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A transitional justice model for Zimbabwe

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**Submitted in fulfilment
of the requirements for the degree of**



**UNIVERSITY OF JOHANNESBURG
FACULTY OF LAW
JOHANNESBURG, SOUTH AFRICA**

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ACKNOWLEDGEMENT

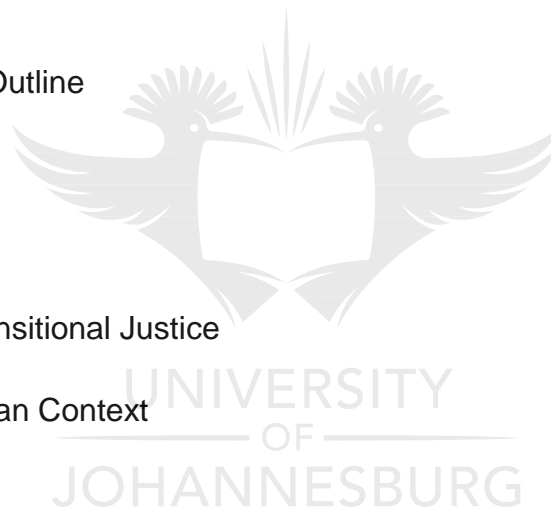
For my mother.



TRANSITIONAL JUSTICE MODEL FOR ZIMBABWE

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ABSTRACT

Zimbabwe is in a quagmire. The time for regional and international complacency has passed and it is now in the hands of ordinary masses with a coalition of the willing regional and international allies to usher in true social, economic and political recovery in Zimbabwe. The nation is replete with past and current human rights violations. The consequence of this state of affairs is a society traumatized by fear, withdrawal and collective depression based on past memories of violence, intimidation and harassment. The skeletons must be unearthed in the interest of accountability and nation building. Even though Zimbabwe has not gone through any real political transition, it is still possible to devise a way of achieving restorative justice. There are many countries to learn from while devising a transitional justice model for Zimbabwe. Zimbabwe must devise a form of transitional justice which will not only look backward- punishing, remembering, discovering the truth, telling the stories- but will also look forward, restoring the rule of law and creating new institutions and new attitudes which will protect from abuse of power and impunity in future.

TRANSITIONAL JUSTICE IN ZIMBABWE

CHAPTER 1

1.1 *Introduction*

"What transitional justice processes and mechanisms are possible in a state where gross human rights violations continue to be perpetrated with no genuine political transformation and where the state is predatory, authoritarian and violent?"¹

The United Nations views transitional justice as the full range of processes and mechanisms associated with a society's attempt to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation.² Zimbabwe is and has been a nation on the brink.³ The causes of the Zimbabwean catastrophe are according to Ndlovu clear; the abuse of power, raw unadulterated greed, mishandling of economy and all which are fuelled by the complete absence of accountability.⁴ In a society governed by the rule of law every person should be accountable for what they do. Perpetuated impunity frustrates accountability and anarchy and defiance of both secular and divine would become the norm and victims would have no justice.⁵

Zimbabwe has descended into a state where no accountability of the most heinous crimes against humanity exists. It is now in the hands of the broader Zimbabwean populace and resilient international community to come up with a clear path towards a justice model that will usher true healing and compensation for the victims while placing the country on a coherent path to political, economic and social recovery. Several efforts have been made to usher in the seeds of accountability at national and regional levels but still it has not produced the long awaited and desired

¹Reeler, Tarisayi and Maguchu "Transitional Justice in Pre-transitional Times. Are there any lessons for Zimbabwe?" Zimbabwe Human Rights NGO forum 2017 6.

²Guidance note of the secretary general "United Nations models for transitional justice", 2010 2

³ Ndlovu "What Transitional Justice in Zimbabwe?" *Women of Zimbabwe Arise (WOZA) prepares for popular participation* 113-119 at oalib.com/paper/1330953#.WRw8i4VOL4g (22 March 2017)

⁴ Ndlovu (n 3) 113 113

⁵ Nsereko The Evolution of International Criminal Law and the International Criminal Court in Context, address to the Parliament of Uganda at Parliament building Kampala, Uganda, September 2013

accountability in Zimbabwe. The question remains as to which transitional justice method would suit the Zimbabwean context.

Therefore, the fundamental question of this study is; is transitional justice in Zimbabwe achievable under the current political context and what form would it take? If there is a sociological, political and most importantly legal case for a deliberate national process of remembering and coming to terms with past gross violations of human rights what legal considerations would affect these questions or affect the forms that such a process might conceivably take in Zimbabwe?⁶ Eventual democratization of the political and social life is anticipated in Zimbabwe and so is the kicking in of transitional justice mechanisms.

The subject matter of this thesis relates to an evolving political context but positions itself as an enquiry into the possible ways of solving the accountability crisis on the score of gross human rights violations in Zimbabwe. This study argues that no single method of Transitional Justice would wholly address the crisis for accountability in Zimbabwe, rather an experimental "cocktail" of all tenets of transitional justice as a concept have to be undertaken in Zimbabwe with the victims at the forefront in choosing which methods or combinations thereof to take up.

1.2 *Research gap*

Redress for atrocities of the past in Zimbabwe is a neglected topic. The *gukurahundi* genocide for instance has not been addressed with the intensity it deserves since it "ended" with the Unity Accord in 1987. The topic remains contentious as the victims have not found closure. Discussion of *gukurahundi* has been rendered taboo in authoritarian texts.⁷ What happened was chilling and gruesome and still causes strong emotions⁸ and hence the need for redress. To date nothing has been done to bring those responsible to book and this rings true to the notion expressed by Simpson that "each war crimes trial is an exercise in selective justice to the extent

⁶ Du Plessis and Ford "Transitional justice: a future truth commission for Zimbabwe?" *International and Comparative Law Quarterly* (2009) 73 75.

⁷ Mpofu "When the Sulbatern speaks: citizen journalism and genocide "victims" voices online", *African journalism studies* vol.36 2015 82.

⁸ Msipa "*In Pursuit of Freedom and Justice- A Memoir*" 2015 113.

that it reminds us that the majority of war crimes go unpunished"⁹The *gukurahundi* genocide and a plethora other human rights violations have not been addressed with the intensity they deserve. The Clemency order no 1 of 18 April 1988 which granted blanket amnesty to all parties who administered violence during the *gukurahundi* massacres has however made government reluctant to release the findings of the *Dumbutshena* and *Chihambakwe* commissions¹⁰ citing that digging into the past can incite further conflict.¹¹ However, knowing the truth will certainly provide the victims of the *gukurahundi* massacres with a propitious environment for healing and possible reconciliation.¹² Though it is a terrain that is difficult to navigate given the extent of the atrocities, it is worthwhile to try and seek reconciliation through truth telling.

There is therefore a need to open dialogue on the subject of accountability for the genocide so as to pave way for true reconciliation in Zimbabwe. A discourse spearheaded by academia is a good starting point to usher in confidence to tackle the impasse which has been created by a lack of accountability in Zimbabwe.

1.3 *Structure and outline*

To effectively answer the research questions and give a holistic view of the presented arguments, the study will be presented in five chapters. Chapter one provides a background and historical context of the need for redress in the form of Transitional Justice for Zimbabwe to address past atrocities and restore the rule of law and foster reconciliation.

Chapter two houses a discussion of the term Transitional Justice and the historical context of the Zimbabwean political situation which has given rise to a need for redress. This chapter will look closely at the history of Zimbabwe and how a culture of impunity was cultivated and how the sectors of the political, social and economic life of the masses has developed with a view to formulate recommendations on how

⁹ Simpson *The Boundaries of Liability in International Criminal Law*, Journal of Conflict and Security Law (2001), Vol 6, 1, 3-6.

¹⁰ Established in 1981 and 1983 respectively to investigate disturbances in Matebeleland.

¹¹ See the Catholic Commission for Justice and Peace in Zimbabwe and Legal Resources Foundation Zimbabwe 1997; *Breaking the Silence, Building the Peace. A report on the disturbances in Matebeleland and the Midlands, 1986 to 1988*, Harare, Catholic Commission for Justice and Peace in Zimbabwe, 16.

¹² Murambadoro " We cannot Reconcile until past has been acknowledged" Perspectives on Gukurahundi from Matebeleland, Zimbabwe, African Journal on Conflict Resolution 15 (1) 2015 33-57.

the atrocities of the past can be avoided and how the rule of law can be restored so that the people can be able to trust their government again.

Chapter three will look at various models of transitional justice that have been applied in other jurisdictions such as the *gacaca* courts in Rwanda and the Truth and Reconciliation Commission in South Africa and analyse the likelihood of those methods to achieve desired results in the Zimbabwean context.

Chapter four is dedicated towards a look at methods that have locally and regionally been put into effect in Zimbabwe with a view to achieve reconciliation and peace and analyse the strengths and shortcomings of any such initiatives.

Chapter five will be devoted to the overall assessment of the foregoing discussion and thereby conclude and recommend possible modes of action to effectively satisfy the objectives of transitional justice. This chapter will wrap up the discourse in preceding chapters and aim to contextualise the events in Zimbabwe with a view to come up with the correct form of viewing the human rights abuses and the 1980 genocide and formulating best ways to react to it in order to usher in true healing and nation building and restore the rule of law in Zimbabwe.

CHAPTER 2

TRANSITIONAL JUSTICE AND ZIMBABWE'S STATE OF IMPUNITY

2.1 *Introduction*

Chapter one gave a bird's eye view of the essence of this study. This chapter focusses on an overview of the concept of transitional justice, its evolution and the history of Zimbabwean government's state of impunity.

2.2 *Concept of transitional justice*

Transitional justice refers to the ways in which countries emerging from periods of conflict and repression address the large scale or systematic human rights violations so numerous and so serious that the normal justice system will not be able to provide an adequate response.¹³ The United Nations has joined the dialogue on Transitional Justice.¹⁴ The United Nations views transitional justice as the full range of processes and mechanisms associated with a society's attempt to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation.¹⁵

Transitional Justice is a term coined by Ruth Teitel in 1991 as traditionally referring to short term processes and mechanisms used to address the legacy of human rights violations and violence during a society's transition from an authoritarian regime.¹⁶ Mark Amstutz interprets the transitional justice debate in terms of the liberal idea of retributive justice with its concern for accountability and punishment versus the communitarian idea of restorative justice with its concern for social solidarity and moral values.¹⁷ Weinstein and Stover postulate that there is a need to develop interventions that focus on the multiple levels of society and attend to the psychological and social aspects of the law while engaging survivors of mass violence as active agents as opposed to viewing as mere auxiliaries. This approach

¹³ International Centre for Transitional Justice "What is Transitional Justice?" 1.

