



***Sexual Violence against
Women, Justice, and the Right
to Protection.***

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Research and Advocacy Unit**

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CONTENTS

Foreword – Kudakwashe Chitsike	2
The challenges encountered in national jurisdictions in rape investigations - Fungisai Maisva.	3
Sexual Violence: Consent and armed conflict – Fungisai Maisva	12
The importance of Truth telling: Is it enough to warrant amnesty especially with regard to violence against women? – Fungisai Maisva	15
Restorative Justice vs. Retributive Justice’: The Pros and Cons from a woman’s perspective – Rumbidzai Dube	18
Prevention in the Concept of the Responsibility to Protect – Maureen Sibanda	24

Foreword

Considerable documentation is available on the Zimbabwean crisis, written by both local and international organizations, but there is very little written about the women's experiences, or the crisis from women's perspective. Women have different experiences on the crisis from men and therefore they will have different views on how it should be resolved.

In 2009, the Research and Advocacy Unit (RAU) began a campaign to end politically motivated violence against women, which was kick started by a video *Hear Us: Women Affected by Political Violence in Zimbabwe Speak Out*. This was launched in Harare but has had a global outreach. Subsequently a petition, signed by over 1500 people, was submitted to the International Relations Department of the South African government to investigate violence against women in keeping with the articles of the SADC Protocol on Gender and Development; South Africa was the then Chair of The Southern African Development Community (SADC) as well as the SADC Facilitator on the Zimbabwean crisis.

As part of this campaign, RAU has partnered with IDASA (An African Democracy Institute), the International Center for Transitional Justice (ICTJ), and the Women's Coalition of Zimbabwe (WCoZ). The first initiative of this collaboration was to conduct a survey to find out women's views on elections, violence, peace, the inclusive government, transitional justice, and law enforcement. Two reports have been issued to date detailing the findings of the survey: *Women, Politics and the Zimbabwe Crisis* and *Preying on the Weaker Sex: Political Violence against Women in Zimbabwe*. A third report *When the Going gets Tough, the Men get Going* was also issued, detailing the qualitative responses of women to the survey findings, and deriving from 10 focus group discussions involving 150 women who were not part of the original survey.

The campaign to end political violence against women will feed into the more general action by human rights and civic groups for transitional justice, and the long-term goal is that these rights will be enforced, with victims and survivors receiving the redress they deserve. The campaign, in its contribution to the transitional justice demands, will also make a contribution to the restoration of the rule of law through the challenge to impunity, and the exposure and possible prosecution of the most serious offenders

This collection of opinion pieces looks at issues relating to political violence from women's perspectives, with an emphasis on sexual violence and what should happen when the violence is over. There are special challenges that women face with regard to reporting rape and other forms of sexual assault, including the stigma of being labelled a rape victim, fears of spousal abandonment, and the attitudes of the police towards them.

Truth telling after periods of conflict it is critical before any form of healing can take place. The fact that events that occurred in our history were never made public, particularly the liberation war and the Matebeleland massacres of the 1980s, is one of the reasons Zimbabweans find themselves in this predicament today. There is resentment, fear, and mistrust, and the only way to address these is to bring out the truth and let victims come to terms with what happened to them and their loved ones, without being forced to forgive and forget without full knowledge of the what, why, where, and how.

This collection also looks at the role of consent during sexual abuse, which has been used as a defence by perpetrators. Where there is coercion, or a coercive environment, particularly where the coercion is violence or threats of violence, the issue of consent falls away. The issue of justice always comes up after periods of conflict, and, looking at this from the point of view of a rural woman who has lost her possessions consisting primarily of household utensils, what would be her preferred form of justice; restorative and retributive justice? The pros and cons of both are looked at. From as far back as Independence, Zimbabwe has created a culture of impunity based on the idea of reconciliation rather than confronting the truth of what has happened; it is evident that without resolving our past our future is bleak. The collection concludes with the notion prevention in the responsibility to protect, a new international initiative to provide grounds for where the international community must intervene where a government fails in its responsibility to protect its people. Prevention of violence has not been one of the Zimbabwe government's strongest suits as even law enforcement and state agent have been implicated in violence.

The purpose of this monograph is to contribute to efforts by civil society to widen and encourage the discussions on transitional justice by raising issues relating to women, and beginning the discussions on how any transitional justice process in Zimbabwe should take women's points of view into consideration.

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The challenges encountered in national jurisdictions in rape investigations.

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Introduction

While sexual assault is criminalised in most countries, it is often investigated, and punished at much lower rates than other crimes of similar severity. One of the main reasons for this is that prosecution of sexual assault is informed by common stereotypes about women and about female sexuality, irrespective of culture. As a consequence, law enforcement officials often believe that survivors of sexual violence are complicit in the abuse, either through provocation or by consent that was later revoked. As a result, women often feel ashamed to report rape and when they do make a report, rape victims find often their own behaviour on trial rather than that of their assailants.¹ This common experience is amplified when the rape is politically motivated.

The effect of rape on victims immediately after the assault has a profound impact on whether and the manner in which the crime is reported. At the time of a rape, its aftermath, a woman often experiences shock, an overwhelming feeling of powerlessness, and a fear of injury or death which is often paralysing, making it impossible to try to fight back. This commonly results in a feeling of loss of control and shame. The sense of shame is usually that of being naked or defiled. Women often feel physically dirty and want to clean themselves frequently and compulsively. They may have the seemingly strange reaction of feeling dirty and even harbour feelings of self-recrimination concerning the rape as though they themselves were responsible for the crime. This is reinforced by the attitude of many people that the rape is somehow a woman's fault. The result is a chain of reactions, commencing with feelings of defilement and self-recrimination, then a reluctance to complain, a resultant delay in lodging a complaint, a loss of evidence occasioned by the delay and consequent weakening of the case against the offender in any prosecution.²

The challenges for women reporting rape

As pointed out above, the similar experience of rape crosses all cultural barriers. For example, in a Russian study³ substantial barriers were found that prevented women complaining of sexual violence

¹ Askin & Koenig *Women and International Human Rights Law* Vol 1 (2000) p 149.

² McFadden P. "Sex, sexuality and the Problems of AIDS in Africa" in Meena Gender in Southern Africa Conceptual and Theoretical Issues (2ed) (2002) pp 184-185.

³ In 1996 a Women's Rights Project investigated state responses to violence against women. The Project visited Moscow, St Petersburg, Sergiyev Posad, Murmansk and Nizhni Tagil and the investigators found that the Russian government, in particular the Russian law enforcement agencies, have denied women's right to equal protection of the law. Human Rights Watch Women Rights Project, *Neither Jobs nor Justice: State Discrimination Against Women in Russia 1995*, Cited in Askin & Koenig *Women and International Human Rights Law* Vol 1 (2000) p 149.

from being registered by law enforcement agencies and then successfully investigated and prosecuted. While there is no distinction in Russian law between rape perpetrated by a stranger as opposed to an acquaintance, the latter is often treated with less gravity and as a less serious violation, with law enforcement officials more ready to believe that a woman has in some way provoked the rape or fabricated the report. In a majority of these cases women were either turned away by the police or discouraged from filing a complainant. Police officers often told women that the investigation would be shameful. They then used investigators to collect information about women's sexual behaviour and past sexual history. As the study pointed out, even if the matter was reported to the police and the police accepted the report, the investigative process was nonetheless extremely gruelling for the rape survivor because of the frequent interviews and pervasive invasions of privacy. Many survivors told the investigators of the project that complainants and their families were also harassed and threatened in an effort to persuade them to drop rape charges. It was evident that the police took no steps to protect either survivors or witnesses from this harassment. It was noted that the most disturbing aspect of the investigative process for sexual assault in Russia was the focus on "purity" or virginity. Young virgins who were raped by strangers were most likely to get redress while married women or women who were sexually active often were told not to pursue criminal complaints.⁴

The Women's Rights Project investigation on rape in South Africa in 1995 revealed very similar results despite emanating from a very different set of cultural circumstances and settings. The investigation, conducted in 1996, showed that the South African legal system is filled with similar assumptions and biases as those found in the Russian. The mistreatment of rape survivors was a significant factor contributing to the low percentage of reported rapes. Stereotypes of raped women were often assimilated by police officers and women had to convince the police that they had been raped. For instance, women faced greater difficulties in filing rape charges if they had not physically resisted their assailants, had not sustained serious and obvious injuries, did not appear sufficiently distressed, had dated the perpetrator, had dressed "provocatively" or were prostitutes.⁵

In addition to the above, there are deeply ingrained racial and sexist stereotypes in areas of South African life, in particular against black women, which adversely affect the state's response to sexual violence. From an interview conducted at the Family and Marriage Services of South Africa, it was noted that when women in predominantly white areas telephone the police, they receive instant help. However if a women from black or "coloured" townships call there is a 'breakdown of service' in that the response

⁴ One activist told the investigators how the police tried to persuade her to withdraw her report. "The police said to her that 'people are murdered on the street, but here it is just rape.' Askin & Koenig *Women and International Human Rights Law* Vol 1 (2000) p 150.

