

Crimes against humanity and the Zimbabwe transition.

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6 May 2003

"The Torture Convention was agreed not in order to create an international crime which had not previously existed but to provide an international system under which the international criminal--the torturer -could find no safe haven." [Browne-Wilkinson, ex parte Pinochet(3)(1999)].

As Zimbabwe moves inexorably into greater and greater crisis, the prospect of a negotiated transition moves higher up the agenda of possible solutions. There seems little consensus on the way forward however. The Nigerian President favours the retirement of Robert Mugabe, but also wants the MDC to drop their petition on the Presidential Election in order to remove a potential obstacle to the transition, or is this to remove a source of embarrassment for the African nations that validated a palpably fraudulent election? There are indications that the South African government favours a Government of National Unity, probably with the support of the Southern African business community. On the other hand, the US and the EU have raised the pressure with increased personal sanctions, and the US raised the matter at the forthcoming Human Rights Commission meeting in Genevaⁱ, but this was less than successful, with a decision to take **no action** - the decision has been implicitly criticised by the Secretary-General of the United Nations. The International Bar Association believes that Robert Mugabe and his henchmen should be tried for crimes against humanityⁱⁱ. The Commonwealth has now decided upon the maintenance of the presently imposed sanctions, and it will be hard to see how it will not adhere to this decision until the Heads of Governments meeting later in the year. The Mugabe regime provides a simple explanation of the crisis, and likes to characterise the diplomatic problem as a clash between the white and black nations, but few really give this view credit. The problem is that the Zimbabwe crisis seems to have arraigned the forces of principle on one hand against the forces of pragmatism on the other hand. Or should it be more properly described as a clash between principle and expediency?

ZanuPF argues that land is the central problem, and that the political crisis is exacerbated by the MDC and its international allies in the West. In contrast, the MDC argues that the crisis is over governance and accountability, and the refusal of ZanuPF to accept their political eclipse at the polls. The MDC further argues that the ZanuPF state is guilty of human rights violations on the largest scale in its pursuit of maintaining political power. Indeed, the assertions by the MDC are gaining greater and greater credibility, and the most recent violence has even drawn criticism from South African President, Thabo Mbeki.

This raises the central problem in the probable transition; that of accountability, and accountability in turn depends upon whether there is evidence requiring such accountability. In the case of Zimbabwe, the evidence of gross human rights violations is disconcerting at the least and, at the most, draws the kind of conclusion that the International Bar Association has done. What place will the allegations of crimes against humanity have on the negotiating table for the political transition in Zimbabwe?

This is not a trivial problem, but perhaps the most serious issue to be discussed in all the negotiations over the transition. The manner in which this is dealt with have an enormous effect upon the future of Zimbabwe, as was the case with South Africa. To use the South African example, apartheid was defined by the international community as a crime against humanity, and it was scarcely sensible that such a crime was not an issue in the discussions over the transition. The ANC insisted that apartheid and the crimes committed in its defence were dealt with, even though it may be debatable now whether the Truth and Reconciliation Commission was an adequate response. The ANC repudiated the amnesty given by the Nationalist Party government, and insisted upon an accounting for apartheid.

The question about whether the violence in Zimbabwe would conform to international definitions of crimes against humanity presupposes two problems. The first is whether the evidence establishes that the allegations of crimes against humanity are valid, and the second problem is what to do about this.

Political violence or crimes against humanity?

In dealing with the first problem, two wholly opposing views are raised in Zimbabwe about the nature of the violence. For Mugabe regime, the strongest case that it can make is to admit the violence, but to characterise this as due to clashes between opposing political party supporters, or actions taken by individuals or groups asserting their historical rights to land. Essentially, the regime's position has been to minimise the scale, to attack those documenting the violence as prejudiced and politically partisan, and to continually argue that all current wrongs in Zimbabwe stem from a land problem. Furthermore, the Mugabe regime would also argue that there have relatively few deaths – as compared to many other countries – and this too presupposes that there have not been gross human rights violations on a large scale. The ZanuPF view has been well-summarised, albeit facetiously, in a publication of the Human Rights Forum:

[The Government] is fighting a Third "Chimurenga." This new "war" is a struggle to achieve economic justice for the black majority. The Second Chimurenga war was fought to liberate the country from the yoke of white minority rule. This armed struggle resulted in the political emancipation of the black majority, but not economic emancipation as after 1980 a tiny white settler community continued to dominate the agricultural and commercial economy. In particular, a small number of whites still owned a huge proportion of the most fertile farmland, with the black majority being relegated to poor quality land. This gross social and economic injustice could not be allowed to continue. Thus when the landless people "spontaneously" invaded white farmland to register their protest against this gross injustice, Government then felt compelled to act. It thus embarked upon its fast track resettlement programme. The new political party, the Movement for Democratic Change (MDC), was formed as a front for the whites to resist the moves towards the redistribution of the economic assets of Zimbabwe. Britain and other European powers are sponsoring the MDC because they wanted to protect the property rights of whites and are vigorously opposed to the expropriation of white-owned farmland. These Governments are also waging a vicious

propaganda campaign against Zimbabwe. The Government was justified in taking all necessary measures to prevent the MDC and its Western allies from denying the black majority the economic justice they cried out for. It was perfectly justifiable to use necessary force to overcome resistance to the transformation of the economy in favour of the black majority to achieve economic justice. After all, the colonial regime had violently dispossessed the black majority of their land and had brutally suppressed them for many decadesⁱⁱⁱ.