¹⁴ Rule of law tools for post -conflict states, Vetting: An operational framework.

¹⁵(n 2) 2.

¹⁶ Ruth Teitel, Transitional Justice globalized, The International Journal of Transitional Justice 2008, Transitional Justice Institute Research Paper No 12-06.

¹⁷ Amstutz The healing of nations, Boulder: Rowman and Littlefield Publishers, Inc (2005).

must be considered in the process of social re-construction after war and mass atrocity.¹⁸

Transitional justice is now considered to be a vital component of prescriptions for modern peace building alongside disarmament, security sector reform and elections amongst others.¹⁹ As a developing inter-disciplinary field in law, Transitional Justice has received significant attention worldwide.²⁰ The concept is rooted in accountability and redress for victims. It recognises their dignity as citizens and as human beings and aims at recognizing dignity of individuals, acknowledges violations and prevents them from happening again.²¹ Mass atrocities and system abuses devastate societies and their legacy is likely to make the social, economic and political conditions of a country fragile.

Judicial and non-judicial processes, prosecutions, truth-seeking, reparation programs, institutional reforms or appropriate combinations thereof are housed under Transitional Justice initiatives. These should further seek to take account of causes of violations of all rights including civil, political, economic, social and cultural rights with a view to contribute to the achievement of broader objectives of prevention of further conflict, peace building and reconciliation.²²

Transitional justice in the field of international law has expanded and diversified. The 1988 decision of the Inter-American Court of Human Rights in the case of *Velasquez Rodriguez v Honduras* stated four fundamental obligations on states in the area of human rights:

- to take reasonable steps to prevent human rights violations;
- to conduct a serious investigation of violations when they occur;
- to impose sanctions on those who commit the violations; and

¹⁸ Weinsten and Stover " My neighbour, my enemy: Justice and Community in the aftermath of mass atrocity" New York Cambridge University Press (2004) 21.

¹⁹ Mendelhoff " Truth seeking, truth telling and post conflict peace building: curb the enthusiasm?" International Studies Review (2004) 355 6.

²⁰ Nouwen *Complementarity in the Line of Fire* (2013) 10.

²¹ n 20 above.

²² n 21 above.

-to ensure reparation for the victims of the violations.²³

For the above mentioned obligations to be realised, the causes of the violations have to be identified and so too the perpetrators. This necessitates a deep dive into the history of both the offended and the offender taking into account the political and social context under which the atrocities were committed. This in turn gives a would-be adjudicator a balanced view of the violation and also a fair assessment of the level of guilt and apportionment of blame and punishment.

International Tribunals through punishment and retributive justice mechanisms mainly pursue accountability, while truth and reconciliation commissions on the other hand aim to bring restorative justice through truth telling, public recognition of the violations and societal healing from past patterns of violence.²⁴

The theories of justice that will be examined in the project are compensatory justice, distributive justice, retributive justice and restorative justice all which find expression in the concept of transitional justice. Examples from previous conflicts and tribunals will be used to garner insight on how the past and current atrocities in Zimbabwe can be addressed for example case studies of domestic jurisdictions that have sought to apply this approach like Cambodia, Sierra Leone and neighbouring South Africa will inform this work. Bearing in mind that every country's' situation is unique and mechanisms for transitional justice must speak well to the situations presenting themselves in any context that presents itself.

2.3 *Zimbabwe situation overview*

Zimbabwe is a wounded nation. In proposing a model for transitional justice in Zimbabwe it is imperative to understand Zimbabwe's history and how a culture of impunity was cultivated and entrenched. Ndlovu²⁵ narrates that Zimbabwe's brutal colonial rule has been well documented as has the path to independence. During independence struggle both sides to the conflict-Ian Smith's intransigent 'settler' government and the two liberation movements Zimbabwean African Peoples Union (ZAPU) and Zimbabwe African National Union (ZANU) were both responsible for

²³ International Center for Transitional justice, "What is transitional justice?" 2009 1.

²⁴ Zuin "A Model for Transitional Justice for Somalia", Praxis, The Fletcher Journal of Human Security Volume xxiii 2008 89-102.

²⁵ Ndlovu (n 3) 113 115.

atrocities including torture, war crimes, mass rape and crimes against humanity. The British government in 1979 brokered the terms of independence but justice-both retributive and restorative justice, was sacrificed in order to obtain the peace which everyone so badly desired - a culture of impunity was entrenched and has been maintained during three decades of state sponsored violence.²⁶ No perpetrators have been successfully pursued by prosecuting authorities.²⁷ Other countries emerging from conflicts have devised processes of accountability but Zimbabwe's government relentlessly insisted that 'old wounds' must not be 're-opened' Over time known perpetrators of the most horrendous abuses were granted promotions, political appointments and economic favours and benefits²⁸

In situations of conflict where war crimes, crimes against humanity and other human rights violations are committed, the dichotomy of 'peace versus justice' and 'truth versus justice' presents numerous challenges.²⁹ From independence the focus was shifted more towards consolidation of black majority rule and while the public was mesmerised with the new-found independence, Mugabe's regime used the period from attainment of independence in 1980 to the time when opposition began to arise notably in 1999 with increased activity of trade unions and ultimate formation of the Movement for Democratic Change (MDC) to consolidate its relentless grip on power by incubating institutions based on patronage and loyalty to Mugabe and the ruling elite.

Thus, years later Zimbabwe finds itself deep in the pit of political and economic dysfunction and all systems that could potentially untangle the untenable situation are now under the direct or indirect control of the oppressive ruling elite. The Zimbabwe Electoral Commission (ZEC) is very reluctant as regards any reforms that could lead to a free and fair election³⁰ and hence likely topple the Mugabe regime.

²⁶ Ndlovu (n 3)113 115.

²⁷ Ndlovu (n 3)113 115.

²⁸ Ndlovu (n 3) 113 115.

²⁹ See E Lutz *Transitional Justice in the Twenty First Century* (2006) 327.

³⁰ Serving police officers reportedly told Human Rights Watch that between April and July 2008 police across Zimbabwe were issued specific instructions not to investigate or arrest ZANU PF supporters implicated in political violence. Human Rights Watch also found out that at least 163 politically motivated extrajudicial killings of mostly MDC supporters since March 2008 general elections resulted in only two arrests and no prosecution. Commissioner Bessie Nhandara admitted that some of the employees in the Zimbabwe Electoral Commission were once employed in the national army and Central Intelligence Organization (CIO).

The Judiciary system is packed with regime loyalists and the armed and police forces are core inflictors of harassment on the people instead of protecting them.

While every nation's situation is unique, Zimbabwe is distinct due to its lack of defined warring parties. It is not in armed conflict and thus escapes the key definitional element of war crimes and crimes against humanity.³¹ Zimbabwe escapes the definitional elements to suit the traditional understanding of the terms war crimes and crimes against humanity because it is not in armed conflict. However, recent thought as inspired by the ICTY³² and ICTR³³ definitions of crime against humanity reflect that an attack does not have to be physical or occur in the context of armed conflict in order to fit the definitional elements³⁴ of an international crime. The need for judgement is the same as it has always been-to prevent the next despotic regime from doing to another people what the ruling elite has done in Zimbabwe. Zimbabwe has an on-going situation in which an all-powerful government has repeatedly quashed unarmed political opposition and non-political protests with campaigns of violence and gross human rights violations using the arms of the army, police and other state actors to commit atrocities.

Zimbabwe has been caught up in a government policy which deliberately mismanages the banking system³⁵, agricultural production³⁶, industry and mining and retailing in order to please the political and military elite.³⁷ The resulting distortion and inflation steals the incomes and savings of all Zimbabweans who have no access to patronage. The resultant forced migrations, mass starvation and death must surely be crimes against humanity which as according to Bassiouni, should be universally recognised as criminal and as a grave matter of international concern.³⁸ Indeed for the valid reason of the lack of political will of the current government of

³¹The Rome Statute asserts that these crimes constitute "unimaginable atrocities that deeply shock the conscience of humanity" and that they "threaten the peace, security and well-being of the world".

³²International Criminal Tribunal for the former Yugoslavia.

³³International Criminal Tribunal for Rwanda.

³⁴ Concepts of "attack" and "armed conflict" are independent see the case of *Prosecutor vs Dusko Tadic IT-94-1AR72, 22 October 1995*.

³⁵ Currently the country is devoid of a currency resorting instead to the "bond note" which the reserve bank officials insist functions at par with the US dollar. Crippling cash shortages and zero incentives for external trade are the direct result of that initiative.

³⁶ More than 60% of the repossessed farms are not being utilized.

³⁷ A notorious policy for price reduction that dwindled all meaningful retail activity was carried out by the Zimbabwean government in period 2005-2006.

³⁸ Bassiouni, Crimes against Humanity in International Criminal Law (1999) 17-18.

Zimbabwe to do anything about it should not be left within the exclusive jurisdiction of the legal system in Zimbabwe.³⁹

The above history is necessary because in formulating a transitional justice model for Zimbabwe one has to understand the machinations of the institutions that are key to any such process such as the disposition of the judiciary and the security forces since those are an indispensable tool to any methods that may be employed.

Kaulemu noted that the Zimbabwean government has assumed that violence is a tool that it can take up, use and drop at any time but history has over the years proven that this is not so.⁴⁰ Sachikonye observes that the situation presenting itself in Zimbabwe is one where the government itself is unashamedly at war with its own citizens. A lack of faith in the rule of law is the climax of the steady erosion of human and political rights in Zimbabwe.⁴¹

2.4 Conclusion

Transitional justice consists of both judicial and non-judicial processes and mechanisms including prosecution mechanisms, truth-seeking, reparation programs, institutional reforms or an appropriate combination thereof and should further seek to take account of causes of violations of all rights including civil, political, economic, social and cultural rights with a view to contribute to the achievement of broader objectives of prevention of further conflict, peace building and reconciliation.⁴² Zimbabwe has since Independence been drowning in a culture of violence and human rights violations with no perpetrators being brought to justice. The architects of this human rights abuse situation in Zimbabwe must surely be made accountable to the victims and the international community. In an endeavour to achieve lasting peace and prosperity, Transitional Justice mechanisms become necessary as they provide a holistic approach.⁴³

³⁹ See In re List & Others (1953) 15 Ann. Dig 632 636.

