



Zimbabwe
HUMAN RIGHTS
NGO Forum

ANTI-IMPUNITY
REPORT
2019

Zimbabwe Restoring Legacy
...What about Impunity for State-sponsored violence...?

June 2019

Published by

The Zimbabwe Human Rights NGO Forum
Suite 4, Number 1 Raleigh Street, P. O Box 9077, Harare, Zimbabwe
Copyright © 2019 Zimbabwe Human Rights NGO Forum
ISBN Print Version 978 -1- 77906- 700- 5
ISBN E Version 978- 1- 77906- 698 -5

Designed and Printed by

Sable Press

Edited by

Blessing Gorejena, Wilbert Mandinde, Dewa Mavhinga

External Consultant

Tendai Chabvuta

This publication may be reproduced for non- commercial use in any form, provided due credit is given to the publishers, and the work is presented without any distortion.

Email: admin@hrforum.co.zw

Website: www.hrforumzim.com

The Zimbabwe Human Rights NGO Forum (the Forum) is a coalition of 20 human rights organisations working towards the realisation of a society that respects all human rights in Zimbabwe.

Members of the Forum

- Amnesty International-Zimbabwe (AI- Z)
- Catholic Commission for Justice and Peace – Zimbabwe (CCJP- Z)
- Civic Education Network (CIVNET)
- Counseling Services Unit (CSU)
- Gays and Lesbians of Zimbabwe (GALZ)
- Justice for Children Trust (JCT)
- Legal Resources Foundation (LRF)
- Media Institute of Southern Africa (MISA)
- Media Monitors (MM)
- Research and Advocacy Unit (RAU)
- Transparency International-Zimbabwe (TI- Z)
- VERITAS
- Women of Zimbabwe Arise (WOZA)
- Zimbabwe Association for Crime Prevention and Rehabilitation of the Offender (ZACRO)
- Zimbabwe Association of Doctors for Human Rights (ZADHR)
- Zimbabwe Civic Education Trust (ZIMCET)
- Zimbabwe Human Rights Association (ZIMRIGHTS)
- Zimbabwe Lawyers for Human Rights (ZLHR)
- Zimbabwe Peace Project (ZPP)
- Zimbabwe Women Lawyers Association (ZWLA)

Acknowledgements

The Forum acknowledges the assistance it received from the Secretariat and partners in compiling this report. The Forum applauds the expertise and guidance received from Mr Tendai Chabvuta in the development of this report. Gratitude also goes to the Forum's Public Interest Unit staff for the continuous review of the report.

All this work would not have been accomplished without the support from our development partners who invest in the dignity of humanity.

Table of Contents

Abbreviations	4
1. Introduction	5
Methodology	6
2. Background to the report	7
3. Impunity by design – chronicling amnesties in Zimbabwe	10
Indemnity and Compensation Act of 1975	10
Amnesty Ordinance (3) of 1979 and Amnesty (General Pardon) Ordinance (12) of 1980	10
Clemency Order of 1998	11
Clemency Order of 1995	11
Clemency Order of 2000	11
Pardons post 2000	11
4. Understanding the concept of impunity and Zimbabwe's national and international obligations	13
International Standards	13
International law and curbing impunity	14
Zimbabwe and its relationship with international law	14
Regional African Standards	15
Zimbabwe's Legal Framework	15
Legislation governing the police in Zimbabwe	16
The Police Act – fit for purpose or part of the problem	16
A Rights Based Approach to Zimbabwe's Obligations at law	17
5. The excuse based approach to policing and human rights violations in Zimbabwe	18
Who oversees the police in Zimbabwe	18
Causes of human rights violations by the police in Zimbabwe	18
Repressive legislation	19
Political meddling	19
Toxic police sub cultures	20
Following superior orders	21
Absent police oversight and complaints mechanisms	21
Lack of knowledge of human rights	22
6. The dream of justice – elusive or reachable	23
Will it ever be possible to prosecute all perpetrators?	23

Table of Contents

The Police Act as a stumbling block towards holding officers accountable	24
The need to know the truth	26
Counter arguments raised by other victims on the idea of a truth process	27
The controversial issue of divulging names when truth processes for the police are held	27
Removal from office of perpetrators	28
The quest for rehabilitation of victims	28
Provisional solution to the rehabilitation of victims and their mental health needs	29
Compensation and damages	29
Compensation for wrongful death in Zimbabwe	29
Debts owed by the government	31
State Liabilities Act frustrating victims and survivors	31
7. Discussing the justice mechanisms available to Zimbabweans in cases of state sponsored violence/injustices	33
a) Availability of justice	33
b) Accessibility to justice	33
c) Acceptability of justice processes and systems	34
d) Adaptability of justice systems	34
The Organ on National Healing and Reconciliation and Integration	34
The National Peace and Reconciliation Commission	34
Recalibrating the work of the NPRC	34
8. Types of remedies	36
The argument for prosecutions	36
Who to prosecute	37
When trials could fail or would not be possible?	38
Arguments against prosecutions	38
Reparations	38
Reform of abusive state security institutions	39
9. Recommendations and Conclusion	41
To the Government of Zimbabwe (Ministry of Home Affairs)	41
To the Security Forces (ZRP/CIO/ZNA)	41
To the National Peace and Reconciliation Commission	42
Bibliography	43

Executive Summary

It is a year and a half since November 2017 when President Robert Mugabe was deposed as the leader of Zimbabwe through a military putsch. Favored by Zimbabweans' quest for a new beginning the military led by Army General Constantine Chiwenga moved in to secure the Presidency for the then beleaguered Mugabe's ex deputy, Emmerson Mnangagwa. Events took a swift turn and before long the military junta and the civilian face of Mnangagwa's faction had slipped into power inevitably. In July 2018, a general election followed and Mnangagwa was declared the winner in a controversial and still disputed victory. Several international observer groups refused to give the elections a clean bill. On 1 August 2018, six civilians were killed on Harare's streets in cold blood following widespread protests over discrepancies associated with the disputed election. A Commission of Inquiry led by the former President of South Africa Kgalema Motlanthe and some notable but controversial figures from Zimbabwe and outside the country made the rest of the Commission. The Commission carried out its mandate but the nation was left with more questions than answers about justice for victims, lack of accountability from the state security agents and a general dissatisfaction with the execution of justice in Zimbabwe. "Impunity by design" is what this report chooses to describe this lack of accountability.

The above is part of the story that is told in this report. The narrative seems to be the story of Zimbabwe from pre-independence to present day. The report notes that the failure to hold accountable perpetrators of human rights violations especially state security agents reigns supreme in Zimbabwe. This report narrates the level and extent of state agents' level of impunity in Zimbabwe informed by the legal cases that the Forum has been working on since its formation in 1998.

In Zimbabwe, state security agents such as the police, the army and the central intelligence are by law expected to play a pivotal role in the protection of the internal and external security of the nation. Their roles are set out in Zimbabwe's Constitution and other subordinate laws related to policing and national security services. However, over the years different state and non-state actors including the police have been accused of serious human rights violations against citizens.

In Zimbabwe, the bedrock of state-sanctioned impunity for human rights violations lies between perpetrators of state-organized violence who cannot be sued in their personal capacities, or those who cannot afford to pay the damages by themselves and a government which abuses its own laws to save itself from a victimized populace. The 'untouchable' nature of state security officials such as the police, the military and intelligence officials remains a cause for concern in Zimbabwe's quest for justice for victims of state-sanctioned human rights violations. Zimbabwe's challenge today is to fight this impunity and have state security agents that are accountable, uphold human rights, and protecting its citizens.

Investigations against the reports of wanton human rights abuses have been carried out in some instances through the use of official Commissions of Inquiry and police investigations but in most instances, these have come to naught. Cases remain unresolved, reports are never released and perpetrators are not held accountable. For those cases where state security agents have been found guilty by the courts, fines and sentences have been imposed. Where cases have been taken for civil litigation and awards for damages given, these have often taken time to be paid and some have remained outstanding for extensive periods with the government of Zimbabwe pleading incapacity to pay because of the poor economy. In some cases, where damages have been paid the victims have complained that the money was not adequate as it failed to ensure restorative justice for the victims.

With the coming in of the new government, under President Mnangagwa which has conveniently been dubbed the “Second Republic” with a motto that depicts Zimbabwe as “Open for Business”, the state of human rights, justice and democracy remains in limbo. Victims of all manner of human rights violations committed by state agents continue to suffer humiliation as they see their perpetrators remain in their jobs even though they hold legal judgments that obliges the state to pay compensation at the least and at the most to imprison the accused. For instance, the government has continued conveniently to hide behind the State Liabilities Act, a law that has worked in its favor over the years to dissuade would be litigants from attaching government property in pursuit of compensation for their violations.

The report goes further to discuss Zimbabwe's domestic, regional and international legal obligations towards victims of state sponsored and politically motivated violence. Zimbabwe's 2013 Constitution provides clear protections for civil and political rights, economic as well as social rights. Zimbabwe is also party to SADC, African Union and the United Nations human rights protocols that oblige the state to protect, respect, and fulfill citizens' human rights at any given time. However, this report chronicles several incidents and instances in Zimbabwe's broken past and present where state security agents and private actors acting with the acquiescence of the state have violated citizens rights and the state has turned a blind eye.

In addition to the obligations mentioned above, this report calls for a return to a rights-based approach to policing and security matters in Zimbabwe. To achieve this, there is need for public policy that ensures that human rights in Zimbabwe are based on key principles that seek to achieve clear deliverables benchmarked on justice to be delivered to citizens on key principles that ensure the following: availability, accessibility, affordability and adaptability of the justice mechanisms.

This report reiterates the position held in international law that Zimbabwe's obligations to uphold human rights correspond to a set of rights for all citizens regardless of what political party, ethnicity or political views they hold. The rights are outlined as follows:

- the right of the victim to see justice done,
- the right to know the truth;
- an entitlement to compensation and to non-monetary forms of restitution;
- and a right to new, reorganized and accountable institutions.

The report goes further to chronicle and lament the negligent, ignorant practices as well as the toxic attitudes of Zimbabwe's state security agents in their performance of duty. For example, where the state security agents have been fingered in human rights violations, the Forum has noted regrettable trends especially in the police, military and intelligence security officers' behaviors. For example, the most common excuses used by the state security agents have been that: (i) they were following superior orders; (ii) that they were ignorant of the law and human rights obligations (iii) politicians instruct and interfere with their work and generally that (v) the environment in the security sector is pervasively toxic and encourages rogue behavior.

With the above factors in mind, the report questions whether accountability can be attained in a political system like Zimbabwe's. Several approaches to achieving justice such as prosecutions for serious violations, holding the senior commanders accountable or even prosecuting the actual perpetrators are discussed with the pros and cons of such mechanisms also put onto the table.

In addition to the above the report delves further into a discussion around what sort of remedies would

be most plausible for victims of state sponsored human rights violations. Questions around reparations and compensation are touched on in the report suffice to say that the issues remain vexing and contentious at the national level. Questions remain on who is supposed to bear the cost of such reparations. When the state compensates, is it not just the citizens compensating themselves? Why is it that individual state security agents and their superiors are not held individually accountable for atrocities committed in Zimbabwe? In a free falling and unstable economy like Zimbabwe's what currency should be used and who determines what currency or inflation rates to be used to compensate victims from yesteryear violent epochs. These questions are not easy and require more discussion. This report sets the tone for those discussions.

The report notes that the current judicial system and operating environment in Zimbabwe leaves a lot to be desired. The domestic efforts to set up government and constitutional bodies such as the now defunct Organ on National Healing as well as the National Peace and Reconciliation Commission all seem to be overwhelmed by the state of impunity Zimbabwe finds itself in. More could be done. The bodies mandated to serve justice, investigate past human rights violations and advise the government seem weak, are at their tethers and seemingly do not know exactly where to start from or where to go. The recommendations section in the report deals with that dilemma and recommends solutions to the police, the Ministry of Home Affairs, the NPRC, the government as a whole and what civil society can do to enhance its work on curbing impunity and redressing the scourge of the same phenomenon in Zimbabwe.

Besides bringing to the fore the questionable and unlawful actions of state security agents in Zimbabwe, this report serves another purpose. It questions our conscience as a people on what our values are towards each other and as a nation. The same police officer who tortures another citizen has to go and face the same relatives at hospital or at a funeral. The same government that refuses to pay compensation to victims still collects taxes from the same people and plunders the money through corruption and still pleads incapacity to pay. The same security sector that is supposed to uphold the laws of the nation seem to operate oblivious of the laws of Zimbabwe and even plead ignorance. Yet, one of the fundamentals of law is that ignorance of the law especially from law enforcement officers cannot be a legal defence. How is that possible and how can it be allowed? Something has got to give and this report argues that the legacy of impunity has to be broken forthwith in Zimbabwe.