Against this view, the countervailing evidence is very substantial (and continues to be substantial)^{iv}, and is summarised from a very large number of reports from local Zimbabwean human rights groups, international human rights bodies, and even governments^v. The following is common cause:

- All reports show that the violence has been disproportionately one-sided, and against the MDC and other groups not supporting ZanuPF^{vi};
- All reports show that the violence attributed to ZanuPF is different to the violence attributed the other groups, both in the scale and in the nature^{vii};
- The violence attributed to ZanuPF shows evidence of systematic torture, abductions, disappearance, summary executions and extra-judicial killings, and this is very rarely the case with violence attributed to other groups such as the MDC;
- The systematic torture shows a strong associations with officials of the State – members of parliament, the police, the CIO, and other officials – as well as an association with groups closely affiliated to the ZanuPF political party – “war veterans”, youth militia, ZanuPF youth, ZanuPF supporters, ZanuPF party officials, etc^{viii};
- The evidence shows that plausible allegations can made for the involvement of senior party and government leaders, and there are many statements from victims implicating such persons^{ix};
- The evidence suggests that a strong case can be made for a planned strategy using militia. Firstly, the “war veterans” were deployed to manage the farm invasions and the Parliamentary Elections, and, secondly, a youth militia cadre was developed and deployed initially for the Presidential Election, but have subsequently been deployed all around the country. The evidence available shows a very strong association between the youth militia and torture, and it is not contested that there are training camps for the youth militia nor that government funds have been allocated to such training^x;
- There is no, or very little evidence, of any attempt by the executive or organs of the State to proactively deal with the violence^{xi};
- The evidence suggests, to the contrary, that there an enormous number of examples of hate speech, and encouragement to violence and lawlessness by virtually all members of the executive, the parliament, the party, and the supporters of the ZanuPF party;
- There is strong evidence for severe interference by the State, state officials, and ZanuPF supporters, with the judiciary, magistrates and law officers, including the ignoring of High Court and Supreme Court judgements and orders^{xii};
- There is finally the promulgation of two Presidential amnesties - in 2000 and again in 2002 – which must raise strong suspicion that the State wishes to avoid guilt for its actions since these amnesties provided impunity for all the crimes of torture^{xiii}.

Finally, it must be pointed out that virtually all of these allegations occur not in respect of land reform, but in respect of elections^{xiv}. There are two highly disputed major elections

and a number of bye-elections^{xv}, all of which have attracted adverse comments from local and international election observers. Apart from the widespread dissatisfaction with the electoral processes in these elections, the MDC has mounted 37 challenges to the results of the 2000 Parliamentary Election, and a serious and credible challenge to the Presidential Election. The election petitions to date have shown prima facie evidence of gross human rights violations, and six of the results have been invalidated by the Zimbabwe High Court^{xvi}. Furthermore, it was instructive that not only was impunity imposed after both major elections, but that the witnesses in the elections petitions were harassed and suffered further human rights violations for their courage in testifying against ZanuPF^{xvii}. Thus it is possible to conclude that there have been gross human rights violations primarily during elections, and, more strongly, it can be concluded that there has been epidemic-scale torture and gross human rights violations in the pursuit of the unlawful maintenance of political power during peacetime.

Does this evidence then conform to the definition of crimes against humanity? Certainly, it does on face value, but there are some problems to be overcome still before we attempt to indict Robert Mugabe and members of his regime. There are partly to do with definition and partly to do with jurisdiction.

Crimes against humanity

It is helpful and instructive to refer to the judgements that took place in respect of General Pinochet, for these judgements provide the most recent test of the notions of crimes against humanity, immunity, and universal jurisdiction^{xviii}. It is also instructive to look at the international legal instruments defining crimes against humanity and torture. This is not to suggest that the Pinochet is the only interesting development in international human rights law. There are many other interesting developments both in the case law, and also in the setting up of International Criminal Tribunals for the former Yugoslavia and Rwanda. However, the Pinochet case is interesting because it involves a case against a former head of state.

Although the political contexts of Chile and Pinochet are somewhat different to Zimbabwe and Mugabe, there are nonetheless some features that make this an interesting comparison, not the least of which is that the Pinochet cases represent a number of comprehensive judgements on the matters of crimes against humanity, torture, and immunity. Although dictators are not all the same, there are frequently enough similarities to warrant describing them as a class. Pinochet assumed power through a military coup and then set about subduing his opposition through a programme of abductions, torture and executions^{xix}, whilst Mugabe had assumed power originally through the ballot, and then committed gross human rights violations to maintain his political power, both in the 1980s and in the past three years.

Now the concept of crimes against humanity is well- established in international law, even though it is applied rarely in practice. From the Nuremburg Tribunal in 1946 onwards, the definition has been expanded and formalised in a number of international instruments: the UN Universal Declaration of Human Rights (1948), Common Article 3 of the Geneva Conventions (1949), the UN Convention on the Prevention and Punishment of the Crime of Genocide (1951), UN International Covenant on Civil and Political Rights (1966), UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984), and finally Article 7 of the Rome Statute of the International Criminal Court (1998). According to the most recent definition, the Rome Statute, crimes against humanity are inferred when any of the following acts are carried out in peacetime:

- *Murder;*
- *Extermination;*
- *Enslavement;*
- *Deportation or forcible transfer of population;*
- *Imprisonment or other severe deprivation of physical liberty in violation of fundamental rule of international law;*
- *Torture;*
- *Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;*
- *Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law;*
- *Enforced disappearance of persons;*
- *The crime of apartheid;*
- *Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.*

Such crimes are called “war crimes”, when committed during hostilities. The other crucial part of the definition refers to scale, meaning that any of the above acts “*when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack*”, shall be considered as crimes against humanity.

