



TRANSITIONAL JUSTICE OPTIONS FOR ZIMBABWE: A GUIDE TO KEY CONCEPTS

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Introduction

The signing of the Global Political Agreement in Zimbabwe in September 2008, and the swearing in of the Government of National Unity in February 2009, raised hopes among Zimbabweans and observers throughout the world that the human-rights abuses of the past might be addressed. The theme of transitional justice began to receive a great deal of attention. Human-rights organisations that had been lobbying for transitional-justice mechanisms to be implemented in Zimbabwe hoped that the transitional unity government would prioritise the issue. This hope was short-lived, however. It transpired that economic and political reforms were at the top of the unity government's agenda; addressing the past has not been a priority.

Aiming to contribute to a smooth transition towards a more peaceful and democratic future for Zimbabwe, and acknowledging that Zimbabwe has a unique history as well as some existing mechanisms for addressing human-rights abuses, this document offers some insight into the history and background of transitional justice. An outline of the five primary focuses of transitional justice processes is provided, followed by brief descriptions of some of the key terms that are used to describe aspects of the process. The purpose of providing this information is to show that transitional justice does not have to be prescriptive: equipped with an understanding of the challenges that come with each mechanism, Zimbabweans can choose from those listed here, and select a set of tools that have the potential to work in Zimbabwe.

Some background to the concept of transitional justice

The concept of transitional justice has its origins in the aftermath of the Second World War. Before this, avoidance strategies were common after a war or conflict – no one discussed abuses that had taken place, and no measures were put in place to address the needs of those affected by these abuses. After the Second World War, however, the first war tribunals were set up in Europe and Asia to prosecute those accused of committing what became known as crimes against humanity.¹

Furthermore, the United Nations (UN) adopted the Universal Declaration of Human Rights on 10 December 1948. This paved the way for the drafting of other international and regional human-rights instruments, such as the African Union's African Charter on Human and Peoples' Rights that was adopted in 1981.

Alongside the development of these documents, there have been attempts to build post-

1 Cherif Bassiouni 1999: 107.

war societies that respect people's fundamental rights and freedoms, and recognise victims' rights to redress. Avoidance is no longer regarded as acceptable.² It is now widely accepted that after a country has experienced war or conflict it is important for its citizens to examine and address the abuses that have taken place before taking steps to move forward. Experience has shown that without healing the wounds inflicted by past injustices, there is little chance of countries establishing a meaningful or lasting peace.³

Aryeh Neier argues that there are two crucial reasons for confronting the past.⁴ First, it recognises the worth and dignity of those victimised during a conflict. Wars and conflicts leave many people dead, and many survivors maimed, traumatised and reeling from a myriad of losses. Neier argues that failure to confront what has happened to these people implies that they do not matter, and that only the future is important – a situation which deepens their victimisation. There is a need to obtain the truth of what happened, to recognise wrongdoing, and to acknowledge the pain and suffering that survivors and their families have been through. Gutman and Rieff argue that this is important not only for victims, but that the general public should also be made aware of what has taken place during a conflict.⁵

The second reason proposed by Neier for confronting the past is because it shows that the rule of law is being upheld – that those who committed abuses will not be immune from society's efforts to deal with its past. Before survivors can forgive and forget, the perpetrators of violence have to be held accountable for the parts they played in crimes committed in the name of war and/or politics.

As alluded to by Neier, a process of transitional justice represents the first real test of democratic values for a country that is committed to moving away from war or repression. It offers an important opportunity for demonstrating the difference between an old regime and the new. Dealing firmly with those who participated in, and/or benefited from, human-rights abuses is one way of revealing the differences between the old and the new governments. Another way is for new governments to ensure strict adherence to the principles of democracy and the rule of law during the transitional justice process.⁶ If undertaken correctly, transitional justice presents a powerful opportunity to free a country from the negative aspects of its past. As such it is vital that the transitional justice mechanisms are conducted appropriately and in a context-specific manner, so as to heal the nation rather than do further harm. While perpetrators must be dealt with firmly, investigating and prosecuting crimes can be challenging, especially in developing countries where criminal justice systems do not function properly. Furthermore, prosecution of perpetrators does not address all the needs of victims and survivors. Their unmet needs can also threaten a country's prospects of achieving justice and accountability.