⁴⁰ Kaulemu, *the Culture of Party Politics and the Concept of the State*, 2004.

⁴¹ Sachikonye When a state turns on its citizens: institutionalized violence and political culture 90

⁴² UN models of Transitional Justice, 2010.

⁴³ Pakati *The Interplay between complementarity and transitional Justice* (2012 LLM dissertation UJ) 9.

CHAPTER 3

MODELS OF TRANSITIONAL JUSTICE

3.1 *Introduction*

The second chapter mentioned in passing various methods of Transitional Justice. This chapter will isolate each method and analyse the tenets of each in an attempt to ascertain whether such method will fit the Zimbabwean context and possibly fill the gap for redress that has been prevalent for decades.

Any model for transitional justice must take the Zimbabwean context into account. Transitional justice mechanisms do not operate in a political vacuum but are often designed and implemented in fragile post-conflict and transitional environments.⁴⁴ Peace and justice should be promoted as mutually reinforcing imperatives and the perception that the two are at odds should be countered.⁴⁵

Given that transitional justice usually occurs following some kind of political change, in the case of Zimbabwe this may prove difficult or even impossible. This raises the question- What transitional justice processes and mechanisms are possible in a state where gross human rights violations continue to be perpetrated with no genuine political transformation and where the state is predatory, authoritarian and violent?⁴⁶

Attempts to address violations must be holistic and not only attempts to punish the Mugabe regime or seek revenge otherwise the chosen transitional justice mechanism would alienate other victims.⁴⁷ The United Nations insists that transitional justice models must ensure the centrality of the victims in the design and implementation of transitional justice processes and mechanisms.⁴⁸ There is no all-encompassing criteria in dealing with transitional justice initiatives.⁴⁹ Transitional justice mechanisms are infused with moral dimensions in the context of reparations

⁴⁴UN models of Transitional Justice 2010 4.

⁴⁵ n 1.

⁴⁶ n 1.

⁴⁷ The victims in Zimbabwe are not only in the form of the politically persecuted by ZANU PF government but also other victims of a system of human rights abuses that have no linkage to political agenda. Examples would be people who lost their savings in bank accounts due to illicit and unlawful banking practices in the period 2006 to 2008.

⁴⁸UN models for transitional justice

⁴⁹Orentlicher, " Settling accounts revisited; Reconciling global norms with local agency" 2007.Vol.1 IJTJ 18

and balance both the aims of peace and justice.⁵⁰ In line with the United Nations charter, the UN supports accountability, justice and reconciliation at all times.⁵¹

3.2 *Truth and Reconciliation in the Zimbabwean context*

The rationale behind formal public truth commissions is that deep wounds must be cleaned and aired, not simply bound up and forgotten; out of sight does not mean out of collective memory.⁵² In order to move forward, victims require assurances about certain details of the past as well as recognition of their losses and pain.⁵³ Truth and Reconciliation commissions like the one undertaken by post-apartheid South Africa fall under the umbrella of restorative justice. To begin with, restorative justice implies that there is a community that is ready and willing to re-integrate an offender.⁵⁴ Amstutz believes that political forgiveness is a vital possibility and argues that restorative measures comprise the most viable strategies because of their ability to facilitate psychological healing and renewed social relationships in instances where the victims are willing to forego vengeance and instead express empathy and the offenders in turn admit culpability and offer reparations.⁵⁵ The question then follows: is Zimbabwe ready to re-integrate the offenders - to forgive and forget and live in harmony with no grudges? But before that question can be answered satisfactorily a key question must first be answered; who are the perpetrators of human rights violations in Zimbabwe?

3.2.1 *Gukurahundi* massacre

The first perpetrators in the minds of most who are cognisant of Zimbabwean history would be the architects of "*gukurahundi*"⁵⁶ It has become time to lay the skeletons bare and seek national healing from memories of such heinous activities such as *gukurahundi*.

⁵⁰See Lubanga decision (n 86).

⁵¹(n 2)

⁵²Du Plessis and Ford 87.

⁵³Poulligny "Building peace after mass crimes" International Peace Keeping 202 (2002) 9 (2).

⁵⁴Bornkamm *Rwanda's Gacaca Courts-Between Retribution and Reparation* (2012) 79.

⁵⁵Amstutz (n 16).

⁵⁶The violence that engulfed Matebeleland North and South and parts of Midlands. Between 10 000 and 20 000 people estimated to have been killed in this violence that was unleashed by the Fifth Brigade in 1983 and was the biggest peace-time pogrom that the country has ever experienced in its history. In the view of most war combatants, Gukurahundi was a war of atrocious extents by both sides, the dissidents killed government workers and made areas impenetrable to government functionaries.

The Catholic commission report insisted that polarisation that occurred in the 1980's cannot solely be explained as the consequence of mythically hostile tribes invented by the colonial settlers' in their policy of divide and rule although the existence of such a history could be seen as a necessary but not sufficient basis for the violence that gripped Matebeleland during that time.⁵⁷ Another school of thought to which the ruling elite and indeed those most fingered for the atrocity⁵⁸ for the pogrom that claimed thousands of lives claims that *Gukurahundi* was a government response to foster unity and disarm dissidents. These embrace the quasi-nationalist hysteria - a token by which in Zimbabwe the Matebele sector was viewed as the outsider and the purging of this outsider became necessary for the purification of the rest of the nation.⁵⁹

Most academics⁶⁰ claim that the events in the 1980's were nothing short of genocide and an attempt at ethnic cleansing by the Shonas' against the Ndebeles. Indeed one of the tragedies of the 1980's is that events seemed to harden the regional differences along tribal and linguistic lines. While the Unity Accord in 1987 attempted on the face of it to heal the rift, some would contend that Ndebele speakers never did forget or forgive the perpetrators and to date tribal tensions punctuate the relations between the Shona and the Ndebeles.⁶¹

In response, there are theories that the *gukurahundi* could have been inspired by a desire by the Shona to revenge the 19th century raiding of cattle and women documented to have been inflicted by the Ndebele upon the Shona tribe.⁶² The role of apartheid South African government cannot be downplayed as they are accused

⁵⁷ Report from the Catholic Commission for Justice and Peace in Zimbabwe March 1997.

⁵⁸ Leaders of the security forces in Zimbabwe. *Gukurahundi* was a genocide of atrocious extents and the figures fingered for the violations would be Robert Gabriel Mugabe (commander in chief of the defence forces), Emmerson Mnangagwa (then state security Minister) and Perrence Shiri (then commander of the fifth Brigade)

⁵⁹ S. Mpofu When the Sulbatern speaks: citizen journalism and genocide "victims" voices online, African journalism studies vol.36

⁶⁰ S. Mpofu When the Sulbatern speaks: citizen journalism and genocide "victims" voices online, African journalism studies vol.36, see also -T Reeler, E Tarisayi, P Maguchu, Transitional Justice in Pre-Transitional times: Are there any lessons for Zimbabwe-Zimbabwe Human Rights NGO forum,2017, see also- T M Mashingaidze, Zimbabwe's illusive Healing and Reconciliation Process: From Independence to the Inclusive Government 1980-2009.Conflict trends, 2010 pp19-27.

⁶¹ There is always tension as regards inter-marriages between the Shona and Ndebele. Blood mixing is generally frowned upon with the Ndebele women more often than not being labelled as "infidels" a label which has no statistical support but perpetuated by decades of mistrust between the tribes.

⁶² Report by the Catholic Commission.

of having recruited informers and placed them in Matebeleland to exacerbate tensions between the Shona and the Ndebele.⁶³ They are also according to the Catholic Commission Report accused by the ZANLA forces of systematic supply of misinformation to the government, destruction of huge arsenal at Nkomo Barracks near Harare in 1981, sabotage of Thornhill air base in Gweru in July 1982 which resulted in destruction of substantial percentage of Zimbabwe's aircraft. Also major arms cache which were discovered in early 1982 and which beyond doubt were the tipping point in the tension between ZANU and ZAPU and which according to the Catholic commission's report fuelled the *gukurahundi* genocide were almost certainly engineered by a South African agent by the name of Matt Colloway.

Mugabe later described *gukurahundi* as "a moment of madness"⁶⁴ that ought not to be discussed in the interests of peace and national security and to date it still raises more questions than answers. If *gukurahundi* was a moment of madness,⁶⁵ the question posed by Ruth Murambadoro is; has the mad person gained sanity now and has he atoned for the period of madness and what should the aggrieved do about it?⁶⁶ What happened was chilling and gruesome and still causes strong emotions⁶⁷ and hence the need for redress. Wiesel observed that to forget would not only be dangerous and offensive but also to forget the dead would be akin to killing them a second time.⁶⁸

Gukurahundi was a genocide of atrocious extents and the core perpetrators have not answered for their involvement in the genocide. The *gukurahundi* massacre qualifies as a genocide in international law because it was a systematic attack on the perceived enemies of the state (dissidents) which was designed to eradicate in total the group of persons regarded as dissidents who incidentally were mostly Ndebele speaking people. The Rome Statute⁶⁹ defines genocide as any of certain acts committed with intent to destroy in whole or in part, a national, ethnical, racial or religious grouping. Such acts include amongst others the wilful killing and causing serious bodily harm. History does indeed demonstrate that all it takes for human

⁶³ See report by the Catholic Commission on Disturbances in Matebeleland and the Midlands.

⁶⁴ Mugabe's utterances at the funeral of vice president Joshua Nkomo 1999.

⁶⁵ see <https://www.newsday.co.zw> 2015/05.

⁶⁶ Murambadoro (n 12).

⁶⁷ Msipa *In Pursuit of Freedom and Justice A Memoir* (2015) 113.

⁶⁸ Elie Wiesel, *Night* as quoted in M Mihai (n 87).