⁵ Askin & Koenig *Women and International Human Rights Law* Vol 1 (2000) p 150.

to the matter is not as immediate as those in the white areas.⁶ A police commander told Human Rights Watch that he believed that many African [non-white] women coming to the police station fabricated reports of rape in order to get access to an abortion after becoming pregnant by their boyfriends. These biases clearly reduce the likelihood of non-white women reporting rape or receiving redress for sexual violence. The experience in South Africa illustrates the fact that ingrained stereotypes about women and their behaviour restricts the ability of survivors of sexual violence to get redress. Racial prejudices also increase the difficulty met by black women and men of colour in pursuing criminal charges. Similar prejudices further complicate the decision to file a complaint of rape with the police. Because of the privileged status enjoyed by men within communities, there may be attempts to protect them from the consequences of their actions, downplay the seriousness of the violation and an insistence that the matter be dealt without outside the formal justice system. The determination to pursue charges can then be perceived as an act against the community.⁷

Another obstacle that is faced by victims in their efforts to try and report sexual assault is that law enforcement officers frequently argue that rape cases lack the necessary independent evidence to proceed, and are forced to decide on the veracity of conflicting statements. Law enforcement officials often level this generalisation against rape survivors even though it should be obvious that in all crimes the accused usually contradicts the victim. While it is true that rape often lacks the usual kind of physical evidence available in other violent crimes, what officials neglect to mention is that rape also has many investigatory advantages which other crimes lack. In most rape cases, for example, the victim can easily identify the perpetrator and might in fact know the perpetrator well. The victim's knowledge of the perpetrator should be an enormous investigatory advantage.⁸

The major obstacle for most countries in successfully investigating sexual assault is the requirement that the survivors must be examined at a government-run evidence centre. These medical examinations are mandated to a greater or less degree in countries such as Brazil, Haiti, Russia, Peru, and South Africa. This is problematic in that, for a number of reasons, the medical evidence frequently is collected incorrectly or incomplete. In most instances this leads to valuable evidence being lost. Because medical evidence may be the only corroboration of a rape survivor's testimony, this is particularly troubling.

The lack of training for forensic doctors is often reflected in the biased attitude towards women that affect their investigatory procedures. Forensic doctors, according to the investigation in the countries mentioned above, too often focus on the condition of the hymen and believe the examination of the

⁶ Askin & Koenig *Women and international Human Rights Law* Vol 1 (2000) pp 150-151.

⁷ Askin & Koenig *Women and International Human Rights Law* Vol 1 (2000) p 151.

⁸ Women's justice centre first line Criminal Justice Advocacy sex crimes: Police response and investigation. www.justicewomen.com/handbook/part2d.html (accessed 14 November 2009).

hymen is the most critical part of the forensic examination. This is merely one small part of the necessary examination of a rape survivor, and wholly irrelevant for women that are not virgins. Despite the critical role that medical evidence plays in proving a sexual assault case, women also have enormous difficulty getting access to official centres and obtaining sufficient admissible evidence. In Russia, for example, the evidence centres require an official referral from the police or prosecution, a referral that is usually not provided unless the police accept the complainant. Investigators in addition refuse, in some cases, to give women referrals to the evidence centre or tell women to report to the evidence centre days after filing their reports, thereby losing critical medical evidence. Investigators in a majority of the cases fail to inform women of the importance of being examined as soon as possible after the assault. At times they speak with women for several hours, thus intentionally or irresponsibly delaying their examinations, and again risking the loss of important forensic evidence. Women are also rarely told or informed to forego washing until after their examination.⁹

The difficulty of accessing and receiving admissible evidence from these government-run evidence centres is compounded by the fact that very few of these centres exist and they are often located in inaccessible places. In the case of South Africa, women can obtain admissible medical evidence from either a private doctor or a government district surgeon, but many women are unable to afford the fees required to see a private practitioner. District surgeons in South Africa are often remotely or inconveniently located and women may wait for hours before being examined by a district surgeon.

This situation is similar in Haiti where the law allows women to go to a private doctor or hospital to obtain evidence of forced sexual intercourse. But a majority of Haitian women lack the economic resources to pay for such a visit. Therefore, it is practically impossible for them to obtain such an examination.¹⁰ A study conducted in South Africa¹¹ on child rape, approved the fact that the police often accompany victims to hospitals for a medical examination. However it was also pointed out that the hospitals to which they are required to take the victims for examination are often overcrowded resulting in lengthy delays before victims receive attention. This situation, it was acknowledged, is traumatic for the victims and is often compounded by the unsympathetic behaviour of some doctors as medical evidence may provide the only corroboration of rape charges made by women, the investigations required to gather this evidence should be carried out in terms of clear procedures and accessible and affordable facilities should be made available for this purpose.¹²

⁹ Askin & Koenig *Women and International Human Rights Law* Vol 1 (2000) p 152.

¹⁰ Askin & Koenig *Women and International Human Rights Law* Vol 1 (2000) p 153.

¹¹ Van Zyl & Sinclair "Silent victims of rape: Police effectiveness in dealing with child rape cases" South African Professional Society on the Abuse of Children 2005 p 7.

¹² For example survivors of sexual assault must be aware of and able to access no –fee centres where medical evidence can be gathered. It is troubling that the inaccessibility of evidence centres and the privilege of virginity mean that, at times, such centres

In order for a rape investigation to be successful it is dependent as much on forensic and physical evidence as it is on the ability of the investigator to communicate and partner effectively with the victim. This requires comprehensive insight into the perpetrator-victim dynamics of rape. It is important that officers are familiar with and comfortable using an appropriate lexicon and language to refer to aspects of sexual assault. This requires an ability to adapt to any culture and age level and the full range of sexual and reproductive topics. In order to get through to the victim, this must be done in an empathetic manner. A failure to meet this requirement prevents even the best-intentioned officers from being able to handle sex crimes well. Because of the hyper-male culture of law enforcement and the unique and singularly female experience of rape, many officers and prosecutors do not want to handle rape cases and are ill at ease with such cases. They are often ill-suited to handle these cases, and insufficiently trained in rape's unique investigatory techniques. Another characteristic of rape that explains why so few rape cases are prosecuted is that no victim is easier to "make go away" than a rape victim. Instead of protesting mistreatment by the system, most rape victims are so distressed and wounded by the additional trauma of being re-victimised by the people who are supposed to help, they do not complain to the police. Furthermore, as pointed out earlier, victims are frequently mistrusted by police officials as a result victims understandably avoid complaining, leading to police officials claiming that they are uncooperative.¹³

In Africa, most states do not have the capacity to handle sexual assault cases. In South Africa, for example, in an investigation conducted on child rape, it was reported that there were improvements as to how the police handled child rape cases, but problems still arose when matters were referred to the Family Violence, Child Protection and Sexual Offences Unit (FCS). Victims often had to wait long hours at the police station before being attended to by investigators in this unit. The FCS reported in their defence that they were responsible for handling cases from a large area comprising several police stations. It is often the case that a child rape victim who reported a case will have to wait for several hours to consult with an investigating officer, who might be handling another case from a neighbouring police station. The lack of human resources and the fact that investigating officers have to travel long distances to attend to such cases has a negative impact on the response time to cases¹⁴

In the Democratic Republic of Congo (DRC), for example, the state is unable to deal with sexual violence most particularly because the police and the army are themselves involved in perpetrating these crimes

perform gate-keeping function for the criminal justice system. Askin & Koenig *Women and International Human Rights Law* Vol 1 (2000) pp 153-154.

¹³ Women's Justice Centre first line Criminal Justice Advocacy Sex Crimes: Police Response and Investigation. www.justicewomen.com/handbook/part2d.html (accessed 14 November 2009).

¹⁴ Van Zyl & Sinclair "Silent victims of rape: Police effectiveness in dealing with child rape cases" 2005 South African Professional Society on the Abuse of Children p 6.

against the civilians.¹⁵ The police and the army often deliberately obstruct investigations and shield their subordinates from arrest. The government is struggling to provide access to justice for victims of sexual violence, and the justice system is severely underfunded.¹⁶ The state is unable to provide free legal services for complainants and only 7% of women who want legal assistance are able to obtain it. Those who are able to access legal counsel are faced with multiple barriers to justice. It is almost impossible for the police to locate and arrest members of the armed forces due to security concerns and capacity constraints. Most of the cases against civilian or members of the Congolese security forces are often dropped due to a variety of factors including political interference.¹⁷ The courts are ill equipped, few and far between, and are too understaffed to be able to handle cases quickly and efficiently.¹⁸ Complainants face a series of court fees, both legal and illegal, and there are few incentives for women to bring cases to the courts. If the complainants are successful, they are expected to contribute towards enforcement costs, for which they do not receive any compensation, and often they see their attacker walk free for a variety of reasons. These factors all combine to undermine confidence in the justice system and to create a culture of impunity for rape cases.

Rape is seldom punished and increasingly regarded as an everyday occurrence. Thus the prevalence of sexual violence in the DRC is linked to a lack of peace and a lack of justice. It is evident that a number of factors need to be addressed by all stakeholders who attend to victims of rape in order to bring an end to sexual violence. This must begin by respective governments putting in place more resources in the various departments that deal with victims of sexual violence in the initial stages.

In Zimbabwe the issue of rape is dealt with differently depending on whether the rape was politically motivated or not. If the rape is found to be politically motivated the women have been turned away at state hospitals once this is discovered. When the women try to report to the police, they are told that the police are not dealing with cases of politically motivated violence and they should go back home.¹⁹ However with other cases of rape, women are generally treated in the same manner as other countries reviewed here where the burden of proof is on the victims. Some legal protection is provided by the Sexual Offences Act²⁰ and the Domestic Violence Act²¹ but the issues of stigma and worry of losing

¹⁵ Rape is a crime on an epidemic scale in the DRC. See OXFAM (2010), *"NOW, THE WORLD IS WITHOUT ME": AN INVESTIGATION OF SEXUAL VIOLENCE IN EASTERN DEMOCRATIC REPUBLIC OF CONGO*. A Report by the Harvard Humanitarian Initiative with Support from Oxfam America.

¹⁶ In 2007 for example 0.3% of the national budget was allocated to the Ministry of Justice. SCIAF Scotland's Aid Agency "Ending Mass Rape in the DRC: The Role of the International Community" 2008 p 6.

¹⁷ SCIAF Scotland's Aid Agency "Ending Mass Rape in the DRC: The Role of the International Community" 2008 p 6.

¹⁸ In South Kivu there is a military court, 2 military tribunals and 1 military magistrate. The magistrate has to try 22 cases in 10 days and when he is on annual leave both tribunals have to shut. SCIAF Scotland's Aid Agency "Ending Mass Rape in the DRC: The Role of the International Community" p 7.