Taking into account these realities, the central objective of transitional justice is to confront past abuses in a holistic manner and to ensure that abuses do not recur. To address these goals, those involved need to understand the different aspects of justice – such as restorative, social and criminal justice (as explained later in this paper). They also need to be aware of the various mechanisms that have been developed to address justice and victimisation effectively. It is important to identify which mechanisms are most appropriate for the country in question. Both of these processes are important as they have the potential to lay the foundations for peace and justice in the future.

2 The UN High Commissioner on Human Rights summed up this sentiment in the opening address to the Transitional Justice Workshop on Rule-of-Law Tools for Post Conflict States, held in September 2004, declaring that 'the preference for doing nothing is no longer an option'. [Electronic] <http://www.unhchr.ch/hurricane.nsf> [Accessed 17 February 2011].

3 See Article 19 undated.

4 Neier 1997:99.

5 Gutman and Rieff 1999:4.

6 Kritz 1995:xxvi.

Human rights and the concept of transitional justice in Zimbabwe

At least since the start of colonialism, human-rights violations have been part of Zimbabwe's history. The abuses of the colonial period were a major motivation for the liberation struggles that culminated in Zimbabwe's independence in 1980. It was hoped then that the government of Zimbabwe would make certain that the pain and suffering caused by Rhodesians could never happen again. It is important to mention, without excusing the fact, that an amnesty was part of the peace settlement that led to Zimbabwe's independence.⁷ There was thus no discussion or public consideration of whether to hold actors from both sides accountable for their alleged crimes. Indeed, some alleged perpetrators, including some high-ranking Rhodesian military and intelligence officers, became part of the Zimbabwean government – a fact that may help to explain the continuation of certain abuses under the new government.⁸ Victims and survivors were powerless as they watched their abusers not only get off scot-free but also be given key positions in the new government.

The policy of national reconciliation pronounced by the new government was for people to simply forgive and forget. Thus, there was a general acceptance of 'post-war impunity' (see key terms below), as a way of starting the healing process and allowing the country to start afresh.⁹ Searching for the truth, it was said, would reopen old wounds and impact negatively on reconciliation.

As mentioned earlier, this would be unacceptable today as violations of human rights – including crimes against humanity (discussed below), genocide, and cruel and degrading treatment – are now internationally recognised crimes. The general sentiment in international law now favours a culture of accountability, and has little tolerance of impunity regarding human-rights violations. Accordingly, new international instruments have been developed, such as truth and reconciliation commissions and the concept of prosecution under universal jurisdiction.¹⁰

Transitional justice has been of increasing concern for Zimbabwean citizens since the publication of a report on the human-rights violations (popularly known as *Gukurahundi*¹¹) that took place in the 1980s in Matebeleland and the Midlands. The report was published by the Catholic Commission for Justice and Peace in Zimbabwe and the Legal Resources Foundation in 1997.¹² Since then, there have been a number of initiatives concerned with transitional justice, some of which address the violations of the 1970s war of liberation.¹³ These include a symposium held in Johannesburg in 2003 that was organised by civil-society organisations from Zimbabwe and South Africa. The symposium explored issues of redress, amnesty and impunity, and made strong recommendations for the establishment of a truth,

7 The Lancaster House Agreement of 1979 created the Constitution of Zimbabwe, which is still the current constitution, albeit with recently promulgated amendments that limit individual freedom. One of the conditions of the Lancaster House Agreement was to allow Rhodesian perpetrators to go unpunished to ensure a smooth transition.

8 In his book, *Serving Secretly, An Intelligence Chief on Record*, Ken Flower, who was the head of the Rhodesian Central Intelligence Organisation, tells of how he was invited to stay on after independence and continue to lead the organisation. Mugabe apparently assured him that he wanted to 'draw a line through the past' even though Flower had been instrumental in an assassination attempt against Mugabe himself during the 1979/1980 election campaign.