⁶⁹ Article 6 of the Rome Statute of the International Criminal Court. U.N Doc /CONF.183/9,1998.

atrocities to flourish is for a few to initiate the trickle-down effect and for the many to remain passive.⁷⁰ The greatest manifestations of human atrocities ground themselves in authoritarianism of domestic power holders in suppression of populations they control.⁷¹ With few international and national prosecutions for atrocious crimes, perpetrators often benefit from impunity.⁷²

In the context of the *gukurahundi* genocide, truth telling might work in the Zimbabwean context. Zimbabweans have demonstrated a willingness to re-integrate perpetrators by allowing their leadership and not revolting since the genocide. However, the wounds have not healed and survivors and victims need closure. To date nothing has been done to bring those responsible to book and this rings true to the notion as put forward by Simpson that "each war crimes trial is an exercise in selective justice to the extent that it reminds us that the majority of war crimes go unpunished".⁷³

Perhaps at the centre of Zimbabwe's' woes is a complicit international community⁷⁴ behaving the same way it does on matters that have no immediate bearing on their interests. Where there are years of unspoken pain and enforced silence there is always invariably a pervasive debilitating fear.

Zimbabweans are generally a peaceful people and would welcome dialogue on the subject of *gukurahundi* if true remorse is shown as evidenced by the fact that despite all the apparent mismanagement and human rights abuses there has not been a crippling revolt by the masses who are committed to going ahead with their day to day lives peacefully. Some are of the view that Zimbabweans are now very cynical about reconciliation and that the concept has been widely devalued perhaps beyond repair and remains tainted as a result of political manipulation and failure to deliver meaningful results.⁷⁵ The problem with truth seeking however, is that it depends ultimately on who provides the narrative and there is great chances of downplaying

⁷⁰ Bassiouni *Crimes against Humanity Historical Evolution and Contemporary Application* (2011) 1.

⁷¹ Bassiouni (n 70) 5.

⁷² n 71 above.

⁷³ Simpson, *The boundaries of liability in International Criminal law*, *Journal of Conflict and Security Law* (2001) Vol 6. No 1, 3-6.

⁷⁴ International community is a term implying existence of a common point of view towards such matters such as specific issues of human rights, however term has been criticized as a way of globalizing and glorifying the West and its views on pertinent matters.

⁷⁵ Zimbabwe Human Rights NGO "Exploring transitional justice options in contemporary Zimbabwe" 2006 21

events and motives to gain sympathy.⁷⁶ However it can be concluded that whatever the arguments may be an eventual sustained democratic transition in Zimbabwe will include a truth and reconciliation commission.

3.2.2 Torture and Forced Disappearances

Torture under the hands of state organs is rife in Zimbabwe. Hammar and Raftopoulos observed that "Anyone seen as opposing the regime becomes a non-citizen, an enemy, subject to violent attack and beyond any protection by the state."⁷⁷The torture docket case⁷⁸ is instructive in this regard. The primary events which the docket chronicles relates to events which occurred in March 2007 when Zimbabwean police raided the MDC headquarters and detained and tortured MDC activists. The docket highlighted that torture was committed in a widespread and systematic way in Zimbabwe against political opponents of the ZANU PF regime and that such torture amounted to crimes against humanity and as such South African authorities had an obligation under international law to arrest the perpetrators who often travelled to South Africa.⁷⁹

As regards torture, the security forces in Zimbabwe are the main perpetrators and as such cannot enjoy the benefits of a truth and reconciliation commission because it has been stated that amnesties for gross violations of human rights are incompatible with the obligations of the state party to provide effective remedies against violations as laid out in article 2(3) of the International Convention on Civil and Political Rights (ICCPR).⁸⁰ However, criminal prosecutions can be infused with truth telling and amnesties. In the Zimbabwean context this could be made to work by encouraging truth telling in exchange for amnesty to the security forces who were implicated in human rights violations if they give satisfactory testimony that will bring to book the chief architects of the human rights violations.

⁷⁶Chapman and Ball " The Truth of Truth Commissions: Comparative lessons from Haiti, South Africa, and Guatemala"23 (2001) Human Rights Quarterly 6 7.

⁷⁷Hammar and Raftopoulos *The Making and Unmasking of Local Government in Zimbabwe* (2003) 12.

⁷⁸SALC and Another v Director of Public Prosecutions and others.

⁷⁹Southern Africa Litigation Centre, Promoting Human Rights and The Rule of Law-The Zimbabwe Torture Case available at www.southernafricalitigationcentre.org.

⁸⁰ See HRC *Rodriguez v Uruguay* views of 19 July 1994 (no 322/1988) para 12.4. Zimbabwe acceded to the ICCPR on the 13th of August 1991

One would argue why the genocide perpetrators would benefit from truth telling and amnesty? The answer lies in the fact that tribal tension that punctuates the *gukurahundi* massacre has the potential to further destabilise the nation. Conditional amnesty in the vein of *gukurahundi* will have to be entertained. Conditional amnesty is not against international law where threats to peace exist, exceptions can indeed be allowed.⁸¹ Conditional amnesties are also not perfect as evidenced by the Truth and Reconciliation Commission where conditional amnesty did not in the end satisfy the need for accountability as those who did not apply for the amnesty still escaped and were not prosecuted. Recognition and legality of amnesties in international law is a grey area.⁸² Blanket amnesties are generally frowned upon. Blanket amnesties are "amnesic amnesties" since they aim at concealing past crimes by prohibiting any investigation.⁸³

The laws that conferred immunity on perpetrators in Zimbabwe were:

- Amnesty Ordinance 3 of 1979
- Amnesty (General Pardon) ordinance 12 of 1980
- Clemency order 1 of 1988
- Clemency order of 2000.⁸⁴

These laws have been used by the state to shield those of its agents and institutions that commit atrocities.⁸⁵ The Clemency order no 1 of 18 April 1988 which granted blanket amnesty to all parties who administered violence during the *gukurahundi* massacres has however made government reluctant to release the findings of the *Dumbutshena* and *Chihambakwe* commissions⁸⁶ citing that digging into the past can

⁸¹ Werk *Principles of International Criminal Law* (2009) 216.

⁸² Pakati (n 12) 24.

⁸³ Ambos *Treatise in International Criminal Law* Vol.1 (2013) 422.

⁸⁴ (n 84) below.

⁸⁵ L. Sachikonye (n 4) 90.

⁸⁶ Established in 1981 and 1983 respectively to investigate disturbances in Matebeleland it was announced in November 1983 that the findings of the *Dumbutshena* commission will not be released. In 2004, the Supreme court of Appeal in Zimbabwe dismissed an application for the state to be compelled to release the report see *Zimbabwe Lawyers for Human Rights v President of Zimbabwe & Anor* 5-12-03,civ App 311/99.

incite further conflict.⁸⁷ However, knowing the truth will certainly provide closure and pave way for healing and reconciliation.⁸⁸

The Rome Statute of the International Criminal Court (ICC) defines crimes against humanity as "any of the following acts when committed as part of a widespread and systematic attack directed against any civilian population, with knowledge of the attack...."⁸⁹ Such acts include but are not limited to murder, torture, extermination and enforced disappearance of persons.

Disappearances are not new in the history of human rights violations, however their systematic and repeated nature and their use not only for causing certain individuals to disappear, either briefly or permanently, but also as a means of creating a general state of anguish, insecurity and fear is a recent phenomenon which state agents have mastered.⁹⁰ International practice and doctrine have long categorized disappearances as a crime against humanity and condemned them as cruel and inhuman acts which mock the rule of law and undermines those norms which guarantee protection against arbitrary detention and the right to personal security and safety.⁹¹

The Zimbabwe Human Rights NGO forum has documented 7250 cases of human rights violations from 1998-2008.⁹² The most recent notoriety and excess of the regime was the abduction of Itai Dzamara an opposition activist who was reportedly abducted on the 9th of March in 2015 and despite incessant demands by civil society to release him the Mugabe regime will not comply.⁹³ The establishment of truth is vital to bring closure to victims and their families and at the heart of many Zimbabweans is the desire to at least know the whereabouts of their relatives who

⁸⁷ See the Catholic Commission for Justice and Peace in Zimbabwe and Legal Resources Foundation Zimbabwe 1997; *Breaking the Silence, Building the Peace*. A report on the disturbances in Matebeleland and the Midlands, 1986 to 1988, Harare, Catholic Commission for Justice and Peace in Zimbabwe 16.

⁸⁸ Murambadoro "We cannot reconcile until past has been acknowledged" *Perspectives on Gukurahundi from Matebeleland, Zimbabwe*, African Journal on Conflict Resolution 15 (1) 33-57.

⁸⁹ Article 7 of the ICC.

⁹⁰ Velasquez Rodriguez case, judgment of July 29, 1998 Inter-American court of human rights.

⁹¹ UN Commission on human rights resolution 20(XXXV1), Feb 29, 1980.

⁹² Zimbabwe Human Rights NGO forum "Transitional Justice in Pre-transitional Times. Are there any lessons for Zimbabwe?" www.hrforumzim.org 2017/03/16 (2017/04/22).

⁹³ Zimbabwe Human Rights NGO forum "Government of Zimbabwe advised to find Dzamara." www.hrforumzim.org 2017/03/16 (2017/04/22).

were victims of forced disappearances.⁹⁴ Victims are entitled to know the whereabouts of their families.⁹⁵ There can be no future without forgiveness and truth.⁹⁶

Commercial farm workers bore the brunt of abduction, murder, rape, torture, beatings and a plethora of other violations during the infamous Fast Track Land Reform Program (FTLRP).⁹⁷ Notoriety in the use of violence and corruption for political and economic purposes in Zimbabwe spread in 2000 with the onset of these land invasions or ' *jambanja*' in the local vernacular.⁹⁸

Violence during this phase had a dual purpose.⁹⁹ It was deployed to seize land from 4500 white farmers and to destroy the political base of opposition MDC amongst farm-workers. Sachikonye observed that "The model of accumulation that emerged was one of unregulated acquisition, rampant corruption, fiscal and monetary mismanagement, rentier arrangements and ostentatious consumerism rather than sustained investment and productivity."¹⁰⁰ The result of that program is a country incessantly plagued by dire starvation of the masses and loss of its status as the 'bread basket' of the region.