¹⁹ RAU 'Preying on the Weaker Sex-Political Violence against Women in Zimbabwe' page 12

²⁰ Act 8 of 2001 protects women from sexual abuse and criminalises marital rape and wilful transmission of HIV/AIDS. The Act also prohibits trafficking of persons for purposes of prostitution and imposes stiffer penalties for violations.

²¹ Act 14 Chapter 5:16 of 2006.

husbands and embarrassing families remains a disincentive both as far as reporting rape is concerned and taking appropriate steps to prevent unwanted pregnancies and infections. A further problem is that women have a genuine lack of knowledge of where to go to receive help when they have been raped. In 2009 the law was changed, no longer making it mandatory for a rape victim to report to the police first before seeking medical assistance.²² A rape victim may now make a report to either a medical facility or police and thus avoid the risk of a delay in the collection of evidence by filing a report at the wrong place. The creation of the Adult Rape Clinic in Harare has made it easier for women to come forward and report rape but this is only available to urban women.²³

Conclusion

As the above shows, there are considerable variations between countries in their approach to sexual violence. Some countries have far reaching legislation and legal procedures with a broad definition of rape that includes marital rape, with heavy penalties for those convicted and a strong support for victims. The commitment to prevent or control sexual violence is reflected in an emphasis on police training and an appropriate allocation of police resources to the problem. Priority is given to investigating cases of sexual assault and resources are made available to support victims and provide medico-legal services. On the other hand, there are many countries with much weaker approaches to the issue; where the conviction of an alleged perpetrator on the evidence of the women alone is not allowed. Certain forms of settings of sexual violence are specifically excluded from the legal definition and where rape victims are strongly deterred from bringing the matter to court through the fear of being punished for filing an 'unproven' rape suit.²⁴

The responses of governments to rape and other forms of sexual violence are generally still inadequate. In order to end this problem there is a strong need for governments to implement existing laws and formulate other laws that are needed to make investigations into cases of rape yield the desired results.²⁵

The lack of an agreed definition of sexual violence and the paucity of data describing the nature and extent of the problem worldwide have contributed to its lack of visibility on the agenda of policy-makers and donors. Therefore, there is a need for substantial further research on almost every aspect of sexual

²² Management of Sexual Violence AIDS and TB UNIT Ministry of Health and Child Welfare, April 2009.

²³ However, the clinic has no other branches it has been criticised for perpetuating the stigmatisation of rape by its name.

²⁴ Krug, Dahlberg, Mercy, Zwi & Lozano " World report on Violence and Health" World Health Organisation 2002 p 161.

²⁵ Amnesty International campaign on stop violence against women. www.amnesty.org/en/campaigns/stop-violence-against-women/issues/implementation-existing-laws (accessed 21 November 2009).

violence, as well as more determined effort by governments to ensure that the existing systems and laws are strengthened, with effective training of police forces a priority.²⁶

²⁶ Krug et al "World report on Violence and Health" World Health Organisation 2008 p 172.

Sexual Violence: Consent and armed conflict

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The manifestly coercive circumstances that exist in all armed conflict situations establish a presumption of non-consent and negate the need for the prosecution to establish a lack of consent as an element of the crime. Further, a defence of consent clearly should not be allowed when the sexual assault is charged and prosecuted as slavery, crimes against humanity, genocide, torture, or other *jus cogens*²⁷ crimes to which issues of consent are irrelevant. In addition, consent is not an issue as a legal or factual matter when considering the command responsibility of superior officers who ordered or otherwise facilitated the commission of crimes such as rape in armed conflict situations.²⁸

Sexual slavery as a form of slavery is an international crime and is a violation of the *jus cogens* norms exactly the same manner as slavery. As a *jus cogens* crime, neither the state nor its agents, including government and military officials, can consent to the enslavement of any person under any circumstances. In the same manner, a person cannot under any circumstances, consent to be enslaved or subjected to slavery. Thus it follows that a person accused of slavery cannot raise consent of the victim as a defence.²⁹ This is equally the case for rape and other gross human rights crimes.

The issue of consent may however be raised as an affirmative defence as provided for in the general rules and practices established by the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). The defence in such cases must initially satisfy the judicial body hearing the cases that the evidence of consent is "reliable and credible." The rules of procedure and evidence of these *ad hoc* tribunals provide that, in cases involving sexual assault, consent shall not be allowed as a defence if the victim had been subjected to or threatened with violence, duress, detention, or psychological oppression. This rule of procedure and evidence also requires no corroboration of victim's testimony and restricts the defence of consent in sexual assault cases.³⁰ Rule 63(3) of the International Criminal Court explicitly prohibits making a difference between the

²⁷It is an international law principle which is accepted by the international community of states as a whole as a norm from which no derogation is permitted. A concept, principally of international law which distinguishes between domestic law deviations which may be permitted and fundamental, universal accepted standards of international law such as prohibition against torture, slavery or genocide." www.duhaime.org/legaldictionary/J/JusCogens.aspx. (Accessed 15 June 2010).

²⁸ McDougall Contemporary forms of slavery .Systematic rape, sexual slavery and slavery like practices during armed conflict. Commission on Human Rights, E/CN.4/SUB.2/2000/21. 2000 p 13.

²⁹ McDougall Contemporary forms of slavery .Systematic rape, sexual slavery and slavery like practices during armed conflict. Commission on Human Rights, E/CN.4/SUB.2/2000/21. 2000 p 13.

³⁰This rule must be understood from the background of national jurisdiction laws that require female victims of sexual crimes to be corroborated. It stems from the notion that female victims of sexual crimes were unreliable, untrustworthy and their testimonies need to be corroborated. International Criminal Tribunal for the Former Yugoslavia, Rules of Procedure and Evidence, as amended on the 25 July 1997, Rule 96 (Evidence in cases of sexual assault). International Criminal Tribunal for Rwanda, rules and procedure and evidence adopted on 29 June 1995, Rule 96 (Rules of evidence in cases of sexual assault).

corroboration requirement of proof for testimony on sexual violence and testimony of any other crime falling within the Court's jurisdiction. It underlines that a victim of sexual violence is as reliable a witness as any other witness to any other crime. The corroboration rule means that the Chamber has the discretion to rule on the relevance, and any prejudice that such evidence may cause, to a fair trial or to a fair evaluation of the testimony of a witness. When evidence on sexual violence of a single victim is relevant, probative, reliable and credible, a Trial Chamber may convict an accused for the crime charged: corroborative evidence is not required.³¹ Each case has to be assessed on its own merit without any significance being attached to the victim's sex or nature of the crime.³²

There have been some arguments that the introduction of the element of non-consent and lack of knowledge of non-consent as advocated in the *Kunarac, Kovac, and Vukovic*³³ cases by the ICTY Appeals Chamber was unnecessary and inappropriate. In these cases, the prosecution had established that coercion, force, and threats of force were present; the lack of consent should instead be inferred by the judges themselves.³⁴ The absence of consent should not be an element of rape in supranational criminal law because it is impossible to transfer the elements of rape as found in national laws into supranational criminal law.³⁵ To do that would be to fail to take into account the specific differences that exist in these two bodies of law.

In the context of genocide, crimes against humanity and armed conflict in most of the cases, act of sexual violence will have been committed under threat of force, coercion, or coercive circumstances, and the issue of consent becomes redundant.³⁶ The counter-argument to the above proposition is that, if the accused is barred from raising the issue of consent, as a defence to the alleged crime of rape, this would be a violation of the defendant's right to raise a defence and the right to a fair hearing. The accused therefore should be allowed to raise this defence, but the burden or onus of proof should be shifted to the accused to prove that there was consensual sex in that alleged situation.³⁷ This is surely correct: if the basic context, a state of war, presumes that normal civilian life is absent, then it is clear that the burden of proof should be on the accused.

³¹ Akayesu Judgment para 135, Musema Judgement and Sentence para 45. For example in the Muhimana Case, the Trial Chamber established rape of BJ by Muhimana and the rape of two other girls by his companions on the basis of the testimony of BJ exclusively. See Trial Judgment and Sentences para 288-292. See also De Brouwer *Supranational Criminal Prosecution of Sexual Violence* p 262.

³² In situations where testimony or any other form of evidence including documents is weak or not totally reliable, corroborative evidence might be needed by the Chamber in order to be convinced of the guilt beyond a reasonable doubt. When corroborative evidence exists, it helps to confirm the testimony of the victim but it is not a legal requirement as such. De Brouwer *Supranational Criminal Prosecution of Sexual violence* pp 262-263.

³³ Prosecutor v *Dragoljub Kunarac, Radomir Kovac, Zoran Vukovic IT-96-23-T, 19 April 2000 pp1979-1982.*

³⁴ De Brouwer *Supranational Criminal Prosecution of Sexual violence* p 123.

³⁵ De Brouwer *Supranational Criminal Prosecution of Sexual violence* p 119.

³⁶ De Brouwer *Supranational Criminal Prosecution of Sexual Violence* p 120.

³⁷ Matysak Interview and Opinion 1 July 2009.

The new definition of rape established in *Kunarac, Kovac, and Vukovic* may theoretically rule out any possibility of the victim consenting; consent is not an acceptable element in supranatural criminal law and its inclusion as an element in the definition of rape in international law must be contested.³⁸ This new principle deserves wider appreciation than has been the case to date, and its applicability in countries such as the DRC, Sudan, and Zimbabwe, where widespread rape is reported and there is clear evidence of war or low intensity conflict, needs to be applied.

³⁸ De Brouwer *Supranational Criminal Prosecution of Sexual Violence* p123.

The importance of Truth telling: Is it enough to warrant amnesty especially with regard to violence against women?