9 When the peace agreement was entered into in 1979, Robert Mugabe agreed that all Rhodesian perpetrators of human-rights abuses should go free. These words were spoken by Mugabe in his 'Independence Message' in 1980: 'If yesterday I fought you as an enemy, today you have become a friend and ally with the same national interest, 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. The wrongs of the past must now stand forgiven and forgotten.'

10 Examples of such instruments include the South African Truth and Reconciliation Commission of 1995, and the international criminal tribunals of Rwanda (www.ictt.org) and Yugoslavia (www.icty.org). The principle of universal jurisdiction is most clearly demonstrated in the mandate of the International Criminal Court (ICC), which was established by the Rome Statute of 17 July 1998 and which entered into force on 1 July 2002. The African Charter on Human and Peoples' Rights, was adopted by most of Africa's governments in 1981 and entered into force on 21 October 1986; Zimbabwe is a signatory to this charter.

11 A Shona word meaning the rain that washes away the chaff from the last harvest before the spring rain.

12 CCJP & LRF 1997.

13 See Reeler 1998, 2000.

justice and reconciliation commission.¹⁴ Transitional-justice options for Zimbabwe were discussed and participants initiated a process aimed at achieving justice for victims by agreeing to engage in wider consultation within their own organisations, other civic bodies not represented and with the general public. The symposium issued a declaration that stated:

Victims of all past human-rights abuses have the right to redress and to be consulted about the nature of the mechanisms that will be established to address their needs. The mechanisms that are established must be victim centred, and must be capable of addressing the needs of the victims in a meaningful way. Prior to the establishment of these mechanisms, there must be an extensive process of consultation with the victims' broader community about the mechanisms and the broader community about the sorts of persons who should be made responsible for operating them.¹⁵

Subsequent efforts have been directed mainly towards documenting human-rights abuses, offering humanitarian and legal assistance to victims, and advocating for legal, constitutional and institutional reforms.

Discussions on transitional justice in Zimbabwe were also high on the agenda during the 2008 talks between ZANU-PF and the two MDC formations (MDC-T and MDC-N) that were initiated by the Southern African Development Community (SADC). These talks led to the signing of the Global Political Agreement in September 2008, and culminated in the formation of a unity government in February 2009. Later that year, the Organ of National Healing, Reconciliation and Integration was set up to look into a policy framework for national healing. This was widely seen as an acknowledgement by the unity government of the need for a transitional phase; justice and redress were expected to follow.

The five pillars of transitional justice

Transitional justice has been defined as a response to systematic or widespread violations of human rights.¹⁶ It seeks to provide recognition for victims and to promote possibilities for peace, reconciliation and democracy. Transitional justice is not a special form of justice, but justice as it applies to societies that are transforming themselves after a period of persistent human-rights abuses. In this context, demands for justice must be balanced with the need for peace, democracy, equitable development and the rule of law. Transitional-justice mechanisms take international law and traditional justice into account.¹⁷ They also recognise that, in contexts of transition, there may be unique local advantages and/or practical limitations to the ability of governments to adopt specific justice measures.

The field of transitional justice makes use of and covers a range of disciplines (including law, economics, psychology, history, public policy, forensics and the arts) to promote peace and justice in societies ravaged by war and conflict. Within this broad range, transitional justice focuses on five primary areas, namely: truth seeking and fact-finding; trials; reparations; institutional reform; and memorialisation. Each of these is discussed in more detail below.

1 *Truth-seeking and fact-finding*

Victims, their families and the society in general have the right to know the truth about violations of human rights and humanitarian laws.¹⁸ They have the right to an official account of what happened during a period of conflict, including general information regarding the history of the conflict, systematic violations of rights that took place as part of the conflict, and

¹⁴ See Themba Lesizwe 2004.

¹⁵ See Themba Lesizwe 2004.