Abbreviations

ACHPR	African Commission on Human and Peoples' Rights
AIPPA	Access to Information and Protection of Privacy Act
AU	African Union
CIO	Central Intelligence Organization
GNU	Government of National Unity
ICC	International Criminal Court
ICCPR	International Convention on Civil and Political Rights
ICESCR	International Convention on Economic Social and Cultural Rights
MDC	Movement for Democratic Change
NPRC	National Peace and Reconciliation Commission
POSA	Public Order and Security Act
SADC	Southern Africa Development Community
UDHR	Universal Declaration of Human Rights
ZANU PF	Zimbabwe African National Union - Patriot Front
ZNA	Zimbabwe National Army
ZRP	Zimbabwe Republic Police

1 | Introduction

The role of the police and state security agents in a democratic society is pivotal if the rule of law is to remain meaningful and human rights are to be protected and enjoyed by everyone. It is not contradictory to say that the police are essential protectors of human rights in a democratic society but that the nature of their work can also make them responsible for human rights abuses (through excessive use of force, through discriminatory practices etc.).¹

The above quotation from Dinsdale's 1997 opening address to the Council of Europe on Human Rights and the Police sums up the thrust of this report. State security agents such as the police, the army and the central intelligence in Zimbabwe are expected and have been known to play a pivotal role in the protection of the internal security of the nation. Their roles are set out in Zimbabwe's Constitution and other subordinate laws related to policing and national security services. However, over the years the human rights situation in Zimbabwe deteriorated dismally under the repressive regime of former President Robert Mugabe. Different state and non-state actors including the police were accused of serious human rights violations against citizens. These reports have been confirmed further by cases won in court by complainants. Investigations have been carried out in some instances but in most of the cases, alleged rights violations cases by the police have remained unresolved. For those cases where the police have been found guilty by the courts, fines and sentences have been imposed. Where cases have been taken for civil litigation and awards for damages given, these have often taken time to be paid and some have remained outstanding for extensive periods. In some cases, where damages have been paid the victims have complained that the money was not adequate as it failed to ensure restorative justice for the victims.

Some may view the low sums paid to victims for abuses as understandable, but the Government of Zimbabwe (GoZ) cannot absolve itself of responsibility by pleading incapacity to pay. The GoZ has, in cases, failed to honor demands for payment of damages where its security agents have been found liable by the courts citing inability to pay because of a poorly performing economy. Often, the GoZ has manipulated the laws in its favour. The State Liabilities Act (Chapter 8:14) forbids government property from being attached by victims who have been awarded damages.

The bedrock of state-sanctioned impunity for human rights violations lies between perpetrators of state-organized violence who cannot be sued in their personal capacities, or those who cannot afford to pay the damages by themselves and a government which abuses its own laws to save itself from a victimized populace. The 'untouchable' nature of state security officials such as the police remains a cause for concern in Zimbabwe's quest for justice for victims of state-sanctioned human rights violations. The GoZ in the past set up Commissions² to investigate cases of human rights violations by state security agents but this has not yielded any tangible outcomes. Zimbabwe's challenge today is to fight this impunity and have state security agents that are accountable, uphold human rights, and protecting its citizens.

¹ J Dinsdale opening address in Human Rights and the Police Council of Europe 1997 pg. 8.

² For example, the Commission of Inquiry into the Matabeleland Disturbances from 1983 to 1984, also known as the Chihambakwe Commission of Inquiry (named after its chairperson Mr. Simplisius Chihambakwe) was set up by the then Prime Minister, Robert Mugabe in 1983. The government of Zimbabwe has never made public the report of the Commission and its recommendations.

Methodology

The Zimbabwe Human Rights NGO Forum (hereinafter referred to as the Forum) has, since its formation in 1998, been collecting data on politically motivated human rights violations either by state agents or private individuals. The Forum has systematically collected data from victims referred from its members and partner organizations who have walked into its offices to report their ordeals to the Public Interest Unit, a division manned by professional and specialized lawyers. The Forum also relies on citizens reports received through the Ziso/ Ilihlo platform and press reports. The reports are verified and recorded into a secure database where they are then thoroughly verified through corroboration and the Forum's own investigations before publication in reports or, in some cases, litigation at the courts. This report relied on data from this database to compile information on the different types of violations.

This report has used a desk study approach to analyze the state of impunity in Zimbabwe as it relates to the human rights violations committed by the state security agents with a focus on the police. The Forum has in the past produced reports detailing legal cases that have been litigated on behalf of victims of human rights violations, such as the 2006³ report focusing on violations from 1998 – 2006. Updated data from the cases handled between 2007 to date has also been compiled. This information has been retrieved and updated to reflect the new status documented in this report.

The Forum held interviews to document the different viewpoints held by security services officials whose identities are not disclosed in this report for security reasons. The responses from the interviews formed the bulk of the information in sections explaining the challenges that the police service face when executing 'political' orders. The recommendations section was informed by the outputs from the interviews with the security officers. In addition, interviews using open-ended questions were administered to key civil society leaders in Zimbabwe and the lawyers at the Forum on the state of impunity in Zimbabwe.

³ An Analysis of Zimbabwe Human Rights NGO Forum Legal Cases – 1998 – 2006, Zimbabwe Human Rights NGP Forum, June 2006, Harare, Available at <http://www.hrforumzim.org/press-releases/an-analysis-of-zimbabwe-human-rights-ngo-forum-legal-cases/>, (accessed September 2018).

2 | Background to the report

2019 marks the second year since independence in 1980 that Zimbabwe has not had former President Robert Mugabe as the leader of the country after his ouster by the military led by the then Defense Forces Commander, General Constantino Chiwenga in November 2017. The national harmonized (presidential, parliamentary, and council) elections held on 30 July 2018 had 23 presidential candidates including Emmerson Mnangagwa of the Zimbabwe African Nationalist Union – Patriotic Front (ZANU-PF) and Nelson Chamisa of the main opposition, the Movement for Democratic Change (MDC) Alliance. The pre-election period and the voting day were largely peaceful, but post-election violence broke out on 1 August 2018, as the military used excessive and lethal force to crush protests in Harare. Soon after the election, the political atmosphere became tense when both ZANU-PF and MDC Alliance claimed that they had won the elections amid perceived delays in the announcement of presidential election results. When ordinary, including MDC Alliance supporters in Harare took to the streets, the military responded heavy handedly. Uniformed soldiers indiscriminately fired live ammunition and beat up people on the streets, many of whom were not part of the protests. Men clad in military attire were seen indiscriminately shooting and assaulting civilians including those who were not taking part in the protests. Seven people died from gunshot injuries and many others were seriously injured. This post-election violence was shocking but unsurprising.

Since 1998, the Forum has documented cases of horrific human rights violations and fatalities perpetrated by state security agents in the course of policing public protests, gatherings, or political meetings. What is concerning is that since that day, the government has sought in vain to dismiss the reports and allegedly tried to tamper with the evidence of the killings by forcing the relatives of the deceased to accept death records stating that the victims had died from knife stab wounds and not gunshot injuries. This pattern of behavior is well documented as part of the government's strategy in avoiding responsibility where its state security officers have committed murder, extra-judicial killings, torture and other crimes while on state duty.

During Mugabe's authoritarian rule, serious human rights violations were committed against citizens by various state actors including the Zimbabwe Republic Police (ZRP), the dreaded Central Intelligence Organization (CIO) as well as the Zimbabwe National Army (ZNA). Private bodies and individuals such as the war veterans and ZANU-PF supporters often-times acted with the open approval of the state, with support from the police, to commit serious human rights abuses with impunity. Serious human rights violations ranging from torture, killings, rape, sexual assault, arbitrary arrests and detentions, grievous bodily harm, disappearances, theft, arson, destruction of property were committed with brazen impunity.

Mugabe presided over an authoritarian government that terrorized citizens and committed horrific human rights violations. The military labelled Mugabe's ouster from office “*Operation Restore Legacy*”.⁴ Whatever legacy was restored when Mugabe was removed from office in November 2017, it certainly did not deal with the legacy of human rights violations and related impunity that defined his

⁴ Operation Restore Legacy is a military operation which ended Mugabe's presidency after thirty-seven years at the helm of the country and of the ruling ZANU-PF party.

rule. The same police officers and security officials implicated in torture and killings of innocent civilians and opposition party supporters during Mugabe's rule remain in jobs without punishment or being held accountable by the courts of law or any other justice mechanism.

From its formation in 1998, the Forum began work on documenting and reporting on cases of human rights violations by the state and other private individuals acting with the acquiescence of the state especially in politically motivated cases. Since then, the Forum has stood side by side with over 20 000 victims of organized violence and torture and processed over 7 000 civil cases in local and international courts. Most of the cases litigated by the Forum concerned state security agents from the ZRP, the CIO, and the ZNA, but with varying levels of involvement and participation in the abuses. The Forum produced several reports detailing such violations in the past and they are available on the Forum website.

What has remained a thorn in the flesh of the Zimbabwean justice landscape is the impunity for human rights violations by state security agents. The Forum authoritatively notes that hundreds of cases remain unresolved because investigations by the police remain pending. In addition, the more prevalent form of impunity exhibited in Zimbabwe is the utter disregard for investigations by the police. Reports abound that numerous cases have been deliberately bungled, or accused officers transferred leading to loss of crucial evidence or documents. As a result, many cases are then abandoned.

The Zimbabwe judiciary has been criticized for the slow turnover in cases brought forward for adjudication. Victims represented by the Forum often complain that judgments delivered against perpetrators are not deterrent enough. When a judge or a magistrate rules against the government in cases deemed 'political,' the police frequently ignore the court orders. Prosecutors who have sought to prosecute offenders have reportedly been undermined by the police, who as a matter of policy in 'political' cases appear to only arrest opposition activists. ZANU-PF activists and their allies who commit crimes in the context of political matters have, by and large, gone scot-free.

Another key challenge in several cases is the government of Zimbabwe's blatant refusal to pay damages as awarded against it by the courts.⁵ The Zimbabwe government's common defence is lack of capacity to pay due to the poor economic conditions prevailing in the country. To make matters worse, Zimbabwean law, through the State Liabilities Act and other related legislation, prevents the attachment of government property leaving victims of human rights violations by state agents without an effective remedy.

The GoZ has over the years failed to take heed of calls to institute justice mechanisms, programs or other such activities in its legislation or policies. Processes that have been tried have largely been tokenistic, ended abruptly, were poorly conceived, underfunded and not well received by the general populace. For example, the Government of National Unity (GNU) established the Organ on National Healing Reconciliation and Integration (ONHRI) from 2009 - 2013 whose work was very much politicized but did not achieve much in terms of its core objectives to heal, reconcile and integrate Zimbabweans.

⁵ See Barry L.T Gondo, Kerina Gweshe, Nyaradzai Katsande, Peter Chirinda, Phaniel Mapingure, Ruth Manika, Sophia Matasva, Trust Shumba and Mercy Magunje, SADC Tribunal, Case No. SADCT: 05/2008; Judgment available at, http://www.worldcourts.com/sadct/eng/decisions/2010.12.09_Gondo_v_Zimbabwe.htm, (accessed September 2010.)

In January 2018, the GoZ operationalized the National Peace and Reconciliation Commission (NPRC) established by Section 252 of the Constitution after almost five years of back and forth negotiations between the government and human rights organizations fighting on behalf of victims of past human rights violations. The jury is still out on the performance of the NPRC, which seemed to suffer teething problems after the Forum took it to court for operating outside the law. This case arose after the sad demise of its first Chairperson and the NPRC tried to convene meetings and carry out its work without a substantive chairperson. The Forum took exception to this approach arguing that the law needed to be adhered to for the NPRC to carry out its legal mandate. Although the application by the Forum was dismissed in court, the GoZ took heed after having first ignored this call and now a substantive Chairperson has been appointed. However, the NPRC is yet to secure enough resources (human and financial) to enable it function effectively. Its secretariat is yet to be fully appointed and, according to its officials, it is operating on a very slim budget. Questions remain on the link between the NPRC and officers appointed from the President's Office who used to work in the Organ on National Healing and Reconciliation. Their role remains unclear and it could be disruptive if not handled well.

The quest for justice in Zimbabwe remains unfulfilled for thousands of people. Some of the survivors and victims were left with permanent injuries. Some lost their parents, children, property and livestock, got maimed, at the hands of the State security agents under the brutal Mugabe regime. As president Mnangagwa and other senior government leaders traverse the world with the “*Zimbabwe is Open for Business*” mantra, the Forum believes that the president should also address long-standing questions of when justice will be delivered to the thousands of victims who suffered at the hands of the State since independence in 1980.

This report seeks to discuss impunity in Zimbabwe for state security agents, how it is perpetuated by the State, what has been done thus far, and what excuses the government and the security services have continued to give. The report proposes several policy changes with regards impunity and justice for state security officials and victims of state-sponsored violence and politically-motivated violations respectively.

3 | Impunity by design – chronicling the history of amnesties in Zimbabwe

The phenomenon of impunity for human rights violations committed by state security agents in Zimbabwe is an old practice that started during the colonial era.⁶ Evidence from human rights reports from back then to date shows that the State has always resorted to the use of force by security agents to resolve political differences. The dilemma that continues to fester is that when the GoZ has been confronted by victims and human rights defenders to redress such wrongs, there has been lethargy in instituting punishments against the accused security officers.

Seeking redress in Zimbabwe has always been a huge challenge because of the provision of amnesty laws that shield most of the perpetrators from accountability. Pro-amnesty champions have opined that challenging the existing amnesty laws and any other pardons for human rights abusers would subvert the very rule of law that the human rights movement champions by violating the cardinal principle of *nullum crimen, nulla poena sine lege praevia*.⁷ This issue points to the need to establish whether the pardons outlined below were and are in fact legally binding as well as compliance with international standards and principles on amnesties. Questions can be asked further on whether victims and survivors of pardoned human rights violations can still have recourse to judicial or other mechanisms of redress.

This section narrates the long-held tradition of impunity by the state in support of state security agents. This section seeks to show that Zimbabwe needs to make a clean break with its nasty past of torture and other egregious human rights violations by state security agents acting in the name of the past that they go unpunished.

Indemnity and Compensation Act of 1975

This law sought to indemnify the black and white Rhodesia police and soldiers in advance for any human rights violations they would commit. The key provision of this Act read, “if any member of the security forces, defined as the army, the police, and the CIO, or if any civil servant or any minister of government, acting in good faith, committed a breach of the law and became liable criminally or civilly, no court of law could hold them accountable”.

