



ZIMBABWE: FROM IMPUNITY TO ACCOUNTABILITY

**ARE REPARATIONS POSSIBLE
FOR VICTIMS OF GROSS AND
SYSTEMATIC HUMAN RIGHTS
VIOLATIONS?**

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CONTENTS

1. INTRODUCTION	1
2. CONTEXT	2
3. THE BATTLE FOR REPARATIONS	4
4. AMNESTY AND ACCOUNTABILITY	6
5. TRUTH, JUSTICE, RECONCILIATION	10
5.1 The legislative framework	11
5.2 The resources of a TJRC.....	14
5.3 The timeframe	14
5.4 The position of victims.....	17
5.5 The relationship between a TJRC and a new government.....	18
6. THE MAIN MECHANISM FOR THE PAST: SOME ISSUES.....	20
7. THE FUTURE: SOME ISSUES.....	25
8. LAW REFORM: FURTHER ISSUES FOR THE FUTURE.....	30
9. REPARATION	32
Appendix I <i>Declaration of the Johannesburg Symposium (11-13 August 2003)</i>	i
Appendix II <i>Summary of the Johannesburg Symposium (11-13 August 2003)</i>	v

ZIMBABWE: FROM IMPUNITY TO ACCOUNTABILITY

ARE REPARATIONS POSSIBLE FOR VICTIMS OF GROSS AND SYSTEMATIC HUMAN RIGHTS VIOLATIONS?

1. INTRODUCTION

In August 2003 a three-day symposium entitled *Civil Society and Justice in Zimbabwe*¹ took place in Johannesburg, South Africa, bringing together representatives of a large number of Zimbabwe civil society groups with their South African colleagues and other experts from abroad. The symposium sought to foster greater participation by Zimbabwean civil society representatives in discussions regarding the resolution of the present all-round Zimbabwe crisis, as the two main political parties appeared to be on the verge of serious negotiations. Numerous papers were delivered relating directly to the situation in Zimbabwe as well as giving perspectives from other countries that have moved towards more justice-based societies.

Open discussions and debate took place, and despite the wide range of organisations and interests that were represented, there was much agreement on the need to move beyond the rhetoric of human rights and to find practical ways of dealing with the reality of Zimbabwe: past, present and future. The right of victims of human rights violations was central to the discussions. Indeed, the primary purpose of the symposium was to highlight the serious concern that the rights and needs of such victims would once again be side-lined, as has happened in Zimbabwe before. Unless the well-documented culture of impunity is resolutely challenged, the abuses are destined to be repeated.

¹ Full details of the symposium can be found at <http://www.santsep.co.za/satc/zim2003.htm>

ZIMBABWE: FROM IMPUNITY TO ACCOUNTABILITY

The formal documents agreed at the close of the symposium consisted of a **Declaration**² and a **Summary**³ of the basic issues needing attention. The latter document contained an outline of the mechanisms requiring implementation if justice in Zimbabwe is to become a reality. These two documents, together with the papers presented and the resource materials due to be published, were to be used in the ongoing campaign inside Zimbabwe to insist that the needs of victims are fully met in transition and afterwards.

2. CONTEXT

The current Zimbabwe crisis is multi-layered and multi-faceted. The most recent spate of gross and systematic human rights abuses has taken place in a climate of economic collapse, compounded by drought and the HIV/AIDS pandemic. The Zanu-PF Government's use of the land question to hold on to political power has exacerbated the all-round crisis⁴. Food, fuel and many other basic commodities are in short supply, and beyond the reach of millions of Zimbabweans who cannot afford black-market prices. Corruption is rampant, and the vast majority of the population is in dire economic straits. Health, educational and environmental structures are disintegrating. Organised political violence has become entrenched. Torture is routinely practiced and is widespread.⁵ The police, army, recently-instituted youth

² Appendix I.

³ Appendix II.

⁴ Zanu-PF denies that the land reform programme was suddenly implemented in 2000 as a pretext and method for staying in power. However, the violent and widespread invasions of commercial farms began in early March 2000, a fortnight after the Government lost the Constitutional Referendum which would have entrenched its position, and a few months before the June 2000 general parliamentary elections in which it faced a real challenge in the shape of the Movement for Democratic Change (MDC). The MDC, only formed in September 1999, had been one of the main bodies leading the call for a "No" vote in the Referendum. Faced with almost certain defeat at the polls in a free and fair June election, Zanu-PF unleashed the campaign of terror that continues to this day. All serious players in Zimbabwe recognize the need for land reform, which nevertheless was racially manipulated in early 2000 as a crude populist issue and to physically attack all those opposed to Zanu-PF hegemony. In the process the rule of law has been destroyed.

⁵ For a comprehensive survey and analysis of Zimbabwe from the perspective of torture survivors see REDRESS: *Reparation for Torture: A Survey of the Law and Practice of Torture*

militias, former liberation fighters (and those masquerading as them), intelligence services and ruling-party supporters have been and continue to be used to maintain Zanu-PF.