¹⁶ www.ictj.org [Accessed 12 February 2011].

¹⁷ www.peacebuildinginitiative.org [Accessed 13 March 2011].

¹⁸ See Hayner 2002.

specific information about the identities of those responsible for violations. Truth-seeking and fact-finding is as an essential element of transitional justice because, if left untouched, past violations have the potential to undermine a new government and to reinforce the efforts of those determined to bring a repressive government back into power.

2 *Trials*

Trials seek to establish who is guilty, and to punish perpetrators for serious crimes and human-rights violations committed during a particular period. It is important to be aware that a statute of limitations can put a time limit on the prosecution of certain crimes, and the new government will have to decide how to deal with this.¹⁹ Trials can take place in civil or criminal, national or international courts. The important aspect is that perpetrators are brought before a court of justice to answer for crimes committed. It may also be necessary to enact new legislation to address crimes that have not been considered before. In most cases, governments emerging from repression embark on constitutional changes that effectively address crimes committed in the past. Therefore, states may create specific legal mechanisms to address past violations based on domestic and international standards.

When designing a legal process for dealing with perpetrators, issues of impunity and the role of amnesty have to be confronted. Studying past transitional-justice processes can be useful here in providing an understanding of initiatives aimed at engendering reconciliation. For example, lessons can be drawn from the South African process in which amnesty was offered in exchange for the truth. This offers one way of getting around the issue of impunity but at the same time addresses the victims' right to full disclosure, and ensures that everyone knows about the perpetrators and their motives. Transitional justice is about transformation, nation building and healing at every level of society.²⁰

3 *Reparations*

Reparations serve several purposes in national reconciliation: they serve as a form of acknowledgement by the nation that victims have experienced losses under the repressive regime; they allow the victims to recover some of the monetary costs of their losses; and they serve as a deterrent to future perpetrators by making them aware that to their actions will have consequences.²¹ There have been debates about who should meet the costs of reparations if negotiators decide to provide financial compensation to victims. It is now accepted in international law that governments are obliged to pay compensation to victims of human-rights violations and that, if the regime that perpetrated the violence does not provide compensation, then the successor government should do so.²² There are various types of reparations, including compensation, rehabilitation, restitution and reparations, and these are discussed in the next section of this paper.

4 *Institutional reform*

Violent conflicts have a tendency to destroy a country's justice system, leaving behind corrupt, illegitimate and dysfunctional institutions. Post-conflict societies under new governments often struggle to manage ongoing tensions in contexts in which the rule of law has broken down and where people have lost trust in the impartiality or effectiveness of the justice system.

Institutional reform in this context refers to the modification or redrafting of a country's legal framework, and the reforming or rebuilding of its justice system (including institutions such as the judiciary, and the police and prison services). This may include removing perpetrators from public positions²³ and arranging for human-rights training for all

19 Kritz 1995.

20 For more on this issue see Villa-Vicencio and Doxtader 2004:8.

21 United Nations 2006.

22 RAU 2010:37.

23 Ellis 1996.

public officials – repressive governments tend to entrench their doctrines throughout state institutions. Often, certain public institutions, including the judiciary, police, military and state-intelligence agencies, have contributed directly to repression and other human-rights violations. In Zimbabwe, institutional reform will have to include retraining of the security forces, as they have been implicated in the perpetration of violence and have failed to investigate cases of political violence.

5 *Memorialisation and collective memory*

Memorialisation is about honouring the dignity, suffering and humanity of victims, both living and dead, and commemorating the struggles and suffering of individuals and communities.²⁴ Such a process aims to contribute to healing and reconciliation, and to ensure that history is never forgotten, regardless of how horrific it may have been. Memorialisation usually comes after the initial phase of transition, and can be achieved by constructing monuments and museums, establishing national days of remembrance, and including information about the past in the school curriculum.²⁵

Transitional-justice processes have serious implications in terms of human, technical and financial resources, and this can create problems for emerging democracies, especially where state coffers have been depleted by the previous regime. It is, however, generally agreed that efforts have to be made to source the funds, and that failing to address the abuses of the past can lead to countries paying a much higher price in the long run. Where transitional governments cannot meet the costs of transitional justice, donors can be approached. This should be approached cautiously, however, as donors may have their own agendas and wish to attach conditions to funds they provide.²⁶

Other key terms and definitions

Certain key terms have specific meanings in the context of transitional justice. For ease of access, these are listed below in alphabetical order and briefly explained.