Amnesty Ordinance (3) of 1979 and Amnesty (General Pardon) Ordinance (12) of 1980

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

The Lancaster House Constitution concluded on the eve of Zimbabwe's independence encompassed several agreements that entrenched the culture of impunity over human rights violations that had occurred since the colonial days. It appears the logic was that silence about past injustices would supposedly heal the nation and assist the politics of reconciliation that the then Prime Minister Robert

⁶ Declaration of the Johannesburg Symposium, August 2003, in Civil Society and Justice in Zimbabwe Summary of Proceedings of a Symposium held in Johannesburg 11-13 August 2003. <http://www.santep.co.za/satz/zim2003.htm> (last accessed 10 January 2006).

⁷ A principle which prevent the use of legislation to punish crimes committed before the passing of the legislation.

Mugabe and his government advocated for at independence. Thus, on Independence Day in 1980, Mugabe told the nation:

*Henceforth you and I must strive to adapt ourselves intellectually and spiritually to the reality of our political change and relate to each other as brothers bound one to the other by a bond of comradeship. If yesterday I fought you as an enemy, today you have become a friend and ally with the same national interests, loyalty, rights and duties as myself. If yesterday you hated me, today you cannot avoid the love that binds you to me and me to you. Is it not folly, therefore, that in these circumstances anybody should seek to revive the wounds and grievances of the past? The wrongs of the past must now stand forgiven and forgotten.*⁸

This Mugabe strategy cast a veil over the human rights violations of the Rhodesian secret service, army and police. It was at the same time, appreciated by the leaders of the liberation movements because it meant also closing the books on their violence against civilians in Rhodesia and against their rivals in the training camps in Mozambique and Zambia.⁹

Clemency Order of 1998

The amnesty initially conceived to gloss over human rights abuses of the liberation war period fueled a culture of impunity that became a driving force in the independence era. A Clemency Order of 1998 pardoned all violations committed by all parties from 1982 up to the end of 1987 – thus inclusive of the atrocities committed in the Matabeleland and Midlands provinces.

Clemency Order of 1995

Clemency Order (1) of 1995, officially excused the politically-motivated beatings, burning of homes, and intimidation perpetrated by supporters of the ruling ZANU-PF party during the 1995 elections, by granting amnesty to those liable to criminal prosecution for, or convicted of, these crimes.

Clemency Order of 2000

This set a further precedent for yet another presidential pardon for political violence, Clemency Order (1) of 2000, which was declared after the violent June 2000 parliamentary elections. Once again, those involved in human rights violations - such as kidnapping and torture, but excluding murder, rape and fraud could not be held accountable for criminal or civil claims through the justice system. Contentious questions arise from these situations.

Pardons after 2000

Since the year 2000, more egregious human rights violations were committed by the Mugabe-led regime using the security officers and para-military groups aligned to ZANU-PF. Invariably, Mugabe invoked the Presidential Powers (Temporary Measures) Act¹⁰ to pardon perpetrators or to refuse to pay for damages arguing that the government was facing economic challenges.

Annual Presidential pardons

Zimbabwe's Lancaster House Constitution provided for the President to pardon criminals each year, just as the new 2013 Constitution provides in Section 112.¹¹ This provision in Zimbabwe's laws is

⁸ "Zimbabwe: A Final Priceless Reward", Newsweek, 28 April 1980, in „Foreword“, B Raftopolous and T Savage (eds), Zimbabwe Injustice and Political Reconciliation (Cape Town, Institute for Justice and Reconciliation, 2004).

⁹ See NJ Kriger, Zimbabwe Guerrilla War: Peasant Voices, (Cambridge, Cambridge University Press, 1992) at 156

¹⁰ Presidential Powers (Temporary Measures) Act Chapter 10:20 Act 1/1986

¹¹ Constitution of Zimbabwe, Amendment (Number 20) Act 2013, Section 112, Power of Mercy.

problematic as it leaves justice at the mercy of the President. This inhibits the rule of law as the President who is the part of the Executive can overturn the decisions of the judiciary on the basis that he is implementing a government policy. This flies in the face of democracy and justice especially for victims who might think that justice had been served only to realize that the President can overturn their joy at the stroke of a pen.

4 | Understanding the concept of impunity and Zimbabwe's national and international obligations

Impunity is generally understood to mean:

*“the absence or inadequacy of penalties and/or compensation for massive and grave violations of the human rights of individuals or groups of individuals. This definition is applicable to civil and political rights, as well as economic, social and cultural rights, and to collective or communal rights”.*¹²

For the purposes of this report the Forum defines impunity as the impossibility, in law or in fact, by acts or omissions, of holding perpetrators of human rights violations accountable. The Forum will, throughout this report, examine the three circumstances outlined below:

1. Institutional/legal deficiencies that make it difficult or impossible to ensure accountability for crimes committed by the state (or state-endorsed) actors.
2. Deficiencies arising from the inaction of state officials in general.
3. Cultural or political reasons why the State may fail to implement accountability provisions even when all the necessary institutional mechanisms are in place.¹³

This working definition of impunity has been chosen to narrow down practices of impunity applicable to the police in Zimbabwe, as state actors. Secondly as deficiencies because of the state turning a blind eye on the actions of the police and or the lack of implementation of institutional mechanisms to hold the police accountable. This working definition allows us to focus on root causes and helps to focus the work on impunity.

International Standards

Under international human rights law, a state is obliged to carry out several actions in response to human rights abuses.¹⁴ Mendez reiterates that these actions are first to investigate, prosecute, and punish the perpetrators. Secondly to disclose to the victims, their families, and society all that can be reliably established about those events. Thirdly, to offer the victims *adequate reparations*. Lastly to *separate* known perpetrators from law enforcement bodies and other positions of authority.¹⁵

Mendez reiterates the position held in international law that the state's obligations to uphold human rights correspond to a set of rights for individuals and groups. The rights are outlined as follows:

- the right of the victim to see justice done,
- the right to know the truth;
- an entitlement to compensation and to non-monetary forms of restitution;
- and a right to new, reorganized and accountable institutions.¹⁶

¹² U.N. Econ. & Soc. Council, Sub-Comm. On Prevention of Discrimination & Prot. Of Minorities, Final Report on the Question of Impunity of Perpetrators of Violations of Human Rights (Economic, Social and Cultural Rights) 5, U.N. Doc. E/CN.4/Sub.2/1997/8 (June 27, 1997).

¹³ Vinuales JE, Impunity: Elements for an Empirical Concept, Law & Inequality: A Journal of Theory and Practice, Volume 25, Issue 1, Article 3, 2007:127.

¹⁴ Article 2, ICCPR.

¹⁵ JE Mendez, “Accountability for Past Abuses” (1997) 19 Human Rights Quarterly 255 at 260.

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

Taking from Mendez's analysis outlined above, there is reason to believe that international law supports other accountability mechanisms as opposed to solely criminal prosecutions.¹⁷ Zimbabwe could borrow from such progressive policy thinking when it comes to its policies on dealing with a past littered with reports of human rights violations.

International law and curbing impunity

The need to hold systematic human rights violators accountable is well established in international law. Article 2 (3a) of the International Convention on Civil and Political Rights (ICCPR) obliges state parties to undertake to ensure that victims of human rights violations “*shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity*”. The UN Human Rights Committee (HRC) - the interpreter of the ICCPR, has repeatedly held that blanket amnesty laws and pardons are inconsistent with the ICCPR because they create “a climate of impunity” and deny the victims this right to a remedy”.¹⁸ Article 9 of the ICCPR guarantees the right to liberty and security of the person as a right to be guaranteed by the state. Subsection 5 of the article gives a victim a right to compensation where his or her right to liberty and security has not been realized by the state.

The right to a remedy or reparation in the event of a human rights violation is well entrenched in international law. The Articles on Responsibility of the State for Internationally Wrongful Acts prepared by the International Law Commission, the Universal Declaration of Human Rights (UDHR), the ICCPR provides a right to an effective remedy and compensation. The Velasquez Rodriguez¹⁹ is instructive and the judgment ruled that “every violation of an international obligation which results in harm creates a duty to make adequate reparations”. In *Embga Mekong Louis v Cameroon case*,²⁰ the African Commission on Human and Peoples Rights granted compensation to the legal heirs and next of kin of a deceased victim for human rights violations.

Zimbabwe and its relationship with international law

In Zimbabwe international law is not automatically applicable or made into local law when ratified or acceded to. For international law to become applicable in Zimbabwe it should be incorporated through an Act of Parliament.²¹ The relevant treaties creating binding legal obligations on human rights standards relevant to policing in Zimbabwe are the ICCPR, the ICESCR, and the African Charter on Human and Peoples' Rights (ACHPR). They have all been ratified by Zimbabwe without reservations.

Among other international treaties and conventions of International law, Zimbabwe is signatory to both the ICCPR²² and the ICESCR,²³ of which it ratified on 13 May 1991. Apart from these Zimbabwe is also a signatory to the Rome Statute²⁴ but has not ratified it. Zimbabwe is also party to the Constitutive Act of the African Union, the Charter of the African Commission on Human and Peoples Rights as well as other regional protocols in the Southern Africa Development Community organization.

¹⁷ P DeGreiff, “International Courts and Transitions to Democracy”, (1998) 12 Public Affairs Quarterly 79, at 79.

¹⁸ Comments of the Human Rights Committee, Consideration of Reports submitted by States Parties under Article 40 of the Covenant, 10 UN. Doc. CCPR IC/79/Add.46 (1995).

¹⁹ Velasquez Rodriguez Case, Inter-Am. Ct.H.R. (Ser. C) No. 4 (1998), Inter – American Court of Human Rights (IACrTHR), 29 July 1998, available at <http://www.refworld.org/cases, IACRTHR,40279a9e4.html> [accessed 7 November 2018]

²⁰ *Embga Mekong Louis/Cameroon 59/91*, available at <http://www.achpr.org/communications/decision/59/91/> [accessed 7 November 2018]

²¹ S327 (2) (a) and (b) of the Zimbabwe Constitution

²² International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

²³ UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, available at: <http://www.refworld.org/docid/3ae6b36c0.html> [accessed 25 April 2018]

²⁴ N General Assembly, Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998, ISBN No. 92-9227-227-6, available at: <http://www.refworld.org/docid/3ae6b3a84.html> [accessed 25 April 2018].

The African Commission noted in the *Amnesty International v Sudan*²⁵ case, that “ratification obliges a state to diligently undertake the harmonization of its legislation to the provisions of the ratified instrument”. Article 1 of the ACHPR directs States parties to “adopt legislative or other measures to give effect to the rights protected under the Charter”. It further stated that “Article 1 of the Charter confirms that the government has bound itself legally to respect the rights and freedoms enshrined in the Charter and to adopt legislation to give effect to them”.²⁶

Regional African Standards

Article 4 (0) of the Constitutive Act of the African Union²⁷ sets out that members of the African Union (AU) will function in accordance with the principle of respect for *sanctity of human life, condemnation and rejection of impunity and political assassination, acts of terrorism and subversive activities*. Principle (m) of the same article demands a respect for democratic principles, human rights, and the rule of law and good governance. Zimbabwe in signing and ratifying this Constitutive and being a member of the African Union, pledged to adhere to such principles.

The African Charter,²⁸ in Article 4 states:

Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right”.²⁹

Article 7 of the same Charter guarantee one's right to be heard before the court and to be presumed innocent until proved guilty.

The Resolution on the fight against Impunity in Africa³⁰ urges State Parties to the African Charter to:

comply with their obligations to investigate serious human rights violations, and hold perpetrators accountable in accordance with applicable regional and international human rights standards; take the necessary legislative and other measures to put an end to impunity and ensure that all the perpetrators of serious human rights violations are prosecuted; adopt necessary laws, policies and mechanisms to guarantee the rights to justice, truth and reparation for victims of serious human rights violations and international crimes.

Zimbabwe's Legal Framework

The Zimbabwe Constitution³¹ enshrines the country's founding values and principles including the rule of law, fundamental human rights and freedoms, recognition of the inherent dignity and worth of each human being, recognition of the equality of all human beings, and good governance. It further elaborates on the principles of good governance, “which bind the State and all institutions and agencies of the government at every level”, to include “transparency, justice, accountability and responsiveness”.

²⁵ 48/90-50/91-89/93 Amnesty International Comite Loosli Bacherlard, Lawyers Committee for Human Rights Association of Members of the Episcopal Conference of East Africa/Sudan, available at: <http://www.achpr.org/communications/decision/48.90-50.91-89.93/>.

²⁶ Ibid at para 40.

²⁷ Organization of African Unity (OAU), Constitutive Act of the African Union, 1 July 2000

²⁸ The African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (Banjul Charter).

²⁹ Organization of African Unity (OAU), African Charter on Human and Peoples' Rights ("Banjul Charter"), 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

³⁰ Resolution on the fight against impunity in Africa - ACHPR/Res. 344(LVIII) 2016.

³¹ Constitution of Zimbabwe Amendment (No. 20) Act, 2013 [Zimbabwe], 22 May 2013.

Chapter 2 of the Constitution sets out the national objectives of good governance: - to adopt measures to expose, “combat and eradicate all forms of corruption and abuse of power by those holding political and public offices.” In its Declaration of Rights, the Constitution in Chapter 4 gives

the State and every person, including juristic persons, and every institution and agency of the government at every level” the duty to “respect, protect, promote and fulfill the rights and freedoms set out in the Constitution.

The Declaration of Human Rights in the Constitution further outlines the right to human dignity for all, right to personal security which includes right to “**freedom from all forms of violence from public or private sources**”, **freedom from torture or cruel, inhuman or degrading treatment or punishment** and afford the rights of arrested persons to be treated humanely and with respect for their inherent dignity. The same chapter prescribes that the interpretation of the Declaration of Human Rights “must consider international law and all treaties and conventions to which Zimbabwe is a party”.