According to the developing international legal position on crimes against humanity, including other gross human rights violations such as torture, there shall never be immunity for such crimes; there shall always be prosecution for such crimes; and there shall be universal jurisdiction over such crimes. As Article 27 of the Rome Statute expresses this:

Irrelevance of official capacity

1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

This is a general principle of most of the international instruments: that impunity should never be applied, nor should there be any immunity, since this would completely subvert the meaning of these instruments. Article 4 of the original Convention on the Prevention and Punishment of the Crime of Genocide clearly excluded immunity for everyone: “*Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals*”. This reflects the growing position in international law since Nuremburg, and this is neatly summarised in the final Pinochet judgement by Lord Browne-Wilkinson:

“Apart from the law of piracy, the concept of personal liability under international law for international crimes is of comparatively modern growth. The traditional subjects of international law are states not human beings. But consequent upon the war crime trials after the 1939-45 World War, the international community came to recognise that there could be criminal liability under international law for a class of crimes such as war crimes and crimes against humanity. Although there may be legitimate doubts as to the legality of the Charter of the Nuremberg Tribunal, in my judgment those doubts were stilled by the Affirmation of the Principles of International Law recognised by the Charter of Nuremberg Tribunal adopted by the United Nations General Assembly on 11 December 1946. That Affirmation affirmed the principles of international law recognised by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal and directed the Committee on the codification of international law to treat as a matter of primary importance plans for the formulation of the principles recognised in the Charter of the Nuremberg Tribunal. At least from that date onwards the concept of personal liability for a crime in international law must have been part of international law. In the early years state torture was one of the elements of a war crime. In consequence torture, and various other crimes against humanity, were linked to war or at least to hostilities of some kind. But in the course of time this linkage with war fell away and torture, divorced from war or hostilities, became an international crime on its own...” [ex parte Pinochet (3)(1999)]

In practice, this is not so simple, but the basic assumptions are relatively straight forward: that there are a class of crimes that concern all nations and peoples, and these crimes are so horrible that they strike at the heart of humanity and civilisation. Hence they concern us all, and cannot be only an issue for the sovereign nation in which the crimes occurred. This was the case for apartheid, for example, where the repugnance of the international community for the racist policies of apartheid resulted in the policy being defined as a crime against humanity.

However, it is not so simple to prosecute crimes against humanity, not matter how clear this may seem to common sense: there remains a very strong attitude amongst the political forces of the world, with the United States foremost in this view, that a certain amount of immunity is necessary for political action to take place. Means-ends analysis, in this view, requires that

hard decisions must sometimes be made that contradict human rights considerations. This is clearly argued in the “war against terrorism”, and has been argued for years by Israel in their conflicts with terrorism or guerrilla war: torture has even been justified once by the Israeli Supreme Court, although it has now rescinded this view.

But political considerations notwithstanding, the Pinochet judgements may have helped us to get clearer about the issues. As the Law Lords put it, their job was to decide two questions of law: were there any extradition crimes and, if so, was Pinochet immune from trial for committing those crimes? In answering these questions a number of other issues had to be decided. Firstly, there was the matter of crimes that transcended national boundaries, and it is clear from the Law Lords that the modern meaning of crimes against humanity is that such crimes offend against all peoples and cannot be seen as merely domestic matters. As Lord Millet stated:

“Since the Second World War states have recognised that not all criminal conduct can be left to be dealt with as a domestic matter by the laws and the courts of the territories in which such conduct occurs. There are some categories of crime of such gravity that they shock the consciousness of mankind and cannot be tolerated by the international community. Any individual who commits such a crime offends against international law. The nature of these crimes is such that they are likely to involve the concerted conduct of many and liable to involve the complicity of the officials of the state in which they occur, if not of the state itself. In these circumstances it is desirable that jurisdiction should exist to prosecute individuals for such conduct outside the territory in which such conduct occurs.” [Millet, ex parte Pinochet(3)(1999)]

So, as I have outlined above, there are strong prima facie grounds for believing that the Mugabe regime’s perpetration of gross human rights violations must “*shock the consciousness of mankind*”, and also strong prima facie grounds for believing that these crimes have involved “*the concerted conduct of many and liable to involve the complicity of the officials of the state in which they occur, if not of the state itself*”. Furthermore, as the Law Lords pointed out, these human rights violations are not considered to be part of the normal practice of governments and leaders of states. The Mugabe regime will be hard put to deny that there has not been complicity of state officials or even the state itself in the gross human rights violations that have occurred in Zimbabwe since 2000^{xx}. It is the massive scale of the torture, including sexual abuse, that concerns us here in the main, although the summary executions and extra-judicial killings are of concern too.

Now, torture is identified as one of the crimes against humanity, and is furthermore covered under a separate convention, the UN Convention Against Torture and Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UN.1984). Torture can be a crime against humanity, but can also be a crime of an individualised nature, as when a police officer tortures a criminal suspect in order to extract information or force a confession, and it need not be for any political purpose. Nonetheless, torture has been accorded a separate status quite simply because it is so serious, is so difficult to detect, and has such pernicious long-

term effects. I will not summarise an enormous scientific literature here in defence of this assertion, but merely point out that it is common cause that torture is one of the most serious human rights violations for the very reasons I have given above^{xxi}.

Indeed, the prohibition against torture is recognised as a norm of customary international law. In the Pinochet case, Lord Browne-Wilkinson was of the opinion that the right against torture was 'jus cogens' (a peremptory norm) and so of even higher status than customary international law: in his words, "the 'jus cogens' nature of the international crime of torture justifies states in taking universal jurisdiction over torture wherever it is committed".