Accountability

Post-conflict justice is premised on the understanding that domestic stability, security and democratic governance in the aftermath of atrocities perpetrated by a repressive regime are strengthened by a commitment to accountability. This involves acknowledging and taking responsibility for one's actions and decisions, and suffering punishment if the actions and decisions were illegal. Accountability is often used synonymously with such concepts as liability, responsibility, answerability and blameworthiness. As argued above, perpetrators of violence and human-rights abuses must be held accountable for their actions in order to help prevent future violations.

Acknowledgement

This means owning up to or admitting one's part in the commission of an act. Acknowledgement is about accepting responsibility for one's actions, recognising another person's desire to understand why the actions were carried out, and his/her need to come to terms with what happened. It allows a wronged person an opportunity to grieve and arrive at a decision about whether or not to forgive the perpetrator. It also raised the possibility of compensation. Acknowledgement in this context does not involve prosecution or persecution of the perpetrators; it is merely a process of finding out what happened so that victims and/or their families can move on. In Zimbabwe the issue of acknowledgement has arisen in discussions on transitional

²⁴ Jelin 2007.

²⁵ In Chile, for example, the government built a number of historical markers in the early to mid-1990s. Known as *sitios de memoria* or memory sites, they commemorate and honour those who suffered and died under the Pinochet regime, which ended in 1990.

²⁶ Kritz 1995:xxxj; RAU 2010:32.

mechanisms to be adopted. An apology could serve as a form of acknowledgment that undue harm was caused to Zimbabweans during, for example, *Gukurahundi* in Matebeleland and parts of the Midlands soon after independence, and *Operation Murambatsvina* of 2005. These two cases are often cited, and acknowledgement is clearly needed urgently.

Amnesty

Amnesty is a legal pardon for human-rights abuses. It is granted by the state, usually after the truth about the abuses has been told with the aim of ensuring peace. Amnesties must be based on the truth so that everyone knows what the amnesty is for. There are certain crimes for which amnesty cannot be granted, such as murder, rape and sexual enslavement. These and other serious human-rights violations are known as crimes against humanity. Self-amnesties that are designed to conceal rather than reveal the truth are spurious and illegitimate.²⁷

Apologies

Apologies by the state, individual perpetrators and others may encourage social understanding, facilitate national reconciliation, and enable victims and their families to reach forgiveness.

Compensation

Compensation provides victims with monetary payment for damages, suffering and losses resulting from past violations. This can include payments to help victims address the consequences of one or more of the following: physical or mental harm that they have suffered; lost economic, educational and social opportunities; damage to their reputation and dignity; and costs related to obtaining relevant legal, medical, psychological or social assistance. One example of this that already exists in Zimbabwe is the War Victims Compensation Fund, which was introduced by the government in the 1990s to cater for war veterans.

Education

States have a responsibility to ensure that information about past violations is adequately and appropriately communicated to broad sectors of society. To this end, states should integrate the documentation and analysis of past violations into national educational curricula. They should also work with victims, communities, civil-society organisations and others to ensure that the public is aware of past violations, as a means of preventing recurrences and of building a culture of respect for fundamental human rights and the rule of law.

Crimes against humanity

Crimes against humanity are murder, extermination, enslavement, deportation or forcible transfer of population, torture, rape, sexual slavery, enforced sterilisation, forced pregnancy, imprisonment or severe deprivation of physical liberty, sexual slavery, enforced prostitution, sexual violence, enforced disappearance, apartheid and other inhumane acts. These are the most serious crimes in international law that entail individual criminal responsibility. They include conduct that is not allowed under generally applicable international law. Such crimes are subject to universal jurisdiction; in other words, all states can exercise their jurisdiction to prosecute perpetrators, regardless of where the crimes were committed.

