

International Conference on Transitional Justice Zimbabwe

CONFERENCE REPORT

TROUTBECK INN, NYANGA
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CONFERENCE REPORT



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‘There is a need to create spaces
where Zimbabwe can have the conversation about itself
– past, present and future – as it becomes possible,
and especially across generations, with young people.’

Dr Undine Whande, Keynote Address (p. 17)

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Acronyms used

ANC	African National Congress (South Africa)
BStU	Stasi Records Office (Der Bundesbeauftragte für die Unterlagen des Staatssicherdienstes der ehemaligen DDR)
CCJP	Catholic Commission for Justice and Peace
CIO	Central Intelligence Organization
CSO	Civil Society Organization
ECOWAS	Economic Community of West Africa
FBO	Faith-Based Organization
GDR	German Democratic Republic
GPA	Global Political Agreement (Zimbabwe)
ICC	International Criminal Court
ICJ	International Commission for Jurists
ICPC	International Centre for Policy and Conflict
ICTJ	International Center for Transitional Justice
ICTR	United Nations International Criminal Tribunal for Rwanda
ICTY	United Nations International Criminal Tribunal for the Former Yugoslavia
KHRC	Kenya Human Rights Commission
LRA	Lord's Resistance Army
LRF	Legal Resources Foundation (Zimbabwe)
MDC	Movement for Democratic Change
MDC-T	Movement for Democratic Change (Tsvangirai-led formation)
NGO	Non-Governmental Organization
NPRC	National Peace and Reconciliation Council (Zimbabwe)
ONHRI	Organ for National Healing, Reconciliation and Integration (Zimbabwe)
PCGG	Presidential Commission on Good Government (Philippines)
PF-ZAPU	Patriotic Front – Zimbabwe African People's Union
PRDP	Peace, Recovery and Development Plan (Uganda)
SED	Socialist United Party of Germany (Sozialistische Einheitspartei Deutschlands)
Stasi	Staatssicherheitsdienst
StUG	Stasi Records Act (Stasi-Unterlagen-Gesetz)
TJRC	Truth, Justice and Reconciliation Commission (Kenya)
TRC	Truth and Reconciliation Commission (Liberia, South Africa)

Acronyms used

UN	United Nations
UNIFEM	United Nations Development Fund for Women
UPDF	Uganda People's Defence Forces
WONGOSOL	Women Non-Government Organizations Secretariat of Liberia
ZANU(PF)	Zimbabwean African National Union (Patriotic Front)
ZIPRA	Zimbabwe People's Revolutionary Army

ACKNOWLEDGEMENTS

The Zimbabwe Human Rights NGO Forum (the Forum) acknowledges with appreciation the participation and assistance of individuals and organizations that contributed to the planning of the *International Conference on Transitional Justice*. It applauds member and partner organizations for their support throughout the various stages of the conference.

Considerable appreciation is expressed to our development partners for their financial support that made it possible to convene the conference.

The Forum also expresses its appreciation to its secretariat, rapporteurs, members and partners who worked tirelessly, before, during and after the conference. Special mention goes to members of the Transitional Justice Unit for faithfully compiling and editing various pieces of work, presentations and group discussions into this publication.

Our thanks go to the presenters who developed their conference papers and shared their country experiences with the people of Zimbabwe.

Finally, the conference could not have proceeded without the valuable input of participants from government, churches, farmers, civil society, media, business, and everyone who contributed to the rich discussions that are shaping the future of our great nation.

FOREWORD

The Zimbabwe Human Rights NGO Forum has for the past fifteen years been working with victims of organized violence and torture to try and find redress.

Recommendations have been made at both local and international levels on how to address the legacy of gross human rights violations: from the United Nations Human Rights Committee (which issued a report in September 1998 endorsing the Forum's call for an independent commission of inquiry), to the voices of ordinary citizens (calling for a Truth, Justice and Reconciliation Commission in the *Taking Transitional Justice to the People* Outreach Programme). Zimbabwe is still to see a comprehensive official transitional justice process, yet an official process without the participation of the grassroots is not comprehensive enough.

The Forum acknowledges the work of the *Organ on National Healing, Reconciliation and Integration* (ONHRI) in facilitating national dialogue on this issue. The Forum supports the work of many committed civil society organizations that have filled the gap and responded to the plight of victims by providing psychosocial support, legal assistance and other non-official interventions.

However, Zimbabwe remains in deficit of justice for all her citizens. *The International Conference on Transitional Justice* has set the tone for action-oriented dialogue among all stakeholders in the urgent search for sustainable peace. It is encouraging that government, churches, labour, business and civil society have started coming together in this search. We owe it to the victims, both living and departed – we owe it to our children – to find solutions that make sense in our context. In as much as we can learn from the suffering of others, our own suffering remains unique and very personal, as individuals and as a society. There is no substitute for a dialogue with ourselves. Inasmuch as we tread the halls of the United Nations, bang on the doors of SADC, and listen to the chilling stories from our friends in Rwanda, Uganda and Liberia, we still come back to ourselves, and it is from us that the solutions must be found. As Dr Whande noted in her keynote address, we are initiating a deep conversation with our past, a conversation that reaches four generations into the future.

It is our hope that this report admits everyone into the deliberations that took place in Nyanga and also into the intergenerational conversation on truth, justice and accountability for all Zimbabwe.

Abel Chikomo
Executive Director, Zimbabwe Human Rights NGO Forum

INTRODUCTION

Objectives of the conference

The conference had three main objectives, which built upon each other:

- To enable Zimbabwean decision-makers to learn from the experiences of other countries' strategies of how to address socio-political and transitional justice issues in a holistic manner.
- To gain a better understanding of how specific transitional justice issues are dealt with using case studies from other countries.
- To enable stakeholders from a cross-section of the Zimbabwean community to define the way forward for transitional justice in Zimbabwe.

Issues addressed by the conference

The conference addressed various issues relating to the development of a transitional justice policy framework. The main issues that were brought to the agenda of the conference included:

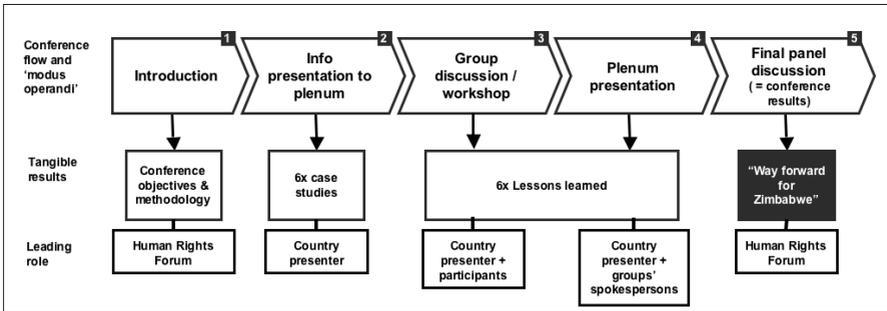
- Government and dealing with the past.
- Traditional mechanisms of dealing with the past.
- Inclusiveness in transitional justice processes.
- Politically exposed persons, asset recovery and reparations.
- Human rights commissions and transitional justice.
- Engendering transitional justice.
- Justice, reconciliation and peace in Africa.

Additional presentations were delivered on the background to transitional justice, the Zimbabwean and global experiences, as well as a country studies. A keynote address by Dr Undine Whande and a speech by Hon. Co-Minister Sekai Masikana Holland were also part of the conference.

Methodology

The methodology for attaining the objectives of the conference was designed as a mix of presentations, group discussions and plenary sessions, as indicated below and in the diagram.

- An introduction explains the purpose of the conference, introducing participants and explaining the sequence of activities.
- Six country experts present their country-specific transitional justice experience in front of the plenum.



- Participants are allocated to discussion groups and discuss the topics in workshops. Outcome: Lessons learned.
- Facilitators (who had been pre-selected) in each group present findings of the respective group in front of the plenum.
- A summary of the key lessons learned and the way forward for Zimbabwe is presented by the conference organizer, along with the presenters in the panel and in front of the plenary.

Participants

In order to create a platform for discussions that included society as a whole, the following groups of people were invited:

- Civil society organizations
- Government institutions
- Faith-based organizations
- Farmer organizations
- Academia
- Legislators
- Development partners
- Labour
- Security sector
- The media

As the conference was structured to promote an exchange of ideas and learn from other countries' experiences, presenters from the following countries were invited:

- Rwanda
- Germany
- Kenya
- South Africa
- Uganda
- The Philippines
- Liberia

Structure of the report

This report is structured as follows:

An Executive Summary is followed by Part One, which contains the Zimbabwe country overview on national healing, delivered by Mrs Zembe, Director of the Organ for National Healing Reconciliation and Integration, on behalf of the Hon. Co-minister, Mrs Sekai Holland, and the keynote address by Dr Undine Whande.

Part Two presents an overview of transitional justice at the global and Zimbabwean levels. Part Three is a collection of country-specific studies, which is followed in Part Four by overall recommendations and the way forward for Zimbabwe suggested by the participants.

EXECUTIVE SUMMARY

This year, 2013, marks the 50th anniversary of the founding of the Organization of African Unity — the African Union’s predecessor. Unfortunately the continent is far from being united. Prior to countries’ independence, and thereafter, the continent has faced various conflicts leading to gross human rights violations, crimes against humanity, organized violence and torture, ethnic violence, border disputes and religiously motivated violence, among others. Most member states of the African Union are struggling to deal with their past while at the same time being confronted with new conflicts.

Transitional justice is crucial in dealing with the past and in achieving reconciliation. The United Nations Secretary General’s report on the rule of law and transitional justice in conflict and post-conflict societies describes transitional justice as ‘the full range of processes and mechanisms associated with a society’s attempt to come to terms with the legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation’.¹

The UN Human Rights Council, pursuant to its Resolution 18/7 of 29 September 2011, appointed Professor Pablo de Greiff as the first Special Rapporteur on the ‘promotion of truth, justice, reparation and guarantees of non-recurrence’ with effect from 1 May 2012. Resolution 18/7 mandates the Special Rapporteur to deal with situations in which there are gross human rights violations and serious violations of international humanitarian law. In addition, the Human Rights Council requests the mechanism to adopt a comprehensive approach to its mandate in a way as to ‘ensure accountability, serve justice, provide remedies to victims, promote healing and reconciliation, establish independent oversight of the security system and restore confidence in the institutions of the State and promote the rule of law in accordance with international human rights law’.²

Thus the implementation of transitional justice is a fundamental issue, recognized at national, regional and international levels towards achieving sustainable peace. The discourse on transitional justice has been growing in Zimbabwe over the years. The following section highlights some of the processes and/or events leading to this debate.

¹ Report of the UN Secretary General: S/2004/616, available at <<http://www.unrol.org/files/2004%20report.pdf>>. Accessed 29 Jan. 2013.

² Human Rights Council Resolution A/HRC/RES/18/7, available at <<http://www.news.admin.ch/NSBSubscriber/message/attachments/27961.pdf>>. Accessed 8 Apr. 2013.

Transitional justice in Zimbabwe

Before its attainment of independence in 1980, Zimbabwe (then known as Rhodesia) had been under colonial rule since 1890. Between 1972 and 1979 there was a violent struggle for independence. In terms of reconciliation and justice, Zimbabwe's violent colonial past was never addressed by way of a co-ordinated transitional justice process.

Following the attainment of independence, violent internal conflicts continued to impact seriously on Zimbabwe's development, in particular: the Gukurahundi in the Midlands and Matabeleland in the 1980s;³ the Food Riots in 1998;⁴ several waves of farm invasions after 2000; several violent major political events after 2000; the displacement of over 700,000 Zimbabweans in the high-density areas of the country during Operation Murambatsvina in 2005;⁵ and most notably the June 2008 presidential election run-off, when over 200 people were allegedly killed in politically motivated violence.

Following up these tragic events, Zimbabwe and its people are still to experience justice and/or healing at a national and community level. There has been no comprehensive approach towards addressing the past. Government's response to the episodes of violence has not been sustainable or informed by international best practices.

However, since the formation of the Inclusive Government and the Organ on National Healing, Reconciliation and Integration (ONHRI) in 2009, space has opened up for discussion and consultations regarding the most effective way of processing the past, healing the nation and designing a new future. Both ONHRI and civil society in Zimbabwe have committed themselves to transitional justice in some shape or form in order for Zimbabwe to move forward.

From a civil society perspective, there are clear minimum conditions that need to be met to satisfy a comprehensive transitional justice approach. These build

³ For detailed information on the Midlands and Matabeleland atrocities, see Catholic Commission for Justice and Peace in Zimbabwe and Legal Resources Foundation, *Breaking the Silence, Building True Peace: Report on the Disturbances in Matabeleland and the Midlands, 1980 to 1989* (Harare: CCJPZ and LRF, 1997). A summary of the report is available at: <http://www.kubatana.net/docs/hr/ccjp_lrf_breaking_silence_9904.pdf>. Accessed 29 Jan. 2013.

⁴ For more information on the 1998 Food Riots, see *A Consolidated Report by the Zimbabwe Human Rights NGO Forum*, available at <<http://www.hrforumzim.org/reports/reports-on-political-violence/food-riots-jan-1998>>. Accessed 29 Jan. 2013.

⁵ See United Nations, 'Report of the Fact-Finding Mission to Zimbabwe to Assess the Scope and Impact of Operation Murambatsvina by the UN Special Envoy on Human Settlements Issues in Zimbabwe Mrs. Anna Kajumulo Tibaijuka' (UN, 2005), available at <<http://ww2.unhabitat.org/documents/ZimbabweReport.pdf>>. Accessed 29 Jan. 2013.

on the resolutions of the symposium on Civil Society and Justice in Zimbabwe held in Johannesburg, 11–13 August 2003. In 2008, civil society organizations in Zimbabwe adopted the minimum conditions for lasting closure of Zimbabwe's violent past:

- Victim-centred transitional justice
- Comprehensive, participatory, inclusive and consultative process
- Establishment of the truth
- Acknowledgement of the gross violation of human rights by the state
- Justice, compensation and reparations
- National healing and reconciliation
- Non-repetition ('never again')
- Gender-sensitive processes
- Transparency and accountability
- Nation-building and reintegration

Using these minimum requirements, the Forum undertook the *Taking Transitional Justice to the People* Outreach Programme from 2009 to 2010 with the objective of introducing the concept of transitional justice to the people, and in 2011, the Forum carried out a research survey to capture their views and recommendations on transitional justice.⁶

In 2009, ONHRI, with the collaboration of the Churches and Civil Society Forum also conducted outreach studies in which they sought the views of the people on national healing. The inter-party Joint Monitoring and Implementation Committee has numerous exercises on peace-building under way in the country.

In 2012, the Forum published the views and recommendations of Zimbabweans in the diaspora on transitional justice. As a conduit, the Forum duly passed on the perceptions on transitional justice of Zimbabweans from all walks of life to all stakeholders, including policy-makers.

While the Forum works for a truly victim-centred transitional justice mechanism driven by Zimbabweans themselves, it believes that this must meet the best international practices. This is achievable if lessons can be drawn from the experiences of other countries.

The International Conference on Transitional Justice

The Forum organized the International Conference on Transitional Justice in

⁶ All the reports on the outreach programme can be found at <<http://www.hrforumzim.org/category/reports/special-reports>>. Accessed 29 Jan. 2013.

Nyanga, Zimbabwe, on 4–6 October 2012. It was billed as a discussion platform for all stakeholders – government, policy-makers, civil society and the churches in the country – with the aim of encouraging wider thinking. The Forum invited different experts from countries that had experienced gross human rights violations and had applied various transitional justice mechanisms as a way of dealing with the past. These came from Rwanda, Germany, Uganda, Kenya, Liberia and the Philippines. Each presentation was specific to the experiences and mechanisms adopted for each country. The lessons learned from these experiences will inform decisions and strategies for policy-makers as well as other stakeholders in defining the ‘Way Forward for Zimbabwe’.

Overview of violations in selected countries

For more than the one hundred years of its existence, Zimbabwe has gone through different forms of violations, including colonization, the liberation struggle and post-conflict violations. Anthony Reeler summarizes this experience. Freddy Mutanguha captures the Rwandan experience with the genocide in which more than a million people were consumed in one hundred days of meaningless tribal anger. In Uganda the government, the Lord’s Resistance Army and a number of armed militants have caused undue suffering to citizens since independence, and Lyandro Komakech presents a strong case in this regard. Joachim Förster notes the extent of state terror in the former communist East Germany, where the state ruled through an effective secret police, the Stasi. The Philippines is a country where the elites and their families were united in stripping the state of its assets in a violent manner, and Justice Cleto Vilacorta demonstrates the extent of damage and the difficulty in recovering lost assets. Kenya presents a case of violent post-colony where the elites use violent means to capture or retain power; in his presentation, Davis Malombe shows how violence can devour society rapidly in short time. Blanche Satta Gaie notes the extent to which gender-based violence, particularly rape, was used during the Liberian conflict.

Typical and possible transitional justice approaches

Different transitional justice approaches have been and are still being applied to deal with those gross human rights violations, with the ultimate aim of achieving reconciliation and sustainable peace. The case studies show that the history of each country, its culture, tradition, the level of human rights awareness within each society, political will, and the involvement of civil society are decisive in determining the kind of approach and mechanism(s) to be applied to ensure

accountability, abolish the culture of impunity, provide remedies to victims, bring perpetrators to justice and promote healing: ‘preventing the recurrence of crises and future violations of human rights, to ensure social cohesion, nation-building, ownership and inclusiveness at the national and local levels and to promote reconciliation’.⁷

In general, what is prevalent in most post-conflict situations is a culture of impunity and general amnesty that prevents the implementation of transitional justice mechanisms. It usually takes a very long time before societies develop and adopt adequate reconciliation and redress policies. In most instances, it has been made possible only after a change of government, a reform of institutions and/or the persistent claim for justice by civil society.

The most typical and promising transitional justice approaches or mechanisms derived from the country case studies presented at the conference are given below.

Rwanda: Rwanda adopted both national and international mechanisms for addressing the gross human rights violations that obtained in the country between 1990 and 1994 (the Rwanda genocide). At the international level, the prosecution of perpetrators was carried out through the International Criminal Tribunal for Rwanda. At the local level, addressing the specific socio-cultural fabric and character of the conflict (genocide), traditional justice (Gacaca courts) and preventative measures – for example, social integration projects, memorialization – have been implemented as the main transitional justice mechanisms.

Uganda: A history of different conflicts and failed peace agreements have left multiple legacies of violence in Uganda. Uganda chose a comprehensive transitional justice approach inclusive of formal and informal justice mechanisms.

Germany: The German government promoted disclosure of formerly classified documents belonging to the secret police of the former German Democratic Republic as a truth-recovery mechanism. These documents are now being used for vetting, criminal prosecutions, rehabilitation of survivors, research and political education. It is important to note that

⁷ See: Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantee of non-recurrence, Pablo de Greiff, 9 August 2012, A/HRC/21/46, p. 5, available at <http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session21/A-HRC-21-46_en.pdf>. Accessed 8 Apr. 2013.

the government was reluctant to implement these measures; however, it capitulated after the efforts of civil society.

Kenya: In response to its long history of violence, Kenya implemented a number of measures which included the Independent Review Commission on general elections, the Truth, Justice and Reconciliation Commission, and the Constitutional Commission which was tasked with working on constitutional reforms. It is important to note that, after the 2007 post-election violence, there was political will within the government to deal with past and present human rights violations, and this led to the development of the constitutional reforms and the inclusion of transitional justice mechanisms therein.

Liberia: During Liberia's civil war, sexual violence against women was used as an instrument of war. In dealing with this aspect of its violent past, a special focus was given to the needs of women and children as victims within the Truth and Reconciliation Committee's practices. In addition, there was a categorization of the different types of victims, which helped to mainstream gender into the transitional justice process at all levels.

Philippines: Grand corruption, asset theft, and international flows of stolen and laundered money have had an insidious and devastating impact on the Philippines since its independence. In the post-Marcos era, a Presidential Commission on Good Governance (PCGG) was set up to recover unlawfully acquired assets. However, the approach was unsuccessful as the PCGG lacked skill in asset-tracing and combating syndicated money laundering. The PCGG did not cover the reparation aspirations of the victims of human rights.

The way forward for Zimbabwe

Based on the presentations of the case studies and extensive group discussions, a set of major recommendations have been defined as a 'Way Forward for Zimbabwe' in transitional justice:

1. Establishment of a Transitional Justice National Working Group.
2. Establishing credible research and documentation archiving.
3. Advocate policy change and legislation.
4. National engagement.
5. Rehabilitation of survivors, with specific attention to women and children.
6. Reform and monitoring of institutions.

The Forum believes that Zimbabweans must continue with this dialogue

Executive Summary

on transitional justice and reach out widely in the search for sustainable peace. Designing a future in which everyone is secure is a process that requires the participation of all.

In 2013, the Forum will organize a follow-up International Conference on Transitional Justice (2nd ICTJ) in order to assess the implementation of the recommendations, the challenges faced and successes, as well as bringing the transitional justice situation in Zimbabwe to the attention of the international community.

Part 1

Zimbabwe Country Overview and Keynote Address

ZIMBABWE: COUNTRY OVERVIEW

The Organ for National Healing, Reconciliation and Integration

Hon. Sekai Masikana Holland

*Minister of State in the Office of the President and Cabinet,
Organ for National Healing, Reconciliation and Integration (ONHRI)¹*

It is with humility that I stand before you today addressing those who have come from countries within and beyond the region, and local participants, to share experiences on transitional justice in Zimbabwe.

On behalf of the Organ for National Healing, Reconciliation and Integration (ONHRI) Principals, made up of Vice-President John Landa Nkomo, the Chairman, Minister Moses Mzila-Ndlovu and myself, may I take this opportunity to convey our sincere welcome to you. It is the ONHRI's fervent hope that you will find time to truly sample the abundant hospitality of the Zimbabwean people.

The President of the Republic of Zimbabwe, guided by the Global Political Agreement (GPA), in consultation with the leaders of the political parties signatory to this agreement, appointed three Elders as Ministers of State in his office with the specific mandate to pursue the provisions of Article VII of the GPA, as enshrined in Schedule 8 to the Constitution of Zimbabwe.

The operative part provides that the Inclusive Government shall 'Give due 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 victims of pre- and post-independence conflict.'

In this context, the ONHRI would like to applaud the unity of purpose exhibited so far by key stakeholders like the traditional leaders, who have demonstrated a keen interest in promoting peace-building and reconciliation in their areas of jurisdiction, co-ordinated at the national level by the Chiefs' Council. Similarly, the efforts of faith-based organizations (FBOs) and civil society organizations (CSOs), among so many other groupings and individuals, are accordingly acknowledged.

The partnership established between the Heads of Christian Denominations and CSOs, resulting in the Church and Civil Society Forum, working in close

¹ This speech was delivered by Mrs Sibusisiwe Zembe, the Principal Director of ONHRI, on behalf of Hon. Sekai Holland.

collaboration with ONHRI has been found quite effective in implementing peace-building activities across the country.

Going back to the instructive part of the ONHRI's mandate mentioned above, it will be recalled that reference is made to 'achieve National Healing, Cohesion and Unity in respect of victims of pre- and post-independence conflict'. This is an admission that in our pre- and post-independence, as well as contemporary periods of Zimbabwe's history, the country experienced cyclical episodes of violent conflict, resulting in physical and emotional hurts among its people.

Regrettably, political violence has continued to rear its ugly head during Zimbabwe's post-independence era and became a serious indictment on Zimbabwe's political terrain during the 2008 electoral process. This prompted the main political actors – ZANU(PF), the MDC-T and the MDC – to agree to work together through the Inclusive Government born out of the GPA, which, in itself, is a peace instrument, though not perfect.

Despite challenges, which continue to confront the Inclusive Government of the Republic of Zimbabwe, the GPA has to be credited for bringing some semblance of unity of purpose and stability to the country. National unity or coalition governments in most countries – and, as of now, there are many – have not found the going easy, especially given ideological differences that have to be managed.

It is important that peace and reconciliation processes be ingrained in and internalized by the Zimbabwean people. Hence, family units, communities, traditional leadership, FBOs, CSOs, the school system, the media, and others, are expected to communicate messages of peace and reconciliation that should further buttress the national healing, reconciliation and integration processes.

The ONHRI has engaged in consultative processes that have resulted in the progressive establishment of an infrastructure of peace and reconciliation to entrench peace-building processes in Zimbabwe. Some of the outputs achieved in this regard include:

- The Zimbabwe National Framework for Peace and Reconciliation, which, among other issues, seeks to create a National Peace and Reconciliation Council (NPRC) with structures spanning national, provincial, district, ward and village levels. The broad policy objective is to institute an enabling environment to facilitate dialogue and peace-building among all Zimbabweans through programmes and/or projects that would lead to peace through conflict resolution, reconciliation and transformative engagements. The Policy Framework, therefore, proposes the establishment

of an independent operational institution to be called the NPRC where 'reconciliation' is inclusive of healing and reparations and 'peace' suggests negotiated settlement of disputes and prevention of future violence.

- Principles for the National Peace and Reconciliation Bill derived from the Policy Framework are currently being transformed into an enabling legal instrument by government legal experts in an effort to promulgate an Act of Parliament enabling the administrative and operational functions of the NPRC.

Other activities that have been undertaken cover the following:

- Facilitation of the drafting of the Zimbabwe Political Parties Code of Conduct in close liaison with the Secretaries-General of the three political parties in the GPA. This is currently under active consideration before signing, when it is intended that it will regulate as well influence the behaviour of the respective political parties' leadership, members and supporters through internal disciplinary machinery and moral suasion.
- Recommendations were made for the incorporation of the NPRC into the Draft Constitution as currently reflected therein with some adjustments.
- Influenced the holding of the Anti-Violence Indaba (Dialogue) held in November 2011 between the three political parties in the GPA at the Rainbow Towers Conference Centre.
- Facilitated the joint ZANU(PF) Politburo and the MDC formations' National Executive committees.

In addition to the above, considering the various challenges that characterize Zimbabwe's political and socio-economic environment, the government through the ONHRI is now focusing on locally generated national efforts aimed at developing decisive measures and mechanisms that strengthen national institutions in conflict resolution and prevention. Among such efforts is the Traditional Mechanisms, Approaches and Systems for Peace-Building, Conflict Resolution and Reconciliation which is being pursued in partnership with the Chiefs' Council, academia, CSOs and FBOs, among other key stakeholders.

The ONHRI is also working towards strengthening peace and reconciliation advocacy and programme implementation through the capacity enhancement and/or sensitization of the aforementioned strategic key stakeholders in conflict prevention, management, resolution and transformation.

Turning to its History Programme, the ONHRI has engaged historians from various universities to undertake research on the history of violent conflict in Zimbabwe. The scope of this project is to focus on the different eras of Zimbabwe's

history and the role of violence and anger in shaping the nation for the purpose of informing our future by learning from the past. The research study will also look at the conflict-resolution and anger-management mechanisms that were employed at different stages in our history.

The ONHRI has engaged the Ministry of Education, Arts, Sport and Culture and the Ministry of Higher and Tertiary Education to:

- Mainstream peace-building in the curriculum of the education system from the lowest to the highest level.
- Commission school essay and art competitions on an agreed topic on national healing, reconciliation and integration.
- Collaborate on the commemoration of the International Day of Peace led by the Ministry of Foreign Affairs.

Peace programmes are also being pursued through the Ministry of Women Affairs, Gender and Community Development, the Ministry of Youth Development, Indigenization and Empowerment, and the Ministry of Small and Medium Enterprises and Co-operative Development, to mention just a few.

In concluding this submission, I hope that the above will inform and serve as a foundation to Zimbabwe-specific national healing, reconciliation and integration approaches, which are informed by the experiences of other countries.

It is further hoped that, in this regard, Zimbabweans will inclusively remain resolute and steadfast in our commitment to the national values and norms that define and preserve our nationhood, guided by the spirit of national unity, peace and reconciliation founded on *unhu hwedu/ubuntu bethu*.

With your indulgence may I end with ONHRI's public message, which I request you to please repeat after me:

*Peace begins with me,
Peace begins with you,
Peace begins with us!*

I thank you!

KEYNOTE ADDRESS

Windows across Time and the Search for What Really Matters: A Meditation on Transtemporal Transitional Justice

Dr Undine Whande

Centre for the Study of Violence and Reconciliation, Cape Town, South Africa

I want to start with a quotation from Ben Okri that speaks to the title of my speech:

We live by stories, we also live in them. One way or another we are living the stories planted in us early or along the way, or we are living the stories we planted – knowingly or unknowingly – in ourselves. We live stories that either give our lives meaning or negate it with meaninglessness. If we change the stories we live by, quite possibly we change our lives.¹

With your permission, I will take the liberty to invite a contemplative moment, a moment of looking at transitional justice through the lens of personal memory, and from the perspective of windows across time.

In Western thought, time is mostly conceived of as linear. It leads from the present into the future, picturing the past as lying behind us. In this case, transitional justice is perhaps like taking a look at the past through a window in time, looking backwards. In ancient and indigenous cultures around the world, however, time is most often seen as cyclic. It moves from the present to the past-as-future. How so? The thinking is that the future re-joins the past in a loop: As I walk my life journey, I move towards becoming first an elder and then an ancestor. I walk backwards into the future, the past in front of me and visible, the future at the back. The future is, at the same time, the realm of the past because it is also the realm where I join my ancestors and from whence those not yet born come, too. Cyclic time emerges from the notion of infinity, from which life emerges and to where it returns.

In the Western sense of time, the present, then, is a moment that is perpetually gone. It is now and it is past instantly. In the cyclic understanding of time, the present is expansive: it spans across generations and even signifies a kind of eternity, a never-ending now, and now, and now. I invite you to contemplate

¹ Ben Okri, *A Way of Being Free* (London: Phoenix House, 1997).

this now by looking at a picture of the hands of Checker. Checker is in her late eighties and she lives in a small village just south of the Limpopo river. She is a weaver and, with her nimble fingers, she weaves mats and baskets to this day. Take a moment and look at your own hands, appreciate your hands, the work they have done for you, the tender touches, perhaps, that they have given.



Photo: Webster Whande

Contemplating this picture, I want to invite you to reflect on the oldest person whose hands you have held with your own hands in your life. Who is this person? What is their date of birth? Perhaps it was your grandfather or grandmother, or an elder in your community? Perhaps he or she was born in the late 1800s, or the early 1900s? Hold the image of that person in your mind's eye for a moment – who were they? What were their life experiences? What shaped them and what did they teach you that perhaps shaped you?

Now take a moment and think of the youngest person whose hands you have held? Most likely these were the hands of a baby recently, perhaps your own child or grandchild? Do you have a mental picture? Think about this child's life. If he or she lives a full life – to eighty, ninety or a hundred years – what year will we have? The year 2100 perhaps?

Please take a moment and share with neighbour for two or three minutes about these two people – the oldest and the youngest person whose hands you have held. [*The room comes alive with conversation, laughter, sharing.*]

Just consider for a moment how you feel right now. Speaking about positive memories really enlivens us. This is an important consideration for transitional justice because, alongside memories of harm and pain, we all have memories of joy and moments that were meaningful. We connect through memory to people that gave and continue to give us energy in the now, emanating from encounters made perhaps as long as half a century before the now.