Zimbabwe has never acceded to the Torture Convention, and indeed both of the recent Presidential amnesties are specifically aimed at excusing torture. The Presidential Pardon of October 2000 quite explicitly gave amnesty for assault with intent to do grievous bodily harm and common assault, two of crimes in the criminal law of Zimbabwe that deal with torture by implication^{xxii}. However, such amnesties and even the ones from the 1980s and 1970s may not exclude liability for the perpetrators, at least in international law. Lord Browne-Wilkinson summarised the position on torture as follows:

- 1) Torture within the meaning of the Convention can only be committed by "a public official or other person acting in an official capacity", but these words include a head of state. A single act of official torture is "torture" within the Convention;*
- 2) Superior orders provide no defence;*
- 3) If the states with the most obvious jurisdiction (the Article 5(1) states) do not seek to extradite, the state where the alleged torturer is found must prosecute or, apparently, extradite to another country, i.e. there is universal jurisdiction.*
- 4) There is no express provision dealing with state immunity of heads of state, ambassadors or other officials [ex parte Pinochet(3)(1999)]*

Although there was no mention of immunity for committing torture, the effect of the Pinochet decisions was to quite clearly limit the immunity that could be claimed by a government or a head of state^{xxiii}. As Lord Hoffman commented:

"...it hardly needs saying that torture of his own subjects, or of aliens, would not be regarded by international law as a function of a head of state. All states disavow the use of torture as abhorrent, although from time to time some still resort to it. Similarly, the taking of hostages, as much as torture, has been outlawed by the international community as an offence. International law recognises, of course, that the functions of a head of state may include activities which are wrongful, even illegal, by the law of his own state or by the laws of other states. But international law has made plain that certain types of conduct, including torture and hostage-taking, are not acceptable conduct on the part of anyone. This applies as much to heads of state, or even more so, as it does to everyone else; the contrary conclusion would make a mockery of international law." [Hoffman, ex parte Pinochet(2)(1998)]

The notion of immunity is clearly more complicated than this^{xxiv}, but the overall conclusion of the Law Lords was to point out that heads of state, and their minions, could not commit gross

human rights violations: to conclude otherwise was to mock international law. And lest we think that the ZanuPF view that the small number of deaths mitigates against any view that there have been crimes against humanity, the Law Lords also pointed out that torture would comprise a crime against humanity if perpetrated on a massive scale as part of a systematic campaign or policy. This is clearly the intent of the Convention on the Prevention and Punishment of the Crime of Genocide, as well the Rome Statute: it is not merely deaths on a large scale that comprises genocide, or crimes against humanity, it is the systematic perpetration of any of a number of cruel and inhuman practices - gross human rights violations, in other words - that constitute crimes against humanity. This is the *prima facie* conclusion to be drawn from the summary of evidence cited above in respect of Zimbabwe.

However, there still remain many complex issues of jurisdiction relating to accession to the treaties, which will bedevil any prosecution of Mugabe and members of his regime, but the general points seem clear: that the international community recognises crimes against humanity; that heads of state and state officials will not be able to claim immunity for their actions in respect of crimes against humanity; and that there is at least a principle that such crimes should attract universal jurisdiction, although in practice this may be difficult to enforce.

It may be that prosecutions can be mounted under the Rome Statute of the International Criminal Court for crimes committed since July 2002, and it may equally be that a special criminal tribunal could be set up, as was the case for the Balkans and Rwanda. However, will either of these be the best remedy for Zimbabwe, and how might this affect the transitional process now so tortuously emerging? How to ensure that justice takes place, and how to prevent fears of accountability derailing any negotiated solution to the Zimbabwe crisis?

Firstly, we must remember that accountability for crimes against humanity is a matter that must be raised not only for the recent past, but also for the 1980s and the 1970s^{xxv}. If we contest impunity, on what basis will we contest for one period and not others?^{xxvi} This applies to equally to matters of reconciliation as it does to matters of justice, and, if we open the can of worms that are crimes against humanity, then we open the whole can, and do not deal merely with selected worms^{xxvii}. Secondly, it is clear that the best remedies for all human rights will always be domestic rather than international, for the former will always more strongly enforce the rule of law and strengthen confidence in the law in countries that have seen the rule of law disappear or be seriously eroded, but obviously this is rarely possible. The most common consequence of transitions where accountability for human rights violations is a problem for one party to the negotiations has been to accept truth but avoid justice: this is usually the only path that will allow the powerful and violent to accept the giving up of power^{xxviii}.

Accountability and the transition in Zimbabwe

As indicated above, Zimbabwe has a very sorry history indeed in the field of human rights observance, and we must bear this in mind as we decided upon the right course of action in the current dilemma. Clearly we can go on as we have done in the past, but this scarcely seems sensible. We must put an end to this vicious cycle of mass torture and impunity, this mad repetition compulsion in our national psyche.

In the short term, we must clearly evaluate the available evidence. There is an enormous amount of evidence, especially from the past few years since February 2000, but this needs not to be taken at face value, and must be tested. There are a number of issues that must be confronted in the short term, and these must address the current context of a very serious humanitarian crisis where prevention must be a major issue. A short list of recommendations has been made already and the following would seem to be the minimum steps required immediately from the international community^{xxix}:

- ***Demand the immediate removal by the government of Zimbabwe of all statutes of impunity in order to give the strongest signal that organised violence and torture shall be repudiated, and to signal commitment to the rule of law;***
- ***Demand the immediate disbanding of all militia groups – the youth militia, the “war veterans”, and ZanuPF youth;***
- ***Demand that the Zimbabwe Republic Police take immediate action to take control of the civilian situation in order to ensure that all violence ceases, that all cases of public violence are immediately investigated, and that all investigations into organised violence and torture take place with urgency;***
- ***Demand the setting up of an international commission of inquiry into the operations of the militia;***
- ***Demand the setting up of another international commission of inquiry into the allegations of widespread sexual violence against women, and this commission should be women-driven;***
- ***Failing any response from the government of Zimbabwe to these demands that the international community insist that the matter be placed before the forthcoming session of the United Nations Commission on Human Rights, meeting in Geneva.***

The last has been by the United States of America, but the idea of testing the allegations through independent international commissions does not seem to have been made strongly.