Legislation governing the police in Zimbabwe

The Constitution of Zimbabwe does not give the police and army personnel free reign in maintaining order in the country. Section 206(3)(a) of the Constitution notes that the police force must show the utmost respect for “the fundamental rights and freedoms and the democratic values and principles enshrined in the Constitution.

The Police Act³² of Zimbabwe establishes and regulates the police. Section 19 of the Act describes the power and duties of the members of the police as follows:

Every Regular Force member may exercise such powers and shall perform such duties as are by law conferred or imposed on a Regular Force member and, subject to any other law, he shall obey all lawful directions in respect of the execution of his office which he may from time to time receive.

The Police Act – Fit for purpose or part of the problem?

The Police Act has several sections which could be strengthened. For example, the Act is vague on the kind of duties that are unlawful and does not refer to any other law to give examples of unlawful acts by a member of the police force. However, the Police Act stipulates that every member of the force must only obey all lawful directions in line with his or her office. This can be interpreted to mean that a police officer can disobey unlawful directions from his or her superiors.

Furthermore, the Police Act sets out disciplinary measures for members of the police force who contravene the Act or those who disobey lawful orders under the Act. It also gives measures for the trial of members for an offence under the jurisdiction of a court or tribunal. It also gives powers to the Commissioner General to confirm convictions and sentence, alter, quash, or reduce sentence. This provision is problematic because it gives too much power to the head of the police with regards how

³² ZWE-1995-L-41991.

police officers can be held accountable. If the Commissioner General has powers to rescind or alter sentences then it means that police officers acting outside the law but obeying his orders can do so knowing full well that they are protected by the “law”. Arguments can be made that such a provision should be read with positivity, however judging from what the Forum has observed in its interactions with the police and other state security agents it would be difficult to have confidence in a police force that has wide powers of “self-control” outside the normal judicial system of the country.

Zimbabwe's laws remain weak with regards a most fundamental issue linked to police brutality, excessive use of force, and extrajudicial killings. Members of the police force have on numerous occasions been implicated in cases that have ended up being judged to have been extra judicial killings³³ due to recklessness, complete disregard of the law and a “trigger-happy” mentality. On the question of use of lethal force by the police, including in the context of arrest, this matter should be viewed as a matter of utmost gravity and should be based on a solid ethical and legal framework. These include the fundamental nature of the right to life; the irreversible nature of death; the potential of errors of fact and judgment; the effect on the legitimacy of the police and the State; and the trauma suffered by everyone involved when a life is ended unlawfully through violence”.³⁴

A Rights-Based Approach to Zimbabwe's Legal Obligations

Under international human rights law standards, the Zimbabwe government has legal obligations to respect, protect, and fulfill the enjoyment of human rights by all those under its jurisdiction. The ***obligation to respect*** human rights requires the government and all its organs including the ZRP, ZNA and the CIO, to refrain from carrying out any discriminatory and retrogressive practices or sponsoring or tolerating any practice, policy or legal measures that violate the rights of individual citizens. With regards the human rights violations perpetrated by the security agents highlighted in this report, the government is required to refrain from such acts. Concurrently, the ***obligation to protect*** the right to freedom from torture and any other violations by state security agents obliges the state and its agents to prevent the violations by any other individual or non-state actor who might include private individuals such as medical personnel, transport operators, bankers and other such institutions as might be involved in perpetuating human rights violations by state security agents. The ***obligation to fulfill*** means that States must take positive action to facilitate the enjoyment of human rights.

³³ 295/04 Noah Kazingachire, John Chitsenga, Elias Chemvura and Batanai Hadzidzi (represented by the Zimbabwe Human Rights NGO Forum) / Zimbabwe – ACHPR.

³⁴ Ibid at para 108

5 | The excuse-based approach to human rights violations and policing in Zimbabwe

Section 219 (1) of the Constitution of Zimbabwe provides for the establishment of the Zimbabwe Republic Police. It notes that there is a Police Service responsible for:

- Detecting, investigating and preventing crime
- Preserving the internal security of Zimbabwe
- Protecting and securing the lives and property of the people
- maintaining law and order
- Upholding the constitution and enforcing law without fear or favor

The ZRP was established at independence in 1980. Immediately after it was set up, it adopted a Police Service Charter, which among other things, strived to have the ZRP committed to provide the most efficient and effective service to the public. The Service Charter outlined organizational values of the ZRP including among others, highest quality service to the public, highest professional standards in its operations, transparency and accountability. The Service Charter set out the values of individuals in the police force as being: *diligence; courtesy; fairness, honesty, integrity and with due respect of human rights*. The new Police Service Charter that was launched soon after President Mugabe's removal from power has its Vision as “to be the leading police service provider in the world by the year 2020”.

Who oversees the police in Zimbabwe³⁵

The ZRP operates under the direct command of the Commissioner General of Police, who reports to the Minister of Home Affairs and Culture. The administration of the ZRP and terms and conditions of service are set out in the Police Act, which prohibits serving members of the police force from engaging in partisan politics. Citizens and victims alike are free to report cases against the police to any police station or security officer of the state. The Constitution and the Police Act mandates the ZRP to ensure “prompt and speedy investigations of the matters reported”. Section of the Zimbabwe Constitution notes that “every person accused of an offence has the right to a fair and public trial within a reasonable time before an independent and impartial court”. Within a reasonable time,³⁶ the matter must be brought before a competent court of law for adjudication by a judge either in the Magistrates' Court or the High Court of Zimbabwe.

Causes of human rights violations by the Zimbabwe police

While it is well documented that the police and other security agents in Zimbabwe have been and continue to be involved in human rights violations not much research has been carried out into understanding why the police continuously are found on the wrong side of the law and in the forefront of perpetrating human rights violations. The Forum through its research and observations has documented some of the reasons discussed below.

³⁵ Who Guards the Guards: Violations by Law Enforcement Agencies in Zimbabwe 2000-2006, Zimbabwe Human rights NGO Forum, Harare 2006.

³⁶ See *S v Mashayamombe* (HH 596-15 CRB 112/15) [2015] ZWHHC 596 (02 July 2015); and *Mhari v Presiding Magistrate Mangota N.O. & Others* (HC 1867/15) [2015] ZWHHC 247 (10 March 2015) for further elucidation on the concept of reasonable time.

Repressive legislation

The legal framework in Zimbabwe is retrogressive when it comes to the observance of human rights. Draconian provisions in laws such as the Access to Information and Protection of Privacy Act (AIPPA)³⁷ and Public Order and Security Act (POSA)³⁸ lead to the abuse of citizens by stifling their freedoms to assembly, expression and association. The POSA impinges on the rights of freedom of association and assembly as it regulates against public meetings without prior notification³⁹ to the police which in practice has been interpreted to mean a requirement for prior permission from the police.

The Zimbabwe police has used these two laws, among others, over a long period of time as an excuse to stop or disrupt political gatherings, peaceful protests, and any other politically related activities. In the past, as documented by the Forum, during the years when there have been elections, human rights violations by state security agents or private individuals acting with the acquiescence of the state sharply increased. When confronted by the Forum, most police officers have argued that they will be following the law of the land when they are accused of infringing on people's rights.

Political leaders have repeatedly made public statements that encourage the police to deploy the wrath of the law, often leading to wanton abuses. For example, in April 2006, the then president Mugabe threatened to “[bring down the full wrath of the law]” against anyone who disturbs Zimbabwean peace and stability⁴⁰. The threat came after calls by the country's then main opposition leader, Morgan Tsvangirai, for street protests to topple Mugabe's 26-year rule.

The Criminal Procedure and Evidence Act (CPEA) [Chapter 9:07] confers on the police the powers of investigation, arrest, detention, search, entry and seizure. Although section 29 of POSA authorizes the use of firearms it does not mention using them to kill people. Section 42 of the CPEA states that “lethal force” (that is, force that is likely to cause death or serious bodily injury) can be used only in certain specified circumstances. Neither statute expressly authorizes the police or security force personnel to kill people.

The ambiguity in the statutes leaves the ZRP, ZNA and the CIO unclear about using firearms to shoot to kill. This is illustrated by the ZRP Human Rights Pocketbook, which advises police officers that the golden rules when using firearms are: “*first to fire warning shots, then if that fails to shoot to injure, disable or maim, and only if that fails to shoot to kill “if necessary or justifiable in the circumstances”*”.

Political interference

For all the time that ZANU-PF has been in power since 1980, the police has failed to dissociate itself from the ruling party and act independently. In the peak periods of politically-motivated and state-sponsored violence ruling party leaders and government officials would pronounce their protection from state security officials who include the police, army and the intelligence. An April 2007 report by the Forum “**Their words condemn them: The Language of violence, intolerance and despotism in Zimbabwe**” chronicles the utterances of ruling party-political leaders during periods they have faced heavy criticism or serious challenges to their political power.

⁴⁰Their Words Condemn Them: The Language of Violence, Intolerance, and Despotism in Zimbabwe, Zimbabwe Human Rights NGO Forum May 2007

On 23 March 2007, the then president Mugabe said he hoped the opposition had learned that violence did not pay following the police crackdown on disturbances that were supposedly sponsored by the opposition MDC party and some sections of the civic society. He said:

“Our arms of Government, the police will act very vigorously and severely on those who go on a defiance campaign. We hope they have learnt a lesson. If they have not, then they will get similar treatment”.

In April 2006, Didymus Mutasa, the then State Security Minister had said:

“We will not fold our arms while the country burns. Organs of security are there to maintain security and no sane government in this world will keep its security organs in the camps while some mischievous elements destabilize the country, even threatening to remove a democratically elected government by force.”

In September 2006, speaking about the police beatings of the trade union ZCTU leaders who had engaged in peaceful public demonstration, president Mugabe said:

“We can't have that; that is a revolt to the system. Others are crying that we were beaten up, yes you would be beaten up. When they police say move, move. If you don't move, you invite the police to use force.” (The Herald, 25 September 2006).

After a SADC Summit in Tanzania on 30 March 2007 the then president Mugabe said:

*“Yes, I told them he was beaten but he asked for it. We got full backing, not even one (leader) criticized our actions. I told the police, beat him a lot”. He and his MDC must stop their terrorist activities”.*⁴¹

In a report after a fact-finding mission to Zimbabwe in June 2002, the African Commission on Human and Peoples' Rights condemned the ZRP's partisan stance and its routine abuse of human rights. The Commission noted that the Law and Order Unit was the worst culprit and called for it to be disbanded. It said that the unit seemed to *“operate under political instructions and without accountability to the ZRP command structures,”* and urged Zimbabwe to *“avoid any further politicization of the police service.”*

Toxic police culture, sub cultures

The Forum has researched on the police culture and sub cultures that perpetuate human rights violations, rogue policing, cover-ups and criminal behavior by police units. According to general trends analyzed by the Forum in the police, there is a level of “comradeship” where members of the police cover up for each other for wrongdoing and generally encourage each other to implement whatever force or tools as would help to accomplish a task. For example, when members of the police are asked to disperse a demonstrating crowd, they usually resort to the use of force and in some instances torture individuals who they would have arrested. To make sure they are not traced, the police officers usually

⁴¹ Sunday Herald UK 31 March 2007.

go and dump the victims at different police stations or in other unidentified places. When questioned for details, the police members manning the police station where the victims would have been dumped often profess ignorance. This kind of behavior is built over time because of impunity and general decay in the governance systems of accountability for state security institutions.

It is a commonly held view in police circles that talk of adhering to human rights standards has the potential to make the police look weak and inefficient and thus they should look and act tough. This often leads to human rights violations by the police.

It is not uncommon to hear members of the police noting that the only people who talk about human rights when it comes to the police are opposition political parties.⁴² With the toxicity and negative views held by the ruling party towards opposition political parties in Zimbabwe, the police in most instances have resorted to towing the line and apportioning a “criminal” tag to opposition political parties who are then as seen as destabilizers, enemies to peace, and agents of imperialist foreigners. These views give the police the gusto to be able to commit some of the common violations recorded by the Forum.

Following superior orders

In court proceedings and off the record conversations, the Forum notes that often members of the police have reported that they carry out human rights violations at the behest of their superiors. It is noted that junior officers would be afraid of refusing to disobey their superiors. Principle 26 of the UN Basic Principles on the Use of Force and Firearms proscribes this:

Obedience to superior orders will be no defense if law enforcement officials know that an order ... was manifestly unlawful and had a reasonable opportunity to refuse to follow it ...

This situation is quite challenging in a country such as Zimbabwe where it is difficult to draw the line between those who hold political positions in government and those who seemingly hold “political” positions in the police force. The language that has been used over time especially by senior police officers showed a bias towards the Robert Mugabe regime. The orders given to junior officers who were reportedly meant to prop up the regime were noted. It can also be discerned from the conversations with some key informants that the messages from the senior officers became blurred to the point that they seemed legal.

Ineffective police oversight and complaints mechanisms

Most progressive nations have oversight complaints mechanism that handle the security services sectors in their countries. These bodies are usually manned by civilians who receive and deal with complaints on the security sector by the public. When a police officer breaks the law, it is important that the police's special powers over law enforcement aren't misused in a way that allows the officer to escape a proper investigation. The civilian oversight of police is crucial for holding police accountable when police break the law or otherwise engage in wrongdoing. Section 210 of the Zimbabwe Constitution says that “an Act of Parliament must provide an effective and independent mechanisms for

⁴² Promoting Police Observance of human rights: Master Thesis, Faculty of Law University of Lund, Goreti Mudzongo, 2002.

receiving complaints from members of the public about misconduct on the part of members of the security services, and for remedying any harm caused by such misconduct”.