I want to ask you to calculate the time between the birth date of the oldest person whose hands you have held and the final year of youngest person if he or she lives a full life. Recently, some thinkers in the peace-building field have suggested that this time span is what we need to consider as the present – our 200-year present.²

In fact, this time span between the two ages is your 200-year present, a present made up of living memory, by people whose hands you have touched. This present spans three or four generations and is determined by the direct memory and experience of those actual people. Having touched those hands, you are the connecting point within these 200 years. You are like a unique relational crossroads in time. Let me expand on what this means for transitional justice by drawing on another example of personal memory and meaning-making.

This is a picture of my daughter Tawana. She is five years old. She has at least three different roots. She is Zimbabwean, South African and German.

Who is Tawana, what is her ancestry?

She has a great-grandfather who wore the Nazi uniform. Though all family was always at pain to emphasize that he was ‘not really a Nazi’, he did wear the insignia of institutionalized racism, the swastika of National Socialism. He fought in the war that turned from murderous to genocide. He was a surgeon at the front who received honours for saving lives. He was also known for playing the violin. A man who was more interested in giving concerts than holding a



Photo: Undine Whande

gun and yet who was part of it all. At the ending of the war he was captured as a prisoner of war and sent to Siberia. He experienced the Russian Gulag, from where he returned several years after the war. Building up a life in East Germany after his release, he soon recognized that the communist system he was now living under resembled the autocratic traces of the past Nazi era, resembled that which he felt, in hindsight, was a betrayal of the culture and ethos he had wanted to

² See John Paul Lederach, *The Moral Imagination: The Art and Soul of Building Peace* (New York: Oxford University Press, 2005).

stand for. When he spoke out about this, saying ‘these methods are like Hitler’s’, he was persecuted by the East German intelligence forces, the so-called Stasi. When he got word one day that he would be arrested that night, he rounded up his family and fled the country for West Germany that very night.

Tawana also has a great-grandmother. As far as we know, she did not stand up and protest when her Jewish neighbours began to disappear. She was a person who read the philosophers. She never studied but knew so much. She would stay up late at night with her grandchildren to discuss the meaning of life. She brought up her own children during war times. She was raped by a Russian soldier when the front lines broke and Germany was conquered by the Red Army. She contracted syphilis from the rape, which she survived, but she carried the scars and passed them on to her children. When she died in 2002 she had lived through five different political dispensations, the monarchy and Kaiserreich, the feeble Weimar Republic, the Nazi-era Third Reich, the communist regime of East Germany, and finally West German democracy.

Who were these great-grandparents, in the transitional justice sense? Perpetrators, bystanders, beneficiaries, collaborators – products of their time – and perhaps also victims. Their children, my parents, were war-children, deeply psychologically damaged for life. In our generation – the grandchildren of the Holocaust – the trauma manifested itself in various further psychopathological patterns such as anorexia and depression. Even while our parents tried to prevent a trans-generational transfer of memory through silence, exactly this happened – they passed on the emotional matrix of those painful memories, for their children to make sense of.

What does it look like on the African side of Tawana’s ancestry?

Her Zimbabwean grandfather was born in the early 1900s. He was a self-made man who in his youth cycled to South Africa, bringing back cattle and goods. Based on his own wit and guts, he became a successful rural trader. He experienced oppression and indignity at the hands of the colonial powers. As a young man, he was abused in his working situation inside the family that employed him, experienced things he could not speak about for fear of being killed in retribution, as well as cultural taboos. He later supported the liberation war and has since passed on, so we do not know what would have been his stance in the current dispensation.

Tawana’s grandmother fled the bombings of the Rhodesian warplanes with a baby on her back and another at her hand. I recall vividly our two mothers sharing stories on being bombed during our wedding dinner. They instantly

got along so well, despite the geographical and social distances between them, sharing their stories of the experiences of war.

So Tawana's mother is a Nazi granddaughter and also a Zimbabwean *muroora* who is working on transitional justice issues, a person who was obsessing with the memories of the Holocaust since a young age, who lived through an intense close engagement with the South African Truth and Reconciliation Commission and now stands in front of you to ask questions about transitional justice in Zimbabwe.

Now you have an idea where I am speaking from, and why a white German woman would stand in front of a Zimbabwean gathering at this moment in time speaking of such issues.

In the work of transitional justice, it is important to locate your voice at all times, for who can speak about what is a truly sensitive matter? So, speaking from the place I have sketched through personal memory, I am asking: What kind of future can we build for Tawana? What kind of future will allow the reconciliation of these multiple ancestral lines that are perhaps asking to be redeemed and healed? What kind of future for Zimbabwe?

I have entered transitional justice through the back door now, via the personal register, using the anthropological lens and the emotive lens of personal memory. You may ask yourself: How does this soft, fuzzy, emotive, memory-infused dimension relate to the 'hard' politics of the day that we usually consider primary when we talk of transitional justice? How does this psychological reality of four generations from two continents relate to the 'business' of transitional justice – if we accept the reductionist interpretation of transitional justice as creating state-led mechanisms for publicly engaging (and somehow pacifying) violent pasts?

Like others, I, too, wonder at times why transitional justice has gained such prominence, why has it become so fashionable. I suspect it is because it poses a central question, linked to an age-old and ever-new dream of humanity: *Can we as human beings facilitate our own evolution beyond never-ending cycles of violence and atrocity?*

Last week I was in Cambodia at a gathering on memory and memorialization. I walked the killing fields in a country of seven million people, where two million were brutally murdered by the Khmer Rouge regime about thirty years ago. This was done in the name of ideological re-education, in the name of a better human and a better humanity – but this 'perfect human' was, once more, as in the times of the Nazis, fashioned in blood.

There is a second generation now in Cambodia, coming alive with trying to make sense of this, to make meaning, to shape its own identity and sense

of purpose. They are asking their parents: What happened? They meet. First silence, then stories of victimhood, perhaps traces of harm in their families, harm done and harm received, and also some perpetrator heroism and bravado. This new generation is asking new questions, and they are bringing the past onto the community stage, if not yet the political stage. Founding history-oriented organizations and projects, they ignite the conversation about the past through trans-generational dialogues at village level, in universities, at memorial sites, bringing their questions into society in new ways.

This is to say that dealing with the past always happens. People always remember. Perhaps they always also suppress, perhaps forget. Then they re-remember and, in spite of repression and silences, memories resurface as a new generation comes of age and asks new questions.

There is speech and silence according to the context and time. Transitional justice needs from us the skill to 'read' the phases of life that people who were violated are living through, not just freeze them into the moment of the violation. Life goes on, other things happen, everyday chores need attention. Victims of violation tend to have a heightened sense of memory as they approach their passing from this life. Those who violated usually also consider themselves to be victims, just from another time or place.

As one generation prepares to pass on, the conversation about the past often suddenly regains traction and detail. Untold truths surface. This does not always seep into the public sphere, though. The political environment of the day matters, the levels of fear, denial and the risk of public telling. Often, the stories that are told in private, in families, are different from those that dominate in communities, which may yet again be different from those that dominate at societal level.

Transitional justice in that sense is about creating a public moment in a collective for telling the story afresh of who this collective is and aspires to be. Transitional justice takes Ben Okri quite literally in its assumption that (truth)-telling is transformative: 'We live by stories, we also live in them. If we change the stories we live by, quite possibly we change our lives.'

There is a paradox here. While transitional justice is meant to mark an incision in time, a new beginning, a different era, it can at the same time be considered an effort at repairing and re-stor(y)ing ruptures across time. So possibly, the very rupture created by a radical change-over is another one that must then be attended to and mended later.

Through violent conflict the connections in the web of life are interrupted, damaged, severed. Which connections? Relations among the living are damaged.

Relations between the living and the dead have been unhinged, are out of order. Relations with those yet to be born are at stake – the contract with future generations is unclear, needs to be renegotiated perhaps.

I look at transitional justice as a window in time. Transitional justice is a particular, momentary window in the trans-generational, ever-continuous process of dealing with the past. It is an intentional, conscious and societal effort at dealing with the past. If, however, transitional justice becomes a matter of Dealing With The Past (in capital letters), to rewrite certain personal experiences into History (with a capital H), then it may merely lend itself to setting up and establishing the next exclusive and undemocratic dispensation. If the past is to be dealt with ‘once and for all’, it is likely to celebrate the virtues of some to the exclusion of others. Then transitional justice becomes about Vlamik Volkan’s ‘chosen traumas’ and ‘chosen glories’, not transformative at the core but, rather, built on claims to a victimhood that justify violence against others.³

Yet transitional justice also has the potential inherent in seeking to restore the relations between the living, the dead and unborn future generations. If we consider the past to be a living story, then violence is a disruption of this story. The past is a generative energy that seeks to find and engage where the narrative cycle has been broken and start the repairs as well as invent new futures. Hugo von Hofmannsthal referred to collective memory in 1902, which he spoke of as ‘the damned up force of our mysterious ancestors within us’.⁴

Dealing with the past is the ongoing effort to restore and create anew a coherent narrative of who we are in the here and now. This happens with and without transitional justice. After disruption, war and violence, people embark on a search for meaning. They repair damage in the everyday. They search for and recreate aliveness.

Transitional justice in the 1990s, as I experienced it in South Africa, was a staged moment for retrospection and prospecting – it was meant as ‘looking back in order to look forward’, based on the core assumption that indeed looking backward enables going forward.

At the same time, transitional justice as a political project and projection was inevitably tied up with the processes of nation-building, which are by default exclusive. As we focus on creating the kind of post-colonial citizenship that would

³ See <<http://www.vamikvolkan.com/Chosen-Trauma,-the-Political-Ideology-of-Entitlement-and-Violence.php>>.

⁴ Jeffrey K. Olick and Joyce Robbins, ‘Social memory studies: From “collective memory” to the historical sociology of mnemonic practices’, *Annual Review of Sociology* (1998), 24: 106.

be based on rights realized, we turn a blind eye to the phenomenon of migration and people's movements across borders on the continent. While many are victims of displacement due to violence, there are also age-old circular migration routes for purposes of trade. The nation-state does not provide the kind of protection that would be needed for women who cross borders regularly and often illegally to fend for their families. The South African nation has become one of xenophobia and exclusion, as truth, reconciliation and rights apply to citizens or those deemed worthy of being part of the formal system, where one has access to make those rights real in any form.

In South Africa there was hope that the Truth and Reconciliation Commission would be a kind of 'silver bullet', a once-and-for-all, fix-all cure to neatly bag 350 years of brutal colonial conquest and to heal the consequences of nearly fifty years of an institutionalized crime against humanity called apartheid. We thought somehow that we could put it in the bag in the name of humanity, in the name of Steve Biko's quest for a more human face, in the name of Madiba's twenty-seven years in prison and Tutu's extraordinary kindness and compassion.

It was no magic bullet. We thought the pain would go away.

It has not.

We are divided, hurt, angry, furious, shameful, guilt-ridden, and as violent, not least to ourselves.

Our institutions are fragile because they can only be as resilient as our people are healed and at peace in their own hearts and from there with each other. We are not at peace in South Africa. When 500 young men die every six months in an area called Nyanga Crossroads in Cape Town, what kind of peace is that? Those are more deaths than counted in Afghanistan over such a period. We are at war and in denial.

Graça Machel was calling for a second TRC this week. She asked that South Africa consider that the need for an ongoing national dialogue has not ended, and that such a dialogue is intimately interwoven with the processes of the ongoing engagement with the multiple truths and perceptions of the past.

Why would we need a second TRC? What can a national conversation about what happened achieve when structures remain unchanged? Is it really time for talking in the wake of disasters such as Lonmin? But perhaps the brutal killing of the thirty-four mine workers was exactly not that, not a disaster but a trajectory coming full circle. What is happening? How do we make sense? Suddenly everybody is speaking of the collective trauma and the denial we are in. What do we need to do now? We may be at war and in denial but South Africans are also

innovative and vibrant, joyful and funny. How will we use that ability to relate across enormous social distances now that served the transition so well in the mid-1990s?

Does that mean we are transitioning forever, that transition has no end? In the cyclic view time, that is the determining look at reality. There are just generational changeovers, not really endings and beginnings. Transitional justice is a marking of time, no more. Looking at what transitional justice set out to do in the 1990s – pointing out collectively that an autocratic regime had ended – and what is projected into it now – healing, repairing and transforming fragile states and situations of protracted conflict – it is evident that we set ourselves up to fail if we think that transitional justice is a remedy for all social and political ills. We have seen the limits to transformation the minute we seek finite endings and certainty of change.

Instead, what the TRC did enables, and what future processes at best can facilitate is moments of introspection (looking inwards) and of transpection (looking across time) – moments of recognizing both continuities and shifts, of becoming better observers of what is actually happening around us, less emotionally entangled in our own projections.

What was the TRC then? It was such a moment to mark time, to say that we have now chosen to live a different story. There is now a different South Africa, a plea to the world to see us in our striving and in our failures. The state sought to reinvent itself, only to find old patterns and forms resurfacing. Apartheid former security operatives now running businesses are caught dumping school textbooks in fields, former honourable comrades are found with their hands in the cookie jar. Cynicism reigns supreme among many that the TRC was all mercy and no justice, all talk and no repair, that golden handshakes were given while people's suffering continues unmitigated and structural injustice prevails. Which is true.

Travelling eighteen years into independence, we have not yet fully embraced our interdependence, or made amends, or sufficiently begun to repair the devastated lives of survivors. In this region we can learn a lot from Kenya, Uganda, from colleagues in West Africa, Sierra Leone, Liberia, who have been travelling the post-independence road for longer, through several cycles.

We know we need to learn to live in contestation non-violently, to value conflict as a teacher and a change-maker, if we heed the signs. We need to pass on the ability to stay in dialogue with the next generation, not to sell a rainbow story that appears an empty dream for many or to give promises of a change that is always just out of reach.

But how do you do that when so many are hungry, tired, fearful, shameful, or feel helpless, guilty, threatened?

How do you heal when there is a void in the soul that makes people grab and grab and grab but when this void can never be filled with material things?

Just a word on corruption, which seems to dominate the South African headlines so much. What does this have to do with transitional justice? *Corruptere*, the Latin word at the root of the word corruption, means literally 'tearing apart'. What is torn apart here? What is torn apart in the soul of the person who is trying to fill a void that covers a pain that is unseen?

We want transitional justice to 'fix things', to make right, to stand for noble causes. But in transitional justice expert gatherings we tend to want to forget about pain as well. We want survivors to speak, even cry, but within confined and pre-mediated registers that we set for them. We do not want them to go berserk on stage, to shout and scream and holler their pain onto the nation. We provide counsellors and escort out those who collapse. We do not have the means or energy to walk the journey of pain that often follows after having allowed the 'raw recall' of pain in front of media and public. Not without reason the survivors have accused us in the transitional justice world of orchestrating displays of suffering without remedies on offer. Who or what are these displays of suffering feeding? What do we need them for? What do they give to survivors and what is the cost?

At worst, in transitional justice, we may think we can sanitize a living process of memory of atrocity through some clever social engineering, if only we get it right. Are we out to sell the perfect package deal of tribunal, truth commission, reparations and institutional reform programme, with some touchy-feely reconciliation measures as the cherry on top to make what is quite a bitter dish palatable?

And yet ... we can make witness, even if at the heart of violence and atrocity there remains something unspeakable and beyond our intellectual understanding. Even when the raw recall of pain has a cost that is too much to ask for. We can and need to stay with it. Because it means that we choose not to look away when we meet those damaged by war and violence, even when the encounter rattles us. We can choose to look inside and attend to our own healing, as most transitional justice experts come into the field with their own story to tell and in search of their own answers to questions perhaps posed by a distant ancestor of their own. We have the choice to show up differently when we meet our neighbour, every day.

What of Zimbabwe?

What story are you living in? What story are we living inside, here in the region? How do we want to live?

Transitional justice is not reducible to four or five pillars and a package deal of interventions flown in by experts and funders, who may advise that one cannot look back any further than 1980 or 1960 when the living-memory-times before clearly shape the now. Public state-led efforts at changing the mainstream narrative are to be handled with care, always. Transitional justice needs its mechanics and its time periods so that efforts at repair and restoration can be handled by legal and other state processes. At the same time, dealing with the past is not and need not stay limited within those bounds. Hence, the processes we create around official transitional justice and state measures are as critical as are those at the centre of attention.

Dealing with the past happens with or without the transitional justice experts, and not all stories can or should be told in a temporary, often symbolic, transitional justice process. Multiple spaces can be made where they are told. The African chance in being the central focus of transitional justice efforts worldwide is to innovate, to refuse the pre-packaged deal and to be inventive:

How do we enable acknowledgement and the concrete repair and betterment of lives for those who suffered?

How do we enable consciousness and transformation for those who inflicted harm, on grounds of their own unseen, unattended pains of the past?

This is not to romanticize traditions that badly need an overhaul but to use their deep cultural resourcefulness for dialogue, in a quest for justice and peace.

It is also not to vilify international criminal justice as a mere Western hegemonic invention set to neo-colonize Africa but to point out its contradictions, its limitations in the African context.

It is not to be naive about bringing the victims and perpetrators of particular deeds together, thinking that speaking and encounter is always beneficial.

There is a need to create spaces where Zimbabwe can have the conversation about itself – past, present and future – as it becomes possible, and especially across generations, with young people. There is a need to allow young people to make up their own minds, rather than lecturing them about experiences they have not had, that are not part of their reality.

There is a need to speak about how men and women have experienced the situation differently and what they need to recover, transform and heal.

I reiterate that the African chance is to innovate – to refuse the pre-packaged deal. Not to buy what the transitional justice experts, like myself, say, but to make your own, using your own vitality creativity and courage. Follow your hearts and invent the best possible conversation for this moment in time, be it national, or

localized, or both. Chose carefully how you show up to the task every day, and be prepared to be in for the long haul.

I am hopeful about Zimbabwe. I have a sense that you lead us in the region in terms of post-independence politics and efforts at transformation. We walk behind you 'down south', with our seedling of democracy. You have at least a rooting of democracy in the agile and questioning minds of the Zimbabwean people, who have never stopped reading newspapers and questioning the information they find.

Let me end by asking: What will life look like in 2212? If we are looking at the 200-year present, then we are looking to start a conversation here that spans across four generations.

How will that conversation be part of creating that new age of peace and prosperity for the region and for this continent?

Part 2

Global and Zimbabwean Experience of Transitional Justice

The Global Experience of Transitional Justice: The Right to Reparations in Transitional Justice

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Much of REDRESS's work with victims of torture takes place during or after conflict or post repressive regimes, and therefore falls broadly within a context of 'transition'. In this respect, REDRESS's focus is primarily on the accountability of perpetrators and providing reparation to victims. Over the past twenty years of REDRESS's existence, processes of transition have taken place in almost all countries that REDRESS works in, all over the world: in Latin America, in Peru and Chile; to some extent in Eastern Europe after the fall of the Iron Curtain; in Asia in Nepal, the Philippines, and to some extent in Sri Lanka; as well as in many African countries, including Rwanda, Sierra Leone, Liberia, South Africa and many others. Interesting transition processes are also currently ongoing in North Africa, in Tunisia, Libya and Egypt – all countries recovering from decades of repressive regimes.

What is transitional justice, or justice in transition? The UN Rule of Law and Transitional Justice Report of 2004 says that transitional justice is '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'.¹

The components of transitional justice, according to the UN, can include both judicial and non-judicial processes and mechanisms, including prosecution initiatives, facilitating initiatives in respect of the right to truth, *delivering reparations*, institutional reform and national consultations. *Whatever combination is chosen must be in conformity with international legal standards and obligations* [my emphasis].²

¹ United Nations, *The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies: Report of the Secretary-General* (S/2004/616), available at <<http://www.unrol.org/files/2004%20report.pdf>>. Accessed 10 Apr. 2103.

² United Nations, *Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice*, March 2010, <http://www.unrol.org/files/TJ_Guidance_Note_March_2010FINAL.pdf>. Accessed on 25 Feb. 2013.

Clearly, societies that have experienced long-term repression or that are emerging from violent conflict have a lot of issues to grapple with, and this statement emphasizes that there are a variety of components that raise a number of important questions that need to be addressed and discussed.

Here, I will focus primarily on the right of victims of serious human rights violations to reparation in the context of transition. This is not to say that the other components are less important, or that reparation mechanisms operate in a vacuum. A focus on victims' rights in transitional justice, however, is merited, as the perspectives, rights and needs of victims are often ignored.

I will first briefly set out the key principles under international law that pertain to remedies and reparation for violations of international human rights and humanitarian law, before providing some examples of how countries emerging from conflict or repressive rule have attempted to implement victims' right to reparation in practice in the context of transition. While all experiences are different, and transition processes need to be tailor-made to meet specific circumstances, some lessons and experiences from other countries might exist that could be taken into account in the context of Zimbabwe.

A focus on victims' rights is important as it enables victims' suffering to be acknowledged and addressed so as to help healing and contribute to reconciliation. The need for reparation arises in every transitional justice context at some point in time: we have seen that in countries that have decided to establish a truth commission to deal with crimes committed in the past – such as South Africa, Sierra Leone, Morocco, Peru – and in countries that have opted for the broadest possible accountability of perpetrators, as in Rwanda, where close to two million cases have been heard and tried. In these and other countries, reparation for the victims of torture, of genocide and other serious human rights violations played – and, to some extent, continue to play – an important role. Ideally, victims will receive a tangible benefit from justice processes that enables them to move on.

Equally, it is important to emphasize that these processes do not take place in a legal vacuum but, rather, that governments must adhere to certain obligations under national and international law when setting out to frame a transitional justice policy.

What are victims' rights under international law?

Victims of human rights violations have a right to justice, which includes a right to know the truth and a right to reparation. It is long established in international law that a wrongful act involves an obligation on the part of the state to make

reparation in an adequate form. Today, a wide range of international human rights treaties and declarative instruments include a right to reparation for victims of human rights abuses, in particular the UN's *Basic Principles and Guidelines* on the right to a remedy and reparation.³

What does that obligation imply for states? States must put in place a range of measures to meet the victims' right to reparation, which includes a procedural and a substantive aspect. Procedurally, states must enable victims to have their cases heard, providing judicial or public recognition, while, on the substantive side, states have to ensure that at the end of that process victims can obtain certain forms of reparation.

Reparation can come in different forms, yet ideally it is a combination of material and symbolic measures taken to address the harm done to victims. The UN's *Basic Principles* provide for five forms of reparation: restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition. I shall not go into detail as to what these different forms can include, though it is important to emphasize that states have a certain degree of flexibility in the measures they take to provide these forms of reparation; ideally, a reparation mechanism in a transitional justice process will include a combination of all these forms of reparation. A good example of how states have approached the wide-ranging forms of reparation is Morocco, where a truth commission was established to deal with decades of human rights abuses, and reparation measures included financial compensation to families as well as psychological and long-term medical assistance for victims, in addition to symbolic reparation measures.

The degree of flexibility that states have in providing reparation is important, as victims' perceptions of reparations and the reparations process will always be different, depending on the context and situation that victims find themselves in. Victims in the midst of a conflict with security concerns will not find time to think about reparation, but that does not mean that they do not need or want reparation at a later stage. In Argentina, the immediate concern of victims was to find out about the 'disappeared' people, to establish the truth and to punish those responsible. Other forms of reparation, in particular compensation, were regarded as secondary, or even discarded, as many found it distasteful to be paid for the loss of a loved one. However, at later stage, a significant reparations

³ United Nations, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* (A/RES/60/147), available at <<http://www.undemocracy.com/A-RES-60-147.pdf>>. Accessed 12 Apr. 2013.

programme was also established on account of the victims' requests for such a programme. Cultural differences may impact upon perceptions of reparation: for instance, participation in criminal proceedings may be seen as crucial, whereas, for others, truth-telling and the admission of guilt by the wrongdoer will be most important. In some contexts, the fact that one can never undo what was done may militate against reparation, whereas, in other contexts, the symbolic effects can be extremely beneficial and contribute to reconciling a divided society.

The context of the violations, the length of time over which they were perpetrated, the type of violations and the number of victims, as well as perpetrators, involved may give rise to very specific perceptions of what form(s) reparations should take. Should compensation programmes be established? Is there a need for extensive medical and psychological rehabilitation? Has there been a situation of ethnic cleansing that requires a programme for the return of refugees and displaced persons?

As a result of these different contexts, it is important to design reparations mechanisms that take into account the context of the crimes and the situation of the victims.

Putting these rights into practice in the context of justice in transition

In our work we frequently come across individual victims of torture who are seeking access to a remedy and reparation that can be, depending on the circumstances, a relatively straightforward process, at least in comparison to mass victimization. Remedies may be available at national level; if they are not, it might be possible to approach regional bodies, such as the African Commission on Human Rights, or international ones, such as the United Nations Human Rights Council, with a view to obtaining reparation. Victims can submit their claim to national courts or regional mechanisms and bodies, which will then decide on their case and issue judgments or recommendations, including the form of reparation that the victim is entitled to. For obvious reasons, national justice systems, as well as regional and international mechanisms, will find it difficult to make decisions and issue recommendations about the reparation of victims in cases where thousands or tens of thousands of victims are seeking justice and where a legacy of abuses needs to be addressed. Other opportunities then need to be found to provide victims with justice and reparation.

A significant number of wide-ranging political, legal and practical challenges are involved in setting up a mechanism that ensures that the largest possible number of victims receive some form of reparation at the end of the process.

I will focus only on some of these challenges, starting with the political will to provide reparation.

One of the main challenges from a victims' perspective is a right, at the outset of a transitional process, to ensure that there is *political will* to acknowledge that a situation exists that calls for reparation, and that there are victims who have been harmed and are entitled to reparation. This political will needs to be sustained over time, as justice processes can take years to be prepared and implemented. In some countries, such as Rwanda, there was political will to ensure that reparation existed after the Genocide, but that has vanished over time without having been put into practice up to today. Making sure that governments have a willingness to provide a form of reparation accepted by victims will require continued pressure from civil society.

The way in which a reparation process is managed, from the outset until its final implementation, has a significant impact upon the acceptance of transitional justice efforts by victims. Recommendations and promises to pay certain amounts of compensation to victims over a certain period of time, for instance, as in South Africa, need to be followed up and kept. In Rwanda, the government promised in 1996 that a compensation fund for survivors of the genocide would be established, but it has yet to deliver on that promise, leaving many survivors frustrated and dissatisfied with the other considerable and important transitional justice efforts undertaken by the government of Rwanda.

So *outreach* and *management of expectations* are important. These, in turn, will require broad consultation with victims and communities, who need to participate in the process and be consulted about efforts undertaken to establish justice mechanisms. This applies not only to reparation mechanisms but to transitional justice policies. Generally, victims must be real partners, not just beneficiaries. Consultation with and the participation of victims and victims' groups in the process are vital to ensure that their needs, rights and perspectives are adequately reflected in what is eventually established.

In Peru, the Truth and Reconciliation Commission spent a year travelling throughout the country, holding over forty workshops with victims and studying reparation programmes in other countries so as to come up with a proposal that was feasible and that reflected, at least to some extent, the perspectives and needs of victims. In Rwanda, where reparation is high on the agenda of victims' groups but not of the government, experts discuss how reparation can be provided on radio shows, where everyone has an opportunity to call in and ask specific questions or air concerns about the lack of reparation measures taken by the government to date.

Another challenge, of course, is that, if we speak about rights of victims, we need to consider whether a *legal framework* exists that provides for these rights or whether legislation must first be drafted to enshrine these rights at national level, and how to enforce these rights – often a very delicate question, in particular where transition has yet to take place. For instance, in Libya, after decades of repression, the newly established National Transitional Council has adopted a transitional justice law that fails to mention explicitly the right of victims to justice and to reparation; it also does not spell out what type of mechanism will be established to investigate the legacies of violations. As a result, either the law will require amendment or a separate piece of legislation will be required to ensure that rights of victims are adequately taken into account in the months and years of transition to come.

It appears that, where a right to reparation specifically in regard to human rights abuses during conflict and/or repressive regimes is firmly enshrined in law, it is much more difficult for a government to renege later on its promise to deliver reparation. If it does, human rights groups at least have a starting point for holding the government accountable. Relevant reparation mechanisms and victims' right to reparation have, for instance, been firmly established in legislation in Sierra Leone, in South Africa and in Peru, but this does not exist at the moment in Libya, Nepal or Rwanda, countries where survivors continue to struggle to obtain reparation.

The identification of victims is vital, as it determines who will benefit from reparation. While international law provides clear guidance as to *who qualifies as a victim* of a human rights crime, in practice it has proved to be very contentious, and depends on who is in government and, to some extent, on the cultural context. Governments may choose to make ethnicity the determining factor in defining who qualifies as a victim, a strategy that risks excluding those who belong to another group, and reparation measures, such as compensation payments, may therefore easily divide rather than reconcile. Not all violations committed in a particular conflict might be included in transitional justice efforts, which then also have an impact on who is entitled to reparation.

In addition, should perpetrators of violence who later become victims of human rights abuses by the state benefit from reparation? In Peru, armed groups had fought government forces over decades, often in a very brutal manner. The Truth Commission had to decide whether those who had been part of the opposition forces, whom the public referred to as 'terrorists', should qualify as victims. It recommended that victims of serious abuses by government forces

should receive reparations, regardless of their association with an armed group. While this definition is in line with international law, the government of Peru ultimately rejected the Commission's recommendation, and today's reparation programme explicitly excludes members of armed groups and their families. The law establishing the programme even provides that 'members of subversive organizations are not considered victims'. This is not only contrary to international law, and potentially divisive within Peru, but it is also difficult in practice to determine and identify those who had been members of a subversive group.

This brings us to the *implementation* of reparation processes in the aftermath of a repressive regime or a violent conflict. As already mentioned, ordinary court processes might not often be a solution, as the magnitude of the crimes and victims affected would lead to an overburdening of the legal system and to delays in providing reparation. Furthermore, often a legal system does not exist that would allow victims to put their claims forward, as is currently the case in Libya or was in the immediate aftermath of the genocide in Rwanda.

Increasingly, states in transition establish *reparation programmes* that aim to provide the type of reparation necessary under the circumstances – either material, medical or symbolic – and the forms of distribution – either collective, benefiting entire communities, as, for instance, in Peru, or individual, in the form of compensation, for example. Again, the process of designing programmes should be guided by broad consultation. According to the *Guidance Note* of the UN Secretary-General, 'experience has shown that the most successful reparation programmes are designed in consultation with affected communities, particularly victims and women groups'.⁴

Reparation programmes can complement truth-seeking mechanisms. Indeed, the truth commissions established in South Africa, Sierra Leone, Morocco, Peru, Chile and Argentina actually recommended the establishment of reparation programmes. Reparation programmes can also complement prosecution initiatives, such as happened, to some extent, in Bosnia and Rwanda; it appears that reparation programmes, if established, would come after the prosecution of those responsible.