Gender justice

Women and girls experience wars and conflicts differently from men as they tend to be far more exposed to sexual abuse including rape and similar violations. Furthermore, as dependants and family members of combatants, women often suffer secondary victimisation: losing breadwinners and sometimes their status and property rights in their communities if

²⁷ See Zalaquett 1997:12.

their male relatives are killed.²⁸ Gender justice is an attempt to challenge sexual and gender-based violence and make sure that women have equal access to redress for human-rights violations that they suffer. Unfortunately women are often not included in peace processes and transitional-justice processes, but efforts are being made all over the world to change this. For example, UN Resolution 1325 recognises the impact of armed conflict on women and girls, and calls for the equal participation of women in the prevention and resolution of armed conflict as well as in peace-building processes.²⁹

Healing

Healing is about dealing with the wounds of the past, overcoming divisions, and restoring a sense of identity, dignity, potential and belonging to individuals who have been affected by violence or other abuses. Healing often happens more quickly if the truth is made known, and if wrongdoers acknowledge, and are made accountable for, their roles in crime or violence. It is important to note that healing is not an event but a process that often takes a long time. For some, the harm of past violence can be ameliorated by protective and empowering traditions involving collective action, ceremonies, ritual exchanges, prayers and public acts of atonement. Thus, traditional, indigenous and religious approaches, that involve rituals and collective processes, can facilitate individual and community healing through the re-establishment of relationships not only between people but with God, protective spirits and local traditions.

Impunity

This term is used to describe the failure of a state to investigate and bring perpetrators of human-rights violations to justice. Impunity means that perpetrators do not face prosecution, trial or punishment. As a result, victims are denied effective remedies, do not receive reparations for injuries suffered, their right to know the truth about violations is not ensured, and the necessary steps to prevent a recurrence of violations are seldom taken. States can tolerate and even facilitate impunity in many ways, including:

- Deliberately creating laws, such as clemency orders, that protect perpetrators and pardon people liable to prosecution;
- Not taking action against perpetrators and effectively allowing them to go free; and
- Passing token sentences and limiting punishment for gross violations of human rights.

Impunity is common in countries that lack a tradition of upholding the rule of law, have high levels of corruption and/or entrenched systems of patronage; where judicial systems and structures are weak; and where the security forces enjoy special protection and privileges.

Institutional reform

Institutional reform entails states taking measures to improve governance, and setting up institutions to address the legacy of past violations. Such measures include institutional restructuring, security-sector reform, legal and judicial rebuilding, and activities that support democratisation and fundamental human rights. These reforms should be developed alongside broad public consultations that include victims of past abuses, their families, affected communities and civil society representatives. It is essential that women and minority groups are adequately represented in these consultations, particularly where they have been specifically targeted for abuse.

Security-sector reform requires particular attention. According to the International Centre for Transitional Justice, security-sector reforms require a justice centred-approach that uses four dimensions to transform abusive security systems:³⁰

28 Rubio -Marin 2006:23; McKay and Mazurana 2004; Coalition for Women's Human Rights in Conflict Situations 2007.

29 United Nations 2000.

30 International Centre for Transitional Justice 2011.

- Building the institutional integrity of the sector to discourage abuses and increase responsiveness;
- Promoting the legitimacy of the sector to overcome the fundamental crisis of trust characteristic of a situation marked by a legacy of serious abuse;
- Empowering all citizens, especially victims of oppression and violence and other marginalised groups; and
- Enhancing coherence with other transitional-justice approaches such as criminal prosecutions, truth-telling and reparations, to increase the effectiveness of each of these measures.

International law

This is the body of rules that nations recognise as being binding on their relations with one another. Sources of international law include treaties, customs, general principles of law, the resolutions and declarations of international organisations on issues of equity, and the writings of judges and legal scholars.³¹ Among other inter-governmental organisations, Zimbabwe is a member of the Southern African Development Community, the African Union and the UN.