The Police Service Commission is established by section 222 of the Constitution. The Police Service Commission, like all other Commissions established under the Constitution, is supposed to be independent, that is, not subject to the direction or control of anyone; and must exercise its functions without fear, favour or prejudice. Unfortunately, its remit is very limited. It has no say over the appointment or promotion of police officers. It can make no decisions or recommendations about how the police force should conduct itself. It has no disciplinary powers.⁴³

Lack of knowledge of human rights

The Forum⁴⁴ sought to understand whether the police in Zimbabwe go through any comprehensive human rights training and if the police had any knowledge on human rights standards protected in Zimbabwe's Constitution and other regional and international conventions. It can be concluded that many junior police officers that are usually fingered in the most egregious of human rights violations are not well versed in human rights standards nor have they ever been trained on such. The Forum during the research for this report also observed that junior police officers are not willing to divulge much information on how they are trained as they fear retribution and punishment through regulations set out in the Police Act.

Based on available evidence, the Forum is convinced that the lack of human rights training within the police is a major contributor to the scourge of violence and human rights abuses witnessed in Zimbabwe by state security agents. Uniformed officers who are not trained on human rights standards coupled with a plethora of repressive legislation can only harm citizens because they do not have knowledge on human rights standards, and they are buoyed by the repressive laws which allow them to carry on in that manner.

⁴³ See Section 223 of the Constitution of Zimbabwe Amendment (No.20)2013.

⁴⁴ Section 85 (1) (a – e) of the Zimbabwe Constitution provides for any persons, groups or association to act on their own behalf or people who cannot defend themselves to approach the courts of law claiming justice for human rights violations.

6 | The dream of justice – elusive or reachable

The question of what Zimbabwe's victims of past human rights violations would want to see in terms of justice has been raised over time without agreement between the state, victims, human rights defenders and other relevant stakeholders. Victims who have been represented by the Forum or have reported their cases to the organization have continued to voice their needs for justice which they say should come in various forms. It is important to acknowledge that suggestions have been made on what possibilities lie ahead to deliver justice in Zimbabwe. The discussion around what justice to deliver to victims of human rights violations in Zimbabwe turns the concept of justice on its head many a times. The Forum in its continued engagements with victims since it began its work in 1998 has documented the needs of victims and expressed these in various reports, community meetings, engagements with relevant government institutions, one on one meeting with state security institutions and international conferences. Victims have made various suggestions and this section of the report will present what the victims have asked for and try to juxtapose their demands to what is possible in Zimbabwe.

Will it ever be possible to prosecute all perpetrators?

The Forum has met with almost half of the 30, 000 victims that have been recorded in their databases through their Public Interest Unit manned by human rights lawyers as well as its Research and Transitional Justice Unit. Many victims have expressed views that they want to see the perpetrators of violations inflicted on them prosecuted. Prosecution of state security agents is permissible under Zimbabwe's laws. The State Liabilities Act⁴⁵ Chapter 8:14 allows for claims against the State “... *out of any wrong committed by any officer or employee of the State in his capacity within the scope of his authority as such officer or employee, as the case may be*”. *One of the most important provisions of this law is that it allows for the applicant or petitioner to*” make the Minister to whom the headship of the Ministry or department concerned has been assigned nominal defendant or respondent. This is important as accountability for such actions can be attributed to the State who in most instances would have sent the perpetrators to commit the human rights violations.

Cases from the Forum over the years have shown that the legal process of prosecutions does not only take time but is frustrating for victims of human rights violations by institutions such as the ZRP. In numerous instances, evidence is not collected properly, police files go missing and in other instances witnesses cannot be found. Since many of the victims do not understand the legal process they expect the cases to be completed quickly. The Forum has also found out that most victims have over the years become demoralized and stopped communicating when the legal process did not move at their anticipated pace. The cost of legal suits should also be considered. Most clients find it difficult to visit the Forum and other legal defenders who will be supporting them for signing of papers as well as appearing in courts of law. ⁴⁶

While the law provides a schedule for what sentences can be passed on violators, victims have raised issues with the short sentences that have been passed in most courts as these do not seem to be deterrent enough to prevent future violations. Zimbabwean law also has a provision that allows the President to

⁴⁶ An Analysis of Zimbabwe Human Rights NGO Forum Legal Cases, Zimbabwe Human Rights NGO Forum, Harare, June 2006 at 10.

pardon or commute sentences for those who would have been found guilty thus dampening the spirits of those who would have won cases against perpetrators of human rights violations.

Besides going against the tenets of its domestic law and breaking human rights principles, Zimbabwe has been going against its own obligations according to the international treaties it has signed and ratified such as the International Covenant on Civil and Political Rights (ICCPR). Article 2(3a) of the ICCPR obliges state parties to undertake measures to ensure that victims of human rights violations “shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity”. It is clear that Article 2(3) does not provide a right in individuals to force a state to investigate, and thereafter to prosecute any suspects who have been convincingly identified.⁴⁷ However, the HRC has said that blanket amnesty laws and pardons are inconsistent with the ICCPR because they create “a climate of impunity” and deny the victims this right to a remedy”.⁴⁸

The Police Act as a stumbling block towards holding officers accountable

In one way the Police Act [Chapter 11:10] is progressive as it sets out what can be defined as crimes if police officers were to deviate from the law. However, what the Police Act gives with the right hand, it takes away with the left. The Police Act in subsequent sections after having defined the offences goes further and gives very ubiquitous regulations which are difficult to discern whether they should be held as ways of placating the police force or trying to enforce discipline.

The Police Act Schedule sets offences for the police force as follows:

- *11: Without good and sufficient cause, disobeying or refusing or omitting or neglecting to carry out any lawful order, written or otherwise.*
- *19: unnecessarily detaining any person in custody.*
- *21: Using unnecessary violence towards, or neglecting or in any way ill-treating any person in custody or other person with whom he may be brought into contact with in the execution of his duty”*
- *25: Without authority, communicating directly or indirectly, to the press or to the public any matter or thing concerning the Police Force, the communication whereof results in or is reasonably likely to result in any prejudice to the administration, discipline or efficiency of the Police Force.*
- *28: (1) Willfully or negligently losing, destroying, injuring or damaging any property ... of any person in custody, or any exhibit in a criminal case or property, lost, found, taken for safe keeping or unclaimed.*
- *34: Omitting or neglecting to perform any duty or performing any duty in any improper manner.*

The provision marked as *Section 11* above presents challenges in identifying what would be regarded as lawful orders as opposed to criminal acts by the police. These provisions reveal the challenge and the need to prosecute rogue police officers who violate the law and policies governing the police. For a long-time the police has been controlled by the ZANU-PF government, intricately connected with the country's politics, and under orders to obey whatever laws or instructions given by superiors. The

⁴⁷ For a comprehensive and incisive discussion of this matter see C Jalloh and A Marong, “Ending Impunity: The Case for War Crimes Trials in Liberia”, (2005) African Journal of Legal Studies 53 at 62 – 64.

⁴⁸ Comments of the Human Rights Committee, Consideration of Reports submitted by States Parties under Article 40 of the Covenant, 10 UN. Doc. CCPR/IC/79/Add.46 (1995).

government has often been a stumbling block to investigations, the search for information and general prosecution of perpetrators of human rights violations by the police force. Most members of the police are unlikely to cooperate with investigations into abuses by the police for fear of being held in contempt of the police regulations. The new, current government might present opportunities to investigate senior officers who were involved in rights violations.

The Forum is aware that it might be impossible to carry out prosecutions for each human rights violation by the police that is taken to the courts. Prosecutorial selectivity leading to the prosecution of the most serious abuses is what the Forum has called for, and in several cases victims themselves have made similar calls. If executed well, the selectivity by itself would not render any process of prosecutions unfair unless of course it had been deliberately discriminatory, unbalanced, vindictive or unreasonable.

The challenge of following orders from above

Scholars have for a long time debated issues around how to deal with perpetrators who claim to have received orders “from above”. The challenge in dealing with this matter is quite vexing. However, David Gray in a compelling argument, notes that:

*“abusive regimes do not suddenly find themselves entangled in crime but are usually guided by “norms, social ontologies, and historical teleologies that operate through official state agents, constructing a **public face of law** that sanctions and organizes violence perpetrated by institutional actors and private citizens”.*⁴⁹

He further notes that the “public face of law” he refers to encompasses “formal legislation, executive orders, the body of prevailing public threats, institutional expectations represented by institutional agents, and commonly represented public and legal expectations as they would have been perceived by a reasonable person in the actor's condition and position at the time of his act”.⁶⁵

Commenting on the state's and private citizens' complicity in the land invasions in 2002 the Fact-Finding Mission of the African Commission on Human and Peoples' Rights to Zimbabwe noted that:

*The Government cannot wash its hands from responsibility for all the happenings. It is evident that a highly charged atmosphere has been prevailing, many land activists undertook their illegal actions in the expectation that government was understanding and that police would not act against them – many of them, the War Veterans, purported to act as party veterans and activists. Some of the political leaders denounced the opposition activists and expressed understanding for some of the actions of ZANU PF loyalists.*⁵⁰

Statements by senior ZANU-PF officials over the years regarding policing and human rights may have sent wrong signals to the police leading to abuses. In such cases the members of the police have often invoked two excuses: That they were following orders, or that they do not have permission to speak on behalf of the police. Both excuses have frustrated and compromised the process of prosecutions for

⁴⁹ DC Gray, 'An Excuse Based Approach to Transitional Justice,' (2006) 74 Ford Law Review, 1 at 3.

⁵⁰ Executive Summary of the Report of the Fact-Finding Mission to Zimbabwe 24th - 28th June 2002.

many years.

The need to know the truth

Many victims of police brutality in Zimbabwe have expressed the need to just know the truth about the abuses they suffered. Some victims who have been in touch with the Forum put forward an argument that at times proceeding with a prosecutorial approach would just leave them going around in circles with perpetrators being on the defensive, lying or misrepresenting facts about what really transpired. Indeed, while it is true that trials can deepen wounds, the Forum believes that victims should not be led or coerced to forgive and move on. The approach that should be taken is that those who want to forgive perpetrators can only do so when they know who to forgive and for what crimes. Many victims and survivors in Zimbabwe know what violations were perpetrated on them but at times they want to know who the perpetrators were, why they were targeted and what has changed in the status of the perpetrators with regards accountability and remorse.

The Forum is not under any illusion that a truth-seeking process cannot replace a justice-seeking approach focused on prosecuting those responsible for serious past human rights violations especially by state security agents. However, faced with a reality that numerous victims continue to raise these sentiments it is important that their views are documented and presented. This can be achieved through a process outside an official truth-seeking body such as the South African Truth and Reconciliation Commission or, as the Forum proposed in 2003, a Truth, Justice and Reconciliation Commission set up for that purpose. What is important to acknowledge is the fact that victims of torture and other brutalities by state security agents want and need to know how the violations happened, who gave the orders, what kind of orders were given and other relevant information.

It is true that full criminal trials have the potential to unearth all the details of what transpired during the periods when serious human rights violations were committed by state security agents in Zimbabwe. The Forum acknowledges the fact that most truth recovery processes or institutions hold less power than courts of law. There is however a counter argument that criminal trials drag on for too long and might have many technicalities that might lead to information getting hidden because of questions on due process, among other things. Responding to criticism that truth-seeking bodies have an inherent weakness of granting amnesty, Sachs notes that:

Most prosecutions involve amnesty anyhow. Without accomplice participation you don't get very far. And how do you get accomplice evidence? The prosecutor tells the accomplice: [If you tell the truth you may get amnesty]. This wasn't a notion invented just for the TRC. It is one of the core techniques of prosecutions anywhere in the world.⁵¹

The Forum agrees that a truth recovery process not necessarily couched in truth and reconciliation commission terms represents another key approach to providing justice for the victims of past abuses by security state agents. Neier argues in defense of such official enquiries noting that:

By knowing what happened, a nation is able to debate honestly why and how dreadful crimes came

⁵¹ A Sachs "Four Sayings and a Denouncement" in Charles Villa Vicencio and Erik Doxtader (eds.) *The Provocations of Amnesty: Memory, Justice and Impunity* (Institute for Justice and Reconciliation South Africa 2003) 19.

to be committed. To identify those responsible, and to show what they did, is to mark them with a public stigma that is a punishment, and to identify the victims, and recall how they were tortured and killed, is a way of acknowledging their worth and dignity.⁵²

Counter arguments raised by other victims on the idea of a truth process

Discussions with victims of human rights violations that have been in touch with the Forum have largely centered on the need for punishment that can only be delivered through criminal prosecutions. Several victims have expressed the need to know the truth but not at the expense of accountability and punishment for perpetrator. They have argued that perpetrators have an obligation to release any information they have, know or might know about certain rights violations they committed. Victims have pointed out that in most cases they know what happened and would not want the truth to be distorted by alternative storylines and narratives as they know the individuals who perpetrated violence against them.

The Forum, in its consultations with the victims who have approached it, has noted that other options that have been put on the table include the need for the government to officially and publicly acknowledge in government documents and legislation that certain human rights abuses were committed and there is need to hold perpetrators accountable and provide justice to victims. Besides atoning the victims and survivors, such a gesture would serve as an important precursor to follow up judicial action if at all the Zimbabwe was not ready for a full-scale prosecution. The Forum believes that, with the necessary political will, an authoritative report of a special Commission set up for the crimes committed by the police in Zimbabwe can help the nation take the next step towards bringing perpetrators to justice.⁵³

Even though truth-seeking bodies such as special Commissions in Zimbabwe have limited prosecutorial powers, the Forum is of the view that their broader mandate to focus on a pattern of events, including the causes and consequences of political violence, allows them to go much further in their investigations and conclusions than is generally possible in any trial of individual perpetrators. For example, truth-seeking bodies are usually able to reveal the truth about the state and its various institutions that carried out or condoned the repression – including the military and the police. In addition, by listening to victims' stories, perhaps holding public hearings, and publishing a report that describes a broad array of experiences of suffering, a truth-seeking body in Zimbabwe on the violations by the police would effectively give victims a public voice and bring their suffering to the awareness of the broader public. For some victims and survivors, this process would have a liberating effect.