Generally, a *prompt establishment* is important, as the implementation of reparation programmes will usually require a lot of time. A delay in the establishment results in a risk that many victims – in particular the elderly, or

⁴ United Nations, *Guidance Note of the Secretary-General: United Nations Approach to Transitional Justice*.

those suffering from an incurable disease as a consequence of crimes committed during a conflict – will not be able to benefit from reparation. Prioritizing certain groups in receiving reparation could be one way of addressing this risk, and this was done to some extent in South Africa and to a greater extent in Sierra Leone. Delays will create anger and frustration among victims who have been waiting for reparation for years, if not for decades. A transparent process based on consultation can go some way towards addressing potential delays.

The establishment of a reparation programme will require some balancing: how much will a government want to spend on a specific transitional justice mechanism – for instance, the prosecution of perpetrators – and how much will be left for reparation so as to make it meaningful? This balance has not always been in favour of victims and reparation, especially if we look at mechanisms set up at the international level – the International Criminal Tribunal for Rwanda (ICTR), the International Criminal Tribunal for the Former Yugoslavia (ICTY), and the Special Court of Sierra Leone – where the emphasis has been on prosecution, and millions of dollars have been spent to hold perpetrators accountable. While this can be an important component of a reparation policy, it has not reflected the commitment made in terms of reparation. Indeed, neither the ICTY, nor the ICTR, nor the Special Court for Sierra Leone has fully addressed the question of reparation. No provision was made for victims to participate and/or to claim reparation, and no reparation programme has been set up alongside the establishment of tribunals, which explains to some extent the lack of acceptance of these mechanisms by victims in Rwanda and in the former Yugoslavia.

Most reparation programmes include the setting up of a fund that will cover different forms of material reparation in the form of compensation, rehabilitation and restitution – material and non-material damages, access to medical care, university fees, etc. Such funds have been set up in different forms in South Africa, Sierra Leone, Peru and Morocco, and have been suggested for Sudan as well as Rwanda, where funds need yet to be established.

Compensation or reparation funds will need to have a clear management structure, and consider such issues as how to quantify loss and how to distinguish between the harm done to victims – for example, a torture victim who has suffered one day of torture and another who has been detained and tortured over a year. The disbursement of compensation will need to be addressed, as will the composition of a reparation fund. An important challenge, of course, is the financing of such funds, as the implementation of a reparation programme will be expensive. The international community can play a role, as it has in Sierra

Leone, where the UN Peacebuilding Fund and UN Women have contributed funding to a reparation programme targeting particularly amputees and victims of sexual violence.

Some lessons learned and conclusion

A decision to provide reparation to victims of human rights abuses can be challenging, and designing an inclusive reparation mechanism in the context of transition will raise complex questions. Arguably, we need some form of, or at least indications of, transition to address these questions.

Some of the main lessons learned from past and ongoing transitional justice processes in South Africa, Morocco, Peru, Sierra Leone, Rwanda and Chile include that reparation programmes are an important and indispensable feature of any transitional justice process that will require extensive outreach to, and consultation with, victims so as to take their needs and perspectives into account and manage expectations. It is crucial that victims form part of the design of transitional justice mechanisms – including, in particular, women, who have often been targets of human rights abuses but may play only a marginal role in society – as otherwise their perceptions and needs will not be reflected adequately. The scope of the outreach will impact on the scope of a reparation mechanism, the needs of a reparation policy and the methods of implementation.

Irrespective of whether the emphasis is on prosecution or truth-telling, reparation for victims should be an equally important component of a transitional justice policy as it has a direct impact on victims. It would also be wrong to argue that reparation is something that is available only in rich countries and cannot be afforded by poor countries, given the limitations of resources. In the end, it is a matter of priorities and of how the resources available are distributed. Where a transparent and inclusive reparation programme is designed, funding from the international community can become available, such as in Sierra Leone and Morocco. For reparation to be meaningful in transitional justice processes, it is increasingly being recognized that they need to be transformative; for instance, they need to be gender-sensitive as well as culturally sensitive.

Last, but not least, no single form of reparation will suffice, and a combination of reparation measures will usually be required to complement prosecutions and/or truth commissions and to address the often wide-ranging consequences of extensive human rights violations.

The Zimbabwean Experience of Transitional Justice

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In Zimbabwe, one of the more enduring consequences of the organized violence and torture of the 1970s and 1980s is the number of people who have been left handicapped by the experience and exposure to violence. Remarkably, against the general trend from most centres of conflict, the effects in Zimbabwe have been relatively well researched, and not only from a medical standpoint. Medical evidence – or, more properly, forensic evidence – is particularly important, especially as it has increasing significance in criminal tribunals and can provide the only hard evidence where eyewitness testimony may not be available.

Scientific evidence is thus important in the understanding of organized violence, and, here, evidence of extra-judicial executions and torture provide some of the ‘hardest’ facts that can determine whether gross human rights violations have taken place. Torture is a particularly useful indicator of human rights non-observance, particularly since both the physical and psychological effects of torture can now be detected many years after the original insults and injuries.

However, scientific evidence of human rights violations is not confined to so-called ‘hard’ science but can be deduced from other areas of social life. Any examination of the status of the press and media freedom in a country, for example, will also give a simple measure of human rights observance. Count the number of dead, tortured, attacked, harassed, detained and imprisoned journalists and you have a good idea of whether a country has a fair number of torture victims. In Zimbabwe at present there is evidence of continual harassment and violence perpetrated against journalists and newspapers. Many other indices of human rights non-observance correlate with human rights violations, but the frequency of torture remains an extremely ‘hard’ indicator of human rights non-observance in a country. Of course, it is the case that the whole picture is needed in order to explain the situation of human rights observance satisfactorily, but this is not

¹ This paper is based on an earlier version published as A. P. Reeler, ‘Sticks and stones, skeletons and ghosts’, in D. Harold-Barry (ed.), *Zimbabwe: The Past is the Future: Rethinking Land, State and Nation in the Context of Crisis* (Harare: Weaver Press, 2004), 225–38.

perhaps as difficult as it seems. Here, the South African experience, with all its faults, has made us all take a breath and realize that we can deal with very broad problems of accountability. Rather than accept impunity, South Africa opted for a Truth and Reconciliation Commission (TRC) to guide its transition to democracy, and then has consolidated this by enacting a broad range of laws governing human rights observance. The TRC was not a panacea, however, and many problems still remain in resolving the history of racialized capitalism that is South Africa.

In contrast to the partial accountability of the TRC, Zimbabwe is plagued by impunity rather than accountability – a world record for it, as I have commented elsewhere.² In the period from Rhodesia to Zimbabwe in 1980, and in all subsequent decades up to the immediate present, Zimbabwe has had epidemic outbreaks of organized violence and torture. These are invariably followed by planned forgetting and silence, underpinned by the weight of the law. Today Zimbabwe looks a skeleton of itself in regard to the explicit observance of the rule of law, with the courts and judges seriously compromised, the police in contempt of the courts and declaring partisan adherence to a political party, violence being routinely reported, and serious allegations being made of human rights violations.³

These are common facts now, but they are also not uncommon in Zimbabwe's past. The particular configuration of abuses and violations may differ over the decades but the cycle continues, almost on prescription: gross human rights violations during a period of organized violence (war, civil war, insurrection, etc.), immediately followed by a formal impunity, and keep repeating every ten years or so. This is the prescription for how we Zimbabweans solve our political disputes. There is an uncommon sadness that we learn so little, it seems.

Perhaps it is that Zimbabwe is ill, as many contemporary commentators have put it and as many Zimbabwean traditionalists have also suggested. Indeed, for the *masvikiro* (spirit mediums) of Zimbabwe, the country is plagued by the ghosts of the dead, unburied.⁴ Certainly the walking wounded would give this view considerable support, though few Western scientists might easily accept this connection. The walking wounded, however, give this view unqualified support and respect. Thus, Zimbabwe requires explanation in both cultural and biological

² A. P. Reeler, 'Can you have a reparations policy without justice?', *Legal Forum* (2000), 12: 202–9.

³ See the reports of the Zimbabwe Human Rights NGO Forum, available at <www.hrforumzim.org>.

⁴ See M. Mupinda 'Loss and grief among the Shona: The meaning of disappearances', *Legal Forum* (1995), 9: 41–9.

terms, and, when the story is told, it does become much easier to accept both realities. This is not the whole story, for only a truth commission or a criminal tribunal could allow the full story to be properly told.

This particular story will try to tell the story of the present government's use of violence against its citizens. Although it is mainly the story of ZANU(PF), it is also somehow the story of Rhodesia too, for we have gone back to another era in current Zimbabwe. The stories of Rhodesia and Zimbabwe cannot in reality be disentangled from each other, not least because many of the protagonists of violence are still political players. It also the case that much of the history from the initial settler occupation in the 19th century could also be viewed through a human rights lens and arguments made retrospectively about war crimes, crimes against humanity, and the like. History looks very different from the perspective of the sufferers and the losers, as Marx and others make us aware.

However, I will confine this discussion to events after 1965, for 1965 represents an important legal break with the overall past: treason is different from colonial conquest because it is a very deliberate affront to an agreed legal order, and this is what the Rhodesian Front government did in 1965. While we might argue about the moral basis of Rhodesian rule up until that point, no one would have argued that there was not a properly elected, legitimate government, albeit one that was racist and excluding of the majority of potential citizens. Equally, after the Unilateral Declaration of Independence, no one was in any doubt that the government of Rhodesia and all its acts were illegal: those that sought to remove the 'illegal' government were legitimate, armed struggle was legitimate, and the failure of the Smith government to surrender rendered its own violence was illegitimate.⁵

The story of the 1970s

If you had suffered a human rights violation during the 1970s Liberation War, what might have happened to you? This question, in essence, has been asked of many thousands of Zimbabweans over the years, and we now know a number of interesting things about the answers and the Liberation War.⁶

⁵ For the early history of political violence, see L. Sachikonye, *When a State Turns on its Citizens: Institutionalized Violence and Political Culture* (Auckland Park: Jacana, 2011).

⁶ See *Survivors of Torture and Organised Violence from the 1970s War of Liberation* (Harare: Amani Trust, 1998); See also A. P. Reeler, 'Surviving torture: A Zimbabwean experience', in D. Irmiler (ed.), *Old Ways – New Theories: Traditional and Contemporary Family Therapy: Connect in Africa* (Harare: Connect, 1995); A. P. Reeler, 'Epidemic violence and the community: A Zimbabwean case study', *Community Development Journal* (1998), 33: 128–39.

Firstly, if you were Shona, you might have spent seven years, or possibly eight, in a 'protected village' – not by choice but under compulsion – and would have lived in near refugee-camp conditions, with inadequate sanitation, a poor diet, and a high risk of being killed or maimed. By 1977, nearly 750,000 Zimbabweans were confined to such villages, which is a significant percentage of the then population of about five million.⁷ Of course, hundreds of thousands more were in refugee camps in neighbouring countries, and there you might have survived an attack on the camp. Tens of thousands died in such a way, and many of the survivors remain deeply traumatized by their experience. Such experiences alone can lead to life-long psychological disorder and disability. There is ample evidence that this is so from the survivors of Chimoio, Nyadzonja, Tembwe, and Camp Freedom: the massacres that took place in these camps have left many survivors disabled and traumatized.⁸

Secondly, you might have been tortured. This was a high risk for everyone, since political loyalty was demanded by all sides. However, it is worth pointing out that no evidence has been found to show that any white person was ever tortured at all: some were summarily executed, but torture was not a weapon used by the liberation forces against their white enemies. This is remarkable in such a bitter war.

You could be accused of disloyalty and betrayal by either side: whether rightly or wrongly, this was a very common experience for many rural Zimbabweans. If the Rhodesians got you, then the torture could range from all the more sophisticated horrors of electrical shock, mock drowning, suspension and drugs, to good old-fashioned slaps, punches, kicks and beatings with sticks. It could have been done by anyone, especially after the Smith government passed the Indemnity and Compensation Act in 1975. Since the Act gave prospective impunity, it is scarcely surprising that there were few inhibitions in using torture for obtaining information.

If you were an active supporter of the liberation army, then you ran the risk of this happening on multiple occasions. This was less likely for those who fell foul of the guerrillas than for the Rhodesian forces. Some people experienced torture at the hands of the security forces on more than six occasions.

If the guerrillas got you, it might be less sophisticated, but more likely to be

⁷ See Catholic Commission for Justice and Peace, *The Man in the Middle* (Salisbury: CCJP, 1975); Catholic Commission for Justice and Peace, *Civil War in Rhodesia* (Salisbury: CCJP, 1976).

⁸ See A. P. Reeler and M. Mupinda, 'An investigation into the psychological sequelae of torture and organised violence in Zimbabwean war veterans', *Legal Forum* (1996), 8: 12–27.

lethal. The ‘pungwes’ that brought the people together in solidarity of purpose and action were also the courts of the liberation movements. Rightly or wrongly, you might be accused of being a ‘sell-out’ and sentenced to punishment. You might be given a ‘thorough beating’, which might make you unconscious, break your bones, cause enormous pain, and possibly leave you handicapped for life: there were no easily available medical facilities for anyone during the latter years of the war. You might also have seen someone executed, sometimes by beating but also by cutting, burning, hanging and even stoning. These public executions have left many with the most horrible memories of the Liberation War.

In fact, torture was such a common event that, nearly two decades later, you could see the victims with relative ease in every rural clinic and outpatient department in Zimbabwe. Epidemiological studies have shown that about one in ten adults over thirty years of age in a Mashonaland clinic had been tortured or experienced organized violence.⁹ They generally had chronic depression or other such disorders, often had accompanying physical disability – bad back pains were frequent – and were poorer than their neighbours, with a range of accompanying other socio-economic handicaps.¹⁰ It didn’t really make much difference who got you: the prognosis for you was not wonderful, and the past decades have probably not been wonderful either.

You might now be a bit philosophical about your life, and even proud that you contributed to the freedom struggle. You will not be philosophical about your ‘undead’ relatives and friends: all those buried in mass graves in foreign countries – but also all those that ‘disappeared’. Families remain deeply traumatized by these disappeared relatives, and many are dealing with the ghosts that haunt their families and cause continued problems and illnesses. Certainly, you know about the heroism of all your ordinary relatives, friends and neighbours. Many survivors are accepting and empowered in themselves but nonetheless handicapped in some way. For many current survivors, the economic liberalization programme of the Zimbabwe government and the later economic collapse brought exceptional challenges to their coping. At this point, it is pertinent to note that you might have just had your second experience with organized violence and torture.

⁹ A. P. Reeler, P. Mbape, J. Matshona, J. Mhetura and E. Hlatywayo, ‘The prevalence and nature of disorders due to torture in Mashonaland Central province, Zimbabwe’, *Torture* (1998), 11, 4–9.

¹⁰ See A. P. Reeler and J. Mhetura, ‘The psychosocial effects of organised violence and torture: A pilot study comparing survivors and their neighbours in Zimbabwe’, *Journal of Social Development in Africa* (2000), 15: 137–69.

Although the history of the Liberation War has been written about copiously, and there has been a largely unsuccessful attempt through the War Victims Compensation Act [*Chapter 11:16*] to offer redress to the victims, the human rights history remains largely unexplored. The human rights violations committed by the Rhodesian forces are known, but not so those of the liberation forces. Furthermore, the attempt to compensate the thousands of victims has been derailed completely by the scandal involving the fraudulent disbursement of the funds. Impunity, too, has left its mark on the social and political processes of Zimbabwe.

Thus, it is clear that ZANU(PF) can take enormous credit for the liberation of Zimbabwe from a traitorous and brutal regime, but, unlike the ANC, it has never admitted its own violations, except in passing. There still remain issues to be explained: the Nhari rebellion, the assassination of Herbert Chitepo, and the whole dissolution of ZIPRA remain shrouded in mystery – and, of course, the various impunities render this history even more opaque.

The story of the 1980s

What happened to you in 1980s? This is also a question that has been asked. Not much for a very long time, but the story has now been told in earnest.¹¹

You would pretty well have to speak Ndebele if you had had a bad experience in the 1980s, during the so-called Gukurahundi. The violence and torture were confined largely to the southern half of Zimbabwe, and seemed to be specifically targeted at Ndebele-speaking people, who were assumed to be supporting the ‘dissidents’. The methods used to punish the recalcitrant during the Liberation War returned in a new and devastating form: pungwes, ‘thorough beatings’ and torture, and public executions – all were used, predominantly by the Fifth Brigade, a special force reporting to the President and ZANU(PF). The difference from the Liberation War was that no one was spared the terror. Whether you were a member of PF-ZAPU, a former member of ZIPRA, or merely an ordinary resident of Matabeleland North or South, you could be a victim. This was not a

¹¹ See Catholic Commission for Justice and Peace in Zimbabwe and Legal Resources Foundation, *Breaking the Silence, Building True Peace: Report on the Disturbances in Matabeleland and the Midlands, 1980 to 1989* (Harare: CCJPZ and LRF, 1997); Zimbabwe Human Rights Association, *Choosing the Path to Peace and Development: Coming to Terms with Human Rights Violations of the 1982–1987 Conflict in Matabeleland and Midlands Provinces* (Harare: ZimRights, 1999). A summary of *Breaking the Silence* is available at: <http://www.kubatana.net/docs/hr/ccjp_lrf_breaking_silence_9904.pdf>. Accessed 29 Jan. 2013.

war for the hearts and minds of the people, but a massive terror campaign aimed at destroying the will of a whole community.

As an ordinary person, you might have suffered torture, frequently in public, in front of your relatives and friends. You might have been forced to attend a pungwe, where you would have been forced to sing ZANU(PF) songs and listen to speeches denigrating your tribe and its leaders. You might have witnessed the cruel torture of your friends and relatives, and quite possibly the execution of some of them. Some of these horrible occurrences are clearly detailed in the CCJP/LRF report, *Breaking the Silence*. You would have been subjected to a curfew and have faced near starvation as food supplies were interfered with – and this during some of the most devastating droughts that the country had ever seen. You might even have been told that you would be starved deliberately. You would have been forced to live with the immediate memory of the cruel deaths faced by your friends and relatives, after which they were thrown into shallow graves, and be denied the opportunity of giving them a decent burial or being allowed decent grieving. You were told not to touch the dead on pain of further torture and similar treatment.

Indeed, your loved ones might still reside within those graves today – if you knew where they had been buried. Your loved ones might, in fact, have disappeared altogether, taken away and undoubtedly killed. This has been a particularly bitter legacy of the Gukurahundi, as has been attested by recent research.¹² The process of exhumation and reburial will take some years, and this alone is proof of the violence of the 1980 period in Matabeleland.

If you had been either a former soldier or were a member of PF-ZAPU, your fate could have been equally severe. Imprisonment and torture were a very likely fate. In one of the notorious detention centres, such as Bhalagwe or Stops Camp, the Central Intelligence Organization (CIO) might have viciously tortured you. You would have known others receiving similar treatment, many of whom would not survive and would never be seen again, their bodies disposed of in nearby mine shafts.

The scale and intensity were truly enormous. Few people in Matabeleland North and South escaped without some exposure, and the effects can be still seen quite clearly today. Epidemiological studies show us the scale: nearly five adults in ten attending rural clinics or hospital outpatients were victims of the

¹² *A Report on the Exhumation and Reburial Exercise Overseen by the Amani Trust in Gwanda District, 25 July to 3 September 1999* (Bulawayo: Amani Trust, 1999).

organized violence and torture of the past decades, and over ninety per cent of these derived their trauma from the 1980s.¹³ All the available evidence indicates that this epidemic of organized violence and torture can be blamed on the Fifth Brigade, the CIO and ZANU(PF) Youth. These were all organizations that reported to ZANU(PF) or the President; this is common cause and there are ample reports of the President, the government and the commanders of the Fifth Brigade confirming the chain of command.

There has been no credible attempt to provide redress for the victims and no attempt to investigate the allegations of government-sponsored organized violence and torture. The government's own reports have been suppressed, and it is only due to the efforts of civil society organizations – such as the Legal Resources Foundation, the Catholic Commission for Justice and Peace in Zimbabwe, ZimRights and the Amani Trust – that any of the history is publicly known. Even in 2001, the government was reluctant for local newspapers to serialize the *Breaking the Silence* report.

It is clear from the information available about this period that considerable claims can be made that the organized violence and torture differed significantly from their use in the Liberation War. Although the methods may be very similar, the aims and purposes were not. The torture and executions of the Liberation War occurred within the context of a very bitter war, with the loyalty of 'the man in middle' a crucial factor in its success. Although the human rights violations can never be condoned, they are at a least understandable: the guerrillas needed the unquestioning support and loyalty of the rural population in order to survive, while the security forces could not manage without the information that the rural people could give. The Gukurahundi period allows no such conclusion.

The ZANU(PF) government, beleaguered as it might have been by the regional context, faced a weak dissident threat, and even that dissident threat it was to some extent guilty of creating through its own paranoia and partial treatment of ZIPRA and PF-ZAPU. Its response was massively inappropriate, to say the least. As the record shows, the formal military machine – the regular army, the Support Unit of the police and the police – were rarely implicated in gross human rights violations.¹⁴ The forces that reported directly to the party and were

¹³ *Survivors of Organised Violence in Matabeleland: Facilitating an Agenda for Development* (Bulawayo: Amani Trust, Report of the Workshop, 1998).

¹⁴ See, again, CJPZ and LRF, *Breaking the Silence*. For a more detailed exposition, see also J. Alexander, J. McGregor and T. Ranger, *Violence and Memory: One Hundred Years in the 'Dark Forests of Matabeleland'* (Harare: Weaver Press; London: James Currey, 2000).

outside military or police control – the Fifth Brigade, the CIO and ZANU(PF) Youth – were the major perpetrators, the Fifth Brigade being the overwhelming culprit. This speaks right to the crux of the problem: that ZANU(PF) remained a liberation movement at heart and had not made the transformation to a civilian, democratic party. This becomes a factor in understanding the problems of the new millennium.

The story of the 1990s

The story of the 1990s is somewhat different from that of the previous two decades. There were relatively few victims of politically inspired organized violence and torture during most of the decade. Moreover, civil society had an increasing ability to monitor and document the misbehaviour of the state, and this was described in a number of reports.¹⁵

As a victim, you would be most likely to have suffered at the hands of the police as a suspect in a criminal investigation, although you might have run foul of political party supporters during the general election in 1995. There was at least one celebrated assassination attempt, on Patrick Kombayi, which followed the usual pattern: found guilty of attempted murder, Kombayi's assailants were immediately pardoned by the President, Robert Mugabe. However, the number of victims reported in the 1990s were relatively few, as seen in the reports of Zimbabwean human rights organizations such as the CCJPZ and ZimRights, as well as in the reports of international bodies such as Amnesty International. As a citizen, you could be forgiven for believing that the nation was making the all-important transition from a liberation-war ideology to modern democratic principles. You would have changed your mind by the end of the decade.

However, if you were a student, you would have few illusions about the police and especially the riot police. At demonstration after demonstration, you would have witnessed unrestrained violence, with beatings, tear gas, dogs and the lot being unleashed upon the university campus. On every occasion that the riot police met the students, it was clear that the principle of 'minimum force' had a different meaning for the Zimbabwe Republic Police riot squad from that conventionally accepted. That the student body increasingly rejected ZANU(PF) may have had

¹⁵ See *A Consolidated Report on the Food Riots, 19–23 January 1998*, comp. Amani Trust on behalf of the Zimbabwe Human Rights NGO Forum (Harare: The Forum, [1999]), available at <http://hrforumzim.org/wp-content/uploads/1998/01/consolidatedreportonfood.pdf>, accessed 8 Apr. 2013; see also Zimbabwe Human Rights NGO Forum, *Organised Violence and Torture in Zimbabwe in 2000* (Harare: The Forum 2000).

something to do with this, but the violence meted out to the students probably also did little to help them view the government with any warmth.

The most celebrated incidents involving organized violence and torture came with the treatment meted out to mostly the inhabitants of Harare during the Food Riots in 1998, and the notorious abduction and torture of *The Standard* journalists, Mark Chavunduka and Ray Choto, in 1999.¹⁶ The case of the latter has attracted enormous publicity and exemplified the classical view we all have of torture. Taken by a security agency – it is still not known clearly whether this was the army or the CIO – the two journalists were subjected to beatings, mock drowning, electrical shock, falanga, abnormal postures, and a variety of threats and intimidation. In short, this was what we all understand by torture. To date, there have been no arrests and not even a credible investigation of this state-sponsored crime.

For the victims of the Food Riots, if you were so unlucky as to have been one, you might have been apprehended by the police or the army, or both, on the street, beaten and threatened, and even then taken into custody as a ‘suspected looter’. You might have been tortured in your own home by the police or the army, together with members of your family and in front of your children. If you could not adequately account for the possessions in your home, you might have been taken into custody as another ‘suspected looter’. You might even have witnessed people being shot or tear-gassed, with vicious beatings taking place all around you, and have been lucky enough to escape completely.

In custody, the police might well have tortured you again in an effort to get you to confess to your crime of looting. You would have been kept in crowded and insanitary conditions with many other victims, and been acutely aware of their ill-treatment or torture. You would have been denied bail for several weeks, and then quite probably released for a lack of evidence or a properly formulated charge.

In their treatment of the so-called rioters, the security forces – both the police and the army – frequently referred to people as ‘enemies of the state’, reserving special viciousness for students. The compact between the state and its citizens was breaking down again by the end of the decade. There was full conflict between the President and the judiciary and the independent press.¹⁷

¹⁶ See Zimbabwe Human Rights NGO Forum, *Organised Violence and Torture in Zimbabwe in 1999* (Harare: The Forum, 1999).

¹⁷ See, again, Zimbabwe Human Rights NGO Forum, *Organised Violence and Torture in Zimbabwe in 2000*.

Demands for constitutional reform were in full spate, as were demands for a new relationship between the various players in the economic field. With the launch of the Movement for Democratic Change (MDC), the scene seemed set for trouble in the new millennium, but few could have predicted the intensity and the scale.

The story today

Over the past twelve years, since the result of the Constitutional Referendum in February 2000, there has once again been an epidemic of organized violence and torture in Zimbabwe. This has been documented like no period before, and an enormous number of reports are available.¹⁸ More importantly, the reports emanating from Zimbabwean organizations have been corroborated by the reports of international organizations.¹⁹

In addition, there have been regular reports on the political violence that has affected the country, as well as accurate reporting on the election petitions being heard before the High Court of Zimbabwe.²⁰ Thus, it is possible to provide a very clear analysis of both the violence and who is responsible for this violence.

If you are a victim of the current organized violence and torture, you are almost certainly believed to be a member of the Movement for Democratic Change, but in reality you could either be a member of the MDC, the National Constitutional Assembly, a civil servant, a member of a civic organization, or even just an ordinary citizen. The point here is that the violence is targeted at any person or group that is believed not be an active supporter of ZANU(PF). The notion of 'sell-out' has had a new and extremely broad extension, and no one is safe unless they declare active allegiance to ZANU(PF).

¹⁸ See fn. 3, above.

¹⁹ *Zimbabwe: Terror Tactics in the Run-up to the Parliamentary Elections, June 2000* (London: Amnesty International, 2000); *Zimbabwe: The Toll of Impunity* (London: Amnesty International, 2002); *Organised Violence and Torture in Zimbabwe* (Harare and Copenhagen: International Rehabilitation Council for Torture Victims, 2000); *Zimbabwe: Post Presidential Election – March to May 2002: 'We'll Make Them Run'* (Risskov, Denmark: Physicians for Human Rights, 2002); *Subliminal Terror? Human Rights Violations and Torture in Zimbabwe during 2008* (Johannesburg: Centre for the Study of Violence and Reconciliation, 2009).

²⁰ See *Organised Violence and Torture in the June 2000 General Election in Zimbabwe* (Harare: Amani Trust, 2002); *Neither Free nor Fair: High Court Decisions on the Petitions on the June 2000 General Election* (Harare: Amani Trust, 2002); *Organised Violence and Torture in the By-Elections Held in Zimbabwe during 2000 and 2001* (Harare: Amani Trust, 2002); *Heroism in the Dock: Does Testifying Help Victims of Organised Violence and Torture? A Pilot Study from Zimbabwe* (Harare: Amani Trust, 2002).

Overweening attention has been paid to commercial farmers and farm-workers because of the so-called 'land policy' of the ZANU(PF) government. However, the evidence does not support the view that violence has been produced either by clashes over land or was the product of clashes between ZANU(PF) and MDC supporters. Overwhelmingly, the evidence indicates a systematic campaign, close to the level of a low-intensity war, of violence perpetrated by government agencies and supporters against all and any of these groups.²¹ The evidence also shows that government agencies and supporters are disproportionately indicated to be the perpetrators.²²

Deaths in the form of extra-judicial killings or summary executions were not as common as in former periods of organized violence and torture. By August 2001, a total of 112 deaths can be confirmed, but it is also clear that this is an underestimate. If your family member had been killed, you would be very unlikely to have seen any arrest in connection with the murder, even though you probably knew who the perpetrator was.

If you were a victim of torture, and this is the vast majority of the victims, there are a number of things that might have happened to you. You might have been attacked in your own home by a group, sometimes a mob, of ZANU(PF) supporters. You might have been 'thoroughly beaten' in front of your family, and other members of your family may have suffered the same fate. You might have been only 'mildly tortured' but received frightening intimidation and threats. You might have just received threats and intimidation and had your home vandalized and damaged; sometimes your home might have been severely damaged to the point of near total destruction. Your food stores might have been destroyed or stolen. You might have been a civil servant – a teacher or an administrator – and had a mob descend upon your place of work, threatening you and demanding

²¹ *National Youth Service Training – 'Shaping Youths in a Truly Zimbabwean Manner': An Overview of Youth Militia Training and Activities in Zimbabwe, October 2000 – August 2003* (Harare and Johannesburg: Solidarity Peace Trust, 2003).

²² *Who is responsible? A preliminary Analysis of Pre-election Violence in Zimbabwe* (Harare: Zimbabwe Human Rights NGO Forum, 2000); *Are They Accountable?: Examining alleged violators and their violations pre and post the Presidential Election March 2002* (Harare: Zimbabwe Human Rights NGO Forum, 2002); *An Analysis of the Zimbabwe Human Rights NGO Forum Legal Cases, 1998–2006* (Harare: Zimbabwe Human Rights NGO Forum, 2006).

your dismissal.²³ And if you were a woman, you would not have been immune either, as many reports detail.²⁴

In all of these events, you might have decided that discretion was the better part of valour and gone into hiding or left your job. Nearly 9,000 people did this during the pre-election period in 2000. It became an increasing problem again in 2001, 2002, 2003, and an increasing number of people and their families were forced into hiding, abandoning their homes and jobs. This is another form of psychological torture: being forced into hiding by threats is regarded by the UN Compensation Commission as a gross human rights violation requiring compensation.

All of this has been condoned, or at least not condemned, by the leaders of ZANU(PF). They are continuously on the record to the contrary: hate speech, racist remarks, encouragement to violence, threats – all have been recorded from the President downwards.²⁵ We even have senior members of the defence forces threatening treason if ZANU(PF) loses. These comments and statements speak volumes as to the mind-set of ZANU(PF) and to the unreconstructed liberation-war ideology that underpins the party. It also indicates that there is, at the least, tacit condoning of the violence, but it is more likely that the violence is approved of and facilitated by the state. It is hard to conclude otherwise when even the President refers to the opposition in Parliament as ‘enemies’ rather than a loyal opposition, or condones the torture of members of the opposition as he did following the Peace Prayer meeting in 2007.