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*"Truth is the cornerstone of the rule of law, and it will point towards individuals, not peoples, as perpetrators of war crimes, and it is only the truth that can cleanse the ethnic and religious hatreds and begin the healing process."*³⁹

Truth recovery is one of the non-judicial mechanisms that have gained great prominence over the last 15 years.⁴⁰ There have been 27 such commissions around the world with different degrees of success, and many peace accords refer to truth commissions as an option for dealing with the past. Their main function is to investigate human rights violations that occur during armed conflict as a result of oppression from governments. The reports of the truth commissions are findings from the investigations conducted together with recommendations on reparations and measures that will prevent future violations. They are meant to help a country confront its past and as an instrument of transitional justice it is a short term, temporary non-judicial mechanism and process that addresses a human rights abuse legacy as part of a society's transition from conflict or authoritarian rule.⁴¹ Through truth telling, a commission is first and foremost concerned with the recovery of the truth and then an attempt to document and analyse the structures and methods used in carrying out illegal repression, taking into account the political, economic and social context in which these violations occurred.⁴²

The right to truth requires states to provide information relating to the cause of the events that have led to persons becoming victims of human right violations; the reasons, circumstances and conditions of the violations; and the progress and results of the investigation and the identity of the perpetrators. Both in its individual and collective dimensions, the right to truth is an inalienable right, which stands alone. It should be considered as a non-derogable right and should not be subject to limitations.⁴³ Principle 2 of 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 Violations of International Humanitarian Law states that, "every people have the inalienable right to know the truth about past events concerning the perpetration of heinous crimes about the circumstances and reasons that led, through massive systematic

³⁹ Madeleine Albright, 1993.

⁴⁰ It was first used in South American and has spread ever since to many other parts of the world. Boraine & Valentine *Transitional Justice and Human Security* 1st ed (2006) p 27.

⁴¹ The World Bank "Gender, Justice and Truth Commissions" 2006 p 3.

⁴² Boraine & Valentine *Transitional Justice and Human Security* 1st ed (2006) p 28.

⁴³ Study on the Right to Truth, Report of the Office of the United Nations High Commissioner for Human Rights, UN Doc. E/CN.4/2006/91 2006 Para 38.

violations, to the perpetration of those crimes. Full and effective exercise of the right to the truth provides a vital safeguard against the reoccurrence of violations.” By providing a full account of the violations and abuses of the past and in identifying the truth, truth commissions are one of the main tools for the state to ensure the right to truth.

Principle 5 of the updated set of Principles to combat impunity, recommends states to take appropriate action - including measures necessary to ensure the independent and effective operation of the judiciary - to give effect to the right to know. The Sierra Leone Truth and Reconciliation Commission stated that, ‘it is with the right to truth that the truth and reconciliation commissions excel.’⁴⁴

The gender sensitive approach adopted by the commissions differentiates between violations that take place between men and women and also helps identify the causes and consequences of human rights violations between these two groups. This in turn helps in designing reparations programmes that will address their different needs.⁴⁵ The addition of a gender analysis to transitional justice adds the possibility of providing interventions that extend justice from the legal environment that is often politicised, into a sphere of development, where access to education, health care and employment usually is important to sustainability and reconstruction efforts.⁴⁶ Though conflict and repression adversely affects the members of the particular community, for women, conflict also often creates new opportunities for participation in the public domain. The skills and the experience that women possess and gain in protecting their families in uniting for survival and for providing care for their families make them essential participants in building peace once the conflicts have ceased. They are seen as less threatening than younger men during conflict as they are able to move, work and meet even on dividing lines of conflict, though this may increase the burden of social responsibilities. It is also empowering as they take on creative roles in their use of traditional identities.

The increased focus on gender and women’s experiences advances the rights of women and advances gender justice by consideration of important issues. Communities often stigmatise female combatants both as having been part of the conflict and for stepping out of the traditional gender roles by taking up arms. Reintegration too often focuses on economic and social integration and fails to address the psychological, social and medical needs of women. As principal caregivers in most societies, especially where medical and other infrastructures have collapsed, women are often responsible for the reintegration of their kin, many of whom are injured and traumatized. Transitional justice measures need to examine the roles of women as agents of reintegration. Women and girls play multiple roles in combat

⁴⁴ Sierra Leone Truth and Reconciliation Commission, *Witness to Truth: Report of the Sierra Leone Truth and Reconciliation Commission*, 2004, Vol 1 p 44-45.

⁴⁵ The World Bank “Gender Justice and Truth Commissions” 2006 p1.

⁴⁶ The World Bank “Gender Justice and Truth Commissions” 2006 p 1.

that are not always recognised, from cooks and porters to guards and fighters. Therefore to restrict gender issues to simply that of sexual violence against women is to ignore the other gendered dimensions of conflict.⁴⁷

Ultimately any transitional justice process adopted should aim to empower women and address the discriminatory environment. This requires a much broader focus on systematic violations than is currently the norm. It also requires that those involved go beyond established dogmas regarding gender, justice and transition and initiate innovative measures and practices to ensure inclusion. Furthermore successful transitional justice priorities and approaches should ensure accountability for the victimised communities through local ownership supported by transnational solidarity.⁴⁸

The role of truth commissions in clarifying facts about past human rights violations is naturally complementary to the role of national and international courts. The United Nations Commission on Human Rights has encouraged states 'to consider establishing specific judicial mechanisms as well as, where appropriate, truth and reconciliation commissions to complement the justice system, to investigate and address gross human rights violations and serious international humanitarian law.' The work of truth commissions and courts are complementary, though different in nature and should not be confused, as truth commissions are not intended to act as substitutes for the civil, administrative or criminal courts. They cannot be substitutes for a judicial process to establish individual criminal responsibility.⁴⁹ International human rights bodies have stressed consistently that the work of a truth commission must be accompanied by prosecutions. The United Nations Committee against Torture while complementing the work done by the South African Truth and Reconciliation Commission recommended that "*the state party should consider bringing to justice persons responsible for the institutionalisation of torture as an instrument of oppression to perpetuate apartheid and grant adequate compensation to all victims.*"

The Inter-American Commission on Human rights has held that the establishment of truth commissions, as well as measures to compensate victims and their families, do not in any way exonerate the state from its obligation to guarantee the victims' right to obtain a judicial investigation in a court of criminal law to determine those responsible for the crimes committed.⁵⁰ As mentioned above victims of human rights violations have a right to know the truth and a right to justice and in order to combat the culture of impunity, amnesty is an unacceptable measure in dealing with past human rights violations. As stated by the Inter- American Commission in the case of El Salvador, '*despite the contribution that the truth commission made in establishing the facts surrounding the most serious violations, and in promoting*

⁴⁷Ayab, Kouvo & Sooka "Addressing Gender specific Violations in Afghanistan" International Center for Transitional Justice, 2009 p 6.

⁴⁸ Ayab et al "Addressing Gender specific Violations in Afghanistan" International Center for Transitional Justice, 2009 p 9.

⁴⁹ Amnesty International "Truth, Justice and Reparations: Establishing an effective truth commission" 2007 p 8.

⁵⁰ Amnesty International "Truth, Justice and Reparations: Establishing an effective truth Commission" 2007 p 9.

*national reconciliation, the role that it played, although highly relevant, cannot be considered as a suitable substitute for proper judicial procedures as a method for arriving at the truth. The value of truth commissions is that they are created, not with the presumption that there will be no trials, but to constitute a step towards knowing the truth and, ultimately, making justice prevail. Nor can the institution of a Truth Commission be acceptable substitute for the state's obligation, to investigate violations committed within its jurisdiction.*⁵¹

Given the position of women during times of conflict and post conflict, truth seeking is an important mechanism by which the nature and the root of the conflict is revealed but should not in itself warrant amnesty for violations committed against women. Truth seeking is however part of other transitional justice mechanisms which allowed for post conflict reconstruction. Other mechanisms need to be employed to ensure sustainable development for women and access socio-economic rights. This will facilitate the ability to overcome the consequences of conflict - economic hardship, health care violations, fewer legal rights and access to land.⁵²

⁵¹ Amnesty International "Truth, Justice and Reparations: Establishing an effective truth commission" 2007 p 10.

⁵² Ayab et al "Addressing Gender specific Violations in Afghanistan" International Center for Transitional Justice, 2009 p 6.

'Restorative Justice vs. Retributive Justice': The Pros and Cons from a woman's perspective

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What is retributive justice? What is restorative justice? Why restorative justice? Why retributive justice? Why the need for any kind of justice? These are questions that will arise in the minds of people when they hear these two terms. It is important to answer these questions before considering the pros and cons of how each of forms of justice are perceived by women.

The main idea behind the concepts of restorative and retributive justice is to ask whether the point of justice is to punish the wrongdoer or to make good the damage done by the violation. Restorative justice forms an integral part of transitional justice with the purpose of finding equilibrium between demands of justice and peace in exceptional circumstances in which massive and systematic atrocities have been committed.⁵³ Restorative justice emerged as an alternative and critical paradigm vis-à-vis the functioning of the criminal system in contexts of normality and, in particular, vis-à-vis its methods for punishing ordinary crime. Retributive justice is the infliction of punishment in a systematic way on perpetrators of violations on the basis that the perpetrator has done something to upset the harmonious existence of society.⁵⁴ Restorative justice, on the other hand, is a way of addressing past wrongs with the emphasis on the need for healing of both the wronged and the wrongdoers. Some argue that justice is simple self-assertion- insistence that one's honour and integrity must be defended. Hence whatever form it takes it must meet the demands of the wronged.⁵⁵

Retribution argues that, if laws were made to be obeyed, then whoever breaks those laws should be punished. However, many people criticise retributive justice for the reason that it evolves from negative motives such as revenge. Criminal tribunals, such as those in the former Yugoslavia, Rwanda, and Sierra Leone, are examples of retributive justice processes. Restorative justice, on the other hand, strives to achieve reconciliation between victims and perpetrators. It involves the use of non-violent conflict resolution methods. Structures such as truth and reconciliation commissions are examples of the means of achieving restorative justice where perpetrators and victims alike tell the truth of what happened, with the former asking for forgiveness from the latter. For most people, restorative justice represents

⁵³ Rodrigo and Saffon *Transitional Justice, Restorative Justice and Reconciliation: Some Insights from the Colombian Case* in Reettberg and Angelica *Between Forgiveness and the Wall. Questions and Dilemmas of Transitional Justice Bogotá: Universidad de los Andes – CESO – IDRC*, (2005) pp 211-232.