The controversial issue of divulging names when truth processes for the police are held

One of the issues that continue to spark major controversy in Zimbabwe among most policy makers is the issue of whether members of the police and other state agents reigned before a truth-seeking process outside the criminal justice system would be willing to divulge such kinds of information. Victims are supportive of the view that naming names is part of the truth-telling process, especially in a country like Zimbabwe where it is clear the judicial system does not function well enough for perpetrators to be prosecuted. What stands between such confessions and that kind of truth is a plethora of legislation such

⁵² A Neier, "What Should Be Done About the Guilty?", (1990) 37 New York Review Books at 32.

⁵³ See Security Council Resolution 827, U.N. SCOR, 48th Session 3217th Meeting, U.N. Doc. S/RES/827 (1993) (establishing Yugoslavia War Crimes Tribunal); S.C Res. 955, 49th Session 3453dmtg., U.N. Doc S/RES/955 (1994) (establishing Rwanda War Crimes Tribunal).

as the Official Secrets Act and Schedule 25 in the Police Act which notes that:

“Without authority, communicating directly or indirectly, to the press or to the public any matter or thing concerning the Police Force, the communication whereof results in or is reasonably likely to result in any prejudice to the administration, discipline or efficiency of the Police Force”.

The Forum is of the view that such a process would be important in so far as it would be able to give identities to the many nameless members of the police who hide behind their police trucks, helmets and high walls after committing serious human rights violations. It would be one of the most powerful ways of demonstrating commitment by the current government to justice and accountability for past abuses.

Removal of perpetrators from office

What has been couched mostly as the need for security sector reform has largely been understood by the victims of police brutality that have been in touch with the Forum as a call to “*uproot the bad apples*” from the police. The energy exhibited by many a victim when asked about the fate of police officers found guilty of human rights violations is always the same and very clear – they must be removed from office, at the very least.

In those countries where there have been criminal prosecutions and truth-seeking processes in which perpetrators have been named, the removal of alleged perpetrators from public office has usually followed. Exposing the nature and extent of human rights violations frequently reveals a systematic and institutional pattern of gross human rights violations. That undoubtedly assists in the identification and dismantling of those institutions and that might well have the effect of deterring similar occurrences in the future.

The quest for the rehabilitation of victims

Most victims attended to by the Forum have experienced some of the most horrendous abuses ever experienced through the brutality of the police force and other state security agents. Victims have been left with disabilities - legs and or arms amputated, loss of sight, disfiguring burns, broken limbs, and many other gruesome and permanent injuries.

According to the reports from some of the victims, some have injuries that are not visible but have caused serious complications in their lives. For example, one victim narrated to the Forum that he now should take dialysis regularly because his kidneys were damaged from the beatings in police custody. Other victims speak of post-traumatic stress disorders, hallucinations, and generally not being able to function normally, including sexually. While these health problems are not well understood in Zimbabwean and most African cultures, they contribute to the disruption of normal life for many victims of police brutality.

In 2006, the Forum noted that most of the victims had reported symptoms of long-term consequences of Post-Traumatic Stress Disorder (PTSD) such as depression, somatization disorder and even Brief Reactive Psychosis. The consequences of such disorders are there for everyone to see as social and occupational functioning are frequently affected, with survivors having their social relationship impaired through broken marriages, broken homes, domestic violence, child abuse, visible anger

management problems, mental illnesses and many other social problems.⁵⁴

Provisional solution to the rehabilitation of victims and their mental health needs

The Forum recommends that while commissions and enquiries are held, there should be a temporary intervention to deal with the scourge of mental health and other health problems that continue to be faced by victims of state organized violence in Zimbabwe. One proposal that has been put forward by the victims is the setting up of a program or a fund that gives support to medical and social workers including psychologists in special units set up at major hospitals in urban and rural areas to attend to mental health issues. For those who have other ailments, the patients would need to link their concerns to abuses so that the cases of past human rights violations are separated from day to day illnesses. This is important to take care of such patients as those who need physiotherapy, which is considerably expensive and requires specialist services.

Victims told the Forum that mental health services should not only be provided to the public, but also to members of the police to help them find healing. It cannot be denied that some members of the police involved in abuses were affected mentally and thus they need health services support.

Compensation and damages

The law in Zimbabwe provides for the compensation of victims either in criminal or civil cases. Most the clients sue for damages because of the pain and suffering caused by physical injuries resulting from the human rights violations. The Forum has since its formation taken many cases to court. Judgments have been varied with the majority being orders for the minister responsible for the police to pay substantial fines.

What remains lacking is a system where the individual perpetrators are held to account. Most of the perpetrators continue to hide behind the state making it difficult to shame and punish the individual, which can deter further assaults and violations of such a kind.

The law in Zimbabwe through the **State Liabilities Act** prohibits the attachment of government property and does not give any prescription as to what periods can be taken by the government to pay victims of wrongdoing by state officers. In the past Emmerson Mnangagwa has argued that *“the attachment of government property would not only lead to chaos, but the government would become dysfunctional and as a result fail to provide essential services to its citizens”*.⁵⁵

Compensation for unlawful killing in Zimbabwe

The police in Zimbabwe have, over the years, been accused of several cases of wrongful deaths or unlawful killings. The Forum pays attention to those cases of unlawful killings related to politics. Relatives of deceased individuals killed by state agents are unable to sue for adequate compensation for the wrongful deaths since that remedy is not recognized under Zimbabwean law.

The Zimbabwean government has argued before in a case to the African Commission by the Forum that such kind of legislation does not exist in any jurisdiction in the world and that the Forum “should lobby organizations that share its views so that such legislation could be adopted”.⁵⁶ The African Commission noted that the Government of Zimbabwe's assertion that the question of remedies to parents has no legal

⁵⁴ An Analysis of the Zimbabwe Human Rights NGO Forum Legal Cases, 1988 – 2006: Zimbabwe Human Rights NGO Forum, June 2006 at 9.

⁵⁵ Mnangagwa defends State Liabilities Act, Charles Laiton, 27 July 2016 Newsday available at: (Last accessed 7 November 2018)

⁵⁶ See Kazingachire Communication to the ACHPR by the Human Rights Forum at para 55.

basis in Zimbabwe was unfounded and thus dismissed it.

Article 60 of the African Charter on Human and Peoples' Rights (African Charter), urges the African Commission “to draw inspirations from international law” and the matter at hand involves the concept of wrongful death, a concept drawn from English law in the Fatal Accident Act Section 1(1) notes that:

“If death is accused by any wrongful act, neglect or default which is such as would (if death had not ensued) have entitled the person injured to maintain an action and recover damages in respect thereof, the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured.”

In relation to the above, the government of Zimbabwe argued that the African Commission could not be referred to provisions of national legislation of a country (United Kingdom) which is not party to the African Charter. This kind of policy as adopted by the Zimbabwe government is backward looking and should be reviewed. While it is important to maintain the country's sovereignty it does not make sense for the government to reject recommendations from international on the basis that they are from foreign lands. That Zimbabwe is open for business but remains closed to new forms of implementing justice for victims and survivors of past human rights violations is unacceptable.

The Forum has maintained that the proceedings that would have been instituted by the deceased if he had not died can be initiated by his dependents and this should be reflected in the law books. As it stands Zimbabwean law makes no room for compensation in case of wrongful death, except funeral expenses reimbursement and loss of support to children or the surviving spouse. There is no provision for bereavement damages. The Government of Zimbabwe argued then in the African Commission case that “*the law does not support claims for the wrongful death of a person per se ... for one to succeed in a claim for damages situations where persons are wrongfully killed, the claimant must prove loss of support*”.⁵⁷

The government of Zimbabwe argued that the common law position on entitlement to compensation is that dependents of a deceased can claim such compensation for the pecuniary loss they have suffered in consequence of the death of a person who maintained or had an obligation to maintain them. Therefore, Zimbabwean common law provides for compensation for damages for *aquilian action* or *actio iniuriarum*. It does not provide damages for *solatium*. This means generally in Zimbabwe, no compensation is payable for the wrongful death of a person, as it is not an injury to the surviving person. The only damages that are available are loss of support to dependents of the deceased and funeral expenses.⁵⁸

According to the *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*, remedies for gross violations of international human rights law include the victim's right to adequate, effective and prompt reparation for harm suffered.⁵⁹ According to principle 20, compensation should be provided for 'any economically assessable damage', such as 'physical or

⁵⁷ African Commission case at para 81.

⁵⁸ African Commission on Human and Peoples Rights Communication 295/04: Noah Kazingachire, John Chitsenga, Elias Chemvura and Batanai Hadzidzi (represented by the Zimbabwe Human Rights NGO Forum v Zimbabwe at para 102.

⁵⁹ UNGA Res. 60/174: 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.

mental harm'; lost opportunities, including employment, education and social benefits'; 'material damages'; and 'costs required for legal or expert assistance, medicine and medical services, and psychological and social services'. Satisfaction includes a 'public apology, including acknowledgement of the facts and acceptance of responsibility'.

With regards the inadequate legal provisions, the African Commission believed the existing legislation in Zimbabwe were contrary to the spirit of Article 1 of the African Charter as it did not ensure that there were compensatory damages to give just satisfaction to victims of wrongful death particularly close family and relatives who were bereaved because of such deaths.⁶⁰

Debts owed by the government

When it comes to debts owed by the government, enforcement of judgments in Zimbabwe is difficult. It largely depends on whether the government has the financial resources to settle. For as long as government pleads that it does not have the resources, the only reason for proceeding against it in court is to just hold onto the judgment until the day government declares that it now has the capacity to settle.

On March 15, 2017, Justice Mushore delivered a landmark judgment⁶¹ that struck down Section 5(2) of the State Liabilities Act (Chapter 8:14) — the law which made State assets untouchable — saying it was unconstitutional. The development puts every piece of government asset together with those of its companies and other departments — both movable and immovable — at risk of seizure by the creditors. Section 5 (2) of the State Liabilities Act (Chapter 8:14) was declared to be inconsistent with the Constitution of the Republic of Zimbabwe and therefore invalid. The judge noted that:

*If Section 5(2) is being used to frustrate justice as is clearly the case in the present case, then it is not justifiable in a democratic society based on openness, justice, fairness, human dignity equality and freedom ... If those rights are impeded, the Declaration of Rights implementation is severely impeded.*⁶²

However, in July the Constitutional Court of Zimbabwe invalidated the ruling on a technical basis arguing that the High Court Judge who invalidated the Act should not have referred the matter to the ConCourt. Chief Justice Luke Malaba noted on 12 July 2017, that the judge had no legal basis to make that order of referral to the Constitutional Court and therefore, all the processes starting from the judge up to this day were a nullity. The Forum laments such kinds of decision that trump decisions by lower courts on the basis of technicalities. The fundamental issues that led to the offensive law being challenged does not go away and remains valid in the process impinging on the human rights of citizens.

State Liabilities Act frustrating victims and survivors

For many cases of politically motivated and state sponsored violence in Zimbabwe, the people that died were breadwinners in their families and mostly men. Children were left orphans with no one to pay for their school fees, food and other needs.⁶³ To demonstrate sincerity, the government of Zimbabwe should ensure that proper research is carried out by a body such as the National Peace and

⁶⁰ African Commission case at para 143.

⁶¹ Mangwiro V Minister of JLPA 1 HH 172-17 - HC 6960/16

⁶² Tendai Blessing Mangwiro v. The Minister of Justice and Legal Affairs (NO) and 2 Others, HC 6960/16

⁶³ See Zimbabwe Human Rights NGO Forum reports.

Reconciliation Commission on the people that died, how their families are coping with regards their livelihoods and recommend to the government that they be compensated. Compensation methodologies could range from free schooling for the orphans and seed money to start new projects for the widows and other family members. To continue to deny that these atrocities occurred is sheer arrogance that continues to add salt onto the wounds of those left behind.

7 | Discussing the justice mechanisms available to Zimbabweans in cases of state-sponsored violence

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

What remains important for Zimbabwe is that any accountability measures for past human rights violations are legitimate. This should be through an open, democratic debate that includes consultation with and participation of the relevant stakeholders and full transparency of decisions. Second, transitional justice mechanisms should be contemplated as comprehensive and holistic approach. This is not only because there will always be an “impunity gap”, many cases of abuse will not be resolved by trials, thus generating the need for a broader treatment of the universe of violations. It is also because the emerging principles in international law establish that the obligations of the State are four-fold: to prosecute perpetrators, to unearth the truth, to offer reparations to victims, and to reform abusive public institutions. While there is need to recognize the inherently inconclusive nature of justice, a holistic, balanced, comprehensive approach to transitional justice, placing similar emphasis on each of the four obligations, can at least temper this inconclusive nature.

A general comment on the right to education that is equally applicable to the State's obligations towards citizens is General Comment no. 13 by the Committee on Economic, Social and Cultural Rights at the Twenty First Session E/C.12/1999/10, of 8 December 1999 which provides:

- a) **Availability of justice** – functioning judicial systems and mechanisms should be made available to victims and citizens in enough quantities. What is required for the justice system to work varies but generally facilities such as an efficient judiciary, enough and professional police officers who can carry out investigations and have the power to bring offenders to book is critical. The distance from police stations and courts is important.
- b) **Accessibility to justice – Justice institutions and programmes should be accessible to everyone, without discrimination. Accessibility has three overlapping dimensions:**
 - (i) Nondiscrimination – justice must be accessible to all, especially the most vulnerable groups, in law and fact, without discrimination on any of the prohibited grounds on nondiscrimination.
 - (ii) Physical accessibility – justice institutions should be within safe physical reach, at some reasonably convenient geographic location (e.g. a neighborhood police station, court).
 - (iii) Economic accessibility – justice must be affordable to all. The affordability relates to matters surrounding the costs to hire lawyers, submission of documents, money required to travel from police stations, courts and other institutions charged with instituting justice.