The scale of the current violence is difficult to estimate but clearly approaches that of the 1980s, at least in the scale of the torture but not of the deaths. As indicated above, extra-judicial killings, disappearances, torture, and mass

²³ *Teaching Them a Lesson: A Report on the Attack on Zimbabwean Teachers* (Harare: Zimbabwe Human Rights NGO Forum, 2002); *Political Violence and Intimidation of Zimbabwean Teachers, May 2012*: (Harare: Progressive Teachers Union of Zimbabwe, Report prepared by the Research and Advocacy Unit, 2012).

²⁴ *Preying on the ‘Weaker’ Sex: Political Violence against Women in Zimbabwe* (Harare: Research and Advocacy Unit, Report produced by Idasa, the ICTJ and RAU, 2010); *‘When the Going Gets Tough, the Man Gets Going!’ Zimbabwean Women’s Views on Politics, Governance, Political Violence, and Transitional Justice* (Harare: Research and Advocacy Unit, Report produced by RAU, Idasa and the ICTJ, 2010); *No Hiding Place: Politically Motivated Rape of Women in Zimbabwe* (Harare: Research and Advocacy Unit, Report prepared by RAU and the ZADHR, 2010).

²⁵ *Their Words Condemn Them: The Language of Violence, Intolerance and Despotism in Zimbabwe* (Harare: Zimbabwe Human Rights NGO Forum, 2007).

psychological torture have all been recorded, with torture and mass psychological torture comprising nearly ninety per cent of the total. This is all a matter of record.

The effects of impunity

As indicated earlier, Zimbabwe has an unenviable reputation for the use of impunity in dealing with its human rights violations. This pre-dates independence in 1980, and thus ZANU(PF) cannot be seen as the only miscreant in this respect, but ZANU(PF) has turned the use of organized violence and torture followed by impunity into an art form. This has disastrous effects upon the society, for, apart from the terrible consequences for the victims of knowing that their assailants will always walk free, the perpetrators learn that extreme violence is never punished. This can only act as encouragement to use violence. Indeed, many victims of the current violence have been informed quite baldly by their torturers that this would be the case, and the perpetrators were vindicated in their terrible prophecy by the imposition of the Clemency Order in October 2000. Indeed, the names of some of those who were pardoned by the Clemency Order now reappear as the names of people implicated in further torture in subsequent elections and by-elections.

It is clear that impunity has had some minor beneficial consequences. It was the case in both 1980 and 1987 that violence ceased. In 1980, the use of impunity seemed to be the basis for peace, but it is also probable that the ending of the war was itself strong enough motivation for peace. Undoubtedly there was a need to reassure the soldiers from both sides that the peace would exclude personal accountability. With hindsight, it may be that the decision to declare impunity in 1980 was hasty, and prevented Zimbabweans from learning the real benefits of accountability.

This may be so because it is evident that the impunity and the policy of reconciliation did not prevent the violence of the Gukurahundi, nor has it prevented the re-emergence of hate, racism and violence currently. It also seems to be the case that having impunity as a precedent encourages its further use, and perhaps even encourages the use of violence as a political problem-solving device. It even seems in the current violence that ZANU(PF) uses impunity as the final part of its 'campaign' strategy: there are statements on record of victims of the ZANU(PF) militia who were told that there would be no accounting for the violence, just as there was during the 1980s.

The state and organized violence

As will be seen from this very brief exposition, Zimbabwe (and Rhodesia before it) has a long history of using violence. If we examine that history, briefly sketched above, we see that torture and summary executions were used to protect the guerrillas from informers or to ensure compliance from the rural population. This occurred in a war in which there could be no neutral position, and ‘the man in the middle’ was an important strategic resource for all sides to the conflict. Terrible things are always done in war and justified by the war, even though morality and international humanitarian law may disagree. So, immoral things were done in pursuit of a moral aim, the overthrow of a treasonous and racist regime, and the ending of a very bitter war: perhaps 60,000 dead, over 100,000 physically injured, tens of thousands tortured, and hundreds of thousands displaced – in just a decade! This, indeed, may have justified the amnesty in 1980 and allowed peace to come to Zimbabwe.

Thereafter, this is not such an easy position to maintain. In the 1980s, the return to the methods of the 1970s, seen so graphically in the gross human rights committed by the Fifth Brigade, the CIO and ZANU(PF) Youth, cannot be simply explained as the use of immoral means to pursue a moral goal. The mass terrorizing of the southern half of Zimbabwe was out of all proportion to the threat, and put the government very much in the same position as the Smith regime, albeit with a constitutional mandate rather than a treasonous one. Old methods of ensuring compliance were dusted off the shelf and given a terrible new purpose: not to ensure the survival of a guerrilla army but to ensure the political supremacy of ZANU(PF). Immoral means were used for an immoral goal. This is not to suggest that there was not a crisis, nor that there was no dissident problem, but all available evidence shows, especially in respect of the latter, that the dissident problem was being contained successfully by conventional military means. It is noteworthy that most casualties inflicted upon the dissidents came from the regular army and the Support Unit of the police. In contradistinction, the other ‘political’ forces were responsible for the human rights violations. So we see that the lessons learned about enforcing compliance in the 1970s were quickly used again in the 1980s.

The same lessons were applied in an abbreviated fashion during the Food Riots in 1998, on a massive scale during 2000, 2002 and 2008, and still continue in 2012. However, the new twist between 2000 and 2012 is the predominant use of torture and the minimizing of summary executions. The world has frequently failed to understand this, and comments about the small number of deaths

during election periods have been common. However, there is probably a terrible learning that has happened over the decades, and this is that summary executions are not necessary to maintain compliance: this can be done by torture alone. This seems very evident in the strategic aim of the violence over 2000–12.

I have not dealt with *Operation Murambatsvina*,²⁶ or the massive displacements of commercial farm workers,²⁷ and it is clear that there is whole chapter to be written on the use of displacements and the political manipulation of food. These, too, may be systematic and widespread enough to conform to the notion of a crime against humanity, but the paper did not allow for this.

So we are left with the legacy of several decades of organized violence and torture as we move towards a new democratic dispensation in Zimbabwe. We hope that we will learn the lessons this time around, perhaps assisted by the knowledge that South Africa and others have done so in new developments in the field of human rights accounting. However, whatever the process of accounting is in the future, it seems critical to future generations that we document our history accurately and honestly, for if we reduce the range of permissible lies, then maybe, just maybe, this will prevent recurrences of the violence. History will not be a panacea in itself, but, as each generation moves further and further away from the epoch of violence, so they become less empathic to the events that afflicted previous generations: it is a serious finding that young people today think that life was better under Ian Smith, or that transitional justice should not concern itself with periods before 1980. Forgetting or ignoring can become a form of impunity, too.

²⁶ *The Aftermath of a Disastrous Venture: A Follow-up Report on 'Operation Murambatsvina'* (Harare: Zimbabwe Human Rights NGO Forum, 2005); *'Crime of Poverty': Murambatsvina Part II, incorporating 'Hide and Seek': An Account of Finding the Forcibly Displaced in Rural Matabeleland, July–September 2005* (Harare and Johannesburg: Solidarity Peace Trust, 2005).

²⁷ *Adding Insult to Injury: A Preliminary Report on Human Rights Violations on Commercial Farms, 2000 to 2005* (Harare: Zimbabwe Human Rights NGO Forum, Report by the Forum and JAG, 2007); *Reckless Tragedy: Irreversible? A Survey of Human Rights Violations and Losses Suffered by Commercial Farmers and Farm Workers from 2000 to 2008* (Harare: Justice for Agriculture Trust, Report prepared by RAU, 2008).

Part 3

Case Studies of Transitional Justice Experience and Applicability to the Zimbabwean Situation

RWANDA

Government and Dealing with the Past

Freddy Mutanguha
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ABSTRACT

The 1994 Genocide in Rwanda claimed the lives of over a million people. In trying to deal with the trauma caused by the Genocide, the Rwandan government, assisted by the international community, carried out a series of measures.

At the international level, the UN Security Council established the International Criminal Tribunal for Rwanda (ICTR), created by Security Council resolution S/RES/955 of 1994. The ICTR has, over the past eighteen years of its operations, indicted ninety-three people for genocide, crimes against humanity and war crimes.¹

At the national level, the National Consultation Forum opted for home-grown solutions, comprising community festivals, traditional schools, community mediators, the Gacaca court, community and national dialogues. In addition, Rwanda is working towards unity through diverse activities including memorialization.

I am very pleased to be part of this important conference and have this opportunity to share with you Rwandan experience of how we managed to deal with our past, even if the journey is still long.

Background and description of the conflict

In Rwanda, as in many other places in the world, conflict has root causes and dynamics particular to it, which in turn determine the subsequent post-conflict character of the state, shape its reconstruction and the relevant peace-building strategy. Conflicts also have different effects in terms of the magnitude of destruction, but they all lead to a state of moral, social, economic and political degeneration. In extreme cases, conflict leads to a situation of a totally failed state.

This was the glaring state of affairs in Rwanda after the 1994 Genocide. The country had been totally destroyed to a level where some people believed that Rwanda would never be a nation again.

From the 1950s up to 1994, Rwanda came into international focus for a host

¹ See the ICTR Website at <<http://www.unict.org>>.

of reasons, including ongoing conflict, a record of severe human rights abuses, and the action of successive governments that seriously violated the rights of citizens with impunity. Dating back to the colonial period, and throughout the period of conflict, governments entrenched a deep set of divisions within Rwandan society, particularly along ethnic lines. These divisions were further enforced through the enactment and implementation of dehumanizing laws and policies, inequality in treatment, and differential access to basic services.

All these resulted in the Genocide that claimed the lives of over a million Tutsis, who in turn left behind more than 300,000 orphans, without any one to take care of them, and 500,000 widows. Sixty-seven per cent of the women were raped and infected with HIV. There were thousands of handicapped survivors, terrified and vulnerable, clamouring for justice and security, and a highly polarized, suspicious and traumatized population, characterized by distrust and fear and lack of shared national unity. The economy had collapsed, with sixty-five per cent inflation. Moreover, the judicial system and other state management mechanisms had been completely destroyed.

Transitional justice measures

This was a challenging time that my country had never been through before; nobody knew where to start or how to proceed. There was total chaos that needed strong people and committed leaders who were able to disregard their own feelings, their own emotions and their own interests and rescue the country from the ashes of the Genocide; leaders who were ready to take the painful and challenging journey of national healing, unity and reconciliation as a prerequisite for lasting peace, security, good governance and development.

In this regard, government established a national consultative forum to help the leadership to harmonize their understanding of the difficult legacy of unpleasant history and at the same time search for a common vision for the future. The forum was given a number of topics to think about, including national unity, democracy, justice, the national economy and security.

Many traditional and imported modern options on how to deal with our past were suggested, but the imported solutions could not work in the Rwandan context. Rwandans decided to go with home-grown solutions, delivered from our socio-cultural fabric to replace imported divisive practices. I would like to share with you today some of the successful home-grown solutions, and hopefully some people can learn from them.

Gacaca Court: A people (village)-based jurisdiction, but largely premised

on restorative justice with a strong component of reconciliation. It has become common wisdom that the word Gacaca means ‘justice on the grass’. In fact the name Gacaca originates from the word *umucaca*, a Kinyarwanda word that refers to a plant that is so soft that people prefer to sit on it when they meet. These gatherings were meant to restore order and harmony for the purpose of establishing the truth about what happened and determining the punishment of perpetrators.

Why is Gacaca preferable to the classical modern judicial system? Right after the Genocide we had around 120,000 prisoners who were suspected of participating in it. If we followed the modern judicial system, with lawyers and legal processes, it would take 300 years to finish the last case. Who would still be alive?

The choice of using Gacaca to deal with Genocide crimes speeded up the process, and between 2002 and 2012 two million people were tried and found guilty. You can ask me how 120,000 became two million. This is very interesting because it is about the truth. Perpetrators were encouraged to confess, and the truth was a condition for forgiveness. By telling the truth prisoners denounced other people that they worked together with; that is how the number went as high two million.

Gacaca tried two million cases in ten years, while the International Criminal Tribunal for Rwanda (ICTR) established by the United Nations tried less than one hundred cases in fifteen years. Gacaca used only 2.5 per cent of the budget of the ICTR.

Ingando (solidarity camps): A civic education activity that has facilitated the smooth reintegration of former returnees, the then Rwanda armed forces, and provisionally released prisoners back to their communities. Target groups included women, youth groups, students joining university and local leaders.

Umuganda (community work): Traditional community support to both individuals and the national cause has been revived in the interest of national reconstruction. This support comes in form of general cleaning, tree-planting, road works, building houses for vulnerable groups, and the construction of schools, health centres, etc. In all this work the government recognizes the involvement of civil society.

Ubusabane: Community festivals aimed at enhancing unity and promoting partnerships among communities.

Itorero Ry’igihugu: This was formerly a traditional Rwandan school to

instil moral values of integrity and the capacity to deal with one's problems. It has been revived to promote the values of unity, truth and a culture of hard work, all aimed at speeding up the attainment of Vision 2020 and the Millennium Development Goals.

Abunzi (mediators): Community reconcilers who resolve day-to-day conflicts before referring them to courts.

Community and National Dialogue: This has also played a significant role in promoting unity and reconciliation within Rwandan society.

Apart from Gacaca, which became an institution itself, all the home-grown activities were co-ordinated by the National Commission for Unity and Reconciliation, which was established in 1999, just four years after the Genocide. The Commission started by defining unity in the Rwandan context. For the Commission, national unity for Rwandans was not an option but essential. This must happen alongside memory, truth, justice, confession and forgiveness.

In dealing with all these, the government recognizes the contribution of national and international civil societies. The work done by human rights, women and survivors' organizations contributed to shape what Rwanda is today. International organizations were welcomed to support social cohesion among Rwandans, mainly by sharing other countries' experiences and approaches. One of them is Aegis Trust, a British NGO that works in genocide-prevention and crimes against humanity. It uses a unique peace-building model of learning from the past, and inspires individuals to take responsibility and participate in shaping the future of their nation, free from discrimination, prejudice and genocide.

Because of its experience in teaching about the Holocaust, the Aegis Trust was invited by Rwandans and supported by government in establishing the Kigali Genocide Memorial, which is the biggest memorial in Africa in the context of genocide. The Memorial is used not only by survivors to grieve and remember their beloved ones but also as a signpost to say that this has happened. So people should be committed to 'never again'. From my experience, literacy and numeracy do not guarantee peace. On the contrary, the organizers of genocide or crimes against humanity – wherever it happens, here in Rwanda, in Zimbabwe, in Europe in the 1930s and 1940s – were among the best educated in their communities. Aegis Trust peace-building education targets all levels in the community, including the army, police, community leaders, government officials, young people, and so on.

In this context, peace education must help to discuss the way that people view

others and the way we speak about them, the kind of language we use. Is it the language of animosity and suspicion and fear and hatred? Or is it the language of accepting and valuing our neighbours?

Lessons learned and challenges

What was positive regarding the transitional justice process in Rwanda?

- The Rwanda experience had traditional means of addressing a legacy of violence.
- The use of local systems of conflict resolution (Gacaca) and crime prevention.
- Use of community means of social integration.
- A healthy mix of the traditional and modern mechanisms of transitional justice.
- The traditional mechanisms were inclusive of both victims and perpetrators, this promoting a certain degree of integration.
- Traditional mechanisms were fast and cost-effective compared to the ICTR.

What was challenging regarding the transitional justice process in Rwanda?

- The Gacaca was at times complex because of the interchanging victim/perpetrator/witness roles.
- The process was open to abuse by people trying to settle other scores.
- Integration was not always successful, as some victims could not tolerate the proximity of their perpetrators.
- Judges in the Gacaca were not fully equipped with the necessary skills for genocide cases; training was available but inadequate.
- There was inadequate documentation at the Gacaca courts.
- There were no security measures put in place to protect victims and witnesses.
- There was no psychosocial support programmes for victims, perpetrators and witnesses.
- Limited access to healthcare services for victims.

Is the strategy of Rwanda to address transitional justice issues applicable to Zimbabwe?

- Applicability of the Gacaca courts system to deal with gross human rights violations that have taken place in Zimbabwe might be difficult because of different traditions that exist in the country. The Zimbabwe legal system

also recognizes the role of traditional systems of handling matters under the customary courts provided by the Customary Law and Local Courts Act [*Chapter 7:05*]. However, the jurisdiction of traditional leaders (village heads, headmen and chiefs) is limited to petty issues and cannot try cases of political violence.

- Identifying and tracing perpetrators within the community will pose a big challenge in Zimbabwe because most of them came from other communities, incited violence and returned to their own communities.
- It is highly unlikely that in Zimbabwe perpetrators will come willingly to confess their crime as has happened in Rwanda. In Zimbabwe, some of the perpetrators are in politically protected positions.
- It will be a great challenge to guarantee the security of victims and witnesses in Zimbabwe.
- The issues in Zimbabwe are complex (Gukurahundi, Murambatsvina, pre- and post-election violence) so it is impossible to apply only the traditional transitional justice mechanisms.

UGANDA

Whose Justice and Whose Frameworks? Traditional Justice Mechanisms as a Way of Dealing with Past Legacies of Violence in Uganda

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ABSTRACT

The people of Uganda have been subject to violence from perpetrators belonging to both the Ugandan government and revolutionary forces. A history of multiple conflicts and failed peace agreements has left a multiplicity of legacies that are far from uniform and even differ within the sub-regions.

This has led to a complicated and multidimensional set of mutual resentments, all of which need to be addressed to achieve reconciliation. This cannot be solved by formal justice structures alone. In order to tackle this complicated situation, the Government of Uganda worked towards a comprehensive transitional justice policy. Next to formal justice, traditional justice mechanisms – especially in rural areas – are seen to be a crucial complementary element of this policy. The basic principles of traditional justice mechanisms are material compensation, reconciliation and forgiveness, truth-telling and responsibility, cleansing and welcoming, and punishment. The goal is to engage the individual and the community together into a conscious process, through which the parties come to terms with, emotionally respond to, and actively remember and discuss the events of the past.

Is nation-building a Western game or an African illusion?

Africans today are heavily occupied with ethnic issues – or are they? *Luo v. Bantu* in Uganda; *Kikuyu v. Kalenjin*, *Luo v. Luya* in Kenya; *Shona v. Ndebele* in Zimbabwe; *Zulu v. Xhosa* in South Africa; *Tutsi v. Hutu* in Rwanda; *Yoruba v. Igbo* in Nigeria; et cetera, et cetera. The greatest unfulfilled assignments for Ugandans before and after independence are premised on how to restore the right relationships among communities, how best to achieve consensus among diverse ethnic communities and traditions, how best to achieve strategies for common consensus, how to place boundaries and limitations based on reason, how to handle overlapping consensus, and so forth.

Uganda remains a product of historical accident, where different nations and peoples have been forced to co-exist within the borders of one state, under one master, one flag, one national anthem and one currency without their consent. The country adopted a name that has no meaning to Uganda's historical legacy and heritage – deriving from the Berlin Conference and the scramble for and partition of Africa in the 1880s. Ethnic conflicts have remained embedded in the unresolved national questions. There remains no clear model for statehood. Should it take the form of the nation-state approach or the oriental model of 'civilizing the state', as the Chinese might contend? Uganda has been a country at war since independence in 1962, with northern Uganda bearing the greatest brunt and the longest period of insurgency.

My foolish perception and perspective!

What we often characterize as ethnic conflicts are actually unresolved national questions, superimposed on even more complex economic, agrarian and factory questions. As Ugandans, Kenyans, Rwandans, Burundians, Congolese, Nigerian and Sierra Leoneans, we have never decided whether we want to live together as one and, if we do, on what terms? Until we seriously address the national question with its regional, continental and international dimensions, no amount of transitional justice will deal with the sense of dissatisfaction that the imposed nation-state generates in Africa today. In doing this, we must think globally while acting locally. Our local is our traditions, values and belief systems that were uprooted during the introduction of common law in Uganda.

Uganda's transitional justice challenges and prospects

Uganda's attempts at a transitional justice process have never been conventional ones. Most transitional justice theory contemplates an examination of past wrongs going hand-in-hand with political transformation. Yet in the Ugandan context, all such prior attempts were initiated by the regimes in power and were not accompanied by wide-ranging systemic reforms in governance. Idi Amin initiated the first attempt in 1974, and then from 1987 it was through the human rights commission under the National Resistance Movement. These never provided reports with recommendations for action. In Uganda, the transitional justice process is contemplated and initiated in an extremely complex political context, without corresponding regime change and in the presence of a precedent-setting amnesty for all armed groups who renounce rebellion, including perpetrators of international crimes.

The conceptualization of the north as being the only part of the country in need of transitional justice is itself symptomatic of many Ugandans' mistaken view that the north alone has suffered the consequences of war. Uganda's transitional justice process is now at a crossroads. It has the potential either to transform the country or to plunge it back into conflict. The Juba peace talks between the government of Uganda and the Lord's Resistance Army (LRA) created a window of opportunity. The signing of a number of agreements, including an agreement entitled *Agenda Item 2 on Comprehensive Solutions to the conflict* and *Agenda Item 3 on Accountability and Reconciliation* (and its Annexure) lay down a broad framework for a transitional justice policy.¹

Ever since the International Criminal Court brought itself into the situation in northern Uganda, considerable debate has emerged regarding the effectiveness of implementing transitional justice in a country without a formal transition, for example, as regards regime change. To date, various stages in the implementation of a transitional justice mechanism are under way. The role of international and local NGOs has been crucial right from the initiation of the Juba peace process up to now, when the government of Uganda is currently undertaking the implementation of a 'Marshall Plan', referred to as the Peace, Recovery and Development Plan for Northern Uganda (PRDP) in conflict-affected northern region.²

On the other hand, local civil society groups have continued to play significant roles as far as research, engagement with government, as well development of an appropriate bill on national reconciliation are concerned. The outcome of the work of civil society groups so far is seen through the advocacy on amnesty law, the ICC bill, as well as the creation of the International War Crimes Division. While the Juba peace talks have stalled without the signing of the final Peace Agreement, there are arguments that this cannot prevent the government of Uganda from implementing the five Agenda items that were well articulated in Juba.

The government of Uganda through the Justice Law and Order Sector continues to work towards a comprehensive and holistic transitional justice policy. Uganda's transitional justice seeks to address issues of accountability

¹ The text of agreements referred to here can be found at <http://www.beyondjuba.org/BJP1/peace_agreements.php>, accessed 15 Apr. 2013.

² Uganda, *Peace, Recovery and Development Plan for Northern Uganda (PRDP), 2007-2010* (Kampala, 2007), Available at <[http://www.internal-displacement.org/8025708F004CE90B/\(httpDocuments\)/F9933A32534907A8C12573B700779C11/\\$file/PRDP+Sep+2007.pdf](http://www.internal-displacement.org/8025708F004CE90B/(httpDocuments)/F9933A32534907A8C12573B700779C11/$file/PRDP+Sep+2007.pdf)>, accessed 15 Apr. 2013.

and reconciliation through a variety of means/mechanisms that include formal criminal trials, traditional justice, truth-telling, reparations and amnesty. The policy further seeks to address cross-cutting issues such as the protection of special groups (women and children) and other vulnerable groups, as well as witness protection. The challenge in policy development is how to adopt multiple mechanisms in a mutually reinforcing and complementary fashion so that there is no conflict or overlap between their mandate, functions and overall goals. The transitional justice policy in Uganda should aim at breaking the cycle of violence and promoting sustainable peace.

Legacies of conflict in Uganda

The role that traditional justice practices could play in a transitional justice process is related to the conflict's legacies that communities feel require redress. A history of multiple conflicts and failed peace agreements has left a multiplicity of legacies that are far from uniform in Uganda and even vary between the Acholi, Lango and Teso sub-regions in the north. A common trend among these legacies is the trail of human rights violations that remain unacknowledged in any comprehensive way. At the core of these legacies lies a complicated and multidimensional set of mutual resentments, all of which need to be addressed in some way if full reconciliation is to be achieved. Efforts to address accountability, reconciliation, reparations and even the legitimacy of the current government have been sorely wanting. Uganda's current legal regime emphasizes formal justice mechanisms derived directly from the British colonial common law model. Given the complex history of Uganda and its rich and numerous cultural heritages, there is a compelling need to explore opportunities for a comprehensive legal framework that addresses and reflects the people of Uganda's sense of justice. Widespread perceptions that there is some kind of parity between the abuses committed by the government and those committed by the LRA have vital implications for any reconciliation process. Any such process will have to include the victims along with both LRA and Ugandan government perpetrators.

Policy options at play

Policy debate has emerged since peace talks between the Ugandan government and LRA began in July 2006. Agenda Item No. 3 and the Annexure propose a framework for Accountability and Reconciliation that carves out a potentially vital role for traditional justice practices. Clause 3.1 of the Agenda Item states that 'traditional justice mechanisms such as *Culo Kwor*, *Mato Oput*, *Kayo Cuk*, *Ailuc*,

and *Tonu ci Koka* and others as practised in the communities affected by the conflict shall be promoted, with necessary modifications, as a central part of the framework for accountability and reconciliation.’ The PRDP’s Strategic Objective 4, ‘Peace Building and Reconciliation’, broadly proposes a place for traditional justice practices, calling for a focus on ‘building informal leadership among men and women to engage with local authorities and civilians in the reconciliation process’ through ‘localized conflict management mechanisms’.³

The call for an appraisal of traditional justice may in part relate to the limited responsiveness of existing national and international formal justice mechanisms in addressing Uganda’s numerous legacies of conflict, and to the way in which the broader colonial legacy of Ugandan law alienates much of the country from the existing justice system.⁴ Although both Juba and the PRDP acknowledge that traditional justice practices have a role to play, the nuances of their operation and applicability remain unclear. Moreover, the ability of these mechanisms to address injustices committed in the course of decades of violence is increasingly challenged by the conflict’s own state of flux. These issues are heatedly debated in the Justice, Law and Order Society, tasked as it is with the responsibility to design a fitting transitional justice policy for the country. This policy debate is part of a broader narrative currently being charted in Uganda as the country struggles to confront a history of conflicts and moves towards national reconciliation. While the whole enterprise of traditional practices in addressing ‘modern’ injustices may go unresolved, there is evidence that tradition still enjoys a degree of local application in areas affected by conflict and that the values and principles embodied in these practices have a future role to play in national transitional justice mechanisms.

Jurisprudence of traditional justice mechanism: A new common sense over an old idea?

There is a growing trend internationally of integrating traditional justice mechanisms into the mainstream of the administration of justice in transitional justice processes. Truth-telling exercises, such as the one instituted in South Africa, cannot address the largely rural communities’ sense of restoration and

³ Uganda, *Peace, Recovery and Development Plan*, Article 4.4.1.

⁴ This and the following paragraph draws on *Conflict, Justice and Reconciliation in Teso: Obstacles and Opportunities – Briefing Note No. 1* (2008). See <<http://www.static.reliefweb.int/report/uganda/uganda-conflict-justice-and-reconciliation-teso-obstacles-and-opportunities-briefing>>. Accessed 15 Apr. 2013.

reconciliation in the rest of Africa. Guilt in most conflicts where mass atrocities have been committed is attached to whole groups identified by their ethnicity or race. A penal system anchored on individual guilt and punishment is, by nature, out of sync with community perceptions of guilt, responsibility and fair outcome. There is a disconnection between the juridical outcome (e.g. imprisonment) and social relevance (reparations/healing, etc.).

Most Africans are deeply spiritual, and issues of mass atrocities are processed by communities within the context of their belief systems. Forgiveness based on biblical principles or outright amnesty often falls short of the community expectation that great loss requires reparations as a necessary outflow of repentance. Memorialization characterized by the construction of statues and structures does not address memorialization in most African traditions, which involves bringing the souls of the dead to a place of rest in the homestead through specific rituals. International prosecutions such as those witnessed in Sierra Leone and Rwanda have not had the desired impact. They are too expensive and elitist in nature. They have attracted very little African media attention and little public participation.

Traditional justice is grounded in how communities seek assistance to facilitate, account for and resolve conflicts arising from violations or abuses or in support of healing. They also play important roles related to conflict legacies that communities feel require redress. Traditional justice also provides support to community leaders to facilitate, acknowledge and resolve conflicts arising from violations or abuses or in support of healing processes.

The ultimate goal of traditional justice systems in African communities is to seek assistance from the community leaders to facilitate, acknowledge (account for) and resolve (reconcile) conflicts arising from violations or abuses or in support of healing. The process creates a socio-cultural context that allows individuals and communities to refrain from violence and re-establish broken relationships.

Particular procedures of traditional justice practices differ considerably, e.g. our recent research findings show that from the Acholi, Lango and Teso these practices do exist, and they include *Tolu Koka* (Madi), *Kayo Cuk* (Lango), *Ailuc* (Teso), *Mato-oput* and *Gomo Tong* (Acholi).

The contextual reality of traditional justice in Uganda

Traditional justice mechanisms from the Acholi, Lango and Teso sub-regions of greater northern Uganda differ considerably. However, five fundamental principles

stand out clearly from a previous study titled *Tradition in Transition*.⁵ These were ‘material compensation, reconciliation and forgiveness, truth-telling and responsibility, cleansing and welcoming, and punishment’ (retributive aspects). While the relationship between abuses that arose from wars and related conflicts and those that do not remains unclear, the overall traditional justice principles are similar in both situations and express the values of each of these groups.

These principles mentioned above found expression in a sequence of practices that are designed to result in reconciliation between the parties and their clans. The process normally begins with one of two principles. If the individual who committed the abuse had been absent from the community for an extended period of time, it begins with a welcoming or cleansing ceremony. Otherwise, the first step is to identify the responsible party and learn about the damage caused. The next step would begin with retributive action, such as caning. Truth-telling in the form of a dialogue to discuss the events and to ask the offending party to accept responsibility would follow. This dialogue would help establish the reparations due to the victim. Finally, an act which expressed reconciliation and forgiveness would take place. These principles are based on collective community responsibility and find relevant benchmark space with international standards.

The traditional justice landscape in Uganda

Traditional justice practices posit on the individual and society conscious engagement in processes through which the victims may come to terms with, emotionally respond to, and actively remember and discuss the events of the past.

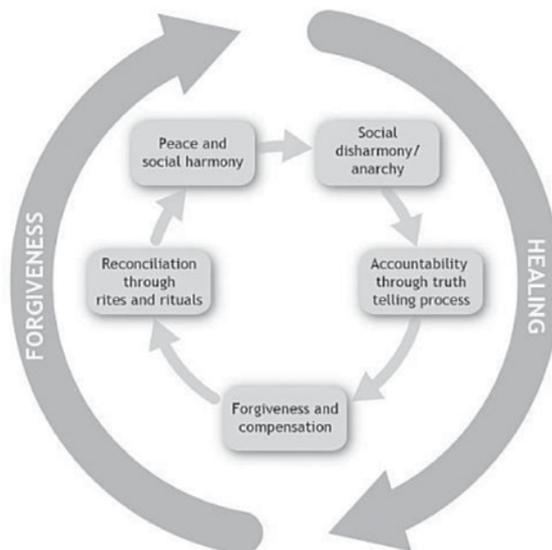
Traditional justice practices have specific features that include, among others:

- Reconciliation and restoring social harmony.
- Crime as a community problem, not an individual’s sole responsibility.
- Voluntary processes.
- Selected traditional arbitrators based on status and lineage.
- A high degree of public participation.
- Discussions confirmed through rituals aimed at reintegration.
- Flexible procedural and evidence rules as set by custom.
- Restorative penalties.
- Penal enforcement secured through social pressure.