⁵⁴ Markel Dan 'The justice of amnesty: towards a theory of retributivism in recovering states' *University of Toronto Law Journal* Vol 49 (1999) pp 389-407.

⁵⁵ Jirsa Jakub 'Forgiveness and Revenge: Where Is Justice?' *IWM Junior Visiting Fellows' Conferences*, Vol. XVI/5 (2004)28.

forgiveness, hope, accountability, and positive outcomes for all parties, especially, but not limited to, communities which have experienced the most harm and could benefit the most from the reversal of harm and suffering. Forgiveness in restorative justice is a process that leads to re-establishing and regaining dignity of the victim as a human being with a certain objective value.⁵⁶

Restorative justice rather than retributive justice

From the perspective of a retributive approach the idea of putting the victims' rights first is salutary since it insists on fair and respectful treatment of victims by the agents of the criminal justice system. Retributive justice is often considered fair because it presents to the offender a chance to experience how it feels to be the victim perhaps preventing similar behaviour in the future. Margaret Falls grounds the retributive justice theory in understanding punishment as a part of holding a given person (offender or wrongdoer) morally accountable, i.e. respectful.⁵⁷ However, retributive justice often fails to go far enough, sometimes running the risk of being so revenge-oriented that it does not consider the option of victim-offender engagement. Thus, it loses the possibility of the kind of restitution and healing that can come from this sort of encounter. Some analysts argue that crime is breaking the rules, breaking the rules is the violation, and the state is the victim. The real victims are not even a significant part of the equation. Retributive justice is preoccupied with blame and pain and is primarily negative and backward looking.⁵⁸

Often times the question that arises in challenging the concept of retributive justice is 'how does one measure the crime or the relevant punishment and who is to judge what punishment is appropriate or proportionate to the offence?' Supporters of restoration argue that socio-economic conditions catalyse the perpetration of certain violations, and thus punishment of the offenders will not help the problem.⁵⁹ Getting to the root of the problem by addressing the social inequities, notions and norms, rather than castigating the offender who acted in a certain context, perpetuates violations rather than addressing the real problem.

In adopting restorative justice mechanisms, the burning questions will be to identify the victims first, their needs second, the obligations to be met in addressing their needs third, and finally, the responsible individuals or bodies to meeting these obligations. Restorative justice aims to promote healing of the victims, the communities, and even the perpetrators.

⁵⁶ Tutu *No Future Without Forgiveness* 1 (1999) pp123.

⁵⁷ Falls Margaret 'Retribution, Reciprocity, and Respect for Persons' *Law and Philosophy* Vol 6 (1987) pp 25-51.

⁵⁸ Bloom Sandra L 'Restorative v Retributive Justice' *The Justice' The Psychotherapy Review* (1) Vol 6 (1999) pp 259-260.

⁵⁹ Nobles Melissa 'The prosecution of human rights violations' *Annual Review of Political Science* (2010) pp 165-182.

Justice from women's perspective

Women make up the majority of victims in times of conflict. They have been used repeatedly as the battlefields at which the conflicting parties test the extent of their prowess. As primary victims, they are subjected to all forms of atrocities including assault, torture, inhuman and degrading treatment, maiming, murder, abductions, and arbitrary arrests. They suffer miscarriages, loss of their children and rape or sexual slavery which in most cases results in the contraction of venereal diseases, including HIV/AIDS. As secondary victims, women have to contend with taking care of and nursing the injuries of those they love. They are subjected to pain and humiliation, watching their loved ones being abused in all sorts of ways, getting killed or just being treated inhumanely. Having suffered different forms of loss - loss of lives, dignity, husbands, breadwinners, parents, siblings, children, property, livelihoods, good health, and peace of mind - women then have different approaches towards the kind of justice they want.

Some women would be inclined towards both retributive and restorative justice processes. On one hand, they want to see the perpetrators of the violence that caused them harm punished - they want them to feel what they felt also. They would find satisfaction in knowing that the person who harmed them has been punished and will not find a mere apology satisfactory. On the other hand, they also want their jobs back, their incomes back, their property restored. They cannot have their husbands back or their loved ones who died restored, but the pain could be eased by the knowledge that the perpetrator has been imprisoned to pay for their crimes. To these women, the "forgive-and-forget" stance will never work. They want open acknowledgement of violations by the perpetrators, accompanied by reparations, prosecutions, and, if possible, restoration of their status quo. They want punishment to be meted out against the perpetrators that will act as a deterrent to future recurrence of the same violations. In achieving this, these women find their peace and healing.

However, there is another group of women victims whose idea of healing stems from a restorative justice viewpoint. They are more concerned with mending relationships and restoring communal cohesion than inflicting equal measures of pain on those who troubled them. They find it more satisfying to have the perpetrators come to them personally and ask for forgiveness. All they want is a restoration of good relations at whatever cost, even if in the process they do not gain anything monetary or the offender never goes through what they went through. They want the perpetrators to develop an understanding of the pain they went through, not for purposes of punishing them, but to make them refrain from doing the same in the future.

There are also women perpetrators. For example, a Zimbabwean report on the violence that took place during 2008 indicated that female ZANU PF supporters were 40 times more likely to have participated in

violence than their MDC counterparts.⁶⁰ They assisted directly in the infliction of pain on other women. They were in positions of leadership or were spies or informers for those who caused the violations to occur. These women definitely would not want retributive justice because it would affect them directly. They do not want to be imprisoned or be punished in any way. They would rather tell the truth and confess their part in the harm they caused to others. They favour reconciliation over retribution.

There is yet another group of women who were neither perpetrators nor victims. These women could hold either of the views mentioned above for reasons that vary from one person to another. There are those that stand for the protection and promotion of women's rights and feel strongly about women's dignity and well being. They campaign for a culture of peace and non-violence. They would be inclined to the exercise of retributive measures against perpetrators to curb the continued practice of harmful behaviour against all women. Some women in this category may also feel that it is more important to rebuild the societal fabric and values, to restore humanness (*ubuntu*) (*hunhu*) in society to further the protection and promotion of basic human rights than to inflict the same levels of pain on the perpetrators.

There are also those women who were neither victims nor perpetrators, nor are they human rights activists, but, just because they are women, they feel that what the others went through at one time could happen to them or their fellow women folk in the future. They want punishment to act as a deterrent measure to restore women's security and freedoms. They would then want to see a total end to violence against women through the prosecution of all perpetrators so that others are deterred from doing the same with impunity. Some of these women could also feel that the punishment should be accompanied by the telling of the truth and compensation to the victims.

Another category of women comprises women who were victims, but are closely related to perpetrators. These women are faced with the dilemma of deciding what they want to see happening in a transitional process. On one hand, they want to see those who harmed them getting punished. They want restoration of the property they lost and compensation for all that they went through. On the other hand, they do not want punishment in the form of imprisonment to befall their husbands or children. They stand to lose breadwinners, and they will worry about raising families on their own.

The point here is that the issue of whether transitional processes should adopt a retributive or restorative stance is a complex one for women. They have a plethora of issues to take into account before deciding on a course of action. This leads to women appearing as a divided front when expressing their

⁶⁰ Centre for the Study of Violence and Reconciliation 'Subliminal Terror? Human rights violations and torture in Zimbabwe during 2008' (2009).

viewpoints. The social dynamics and the implications of each decision impact the lives of women differently. There is thus no one single 'women's perspective'.

The approach by women is a hybrid of the two models - retribution against those who caused them personal, physical, bodily harm, or caused them irreparable harm and irrecoverable losses, and restorative measures in cases where their losses are recoverable. But, for the future, it seems evident that no transitional justice process should be implemented without wide consultation beforehand, making women aware of all the possible options, and ensuring that whatever process is finally put in place has the widest possible acceptance by the community, with women being a crucial group within the community.

Finally, it must be pointed out that all transitional justice processes have one common feature, that of dealing with impunity. It can never be acceptable that a period of gross human rights violations is followed by no justice at all. It is for this reason that the United Nations, in considering the issue of impunity, has argued that, whatever justice process takes place, it should ensure that critical rights of victims and survivors are protected. These rights, four of them, can be simply described: the Right to Know (truth), the Right to Justice, the Right to Non-Recurrence, and the Right to Reparation (restitution, compensation, and rehabilitation).

These rights were discussed by the United Nations in a session in which they established that there are 4 basic Principles that are important in combating impunity.⁶¹ The right to know is described as that right which not only addresses the wish of the individual victim or closely related persons to know what happened, but is also a collective right, ensuring that history accurately records the violations of the past to prevent them from recurring in the future.⁶² This entails a corresponding obligation on the state in the form of the "duty to remember".

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 reparations. The right to justice obliges the State to investigate violations, prosecute the perpetrators, punish them if their guilt is established and have the necessary political will to put into effect international human rights treaties that authorize the extradition of perpetrators of violations, for instance, humanitarian provisions in the 1949 Geneva Conventions and the United Nations Convention against

⁶¹ Commission on Human Rights, Sub-commission on Prevention of Discrimination and Protection of Minorities 49th session E/CN/Sub.2/1997/20.Rev.1.

⁶² E/CN/Sub.2/1997/20.Rev.1.Para 17-25.

Torture.⁶³ Justice also means an end to impunity and can only be achieved when barriers to accessing the justice system such as the prescription for offences; blanket amnesties for offenders are removed. It also requires denying perpetrators of these crimes asylum, extraditing them as well as trying them in absentia, if need be.

The right to reparation entails both individual measures and general, collective measures. It includes relatives and dependants as beneficiaries.⁶⁴ It can take the form of 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); or rehabilitation (medical care, including psychological and psychiatric treatment) or all of these options.