- c) Acceptability of justice processes and systems—the form and substance of justice, including how it is delivered and executed should be acceptable (e.g. relevant culturally appropriate and of good quality) to victims.
- d) Adaptability of justice systems— justice should be flexible so that it can adapt to the needs of changing societies and communities and respond to the needs of victims within their diverse social and cultural settings as well as varying violations.

The Organ on National Healing and Reconciliation and Integration

When the 2009 Government of National Unity (GNU) between ZANU-PF and the MDC was established under the Global Political Agreement (GPA),⁶⁴ its Article 7 provided for the creation of a body called the Organ on National Healing, Reconciliation and Integration. The composition of the Organ for National Healing, Reconciliation and Integration (ONHRI) had three co-ministers representing the three political parties which are signatory to the Global Political Agreement (GPA). These co Ministers were sworn in as: John Landa Nkomo (ZANU-PF) Organ Chairperson, Sekai Masikana Holland (MDC-T) and Gibson Jama Sibanda (MDC) (replaced upon his death by Moses Mzila Ndlovu). Article 7.1C of the GPA sought to advise the three GPA Principals on what measures should be taken by government to address all the transitional justice matters of victims of cyclic political violence before and after independence. While the Organ remained in operation for the most part of the life of the GNU, it was heavily politicized as it was located in President Mugabe's office. Nothing significant except a lot of politicking came out of the process and the Organ and thus failed to serve the justice needs of many a Zimbabwean who had had their hopes raised by the GNU.

The National Peace and Reconciliation Commission

The NPRC was appointed in 2016 but could not immediately begin its work until the enabling law was signed by President Emmerson Mnangagwa on 5 January 2018, the National Peace and Reconciliation Commission Act (Chapter 10:32 (No.11 of 2017)). The Act provides for the functions, powers, operations and removal from office of the members of the Commission, manner of conducting investigations and staffing of the Commission, among others. The NPRC is established under Sections 251 to 253 of the Constitution to ensure post-conflict justice, healing and reconciliation, to develop programmes to promote national healing, unity and peaceful conflict resolution and will run for the next 10 years. The eight-member NPRC were appointed in 2016 and was chaired by first by the late former Speaker of Parliament, Cyril Ndebele. The new chairperson is retired Justice Selo Masole Nare who was appointed by President Emmerson Mnangagwa on 20 February 2018. The other commissioners are Lilian Chigwedere, Patience Chiradza, Choice Ndoro, Netty Musanhu, Charles Masunungure, Geoffrey Chada, Leslie Ncube and Godfrey Chekenyere.

Recalibrating the work of the NPRC

Much as Hayner is a proponent of truth commissions, she problematizes the idea of the truth acquired from such processes. While not true in every case, in many cases, victimized populations, as in Zimbabwe, know what happened and who perpetrated the acts. Hayner thus notes that in such circumstances, the importance of truth commissions might be described more accurately as

⁶⁴Agreement between the Zimbabwe African National Union-Patriotic Front (ZANU-PF) and the two Movement for Democratic Change (MDC) formations, on resolving the challenges facing Zimbabwe accessed at http://constitutionnet.org/sites/default/files/global_political_agreements_2008.pdf.

acknowledging the truth rather than finding the truth. “Acknowledgement” implies that the state has admitted its misdeeds and recognized that it was wrong writes Aryeh Neier. As a bereaved Uruguayan woman confessed, “I am ready to forgive, but I need to know whom to forgive and for what.”⁶⁵ In the very process of uncovering a part of the truth and granting it the status of official, and authoritative record can serve to cover up other aspects of the truth. While the mandate of the NPRC is clearly outlined by the Constitution, the history of what has happened with other Commissions in Zimbabwe remains vivid in everyone's mind and thus cannot be dismissed easily. It is thus an unpleasant paradox that truth commissions can in fact cover up exactly those aspects of the past they might be expected to uncover.

The NPRC is inherently vulnerable to politically imposed limitations because of its structure, sponsor, mandate, political support, financial or staff resources, access to information, willingness or ability. It is not far-fetched that the NPRC, while civic groups and victims have campaigned for its establishment, it can still be used by the government to manipulate the public perception of its tarnished image, to promote a more favorable view of the country's human rights policies and a “Zimbabwe is open for business” view. This is particularly true when Zimbabwe is under international pressure to improve its human rights record. Given the mandate of commission, by definition, to look at the past rather than the present, it is easy for a new government to justify not being subject to the investigations of the commission, while professing improved human rights policies. The commission therefore conveniently overlooks any current abuses. Given this dynamic, it is not always immediately clear whether a government's commission is more a political tool or an accurate reflection of change.

⁶⁵ See A Rigby, *Justice and Reconciliation After the Violence* (Boulder Co: Lynne Reinner Publishers 2001) at 8.

8 | Types of remedies

Zimbabwe's law provides various mechanisms to deal with cases of human rights violations by state security agents. The violations can be classified as criminal or civil depending on what the charges are and what relief is being sought by the victim. Different interpretations of the law lead to varied remedies being presented to a community of state sponsored violence that are not necessarily well versed in the law. This should however not deter victims from reporting their cases to the police, human rights defenders such as the Zimbabwe Human Rights NGO Forum, Statutory bodies such as the Zimbabwe Human Rights Commission or even the police themselves. While the go to remedy for most victims remains the push for criminal prosecutions for the perpetrators, the Forum argues that other forms can be followed with as much equal success as prosecutions. This section discusses the various remedies that may be pursued.

Reports against the police

Article 93 of the Police Act provides for a police to have the function of "preserving the internal security of and maintaining law and order in Zimbabwe."⁶⁶ The Zimbabwe Republic Police (ZRP) operates under the direct command of the Commissioner General of Police, under the control of the Ministry of Home Affairs. The administration of the ZRP and terms and conditions of service are set out in the Police Act, which prohibits serving members of the police force from engaging in partisan politics. Citizens and victims alike are free to report cases against the police to any police station or security officer of the state. The ZRP is mandated by the Constitution and Police Act to ensure "prompt and speedy investigations of the matters reported". Within a reasonable time, the matter must be brought before a competent court of law for adjudication by a judge either in the Magistrates Court or High Court of Zimbabwe.

The argument for prosecutions

Zimbabwe provides in its constitution for the provision of prosecution for those who would have committed transgressions of a criminal or civil nature. Legal prosecutions⁶⁷ generally ensure administration of justice by a formal system committed to due process⁶⁸ fairness and opportunities for individuals to be heard during trials.⁶⁹ Minnow argues that to respond to mass atrocity with legal prosecutions is to embrace the rule of law.⁷⁰ Mendez maintains that settling criminal responsibility for the very worst crimes is essential to peace, because it "separates the responsibility of the individual who exploits the fears of the population for political gain from the collective guilt that is wrongly assigned to collectivities."⁷¹

⁶⁶ Article 93 of the Zimbabwe Police Act.

⁶⁷ The reasons for prosecution are canvassed in the ground breaking article by D Orentlicher, "Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime" (1991) 100 Yale Law Journal 2551, at 2537, see also SP Huntington supra note 2 at 213 - 4 for more discussions on the arguments for and against prosecutions.

⁶⁸ These include such aspects as the right to be informed promptly in a language that one understands of the nature and cause of the charge against him; the right to the presumption of innocence until proven guilty, the right of one to be tried in a language that one understands or, if that is not practicable, to have the proceedings interpreted in that language; and the right to have legal counsel assigned to one by the state.

⁶⁹ M Minnow, "Between Vengeance and Forgiveness" (1998) at 25 in HJ Steiner and P Alston (eds), *International Human Rights in Context: Law, Politics, Morals* (2nd Edition Oxford University Press) 1143.

⁷⁰ M Minnow, "Between Vengeance and Forgiveness" (1998) at 25 in HJ Steiner and P Alston (eds), *International Human Rights in Context: Law, Politics, Morals* (2nd Edition Oxford University Press) 1143.

⁷¹ JE Mendez, "Accountability for Past Abuses" (1997) 19 *Human Rights Quarterly* 255 at 260.

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

The general mantra that “*Zimbabwe is open for business*” that has formed the campaign stance of President Mnangagwa should be matched by a similar call to declare the Zimbabwe Courts and its police systems also “open for business”. The police should be able to answer to all cases of past human rights violations that have been leveled against them. The Forum argues this point from the standpoint that punishing all state security agents who were involved in cases of human rights violations especially those of a political nature has a deterrent effect in the context of entrenched regimes committing large - scale crimes such as the Zimbabwean government since they do not expect to lose power nor to be punished.⁷² The gravity of punishment sends a message to other regimes and other potential violators that they too cannot continue committing such crimes and hope for amnesty in future. Deterrence is premised on either the notion that you are likely to be caught and punished for what you do and or that punishment will prevent a rational decision maker from committing the crime. Indeed, the fact that large - scale crimes continue to occur worldwide despite several prosecution initiatives for such crimes may show that the threat of prosecution alone may not be an adequate deterrent.

If the government refuses to implement an honest and genuine prosecutorial approach to the past human rights violations by the police, the international community must be called upon to enforce other universal human rights norms applicable to apprehend and punish those who commit international crimes, as more potential violators will be forced to consider the consequences and start to be dissuaded from launching criminal campaigns.

Who to prosecute

Questions that have been asked in Zimbabwe center on the time that since elapsed since some of the crimes that have been raised by the Forum were committed by the accused state security agents. It is true that some of the cases have already suffered the prescription period and thus cannot be prosecutable. Technically this would be right but the Forum argues to the contrary and in this report, argues that there is a strong legal case against ordering cases based on prescription especially where it can be proven that there were genuine obstacles that were presented to the victims by the police, the accused and the state.

Secondly, the question of who to prosecute considering the certain waves of political disturbances where orders were said to be coming from “above” continues to raise its ugly head. The Forum believes that while there can be no excuses for those state security agents who committed torture, there can be other criteria that can be discussed at a national level and in parliament to prosecute perpetrators., In this proposition, the Forum is guided by what transpired during Alfonsin's time in Argentina. At the time of reckoning with their past, Argentina proposed three categories to choose those who to prosecute. The categories were divided among a) those who **gave the orders** to violate human rights, b) those **that carried out** the orders and c) **those who engaged in human rights violations beyond** the actions they were ordered to take.

One of the most difficult issues that the Zimbabwean legal system and victims alike should confront is the excuse that some of the state security agents did not know that their actions at that time constituted criminal acts. The argument emanates from the reasoning that in most instances, the political

⁷² See C Villa - Vicencio „Why Perpetrators Should Not Always Be Prosecuted: Where the ICC and Truth Commissions Meet“ (2000) 49 Emory Law Journal 210.

atmosphere was too charged with politicians uttering inciting messages that made the actions of the police look like they were permissible. Gray notes that:

*“law enforcement agents have a right to know, beforehand that their acts are punishable under the law. If there is no law, or if the law is too vague and ambiguous, then it is not fair to punish an agent who had no warning that his actions would be punished”.*⁷³

Gray further outlines that, it is an affirmative defense for the actor engaged in the conduct charged to constitute an offence if the act reflects a reasonable interpretation of the prevailing public face of law. Extension of the excuse to agents of pre- transitional abuse recognizes that many, if not most, pre - transitional wrongful acts were committed by individuals who, given the nature of the public face of law under the abusive regime, were justified in believing that what they did was right, necessary, or at least not subject to legal punishment. However, this argument goes contrary to emerging norms in international law. The ICTY has stated that because of the internationally recognized status of the prohibition of torture, “torture may not be covered by a statute of limitation”.⁷⁴

When trials could fail or would not be possible?

Under international law a state is entitled to derogate from its duty to punish when there is an existence of a grave threat to the life of a nation⁷⁵ and impossibility of performance. Van Zyl explains the conditions for a state to comply with in terms of derogations.⁷⁶ He notes firstly that a state must provide reasons to justify its failure to punish. Secondly, it must outline the exceptional nature of the threat, which prevents punishment. Thirdly, it must demonstrate that the measures taken for example, an amnesty are proportional to the threat posed. Lastly, while it may be permissible, under certain exceptional circumstances, not to punish, it is never permissible to derogate from certain inalienable rights such as the right to life and the right not to be subjected to torture.

Arguments against prosecutions

For a long time, there has been argument in Zimbabwe that there should be considerations for other methods to deal with past human rights violations by the police which do not necessarily resemble or are equal to prosecutions by courts of law. For example, practical considerations have always taken the forefront with proponents of alternative policies noting that if for example those who used to hold power, “are treated too harshly – or if the net of punishment is cast too widely – there may be a backlash that plays into their hands”.⁷⁷

A second practical argument that has been put forward is that since the time of the Zimbabwe crisis when the Forum started recording cases of state sponsored and politically motivated human rights violations criminal offences and potential defendants have become so large that it is unrealistic to expect that all or even most will be prosecuted. Yet still others have argued that the duty to bring perpetrators in such a scenario as Zimbabwe's should extend only to persons most directly responsible or otherwise.

⁷³ Ibid Gray.

⁷⁴ Anto Furundzija case, Judgement of 10 December 1998, IT – 95 – 17/1, paragraph 157.

⁷⁵ See ICCPR supra note 33, Article 4 and a commentary on derogations in *Lawless v Ireland*, Series no. 31 European Human Rights Report 15, 1961), at 31-2.