And indeed as expressed by Mufuka, "True to their faith our brothers have maintained their hold on the land with Philistine brutality .Each Philistine warrior brought home the heads of the vanquished and built a pyramid of broken heads in the town square. There is no village today which has no memory of ZANU PF's militias' brutality." ¹⁰¹

Zimbabweans are ready to talk and forgive only if perpetrators are willing to confess and show genuine remorse. By way of illustration, successful pre-transition amnesties include the famous amnesty in South Africa where, "resulting from a

⁹⁴See Human Rights Council Res 9/11: Promotion and Protection of Human Rights: Study on the right to truth, Report on the office of the United Nations High Commissioner for Human Rights (E/CN.4/2006/91).

⁹⁵ n 69 above.

⁹⁶The central message in Desmond Tutu's book *No Future without Forgiveness* 1999.

⁹⁷ Sachikonye (n 42)

⁹⁸ Sachikonye (n 42)

⁹⁹ L. Sachikonye (n 42) 33.

¹⁰⁰L. Sachikonye "The Land is The Economy: revisiting Zimbabwe's Land Question." *African Security Review* vol.14 3.

¹⁰¹ Mufuka Letter from America-Can Zimbabweans Negotiate Their Way to Freedom?-
nehandaradio.com/2017/04/22/letter-america-can-zimbabweans-negotiate-way-freedom (23/04/2017)

gentleman's agreement between Nelson Mandela and de Klerk later confirmed in the postamble of the interim constitution, not to prosecute those responsible for the crime against humanity of apartheid."¹⁰² However even that amnesty has been criticised as having been more of a political decision which was divorced from the concepts of justice and morals but was rather a compromise between having Nuremberg-style trials on the one hand and forgetting on the other.¹⁰³ To the extent that healing does not occur, trauma is passed into the next generation, a strong desire for revenge is felt and high levels of mistrust are maintained.¹⁰⁴

Amnesties erase the legal consequences of certain crimes. They have been employed in many post-conflict societies in order to foster reconciliation and they can vary from self-serving amnesties enacted by outgoing regimes eg Chile to ostensibly sincere attempts at peace building as was the case in South Africa post-apartheid.¹⁰⁵ Amnesties can be abused and used as means to frustrate accountability and as such must be employed with caution and balanced against other transitional justice goals such as retributive justice and truth seeking.¹⁰⁶ Jurisprudence on human rights courts point towards a new normative form of prohibition of amnesties. However, though highly persuasive, decisions from regional human rights courts do not constitute an express prohibition in international law.¹⁰⁷

Forgiveness according to Kenneth Kaunda,¹⁰⁸ is defined as a constant willingness to live in a new day without looking back and ransacking the memory for occasions and resentment.¹⁰⁹ It must be noted that reconciliation must never be limited to a single event as it is an ongoing process of change that a community needs to go through.¹¹⁰

¹⁰²Schabas 2012 180.

¹⁰³ Justice Goldstone "TRC preferable to trials" Pretoria News (18 August 1997) cited in McDonald "A right to truth, justice and a remedy for African victims of serious violations of International Humanitarian Law" (1999) 2 Law, Democracy and Development.

¹⁰⁴ Ngwenya and Harris "Consequences of not healing: evidence from the gukurahundi violence in Zimbabwe" 35 52.

¹⁰⁵ Dukic' "Transition al justice and the international criminal court-in the interests of justice?" International Review of Red Cross vol 89. No 867, September 2007,691 694.

¹⁰⁶ Pakati

¹⁰⁷ Pakati(n 87).

¹⁰⁸ First president of Zambia from 1964 to 1991.

¹⁰⁹ De Waal and Victor *The Politics of Reconciliation: Zimbabwe's first decade* Hurst & Co London (1990) 77

¹¹⁰ Long and Brecke *War and Reconciliation: Reason and Emotion in Conflict Resolution*, Cambridge, MA, and MIT Press 2003 7.

3.3 Prosecutions

Prosecutions of crimes against humanity overlap with transitional justice initiatives. Foreign criminal prosecutions take centre stage with examples of the role of the Security Council Resolutions to address the atrocities committed in the territory of the former Yugoslavia (ICTY)¹¹¹ and Rwanda (ICTR).¹¹² However such resolutions might never work in Zimbabwe unless the veto power of the UN Security Council permanent members is revised.¹¹³ Creation of an ad-hoc international tribunal to try those responsible for gross human rights violations in Zimbabwe would not only fulfil the desire for justice among the Zimbabwean people but would also reflect the retributive values held among the broader international community.¹¹⁴

Mugabe's regime has long evaded scrutiny and accounting for the regimes' excesses because of the veto power of Russia and China. This state of affairs raises the question that whose moral campus and sense of wrong is really protected by the International Criminal Court?

It would appear that the selectivity in International criminal law is largely influenced by the perceptions of the five permanent members of the United Nations Security Council namely Russia, China and USA, UK and France. "Since they hold veto power as permanent member states, if any of these three powers considers an indictment contrary to the agenda of their nation, they can veto the indictment and allow the perpetrator to go unpunished"¹¹⁵. For instance, Robert Mugabe¹¹⁶ is unrelenting in his impunity¹¹⁷ and is well aware that Russia and China will be his shield against the

¹¹¹ International Criminal Tribunal for the former Yugoslavia.

¹¹² International Criminal Tribunal for Rwanda.

¹¹³ Russia is on record for blocking all attempts led by the Western world at UN Security Council to condemn the gas attacks and human rights abuses in Syria in a bid to shield Assad's government from international scrutiny.

¹¹⁴ Goldstone "Bringing war criminals to justice during an ongoing war", 205-206 quoted in M.Zuin (n 24).

¹¹⁵ International Policy Digest, International Criminal Court: successes and failures at <http://intpolicydigest.org-2012/03/23> (09 Feb 2017).

¹¹⁶ President of Zimbabwe since the country's independence in 1980.

¹¹⁷ War veterans of Zimbabwe insist that there is no impunity that can be inferred from land reform and Mugabe's policies and they say that what Mugabe did was a follow up on the agreements of the Lancaster conference where the British and Americans agreed to land reform in principle. They question whether it should be Mugabe taken to court or the renegers?

ICC. It has been noted that either one supports the rule of law or one supports sovereignty. The rule of law and sovereignty are not compatible.¹¹⁸

The Southern African Development Committee (SADC) region has evidently decided to take a form of quiet diplomacy towards the scene in Zimbabwe.¹¹⁹ Perhaps due to the payment of undue homage to the doctrine of non-interference in the internal affairs of other states; the lack of political will or even lack of moral will in the sense that states are reluctant to point accusing fingers and disturb comity and risk having their own " skeletons in the closet" revealed.

The AU began a process in February 2010 to amend the Protocol on the statute of The African Court of Justice and Human Rights to expand the court's jurisdiction to include international and transnational crimes. The draft protocol adds criminal jurisdiction over the crimes of genocide, war crimes, and crimes against humanity, as well as transnational crimes such as terrorism, piracy and corruption. The Malabu protocol¹²⁰ and its idea of forming an "African International Criminal Court" is a noble one that might appease some disgruntled African political elites but which might sadly not address the impetus behind having an international court at all-that is to bring to account all who engage in conduct which the international community as a whole regards as deserving collective condemnation and prosecution. One cannot then have the luxury of deciding who must try them when they commit atrocities against humanity.

The African Criminal Court cannot possibly succeed if it maintains certain weaknesses. Abass observes that the African market cannot at present cater for the levels of substantive and procedural justice prescribed by international standards. He postulates that whereas there is a clear and compelling case to be made in favour of the court, the added value of such a court is extremely doubtful and such doubt does not arise from *ipso facto* undesirability of such a court but from the low probability that African leaders will ever allow the court to discharge the *ultima ratio* of

¹¹⁸ Broomhall, International justice 56.

¹¹⁹ The ANC in South Africa has become notorious in recent years for effectively supporting the anti-democratic regime of ZANU-PF. Thabo Mbeki's cover of neutrality was blown by his determination to oversee a mediation and creation of a government of national unity in 2008 which he designed to legitimize ZANU-PF domination. SADC has for too long provided cover for ZANU-PF misrule in the name of African solidarity.

¹²⁰ African Union Assembly of Heads of State in Malabu adopted in June 2014 a protocol on amendments to the protocol on the Statute of the African Court of Justice and Human Rights.

international criminal justice-ending impunity for heinous international crimes.¹²¹ There is also real danger of the court being turned into a torment chamber for opposition parties and dissident activities.¹²²

Mugabe is on record for disrupting any fruitful attempts at having a regional criminal court¹²³ and is behind the SADC tribunal being disbanded thereby entrenching state dictatorship and removing the democratic legal avenue of citizens to an international court presiding over Southern African affairs.

Zimbabwe is under an obligation to prosecute those responsible for atrocities. Pure disciplinary and administrative measures are not adequate.¹²⁴ State must investigate and punish violations in order to fulfil their obligation to ensure the enjoyment of human rights.¹²⁵ Genocide conventions of 1948 articles IV and VI obligate states to prosecute and punish perpetrators of genocide. This duty has acquired the status of an international customary law.¹²⁶ There is a right to a remedy and reparation that is protected in international law.¹²⁷

However, independence and impartiality of the judicial machinery ultimately determine the success of any prosecution. A court that is not independent and impartial can never conduct a fair trial.¹²⁸ Courts must not be subordinate to other state organs as is the situation obtaining in Zimbabwe at present where the judiciary is manifestly under the direct control of the executive arm of the state.

Essentially what is vital is that prosecutions should avoid unbridled private spirals of revenge as when victims take justice into their own hands and perform vigilantism.¹²⁹

African traditional institutions, whether political, economic or social, have never been

¹²¹ A Abass, Prosecuting International Crimes in Africa: Rationale, Prospects and Challenges, *European Journal of International Law* (2013) vol 24 no.3 933-946 at 936.

¹²² A Abass (n 120).

¹²³ Mugabe's disruption of the SADC court, see after effects of the *Campbell v Zimbabwe* case.

¹²⁴ HRC, *Bautista v Colombia*, Views of 27 October 1995 (no 563/1993) para 8.2.