The right to non-recurrence is also crucial. It requires the adoption of stiff measures to avoid victims having to endure new violations affecting their dignity. Some of these measures may be the disbandment of parastatal armed groups; the repellation of emergency laws, abolition of emergency courts and recognition of the inviolability and non-derogability of bodily integrity and the removal from office of senior officials implicated in serious violations.⁶⁵ If these rights are enforced, then any justice process – retributive or restorative – will address the needs of victims and the society.

⁶³ E/CN/Sub.2/1997/20.Rev.1. Para 26- 39.

⁶⁴ E/CN/Sub.2/1997/20.Rev.1. Para 40-42.

⁶⁵ E/CN/Sub.2/1997/20.Rev.1. Para 43.

Prevention in the Concept of the Responsibility to Protect

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Introduction

The concept of the *Responsibility to Protect* (R2P)⁶⁶ has recently been developed in the realm of international public law. It refers to the responsibility that all states have to protect their populations from genocide, war crimes, ethnic cleansing, and crimes against humanity. This responsibility does not belong to the state exclusively, but to the entire international community. In cases where a state fails to fulfil its responsibilities, either directly through committing such crimes, or indirectly by failing to prevent these from taking place, it is argued that the general prohibition on interfering in the internal affairs of a sovereign state can be relaxed. It is a set of principles that requires the international community to act in defence of citizens rather than states, and R2P arose directly out of the understanding about how the international community had failed both the Rwandan and Bosnian people. This framework provides the necessary legal instruments for international humanitarian intervention.

The elements that make up the R2P are: the *responsibility to prevent*; the *responsibility to react*, and the *responsibility to rebuild*. The *responsibility to prevent* is aimed at addressing both the root causes and direct causes of internal conflict and other man made-crises putting populations at risk. The *responsibility to react* entails responding to situations of compelling human need with appropriate measures, which may include coercive measures like sanctions and international prosecutions and in extreme cases military intervention. The *responsibility to rebuild* is to provide, particularly after military intervention, full assistance with recovery, reconstruction and reconciliation, addressing the causes of the harm the intervention was designed to halt or avert.⁶⁷

Supporters of R2P view it as a method of establishing a normative basis for humanitarian intervention and its consistent application. Detractors argue that by justifying external breaches of state sovereignty, R2P encourages foreign aggression by stronger nations. Some experts, like Walden Bello,⁶⁸ criticize the Responsibility to Protect as a form of imperialism. According to him, some nations can use the R2P in

⁶⁶ R2P was first adopted as a norm by a United Nations High-Level Panel in 2004. Then the 2005 Report of the UN Secretary-General, submitted to heads of state and governments attending the 2005 World Summit session of the UN General Assembly, recommended endorsement of the R2P principle. In September 2005, in the World Summit Outcome Document, heads of state and government attending the 60th Session of the UN General Assembly agreed to the principle. The UN Security Council, in Resolution 1674 (April 28, 2006), a thematic resolution on the protection of civilians in armed conflict, "reaffirmed" the principle of R2P. And Resolution 1706 (August 31, 2006) applied the R2P principle to a particular context for the first time in calling for the deployment of UN peacekeepers to Darfur.

⁶⁷ Evans Gareth "The Responsibility to Protect" Ending Mass Atrocity Crimes Once and For All, The Brookings Press 2008 p 41.

⁶⁸ Evans Gareth "The Responsibility to Protect" Ending Mass Atrocity Crimes Once and For All, The Brookings Press 2008 p 41.

order to achieve their own imperialistic interests. A clear demonstration of the purely economic reasons for R2P is the fact that its scope has been limited to only violent events, excluding the more social situations of misery and hunger.

Conceptual Development

Bernard Kouchner⁶⁹ invented and popularized the terminology known as “droit d’ingérence”⁷⁰ in the context of the post-Cold War. The concept was not initially accepted by everyone since it was seen as interference in the affairs of a sovereign state. Another approach to the concept was promoted by Tony Blair in what is known as the Blair Doctrine⁷¹, who sought to orientate the doctrine of the international community towards “the most pressing foreign policy we face, and to identify the circumstances in which we should get actively involved in other peoples’ conflicts”⁷². He identified five major considerations “we need to think about in deciding in the future whether we will intervene or not”.⁷³ Francis Deng⁷⁴, a Sudanese diplomat, shifted the discourse, claiming that the essence of sovereignty in the context of R2P is not the protection from an outside interference; rather, it is the states having positive responsibilities for their own citizens’ welfare.

The R2P formal principles were first developed by the International Commission on Intervention and State Sovereignty (ICISS) established by the Government of Canada in the December 2001 report, “The Responsibility to Protect”⁷⁵. The core principles that emerged from the ICISS Report were that the foundations of the responsibility to protect, as a guiding principle for the international community of states, lie in:

- A. Obligations inherent in the concept of sovereignty;
- B. The responsibility of the Security Council under art. 24 of the UN Charter for the Maintenance of the International Peace and Security;
- C. Specific legal obligations under Human Rights and Human Protection instruments;
- D. The developing practices of States Regional Organisations and the Security Council itself.⁷⁶

⁶⁹ Co-founder of both Medecins San Frontieres and the breakaway Medecins du Monde. He was a government minister and prominent humanitarian activist.

⁷⁰ Meaning ‘the right to intervene.’

⁷¹ Tony Blair, Doctrine of International Community, speech delivered at the Chicago Economic Club, April 24, 1999; available at www.number10.gov.uk/output/page1297asp. Accessed January 2010

⁷² Evans Gareth “The Responsibility to Protect” Ending Mass Atrocity Crimes Once and For All, The Brookings Press 2008 p33.

⁷³ The five major considerations were first, ‘Are we sure of our case? Second, ‘Have we exhausted all diplomatic options? Third, ‘Are there military actions we can prudently undertake? Fourth, ‘Are we prepared for the long term? And fifth, ‘Do we have national interests involved?’

⁷⁴ Francis M. Deng ‘*Sovereignty as Responsibility: Conflict Management in Africa*’, The Brookings Institute, Washington, DC, 1996.

⁷⁵ ICISS, The Responsibility to Protect (Ottawa: International Development Research Centre, 2001)

⁷⁶ See Evans p40.

Later, in 2004, this concept was adopted by the UN High Level Panel Report, which considered the R2P a way to guarantee security in the world. The UN High Level Panel in December 2004 developed the concept further to encompass an emerging norm of a collective international responsibility to protect which includes not only the right to intervene of any state but also the responsibility to protect every state when it comes to avoidable catastrophe⁷⁷. In March 2005, this report was endorsed by a report of the UN Secretary-General, entitled "In Larger Freedom: Towards Development, Security and Human Rights for All". In this report, the Secretary-General made reference to a paragraph in the High Level Panel report which refers to an emerging norm of the responsibility to protect, and reaffirmed that the idea of a "responsibility to protect must be "embraced" and "when necessary...acted on".

In September 2005, the concept of the responsibility to protect was incorporated into the Outcome Document of the High Level Meeting of the General Assembly. The Outcome Document contains two paragraphs, 138⁷⁸ and 139⁷⁹, on the responsibility to protect. This Document was subsequently adopted by the General Assembly in its Resolution 60/1 2005 World Summit Outcome⁸⁰. At the 2005 World Summit, the assembled heads of state and government agreed that R2P rests on three pillars:

- 1) The responsibility of the state to protect its population from genocide, war crimes, ethnic cleansing, and crimes against humanity, and from their incitement;
- 2) The commitment of the international community to assist states in meeting these obligations.

⁷⁷ High Level Panel on Threats, Challenges, and Change, A More Secure World: Our Shared Responsibility (United Nations 2004); available at www.un.org/secure-world.

⁷⁸ 138. *Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early warning capability.*

⁷⁹ 139. *The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VIII of the Charter, to help protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities manifestly fail to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity. We stress the need for the General Assembly to continue consideration of the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity and its implications, bearing in mind the principles of the Charter and international law. We also intend to commit ourselves, as necessary and appropriate, to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those which are under stress before crises and conflicts break out.*

⁸⁰ UN General Assembly, "World Summit Outcome 2005," Resolution A/RES/60/1 (October 24, 2005); available at www.un.org/summit2005/documents.html. (Accessed 8/04/2010)

3) The responsibility of the member states to respond in a timely and decisive manner when a state is manifestly failing to provide such protection.⁸¹

As the UN debated major reforms of its human rights system and how it is managed, this idea of committing to an international Responsibility to Protect gained support from many governments and civil society from many regions. Southern leadership at the World Summit was central. Argentina, Chile, Guatemala, Mexico, Rwanda, and South Africa were some of the influential governments insisting on a meaningful commitment to the Responsibility to Protect. The leadership of these governments allowed for the support of many other Members from the global South. In the end, the historic commitment was finally made at the World Summit in September 2005.⁸² In Paragraphs 138-139 of the World Summit Outcome Document, Heads of State and government agreed to the following:

That each individual state has the primary responsibility to protect its populations from genocide, war crimes, crimes against humanity and ethnic cleansing. And it is also a responsibility for prevention of these crimes.

That the international community should encourage or assist states to exercise this responsibility.

The international community has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means to help protect populations threatened by these crimes. When a state manifestly fails in its protection responsibilities, and peaceful means are inadequate, the international community must take stronger measures, including collective use of force authorized by the Security Council under Chapter VII.⁸³

The Security Council made reference to the concept in Resolution 1674 on the protection of civilians in armed conflict. Since the 2005 World Summit, there have been several important normative advancements, including the Security Council unanimously adopting Resolution 1674 on the Protection of Civilians in Armed Conflict, which includes the historic first official Security Council reference to the Responsibility to Protect. The Security Council also passed Resolution 1706 authorizing UN peacekeeping

⁸¹ Luck .C Edward, *The United Nations and the Responsibility to Protect*. The Stanley Foundation, policy analysis brief, August 2008. available at www.stanleyfoundation.org/publications/pab/LuckPAB808.pdf. (Accessed 8/04/2010)

⁸² <http://www.responsibilitytoprotect.org/index.php/about-rtop/learn-about-rtop>. (Accessed 12/04/2010)

⁸³ <http://www.responsibilitytoprotect.org/index.php/about-rtop/learn-about-rtop> (Accessed 12/04/2010)

troops to Darfur, which referred to Resolution 1674 and paragraph 138 and 139 on the Responsibility to Protect in the Summit Outcome Document. The Secretary-General Ban Ki-Moon has also made two very important appointments: Mr. Francis Deng as Special Adviser on the Prevention of Genocide, and Mr. Edward Luck, Special Adviser to the Secretary General with a focus on the Responsibility to Protect.⁸⁴

On 12 January 2009, UN Secretary-General Ban Ki-moon issued a report entitled, *"Implementing the Responsibility to Protect (RtoP)"*. The report is the first comprehensive document from the UN Secretariat on the Responsibility to Protect, following the Secretary-General's stated commitment to turn the concept into policy. The Secretary-General's report sets the tone and the direction for the discussion on the subject at the UN. The report proposes a terminological framework for understanding the Responsibility to Protect, and outlines measures and actors involved in implementing the three-pillar approach, first outlined in the Secretary-General's July 2008 speech.