⁷⁶ P Van Zyl, „Justice Without Punishment: guaranteeing human rights in transitional societies“ in C Villa – Vicencio and W Verwoerd (eds), *Looking Back Reaching Forward* (University of Cape Town Press London 2000) at 51.

⁷⁷ F Marvin, *Out of the Shadow of the Night: The Struggle for International Human Rights* (Delarcote Press, New York 1989).

Dianne Orentlicher discusses this issue and notes that on a practical level, the duty to bring perpetrators to justice in transitional structures arguably extends only to persons most responsible directly or otherwise. She concludes that:

Customary law should ...not require prosecution of every person... Prosecution of those who were most responsible for designing and implementing a system of human rights atrocities or for especially notorious crimes that were emblematic of past violations would seemingly discharge governments customary law obligation...provided the criteria used to select potential defendants did not appear to condone or tolerate past abuses.⁷⁸

Mendez gives pointers to the dilemma of who to prosecute between the superiors and those who carried out the orders a discussion that will dominate Zimbabwe's quest for justice. He observes that whilst it is worthwhile focusing on the most responsible there is need to prosecute even the so-called “trigger pullers”. He argues that it would be regressive to allow everyone else involved down the chain of command to escape prosecution on the grounds of having followed orders. In a persuasive argument Mendez advises that:

It would be a tremendous step backward to allow obedience to be used as a valid defense, especially when dealing with orders that exhibited a manifest illegality or when there was a reasonable chance of disobeying these these orders without risking limb or life.⁷⁹

Reparations

Reparations to victims of human rights are going to be an essential element of any accountability measures in Zimbabwe. However, the Forum notes that it would be retrogressive for any process that would offer monetary compensation and then suppress all possibilities of justice, truth recovery and institutional reform to be used in any situation. One important point to note will be the need to distinguish between development rights and reparation issues. By keeping the two initiatives separate, in an increasingly poor country like Zimbabwe, there can be avoidance of creating privileges and resentment towards victims. For example, Zimbabwe's economy has been in a downward spiral and that any efforts to give out money will cause further damage.

Reform of abusive state security institutions

The reform of abusive public institutions through lustration will be one important step in providing justice for victims of past brutalities by state security agents. Any new democratic dispensation requires that institutions be free from individuals who abused the power of those institutions in the past.⁸⁰ Vetting public institutions and excluding abusive individuals serves two purposes: first, it helps to generate civic trust between citizens and their institutions; and second, it increases the State's effectiveness in meeting the challenge of fighting crime and redressing wrongs by allowing it to count on the cooperation of its citizens.

Whatever way Zimbabwe's transition will take there are certain fundamentals of justice that will need to

⁷⁸ The reasons for prosecution are canvassed in the groundbreaking article by D Orentlicher “Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime” (1991) 100 Yale Law Journal 2551, at 2537.

⁷⁹ JE Mendez, “In Defense of Transitional Justice”, in AJ MacAdam (ed), *Transitional Justice and the Rule of Law in New Democracies* (University of Notre Dame Press, Notre Dame 1997). According to the International Criminal Court, crimes against humanity include crimes such as the extermination of civilians, enslavement, torture, rape, forced pregnancy, deportation, persecution on political, racial, national, ethnic, cultural, religious or gender grounds, and disappearances but only when they are part of a widespread or systematic attack directed against a civilian population.

⁸⁰ See generally on the reform of the police in Northern Ireland, M O'Rawe, “Transitional Policing Arrangements in Northern Ireland: The Can't and the Won't of the Change Dialectic”, (2003) 26 Fordham International Law Journal, 1015 – 1073.

be complied with. For example, the new state will have to prosecute and punish the perpetrators of abuses when these abuses can be determined to have been criminal in nature.

Secondly, all violations that remain shrouded in secrecy should be investigated and the truth be disclosed to the victims of injustice, to their relatives, and to society.

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

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

What remains important for Zimbabwe is that any accountability measures for past human rights violations are legitimate. This should be through an open, democratic debate that includes consultation with and participation of the relevant stakeholders and full transparency of decisions. Second, transitional justice mechanisms should be contemplated in as comprehensive and holistic an approach as possible. This is not only because there will always be an “impunity gap”, meaning that many cases of abuse will not be resolved by trials, thus generating the need for a broader treatment of the universe of violations. It is also because the emerging principles in international law establish that the obligations of the State are four-fold: to prosecute perpetrators, to unearth the truth, to offer reparations to victims, and to reform abusive public institutions. While there is need to recognize the inherently inconclusive nature of justice, a holistic, balanced, comprehensive approach to transitional justice, placing similar emphasis on each of the four obligations, can at least temper this inconclusive nature.

9 | Recommendations and conclusion

The quest for justice for human rights violations committed by state security agents in Zimbabwe from as far back as the independence era continues to dominate justice issues in Zimbabwe. The justice questions refuse to move and Zimbabwe stands soiled by its poor and shameful record of state sponsored human rights violations. These violations against civilians by state security agents continue to rear their ugly heads and the latest killings on 1 August 2018, reportedly by members of the army who are alleged to have been called in by the police attest to this.

To commit to deal with these human rights violations would be a brave act of standing for what is right and ensuring that Zimbabwe breaks with its past in the process providing justice for the thousands of Zimbabweans whose rights have been violated. To provide justice for the cases the state security agents are accused would be an opportunity to provide much needed healing and reconciliation so that the country can move forward. These requests are not new. The Forum has stood firm since its formation in 1998 arguing for justice against state security agents who have committed human rights to be served. The calls have largely fallen on deaf ears and ignored.

However, the historical and socio-political circumstances in Zimbabwe as in many other countries might demand derogation from this duty to prosecute. Zimbabwe would need some form amnesty for those who have committed gross human rights violations. This would be to achieve the goal of reconciliation, truth, acknowledgement and a return to democratic rule. What is needed in Zimbabwe is the consensus that the nation can only be redeemed from its poor record of human rights and economic quagmire based on consent rather than conquest by all the stakeholders. Whatever way Zimbabwe's transition will take there are certain fundamentals of justice that will need to be complied with. For example, the new state will have to prosecute and punish the perpetrators of abuses when these abuses can be determined to have been criminal in nature. Secondly, all violations that remain shrouded in secrecy should be investigated and the truth be disclosed to the victims of injustice, to their relatives, and to society. Thirdly, reparations will have to be granted to victims in a manner that recognizes their worth and their dignity as human beings. Monetary compensation is certainly a part of this duty, but the obligation should also be perceived as including non-monetary gestures that acknowledge the harm done to them. The form that these remedies will take depends on the circumstances of the violation, the kind of harm caused, and the circumstances and needs of the victims. Other responses from the State can also be considered as part of an overall remedy, such as public or private apologies from the authorities, disciplinary procedures for those individually responsible and measures to remember the deceased. Moreover, those found culpable while they were or are still serving in any capacity in the armed or security forces of the state should not be allowed to continue the roles of reconstituted, democratic law enforcement or security related societies. What remains important for Zimbabwe is that any accountability measures for past human rights violations are legitimate. This should be through an open, democratic debate that includes consultation with and participation of the relevant stakeholders and full transparency of decisions.

To the Government of Zimbabwe (Ministry of Home Affairs)

- The government must provide adequate support and show political will for the prosecution of all past human rights violations where the police were reported to have been involved
- Adequate support must be provided to the investigative wings of the police and the Zimbabwe

Republic Police to deal with the subsequent investigations that will be sanctioned by the state as well as all cases that will be brought forward by human rights organizations on behalf of victims or cases brought directly to the police by the victims themselves

- The government should cease to deny its culpability in cases of human rights violations committed by state security agents and instead start implementing very deliberately positive looking programs and policies that seek to reconcile the police and citizens
- Sensitizing politicians against the use of hate and insightful speech when addressing national and or political matters
- Undertake law reform to bring domestic laws on compensation in case of wrongful killings into conformity with the African Charter on Human and Peoples' Rights and other international standards, especially in respect to effective and satisfactory compensation.

To the State Security Forces (ZRP/CIO and ZNA)

If police are to be human rights defenders rather than human rights violators, there must be clear standards for police conduct; proper training, tools and other support for meeting these standards; effective mechanism for public oversight and accountability; and a relationship of trust with the communities they are policing.

- Training personnel at all levels on observance of human rights
- Repeal all laws that hinder the effective enjoyment of human rights
- Discouraging the abuse of police powers to arrest, search, detention and disproportionate use of force and firearms
- Taking disciplinary action against police members who willfully violate human rights
- Establishing oversight-monitoring body under Section 210 of the Constitution to ensure police accountability. These body should be independent and constituted by civilians. The functions of this body include monitoring the policing process to ensure that citizens' complaints by the police are effectively dealt with and by providing recourse to dissatisfied citizens with complaints against the police
- Increasing supervision, monitoring and evaluation of police officers to reduce the incidents of human rights violations and promote human rights observance
- Finalizing all known cases of human rights violations by the police which remain uninvestigated and pending in the courts
- Formulating clear human rights policies and standard for human rights values in police service.

To the National Peace and Reconciliation Commission

- To carry out solid investigations into the human rights violations reports presented to them by victims, survivors and human rights organizations
- The National Peace and Reconciliation Commission needs to be adequately funded so that it can carry out its mandate with effectiveness.
- To keep the nation updated on their successes and challenges in the implementation of its mandate
- To be impartial in the investigation of alleged human rights violations by the police, CIO and the ZNA
- To carry out proper research on the needs of victims and survivor's Vis a Vis issues such as rehabilitation, medical attention, compensation, restoration of livelihoods and the management of post-traumatic stress disorders

Bibliography

Books

NJ Kriger, *Zimbabwe Guerrilla War: Peasant Voices*, (Cambridge, Cambridge University Press, 1992)

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

F Marvin, *Out of the Shadow of the Night: The Struggle for International Human Rights* (Delarcote International Human Rights in Context: Law, Politics, Morals (2nd Edition Oxford University Press) 1143. London 2000)

M Minnow, "Between Vengeance and Forgiveness" (1998) in HJ Steiner and P Alston (eds), P Van Zyl, 'Justice Without Punishment: guaranteeing human rights in transitional societies' in C Villa – Press, New York 1989)

Vicencio and W Verwoerd (eds), *Looking Back Reaching Forward* (University of Cape Town Press

"Zimbabwe: A Final Priceless Reward", *Newsweek*, 28 April 1980, in 'Foreword', B Raftopolous and T Savage (eds), *Zimbabwe Injustice and Political Reconciliation* (Cape Town, Institute for Justice and Reconciliation, 2004)

Journals

A Neier, "What Should Be Done About the Guilty?", (1990) 37 *New York Review Books*

C Jalloh and A Marong, "Ending Impunity: The Case for War Crimes Trials in Liberia", (2005) *African Journal of Legal Studies* 53

C Villa - Vicencio 'Why Perpetrators Should Not Always Be Prosecuted: Where the ICC and Truth Commissions Meet' (2000) 49 *Emory Law Journal* 210

D Orentlicher "Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime" (1991) 100 *Yale Law Journal* 2551

DC Gray, 'An Excuse Based Approach to Transitional Justice,' (2006) 74 *Ford Law Review*, 1

JE Mendez, "Accountability for Past Abuses" (1997) 19 *Human Rights Quarterly* 255

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

M O'Rawe, "Transitional Policing Arrangements in Northern Ireland: The Can't and the Won't of the

Change Dialectic”, (2003) 26 Fordham International Law Journal, 1015 – 1073

P DeGreiff, “International Courts and Transitions to Democracy”, (1998) 12 Public Affairs Quarterly 79

Vinuales JE, Impunity: Elements for an Empirical Concept, Law & Inequality: A Journal of Theory and Practice, Volume 25, Issue 1, Article 3, 2007:127

Reports:

An Analysis of Zimbabwe Human Rights NGO Forum Legal Cases, Zimbabwe Human Rights NGO Forum, Harare, June 2006 at 10

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

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

Legislation and International Conventions

Zimbabwe

Constitution of Zimbabwe Amendment (No. 20) Act, 2013, 22 May 2013

Presidential Powers (Temporary Measures) Act Chapter 10:20 Act 1/1986

State Liabilities Act Chapter 8:14; 13 May 1932

International Conventions

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

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

UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, United Nations, Treaty Series, vol. 993

UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998,

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

Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights ("Banjul Charter")*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982)

Organization of African Unity (OAU), *Constitutive Act of the African Union*, 1 July 2000

Resolution on the fight against impunity in Africa - ACHPR/Res. 344(LVIII) 2016

U.N. Econ. & Soc. Council, Sub-Comm. On Prevention of Discrimination & Protection of Minorities,

Final Report on the Question of Impunity of Perpetrators of Violations of Human Rights (Economic, Social and Cultural Rights) 5, U.N. Doc. E/CN.4/Sub.2/1997/8 (June 27, 1997)

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

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

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

UNGA Res. 60/174: 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

Legal Cases

Anto Furundzija case, Judgment of 10 December 1998, IT – 95 – 17/1, paragraph 157.
Lawless v Ireland, Series no. 31 European Human Rights Report 15, (1961), at 31-2.

African Commission on Human and Peoples Rights Communication 295/04: Noah Kazingachire, John Chitsenga, Elias Chemvura and Batanai Hadzidzi (represented by the Zimbabwe Human Rights NGO Forum) v Zimbabwe

Websites

www.worldbank.org

CONTACT DETAILS

Zimbabwe Human Rights NGO Forum
Suite 4, 1 Raleigh Street
PO Box 9077
Harare

0242 772860, 770177, 770178

Website: www.hrforumzim.org
Email: admin@hrforum.co.zw

Printed By Sable Press Pvt Ltd