of the need to hold perpetrators of human rights violations accountable in contemporary times based on international law. It has noted that human rights law generally attributes actions or omissions to the State when they are those of an agent of the State, or of a person acting with the consent or acquiescence of a public official. Therefore, the State and in this case Zimbabwe has a duty to conduct an effective, official investigation of suspected human rights violations.

The thesis has also discussed the issue of amnesty. It has been deduced that amnesties for serious international crimes against human rights are condemned by the

practice of the United Nations,¹⁴¹ and the interpretation of the International Covenant on Civil and Political Rights (to which Zimbabwe is a state party) by the Human Rights Committee.¹⁴² However, the historical and socio political circumstances in Zimbabwe as in many other countries might demand derogation from this duty to prosecute. For example as in South Africa, Zimbabwe would need some form amnesty for those who have committed gross human rights violations. This would be in order to achieve the goal of reconciliation, truth, acknowledgement and a return to democratic rule. What is needed in Zimbabwe is the consensus that the nation can only be redeemed from its poor record of human rights and economic quagmire based on consent rather than conquest by all the stakeholders. More importantly, most issue discussed in this thesis get to the core of the perceived weaknesses of ZANU PF. However, what is important is that it gives the ZANU PF leadership a chance to redeem them and assist the nation move forward. The recommendations in this thesis are not in any way exhaustive but seek to open the debate to a question that is difficult to discuss – that of negotiating Mugabe’s exit from power and how the past marred with human rights violations will be dealt with.

Whatever way Zimbabwe’s transition will take there are certain fundamentals of justice that will need to be complied with. For example, the new state will have to prosecute and punish the perpetrators of abuses when these abuses can be determined to have been criminal in nature. Secondly, all violations that still remain shrouded in

¹⁴¹ Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, S/2000/915, 4 October 2000, par. 22: ‘While recognizing that amnesty is an accepted legal concept and a gesture of peace and reconciliation at the end of a civil war or an internal armed conflict, the United Nations has consistently maintained that amnesty cannot be granted in respect of international crimes, such as genocide, crimes against humanity or other serious violations of international humanitarian law.’

¹⁴² UN Human Rights Committee, General Comment 31, *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, par. 18 (prohibiting amnesties for public officials or State agents who commit gross violations of human rights).

secrecy should be investigated and the truth be disclosed to the victims of injustice, to their relatives, and to society as a whole.

Thirdly, reparations will have to be granted to victims in a manner that recognizes their worth and their dignity as human beings. Monetary compensation is certainly a part of this duty, but the obligation should also be perceived as including non-monetary gestures that acknowledge the harm done to them. The form that these remedies will take depends on the circumstances of the violation, the kind of harm caused, and the circumstances and needs of the victims. Other responses from the State can also be taken into account as part of an overall remedy, such as public or private apologies from the authorities, disciplinary procedures for those individually responsible and measures to remember the deceased

Lastly, any new Zimbabwean Government should see to it that those who have committed human rights crimes are held accountable. Moreover, those found culpable while they were or are still serving in any capacity in the armed or security forces of the state should not be allowed to continue on the rolls of reconstituted, democratic law enforcement or security related societies.

What remains important for Zimbabwe is that any accountability measures for past human rights violations are legitimate. This should be through an open, democratic debate that includes consultation with and participation of the relevant stakeholders and full transparency of decisions. Second, transitional justice mechanisms should be contemplated in as comprehensive and holistic an approach as possible. This is not only because there will always be an ‘impunity gap,’ meaning that many cases of abuse will not be resolved by trials, thus generating the need for a broader treatment of the universe

of violations. It is also because the emerging principles in international law establish that the obligations of the State are four fold: to prosecute perpetrators, to unearth the truth, to offer reparations to victims, and to reform abusive public institutions. While there is need to recognise the inherently inconclusive nature of justice, a holistic, balanced, comprehensive approach to transitional justice, placing similar emphasis on each of the four obligations, can at least temper this inconclusive nature.

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