Memorials

As a key aspect of transitional justice, memorials can take many forms. They can help to preserve public memory of victims and raise moral awareness about past human-rights violations in order to prevent their recurrence. Memorials have become a means of reclaiming the histories of the oppressed, and of honouring those that have died or have been victimised during times of conflict.³² Memorials are important especially in poverty-stricken countries, and in instances where many lives were lost, where there are never sufficient resources for financial reparations to be meaningful. The design of memorials should include civic participation, taking into account the opinions and ideas of victims, their families and civil society organisations, while at the same time displaying great sensitivity towards local culture and values.

Prosecution

Prosecution includes judicial investigations and the punishment of those responsible for human-rights violations. States can create specific legal mechanisms to address past violations based on domestic and international standards. This promotes stability, the rule of law and democracy, and it subjects certain conduct to universal condemnation. Prosecution³³ can also serve as a deterrent, because potential future perpetrators may be less likely to commit atrocities if they are aware of the consequences. In order for prosecution to serve this purpose, there must be equality before the courts, and the judiciary must be seen to be impartial and independent. Also, the state must protect witnesses, their family members and others who may be harmed as a result of their cooperation with investigations and prosecutions. Prosecution is one way to ensure accountability (see above).

Reconciliation

Where violent conflict has divided a nation, reconciliation is the process through which individuals learn to trust one another as citizens again and try to live together harmoniously as equal citizens.³⁴ Reconciliation usually involves an element of forgiveness on both sides and therefore cannot be forced on people. Like healing, reconciliation is often a slow process – it can take time to deal with the past. True reconciliation is hard work, and it entails mourning, listening, understanding, healing, acknowledgement and reparations. Managing

31 www.hg.org/international-law.html [Accessed 21 February 2011].

32 Naidu 2004.

33 Nino 2006.

34 Garkawe 2003:338.

these complex issues is difficult, especially within the highly polarised political contexts that often follow wars, civil unrest and authoritarian rule. Reconciliation requires individuals to think beyond the idea of ‘me and my future’ and embrace the concept of ‘we and our future’ – it creates the basis for a new way of living and facilitates the restoration of peace.

Redress

Redress is similar to reparations, and involves attempting to return victims to the position they were in before they were abused or violated. Compensating wronged parties financially or taking care of their medical needs can achieve redress, as long as victims agree to the fairness of these measures.

Rehabilitation

This is a process which restores either an individual or a community that has been involved in human-rights abuses. It involves a range of activities including counselling, medical care, social services, legal assistance, job training and education, and aims to reduce or minimise the impact of past violations. Rehabilitation is the process of restoring an individual’s full health and reputation after the trauma of a serious attack on his or her physical or mental integrity. It also aims to restore what has been lost, and seeks to achieve maximum physical and psychological fitness by addressing the individual, the family, local communities and ultimately society as a whole.

Reparations

Reparations involve actions, or money paid, by the state or other designated bodies to make amends for wrongs done. Discussed above as one of the primary areas of transitional justice, reparations help repair the material and moral damages of past abuse.³⁵ They typically constitute a mix of material and symbolic benefits to victims. Such benefits may include financial compensation and official apologies. States remain responsible for reparations even where the government that committed past violations no longer exists. States also have an obligation to enforce domestic judgements against responsible parties. Where perpetrators are unable or unwilling to meet their obligations, the state should assume this responsibility, especially where a state was either partially complicit or failed to take adequate preventive action to prevent human-rights abuses from taking place.

Restitution

This is a remedy that seeks to restore a person to the situation they were in, or would have been in, had it not been for the unlawful action of another. It is the act of making up for loss or injury. Restitution includes: resettlement in one’s place of prior residence; the return of confiscated property; and the restoration of liberty, employment, family unity, legal rights and citizenship. States should make special efforts to ensure that individual criminal records are cleared of illegitimate and politically motivated convictions related to government repression.