Given that the recent and some of the old violence conforms to notions of crimes against humanity, this could lead to the International Criminal Court in respect of crimes since July 2002, and an international criminal tribunal in respect of the crimes before that date. Such developments would certainly accord with the international community taking its responsibilities seriously, but it is not clear that it would serve Zimbabwe best for a non-Zimbabwean jurisdiction to be judging the evidence on crimes against humanity.

Undoubtedly, domestic remedies would strengthen the constitution and the rule of law best, but what sort of domestic remedies? There has been much talk within Zimbabwe about a Truth and Reconciliation Commission in the future, but truth commissions are generally a response to particular transitional problems. Firstly, the rationale for TRC processes has always been a compromise on justice occasioned by transfer of political power, and even South Africa was no exception to that rule, no matter how much further South African took the TRC concept. It seems to me that TRC processes merely narrow the range of permissible lies, as one commentator has put it, but do not necessarily promote justice or reconciliation. Rather we should see that we need to decide what ground must be covered before we decide upon the mechanism: do people want healing, reconciliation, justice, retribution, or what? And in the case of decades of violence followed by impunity, how far do they want to go back?

There are some new views on dealing with countries where impunity has been a dominant theme. Impunity, and how to deal with its consequences has been considered in detail recently by the Economic and Social Council of the United Nations^{xxx}, where the ECOSOC Sub-Commission identified a rights framework as fundamental to combating impunity:

- *The victims' right to know;*
- *The victims' right to justice;*
- *The victims' right to reparations;*
- *The right to non-recurrence.*

The right to know is not simply the right of any individual victim or closely related persons to know what happened, but is also a collective right, ensuring that history accurately records the violations to prevent them from recurring in the future. Its corollary is a “duty to remember”, which the State must assume in order to guard against the perversions of the truth; the knowledge of the oppression that has been lived through is part of a people's national heritage and as such must be preserved. Most trauma silences victims: they are shamed, dirtied, guilty, and elect to suffer in silence. They are, however, the victims of criminal wrongs, and should feel strongly about asserting their rights.

The right to justice implies that all victims shall have the opportunity to assert their rights and receive a fair and effective remedy, ensuring that the perpetrators stand trial, and that the victims obtain the legal basis for reparations. The right to justice entails obligations for the State: to investigate violations, to prosecute the perpetrators and, if their guilt is established, to punish them. Lastly, international human rights treaties should include a “universal jurisdiction” clause requiring every State party either to try or to extradite perpetrators of violations.

Restrictions justified by the desire to combat impunity may be applied to certain rules of law in order to support efforts to counter impunity. The aim of this right is to prevent the rules concerned from being used to benefit impunity, thus obstructing the course of justice. Of course, such considerations took up an enormous amount of energy in the decisions of the House of Lords in the Pinochet case. The main restrictions on impunity advocated by the EcoSoc sub-committee are as follows.

- *No Prescription for offences;*
- *No Amnesty for offences;*
- *No Right to asylum for perpetrators;*
- *Extradition of all perpetrators;*
- *Trial in absentia;*
- *Due obedience is no defence;*
- *Legislation on repentance should not avoid either amnesty or prescription;*
- *Military courts should not be used;*
- *The principle of the irremovability of judges.*

Clearly, this right is envisaged to wholly exclude impunity, and to thus validate the general positions developing under international law.

The right to reparation entails both individual measures and general, collective measures. On an individual basis, victims - including relatives and dependants - must have an effective remedy. The procedures applicable must be publicized as widely as possible. The right to reparation should cover all injuries suffered by victims, and this right embraces three kinds of action:

- *Restitution (seeking to restore victims to their previous state);*
- *Compensation (for physical or mental injury, including lost opportunities, physical damage, defamation and legal aid costs);*
- *Rehabilitation (medical care, including psychological and psychiatric treatment).*

The right to non-recurrence is also crucial according to the Sub-Commission, and three measures need to be taken in order to avoid victims having to endure new violations affecting their dignity:

- *Disbandment of parastatal armed groups;*
- *Repeal of all emergency laws, abolition of emergency courts and recognition of the inviolability and non-derogability of habeas corpus;*
- *Removal from office of senior officials implicated in serious violations.*

Now, this rights framework has some appeal to Zimbabwean victims. The Amani Trust has held extended discussions with the victims of torture over many years, both historical and current victims, and it is interesting that the victims have supported this framework of rights. One can see that this framework has little appeal to those who fear accountability, and it is for this reason that we always end up with Truth Commissions.

One solution is to separate the issues of transition and accountability. For Zimbabwe, the current humanitarian crisis requires urgent solution, and it must be a question whether the

appalling history of gross human rights violations is as imperative of solution as feeding millions of people. This does not, however, mean that investigations should not take place, or that crimes against humanity should not be examined, rather that actions in respect of either could wait until the transition has been negotiated. Simply, we should not make accountability a matter for negotiation, but leave it to the new democratic state to decide, and here, I would suggest, this should be a matter for a new, independent human rights commission in Zimbabwe. The commission could take as its first task a consultation with the people of Zimbabwe – the victims of the 70s, the 80s, and the current period – and see what the people would wish. This, in my view, will be the only way to honour the international obligations for justice without doing damage to Zimbabwe's real history. Mugabe and his regime are probably our worst villains, but they are not the only villains. It is not for the politicians to judge either history or determine the future; it is for the people to see themselves and their history, and to decide upon justice, truth and reconciliation in whatever combination. That history will judge Robert Mugabe harshly seems in little doubt, and the people of Zimbabwe will determine his fate for his crimes against humanity when we are able to see our history with clarity, and not before.