¹²⁵ See landmark judgment of the Inter American Court of Human Rights in *Velasquez Rodriguez v Honduras*, judgment of 29 July 1988, para 166, 176.

¹²⁶ Reservations to the Conventions on the Prevention and Punishment of the Crime of Genocide, ICJ Advisory opinion of 28 May 1951, ICJ Reports 1951, 15, 23, see also R Cryer et al, *An Introduction to Criminal Law and Procedure* (2007) 59.

¹²⁷ See the basic principles and guidelines on the right to a remedy and reparations for victims of gross violations of international human rights law and serious violations of international humanitarian law adopted on 16 December 2005 UNGA 60th session, Resolution 147 (A/Res/60/147)

¹²⁸ Article 14(1) of the ICCPR.

¹²⁹ Forge "Traditional justice and reconciliation after violent conflict: learning from African experiences" 2008 147.

inept¹³⁰ as the *gacaca* courts in Rwanda have proven. *Gacaca* courts in Rwanda combined elements of African dispute resolution and Western style criminal tribunals.¹³¹

The divisiveness of retributive practices and the strict rules of evidence and tainted judiciary under previous regimes has made critics plead against prosecutions in favour of alternative mechanisms.¹³² Such projects can only antagonise society by providing enraged victims with a propitious context for political vendettas and scapegoatism.¹³³ True to the views shared by the current elite¹³⁴ in Zimbabwe that *gukurahundi* must be a buried chapter that must not be opened as it stalks tribalism.¹³⁵ Those against accountability insist that negative public emotions should not be indulged but rather suppressed in order to stabilise the ground for institutional reforms necessary to consolidate democracy.¹³⁶

Prosecutions may not be ideal to address the long history of violations in Zimbabwe because it may prove onerous to gather evidence that is convincing for criminal charges from events that occurred more than 30 years ago and when most perpetrators are either too old or dead.¹³⁷ For instance if Mugabe was to be prosecuted he is likely to be released because of his age. There is also the dilemma that most post-colonisation perpetrators of violations were themselves victims of colonial violations and a model has to be designed that deals better with these complicated dual victim/ perpetrator identities.¹³⁸

Attempts to address violations must be holistic and not only attempts to punish the Mugabe regime or seek revenge otherwise the chosen transitional justice mechanism would alienate other victims.¹³⁹ The United Nations has cautioned against an inflexible approach and emphasized consultations with victims and states

¹³⁰ Forge (n 128) 149.

¹³¹ Bornkamm (n 55) 327.

¹³² Mihai *Transitional Justice and the Quest for Democracy: Towards a Political Theory of Democratic transformations*, PhD thesis, University of Toronto, 2010.

¹³³ Mihai (n 126).

¹³⁴ Joseph Chinotimba to be precise

¹³⁵ Chinotimba's response to a question as to whether the Gukurahundi files should be re-opened

¹³⁶ Mihai (n 126).

¹³⁷ Bamu "Transitional justice without transition?" Oxford Transitional Justice Research Working Paper Series, 18 December 2008.1-4.

¹³⁸ Bamu (n 131).

¹³⁹ Bamu (n 131).

concerned when choosing appropriate measures.¹⁴⁰ In situations of this nature alternative measures like truth commissions that are likely to establish the truth of what happened in the dark years in Zimbabwe. Traditional methods of justice as in the case of indabas headed by traditional village heads need to be deployed in Zimbabwe instead of full-fledged international prosecutions. Traditional mechanisms may not fit in the Western perceptions and notions of justice and indeed have their own shortcomings such as bias against women and children, failure to abide by international human rights standards and failure to document judgments amongst other shortcomings but they remain key in ensuring that justice is domestically rooted and owned by local communities for sustainability of peace and justice. Traditional mechanisms have been deployed successfully in the Rwandan *gacaca* courts, the *mato oput* of Uganda, *barza intercommunautaire* of DRC and *bashingantahe* of Burundi among other countries.¹⁴¹

3.4 Reparations

Though traditionally not an inherent component of criminal justice¹⁴² reparations programs have to be established to compensate victims of gross human rights violations.¹⁴³ Challenges confront decision makers as to which forms of reparations to apply.¹⁴⁴ Civil law suits aimed at reparation against the perpetrators with a view to get compensation would work in a stable economy. Reparations are an attempt at appeasing the emotionally and physically damaged victims by compensations in the form of money, social services or symbolic reparations. Obligations to pay reparations are a customary international law norm.¹⁴⁵

Such an initiative was evidenced by the Khulumani case¹⁴⁶ where a class action was brought against companies that were allegedly complicit in the apartheid

¹⁴⁰Basic Principles and Guidelines on the Right to a Remedy and Repatriation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law: Resolution of the United Nations General Assembly, 16 December 2005 (A/RES/60/147).

¹⁴¹Heal Zimbabwe Trust and Zimbabwe Civic Education Trust, Exploring Indigenous Transitional Justice Mechanisms in Zimbabwe, Transitional Justice Policy Brief series 1, February 2016.

¹⁴²Pakati (n 141) 24.

¹⁴³Orentlicher (n 50) 20.

¹⁴⁴Pakati (n 141) 24

¹⁴⁵Case of the *Plan de Sanchez Massacre v Guatemala Reparations Judgment* of November 19, 2004 SeriesC No.116 par 52-54, see also *Prosecutor v Thomas Lubanga Dyilo Decision establishing the principles and procedures to be applied to reparations ICC-01/04/01/06-7 August 2012*.

¹⁴⁶Khulumani apartheid litigations.

transgressions. Whether the guilt of the accused is expunged and the pain of the victims is alleviated by reparations still remains in the grey.¹⁴⁷

Reparations in Zimbabwe are at present useless as payments are delayed and value eroded by inflation and they end up just being a form of false victory for the victims.

In 1989 the UN Commission on human rights initiated a study on the reparation for gross human rights violations.¹⁴⁸ Reparations can take various forms-Restitution; wiping away of consequences of the violation and restoring the situation as before.¹⁴⁹ Considering the extent and gravity of the violations in Zimbabwe, restitution cannot be achieved.

Compensations; are attempts at quantifying the harm suffered in economic terms.¹⁵⁰ However in the Zimbabwean context, how would one tackle the task of assessing the value of human lives lost or a people's mental or physical health?¹⁵¹ No amount of money will ever satisfy the harm caused but it would serve as an indication of true remorse if the government was to allocate a fund towards the victims and survivors of the human rights violations.

One problem however in Zimbabwe is that no one person can ever say that they have not been victimised by the current regime. Masses have been displaced and millions are living in artificial poverty created by the mismanagement of the current regime. So allocation of the compensation and the budget would be too big for the economic ability of the country's reserves.

Satisfaction; is a form of moral reparation. It can house such initiatives such as public apologies,¹⁵² rehabilitations which encompass free access to medical and psychological care as done by Germany, South Africa and Chile. Sincere regret is central to the requirement of an apology.¹⁵³ Establishment of memorial sites and museums like Germany's Holocaust museum are another form of reparations and

¹⁴⁷ K.Pakati, The Interplay between complementarity and transitional justice, LLM (International law), University of Johannesburg, 28 at <https://ujdigispace.uj.ac.za> (13/05/2017).

¹⁴⁸ Resolution 1989/13 of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities.

¹⁴⁹ See the case concerning the factory at Chorzow (Germany v Poland), PCIJ, Judgment of 13 September 1928, PCIJ Series A no 17, 47.

¹⁵⁰ Greiff, "Justice and Reparations" in the Handbook of Reparations (2006) 452.

¹⁵¹ Bornkamm (n 50) 126.

¹⁵² See Basic Principles on the Right to a Remedy and Reparation, para 22(d), (e).

¹⁵³ du Plessis and Pete 9 (eds), "Taking Apology Seriously", Repairing the Past (2007) 60.

attempts at acknowledging and erecting reminders never to commit similar offences against humanity.¹⁵⁴ Exhumation and reburial of people in mass graves in Matabeleland is recommended as a reparatory procedure.¹⁵⁵

3.5 *Redistribution of resources*

The UN prescribes that transitioning societies should strive to ensure that transitional justice mechanisms take account of the root causes of conflict and repressive rule, and address the violation of all rights including economic, social and cultural rights.¹⁵⁶ Reforms should include economic sector reform which aims at restructuring systems that regulate markets, economic production and employment.¹⁵⁷

Socio-economic rights are a broad category of human rights guaranteed in the International Covenant on Economic, Social and Cultural Rights (ICESCR) and other legally binding international and regional human rights treaties. Socio-economic rights are rights that allow people to access certain basic needs in-order to lead a dignified life.¹⁵⁸ Peace can only prevail if issues such as systematic discrimination, unequal distribution of wealth and resources and endemic corruption that are plaguing Zimbabwe can be addressed in a legitimate and fair manner by trusted public institutions.¹⁵⁹

Chapter 3 of the Constitution of Zimbabwe protects socio-economic rights¹⁶⁰ The infamous land reform policy that is peddled to the international community as having been in the interests of people has produced the total opposite result in Zimbabwe- the masses were in effect allocated to dry and arid reserves with no access to proper water and sanitation facilities while the political elite got the fertile and most productive land which they are under-utilising.

¹⁵⁴ Eppel *Healing the Dead: exhumation and reburials as a tool to truth telling and reclaiming the past in rural Zimbabwe*, University of Notre Dame Press, 2006 263.

¹⁵⁵ Eppel (n 153).

¹⁵⁶ UN Models of Transitional justice (n 2) 7.

¹⁵⁷ UN Models of Transitional Justice par (n 2) 9.

¹⁵⁸ Amnesty International; *Economic, Social and Cultural Rights*, 2010.

¹⁵⁹ UN Models of transitional justice (n 2) 7.

¹⁶⁰ Constitution of the Republic of Zimbabwe 2013.

The scourge of "*Murambatsvina*"¹⁶¹ devastated the poor civilian population and its victims were mainly those viewed as supporters of the opposition parties in Zimbabwe. The civil servants housing scheme was hijacked by the political elite and the majority now live in situations of dire poverty with more than three quarters of the Zimbabwean population living below the poverty datum line.