Restorative justice

This involves cooperative processes aimed at addressing past wrongs with an emphasis on the need for healing both the wronged and the wrongdoers. Parties involved in a specific offence collectively resolve how to deal with the aftermath of that offence. It implies restoring a normalised everyday life, and recreating and confirming people’s sense of being and belonging. The objectives of restorative justice are to:

³⁵ United Nations. *Rule-of-Law Tools for Post-Conflict States*.

- Attend fully to victim's needs – material, financial, emotional and social, including those close to the victim who may be personally affected;
- Prevent new offences by reintegrating offenders into a community;
- Enable offenders to take active responsibility for their actions; and
- Create a working community that supports the rehabilitation of offenders and victims, and remains active in preventing crime.

Retributive justice

This refers to the systematic imposition of punishment on perpetrators of violations on the basis that the perpetrator has done something to upset the harmonious existence of society. Retribution argues that, if laws were made to be obeyed, then whoever breaks those laws should be punished. Using the notion of retribution, crime is viewed as an individual act and thus individuals are seen as being responsible. Punishment of the individual is seen as an effective response because it aims to change a specific person's behaviour and deter them from committing another crime. The focus of this form of justice is therefore on establishing which individuals are guilty and who is to blame. This approach is sometimes criticised because it can originate from and sustain negative motives such as revenge.

Special tribunals

These usually refer to legal processes set up to investigate and report on gross violations of human rights, with a view to prosecuting persons alleged to have committed abuses during a specific period in a country's history. The purpose of these tribunals is to obtain justice for the victims and deter others from committing the same or similar crimes in the future.

Truth and Reconciliation Commissions

These are temporary, officially sanctioned, non-judicial investigative bodies, the primary purpose of which is to investigate and report on key periods of past abuse. Truth and reconciliation commissions (TRCs) provide important mechanisms for addressing the right to truth for victims, their families and society as a whole.³⁶ TRCs serve a variety of interrelated goals, including:

- Establishing an accurate historical record of past violations;
- Determining individual and/or organisational responsibility;
- Providing an official forum where victims' stories can be heard and acknowledged;
- Challenging impunity through objective research which can be made available for use by policymakers and others;
- Facilitating national reconciliation and the open acknowledgement of wrongdoing; and
- Recommending reparations, institutional reforms and other policies.

International experience has shown that the success of a truth commission is dependent on the existence of sufficient time, human resources and capital. A truth commission should not be seen as an alternative to prosecutions, but rather as complementary to these. Although supported by government, the commission must not be seen to be a political body; it must have operational independence as well as a strong but flexible mandate. The inclusion of a broad range of actors in all aspects of its processes, as well the ability to reach political consensus and implement all of its recommendations, are generally acknowledged to be attributes of successful commissions.

³⁶ The South African Truth and Reconciliation Commission was established to deal with what happened under the apartheid regime, where gross human-rights abuses were committed and the truth needed to be made known. On the first day of the Commission's meetings, then-President Nelson Mandela said, 'To forgive and forget we should know what actually *happened*.' To forge a future, perpetrators and victims had to honestly and squarely confront their past.

Conclusion

Post-conflict justice involves a delicate balance between peace, justice and reconciliation. Managing these issues is difficult and may take a very long time, especially within a highly divisive political context such as that of Zimbabwe. The situation is especially complex where addressing victims' needs involves confronting political actors who are directly or indirectly responsible for past atrocities. Despite the tensions inherent in balancing competing goals, the failure to engage past atrocities can prevent citizens from feeling willing (or able) to build a truly reconciled society. Restoring peace and security in the aftermath of conflict requires a long-term commitment, but experience has shown that it is achievable if this commitment is based on careful planning and effective implementation of the kinds of approaches outlined in this document. Transitional justice does not have to be prescriptive: equipped with an understanding of the challenges that come with each mechanism, Zimbabweans can choose from those listed here and select a set of tools that has the potential to work in their context.

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