⁵ *Tradition in Transition: Drawing on The Old to Develop a New Jurisprudence for Dealing with Uganda’s Legacy of Violence* (Kampala: Makerere University, Faculty of Law, Beyond Juba Project Working Paper No.1 Revised Edition, May 2009), <http://www.beyondjuba.org/BJP1/working_papers/BJP.WP1.pdf>, accessed 15 Apr. 2013.

Benefits of traditional justice practices

The traditional justice cycle provides a quick snapshot of how simple, though complex, the process might be.



The traditional justice cycle

(Source: Justice Law and Order Sector, Sub-committee Report, 2008)

It is noticeable that these practices carry along with them numerous advantages that merit contemporary application:

- They are accessible to local and rural people.
- Proceedings are carried out in the local language.
- Accessible walking distances.
- Simple procedures that do not require the service of other languages.
- None of the delays that are associated with the formal system and its bureaucracies.
- Help educate all members of the community as to the rules to be followed.
- Employ non-custodial sentences, hence effectively reducing prison overcrowding. Prison budgets could be diverted towards social development purposes.
- Permit offenders to continue contributing to the economy and to pay reparations to victims.

- Prevent economic and social dislocation of the family.

NB. These offer domestic credibility and, by focusing on weakness, we may be avoiding unfounded expectations.

Cleansing and welcoming

Cleansing practices are an important element of traditional practices among the ethnic communities of Uganda. For example, throughout the Acholi, Lango and Teso regions these practices form the core of reintegration processes after conflict. They are most commonly practised as part of a process of welcoming, but they also remain integral to response mechanisms for a killing or other act properly understood in the community as an abomination. Cleansing also functions as part of a final reconciliation process to normalize relations between a victim and a perpetrator. Cleansing is most prominently connected with welcoming practices for individuals who had been absent from a community for a prolonged period of time.

Cleansing ceremonies to date remain integral to major reconciliation practices among local communities in Uganda. Community members often describe cleansing as part of the reconciliation process in the slaughtering of a bull, sheep or goat. For example, in northern Uganda, the communities closely associate cleansing with the idea of cooling one's temper after becoming hot or disturbed. Others further view cleansing as important in restoring balance, both mentally and emotionally, and it serves as a necessary preparatory step in readying both individuals and the community for a further process of reconciliation. Cleansing is also framed as welcoming individuals back into the community. This principle of welcoming and cleansing should be part of the national transitional justice process to facilitate the restoration of a national community.

Punishment and retributive aspects of traditional justice

It would be an error to ignore entirely the role of punishment in the practice of traditional justice. Caning was the most common form of punishment and was ubiquitous across the three regions. The retributive aspect of traditional justice is often part of an initial community response to a given abuse, and is then followed by mechanisms that embody the justice system's other elements. The intended purpose of punishment is focused mainly at deterrence. Importantly, punishment is a largely individualized element of traditional justice, unlike the communal nature of much of its other elements. The individual who committed an offence would be caned, not the clan as a whole.

Truth-telling, dialogue and responsibility

Truth-telling was integral to achieving justice in traditional communities in all three regions, but it should be understood more accurately as a process of interactive dialogue between the offended and offending parties rather than as a one-sided public declaration. Chronologically a truth-telling dialogue would take place after both an initial welcoming and cleansing process and retributive action. It was fundamental to traditional justice practices in the three regions that both the wronged and wronging party needed to agree on an account of the events that transpired for a given offence. Truth-telling has been widely discussed as a potential element in the post-conflict transitional justice process in Uganda. It should be noted that there still remains the question of whether commanders from the various parties to the conflicts – including the LRA, the Uganda People's Army, and the Uganda's Peoples' Defence Forces (UPDF), among others – would be willing to participate in any form of dialogue or truth-telling in any future process in Uganda.

Material compensation as reparation

Compensation for losses incurred was the most important issue when considering the entire subject of reconciliation. Whether the loss was suffered due to war or through ordinary criminal behaviour (cattle theft, for example), compensation for the loss must occur first. For example, the military is seen as mostly responsible for the loss of cattle in Teso in eastern Uganda and, to a lesser extent, in Acholi-land in northern Uganda. While there was little direct discussion of compensation as a means of punishment, the motive and intentions of the crime were considered in the amount to be rewarded, suggesting that there were at least some retributive aspects to it. An often cited example is the different compensation awarded for intentional and unintentional killing.

Multiple purposes of material compensation suggest several things for the creation of a contemporary reparations framework in the overall transitional justice process in Uganda. A contemporary reparations framework in essence should seek to address the financial impact of the legacy of conflicts in various regions of Uganda. There may be several ways of fashion-design reparations, including large infrastructure projects aimed at restitution, as has already been called for in the PRDP, though seeing these reforms through will be a challenge of the utmost importance. A contemporary reparations framework will also need to be related specifically to the abuses committed throughout the conflicts, and should reflect the gravity of those offences so as to serve as a level of recognition

of what transpired. This would aid in reconciliation and could provide a level of consolation to those who suffered in the conflict. The challenge will be how to identify victims accurately within the conflict, and how to identify the resources for their compensation. It should be noted that there exists a potential disconnect between this contemporary notion of restitution and the traditional understanding of compensation directly linked to the nature and severity of a given abuse. While restitution might fulfil the purpose of compensation that is intended to address the economic impact of an abuse, it may or may not be able to address the reconciliation process at local community level.

Reconciliation and forgiveness

Reconciliation in essence refers to the normalization of relations between the offended and offending parties to a conflict. Reconciliation practices were seen to be required for a wide range of abuses, including sexual offences and assault, but were most commonly discussed in the context of killings. The restoration of a relationship between the offending and offended parties is strongly connected to a process of shared eating and drinking, often after slaughtering an animal. Reconciliation is also expressed most clearly through a particular practice in each of the three districts: *Mato Oput* in Acholi, *Kayo Cuk* in Lango, and *Ailuc* in Teso. These three practices have become symbolic of the broader system of traditional justice and often combined several of the other principal elements of traditional justice. While it appears that these practices are still widely understood, instances of their use are fairly rare, even more so in relation to abuses committed during contemporary conflicts in the regions, yet there exists a substantial desire for a role for them in addressing the legacies of these conflicts, though there are reservations about the feasibility.

The notion of reconciliation as a means of ending cycles of violence and achieving normal social relations remains perhaps the most widely appreciated aspect of traditional justice. An abuse of any sort between clans, or even within a clan, was a disturbance in the relationship between the offended and offending party. In the case of different clans, they would no longer be allowed to eat or drink together, to get water from the same well, or to inter-marry. It would be important to address this in order to restore social harmony that allowed for the proper functioning of day-to-day life. Reconciliation was only possible when cleansing, truth-telling and compensation had either already taken place or were part of the final reconciliation. Any contemporary application of the practices and principles of traditional justice would have to include all of these elements. In

addition, it would be important to create space for celebration at the conclusion of the national transitional justice process to recognize the new peace.

Challenges of traditional justice practices today in Uganda

The principles and the practices from which traditional justice mechanisms were derived find contemporary use, and they are considered highly relevant today. Nonetheless, there exist major obstacles to their use and their potential role in the national transitional justice process in Uganda.

Contemporary role and status of traditional leaders (*Weakened cultural institutions over the course of conflict, and the youth have little knowledge about rituals.*)

At present, the clan elders' loss of their relative economic power within the community poses a serious gap in decision-making processes: youths earn higher incomes than the elders, and the latter's ability to garner support through patrimonial means has declined. Secondly, there has been a rise in the education of the younger generations, who no longer see the elders as the ultimate figures of authority or wisdom. Thirdly, something of an amalgamation of the first two along with other economic and social effects, the broader force of modernization increasingly pushes the social role of the elders into the background.

The relationship between religion and tradition (*Western cultures and religions have influenced perceptions.*)

Religious beliefs are at times interwoven with traditional justice practices in the Acholi and Teso regions of Uganda. This has not been the case in Lango, where religion appeared to have deeply altered, and in some cases entirely eliminated, some elements of traditional justice practices. Religion most often came into conflict with traditional practices when it came to notions of cleansing, and particularly the slaughter of animals.

The role and treatment of women and children in the practices

The issue of how women and youths are involved (or not) in traditional justice poses one of the greatest challenges to their contemporary use as part of any broader transitional justice strategy. Women's roles in traditional justice processes are minimal, and, although this is changing, the pace of change is slow. Women were not allowed to administer the practices, though there were some exceptions regarding welcoming practices. The youths have had virtually no distinct role in the administration of traditional justice. Although there are claims that there

have been noticeable changes, there is no evidence to attest this. Perhaps the most immediately challenging aspect of women's participation in traditional justice practices has to do with how they have been treated as complainants in cases. There is a widely held belief that a woman cannot receive compensation directly if she married a man from a clan other than her own. This is rooted in the belief that a woman is not a full member of her husband's clan.⁶

The relationship of traditional justice to formal justice structures

Although rural citizens understand the need for a formal justice system, they do not understand how it relates to the traditional one. Significant wariness concerning the effectiveness and desirability of the formal justice process continues to be voiced from rural communities. The most common frustration is corruption in the police force, the confusion and legal expenses of navigating the court system, and the fact that reported cases either took a long time to be resolved or did not result in a conviction. Largely, members of rural communities believe that the formal justice system is incompetent to handle judicial matters properly. In trying to understand how traditional justice principles and practices may relate to the formal justice process in the future, it is vital to understand how the two relate to one another now, and what models already exist for their relationship.

The relevance of traditional practices to abuses committed as part of mass conflicts (*Mass atrocities committed over the twenty years of the conflict.*)

Recent research by the Refugee Law Project certainly confirmed that traditional justice practices have been used historically to address 'ordinary' or daily criminal and civil conflicts – both large and small – and not conflicts arising from war.⁷ While many of the elements of 'war' crimes are the same as for crimes committed outside of war (murder, arson, rape, etc.), the motives and gravity of the offences are often very different in war. The traditional justice practices appear not to be designed to address crimes in which only the victim or only the perpetrators were known, a common reality for many of the communities who suffered losses during the contemporary conflicts. There exist potential issues regarding the complexity of the abuses committed throughout the relevant conflicts. For example, the conflicts involved three or four parties ranging from the LRA,

⁶ Interview with an LRA Delegate to the Juba Peace talks, Gulu Town, 16 Sept. 2008.

⁷ See *Tradition in Transition*.

UPDF, local militias and the general population, all playing a role. Defining any of these groups as victims or perpetrators remains difficult, and often individuals may be both. The question of whether traditional practices can deal with war-induced crimes remains a central debate for the local community, and also serves potentially as a confluence for complementarity with formal justice practices.

The traditional justice part of the equation essentially has three components: one part will need to address the clan-to-clan needs, another the community-to-community needs and the third to respond to the nations' broader needs addressing the government's relationship with the various rebel groups and the responsibilities of all for the conflicts. Current national justice structures appeared unresponsive to local needs and values, and the void left by shortcomings of these structures is being filled by locally practised, traditional mechanisms. Inter-ethnic tensions in the various regions of Uganda continue to brew just below the surface of seemingly placid relations, indicating that further dialogue is still vital for achieving a lasting peace in the region.

Traditional justice mechanisms should therefore be used to establish the principles of a national system, while also being practised directly in local communities affected by the conflict. The legacies of conflict discussed in this chapter are far from local in nature. They are dynamic at a regional and national levels, and are connected to a national pattern of cyclical violence that has produced a tenuous peace through pacification rather than reconciliation. Moreover, the need for a national set of transitional justice structures is highlighted by the fundamental question of how abuses committed in a particular region by an individual from another region should be addressed. All these should be placed within the framework of a national reconciliation law and national policy framework on peace-building and conflict prevention. These are new challenges that require effective national responses.

Traditional justice mechanisms need to be a major part of this transitional process. Of necessity the traditions of Uganda's informal justice system will need to change if they are to assist in the healing from years of conflict. Moving from its historical role of resolving individual conflicts within a clan or village to a role that complements the formal justice system in addressing war crimes will be the next challenge. The respect that traditional practices continue to have in rural areas underscores the need to use them in the coming transitional justice environment.

Conclusions

Traditional justice practices have a local, national, regional and international relevance in contributing to a comprehensive international jurisprudence on redressing the complex balance between retribution and restoration after mass atrocities. Within the conflict-prone Great Lakes region, traditional mechanisms could contribute to addressing both the legacies of the major conflicts in the region and day-to-day issues of crime in a multi-dimensional way. Traditional justice mechanisms are a starting point for addressing the lingering national questions in Uganda today. Traditional justice mechanisms will need to play a multifaceted role in both the transitional justice process in Uganda and in future reforms to the broader legal system. Rather than attempt to codify the specific practices of different ethnic groups, legal reform in Uganda should apply the emerging cross-cutting principles, which are shared across the different regions of northern Uganda and Uganda generally. This is an initiative that should see the contribution of traditional justice mechanism in complementing the current formal jurisprudence in Uganda.

Lessons learned

What was positive regarding the transitional justice process in Uganda?

- There was an official directive for an audit to be done into human rights violations and a clear mandate to work on transitional justice issues.
- The 'home-grown' approach – which included all relevant stakeholders, the traditional leaders and those from grassroots – met the specific needs of the Ugandan transitional justice process.
- The methods used in Uganda were inclusive, involving civil society and the government.
- The deliberate focus on a particular ethnic group was positive. This allowed for a focused understanding of a specific group's issues.
- The documentation of disappearances provided an accessible information source.
- Institutional reform was a critical aspect of transitional justice.
- The army leaders took a leading responsibility in programmes of non-repetition; they changed the army's self-conception from being a 'force' into that of a 'service institution'.

What was challenging regarding the transitional justice process in Uganda?

- The transitional justice process in Uganda took place in an extremely complex political context without corresponding regime change and in the presence of a precedent-setting amnesty for all armed groups who renounced rebellion, including perpetrators of international crimes.
- Uganda is in a perpetual transitional justice mode as each incoming president has been initiating a transitional justice process.
- There has been a weakening of cultural institutions in Uganda due to colonialism, which led to a gap between the formal justice sector and the traditional structures.
- The role of women is not defined in the transitional justice process.
- It is not defined how far back in history the transitional justice process should go.
- Witness protection was not adequately addressed in Uganda.

Is the strategy of Uganda to address transitional justice issues applicable to Zimbabwe?

- The documentation of all human rights violations is critical and Zimbabwe can adopt the same approach.
- These traditional justice mechanisms can also be applied to the Zimbabwean context.
- Learning the local language of each group of people concerned is critical in conducting fair trials.
- In Uganda, there was a reintegration of child soldiers. The reintegration of the youths who were involved in political violence in their communities can be implemented in Zimbabwe, too.

GERMANY

Inclusiveness in the Transitional Justice Process

Joachim Förster

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ABSTRACT

Germany has experienced two dictatorships in the twentieth century: The genocide of millions of victims perpetrated by the Nazi dictatorship under Hitler and the oppressive communist GDR regime with its notorious Stasi.

Different approaches have been taken in dealing with the past. Whereas the Allies conducted the Nuremberg trials against the main Nazi perpetrators, the GDR regime was ousted by a peaceful revolution. The GDR controlled its population through the Stasi, a huge apparatus with official employees and unofficial informants, was the 'shield and sword' of the SED party.

The methods of the Stasi were not direct physical torture but psychological demoralization, surveillance, discrimination and masked arbitrary acts directed against any opponent or mere critic of the system and its leading party. The Stasi recorded all its activities.

After German reunification, based on the Unification Treaty, the Stasi Records Office was established. The Special Stasi Records Act allowed access to the archives by the population for purposes or under conditions stated in the Act. The records are being used by victims of surveillance, for vetting employees and public officials, for criminal prosecution, for rehabilitation, and also for research and political education.

Germany has been coming to terms with two 20th century dictatorships: the Nazi dictatorship under Hitler, and the Communist German Democratic Republic (GDR) between 1949 and 1989/90. In view of the millions of victims of the Third Reich, caused by the Genocide and the World War that was provoked, the two dictatorships cannot be compared. But there is no reason to play down the second dictatorship of the GDR under the rule of the Communist party, the Socialist United Party of Germany (SED). During its existence, there were about 4.5 million refugees, 1,000 victims were killed at the border, 250,000 imprisoned for political reasons, and the fundamental rights of freedom were denied by the state for forty years.

Different approaches were used in coming to terms with the past. The trials of the main National Socialist Underground perpetrators who survived were held in Nuremberg by the Allies, and there was also the so-called Denazification. In West Germany the past was repressed for years, and the big trials against the perpetrators at the concentration camps began only in the 1960s. In East Germany there were also prosecutions, but not in public. The Nazi past was instrumentalized against the West, which was alleged to be fascist.

After 1989, the Germans themselves had an opportunity to come to terms with the Communist past, and the leaders of the peaceful revolution in the GDR demanded that it begin immediately.

The secret police of the GDR and its important role

The Ministry of State Security, the 'Stasi', was not an isolated power within the state and its dictatorship. It was, in its own understanding, the 'shield and sword of the leading party' (the SED) against any 'enemy of the proletarian revolution', which meant in practice any opponent or mere critic of the system and its leading party. The Stasi claimed to be one with the Communist secret police in the Soviet Union and the other countries of the Eastern bloc.

The methods that the Stasi used from the 1960s until 1989 were not direct physical torture but psychological demoralization, surveillance, discrimination and masked arbitrary acts by the authorities in all spheres of society. Nevertheless, for many people the Stasi was the symbol of hidden influence over the lives of individuals, a symbol of mistrust and a symbol of oppression and arbitrariness.

By 1989 the Stasi was a huge operation with about 90,000 official employees and about 189,000 unofficial informants, which left an enormous legacy of approximately 158km of documents (incl. microfilm), 38 million file cards, 1.4 million photographs and film documents, and hundreds of thousands of tapes of bugged and recorded conversations. The documents, of course, comprise millions of reports by Stasi officers and unofficial informants about other individuals. This is one of the reasons why the opening of these files was one of the important demands of the peaceful revolution in 1989. Many people saw their opening as an act of social and personal liberation as well as a means to break the Stasi's control through secret knowledge.

The peaceful revolution

During the peaceful revolution in November/December 1989, demonstrators occupied several offices of the Stasi to prevent the ongoing destruction of

documents by Stasi officers. Most of the legacy could be saved and safeguarded. In the period that followed, there were controversial debates in the GDR about how to deal with the Stasi files, whether or not to open them and how. The first freely elected parliament in the GDR decided in 1990 to enact a law to permit and safeguard their use. During the negotiations about the reunification of East and West Germany, the issue arose again.

The leading negotiators on both sides did not initially include a law on opening the Stasi documents in the Unification Treaty. West German officials voiced scepticism about the need to open these files. Many of them feared that it would be a burden for the future of a reunified, democratic society and would cause discord, lead to personal revenge-taking, and could divide society.

Moreover, opening these sensitive documents, which were collected by a state without the rule of law and in violation of human rights, would conflict with the right to privacy and the protection of personal data, both of which had evolved over forty years in West Germany. If the records were to be preserved at all, the critics wanted them to be added to the records at the Federal Archives. The consequence of that would have been that access to the personal data of employees and supporters of the Stasi would not have been accessible until thirty years after an individual's death.

The opening of the Stasi files

Eventually, the demands of the East German civil rights movement, bolstered by renewed occupations of former Stasi buildings and hunger strikes, were added to the agreements for the Unification Treaty. On this basis, a special institution was to be established by a special act, the Stasi Records Act – the Federal Commissioner for the Records of the State Security Service of the former GDR, the Stasi Records Office (BStU). The records of the Stasi are kept in centralized custody by the BStU as an independent federal institution. The Federal Commissioner is directly elected by parliament (for a maximum of two terms of five years).

The Act, which provided for the opening of the archives while protecting individual rights, represented a synthesis between the demands of the civil rights movement of the GDR and the highly developed protection of personal data under the rule of law. It was an experiment without precedent. The former subjects of surveillance now had a right to access these documents. It was the first time that the workings of an entire secret police become public. Of course, this unprecedented development was made easier by the fact that not only the secret police but also the entire state that it had served had been dissolved.

The German example is not based upon a 'top-down' reappraisal by the state. Many stakeholders have taken part in the process of reappraisal, as should be the case. The state has been creating the conditions and the framework for society and individuals to come to terms with the past.

The Stasi Records Act

The Stasi Records Act of 1991 (StUG) guarantees, on the one hand, strict and strong protection of personal data for the former subjects of surveillance to prevent their further abuse. At the same time, the protection of personal data regarding former employees and unofficial informants has been limited. Their names can be provided in certain cases without normal restrictions. Thus, in each case it must be decided whether a document can be provided with or without the consent of a person.

Access to the records is limited to the purposes of, and under the conditions contained in, the StUG. The purposes allowed reflect the way of dealing with the past in Germany and correspond to the demands of the civil rights movement of the former GDR.

Individual access to the files

The victims of surveillance have the right to access to all documents regarding themselves. Each person has a 'right to truth' in order to clear up personal disadvantages, to regain 'sovereignty over his or her life', and to re-establish trust in the personal sphere.

It is also possible to clear up the fate of deceased and missing relatives. The right to access also includes the right to get information about the name of the person who reported to the Stasi about the applicant.

Of course, there have been a number of emotional cases – for example, a husband reporting on his wife within an opposition group, reports of teachers about their students, etc.

Use of records for the purpose of vetting employees and public officials

The StUG opened the possibility of vetting people with certain public functions, whether they worked for the Stasi or gave information as an unofficial informant.

The purpose of these applications for vetting is to exclude suspicion and build trust in the civil service and in important officials – members of parliament, members of government, local and municipal councils, judges, etc.

The public (or a private) body decides how to apply the vetting information

and what consequences there may be in case of past involvement with the Stasi. In certain cases, special commissions have been established to decide this question.

In 2007, after fifteen years, the offices subject to potential vetting were restricted by law. Today only leading functionaries – or, in the case of concrete suspicion, other civil servants – can be examined, and only documents for this purpose can be provided.

Use of documents for the purpose of criminal prosecution

The German Federal courts have determined that, based on the rule of law, a criminal prosecution can take place only if there was a punishable offence under the law of the former GDR (*nulla poene sine lege* – no penalty without a law). The High Court of Germany decided that exceptions could be made for serious violations of human rights – for example, following the order to shoot and kill refugees at the border.

In addition to killings at the border, such crimes as the perversion of the course of justice have been prosecuted, as well as crimes of kidnapping by the secret police and the manipulation of elections.

Use of records for the purpose of rehabilitation

Documents of the Stasi have been provided to courts to quash criminal sentences for political reasons by courts of the GDR. This also represents a precondition for obtaining compensation for the time of detention.

The authorities that decide on applications of rehabilitation gain access to the files to examine the details and to exclude the possibility of abuse of the rehabilitation process by perpetrators. The Stasi files give important evidence in many cases about unjust disadvantages imposed by the authorities of the former GDR for political reasons and about health problems resulting from the actions of the GDR authorities.

In addition to compensation in such cases, there is a special honorary pension since 2007 for anyone who spent six months or more in a GDR prison for political reasons.

Use of records for scholarly research and by the press and mass media

For the purpose of publication by researchers and the media, access is granted to documents relating to a specific subject, which has to involve the political and historical reappraisal of the Stasi, the mechanisms of power of the GDR or the Nazi era. Research and publication about these subjects have been considered

important for informed public discussion based on historical facts and for discovering the consequence of the Stasi's activities.

Providing documents for the purpose of political education

The Stasi documents have been used also for political education. They can be provided to external public and private applicants for projects – for example, at universities, foundations or museums.

Research, public information and political education by the BStU

The BStU itself has a special department for research and education for informing and instructing the public about the structure, methods and modus operandi of the Stasi. Therefore, the BStU, often in co-operation with other organizations and institutions, organizes public events such as panel discussions, screenings and lectures on special subjects, such as the influence of the Stasi on culture, sport, church, schools, etc. Of great importance are the presence and activities of the BStU in the regions of the former GDR, because there are often not many initiatives for such activities locally.

Another way to inform the public is through publications and exhibitions. There is an Information and Documentation Centre in Berlin, which will be moved in the near future to the former Stasi headquarters. The BStU also has a 'travelling exhibition', which has been shown in many German cities and also in other countries.

Political education for young people is very important because, for most of them, the GDR is an 'alien country'. So, projects at schools have been carried out and supported, along with seminars for teachers; the BStU has also provided educational materials to schools. DVDs and, of course, the Internet also serve as tools for political education.

All these activities should help to combat the myths that play down the brutality of dictatorship. The records of the Stasi are, in that respect, a 'medicine against nostalgia'.¹

Players and stakeholders in the process of coming to terms with the past

Apart from the BStU as an official authority, many other players participate in the process of reappraising the GDR dictatorship. There is the Federal Foundation

¹ Joachim Gauck, quoted in Barbara Miller, *The Stasi Files: Guilt and Compliance in a Unified Germany* (Routledge, 1999).

for Reappraisal, which organizes public events and activities, as well as other foundations at the local level that are also publicly financed. A very important task of several foundations is to establish and maintain memorials with documentation centres at the original locations, especially at the former detention centres and prisons of the Stasi in several towns.

Victims, organizations and NGOs provide counselling and advice bureaux, and in some cases they have archives and Internet portals with testimonies of contemporary witnesses.

The churches have also engaged themselves in matters of reappraisal and reconciliation in some areas.

Large private firms, which were generally not very active in vetting their leading staff directly, have supported the historical research and political education by their foundations in some cases.

The aforementioned researchers and media also play a very important role. Publications, public events and documentary TV films about victims and perpetrators often reach a wider public.

Summary: The use of the Stasi records in the past twenty years

Summarizing the twenty years' experience of using the Stasi records for purposes of reappraisal, we can see positive results, but also challenges and limitations.

Positive results and successes

- Access by individuals to the Stasi records for their private reappraisal can be summarized as a success. About 1.9 million people have used their right to access for a total of 2.9 million requests. Even after twenty years, the number of such applications is 80,000 a year.
- Contrary to all the early fears, individual access has not sparked social disharmony or revenge-taking, and society has not been divided as a result of the opening.
- As a consequence of the vetting (about 1.8 million requests), the influence of former officers and unofficial informants of the Stasi in the public sector could be eliminated to a great extent, and, for the most part, there is public trust in the civil service in the new Federal states in the former East Germany.
- Reappraisals through criminal proceedings could be carried out by the courts within the first fifteen years. In about 75,000 preliminary proceedings – based mainly on the Stasi documents – and charges against 1,737 accused

persons, the facts and the truth were documented and cannot be denied in future. More importantly, the commanders who gave the orders to shoot at refugees at the border were sentenced to prison without parole.

- It was also possible to track down and uncover important assets and the financial property of the former SED.
- The records and files have been important sources for making decisions in many thousands of cases of rehabilitation.
- The BStU has provided millions of documents to researchers and the media, which have been the base of numerous publications, films, documentaries and exhibitions. The right of researchers and journalists to obtain information from the Stasi archives and to use it has been a decisive and important prerequisite for informed public discussion about the past in academia and the media.

Problems, challenges and limits

- Although many millions of individuals have gained access to the records of the Stasi, there is no exact knowledge or statistics about the consequences in the individual sphere. However, personal reconciliations seem to be rare. Most former unofficial informants of the Stasi have evaded confrontations with the people about whom they reported. Most former employees and officers of the Stasi have not accepted that their acts were illegitimate or even illegal. Accordingly, in most cases they have not shown remorse or apologized.
- The vetting of civil servants, public figures and functionaries has not been universally applied, and in terms of consequences, there were differences among the various Federal States and institutions. For example, while the public broadcasting corporations vetted their staff, the private ones did not.
- Another problem lay in the sole focus on the Stasi itself. In some cases, ordinary unofficial informants had to bear the consequences for their Stasi contacts, while some former Communist functionaries or staff members of former government offices went untouched.
- Many former political prisoners and victims who suffered disadvantages owing to the persecution of the Stasi are bitter about the discrepancy between the crimes committed by the former regime and their consequences for the victims, on the one hand, and the small number of prison sentences on the other, which were too lenient and mostly suspended. A great many of the injustices that had occurred in the GDR could not be punished because of

the aforementioned constitutional restrictions. A renowned member of the East German civil rights movement expressed her sentiments as follows: 'We wanted justice and instead got the state under the rule of law.' In the eyes of many perpetrators, of course, the trials and sentences by the courts were 'victors' justice'.

- Many victims also compare their social situation and their honorary pensions for imprisonment with the pensions of retired Stasi officers and functionaries, which are sometimes higher.
- The use of the records by the media always raises the danger of instrumentality and unjustified stigmatization of individuals. The StUG and the BStU were intended to prevent this, along with the responsibility of the media to report correctly and to observe the legal protection of individuals. Of course, the reappraisal of the Communist dictatorship in the former GDR should be carried out not on the basis of the Stasi only but in the context of the entire political system and mechanisms of power.
- With regard to political education, poll results among pupils have revealed astonishing gaps in their knowledge about the former GDR and life under the dictatorship. The BStU's support for schools and political education in general must thus be continued and intensified.

General conclusions

Some general conclusions based on the German experience include:

- It is important to ensure the immediate protection and safeguarding of the archives left behind by the dictatorship and their secret police under an independent, centralized authority, no matter whether or how they will be used in the future on the basis of a democratic decision. The files have to be protected against destruction, theft, manipulation and abuse.
- 'No future without the truth'. When there is no memory, there can be no justice, even though justice cannot be perfect.
- Independent courts, a free press and media, and a growing civil society are important conditions, players and supporters for a balanced and lasting process of reappraisal in society.
- Coming to terms with the past in every case requires time and persistence.

Lessons learned

What was positive regarding the transitional justice process in Germany?

- The full exposure of the human rights violations in Germany was a good thing.
- The Stasi was identified as a symbol of oppression, and its dissolution symbolized moving forward by dismantling oppressive structures.
- The passing of relevant legislation was crucial to allow access to the Stasi records.
- The inclusiveness of the processes was key, as all citizens had the chance to get involved.
- Compensation was given to political prisoners who were imprisoned for six months and above.
- Facilities for counselling and rehabilitation for the victims and perpetrators were/are available.
- The Stasi documented its entire ill doings. This facilitated the investigations of the Stasi methods and their victims after reunification. The archived documents were used for litigation. Public access to the documents was guaranteed. The Stasi records were/are also being used for political education to facilitate reconciliation and guarantee non-recurrence.

What was challenging regarding the transitional justice process in Germany?