This solution is not offered to undermine the important developments in international law, or to minimize the jurisdiction of the International Criminal Court: it is merely to address the problem that Robert Mugabe and ZanuPF's accountability can derail sensible negotiations for the necessary transition in Zimbabwe. The important issue is that crimes against humanity should not escape a jurisdiction of any kind, and we would certainly not wish to see the "Sarajevo joke" repeated in Zimbabwe. As Geoffrey Robertson expresses this "joke", *"When someone kills a man, he is put in prison. When someone kills twenty people, he is declared mentally insane. But when someone kills 200,000 people, he is invited to Geneva for peace negotiations"*. The hope is that peace comes from negotiation, but that those who have committed crimes against the Zimbabwe people and humanity at large are held accountable for their crimes, and, if not in Zimbabwe, then in Rome or Geneva.

Appendix 1.

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Amani (2002), *Organised Violence and Torture in the June 2000 General Election in Zimbabwe*, HARARE: AMANI TRUST.

Amani (2002), *Neither Free nor Fair: High Court decisions on the petitions on the June 2000 General Election*, HARARE: AMANI TRUST.

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Zimbabwe Human Rights NGO Forum (2001), *Who was responsible? A consolidated analysis of pre-election violence in Zimbabwe*, HARARE: ZIMBABWE HUMAN RIGHTS NGO FORUM.

Zimbabwe Human Rights NGO Forum (2001), *Politically motivated violence in Zimbabwe 2000–2001. A report on the campaign of political repression conducted by the Zimbabwean Government under the guise of carrying out land reform*, HARARE: ZIMBABWE HUMAN RIGHTS NGO FORUM.

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Amnesty International (2002), *Zimbabwe: The Toll of Impunity*, LONDON: AMNESTY INTERNATIONAL.

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Physicians for Human Rights (2002), *Zimbabwe 2002. The Presidential Election: 44 days to go*. Physicians for Human Rights, Denmark, 24 January 2002.

Physicians for Human Rights (2002), *Zimbabwe: Post Presidential Election – March to May 2002. "We'll make them run"*. Physicians for Human Rights, Denmark, 21 May 2002.

Physicians for Human Rights (2002), *Zimbabwe: Voting ZANU for Food: Rural District Council and Insiza Elections*, Physicians for Human Rights, Denmark, August to October 2002.

Endnotes:

ⁱ See US Government, *Zimbabwe's Manmade Crisis*, Department of State Publication 11018, Released March 12, 2003.

ⁱⁱ See International Bar Association (2003), *The IBA's Human Rights Institute Calls for Robert Mugabe to be Investigated for Crimes Against Humanity*, Friday, March 07, 2003.

"The International Bar Association's (IBA) Human Rights Institute (HRI) has called for Robert Mugabe to be investigated for allegedly committing serious violations of international humanitarian law. The HRI addressed its call to all State Parties to the International Criminal Court (ICC), each of whom has the authority to request that an investigation be initiated, and it urged that the ICC's investigation be directed at the alleged atrocities committed by Zimbabwe's President and his regime.

'No single act would more accurately reflect the purpose and importance of the ICC than to have Mr Mugabe investigated by the new Court', said Mark Ellis, the IBA's Executive Director. 'Fortunately for the international community and for those who have suffered under Mr Mugabe's policies, the existence of the ICC means that he cannot escape being held accountable for his actions.'

Mr Ellis states that there is already sufficient evidence to justify the investigation of allegations that Mr Mugabe has committed and continues to commit crimes against humanity. These are defined as acts that are part of a widespread or systematic attack against any civilian population, including murder, torture, imprisonment or other inhumane acts of a similar nature intentionally causing great suffering.

Evidence and reports are emerging almost daily in support of these claims from Zimbabwe, where threats, beatings, and torture appear to be systematically directed at those groups who stand outside, or criticise the ruling Zanu-PF party. Mr Mugabe's rhetoric increasingly defines those who do not actively support him as traitors, and many of the actions of the police and the militia appear to be motivated by such rhetoric. In the current atmosphere, the independence of the rule of law has been consistently undermined, as frequently highlighted by the HRI.

The ICC came into existence on 1 July 2002 as the first permanent court ever established to investigate and try individuals for the

most serious violations of international humanitarian law, including crimes against humanity. The ICC is currently recruiting its first Prosecutor, hence the timing of the HRI's call." Although Zimbabwe has not yet ratified the ICC Statute, an investigation of Mr Mugabe's alleged crimes by the ICC can still occur while awaiting the return of democracy and the rule of law in Zimbabwe. At that point, a new democratically based government could immediately accept the exercise of jurisdiction by the Court with respect to the alleged crimes committed by Mr Mugabe.

ⁱⁱⁱ See Zimbabwe Human Rights NGO Forum (2001), *Politically motivated violence in Zimbabwe 2000–2001. A report on the campaign of political repression conducted by the Zimbabwean Government under the guise of carrying out land reform*, HARARE: ZIMBABWE HUMAN RIGHTS NGO FORUM.

^{iv} See here the recent report from the Crisis in Zimbabwe Coalition: *Crisis in Zimbabwe Coalition (2003), A Report on Organised Violence and Torture in Zimbabwe from 20 to 24 March 2003*, HARARE: CIZC.