The three pillars are:-

1. Pillar One stresses that States have the primary responsibility to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity.
2. Pillar Two addresses the commitment of the international community to provide assistance to States in building capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and to assisting those that are under stress before crises and conflicts break out.
3. Pillar Three focuses on the responsibility of the international community to take timely and decisive action to prevent and halt genocide, ethnic cleansing, war crimes and crimes against humanity when a State is manifestly failing to protect its populations.⁸⁵

Finally, the first resolution on the Responsibility to Protect was adopted by the General Assembly on 14 September 2009. The resolution ([A/RES/63/308](#)) was introduced by the delegation of Guatemala and was co-sponsored by 67 Member States. The General Assembly took note of the report of the Secretary-General and of the "timely and productive" debate in the General Assembly, and decided to continue its consideration of R2P.⁸⁶

⁸⁴ <http://www.responsibilitytoprotect.org/index.php/about-rtop/learn-about-rtop> (Accessed 12/04/2010)

⁸⁵ <http://www.responsibilitytoprotect.org/index.php/about-rtop/learn-about-rtop> (Accessed 12/04/2010)

⁸⁶ <http://www.responsibilitytoprotect.org/index.php/about-rtop/learn-about-rtop> (Accessed 12/04/2010)

State Responsibility to Prevent

Every State and government has the responsibility to protect its own citizens against mass violations of their rights, but also to do what it can to help others do the same. The basis of this responsibility lies essentially on the following obligations: the obligation inherent in the concept of sovereignty; the specific legal obligations under international human rights and humanitarian law; and national law. More clearly, states' responsibility to prevent violations of human rights can be portrayed on two levels: firstly, within national jurisdiction and, secondly, vis-à-vis other States.

Prevention of deadly conflict and other forms of man-made catastrophe is, as with all other aspects of the responsibility to protect, first and foremost the responsibility of sovereign states, and the communities and institutions within them.⁸⁷ The Security Council, the body charged with the primary responsibility for the maintenance of international peace and security, has stressed the importance of responding to the root causes of conflict and the need to pursue long-term effective preventive strategies. This concern is grounded firmly in the UN Charter, Article 55 of which explicitly recognizes that solutions to international economic, social, health and related problems; international, cultural and educational cooperation; and universal respect for human rights are all essential for "the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations." The Charter thus provides the foundation for a comprehensive and long-term approach to conflict prevention based on an expanded concept of peace and security.⁸⁸

A firm national commitment to ensuring fair treatment and fair opportunities for all citizens provides a solid basis for conflict prevention. This is due to the fact that conflict usually erupts when other people in the community feel left out in terms of opportunities for jobs, governance or other citizen activities. Efforts to ensure accountability and good governance, protect human rights, promote social and economic development, and ensure a fair distribution of resources point toward the necessary means.⁸⁹

Effective conflict prevention, according to Gareth Evans, depends on two major factors; strong analysis and good early warning signs. The first step to addressing grievances (which are the underlying cause of conflicts), and hence preventing an outbreak of violent conflict, is making fundamental changes to a state's system of internal *governance*. And this can be done by ensuring the promotion and observance of human rights (in light of the international standards). Evans, for example, raises the cases of Sudan, Somaliland and Sri Lanka where the larger problems of these countries emanate from unfair

⁸⁷ http://www.idrc.ca/en/ev-28739-201-1-DO_TOPIC.html (Accessed 7/02/2010)

⁸⁸ http://www.idrc.ca/en/ev-28739-201-1-DO_TOPIC.html (Accessed 7/02/2010)

⁸⁹ Evans Gareth, Responsibility to Protect: Ending Mass Atrocity Crimes Once and For All p 91-94. www.brookings.edu

constitutional arrangements. The promotion and observance of human rights also requires the creation of sustainable local institutions capable of defending human rights and monitoring and prosecuting violations.

Taking the case of armed forces, police and intelligence as an example, the military leaders and the chief of police in Zimbabwe explicitly declared before the elections that they would not support any leader who “did not have liberation war credentials” and this was a clear indicator that they were not going to accept the results of the elections if Mugabe did not win the elections.⁹⁰ Therefore, it goes without saying that had there been a fair constitutional structure and rule of law, both on paper and in practice in Zimbabwe, the violence that erupts at every election period in Zimbabwe but especially that of the June 2008 elections could have been prevented. Ruling party politicians made numerous inflammatory statements that encouraged violence. Certainly nothing was done to curb its incidence.⁹¹ After investigating the claims made by the Human Rights Forum after the 2000 elections, the African Commission on Human and Peoples’ Rights ruled:

....the Government cannot wash its hands from responsibility for all these 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. Government did not act soon enough and firmly enough against those guilty of gross criminal acts. By its statements and political rhetoric, and by its failure at critical moments to uphold the rule of law, the Government failed to chart a path that signaled a commitment to the rule of law.⁹²

Most African countries plead sovereignty as an excuse to shun external intervention even when they are clearly infringing on their people’s human rights. In 1992, the first UN Secretary-General from Africa or the Arab world, Boutros Boutros-Ghali, commented that “*respect for its [the state’s] fundamental sovereignty and integrity are [sic] crucial to any common international progress. The time of absolute and*

⁹⁰ Statement by Augustine Chihuri (Commissioner of Police) before the 2002 presidential elections.

⁹¹ See a report by Zimbabwe Human Rights NGO Forum, ‘It’s the Count that Counts: Food for Thought, Reviewing the Pre-election Period’, March 2005 p 3. HARARE: ZIMBABWE HUMAN RIGHTS NGO FORUM.

⁹² See a report by Zimbabwe Human Rights NGO Forum, ‘It’s the Count that Counts: Food for Thought, Reviewing the Pre-election Period’, March 2005 p 3. HARARE: ZIMBABWE HUMAN RIGHTS NGO FORUM.

exclusive sovereignty, however, has passed; its theory was never matched by reality."⁹³ In 2000, African nations were working to enshrine the principles of R2P within the founding Charter of the AU. First, the Constitutive Act defines the promotion of peace, security and stability and the promotion and protection of "human and peoples' rights" as core objectives of the Union. Second, it identifies "respect for democratic principles, human rights and the rule of law and good governance", "respect for the sanctity of human life", and "condemnation and rejection of impunity" among the core values. Most significantly, Article 4(h) of the Constitutive Act states the "right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances; namely war crimes, genocide and crimes against humanity."⁹⁴

This important clause conveys one end of the full R2P spectrum, the interventionist side, but the Charter shows the commitment of African nations to protecting populations from grave crimes, even if infringement on sovereignty is required. In 2005, with R2P as part of the proposed recommendations for improving the UN, the African Union responded with its own evaluation of the proposed reforms.⁹⁵ The report known as the *"Ezulwini Consensus"* was expressed at the African Union's 7th Extraordinary Session of the Executive Council of 1-8 March 2005, in Addis Ababa, Ethiopia. In its report, the AU embraced the Responsibility to Protect Doctrine and recognized the authority of the Security Council to decide on the use of force in situations of genocides, crimes against humanity, war crimes, and ethnic cleansing. It also insisted on the need for the empowerment of regional organizations to take action in such cases.⁹⁶ In the above mentioned circumstances, pleading sovereignty when committing atrocities and crimes, such as crimes against humanity will not be permissible.

Second, but not less important, is the *eradication of corruption*; because, as Evans⁹⁷ clearly states, deeply ingrained corruption can ultimately push states to the edge of state failure and thus precipitate conflict. Of course good governance and corruption are interrelated as lack of good governance is a fertile ground for widespread corruption. The actors involved in this are primarily states but the international community has the obligation to assist the states in achieving this goal by providing assistance in the form of capacity building and training.

Prior to the eruption of a conflict there is always a breakdown of law and order, and the police, as internal security actors, may not be fully operational, effective or may even be partisan. There is therefore a strong need for security sector reform. The overall objective of security sector reform is to

⁹³ Boutros Boutros-Ghali, *An Agenda for Peace*, A/47/277—S/2411, June 17, 1992, paragraph 17, p 5.

⁹⁴ http://www.africa-union.org/root/au/AboutAU/Constitutive_Act_en.htm.