- The German reunification itself was a challenge because it created some resentment between the people of East and West, and citizens didn't participate in the reunification treaty.
- There were challenges around the interpretation of the documentation because the Stasi had used its own special code for recording.
- As there were no special courts created to deal with the Stasi crimes, ordinary criminal courts had to decide on the sentences.
- Reconciliation between the victims and the perpetrators is still difficult: The latter did not acknowledge and reflect on their wrong-doing; on the other hand, the victims were unhappy with the sentences, saying that they did not correspond to the injury they suffered; compensation was only partially granted.

Is the strategy of Germany to address transitional justice issues applicable to Zimbabwe?

- There is a similarity in the methods applied to oppress citizens in the former GDR and Zimbabwe, especially concerning 'the state's intrusion into people's lives'. Thus, the German method of exposing the Stasi and dismantling it might be applied to reform the institutions in Zimbabwe.
- It is important for civil society in Zimbabwe to document and archive human rights violations.
- It may be difficult to have reparations for every single crime/violation committed in Zimbabwe. Unlike in Germany, in Zimbabwe this process might be economically challenging.

THE PHILIPPINES

Rhetoric v. Practice, Co-optation v. Contestation The Philippine Experience of Politically Exposed Persons, Asset Recovery and Reparations

Justice Cleto R. Villacorta III
Regional Trial Court, Philippines

ABSTRACT

Grand corruption, asset theft, and international flows of stolen and laundered money have had an insidious and devastating impact on Philippines since independence. They degrade and undermine confidence in public institutions. They taint and destabilize financial systems, affecting trust. They damage the victim country's investment climate and prospects for macroeconomic stability. This fuels capital flight, which impedes growth and poverty reduction efforts, which heightens inequalities. Such abuse of resources by politically exposed persons is a gross violation of human rights. The damage is long lasting and more severe the longer a corrupt regime is in place.

In the case of Philippines, the attainment of independence in 1935 resulted in severe abuse by the state, looting, and large-scale violation of human rights by the political elites. The most severe period of wholesale looting of state assets during a repressive environment was under the tutelage of President Marcos, who aligned with agri-business and family elites to siphon assets out of the country. President Marcos, entrusting his family members and close associates with prominent public functions, represented a greater money-laundering risk when they abused their positions and influence to carry out corrupt acts, such as accepting and extorting bribes and misappropriating state assets, and then using domestic and international financial systems to launder the proceeds.

The post-Marcos regimes attempted accountability measures with little success. Even with clear rules of corporate governance, set out in the Presidential Commission on Good Governance (PCGG), this did not succeed. The ill-gotten wealth, cases of graft, and safeguards to stop the rot became tragedies of good intentions. The PCGG failed to meet its objectives as it lacks skills in asset-tracing and combating syndicated money-laundering; neither does it consider its work in the light of Marcos's violation of human rights. The PCGG does not cover reparation aspirations of the victims of human rights. Any enforcement that would compel

asset recovery was deflected or the hearing delayed by the courts. In a recent case before the New York Court of Appeal, the Republic of the Philippines blocked claims by the Philippine victims of human rights violations seeking \$42 million of Marcos assets, which have been in New York for forty years. The victims have recovered little of the \$2 billion judgment against the estate of Marcos, chiefly because of opposition from their Republic.

The Republic of the Philippines is located in South-east Asia. In relation to Zimbabwe, the Philippines is across the Asian continent and the Indian Ocean. It is an archipelago of 7,107 islands, south of Taiwan and Japan and north of Malaysia, with Manila City as its capital. The Philippines has an area of 127,000 square kilometres that spreads through three major islands: Luzon, Visayas and Mindanao. Though consisting of 120 ethno-linguistic groups, the people in the Philippines are uniformly referred to as Filipinos, numbering 103 million as of July 2012.

Form of government

The Philippines has a unitary form of government with three branches: the Executive Department, which the President heads; the Congress, which consists of two houses, the House of Representatives and the Senate; and the Judiciary, which is made up of one Supreme Court and several lower courts permanently stationed in different parts of the Philippines. These branches are collectively referred to as the National Government. The Philippines has political subdivisions, known as Local Government Units, which administer their respective territories. They each have their local chief executive and local legislative body but their powers are only those granted by the laws formulated by the National Government.

The Philippines is a republican and democratic state, with the level or stage of its democracy discussed below. It is republican in the sense that the people elect their leaders to run the National and the Local Governments. The President, the Senators who compose the Senate, and the party-list members, who occupy around fifty-four seats in the House of Representatives, are elected nationally. The other members of the House of Representatives and the leaders of the Local Government Units must win in periodic elections through pre-defined local territories. Members of the Judiciary holding titles of Justices and Judges, including those in the Supreme Court and its Chief Justice, are appointed by the President.

Democracy

While the Philippines was once a colony of Spain for about 400 years, of the United States of America for only a quarter of that, and was for five short but brutal years under Japan during World War II, its brand of formal democracy radiates with US influence only. Except for its criminal and civil codes, vintages of Spain and Continental Europe, the Philippines' political commercial and legal systems have by far followed US traditions. Philippine courts follow the US adversarial system of hearing and deciding cases, with the judge deciding issues of both facts and law, though its rules of evidence are those suited to a jury trial. This disjunction between the requirements of a non-existent jury trial and a judge-alone system is perceived to be one of the reasons for the inefficiency of a court-led resolution of disputes.

The democratic traditions of the Philippines are defined in the texts of the constitutions that have come and gone, as well as the one now existing. There have been the historically significant but largely marginal revolutionary constitution of 1898 when the Philippines successfully repulsed Spain; the colonial constitutions during the American occupation from 1901 until 1935; the Commonwealth constitution of 1935, which lasted until 1972; the 1972 constitution formulated by Ferdinand Marcos for his constitutional authoritarianism; the Freedom Constitution after the authoritarian Marcos was removed from power; and the present constitution that was adopted in 1987.

Typologies

Rakner *et al.* use temporal frames to situate the phases of democratization: liberalization from authoritarian rule, transition to democracy, and consolidation to a democratic system.¹ O'Donnell calls the desirable last phase representative democracy; for Doorenspleet it is liberal democracy.² A democracy that does not reach this stage, if it does not revert to authoritarianism, is labelled unconsolidated or a hybrid regime (Rakner, *et al.*), delegative democracy (O'Donnell), or polyarchy, following Dahl.³

In a liberal democracy, Dahl's prerequisites of democracy are present,

¹ L. Rakner, A. R. Menocal, and V. Fritz, 'Democratization's third wave and the challenges of democratic deepening: Assessing international democracy assistance and lessons learned' (Advisory Board for Irish Aid, Research Project (RP-05-GG), Aug. 2007).

² G. O'Donnell, 'Delegative democracy', *Journal of Democracy* (1994), 5(1): 55–69; R. Doorenspleet, 'Reassessing the three waves of democratization', *World Politics* (2000), 52(3): 384–406.

³ R. A. Dahl, *Polyarchy: Participation and Opposition* (New Haven: Yale University Press, 1972).

i.e. ‘meaningful and extensive competition, sufficiently inclusive suffrage in national elections, and a high level of civil and political liberties’.⁴ Rustow says that complete democracy must have these features: internalization of a sense of national political community; sensible resolution of conflicts over societal issues; institutionalization of crucial aspects of democratic procedure; and consensual submission to democratic rules of contestation.⁵

In a hybrid regime, delegative democracy or polyarchy, the deficiencies or weaknesses are two-fold – failure to achieve a shared commitment to build and strengthen democratic institutions, and the absence of effective means to cope with social and economic problems.⁶ Here, what substitutes for democratic institutions – ‘regularized patterns of interaction that are known, practised, and regularly accepted (if not necessarily normatively approved) by social agents’ expecting to interact ‘under the rules and norms formally or informally embodied in those patterns’ – are ‘other non-formalized but strongly operative practices – clientelism, patrimonialism, and corruption’.⁷

Accountability

Accountability is central to democratic consolidation. The types of accountability are vertical, i.e. through the ballot; horizontal, i.e. institutions designed for that purpose; and societal, i.e. civic associations, other NGOs and independent mass media auditing state actions. Its objectives are:

- justice for the victims
- penalty for the offending public officer
- guarantee for good governance
- option for peace with justice initiatives, where accountability need not be boxed inside removal from power and criminal prosecution
- institutional, for restoring faith in the justness of society
- political, by eliminating sources of recovering power and re-establishing legitimacy

Accountability is hampered when democracy is in the delegative stage, a re-statement of its weakness, because of its ‘anti-institutional bias’ and characteristic

⁴ Doorenspleet, ‘Reassessing the three waves of democratization’.

⁵ D. Rustow, ‘Transitions to democracy: Toward a dynamic model’, *Comparative Politics* (1970), 3: 337–63.

⁶ O’Donnell, ‘Delegative democracy’.

⁷ *Ibid.*, 57, 59.

'high personalization and concentration of power in the executive'. This should explain in this democracy stage the propensity for and attractiveness of extra-institutional means of addressing social and economic ills and regime change, like massive social protests and coups d'état.⁸

Early transitions to Philippine democracy

Early transitions to democracy in the Philippines coincided with the end of its colonial periods and the legacies of large-scale human rights abuses. The first took place in 1898/9, when the first democratic and independent Philippine government was established. Short-lived, this government came with its own constitution that pulsated with independence from Spanish colonial rule and the bill of rights. The second transition, ensuing after the Philippine–American war, saw varied forms of colonial governments initiating elections and respect for rights by the state. This went on until American tutelage ended in 1935, with the formal declaration of an independent Philippine republic. World War II brought the Japanese army to Philippines shores. For five years, as World War II raged, human rights were again violated. The third transition was in 1945, with the liberation from Japanese occupation and the resumption of an independent Philippine republic. This was to be the case until 1972 when Martial Law was imposed.

Contemporary transitions to Philippine democracy

From martial law to democracy, 1986–2001

Huntington and Shin identify the Philippines as belonging to the third wave of democratization.⁹ According to these authors, countries shifting from authoritarianism to democracy in the 1980s and 1990s rode this wave. In the case of the Philippines, Ferdinand Marcos was the turning point. Freely elected president in 1965 and 1969 but unable to run a third time for the presidency, and this was under the Commonwealth constitution, he used martial law powers in 1972 to stay in office. He then brokered the 1972 constitution to keep himself as an almighty President.

Dahl lists three prerequisites of democracy: competition, inclusiveness

⁸ O'Donnell, 'Delegative democracy'.

⁹ Samuel P. Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (Norman: University of Oklahoma Press, 1991); Doh Chull Shin, 'The third wave in East Asia: Comparative and dynamic perspectives', *Taiwan Journal of Democracy* (2008), 4(2).

and civil liberties. Marcos's 1972 constitution, theoretically, allowed elections, guaranteed civil liberties, and retained the functions of the courts. The reality, however, flatly rejected the theory. The elections were rigged and therefore unreliable dispensers of popular mandate.¹⁰ Marcos monopolized power, both political and economic.¹¹ He violently suppressed dissension; his government used killings and enforced disappearances towards this end, and he turned himself literally into the many martyrs' last visions.¹² A total of 100,000 people became victims of extrajudicial killings, enforced disappearances and torture. In Marcos's time, political and civil rights were dead. Economic rights proved no better. Marcos was the only wielder of power, and his control and influence extended from politics to economics.¹³ He lucratively turned the economy into his cronies' businesses, ultimately for his own benefit, creating crony capitalism.¹⁴

Marcos's administration was not just a case of 'potential risk of heightened concentration of executive power'.¹⁵ He was not simply power hungry. Under Doorenspleet's democracy typologies, he led an authoritarian government, as he failed to meet the requirement of competition, i.e. no citizens' access to policy options and participation in policy creation, nor 'institutionalized constraints' on Marcos' exercise of power.¹⁶

In 1985, amidst pressure from the United States and the restive Filipino people, Marcos was compelled to call special elections for the posts of President, which he held, and of Vice-President. His adversary was Corazon Aquino, the widow of Benigno Aquino, whose death in 1983 had sparked massive outrage against the political repression and economic deprivation attributed to Marcos's government. Official results had Marcos winning over Corazon Aquino. The people protested the perceived grotesqueness of this result.

¹⁰ T. Rivera, 'Transition pathways and democratic consolidation in post-Marcos Philippines', *Contemporary Southeast Asia* (2002), 24(3).

¹¹ C. Hernandez, 'Constitutional authoritarianism and the prospects of democracy in the Philippines', *Journal of International Affairs* (1985), 38(2): 243.

¹² J. M. Sison, *Rise and Fall of Marcos Fascist Dictatorship: Causes and Consequences up to the Present* (2012), <<http://www.philippinerevolution.net/statements/rise-and-fall-of-marcos-fascist-dictatorship-causes-and-consequences-up-to-the-present>>. Accessed 14 Sept. 2012.

¹³ Hernandez, 'Constitutional authoritarianism'.

¹⁴ Rivera, 'Transition pathways'.

¹⁵ J. Paley, 'Toward an anthropology of democracy', *Annual Review of Anthropology* (2002), 31: 469–96; A. C. Armony and H. E. Schamis, 'Babel in democratization studies', *Journal of Democracy* (2005), 16(4): 113–28.

¹⁶ Doorenspleet, 'Reassessing the three waves of democratization'.

In February 1986 Ferdinand Marcos's reign of terror and corruption came to an end. This was the fourth transition. People marched through the streets of EDSA, the acronym of the name of the highway that links north and south of the Philippines' premiere metropolis. The key actors were Corazon Aquino; Cardinal Jaime Sin of the Philippine Catholic Church; Fidel Ramos, then deputy commander of the Philippine Armed Forces and commander of the national police force; Juan Ponce Enrile, then Marcos's defence secretary; and the several social movements, backed by formal organizations, from the left to the right of the political spectrum, united in the aspiration to put an end to Marcos's regime of violent political repression and teeming centralized corruption.

The Presidential Commission on Good Government

The efforts to consolidate Philippine democracy, post Marcos, involved initiating measures to compel accountability and creating institutions for that purpose. Hence in February and March 1986 President Corazon Aquino, using her legislative powers under the Freedom Constitution that was put in place immediately after Ferdinand Marcos was toppled from power and the 1972 constitution set aside, ordered the 'freeze' of all assets and properties in the Philippines, 'prohibit' their disposal, and 'require' full disclosure by all persons in the Philippines holding such assets or properties, through the Presidential Commission on Good Government (PCGG), as proceedings were taking place to determine the assets' legitimacy or illegitimacy.

The tasks of the PCGG are:

- a) The recovery of all ill-gotten wealth, whether located in the Philippines or abroad, including the takeover or sequestration thereof.
- b) The investigation of such cases of graft and corruption as the President may assign to the Commission from time to time.
- c) The adoption of safeguards to ensure that the above practices shall not be repeated in any manner under the new government, and the institution of adequate measures to prevent the occurrence of corruption.

The PCGG's power and authority are designed just to facilitate and conduct investigations. It does not decide whether the assets are ill-gotten or legitimately acquired. Hence it can:

- a) Sequester or place or cause to be placed under its control or possession any property believed to be ill-gotten.

- b) Provisionally take over in the public interest such property or prevent its disposal or dissipation.
- c) Enjoin or restrain any actual or threatened commission of acts against the PCGG.
- d) Administer oaths and issue subpoenas necessary for the PCGG's tasks.
- e) Hold any person in direct or indirect contempt and penalize him or her.
- f) Seek and secure the assistance of any office, agency or instrumentality of the government.
- g) Promulgate such rules and regulations as may be necessary to carry out the purposes of this order.

In exercising its mandate, the PCGG uses the writs of:

Sequestration: taking into custody or placing under the PCGG's control or possession through its fiscal agent any asset, fund or other property, as well as relevant records, papers and documents, in order to prevent their concealment, destruction, impairment or dissipation pending determination of the question whether the said asset, fund or property is ill-gotten wealth under Executive Orders Nos. 1 and 2.

Freeze Order: an order intended to stop or prevent any act or transaction which may affect the title, possession, status, condition, integrity or value of the asset or property which is or might be the object of any action or proceeding under Executive Orders Nos. 1 and 2, with a view to preserving and conserving the same or to preventing its transfer, concealment, disposition, destruction or dissipation.

Hold Order: an order to temporarily prevent a person from leaving the country where his departure will prejudice, hamper or otherwise obstruct the PCGG's task to enforce Executive Orders Nos. 1 and 2.

The PCGG is granted immunity from claims for damages and from being called to testify or reveal information in any court or any other body. It is also empowered to grant immunity from criminal prosecution to any person who provides it information or testifies in any investigation it is conducting.

The criminal and civil cases initiated by the PCGG are filed with the Sandiganbayan, a collegial court in the Philippines and one of three courts ranked just below the Philippine's highest court, the Supreme Court. Notably, in PCGG-initiated cases, the Sandiganbayan can compel a witness to testify or provide information but no testimony or other information compelled under the order

(or any information directly or indirectly derived from such testimony, or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

Accountability with no reparation

The PCGG's thrust and structure are not meant to accomplish all the objectives of accountability. Its key actors, for example, are not adept at asset-tracing or other skills aimed at combating money-laundering. Sleuthing is not one of the major skills demanded of its personnel. The ordinary qualification standards for government employees are the bases for hiring the PCGG's staff. Also, there was no conscious effort to link the social, political and historical contexts of the PCGG's creation. The PCGG does not see its work in the context of the large-scale human rights violations that took place during the Marcos regime. Rather, its mandate is understood in a mindset that it is prosecuting ordinary, though complicated, cases of graft and corruption, with the systematic and political character by which the perpetrators plundered the nation's resources becoming lost on the PCGG's key actors.

The fruits of the PCGG's labour, the assets it recovered, no matter how paltry, are divested of any significance and relation to human rights. Claims for reparation by victims of human rights violations are not one of those identified for financing by PCGG-generated assets. In the end, the PCGG has become just another government agency doing the work of an ordinary bureaucrat.

The Sequestered Assets Disposition Authority and later the Asset Privatization Trust, independent boards, and PCGG's fiscal agent are responsible for determining how to dispose of the assets either acquired by the PCGG or awarded to it pursuant to a decision of the Sandiganbayan, if the assets have not been set aside for some purpose. Their job is to transfer, sell, assign or otherwise dispose of these assets 'on such terms and conditions as are in the best interest of the National Government'.

Resources obtained from the PCGG's exercise of power have been earmarked for various at times criss-crossing purposes, but never for reparation.

Republic Act 9700 (2011) makes land acquired by the PCGG in the exercise of its mandate open to distribution for land reform, while Republic Act 8532 (1998) allocates receipts from proceeds of assets and sales of ill-gotten wealth to fund the agrarian or land reform programme.

Republic Act 7202 (1992) allocates 'assets or funds that may be recovered, or

already recovered, which have been determined to have been stolen or illegally acquired from the sugar industry' for compensating 'all sugar producers from Crop Year 1974–1975 up to and including Crop Year 1984–1985 on a pro rata basis.'

Executive Order 313 (2000) sets aside the coconut levy shares in the San Miguel Corporation as initial capital for a trust fund to be used for 'the purpose of financing programs of assistance for the benefit of the coconut farmers, the coconut industry, and other agri-related programs intended to maximize food productivity, develop business opportunities in the countryside, provide livelihood alternatives, and promote anti-poverty programs.'

The exclusion of reparation from among the PCGG's mandate is anomalous. Marcos's government was deposed for, among other reasons, its rabid repression of human rights. Accountability was reiterated as a fundamental democratic principle in the 1987 constitution.¹⁷ This constitution is a documentation of Appadurai's 'politics of hope', where 'social development (including a deeper consciousness of rights, broader access to knowledge, and fuller participation in the public sphere) is taken to be the best road to equality (seen as the reduction or elimination of poverty)'.¹⁸ The constitution impresses the 'classical idea of popular sovereignty' and rule of law in which citizens are equal, and simultaneously seeks legitimacy by obliging the State to 'provide for the well-being of the population'.¹⁹ Yet a budget for human rights claims has been altogether ignored. A monument was erected for human rights victims, but that is all. No money has been allocated to recognize and compensate them for their sufferings and sacrifices.

PCGG: More of the same

To be sure, the efforts to protect human rights and to check corruption in the Philippines did not begin in 1986 or after Ferdinand Marcos's fall from power. For even before he began his authoritarian rule and throughout his reign of terror

¹⁷ Hence, a whole article in the 1987 constitution is devoted to accountability. It re-instituted existing institutions – the Civil Service Commission, Office of the Ombudsman, Sandiganbayan, power of impeachment – to compel accountability. For the first time, the constitution elevated to fundamental prominence the rule that 'the right of the State to recover properties unlawfully acquired by public officials or employees, from them or from their nominees or transferees, shall not be barred by prescription, laches, or estoppel.' The constitution also recognized the validity of the PCGG's sequestration or freeze orders but required that these writs be issued only upon showing of a prima facie case and that these writs are deemed automatically lifted if no judicial action or proceeding is commenced. The constitution created, too, the Commission on Human Rights whose work on human rights has all but been felt.

¹⁸ A. Appadurai, 'Hope and democracy', *Public Culture* (2007), 19(1): 29–34.

¹⁹ P. Chatterjee, *The Politics of the Governed* (New York: Columbia University Press, 2004).

and corruption, existing statutes against corruption and the violation of human rights remained part of the legal system and thus ought to have been followed.

For instance, Republic Act 1379, which was enacted in 1955, provides the procedure for the forfeiture in the state's favour any property found to have been unlawfully acquired by any public officer or employee. This statute says that whenever any public officer or employee has acquired during his or her incumbency an amount of property manifestly out of proportion to his or her salary as such public officer or employee and to his other lawful income and the income from legitimately acquired property, the property shall be presumed *prima facie* to have been unlawfully acquired. Giving substance to this presumption is the requirement that all Philippine public officials, before entering public office, every year they are such, and when they terminate their official functions, must list and reveal all their assets and liabilities, sources of income, and relatives employed by the Philippine government, local and national, under pain of criminal sanctions.

Republic Act 3019, the 'Anti-Graft and Corrupt Practices Act', was passed into law in 1960 and penalized every conceivable corrupt practice committed by any public employee or officer.

Under the Civil Code, which came into force in 1949, any violation of human rights that results in an injury, physical or otherwise, provides a cause of action for damages.

The Revised Penal Code, which has been in effect since 1930, requires public officers and employees who commit crimes in relation to or aided by their office to restore the things obtained or repair the damage caused by their acts.

The wholesale plunder of economic resources and violations of human rights by Ferdinand Marcos, his family and his associates cannot therefore be attributed to the absence of formal mechanisms to control public officers' malfeasance or misfeasance in office. The explanation, it appears, is the inability of the Philippines to complete its process of democratization with the features identified by Rustow, or to surpass O'Donnell's characterization of a delegative democracy or polyarchy – failure to achieve a shared commitment to build and strengthen democratic institutions, absence of effective means to cope with social and economic problems, and conversely, the rise of clientelism, patrimonialism, and corruption. Rivera describes Philippine democratization as a 'colonially rooted installation of formal democratic rules of contestation lacking the initial nourishing environment of a working national unity'.²⁰ Philippine democracy

²⁰ Rivera, 'Transition pathways', 468.

does not have a national consciousness of ‘institutionalized uncertainty’, i.e. ‘in a democracy, all outcomes are unknown and are open to contest among key players ... and the only certainty is that such outcomes will be determined within the framework of pre-established democratic rules’.²¹

As the PCGG is unable to rise above the practices of an ordinary government office and exercise its mandate, it becomes prone to these problems as well. The ‘good government’ in the acronym PCGG has ceased to be an inspiration in the way it does its work amidst charges of corruption and complicity with the Marcoses against some of its officers.

This condition of Philippine democracy persists up to this day. It gives important context to a survey that concluded that for most Filipinos economic development is more important than democracy.²² Subliminally, this means that Filipinos are willing to become authoritarian if food, jobs and shelter are abundant. The same sentiment was expressed by most Filipinos when asked about how the 1986 transition has affected their lives. They felt that it lacked the capacity to foment good governance and lasting social change.²³ These perceptions of democracy as incapable of delivering the social entitlements promised by the 1987 Constitution are dangerous because democratic institutions are seen to be inutile.

Despite the weakness of its institutions, the official discourse in the Philippines is to turn the issue of accountability – including that of Ferdinand Marcos, his family and his cronies – into a legal and bureaucratic concern. Of course, this would have been ideal if democracy and its institutions were flourishing in the country, but, like other disputes that have been legalized for their resolution, institutional problems abound.

1. Complaints – for example, against Marcos *et al.* – are inefficiently resolved. They take a long time to be decided in exchange for a measly judgment, if at all; they are delayed for the flimsiest of causes or issues. Complaints get bogged

²¹ Przeworski, cited in Rakner, Menocal and Fritz, ‘Democratization’s third wave’.

²² J. Abueva and L. L. Guerrero, *What Democracy Means to Filipinos* (Taipei: Asian Barometer Project Office, National Taiwan University and Academia Sinica, Working Paper Series No. 5, 2003), <<http://www.asianbarometer.org/newenglish/publications/workingpapers/no.5.pdf>>. Accessed 12 Sept. 2012.

²³ J. H. Liu and C. Gastardo-Conaco, ‘Theory and methods of a representational approach to understanding social movements: The role of the EDSA revolution in a national psychology of protest for the Philippines’, *Social Justice Research* (2011), 24(2): 168–90, <<http://www.springerlink.com/content/m57g2278115214n2/fulltext.pdf>>. Accessed 12 Sept. 2012.

down by perceived technical or formal deficiencies in the proceedings or the form of the papers submitted. This flaw distracts from the seriousness of the charges involved. To illustrate:

- Civil Case No. 0009, one of the cases initiated by the PCGG against Marcos, his family and his cronies, was filed with the Sandiganbayan in 1987 but went through pre-trial only in 1996 all the way to 1997. Ordinarily, the pre-trial of a case takes place one month (or, at most, three months) after a case is filed in court, and the pre-trial itself does not take a year to complete but is over in one or two hearings within just a month. For whatever reason, the PCGG, through state prosecutors, completed presenting its evidence in the year 2000, and as it was about to rest its case, remembered to make the late offer of one more important document that it had omitted to introduce as evidence: the transcript of the deposition of a key witness. The Sandiganbayan refused to admit this document as part of the PCGG's evidence. In the year 2001, believing the importance of this document in the presentation of its case, the PCGG appealed the Sandiganbayan's refusal to the Supreme Court. Meanwhile, the proceedings before the Sandiganbayan were suspended to await the Supreme Court's action on the appeal. After ten long years, in 2011, the Supreme Court decided to deny the PCGG's appeal. It is only now that Civil Case No. 0009 is again being heard by the Sandiganbayan, and, without the transcript of the deposition as evidence, a PCGG defeat might well be inevitable.
- In 1986, the PCGG sequestered the company Tourist Duty Free Shops, Inc. and froze all its bank accounts. In 1987 the PCGG filed with the Sandiganbayan Civil Case No. 0008 against Ferdinand Marcos, his wife and his business associates. In 2001 the same Sandiganbayan stopped the enforcement of the sequestration and freeze orders. Proceedings in Civil Case No. 0008 were suspended as the PCGG appealed to the Supreme Court the Sandiganbayan's order to stay the sequestration and freeze orders. After ten years, in 2011, the Supreme Court decided to reverse the order of the Sandiganbayan. It is only now that Civil Case No. 0008 may be decided.
- In 1987 the PCGG initiated Civil Case No. 0011. It completed presenting its evidence, after proceedings before the Supreme Court, only in 2010. Noticeable from this civil case is the recognition that 'given the voluminous documents and papers involved in ill-gotten wealth cases, it was indeed unavoidable that in the course of trial certain documentary exhibits were omitted or unavailable by inadvertence, as what had happened in this case

where the subject original documentary evidence were found misfiled in a different case folder'. There therefore needs to be an excellent records management system in the prosecution of ill-gotten wealth cases.

- Civil Case No. 0014 was dismissed for the PCGG's failure to present evidence against the Ferdinand Marcos, his wife and his business associates.

2. In the case of the PCGG-initiated cases, the only things that can be decided upon are, first, that corruption existed during the Marcos regime, and second, that the assets in the names of Marcos, his family and cronies were products of such corruption. Accountability has ignored or neglected human rights claims. In fact, the official position of the Philippine government is to reject reparation for human rights victims as among the official destinations for the proceeds of the Marcos assets, ill-gotten or otherwise.²⁴ Further, a compensation bill has been gathering cobwebs before the House of Representatives for over fifteen years now. It is thus easy to believe that the Philippine government gives no – or, at best, low – priority to the victims of human rights abuses during Marcos's time or any other time in Philippine history.

3. Even if accountability is limited to resolving the issue of corruption, the complaints initiated by the PCGG have to struggle for time in the Sandiganbayan's calendar for hearing cases. And if they do get to be heard, the prosecutors handling these cases have to deal with the administrative delay in obtaining evidence, if indeed there is any. And, with the high turnover of lawyers handling these cases, they have to spend time getting up to speed with case strategies and other aspects of the case. More often than not, too, prosecutors are ill-equipped to understand critical non-legal facets of the complaints and go to trial effectively. They have no background knowledge in such matters as reading financial statements or comprehending technical commercial terms and procedures, which are necessary to track and recover the ill-gotten wealth of Marcos *et al.* They have no understanding of the political nature of these cases. They have no idea of what transitional or transformational justice is all about. These topics are alien to the lawyers handling these cases. Other problems include errors in the prosecution of cases through a lack of appropriate guidance and trial skills, uncertainties in the interpretation of the law, lack of zeal and commitment, and the invisible hands of clientelism, patrimonialism, and corruption. Lastly, while all these contribute to

²⁴ See, for example, *Republic v. Villarama et al.*, G.R. No. 117733, 5 September 1997.

the delay in resolving the complaints against Marcos *et al.* justly and efficiently, there is unfortunately no official study that identifies which of these factors affect the desired goal the most, and which of them only marginally.

The legal and bureaucratic discourse has therefore failed on essentially two fronts – as it continues to ignore the human rights violations that the Marcos regime and other governments had perpetrated, the corruption cases that the PCGG initiated to forfeit the assets supposedly illegally acquired are also floundering.

To be fair, the PCGG has had some success in discharging its mandate. For example, properties were ceded to the PCGG, on behalf of the Philippine government, in exchange for immunity from prosecution for the assignors. The assignors were former cronies of Ferdinand Marcos.²⁵ Success was also registered through the use of the statutory presumption of assets being ill-gotten and the trial technique of summary judgment, which does not require the presentation of evidence through a regular trial and which demands some activism from the court hearing and deciding the case.²⁶ However, what these instances of success show is the difficulty of recovering ill-gotten wealth solely through the legal and bureaucratic – and especially trial – process.

Surviving Gloria Macapagal-Arroyo's strong republic: From 2004 to 2010

Formal democracy has been observed from 1986 to the present. Elections were held regularly and there is open public space to initiate conversations and to exercise free expression on any topic. But the substance of democracy was frighteningly threatened during the latter part of the administration of Gloria Macapagal-Arroyo.