^v See the reports indicated in Appendix 1 of this report.

^{vi} See the reports indicated in Appendix 1 of this report, but also the monthly Political Violence reports of the Human Rights Forum, which are available at www.hrforumzim.com.

^{vii} This is well described in the reports of the Human Rights Forum, but also in the reports from international human rights organisations. Here see *IRCT (2000) Organised Violence and Torture in Zimbabwe, 6th June 2000, Copenhagen and Harare, COPENHAGEN & HARARE: IRCT & AMANI TRUST; IRCT/RCT (2001), Organised election violence in Zimbabwe 2001, COPENHAGEN: IRCT & RCT; IRCT (2001) Organised Violence and Torture in Zimbabwe, 24th May 2001, Copenhagen and Harare, COPENHAGEN & HARARE: IRCT & AMANI TRUST; Physicians for Human Rights (2002), Zimbabwe 2002. The Presidential Election: 44 days to go. Physicians for Human Rights, Denmark, 24 January 2002; Physicians for Human Rights (2002), Zimbabwe: Post Presidential Election – March to May 2002. "We'll make them run". Physicians for Human Rights, Denmark, 21 May 2002.*

^{viii} See Zimbabwe Human Rights NGO Forum (2003), *"Are They Accountable?: Examining alleged violators and their violations pre and post the Presidential Election March 2002"*, HARARE: ZIMBABWE HUMAN RIGHTS NGO FORUM; Zimbabwe Human Rights NGO Forum (2001), *Who was responsible? A consolidated analysis of pre-election violence in Zimbabwe*, HARARE: ZIMBABWE HUMAN RIGHTS NGO FORUM; Zimbabwe Human Rights NGO Forum (2000), *Who is responsible? A preliminary analysis of pre-election violence in Zimbabwe*, HARARE: ZIMBABWE HUMAN RIGHTS NGO FORUM.

^{ix} See Reeler, A.P (2003), *Who should be sanctioned? [www.zwnews.net] for a report on the involvement of government officials and others in the organised violence and torture.*

^x See Reeler, A.P (2003), *The role of militia groups in maintaining ZanuPF's political power.*

^{xi} See Zimbabwe Human Rights NGO Forum (2001), *Politically motivated violence in Zimbabwe 2000–2001. A report on the campaign of political repression conducted by the Zimbabwean Government under the guise of carrying out land reform*, HARARE: ZIMBABWE HUMAN RIGHTS NGO FORUM.

^{xii} See Legal Resources Foundation (2002), *Justice in Zimbabwe. A report compiled by the Legal Resources Foundation*, HARARE: LEGAL RESOURCES FOUNDATION.

^{xiii} See Amnesty International (2002), *Zimbabwe: The Toll of Impunity*, LONDON: AMNESTY INTERNATIONAL.

^{xiv} See *Zimbabwe Human Rights NGO Forum (2002), Human Rights and Zimbabwe's Presidential Election: March 2002, HARARE: AMANI TRUST; Amani (2002), Organised Violence and Torture in the June 2000 General Election in Zimbabwe, HARARE: AMANI TRUST; Amani (2002), The Presidential Election and the Post-Election Period in Zimbabwe, HARARE: AMANI TRUST; Amani (2002), Beating your opposition. Torture during the 2002 Presidential campaign in Zimbabwe, HARARE: AMANI TRUST.*

^{xv} See *Zimbabwe Human Rights NGO Forum(2000), Report on Pre-election Political Violence in Mberengwa, HARARE: ZIMBABWE HUMAN RIGHTS NGO FORUM; Zimbabwe Human Rights NGO Forum (2001), Report on Election-related Political Violence in Chikomba, HARARE: Zimbabwe Human Rights NGO Forum; Amani (2002), Organised Violence and Torture in the Bye-Elections held in Zimbabwe during 2000 and 2001, HARARE: AMANI TRUST.*

^{xvi} See *Amani (2002), Neither Free nor Fair: High Court decisions on the petitions on the June 2000 General Election, HARARE: AMANI TRUST.*

^{xvii} See *Amani (2002), Heroism in the Dock: Does testifying help victims of organised violence and torture? A pilot study from Zimbabwe, HARARE: AMANI TRUST.*

^{xviii} The issue of crimes against humanity has been covered recently in a well received book by Geoffrey Robertson QC: See *Robertson, G (2000), Crimes Against Humanity. The Struggle for Global Justice, LONDON: PENGUIN.*

^{xix} The Spanish Government alleged a widespread conspiracy to take over the Government of Chile by a coup and thereafter to reduce the country to submission by committing genocide, murder, torture and the taking of hostages, which primarily took place in Chile but also elsewhere.

^{xx} See *Reeler, A.P (2003), Who should be sanctioned?*

^{xxi} There is an enormous international literature on torture and its effects. What is probably less well-known is that is a substantial literature on torture in Zimbabwe, well known even to the Mugabe government before the current epidemic. The Mugabe government is not even in the position of being ignorant of the consequences, were such a position a possible defence.

^{xxii} The amnesty did not excuse murder, rape, indecent assault, or crimes of financial impropriety. It is noteworthy that there were a number of very public murders during the pre-election period in 2000, including one by a CIO official, and few of these have even been brought to trial. In the case of Joseph Mwale, he remains at large despite an order by a High Court Judge that he be prosecuted. This, of course, indicates how formal impunity is frequently bolstered by practical impunity: just do nothing.