⁹⁵ <http://www.responsibilitytoprotect.org/index.php/about-rtop/learn-about-rtop> Accessed 12/04/2010

⁹⁶ <http://www.responsibilitytoprotect.org/index.php/about-rtop/learn-about-rtop> Accessed 12/04/2010

⁹⁷ Evans Gareth, *Responsibility to Protect: Ending Mass Atrocity Crimes Once and For All*.www.brookings.edu

contribute to a secure environment that is conducive to development⁹⁸. Efforts should be made to provide training, equipment, and institutional and legal reforms to make sure that they operate under democratic principles. The armed forces, police, and intelligence forces should be reformed in order to ensure that there is good governance and impartiality. The transformation of the military and police is a central component of civilian protection and sustainable peace-building in countries like Zimbabwe and Burundi.⁹⁹ Ensuring that armed forces, police, and intelligence forces are competent and democratised is a significant conflict prevention tool, vital to enhancing governance, promoting stability and ensuring greater public trust in the state.¹⁰⁰

The violence that erupted in the March and June 2008 election period in Zimbabwe could have been prevented because there were clear indicators that violence could erupt. The fact that the military and police chiefs had declared that they were not going to accept the election results unless Mugabe won was a clear indicator that they were not going to prevent any violence that would ensure if they did not get the result they wanted¹⁰¹. This was unacceptable behaviour on their part because their constitutional role was, and still is, to serve the people of Zimbabwe and not an individual or any single political party. For many years the Zimbabwe National Army (ZNA) has been under the control of Mugabe as its commander in chief, and so the army has been seen to be protecting the interests of the party, ZANU-PF, rather than the security of and interests of the Zimbabwe people or a democratic government.

The state agents in Zimbabwe have also been implicated in human rights violations against women¹⁰². They have also failed in some instances to react to reports of human rights violations because they are highly politicized¹⁰³. The police allegedly aided the flourishing militia bases in Zimbabwe by refusing to help people taken to the bases, and also by directly taking part in the violations at the bases. The police were sometimes involved in rescuing victims from these bases, but did not generally arrest those found torturing victims.¹⁰⁴ The police force is now highly partisan and offers little or no protection to members of opposition parties or sympathizers, and the head of the police force has openly proclaimed his support for ZANU (PF). Police officers attempting to remain non-partisan are penalized. War veterans and former

⁹⁸ DIFID,2003,30,OECDI,DAC 11-35

⁹⁹ See Evans Gareth, Responsibility to Protect: Ending Mass Atrocity Crimes Once and For All p87.

¹⁰⁰ Evans Gareth p 100

¹⁰¹ See a Report by the Zimbabwe Human Rights NGO Forum, *'Their Words Condemn Them: The Language of Violence, Intolerance and Despotism in Zimbabwe'*, p 19 April 2007. HARARE: ZIMBABWE HUMAN RIGHTS NGO FORUM. Statements by General Vitalis Zvinavashe [Commander-in-Chief of the army at the time] Made in the period leading up to the 2002 elections: "The highest office of the land is a straight jacket whose occupant is expected to observe the objectives of the liberation struggle. We will therefore not accept, let alone support or salute anyone with a different agenda that threatens the very existence of our sovereignty, our country and our people." (Source: Film footage from film entitled Fighting For Rights)

¹⁰² See a Report by Women of Zimbabwe Arise *'The Effects of Fighting Repression with Love'* March 2008. HARARE: WOZA. www.wozazimbabwe.org (Accessed 18-09-2009).

¹⁰³ See a Report by the Zimbabwe Human Rights NGO Forum, *Their Words Condemn Them: The Language of Violence, Intolerance and Despotism in Zimbabwe*, April 2007. HARARE: ZIMBABWE HUMAN RIGHTS NGO FORUM

¹⁰⁴ See Zimbabwe NGO Forum report December 2002, *Are they Accountable? Examining Alleged Violators and their Violations Pre and Post Presidential Election March 2002*. HARARE: ZIMBABWE HUMAN RIGHTS NGO FORUM.

youth militia are being recruited into the force, and those already in it have been rapidly promoted; many are now in charge of rural police stations. Members of the police force have been involved in attacks upon people in urban areas. Top-ranking officers in the Zimbabwe National Army have also professed their support for ZANU (PF).¹⁰⁵ The Army Commander has attempted to influence soldiers to support the ruling party. Army personnel have allegedly been involved in attacks on MDC officials and supporters, and in carrying out farm invasions.

Civil society and donors need to provide financial and technical support to help the military and police to transform into a professional force able to protect the state and the citizens. There is therefore a great need to address politicised institutions to reduce and prevent future conflicts. Strengthening civil society is also a core component of Security Sector Reform because a robust civil society will act as an oversight mechanism to these issues, and civil society may stimulate dialogue on the reforms. Direct security measures, according to Evans, can include preventative military deployment. This usually occurs where there is a clear threat of conflict in a certain region or country. Preventative deployment is carried out with the permission of the governments concerned. It is carried out for at least three reasons:

- 1) To prevent the escalation of the dispute or situation into armed conflict; and
- 2) To calm the communities in the area by monitoring law and order; and
- 3) To monitor general conditions and assist the local areas.

There was need for the preventative deployment in Zimbabwe before the June 2008 elections because this would have calmed the communities in the rural areas and prevented the military from brutalising the innocent civilians.

The direct approach involves legal dispute resolution and threat of international criminal prosecution. The direct legal strategy to enforce the responsibility to protect generally involves "arresting, trying and convicting and punishing" the violators of human rights. And this can be enforced at national or international level - which also determines the actors responsible for enforcement. At the national level, national courts can assume universal jurisdiction and special or ad hoc tribunals can also be established. At the international level, the ICC has this responsibility. At the same time, a hybrid system can also be used to enforce this responsibility.

¹⁰⁵ Statements by General Vitalis Zvinvashe [Commander-in-Chief of the army at the time]. Made in the period leading up to the 2002 elections: Statement by Didymus Mutasa [(ZANU PF Minister):

"General Vitalis Zvinvashe said that many of us did not go to fight the second Chimurenga in order to install the British puppet like Tsvangirai. That under those circumstances if there were to be a coup we will support it, very definitely." Statements made at a rally in the period leading to the 2002 elections.

Conclusion

One of the most obvious benefits of the “prevention arm” of the Responsibility to Protect doctrine is that it eliminates the conflict before it starts, thereby saving lives and resources. Even if the conflict does come to a head, preventative measures can also be taken at each phase as a way to mediate the conflict as it progresses, as a harm reduction strategy. There are frequently many early warning signs of conflict, but the problem is that there has been no real political will to implement the doctrine. Thus, early warning signs rarely lead to an effective and timely response because warning signs are largely a technical exercise while early response is a political exercise. R2P can only work with significantly increased political will generated by the growing global anti-genocide movement. It is only then that this doctrine can help create a world in which R2P is the standard and the United Nations instinctively turns to this doctrine whenever it faces even the possibility of genocide or mass atrocity crimes.¹⁰⁶

A firm national commitment to ensuring fair treatment and fair opportunities for all citizens provides a solid basis for conflict prevention. Efforts to ensure accountability and good governance, protect human rights, promote social and economic development, and ensure a fair distribution of resources point toward the necessary means. But conflict prevention is not merely a national or local affair. The failure of prevention can have wide international consequences and costs. Moreover, for prevention to succeed, strong support from the international community is often needed, and in many cases may be indispensable. Such support may take many forms. It may come in the form of development assistance and other efforts to help address the root cause of potential conflict; efforts to provide support for local initiatives to advance good governance human rights and the rule of law; good offices missions, mediation efforts, and other efforts to promote dialogue or reconciliation. In some cases, international support for prevention efforts may take the form of inducements. In others, it may involve a willingness to apply tough and perhaps even punitive measures.¹⁰⁷

The basic point of preventative measures is to reduce and hopefully eliminate the need for intervention altogether. The importance of conflict prevention, as opposed to reaction, is recognised globally. That is why an array of international, regional, and non-governmental mechanisms for conflict prevention focused particularly on intra-state conflict were established in the 1990s. The Organization of African Unity (OAU), for instance, in 1993, established a “Mechanism for Conflict Prevention, Management, and Settlement”, with support from external donors. The Organisation for Security and Cooperation in Europe (OSCE) has developed a number of innovative internal mechanisms and practices toward preventing

¹⁰⁶ *R2P, The ICC and Stopping Atrocities in the real world* by John Prendergast and Lisa Rogoff, Enough Strategy Paper no 13 Feb 2008, www.enoughproject.org (Accessed 8-04-2010).

¹⁰⁷ http://www.idrc.ca/en/ev-28739-201-1-DO_TOPIC.html (Accessed 5/04/2010).

conflict in Europe. Also important has been the increasingly significant role played by NGOs, particularly in the context of early warning efforts and help in galvanizing domestic and foreign public opinion in support of prevention measures.¹⁰⁸

Local NGOs in Zimbabwe and many other countries are good at providing early warning signs, especially before election periods. However, these early warnings are usually not acted upon by the international community, and the result has been that thousands of women have been raped, maimed, or terrorised, and some killed, because of the political violence that occurs. The work of NGOS is complemented by the monitoring and reporting capacity of international and national human rights organisations such as Amnesty International (AI), Human Rights Watch (HRW) and the Federation Internationale des Liges des Droits de L'homme (FIDH). These organisations, which previously devoted most of their energies to reporting on human rights violations against individuals and groups, have made a conscious effort to expand their work to include early warnings about conflicts that could result in massive violations of human rights or even genocide.

The media have a particularly important role in conflict prevention, in particular alerting policy makers and the public opinion that influences them to the catastrophic consequences that so often flow from non action. More immediate and more graphic stories will always tend to take precedence, but there is much more that can and should be done to identify emerging issues, explain the human risks associated with them, and prod decision makers into appropriate action. It is necessary for the international community to change its basic mindset from a 'culture of reaction' to that of a 'culture of prevention.' To create such a culture will mean, as the Secretary-General reminds us, '*setting standards for accountability of member states and contributing to the establishing of prevention practices at the local, national, regional and global levels.*'¹⁰⁹ Without a genuine commitment to conflict prevention at all levels – without new energy and momentum being devoted to the task, the world will continue to witness killings and the reckless waste of precious resources on conflict rather than social and economic development. The time has come to take practical responsibility to prevent the needless loss of human life, and to be ready to act in the cause of prevention and not just in the aftermath of disaster.¹¹⁰

¹⁰⁸ Supra note 40

¹⁰⁹ http://www.idrc.ca/en/ev-28739-201-1-DO_TOPIC.html accessed 5/04/2010

¹¹⁰ http://www.idrc.ca/en/ev-28739-201-1-DO_TOPIC.html accessed 5/04/2010



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