In 2001 Vice-President Gloria Macapagal-Arroyo was sworn into office as President after President Joseph Ejercito Estrada was ousted from power. The Philippine Supreme Court categorized Estrada's fall from power as 'constructive resignation' when both the political and military components of the Philippine government refused to heed his mandate. The ouster was effectively a coup d'état that had the support of the Philippine capital city's middle class and civil society groups. Between 2001 and 2004, much promise was shown by Macapagal-Arroyo – until she decided to run for another presidential term in 2004.

The presidential election of 2004 was essentially between Macapagal-Arroyo

²⁵ For example, in the court cases *City of Pasig v. Republic*, G.R. No. 185023, 25 August 2011, and *Republic v. Sandiganbayan et al.*, G.R. No. 108292, 10 September 10.

²⁶ For example, *Republic v. Sandiganbayan et al.*, G.R. No. 152154, 15 July 2003.

and the hugely popular movie actor Ferdinand Poe Jr. The election was generally unimpressive. However, after Macapagal-Arroyo was declared President-elect, secretly taped conversations between Macapagal-Arroyo and a top official of the Commission on Elections were divulged. In those conversations, they were heard orchestrating massive cheating in the presidential election. Unrest among junior military officers followed. Civil society groups were similarly agitated. In the process of trying to survive the challenges to her hold on power, Gloria Macapagal-Arroyo unleashed war on the fringes. As a result, not less than 1,000 people were subjected to extrajudicial killings, enforced disappearances and torture. Human rights violations were again escalating until United Nations Special Rapporteur Philip Alston completed his fact-finding mission in the Philippines. At about this time, the Philippine Supreme Court introduced the special procedures of *amparo* and *habeas data* to address the wave of extrajudicial killings, enforced disappearances and torture.

Unfortunately for the victims of human rights violations during Macapagal-Arroyo's term, there were no programmes to address the injustices that they suffered. In fact, up to today, those reported missing can still not be found. An attempt to establish a Philippine Truth Commission in 2010, when Macapagal-Arroyo's term as President ended, was struck down by the Philippine Supreme Court as unconstitutional. The reasons were: (a) the search for truth cannot be limited to the tenure of Macapagal-Arroyo but must extend to the Spanish times when human rights violations were also prevalent; and (b) the Philippines is not in the process of democratization but is a full-blown democracy so that any grievance must be lodged with existing bureaucracies for their resolution.²⁷ Understandably, just like the human rights victims from the Martial Law regime, the victims of the Macapagal-Arroyo administration had to resort to civil society interventions to obtain justice.

Civil society intervention

Chatterjee distinguishes between two conceptualizations of society: civil society, where the theoretical popular sovereignty and textual rule of law and equal rights description of democracy are expounded but often contested, and political society, where protests are addressed on a political terrain quite divorced from, though legitimated by, normative democratic values.²⁸ These typologies should be

²⁷ *Biraogo v. The Philippine Truth Commission*, G.R. No. 192935, 7 December, 2010.

²⁸ Chatterjee, *The Politics of the Governed*.

useful in resolving the impasse when seeking forfeiture of ill-gotten assets for the objectives enumerated above.

As the Philippine experience shows, trusting the mission solely to the legal fiction of the rule of law and the bureaucratic theory of the supremacy of democratic institutions may result in tragic consequences. Interventions on the political terrain are indispensable. Certainly, the Marcos's cronies or associates would not have agreed to assign properties to the Philippine government had the political movements lain low. The statutory presumption of ill-gotten wealth is not a product of the law working above people and institutions but of people working through institutions to make this presumption into law. Significantly, human rights claims will not be forgotten, even if they are ignored or neglected by institutions of the state, if social movements and a critical mass clamour for them.

The Philippine constitution's bias for societal accountability, i.e. a wide public place where 'a robust civil society [has] militantly advanced the social and economic interests of the various disadvantaged sectors', has compensated for the historical experience of weak institutional contestation, i.e. vertical and horizontal accountability.²⁹ This is inevitable in a society like the Philippines where some thirty-four million Filipinos live in dire poverty under a horrendous public fiscal position, where forty per cent of the government budget goes to debt-servicing alone, and an active military mindset of intervention, euphemistically called 'nation-building',³⁰ pervades the thinking even of civilian leaders.³¹ These offer wide opportunities to rupture institutions, so it makes sense at times to reserve the strength of the legal system in the hands of political contexts. Political society 'occupies a unique interstitial ground between the highly concentrated powers of the state and the usually highly diffuse powers of popular sentiment, will, and mobilization. It provides the institutional channels, or lineaments, along which power flows, or becomes blocked and diverted'.³²

Compensation of human rights claims by the violators themselves, howsoever their assets are denominated, should not be denied or ignored. Neither should

²⁹ Rivera, 'Transition pathways'.

³⁰ D. Acop, 'Assessing the expanded role of the armed forces of the Philippines in nation-building', *Asia-Pacific Social Science Review* (2006), 6(2):131–52, <http://www.dlsu.edu.ph/research/journals/apssr/pdf/200612/science_5.pdf>. Accessed 12 Sept. 2012.

³¹ A. Doronila, 'Stand-off in Fortress Tripoli unlike Edsa 1', *Philippine Daily Inquirer* (3 Jan. 2011), <<http://global.factiva.com.ezproxy2.library.usyd.edu.au/ha/default.aspx>>. Accessed 12 Sept. 2012.

³² Jonathan Hearn, 'Taking liberties: Contesting visions of the civil society project', *Critique of Anthropology* (2001), 21: 339–60.

their resolution be left to legal discourse alone. To begin with, it is both a matter of justice and a consciousness of lessons learned that should not be repeated, that the victims' victimization is acknowledged with something more than tokenism.

For then Associate Justice (now Chief Justice) Ma. Lourdes P.A. Sereno of the Philippine Supreme Court, on typifying the importance of a creating a truth commission, the overall need to shape collective memory about injustices done is motivated by several beneficial effects: to prevent impunity from becoming the norm, where 'might makes right', and to resist the recycling of oppressors as politicians in the new order because they have the wealth to do so; to reinforce the rule of law and educate people about the nature and extent of past wrongdoings; to give value to the utility and meaning of truth to those who have been aggrieved; to help society, especially the victims, to obtain the courage to believe that a just society exists.³³ The Chief Justice, quoting Hom and Yamamoto, concludes:

For many of the 10,000 Philippine citizens tortured and murdered for their political opposition to the former Ferdinand Marcos regime, reshaping memory became both a means to challenge injustice and a psychological end in itself. Consider the anguish of the family of Archimedes Trajano, a college student who posed a mildly critical question to Marcos's daughter at a forum and was whisked away, tortured for days, and thrown off a building. For his family, and thousands of others, there existed the need to create a new memory beyond the excruciating story of personal loss and

³³ M. L. P. A. Sereno, 'Dissenting Opinion', *Biraogo v. The Philippine Truth Commission*, G. R. No. 192935, 7 December 2010, <http://sc.judiciary.gov.ph/jurisprudence/2010/december2010/192935_sereno.htm>. Accessed 24 Apr. 2013. She said:

Striking down efforts to give the public information regarding the misdeeds of powerful officials sends a signal of the continuing dominance of 'might makes right' and the futility of attempting to hold public officials accountable for their actions. Conversely, by carrying out investigations of the past actions of public officials, and by holding up its results to public scrutiny and criticism, the government reinforces respect for the rule of law and educate the people on the nature and extent of past wrongdoing. Moreover, the characterization of public discussion – the 'second forum' – as an inappropriate venue for the release of the PTC's findings devalues the utility and meaning that truth possesses for the aggrieved group, and denigrates the need for the construction and repair of the group's collective memory. Indeed, the Concurring Opinion implies that the PTC's influence on public perceptions – and consequently the shaping of the collective memory of Filipinos – will only instigate more injustice. To the contrary, the need to shape collective memory as a way for the public to confront injustice and move towards a more just society should not be diminished or denied. The Concurring Opinion disregards the significance to justice of what is seen and remembered and eliminates the vital role of the people themselves in 'constructing collective memories of injustice as a basis for redress.' This disregard need not prevail. There is much value to be found in memory ...

suffering – a memory that included a sense of social justice and government accountability. To write this new memory collectively, many families, lawyers, bureaucrats risked much in the Philippines to aid the thirteen-year human rights multidistrict class action litigation in the United States.

There are some recommendations on how to avoid the delays that derailed the corruption cases against Ferdinand Marcos, his family and his cronies.³⁴ These require state action. But equally importantly, the intersecting concerns of human rights, corruption and the recovery of ill-gotten wealth could learn from the commitment and activism of social movements, which broke the inertia of state passivity.

To begin with, an adversarial court system may not be the best mechanism for resolving these issues. It is not improbable that the victims would once again feel victimized by the terrorizing atmosphere of a court hearing where the court or the judge, sitting as a disinterested umpire, is unable to protect them from over-eager defence lawyers. Furthermore, in this system, technical matters are prevalent and often decisive.

Facilitation and investigation with the power to decide and enforce decisions, provided due-process rights are respected, should replace the adversarial system. This forum is more efficient and humane because it has more control of the processes and the proceedings and it turns more on the substance than on the technicalities. Social movements must be at the forefront of laying the groundwork for this accountability forum; this cannot be left to official legal and bureaucratic discourse to unravel. Social movements must also involve themselves in consistent and incessant efforts to inform, educate and persuade the people about the importance and centrality to their lives of retrieving ill-gotten assets and of determining and writing the truth about human rights violations and corruption. Only then, with the creation of a critical mass, can significant progress be achieved.

Social movements have initiated what the Philippine government refused

³⁴ These are: a. There must be a strong and legally enforceable presumption of when wealth is deemed ill-gotten. b. The body tasked to enforce the build-up and prosecution of ill-gotten wealth cases must have as much power as the PCGG but given more resources and allowed to hire the best staff with legally binding commitments to stay for a minimum period of time. c. An efficient and fail-proof records-keeping must be put in place, always considering the probability of a long-drawn legal battle where a deluge of documents is inevitable. d. A dedicated court must be assigned for purposes of trying this type of cases. Appeals in the course of the proceedings must be disallowed; so must tactics, both those obviously dilatory and even merely tending to delay, be prohibited. If appeals are sanctioned, a deadline must be required for the resolution thereof.

or neglected to do so far as compensating human rights victims or bringing to steady and consistent public attention the evils of corruption.

In the Philippines, for example, the Center for People Empowerment in Governance (CENPEG) has published a dictionary of the words used by rent-seeking officials and bribers to facilitate their illegal transactions and pursuits. This dictionary aims to expose and shame these corrupt individuals and keep the people's consciousness active and alive against graft and corrupt practices and the individuals who engage in them. The political pressure brought about by this book was such that the Philippine court in its proceedings referred to this dictionary in defining the terms embedded in the practice of corruption. Obviously, for parochial reasons, the Philippine government would not have conceived of publishing this book.

Human rights victims have successfully prosecuted a class-action suit for damages against Ferdinand Marcos and his estate in Hawaii, United States.³⁵

³⁵ On May 9, 1991, a complaint was filed with the United States District Court (US District Court), District of Hawaii, against the Estate of former Philippine President Ferdinand E. Marcos (Marcos Estate). The action was brought forth by ten Filipino citizens who each alleged having suffered human rights abuses such as arbitrary detention, torture and rape in the hands of police or military forces during the Marcos regime. The Alien Tort Act was invoked as basis for the US District Court's jurisdiction over the complaint, as it involved a suit by aliens for tortious violations of international law. These plaintiffs brought the action on their own behalf and on behalf of a class of similarly situated individuals, particularly consisting of all current civilian citizens of the Philippines, their heirs and beneficiaries, who between 1972 and 1987 were tortured, summarily executed or had disappeared while in the custody of military or paramilitary groups. Plaintiffs alleged that the class consisted of approximately ten thousand (10,000) members; hence, joinder of all these persons was impracticable.

The institution of a class action suit was warranted under Rule 23(a) and (b)(1)(B) of the US Federal Rules of Civil Procedure, the provisions of which were invoked by the plaintiffs. Subsequently, the US District Court certified the case as a class action and created three (3) subclasses of torture, summary execution and disappearance victims. Trial ensued, and subsequently a jury rendered a verdict and an award of compensatory and exemplary damages in favor of the plaintiff class. Then, on February 3, 1995, the US District Court, presided by Judge Manuel L. Real, rendered a Final Judgment (Final Judgment) awarding the plaintiff class a total of One Billion Nine Hundred Sixty Four Million Five Thousand Eight Hundred Fifty Nine Dollars and Ninety Cents (\$1,964,005,859.90). The Final Judgment was eventually affirmed by the US Court of Appeals for the Ninth Circuit, in a decision rendered on December 17, 1996.

On May 20, 1997, the present petitioners filed Complaint with the Regional Trial Court, City of Makati (Makati RTC) for the enforcement of the Final Judgment. They alleged that they are members of the plaintiff class in whose favor the US District Court awarded damages. They argued that since the Marcos Estate failed to file a petition for certiorari with the US Supreme Court after the Ninth Circuit Court of Appeals had affirmed the Final Judgment, the decision of the US District Court had become final and executory, and hence should be recognized and enforced in the Philippines, pursuant to Section 50, Rule 39 of the Rules of Court then in force.

See <<http://sc.judiciary.gov.ph/jurisprudence/2005/apr2005/139325.htm>>. Accessed 24 Apr. 2013.

They have been adjudged victims and compensation has been ordered. The US Court's judgment is now before a Philippine trial court for its enforcement as a foreign judgment. The long journey by the indefatigable martyrs of Marcos's reign of terror is nearing its hopefully fruitful end – though somewhat late because, with their resources, the Marcos family and their cronies are again back in power in the Philippines.

Another instance was when health workers detained by the military during the administration of then President Gloria Macapagal-Arroyo, on allegations that they were communist guerrillas, sued the former President and concerned military officers for damages. Their causes of action are violations of their human rights, specifically, against torture, illegal detention and the manufacture of bogus evidence. The health workers resorted to a civil case because of the unwillingness of government institutions to initiate, let alone decide favourably on, such complaints through the usual criminal prosecutions or the removal from power of the perpetrators. Private accountability, like the civil case for damages against Macapagal-Arroyo *et al.*, will need only the patience, resourcefulness and initiative of political society, which are in abundant supply in the Philippines. What is more, as mentioned above, hitting these wayward leaders at points where they can no longer recycle themselves as leaders, because their resources for doing so are taken away from them and distributed among their victims, prevents impunity from taking place. The case for damages of these health workers is awaiting trial.

In addition, the murder of around a hundred individuals in Maguindanao, a province in southern Philippines – consisting of journalists, lawyers, civil society members, local politicians and their supporters, carried out by the clan of a local politician having strong links to then President Macapagal-Arroyo, using the clan's private armed group – is undergoing trial. While this is essentially a criminal case, it has claims for damages and several orders for the freezing of the clan's wealth, supposedly ill-gotten. This case is moving forward only because of the activism of social movements and their proactive efforts to eliminate the political clout of the perpetrators by depriving them of their financial and economic resources that have in the past been used to buy off witnesses and grease the wheels of justice to turn in their favour. Political society pressure moved legal discourse to abandon a normative reaction, which prevented lumping this criminal case with ordinary criminal cases, and instead pushed all concerned to treat it as a case of paramount importance – in local parlance, 'the trial of the century' – and to give it all the resources it needed for its efficient and effective resolution.

Undoubtedly, the mobilization of public opinion is necessary when domestic democratic normative institutions are weak. This mobilization is important for two reasons – it helps unclog the systemic deficiencies in an adversarial legal system by marshalling resources to avoid the usual route; and, by freezing assets, it focuses attention on corrupt tyrants so they may never again return to power and, in distributing these assets among the victims and development, obtains real individual justice for each of them and the people at large. If these were done, there would be justice for the victims, penalty for the offending public officer, guarantees of good governance, and another effective option for peace with justice initiatives. Certainly, the effort to accomplish these objectives is gargantuan. It is quite like professing and making love in times of the cholera – so sweet but so laborious, if not lonely. But it is the only way in which to say, meaningfully, ‘never again’, and not ‘never again, but to what?’

Lessons learned

What was positive regarding the transitional justice process in the Philippines?

- Civil society played a decisive role in the process of raising awareness that assets acquired as a result of economic rights abuses such as corruption needed to be recovered.
- Civil society had been resilient and committed in gathering information and documenting acts of injustice. The approach did not stop at easy accessible targets but tracked ill-gotten wealth of people who are politically connected.

What was challenging regarding the transitional justice process in the Philippines?

- Despite the establishment of the PCGG there was little political will to identify perpetrators and compensate victims.
- The church played an influential role but was divided.
- Although information of unlawful appropriations was available, the structures in documentation were dysfunctional.
- There was a criminalization of activists as rebels. There is no room for the government to be critiqued.
- It had been difficult to build a critical mass, because people in the Philippines lack political and human rights knowledge.
- Other human rights abuses beyond unlawful asset appropriations were not documented.

- There was resistance by the military to the process and judicial activism was lacking.
- Sadly, the cycle of corruption in Philippines has not been broken yet, and the same people involved in asset misappropriation are implicated in gross human rights violations too. Thus, there is a continuation of violations, and the perpetrators' children are also involved as they inherit this wealth.
- There were no reparations for the victims as the mandate of the PCGG was only limited to asset recovery.

Is the strategy of the Philippines to address transitional justice issues applicable to Zimbabwe?

- The Philippines' experience can be applied in Zimbabwe to raise awareness that assets acquired as a result of economic rights abuses such as corruption (often by people who are politically connected) need to be and can be recovered.
- Recovered assets could be channelled to fund reparation programs, that is paying compensations, and rehabilitation of victims
- Taking the PCGG as a model, Zimbabwe can also benefit from such a separate body to investigate corruption provided it is properly constituted.

KENYA

Justice in Transition: Gains and Pitfalls in Kenya and Beyond

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ABSTRACT

Kenya suffers from a legacy of different colonial and post-colonial governance systems, under which gross human rights violations and economic crimes were committed with no recourse for effective redress.

For many years, a culture of impunity prevailed, which only deepened the conflicts within the society. As a result of this, key transitional justice mechanisms have been put in place: constitutional reforms, truth commissions, criminal accountability via public interest litigation, reparation and memorialization, research and documentation, vetting and lustration, peace-building and conflict management.

This paper captures my reflections and perspectives on transitional justice issues and processes in Kenya and Africa at large. It aims to achieve the following objectives:

- To provide an understanding of the Kenya Human Rights Commission and Kenya's civil society perspectives with respect to transitional justice discourse and projects.
- Analyse the political context of impunity in Africa against the various injustices and the state's human rights obligations.
- Discuss the various transitional justice mechanisms in Kenya in the context of the new constitutional dispensation among other democratization and accountability processes.
- Make concluding remarks and illuminate a general way forward.

It is time for state and non-state actors from Africa and other societies in transition to strengthen their partnership around pertinent transitional justice and governance issues, for most of these societies have similar colonial and post-colonial experiences and situations, characterized by impunity.

About the Kenya Human Rights Commission

The Kenya Human Rights Commission (KHRC) is a national NGO established in 1992 to entrench human rights and democratic values in the society. Moreover, partnerships with like-minded state and non-state actors, including survivor groups, and among human rights networks are equally important towards this goal at the national, regional and global level.

With the Ford Global funding and other opportunities, the KHRC is moving towards being a 'domestic transnational' organization in global governance. This means that the Commission will be able, directly and in partnership with like-minded partners, to set the regional and global human rights agenda, which includes transitional justice.

The KHRC believes that transitional justice and the development and implementation of pro-people constitutional, legal and policy reforms are critical in the realization of this vision. Currently, the KHRC works with twenty-seven community/victim-based networks; is a member of twenty national, twenty regional and twenty-five international human rights networks; most of these are transitional justice driven.

It is against this background that I am sharing both our organizational and country-level experiences in this conference, which provides a strategic forum for key scholars and practitioners to discuss transitional justice issues from regional and international dimensions.

Political background: The culture of impunity

Kenya, like other African and developing polities, is a product of repugnant colonial and post-colonial governance systems and practices, which have long been designed and applied to deepen political, social and economic injustices in society.

Throughout all the regimes, abominable human rights violations and economic crimes have been committed by both state and non-state actors, allowing no recourse for effective redress by victims. This has deepened and entrenched the culture of impunity in the society. Impunity generally means exemption from punishment or loss or escape from fines.

Specifically, the international human rights law defines impunity as the impossibility, *de jure* or *de facto*, of bringing the perpetrators of violations to account – whether in criminal, civil, administrative or disciplinary proceedings – since they are not subject to any inquiry that might lead to their being accused, arrested, tried and,

if found guilty, sentenced to appropriate penalties, and to making reparations to their victims.¹

Experts in the transitional justice discourse and international human rights laws describe the root causes of impunity as the failure of the state at four levels:

- Failure to meet their obligations to investigate violations.
- Failure to take appropriate measures in respect of the perpetrators, particularly in the area of justice, by ensuring that those suspected of criminal responsibility are prosecuted, tried and duly punished.
- Failure to provide victims with effective remedies and to ensure that they receive reparation for the injuries suffered.
- Failure to ensure the inalienable right to know the truth about violations; and to take other necessary steps to prevent a recurrence of violations.

After independence in 1963, nothing much changed, and impunity continues unabated as many citizens continue to face afflictions as a result of state repression or inaction. Impunity in Kenya is manifested in the following injustices and victims: political assassinations and killings; torture, inhuman and degrading treatment; arbitrary arrest and detention; disappearances, abductions and extra-judicial killings.

Other manifestations are conflict, insecurity and civil strife; internal displacement and landlessness; poverty and socio-economic inequality; sexual and gender-based violence; discrimination against women, youth and other vulnerable groups in social, economic and political opportunities; and general authoritarianism within the arms and organs of the state.²

In this context, Kenya and other states stand accused of acts of commission and omission and a failure to meet their international obligations to respect, protect and promote the rights of the citizens. The *obligation to respect* requires the states parties to refrain from any measures that may deprive individuals of the enjoyment of their rights or their ability to satisfy those rights by their efforts.

¹ United Nations, *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*. 8 February 2005, E/CN.4/2005/102/Add.1, <<http://www.derechos.org/nizkor/impu/principles.html>>, accessed 24 Apr. 2013.

² See *Justice Delayed: A Status Report on Historical Injustices in Kenya* (Nairobi: KHRC 2011), <http://www.khrc.or.ke/resources/publications/doc_download/13-justice-delayed.html>; *Transitional Justice in Kenya: A Toolkit for Training and Engagement in Kenya* (Nairobi: KHRC, ICJ-Kenya, and ICPC, 2009), <http://www.khrc.or.ke/resources/publications/doc_download/7-transitional-justice-in-kenya-a-toolkit-for-training-and-engagement.html>; Task Force Report on the Establishment of a Truth Justice and Reconciliation Commission (Nairobi, 2003); Kenya, Truth Justice and Reconciliation Commission Act (No. 6 of 2008).

The *obligation to protect* requires the state to prevent violations of human rights by third parties. Finally, the *obligation to fulfil* requires that states take measures to ensure that people under their jurisdiction can satisfy their basic needs.³

Transitional justice mechanisms in Kenya

Transitional justice, according to Roht-Arriaza, includes ‘that set of practices, mechanisms and concerns that arise following a period of conflict, civil strife or repression, and that are aimed directly at confronting and dealing with past violations of human rights and humanitarian law’.⁴

For many years, state and non-state actors have been involved in truth, justice and reconciliation-related interventions without necessarily framing them as transitional justice.

The key transitional justice mechanisms applied in Kenya are constitutional reforms; truth commissions; criminal accountability via public interest litigations; reparations and memorialization; and others such as research and documentation, vetting and lustrating, peace-building and conflict management. Below we explore the application of these mechanisms in Kenya.

The constitution of Kenya as a transitional justice framework

Key gains and achievements

The constitution (promulgated in August 2010) provides a key framework for transitional justice work in Kenya. The following provisions are critical in pursuing the transitional justice agenda, especially in providing the guarantees of non-repetition of atrocities committed:

- The *Preamble* acknowledges those who suffered and were involved in the struggle for freedom and independence. *Article 9* recognizes *Mashujaa* (heroes) by changing Kenyatta Day to Mashujaa Day, one of the three

³ See, for instance, *International Covenant on Economic, Social and Cultural Rights*, <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>>, accessed 29 Apr. 2013; *International Covenant on Civil and Political Rights*, <<http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>>, accessed 29 Apr. 2013.

⁴ N. Roht-Arriaza, ‘The new landscape of transitional justice’, in N. Roht-Arriaza and J. Mariezcurrena (eds.), *Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice* (Cambridge: Cambridge University Press, 2006), 2.

national days.⁵ Within the transitional justice discourse, this would fall under memorialization.

- *Article 2* upholds the supremacy of the constitution and recognizes the general rules of international law as part of the law of Kenya. It also provides that any treaty or convention shall form part of the laws of Kenya. This is a boost to the state's international human rights obligations, most of which form the basis for transitional justice.
- *Article 10* entrenches national values and principles of governance such as national unity, devolution of power, rule of law, democracy, public participation, human dignity, human rights, equity, social justice, equality, inclusiveness, non-discrimination and protection of the marginalized, good governance, integrity, transparency, accountability and sustainable development.

These are critical both in addressing the above-mentioned root causes and manifestations of the culture of impunity and societal injustices and in steering the country towards a just and human rights state. In fact, these tie in well with the outcomes of a transitional justice-driven state.⁶

- The *Bill of Rights* in Chapter 5 is quite comprehensive, as it incorporates both civil and political rights, economic, social and cultural rights, as well as the rights of such special interest groups as minorities and marginalized communities, older members of society, children, the youth and people with disabilities.
- *Article 22* of the same chapter allows and expands the grounds and opportunities for instituting legal proceedings in either one's own or the national interest.⁷ Moreover, Article 59 creates the Kenya National Human Rights and Equality Commission with a mandate to protect and promote human rights and to investigate and respond to gross human rights violations.

⁵ Kenyatta Day is a public holiday, celebrated on 20 October, to recognize the day when over 200 freedom fighters were arrested and detained by the colonial government following the declaration of a state of emergency in October 1952. The founding President, Jomo Kenyatta, was one of those arrested and detained. The day was named after him instead of being broadened to cover other freedom fighters. The other national days are Madaraka Day, 1 June, when Kenya attained self-rule in 1963, and Jamhuri (Republic) Day, 12 December, when Kenya became a republic in 1964.

⁶ It appears that, conceptually, there is a positive correlation or possibly a tension between transitional justice and good governance concepts and processes.

⁷ Critical for undertaking Public Interest Litigation, a vital transitional justice opportunity in Kenya.

From a transitional justice perspective, these are critical legal and institutional gains for dealing with both historical and contemporary injustices and ensuring a violation-free state.

- *Chapter 5* provides for land rights and creates the National Land Commission as the institutional framework for, among other things, investigating and responding to historical land injustices – the past, current and future.⁸
- *Chapter 6*, on Leadership and Integrity, provides the threshold for the values and conduct of all state officers. From the transitional justice perspective, this is critical in the vetting and lustration of state officers before and upon attaining public office. It is the framework for cleaning up public institutions, which have been characterized by rot and impunity.
- *Other chapters, 7, 8, 9, 10, 13 and 14*, have been the basis for electoral, legislative, executive, judicial, public-service and security-sector reforms, respectively.
- *Chapter 11* is also critical for devolved governance and the equitable management of public resources and affairs. These mechanisms are critical in dealing both with the past, current and future governance frameworks.
- *Schedule 5* of the constitution provides a list of legislation expected between eighteen months and five years. Most of these have been put in place and used to steer reforms of the key sectors and institutions associated with impunity.

All the above provisions and frameworks have been used to protect public interest and people's rights through political actions, legislative advocacy and litigation.

Key challenges

The following bottlenecks have been experienced.

- Attempts by the political elite to put in place weak legal and institutional frameworks in the implementation of the constitution.
- A problem of co-ordination of the various legislative and institutional mechanisms on transitional justice issues.
- Increased public expectations in the implementation of the constitution and the resolution of past injustices.

⁸ The National Land Commission is one of the few institutional frameworks in Kenya, mandated under the National Land Policy (2009), the Constitution of Kenya (2010) and the National Land Commission Act (2011), to address both historical and contemporary injustices, mainly land-based, from the colonial era (1895) to date.

Lessons and recommendations

- Ensure the clarity of provisions and implementation mechanisms.
- Conflicts sometimes provide platforms or opportunities for transition and reforms, as happened during the 2007/2008 post-election violence.
- The need for effective complementarity, co-ordination, sequencing and context specificity in the conceptualization and implementation of transitional justice mechanisms.
- A vibrant, vigilant and resilient civil society is necessary for the realization of these gains.

The Truth, Justice and Reconciliation Commission

Overview

Truth commissions are considered to be one of the most effective and comprehensive transitional mechanisms. The clamour for a Truth Justice and Reconciliation Commission started in January 2003 with the formation of the pro-people National Alliance Rainbow Coalition government. A task force was formed in April 2003, but its report, published in August 2003, was never implemented owing to political contestation between the members of the first coalition government in that year.⁹ The Commission re-emerged on the national agenda following the post-election violence on 27 December 2007 and 28 February 2008.

An Act of Parliament establishing the Commission was passed in November 2008. The Commission was to deal with the past human rights violations and economic crimes between 12 December 1963 (Independence Day) and 28 February 2008 (the day the post-election violence ended). An advertisement for the commissioners' jobs was published in April 2009, and nine commissioners (six nationals and three internationals) were finally appointed on 22 July 2009 and sworn in on 3 August 2009.

The Commission was given three months up to 3 November 2009 for setting up and the public education phase. It was to operate for two and half years from 3 November 2009 to 3 May 2012. To date, it is yet to finish its work and accomplish its mandate owing to the challenges captured below.¹⁰

⁹ Mainly between the National Party of Kenya led by (President) Mwai Kibaki and the Liberal Democratic Party led by (Roads Minister) Raila Odinga. This would be the recipe for the 2007/2008 disputed electoral outcome and political violence.

¹⁰ By October 2012, a Bill was pending in Parliament for another extension up to February 2013.

Challenges

The following bottlenecks have been experienced.

- A very weak legal framework for establishing the Commission, including a very broad and unrealistic mandate (for all the violations).
- Lack of committed and competent commissioners. Most of them have no understanding of or passion for the job.
- The process was captured by the political elite and merchants of impunity. The Commission failed to carry out proper investigations and hearings and did not release its report as expected on 3 August 2012, instead seeking another extension. Critics argue that the Commission has been influenced to delay the report so that names are not used by CSOs for vetting and lustration during the nominations and campaigns for the March 2013 general elections.
- Legitimacy and operational crises following accusations that the chair, Bethwel Kiplagat, was involved in the atrocities to be investigated by the Commission: the Wagalla Massacre, 1984; the killing of Robert Ouko, Foreign Affairs Minister, in 1990; and the illegal and irregular acquisition of public land.

Lessons and recommendations

- Ensure a concise and clear legal framework in establishing a truth commission.
- Ensure victims and stakeholder participation, support and engagement throughout the process.
- Develop an effective vetting framework for commissioners and a monitoring and accountability framework for the commission's work.
- Learn from other jurisdictions/countries, but do not 'copy and paste' the frameworks and processes.
- Enhance complementarity with other state institutions, commissions and efforts with transitional justice mandates.
- If the current constitutional commissions had been in place by 2008, the Truth Justice and Reconciliation Commission might not have been required and, if it was needed, its mandate would be quite different and specific.