All revenue from diamond mining has somehow disappeared due to corruption and in 2012, despite the masses having been promised a minimum of 600 million dollars' worth of dividends, the finance Minister only reported just over 43 million dollars' worth¹⁶² and at the beginning of 2014, Ministry of Public Service, Labour and Social Welfare reportedly revealed that the treasury had failed to allocate sufficient funds for vital food and education assistance. Exorbitant salaries pocketed by executives in state owned enterprises worsen the situation amidst corrupt allocation of tenders and the trend of political leaders amassing huge chunks of wealth when they get into government.¹⁶³ Corruption as a problem undermines the realisation of socio-economic rights as well as development in Zimbabwe.¹⁶⁴

There is need to equitably redistribute resources so as to correct the imbalance created by corruption in Zimbabwe. Redistributive justice is necessary to re-allocate looted resources. The land is the country's biggest resource and the corrupt tempering that was created by the "Land Reform" must be revised with an aim to come up with a model that is not driven by the vengeful spirit against white colonisation but rather a need to really emancipate the majority in an open and transparent manner. Zimbabwe is endowed with agricultural and land planning specialists who must spear head this campaign.

¹⁶¹ A massive drive that was carried out to demolish residences perceived to be "sub-standard" by Government run City Councils.

¹⁶² n 162 below.

¹⁶³ Chibiya and Chiweshe "Systematic Corruption in Public Enterprises" Corruption 2008

¹⁶⁴ Chibiya and Chiweshe (n 162) 13

CHAPTER 4

EFFORTS TOWARDS ACCOUNTABILITY AND RECONCILIATION TO DATE

4.1 *introduction*

This chapter will look at the efforts made so far to address the impasse in Zimbabwe.

4.2 Pre-transitional negotiated settlements

Negotiated transitions, whether regime or opposition led, are more possible where the form of government is civilian or military-institutional like in Hungary, Poland, Romania and Senegal. The modes of transitional justice employed therein almost totally revolve around amnesties which in the long run establish impunity and domestic criminal prosecutions. Zimbabwe has initiated a number of transitional justice mechanisms which have largely been driven by civil society.¹⁶⁵ In Zimbabwe, as in other countries, amnesties have been used to end civil war and obviate scrutiny of the state's involvement.¹⁶⁶ The United Nations can not endorse provisions in peace agreements that preclude accountability for genocide, war crimes, crimes against humanity and gross violations of human rights.¹⁶⁷

In July 2008, the Memorandum of Understanding between ZANU-PF and the two factions of the MDC offered the first glimmer of hope in resolving the long standing crisis in Zimbabwe. Article vii (c) of the agreement states that the new government shall "give consideration to the setting up of a mechanism to properly advise on what measures might be necessary and practicable to achieve national healing, cohesion and unity in respect of pre and post-independence political conflicts"¹⁶⁸ Sadly, the negotiations did not lead to a political transition in Zimbabwe.

¹⁶⁵ For the first time in independent Zimbabwe the government acknowledged in the supreme law of the land that there was need to look back and take measures to remedy past human rights abuses. The National Peace and Reconciliation Commission (NPRC) was created with a mandate to ensure post-conflict justice, healing and reconciliation amongst other things.

¹⁶⁶ Zimbabwean NGO Forum (n 1) 6.

¹⁶⁷ UN models for transitional justice (n 2) 4.

¹⁶⁸ See "The Agreement between the Zimbabwe African National Union Patriotic Front (ZANU-PF) and the two Movement for Democratic Change (MDC) Formations on resolving the challenges facing Zimbabwe" signed on 15 September 2008.

A political transition remains unlikely when ZANU-PF is still in power.¹⁶⁹ African societies typically tend to have emerged from an authoritarian regime based on a single individual generally described as the "big man" syndrome¹⁷⁰ as typified by the Mugabe led regime in Zimbabwe.

Pre-transitional negotiated settlements in Zimbabwe with the current political matters at play would never work with a partisan judiciary system and the apparent lack of good will as evidenced by the ineffective government of unity. This seems easy to understand and it is obvious that the authoritarian regimes will have little interest in accountability while in power, and, furthermore, that amnesties are the frequent mechanism to ensure that there is protection of the authoritarian elite in the aftermath of the transition

The legal foundation for transitional justice was attempted by The National Peace and Reconciliation Commission (NPRC)¹⁷¹ which has to date failed to prosecute its mandate of ensuring accountability. The NPRC is headed by a chairperson and 8 other figures appointed by the President and who work in collaboration with the Judicial Service Commission. This constitution of such a critical body raises questions as regards impartiality of such a board but it is nonetheless a good indicator that the need for redress is acknowledged.

4.3 Efforts by civil society

There is yet to be an official truth commission in Zimbabwe. However, truth has not been missing as activities of the civil society will demonstrate. It may be argued that a civil society led transition is already underway in Zimbabwe. Civil society has extensively documented many gross human rights violations that have occurred post-independence. Recourse to judicial justice has mainly been through civil prosecutions.¹⁷²

Zimbabwe Lawyers for Human Rights (ZLHR) and Solidarity Peace Trust have assisted community members with representations for unlawful arrest and

¹⁶⁹ Bamu (n 131) 2.

¹⁷⁰ Zimbabwe NGO Forum (n 1) 11.

¹⁷¹ Established by the 2013 Constitution.

¹⁷² Zimbabwe NGO Forum (n111) 7.

detention.¹⁷³ Also the Organ for National Healing, Reconciliation and Integration (ONHRP) was established in in 2009 to investigate ways to address past injustices in the country following the procedures set by the 2008 SADC mediated Global Political Agreement.¹⁷⁴

Human rights organisations are tirelessly working as whistle blowers to get the attention of the international community with all its known effects¹⁷⁵ but it seems as if the rest of the world is following quite diplomacy where Zimbabwe is concerned. Perhaps they are all biding time until the 'strong man'¹⁷⁶ relents his grip on power so as to plant new seeds of hope and restoration in a fertile political and economic climate.

A follow up to the efforts of civil society is needed.in 1999 a submission to the Human Rights Committee of the UN in respect of Food Riots was made and since 2001 local human rights organisations have ensured that the situation In Zimbabwe remained on the agenda of the African Commission on Human and Peoples' Rights (ACHPR).¹⁷⁷

Council for torture victims (IRCT.2001), Physicians for human rights (PHR.2002) and the Redress Trust (Redress.2005) amongst others all combined to fill out the picture of an ongoing human rights violation scene in Zimbabwe by writing several reports to the United Nations reporting the status of human rights abuses in Zimbabwe.¹⁷⁸ The activities of the human rights watch groups have contributed to the abhorrence with which the international community began to regard Zimbabwe on the human rights violations score. It also immensely contributed to the actions by western governments, commonwealth and even the SADC in 2008.¹⁷⁹

¹⁷³ Murambadoro (n 12).

¹⁷⁴ Emerged as a solution to Zimbabwe's disputed 2008 presidential elections. Intended as a road map to democratic transition while addressing the immediate demands for peace and economic stability. Solution lay in brokering a power sharing deal within the three main competing parties ZANU PF and the two MDC factions.

¹⁷⁵ Sometimes getting the international community involved has further destabilized countries and entire regions as evidenced in Somalia and the Middle East.

¹⁷⁶ Robert Gabriel Mugabe.

¹⁷⁷ Reeler, Tarisayi, Maguchu, Transitional Justice in Pre-Transitional times: Are there any lessons for Zimbabwe-Zimbabwe Human Rights NGO forum, 2017.

¹⁷⁸ Reeler, Tarisayi, Maguchu (n 176).

¹⁷⁹ (n 171).

In 2003 a symposium of civil society and justice in Zimbabwe saw more than 70 civil society organisations from Zimbabwe and other international organisations produce a recommendation which set the stage for formal moves towards transitional justice in Zimbabwe.¹⁸⁰ The referred to what they termed "Joinet Principles" which encompassed rights of truth, justice, reparations and non-recurrence.¹⁸¹

What is feasible currently is reform short of transition. This could be in the form of commissions of enquiry that are erected by all sectors of society and widely representative of the geographical, political, social and economic realities of Zimbabwe.¹⁸² Zimbabweans must convene *indabas*¹⁸³ in their various locations and really engage the "elephant in the room". In doing so Zimbabweans must take note of their unique political reality and know that their position is not as that of the people of Tunisia, Burkina Faso, Egypt and Libya. Zimbabweans are fighting a regime which can resort to indiscriminate force and unorthodox means of silencing dissent.

Civil law suits aimed at reparation against the perpetrators with a view to get compensation would work in a stable economy. Reparations are an attempt at appeasing the emotionally and physically damaged victims by compensations in the form of money, social services or symbolic reparations. Obligations to pay reparations are a customary international law norm.¹⁸⁴ Such an initiative was evidenced by the Khulumani case.¹⁸⁵ In the Khulumani case a class action was brought against companies that were allegedly complicit in the apartheid transgressions. Whether the guilt of the accused and the pain of the victims is alleviated by reparations still remains in the grey.¹⁸⁶ Reparations in Zimbabwe are at present useless as payments are delayed and value eroded by inflation and they end up just being a form of false victory for the victims. There are some people who have

¹⁸⁰ Zimbabwe NGO Forum (n 116) 14.

¹⁸¹ (n 171).

¹⁸² Bamu (n 131).

¹⁸³ Community meetings whose agenda is wholly set by the leaders of community who call such meetings.

¹⁸⁴ Case of the *Plan de Sanchez Massacre v Guatemala Reparations Judgment* of November 19, 2004 Series C No.116 par 52-54, see also *Prosecutor v Thomas Lubanga Dyilo Decision establishing the principles and procedures to be applied to reparations ICC-01/04/01/06-7 August 2012*.

¹⁸⁵ Khulumani apartheid litigations which are celebrated as having strengthened the constitutional democracy of South Africa by acknowledging the supremacy and universality of an international rule of law that obliges adherence to behaviours that respect basic human rights.

¹⁸⁶ Pakati, *The Interplay between complementarity and transitional justice*, LLM (International law), University of Johannesburg, 28 at <https://ujdigispace.uj.ac.za>, accessed 13/05/2017.

been convicted of human rights violations and have been fined in the form of livestock which they do not have at present and the victims are left with no redress.