^{xxiii} Although the Convention is silent on immunity, a reading of at least of the articles in the Convention indicate the intention under the Convention was to exclude immunity. "Under Article 7 the state in whose territory the alleged torturer is found shall, if he is not extradited to any of the states mentioned in Article 5(1), submit him to its authorities for the purpose of prosecution. Under Article 8(1) torture is to be treated as an extraditable offence and under Article 8(4) torture shall, for the purposes of extradition, be treated as having been committed not only in the place where it occurred but also in the state mentioned in Article 5(1)." [ex parte Pinochet(3)(1999), Lord Brown-Wilkinson.]

^{xxiv} The issues around immunity are well-described in the third Pinochet case by Lord Millet. These are given here: "Two overlapping immunities are recognised by international law; immunity *ratione personae* and immunity *ratione materiae*. They are quite different and have different rationales. Immunity *ratione personae* is a status immunity. An individual who enjoys its protection does so because of his official status. It endures for his benefit only so long as he holds office. While he does so he enjoys absolute immunity from the civil and criminal jurisdiction of the national courts of foreign states. But it is only narrowly available. It is

confined to serving heads of state and heads of diplomatic missions, their families and servants. It is not available to serving heads of government who are not also heads of state, military commanders and those in charge of the security forces, or their subordinates. It would have been available to Hitler but not to Mussolini or Tojo. It is reflected in English law by section 20(1) of the State Immunity Act 1978, enacting customary international law and the Vienna Convention on Diplomatic Relations (1961)."

"The immunity of a serving head of state is enjoyed by reason of his special status as the holder of his state's highest office. He is regarded as the personal embodiment of the state itself. It would be an affront to the dignity and sovereignty of the state which he personifies and a denial of the equality of sovereign states to subject him to the jurisdiction of the municipal courts of another state, whether in respect of his public acts or private affairs. His person is inviolable; he is not liable to be arrested or detained on any ground whatever. The head of a diplomatic mission represents his head of state and thus embodies the sending state in the territory of the receiving state. While he remains in office he is entitled to the same absolute immunity as his head of state in relation both to his public and private acts."

"Immunity *ratione materiae* is very different. This is a subject-matter immunity. It operates to prevent the official and governmental acts of one state from being called into question in proceedings before the courts of another, and only incidentally confers immunity on the individual. It is therefore a narrower immunity but it is more widely available. It is available to former heads of state and heads of diplomatic missions, and any one whose conduct in the exercise of the authority of the state is afterwards called into question, whether he acted as head of government, government minister, military commander or chief of police, or subordinate public official. The immunity is the same whatever the rank of the office-holder. This too is common ground. It is an immunity from the civil and criminal jurisdiction of foreign national courts but only in respect of governmental or official acts. The exercise of authority by the military and security forces of the state is the paradigm example of such conduct. The immunity finds its rationale in the equality of sovereign states and the doctrine of non-interference in the internal affairs of other states: see *Duke of Brunswick v. King of Hanover* (1848) 2 H.L.Cas. 1; *Hatch v. Baez* (1876) 7 Hun. 596 U.S.; *Underhill v. Hernandez* (1897) 168 U.S. 456. These hold that the courts of one state cannot sit in judgment on the sovereign acts of another. The immunity is sometimes also justified by the need to prevent the serving head of state or diplomat from being inhibited in the performance of his official duties by fear of the consequences after he has ceased to hold office. This last basis can hardly be prayed in aid to support the availability of the immunity in respect of criminal activities prohibited by international law."

[*R. v. Bow Street Magistrates ex parte Pinochet Ugarte* (No.3) (1999), 2, All E.R., pp.97-192.]

^{xxv} See CCJP[1975], *The Man in the Middle*; CCJP[1976], *Civil War in Rhodesia 1976*; CCJP[1977], *Rhodesia The Propaganda War 1997*; See also Amani[1998], *Survivors of Torture and Organised Violence from the 1970s War of Liberation*, HARARE: AMANI; Reeler, A.P. (1998), *Epidemic violence and the community: A Zimbabwean case study*, COMMUNITY DEVELOPMENT JOURNAL, 33, 128-139; Reeler, A.P., & Mupinda, M. (1996), *Investigation into the sequelae of Torture and Organised Violence amongst Zimbabwean War Veterans*, LEGAL FORUM, 8, 12-27; Reeler, A.P., & Mhetura, J. (2000), *The psychosocial effects of organised violence and torture: A pilot study comparing survivors and their neighbours in Zimbabwe*, JOURNAL OF SOCIAL DEVELOPMENT IN AFRICA, 15, 137-169.

^{xxvi} See Reeler, A.P (2000), *Can you have a reparations policy without justice?* LEGAL FORUM, 12, 202-209.

^{xxvii} See Reeler, A.P. (1997), *We cannot open cans of worms selectively*, ZIMBABWE INDEPENDENT, April 23; Reeler, A.P (1999), *Remembering the victims of torture: Breaking the Silence*, ZIMBABWE INDEPENDENT, July 2.

^{xxviii} See Hayner (1996), *"Commissioning the truth: further research questions"*, Third World Quarterly, 17, 19-29; Hayner, (1994), *"Fifteen Truth Commissions - 1974 to 1994: A Comparative Study"*, Human Rights Quarterly, 16, 597-655.

^{xxix} See Reeler, A.P (2003), *The role of militia groups in maintaining ZanuPF's political power*.

^{xxx} See UN [1997], *The Administration of Justice and the Human Rights of Detainees: Question of the impunity of perpetrators of human rights violations (civil and political)*, Revised final report prepared by Mr. Joinet pursuant to Sub-Commission decision 1996/119, United Nations. Economic and Social Council. Commission on Human Rights. Sub-Commission on Prevention of Discrimination and Protection of Minorities. E/CN.4/Sub.2/1997/20/Rev.1