Criminal accountability

Overview

This entails utilizing constitutional and other provisions and platforms to seek criminal justice/accountability at national, regional and global levels. These have ensured the protection and promotion of human rights, public acknowledgement and condemnation of the violations, effective remedies (financial reparations), and guarantees for the non-repetition of harm suffered.

It has also set progressive precedents and opened up new grounds for litigation with respect to past and current injustices. Finally, these have increased the state's accountability and compliance with the spirit and letter of the constitution of Kenya and other international frameworks.

The following cases will suffice:

- *Torture Victims' Case*: Between 2008 and 2011, the KHRC instituted 100 cases for victims and survivors who had been arrested, detained, tortured or killed by former President Moi's regime between 1986 and 1996. A total of Ksh.300 million (US\$3,500,000) has been awarded to all (to each an average of US\$35,000). These cases have also set progressive precedents on the litigation and remedies over torture-related atrocities in Kenya and other former British colonies, such as Zimbabwe.
- *Mau Mau Reparations Suit*: This is a case instituted in London by KHRC and the Mau Mau War Veterans Association through Martin Leigh Advocates seeking a public apology and remedies for harm suffered during the colonial regime in Kenya. We have managed to win the application by the British government with respect to the limitation of time – Britain was arguing that the suit was overtaken by time, 1950s to date – and state liability – Britain arguing that all liabilities were inherited by Kenyan state. From here, the case may proceed to full trial if Britain fails to appeal against these decisions.¹¹ Again, this case opens more and better grounds for litigation and remedies over colonial related atrocities in the world. Zimbabwe may follow suit.
- *Others*: As well as the many other cases at national level, the KHRC and other CSOs are involved in four cases before the ICC, including the Endorois case, adjudicated by the African Commission on Human and Peoples Rights

¹¹ See <<http://www.khrc.or.ke/media-centre/news/116-mau-mau-case-dealing-with-past-colonial-injustices.html>>, accessed 25 Apr. 2013.

in February 2010. There are also cases with respect to economic, social and cultural rights, e.g. the suit instituted by *Kituo cha Sheria* and others over the demolitions in Nairobi.

Lessons learned

- Sometimes cases take a long time to be adjudicated. This may also affect the availability of victims and evidence.
- There is a lack of resources to advance the many cases over a long period of time, e.g. the Mau Mau case.
- Sometimes poorly researched or conceptualized litigations by CSOs lead to retrogressive precedents or the clogging up or abuse of court processes.
- Sometimes issues are politicized, e.g. the ICC case. Moreover, the state, being a culprit, is sometimes unsupportive and resistant, e.g. in the payment of cash awards.
- For the Mau Mau case, the technicality around the limitation of time and state responsibility has cost us a great deal of time. Many survivors have died owing to ill-health and old age.

Recommendations

- Focus on the most strategic entry points that will set the requisite precedent and open space for the protection of rights.
- Establish critical partnerships with victims' networks and CSOs. Begin targeting the individual perpetrators as well as the state (for them to take personal responsibility).
- It is possible for colleagues in Zimbabwe to deal with violations of the colonial period in a peaceful and accountable manner.
- Progressive constitutions, reference to international laws and other precedents, and reformed judiciaries are key to seeking and attaining remedies.

Reparations and memorialization

Overview

This mechanism cuts across the above approaches. However, the following are some of the specific interventions around memorialization in Kenya: naming places and state utilities after some freedom fighters or survivors; giving national awards; celebrating days related to victims and freedoms; erection and gazetting of national monuments. The KHRC is doing a study on the Sites of Conscience in Kenya.

Challenges

- Politicization of these mechanisms, recognition of the politically correct victims.
- Lack of policy to harmonize government's interventions on reparations and memories. Also lack of justice perspectives on the same, mainly seen through the cultural lens.
- Lack of information on the potential beneficiaries (people and utilities) of the programmes and the difference between remedies and development projects.

Lessons and recommendations

- The need for increased research, policy frameworks, co-ordination and complementarity with related transitional justice programmes is critical.

Other transitional justice and supportive mechanisms

Overview

- *Research and documentation*, which are critical for truth-telling and engagement with other transitional justice mechanisms. The KHRC and other CSOs have many publications, policy briefs and documentaries to this effect.
- *Peace-building and Post-Conflict Transformation*, especially in response to emerging disputes and conflicts.
- *Vetting and lustration*. This is a cross-cutting intervention, depending on the information and opportunities available within the above frameworks.
- *Networking* at the local, national, regional and global levels.
- *Legislative and policy advocacy*, fostering and implementing progressive and pro-people legal, policy and institutional frameworks.

Lessons and challenges

- Continuous but victim-centred research and documentation. There is a need for a database to establish existing information and literature to avoid duplication.
- Have early-warning and rapid-response mechanisms in case of conflicts and violations. Initiate durable solutions to address the underlying governance issues.
- Ensure facts for vetting and lustration to avoid accusations of either white-washing or witch-hunting. Good leaders are as important as good systems.

- Co-ordination and technical leadership in advocacy and networking at all levels.

Conclusion and the way forward

- It is time for CSOs from Africa to strengthen their partnerships around pertinent transitional justice and governance issues, for most of us have related colonial and post-colonial experiences and situations.
- Collaborate with colleagues from the global South, especially Latin America, who have gone through perilous transitional justice moments.
- Set the agenda and phase in the conceptualization and implementation of context-specific and Afro-centric transitional justice programmes. This discourse was initiated during the launch of the Institute for African Transitional Justice in Kampala in November 2010.
- The report and publications produced out of this forum should be used to advance this agenda.
- Foster bilateral and multilateral partnership/exchange programmes between CSOs and victims from different countries and regions in Africa, among others.
- KHRC is planning to organize exchange programmes for colonial and post-colonial victims between Kenya, Zimbabwe, South Africa, Malaysia and Argentina.
- We also plan to enhance studies and partnerships around electoral governance and constitutionalism in Africa. These processes are key in complementing and strengthening transitional justice work in the region.
- We need to utilize the national, regional and international human rights frameworks and opportunities to push the transitional justice agenda in Africa and the world at large.
- Finally, we must remember the monstrous nature of the culture of impunity. One political analyst described it thus: Impunity has become like Macavity, the mystery cat of T. S. Eliot's rousing poem. Macavity the cat was said to be everywhere, but could be captured nowhere. Macavity was the quintessential disappearing act. Just like Kenya's impunity.¹²

With this, thus the struggle continues.

¹² Charles Kanjama, 'Selective implementation of new law good old impunity', *Standard on Sunday*, 5 December 2010, <http://www.standardmedia.co.ke/?articleID=2000023974&story_title=Selective-implementation-of-new-law-good-old-impunity>, accessed 25 Apr. 2013.

Lessons learned

What was positive regarding the transitional justice process in Kenya?

- There was political will within the Kenyan government to cope with past and present human rights violations. This led Kenya to develop an operational legal framework in the constitution that supports a transitional justice agenda.
- Within the Truth, Justice and Reconciliation Commission, the commissioners were appointed independently.
- Vetting and lustration enabled the appointment of independent and qualified people to national institutions. This ensured that the institutions were clean of perpetrators of human rights violations.
- Kenya institutionalized the research and documentation of past and present atrocities. The documentation has a long historical view and cases are archived and accessible.
- The transitional justice process involved the media.

What was challenging regarding the transitional justice process in country Kenya

- Although there is political will, there is too much political interference in the transitional justice process.
- The commissions recording violations have not published reports.
- Considering the scale and pace of the transitional justice work, it is a challenge to reach justice within a reasonable time-frame – before facts are blurred and victims have passed away.

Is the strategy of Kenya to address transitional justice issues applicable to Zimbabwe?

- The Kenyan holistic approach to transitional justice should be applied in Zimbabwe.
- Zimbabwe does not have the same legal framework as Kenya; therefore, using the Kenyan transitional justice approach in Zimbabwe would be problematic. However, transitional justice provisions similar to those of Kenya in the constitution would make the Kenyan model applicable to Zimbabwe. Unfortunately, there is insufficient political will in Zimbabwe to create the appropriate legal framework.
- Unlike Kenya, Zimbabwe is not taking history into consideration in its transitional justice processes.

LIBERIA

Engendering Transitional Justice

Blanche Satta Gaie

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ABSTRACT

In a conflict that spanned over 20 years, Liberia experienced atrocities among which sexual violence against women was widely and indiscriminately used as an instrument of war. These brutal and inhuman acts were carried out by all warring factions, including civilians and ECOWAS peacekeepers.

After the conflict, a Truth and Reconciliation Commission was established to produce an extensive report on the past violence, paying special attention to the specific needs of women and children of Liberia and fight the culture of impunity.

However, women in Liberia could not talk about violations they had suffered because of the cultural circumstances and lack of understanding why they had to testify in front of the TRC.

I would like to start by sharing with you one of Liberia's major tasks in its struggle to rise from a debilitating conflict that spanned more than twenty years. This task was to implement a transitional justice process. The Truth and Reconciliation Commission of Liberia (TRC) formed a significant part of this process, and is one of the major mechanisms meant to help Liberia reconstruct and transform itself from an unequal, conflict-ridden society into a fully fledged democracy with the participation of all its diverse inhabitants. The TRC was mandated by the comprehensive peace accord, which came about through a hard-won battle with warlords at the Accra peace conference in 2003.

As part of its mandate to promote national peace, national security, unity and reconciliation, the TRC was charged with the responsibility to investigate and elicit the root causes of the war from 1979 to 2003, to identify the main perpetrators, and, most importantly, to produce an extensive report that included strong recommendations for the future well-being of Liberia – paying special attention to the experiences and needs of the women and children of Liberia. Although the TRC made many efforts to reach communities throughout the country, civil society organizations working on the ground reported that some members of the general public, even those based in Monrovia, indicated that they

were not only unaware of the mandates or value of the TRC process but also did not fully understand the concept of transitional justice or how they would participate in the process.

It is widely understood that the brutal and inhumane conflict impacted all of us in Liberia but impacted women and men differently. It adversely affected the progress of women and girls in Liberia, mainly because sexual violence was widely and indiscriminately used as an instrument of war.

Women were repeatedly subjected to rape and gang rapes, including violations in which foreign objects were used. Women who were not brutally murdered, experienced and or witnessed unimaginable acts of sexual brutality, mutilation, cannibalism and torture. This was carried out by all the many warring factions, including civilians and ECOWAS peacekeepers. Issues of protection, security, tradition and culture silenced many of these women, and limited their participation in the TRC process, as well as in accessing healthcare and other services. In addition, the opportunity that transitional justice process offered to highlight gender issues had not been exploited to its full capacity. Women were still largely underrepresented in most of the peace processes and had not fully grasped the full extent of the contribution that they could be making.

Against this background, a consortium of women's organizations under the umbrella of the Women Non-Government Organizations Secretariat of Liberia (WONGOSOL), with advice and encouragement from the United Nations Development Fund for Women (UNIFEM) and the TRC gender unit, came together in September 2008 to organize a series of nationwide community dialogue meetings with women. The idea was to evaluate the TRC process from a gender perspective, to discuss seven of the key pillars of transitional justice, and to take an in-depth look at community and individual responsibility for healing and transforming Liberian society. The dialogue meetings also aimed to solicit concrete recommendations from women on the seven transitional justice pillars to inform the TRC's final report, and to form a monitoring group on the implementation of these recommendations at the conclusion of the TRC.

It is important to note that the original concept for the project was developed by three Liberian NGO leaders, including the director of the co-ordinating group, WONGOSOL, and the UNIFEM gender and transition justice specialist. Conscious that this had not been done before, as part of the transitional justice process in any other country, the group was determined not to miss the opportunity to incorporate the needs and demands of women more fully into the TRC process. Given some of the criticisms of Liberia's TRC operations, and the fact that it was

beginning to draw down and enter the report-writing phase, the time seemed appropriate and critical to offer a civil-society-led, independent assessment of the types of recommendations that the Liberian women wanted. An initial concept paper, which was shared with donor agencies, quickly generated support, Fina (ICTJ), the Open Society Institute for West Africa, UNIFEM, and Urgent Action Aid, with the ICTJ and UNIFEM offering additional technical support throughout the project.

The project document consisted of a series of four community dialogues, one in each of Liberia's four regions. Appropriately, one hundred women convened, representing a diversity of women across all counties in each region, in an easily accessible regional city. WONGOSOL member organizations and TRC coordinators in each of the counties were called upon to mobilize the women to attend the meetings.

Each dialogue was planned to begin with an opening ceremony at which the government, the UN and international NGO representatives, including the county superintendents, the United Nations mission in Liberia, gender advisers and TRC commissioners were asked to speak. Participants were divided into four groups of twenty-five women, each with a mechanism to ensure that the women were separated from their friends and families or community groupings. The goal was not only to create space for women from different counties to get to know each other but to allow women to feel free to speak without being inhibited by the presence of family members. The dialogues also aimed to heal division and to begin to foster and strengthen reconciliation among some of the separated ethnic groups.

A team of three individuals facilitated conversations within each of the break-out groups, comprising one facilitator, one documenter and one counsellor for each group. The agenda opened with a discussion of the TRC itself, offering women the opportunity to share personal stories as well as soliciting feedback on the TRC process. The rest of the first and second days was spent explaining and initiating conversations on the seven key transitional justice issues of truth-telling, reparations, memorialization, institutional reform, prosecutions, amnesty and reconciliation.

Transitional justice is not a special form of justice. It is, rather, justice adapted to the often-unique conditions of societies undergoing transformation from a time when human rights abuse may have been a normal state of affairs. In some cases, these transformations will happen suddenly and have obvious and profound consequences. In others, they may take place over many decades.

The TRC process and its report form an important part of Liberia's effort to account for its past and move towards a future in which violations that characterized the conflict are not repeated.

The problematic nature of the TRC's recommendations is the product of a process that was itself debatable. Only few of the transitional justice recommendations can be implemented immediately in their current form, but the issues that they highlight are important components of Liberia's peace-building efforts. These transitional justice processes paved the way to address comprehensively the culture of impunity and to respond to the needs of Liberia's victims.

To date, the debate about the TRC's recommendations has focused almost exclusively on whether or not to take forward the recommendations on criminal accountability and lustration. While criminal accountability is an important element in addressing the past, Liberia has taken advantage of other opportunities for transitional justice in order to build a new and democratic society, founded on respect for human rights.

There is no single formula for dealing with a past marked by massive and systematic abuse. Each society should – and, indeed, must – choose its own path; and so it is plausible for Zimbabwe to take initiatives to develop a transitional justice agenda.

Practice has taught us that a society's choices are more likely to be effective when they are based on a strong examination of past national and international experiences. Such examination reduces the likelihood of repeating avoidable errors, which transitional societies can rarely afford to make. Ensuring active consultation of, and participation by, victim groups and the public is another crucial factor. Without such consultation and participation, the prospects of designing and operating credible and effective transitional justice policies become greatly reduced.

Finally, because transitional justice is a relatively new field, there is a need to continuously assess the empirical impact of transitional justice measures. Through assessment, future policies will stand the best possible chance of achieving the immediate goals of providing redress for victims, as well as the longer term goals of peace, constitutional democracy, and reconciliation.

Lessons learned

What was positive regarding the transitional justice process in Liberia?

- In Liberia, there was political will to investigate the atrocities committed during Charles Taylor's regime. The change of government led to a transitional justice process with wide stakeholder participation that culminated in an agreement to set up a TRC and an independent Human Rights Commission.
- Institutional reforms – such as judicial reforms, land reform, gender, security-sector reform (reorientation of the security sector) – have been implemented.
- Categorizing the different types of victims helped to mainstream gender into the transitional justice process at all levels.
- Community peace-building workshops were held.

What was challenging regarding the transitional justice process in Liberia?

- The prevailing impunity culture and the lack of an enabling environment hindered the transitional justice process, so did budgetary constraints on the TRC.
- There was a lack of a comprehensive work plan for the TRC; the terms of reference were not clear, which posed an operational challenge. The same holds true for its limited technical capacity.
- There was no community ownership owing to a lack of dissemination and awareness about the TRC and the transitional justice process.
- Many of the TRC's recommendations have not implemented to date.

Is the strategy of Liberia to address transitional justice issues applicable to Zimbabwe?

- Gender mainstreaming within the transitional justice process must be implemented in Zimbabwe, as women are still being affected by politically motivated violence.
- In Zimbabwe, the political will for institutional reform is weak. Thus, Liberia's legal and transitional justice framework is not easily applicable to Zimbabwe.

Part 4

The Way Forward for Zimbabwe in Transitional Justice

The Way Forward for Zimbabwe in Transitional Justice

Based on the presentations of the case studies and extensive group discussion, a set of major recommendations were defined as a 'Way Forward for Transitional Justice in Zimbabwe'.

1. The establishment of a *Transitional Justice National Working Group*, whose framework should include work on structures to implement various recommendations on transitional justice. The leadership of the working group should be chosen through a transparent public process considering the importance of objectivity, integrity and credibility.
2. *Research, documentation and archiving*. A co-ordinated approach to research, documentation and archiving of information among various actors should be initialized. Focus should be put into the retrieval of information through an established credible body, to collect information from all actors carrying out documentation, and to standardize the process of documenting violations in order to make the data useful for history, prosecutorial and educational purposes.
3. *Advocacy for policy and legislation*. Stakeholders should work towards building political will, engaging all actors and customizing the transitional justice process to meet the nature of Zimbabwe's unique context.
4. *National engagement*. This should involve a transitional justice audit, exploration of traditional methods of conflict-resolution, engagement with alleged perpetrators, brokerage of interests, conflict-resolution and democratic values, capacity-building for the judiciary, parliament and other relevant actors.
5. *Rehabilitation of survivors*. Reparations/compensation, both on at individual and collective level, are topics that need attention, with specific attention to women and children. A clear protection mechanism for witnesses and survivors must be developed in order to build the confidence and participation of both survivors and alleged perpetrators.
6. *Institutional reform*. Reform of institutions such as the media and the security sector is critical for transitional justice. A mechanism must be put in place to provide for continued monitoring of institutions, their transformation and operation.

Outlook

Participants have urged all stakeholders to advocate for transitional justice in Zimbabwe. However, it was stressed that advocacy methods should be adapted to the needs and level of understanding of the different target groups of society. This will enable the whole society to understand and claim transitional justice.

To implement the adopted recommendations of the conference it is necessary for the Forum, in collaboration with all stakeholders (state and non-state actors), to push for the establishment of a national working group on transitional justice, which, among other things, will ensure the pursuit of a comprehensive and inclusive transitional justice agenda.

In 2013, the Forum will organize a follow-up International Conference on Transitional Justice ('2nd ICTJ') in order to assess the implementation of the recommendations, challenges faced and successes.

Appendix

ABOUT THE PRESENTERS

Joachim Förster

Joachim Förster currently works as the Head of Department and Deputy Director at the Federal Commissioner for the Records of the State Security Service of the former German Democratic Republic, Berlin (responsible for the use of Stasi-Documents, i.e. transmission of records, communication of information from the records). Prior to that, he has also worked (1996–2002) as Head of the Department of the Interior, Regierungspräsidium Dresden, Saxonia (former East Germany), (1992) Head of the Office of the Regierungspräsident Dresden (Saxonia), (1983–1991) Lawyer in Hamburg and Academic Assistant of Constitutional and Administrative Law at the Helmut-Schmidt-University Hamburg.

Blanche S. Gaie

Blanche is a social worker and currently a Project Officer at the Women Peace and Security Network-Africa (WIPSEN-Africa) in Monrovia, Liberia. Her work focus is Girls and Young Women Leadership Development and social transformation. She earned a BA Degree in Management and Sociology from the African Methodist Episcopal University (AMEU) in Liberia and hold certificates in Organizational Development, Program Management, Mentoring and Leadership Development, and Policy Engagement and Advocacy.

Komakech Lyandro

Lyandro is a *Senior Research and Advocacy Officer* at Refugee Law Project, School of Law, Makerere University, Uganda. He has been the lead researcher on traditional Justice Mechanisms in Uganda in the just-concluded Beyond Juba Project. Currently, he is the team leader of the *National Reconciliation and Transitional Justice Audit*. His writings include *Tradition in Transition; Drawing on The Old to Develop a New Jurisprudence for Dealing with Uganda's Legacy of Violence (Transitional Justice Working Paper No.1)*. He has recently published a book chapters entitled 'Exploring the place of traditional justice in Uganda' and 'Traditional justice as a form of adjudication in Uganda'. He has travelled widely both within and outside Uganda, and made numerous presentations in workshops and conferences.

Davis Malombe

Davis M. Malombe is a political scientist, policy analyst, and human and women's rights advocate. Davis holds a Bachelor of Arts (Hons) in Political Science from Moi University (1998) and is currently pursuing his Masters in Political Science and Public Administration (University of Nairobi), specializing in public policy and international laws.

He is currently the Deputy Executive Director of the Kenya Human Rights Commission and formerly a programme officer responsible for policy research and advocacy on internal displacement, land rights, transitional justice and policy reforms. Davis has written and published widely on IDPs protection, good governance, transitional justice and human and women rights issues in Kenya and beyond.

Moreover, Davis is a member of number of national and international organizations and networks, including the Internal Displacement and Advocacy Centre, Kenya Transitional Justice Network, African Transitional Justice Network, Land Sector Non-State Actors, Alternative Community Resource Development, and Kenyans for Peace, Truth and Justice, among others.

Freddy Mutanguha

Freddy is the Country Head for Aegis Trust, Rwanda, and Director of the Kigali Genocide Memorial (for which Aegis is responsible). He survived the 1994 Genocide as a teenager. As an orphan head-of-household, he worked his way through school to become one of the leading advocates of peace and human rights education, inspiring the next generation of Rwandans to create a more stable future. A graduate of the Kigali Institute of Science and Technology, Freddy helped to found AERG, Rwanda's student survivors association, and went on to become Secretary General of IBUKA, the national umbrella association for Rwandan Genocide survivors. Freddy lectures internationally about the impact of the Genocide and about post-conflict reconstruction.

Anthony Reeler

Tony Reeler is a Senior Researcher (formerly the Director) at the Research and Advocacy Unit [RAU], an independent institution specializing in human rights, transitional justice, and governance. Since its being set up in 2006, RAU has produced over 150 reports, opinion pieces, and articles on aspects of the crisis in Zimbabwe.

Educated at St George's College in Harare, he attended the University College

of Rhodesia, reading for an LLB, and subsequently attended the University of Exeter, reading for a BA in Psychology, and the University of Leeds, reading for an MSc in Clinical Psychology.

A former academic at the Universities of Malawi (1978–1980) and of Zimbabwe (1982–1992), he was founding director of the Amani Trust (1993), a post held until 2002. Following his resignation from the Trust, he worked for Idasa until the establishment of RAU. Has published widely in the fields of mental health, trauma, human rights and governance. He was a member of the Council of the International Rehabilitation Council for Torture Victims (1993–2003), and a member of its Executive Committee (2000–2003).

Since 2000, Tony Reeler been an active member of Zimbabwe's civil society and has been a member of several international missions on the Zimbabwe crisis. In 2000, he led a mission to Europe and the UK to publicize the plight of torture victims, and, in 2001, was part of a civil society delegation to the EU, the UK, and the US to push for the imposition of targeted sanctions against the Mugabe regime.

Jürgen Schurr

Jürgen joined REDRESS in 2006 as Project Coordinator on Universal Jurisdiction, having previously worked for various human rights organisations. In 2009 he took a position as Associate Legal Officer at the International Criminal Tribunal for Rwanda. He returned to REDRESS as Legal Advisor in 2010 and is working on REDRESS' projects in a variety of countries, including India, Russia, Rwanda and Uganda. Jürgen obtained his law degree from the University of East Anglia and a LLM from the University of Trier.

Cleto R. Villacorta III

Justice Cleto Villacorta III is a sitting judge of the Philippines Regional Trial Court. He also works with public-interest lawyers and NGO workers, though often from afar and within the safe confines of a bureaucrat's office. His professional stint includes lawyering for the Philippine government, acting as a legal consultant for the amnesty process, prosecuting high government officials in forfeiture and graft and corruption cases, and sitting as a judge in one of the Philippines' first-level courts, and now in one of the second-level courts.

Justice Villacorta is attending this Conference as a judge from the Philippines and as a member and legal consultant of the Center for People Empowerment in Governance.

Undine Whande

Dr Undine Whande has worked as a practitioner and scholar in conflict transformation and social change since 1995. Born in Germany she has lived and worked continuously in the SADC region since the mid-1990s. She holds a Ph.D. in Social Anthropology from the University of Cape Town. In the often very challenging context of political and social transition in post-1994 South Africa, Dr Whande developed her expertise as a conflict mediator, coach and facilitator in social change processes. She worked closely with the South African Truth and Reconciliation Commission process and with various civil society organizations and approaches during the time. Dr Whande also took part in and shaped the Healing of the Memories process in South Africa and continues to work with transitional justice processes and organizations on the African continent and globally.

In her work as a leadership coach, she accompanies individuals and organizations that seek to evolve the potential for healing and development out of experiences of conflict and crisis. Her approach is strongly rooted in principles of respect, recognition and valuing each individual biography and life journey. Her current work is grounded in phenomenological approaches, systems theory and a trans-generational lens on memory work. She serves as the Senior Specialist for Conflict Transformation and Organizational Learning for the Centre for the Study of Violence and Reconciliation, and works as a Systemic Leadership Coach. She currently resides in Cape Town, South Africa with her husband and three children.

ABOUT THE ZIMBABWE HUMAN RIGHTS NGO FORUM

The Zimbabwe Human Rights NGO Forum (the Forum) is a coalition of nineteen human rights organizations. The Forum has been in existence since January 1998, when non-governmental organizations working in the field of human rights came together to provide legal and psycho-social assistance to the victims of the Food Riots of January 1998. Since then, the work of the Forum has been shaped by the vision of realizing a society that is free from organized violence and torture.

This work is co-ordinated within the broad membership through four strategic Units: the Public Interest Unit, the Research Unit, the Transitional Justice Unit and the International Liaison Office.

The *Public Interest Unit* challenges impunity and holds the government accountable for its actions by litigating cases of organized violence and torture in domestic and international courts. The Unit is also responsible for spearheading the Anti-Torture campaign, meant to eradicate torture in Zimbabwe through advocacy for legislative reform and ratification and domestication of relevant international conventions and protocols.

The *Research and Documentation Unit* is responsible precisely for the research, monitoring and documentation of human rights violations in Zimbabwe and publication of related reports. The Unit works to raise human rights awareness in the country and globally through the publication and dissemination of periodic human rights reports, bulletins and fact sheets. The Unit is the primary custodian of the database on human rights violations.

The *Transitional Justice Unit* spearheads the Forum's work on rebuilding the pillars of social trust by pushing for legislative reform aimed at transforming the structures of government that promote justice and accountability. The Unit does this through advocacy and policy proposals for a comprehensive transitional justice mechanism that seeks to adequately address the past and give Zimbabweans an opportunity to redesign a new future of truth, justice, accountability and sustainable peace.

The International Liaison Office (IntLO) co-ordinates the international advocacy work of the Forum's nineteen members and many other partner organizations. IntLO discharges this mandate through engagement with institutions such as the United Nations Human Rights Council, the Africa Caribbean Pacific-European Union Joint Parliamentary Assembly, and individual governments. IntLO also acts as the main gateway for information, research and analyses from and into Zimbabwe. In this role it contributes to the

information packaging, keeping a tag on and sending out regular updates and analyses on Zimbabwean human rights issues.

Member Organizations of the Zimbabwe Human Rights NGO Forum

Amnesty International (Zimbabwe)
Catholic Commission for Justice and Peace in Zimbabwe
Gays and Lesbians of Zimbabwe
Justice for Children
Legal Resources Foundation
Media Institute of Southern Africa
Media Monitoring Project of Zimbabwe
Non-violent Action and Strategic for Social Change
Research and Advocacy Unit
Student Solidarity Trust
Transparency International (Zimbabwe)
Women of Zimbabwe Arise
Zimbabwe Association for Crime Prevention and the Rehabilitation of the
Offender
Zimbabwe Association of Doctors for Human Rights
Zimbabwe Human Rights Association
Zimbabwe Civic Education Trust
Zimbabwe Lawyers for Human Rights
Zimbabwe Peace Project
Zimbabwe Women Lawyers' Association

The Forum can be contacted through any member organization or through:

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E-mail: <admin@hrforum.co.zw>; Website: <<http://www.hrforumzim.org>>

International Liaison Office

Archway Resource Centre, 1B Waterlow, London N19 5NJ

Telephone: +44 (0)207 619 3641

E-mail: <IntLO@hrforumzim.com>

Selected Publications by the Forum

- *Exploring Transitional Justice Options in Contemporary Zimbabwe*, 2006
- *Taking Transitional Justice to the People Outreach Report, Volume 1*, 2009
- *Taking Transitional Justice to the People Outreach Report, Volume 2*, 2010
- *Transitional Justice National Survey: A Report of the People's Recommendations and Perception on Transitional Justice in Zimbabwe*, 2011
- *How Far Back Should We Go: An Analysis of the Preferred Periodical Options for Transitional Justice in Zimbabwe*, 2012
- *Epworth Peacebuilding and Conflict Transformation Baseline Study*, 2012
- *A Study into the Torture Legislative Framework in Zimbabwe: Gaps and Opportunities*, 2012

Zimbabwe has passed through many transitions in its short history, and signed many peace agreements and accords in the process, and yet sustainable peace continues to be elusive.

The 2003 Johannesburg Symposium on *Civil Society and Justice in Zimbabwe* made recommendations for the inclusion of survivors in the transitional justice discourse. The 2008 *Transitional Justice Options for Zimbabwe Workshop* in Harare laid down the minimum demands for civil society on transitional justice. Since then, transitional justice discussions have taken centre stage at community level and also at policy level, thanks to the work of civil society organizations as well as of the Organ on National Healing, Reconciliation and Integration.

The 2011 *Transitional Justice National Survey* carried out by the Forum revealed that the language of different players may differ but the substance is the same: Zimbabwe wants a comprehensive way to ensure a permanent end to impunity; Zimbabwe wants to say 'never again' to violence; and Zimbabwe wants to respond to the just needs of the survivors of organized violence. How to arrive at these noble goals was the subject of discussion at the *International Conference on Transitional Justice*. For the first time in the country's history, government and civil society came together to deliberate on these questions that shape the future of all Zimbabweans. These are spaces that need to be expanded in the search for solutions.

This report captures the presentations from seven countries that participated in the conference: Rwanda, Uganda, Germany, Liberia, the Philippines, Kenya and South Africa. It captures reflections from local and international experts on the possible strategies for Zimbabwe. And above all it captures the deliberations by all participants on the way forward for Zimbabwe. The conference closed with six specific action points on which Zimbabwe must focus.

In presenting this report, it is the hope of the Zimbabwe Human Rights NGO Forum to admit everyone into the deliberations that took place at Nyanga and also into the inter-generational conversation on truth, justice and accountability for all Zimbabweans.