4.4 Post-transitional arrangements

Transitional justice mechanisms in the forms of truth commissions and amnesty's increase markedly in frequency once a transition from an authoritarian regime to a more democratic one takes place. Truth commissions as was the case in post – apartheid South Africa create a propitious context for reconciliation if handled well. The problem with truth seeking however, is that it depends ultimately on who provides the narrative and there is great chances of downplaying events and motives to gain sympathy.¹⁸⁷ To overcome the hurdle of insincerity there should ideally be a committee that will be tasked with assessment of a statement by giving consideration to the facts outlined by the victims as they perceived the violation while it unfolded.

Foreign criminal prosecutions take centre stage with examples of the role of the Security Council Resolutions to address the atrocities committed in the territory of the former Yugoslavia (ICTY) and Rwanda (ICTR). However such resolutions might never work in Zimbabwe unless the veto power of the UN Security Council permanent members is revised.

One single expectation of Government, which is shared by all people, is security and protection of human rights. The Mugabe regime has a strong and compelling case to answer as regards gross human rights violations, crimes against humanity especially the *Gukurahundi* massacre and general intentional mismanagement of the economy and industry that has crumbled the livelihood of a large population of Zimbabweans with no political patronage. And it was well summed by the following conclusion by Mufuka; "...my contention is that the single largest contributor to our economic failure all round is the constant letting of blood by these Philistines. All other failures...are partly derivatives of a violent Philistine culture."¹⁸⁸

¹⁸⁷ Pakati (n 185)

¹⁸⁸ Mufuka, (n 68)

CHAPTER 5

CONCLUSION AND RECOMMENDATIONS

5. *A solution is needed.*

Questions abound as to what should be done with a recent history full of victims, perpetrators, secretly buried bodies, pervasive fear, and official denial.¹⁸⁹

Indeed the axe tends to forget but the stumped tree still has fresh memories-It has become time to lay the skeletons bare and seek national healing from memories of such heinous activities such as *gukurahundi*.

It is up to Zimbabweans themselves to get closure and start themselves on a path to democratic and economic recovery. Systematic human rights violations are a cancer to the fabric of society and fill society with animosity and anger. States have special responsibility to reign in institutions that were involved and complicit or inept in preventing those abuses.¹⁹⁰

Truth Commissions should be viewed as complementary to judicial action and not meant to replace the need for prosecution but instead to offer some form of accounting for the past and are very practical in situations where prosecutions are impossible or unlikely due to lack of capacity of the judicial system or a *de facto* or *de jure* amnesty.

The South African TRC has been accused of having a double failure in that the perpetrators and their friends remained unremorseful and incensed by their public humiliation, and the victims and their associates felt that too little had been done to atone for the excesses in pervasive cruelty and abuse.¹⁹¹ Yet a balance has to be struck between vengeance and restoration and as observed by Falk; if the cost of prosecution is seen as jeopardizing the transition to peace and democracy, the decision to grant immunity or amnesty seems understandable and even beneficial.¹⁹²

No "sacred cows" must be spared when it comes to justice for the atrocities committed in Zimbabwe. Trials like those of Saddam Hussein, Slobodan Milosevic

¹⁸⁹ Hayner *Unspeakable Truths: Confronting State Terror and Atrocity* New York NY Routledge (2001) 4

¹⁹⁰ Pakati (n 179).

¹⁹¹ Falk "Human Rights Horizons: The Pursuit of Justice in a Globalizing World" 25.

¹⁹² Falk (n 190).

and Charles Taylor, the *gacaca* courts¹⁹³ in Rwanda mark a wider agreement on the necessity of sooner or later engaging in some form of rectifactory justice.¹⁹⁴ Yet the question remains as posed by Stover and Weinstein; "where should they draw the boundary between enough justice to destroy impunity and punishment so harsh that it becomes revenge?"¹⁹⁵

A follow up to the efforts of civil society is needed. In 1999 a submission to the Human Rights Committee of the UN in respect of Food Riots was made and since 2001 local human rights organisations have ensured that the situation In Zimbabwe remained on the agenda of the African Commission on Human and Peoples' Rights (ACHPR).¹⁹⁶ Civil Society, NGO's and individuals must of necessity compile a name and shame list of known and suspected offenders whose names must appear in a publicly circulating media forum. Human rights lawyers must assist the masses to come up with a comprehensive dossier against the perpetrators of abuses on the Zimbabwean populace.

National consultations conducted with the explicit inclusion of the victims and other traditional excluded groups will prove effective in allowing the victims to share their priorities for achieving sustainable peace and reconciliation through appropriate transitional justice mechanisms.¹⁹⁷ Any potential amnesties must of necessity depend on the gravity of the offences and harm to victims the public dossier will detail. Indeed the people that have endured the crimes must be given the first opportunity to resolve the dilemma of peace and justice.¹⁹⁸

The looters of state funds must be made to return the loot and have their properties compulsorily acquired and evenly distributed among the masses. The current ruling elite must be afforded a time to resign peacefully and made eligible for amnesties should they relinquish grip on oppressive power effectively. Amnesties still enjoy

¹⁹³ A system of community justice inspired by the Rwandan tradition where *gacaca* can be loosely translated to "justice in the grass". This traditional communal justice was adopted in 2001 to fit the needs of Rwanda in the wake of the 1994 Rwandan Genocide wherein an estimated 800 000 people were massacred.

¹⁹⁴ Mihai (n 196).

¹⁹⁵ Stover and Weinstein " introduction; Conflict, Justice and Reclamation" in Stover and Weinstein, *My Neighbour, My Enemy 2*.

¹⁹⁶ Reeler, Tarisayi, Maguchu, "Transitional Justice in Pre-Transitional times: Are there any lessons for Zimbabwe" Zimbabwe Human Rights NGO forum 2017.

¹⁹⁷ UN models for transitional justice (n 2) 6.

¹⁹⁸ Falk (n 190).

recognition as a customary international law norm.¹⁹⁹ There has not been a crystallisation of a new customary law prohibiting the use of amnesties²⁰⁰ and Zimbabweans might be kind enough to extend this avenue in exchange for redemption of their country.

Redistributive justice is necessary to re-allocate looted resources. The land is the country's biggest resource and the corrupt tempering that was created by the "Land Reform" must be revised with an aim to come up with a model that is not driven by the vengeful spirit against white colonisation but rather a need to really emancipate the majority in an open and transparent manner. Zimbabwe is endowed with agricultural and land planning specialists who must spear head this campaign.

Those most responsible for *Gukurahundi* massacre must be prosecuted in the fashion of those responsible for the Rwandan Genocide except that the cooperation of the Security Council might not be garnered due to the veto power of China and Russia so it will be ideal to embrace the Sierra Leone model which used instead the assistance of the United Nations and adulterated prosecution with truth telling. Most Zimbabweans await the day of trial of those responsible for the *Gukurahundi* massacre. The dynamics of global justice would benefit from expanded prosecution and the denials of amnesties.²⁰¹ But the challenge if such an approach were to be entrenched is that dictators would hesitate to relinquish the reins of power knowing full well the gloom that awaits them should they do that.

The logic of the criminal trial leaves little room for restoration and sincere truth telling and reconciliation because the defendant's primary aim is getting off the hook.²⁰² It has been observed by Penrose that, "impunity is the torturers most relished tool. It is the dictators' greatest and most potent weapon. It is the victims' ultimate injury. And it is the international community's most conspicuous failure. Impunity continues to be one of the most prevalent causes of human rights violations"²⁰³

¹⁹⁹ *Prosecutor v Kallon* SCSC-2004-15-AR72 (E) and *Kamara* SCSC-2004-16-AR72 (E), Decision on challenge to jurisdiction; Lome' Accord Amnesty, 13 March 2004.

²⁰⁰ Cassese *International Criminal Law* (2008) 312.

²⁰¹ Falk (n 190).

²⁰² See L. Waldorf, *Mass Justice for Mass Atrocities*, 79.

²⁰³ M Margaret Penrose, *Impunity-inertia, inaction and invalidity* quoted in M Mihai (n86).

A commission should be selected which shall be representative of Zimbabwe's demographics and whose mandate shall be the overseeing of the transitional process and such a commission must disqualify anyone who has served as a close ally of the oppressive regime.

The starting point is for Zimbabweans and well-wishing international community to surgically monitor the upcoming elections in 2018 and ensure that a free and fair election marks the turning point for Zimbabwean democratic transformation and restorative justice. The lessons of the past elections have been clear.²⁰⁴ Mugabe and the ruling elite will not easily relinquish the grip on oppressive rule. Zimbabweans owe it to themselves and upcoming generations to own their independence and restore the fortunes of the once great nation. Cooperation of legal and non-legal, sub-national, national and international, accountability and truth telling institutions is necessary in order to carry out a complex program of transitional justice.²⁰⁵

Stronger campaigns against corruption must be initiated and the international community must take a stronger hand as regards wilful violation of the dictates of international conventions on the progressive realisation of socio-economic rights. The obsession with civil-political rights must at some point give note to the fact that the realisation of civil-political rights is incomplete without the real empowerment that comes with respect for socio-economic rights.

A famous poet Chernyshevsky noted that; "Political authority, material well-being and education are inseparable from each other. No one who lives in poverty can develop his mental capacities, no one whose mental capacities are stunted can participate in the exercise of power".²⁰⁶ Hence Zimbabweans living in poverty due to the socio-economic situation worsened by corruption can never effectively benefit from civil-political rights.

What is likely in Zimbabwe is reform short of transition, complete transition would mean dismantling the ZANU PF edifice, which at present appears unlikely unless the

²⁰⁴ Mugabe can count on the force of the coercive state apparatus, the 2008 presidential elections demonstrated that opposition leader had almost 50% electorate support plus support of the international community-it now leaves the situation open to shred negotiating tactics and on that score Mugabe has unmatched dexterity.

²⁰⁵ M Mihai (n 196) 12.

²⁰⁶ Chernyshevsky, Inscription quoted in the art section of the Constitutional Court of South Africa.

ruling elite make moral concessions based on the will of the people and the future of the once great nation. Reforms in key sectors management such as the security forces and the judiciary and also those handling the fiscal policy of the country are critical. It appears expedient to make use of truth commissions as well as offering economic compensation and redistribution of resources to victims of gross inequality and human rights violations rather than pursuing prosecutions.²⁰⁷



²⁰⁷ Bamu (n 131) 4

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