This current crisis is well documented. Leading activists, historians and commentators have also high-lighted the trampling of political and civil rights in the violent destruction of PF-Zapu after Independence.⁶ Thousands of black Zimbabweans were murdered, maimed and tortured over a five-year period to 1987. The seeds of that conflict go back to the struggle for Independence itself. No less significant were the horrific abuses perpetrated by the white minority regime of Smith during UDI from 1965 onwards, and especially during the 1970s when thousands more black Zimbabweans suffered appalling loss of life and property.⁷ The victims of this bloody past, which runs from the beginning of colonialism in 1890 to the most recent abuses, have never experienced justice.

The history of Zimbabwe over the past 45 years in particular is one of great violence, and the current abuses are not some aberration but yet another manifestation of what has gone before. The civil society organisations represented at the symposium declared, in effect, that ALL the injustices of the past as well as those of the present need to be squarely confronted if impunity is to be replaced by accountability.

This is a bold and ambitious position. It insists that the gross and systematic human rights violations committed *before* Independence be examined along with those committed *after* Independence, especially in the mid-80s and the past few years. It calls for perpetrators to be exposed and to acknowledge their wrongdoing, and for ways to be found to hold them accountable, including prosecutions. It seeks to put the right of victims to

in 30 *Countries: Zimbabwe Country Study*, London, March 2003:
<http://www.redress.org/publications/Audit/Zimbabwe.pdf>

⁶ Ibid.

⁷ Ibid.

ZIMBABWE: FROM IMPUNITY TO ACCOUNTABILITY

justice at the centre of this process. How is such an ambitious programme to be achieved, or even attempted?

3. THE BATTLE FOR REPARATIONS

The Redress Trust⁸ is an international NGO whose objectives are to assist torture victims anywhere in the world, and to make accountable all those who perpetuate, aid and abet acts of torture. It has been following closely events in Zimbabwe, and with its considerable experience of the issues involved REDRESS participated in organising the August symposium and presented papers at it. Six months after the event there is no sign of progress towards democracy, nor credible evidence of serious negotiations between Zanu-PF and the MDC to resolve the crisis.⁹

Despite this, and indeed because of it, human rights groups and brave individuals inside the country continue to document the ongoing abuses, and to fight for justice in the face of ever-increasing risks to themselves.¹⁰ While fully engaged in these difficult and dangerous tasks, there has been little opportunity to build on the process initiated at the symposium or to campaign along the lines of the principles, recommendations and resolutions that were debated and agreed.¹¹

⁸ See generally the REDRESS website: <http://www.redress.org>

⁹ Since 2000 when the current crisis began, South African President Thabo Mbeki has promised the world that South Africa's policy of 'quiet diplomacy' would help to halt Zimbabwe's slide into disaster. Four years later, there is no sign that his tacit support for Zanu-PF has brought Zimbabwe any closer to resolving any of its manifest economic, social, political and human rights problems; on the contrary, things are far worse now than before. His periodic pronouncements that genuine talks between Zanu-PF and the MDC have commenced, or are imminent, are routinely denied by both parties.

¹⁰ Journalists, lawyers, politicians, women's groups, trade unionists and human rights activists continue to be assaulted, arrested and harassed. The police invariably break-up peaceful public demonstrations with excessive brutality. Government-sponsored youth militias continue their rampages, particularly in the rural areas during by-elections. See the monthly political violence reports compiled by the Zimbabwe Human Rights NGO Forum: http://www.hrforumzim.com/frames/inside_frame_monthly.htm

¹¹ See the **Summary** (Appendix II) p.vi: "The Zimbabwe participants recognized they had initiated a process aimed at achieving justice for victims. They undertook to engage in wide consultation within their own organizations, other civic bodies not represented at the symposium and the general public. They will then incorporate these views into a final action plan. The civic organizations that endorse this plan, and agree to participate in its

The political crisis in Zimbabwe is intensifying, and the ruling party clearly has no intention of negotiating itself out of power. Its unrelenting attacks on press freedom have seen the closure of the Daily News with the connivance of the Supreme Court, whose Chief Justice Chidyausiku and the majority of senior judges are openly aligned with the Government. In February 2004 a presidential decree introduced detention without trial¹², ostensibly for those accused of corruption, but which many expect will be used to further neutralize the opposition now that general parliamentary elections have been announced for March 2005. The country is under a *de facto* state of emergency. Civil society itself is braced for a renewed onslaught against it. In the circumstances, it would be insensitive and presumptuous for outside organisations to purport to tell Zimbabwean human rights activists what they ought to be doing. Many of those inside the country are so occupied with simply keeping going that to call on them to embark on additional programmes could understandably be resented.

Zimbabweans recognise that a *political* settlement between Zanu-PF and the MDC is an urgent necessity. To civil society activists, especially those concerned with the recent gross and systematic human rights abuses perpetuated by the present Government and its various agencies and supporters, it is obvious that one of the key issues on the agenda at any serious negotiating table will be amnesties. This is the pattern not only of Zimbabwe's own history but also of many other countries seeking to move from dictatorship to democracy. There is a fear that in their haste to reach a settlement the MDC will agree that Mugabe and others will be 'forgiven' for their multiple crimes so long as they relinquish their political stranglehold. This is frequently referred to in the media as the "honorable exit" strategy.

implementation, will present the plan to the political parties and other actors, and demand that it will be fully taken into account in all deliberations relating to political transition."

¹² The effect of the decree is that detainees can be held for weeks without any prospect of bail. It has been widely condemned in Zimbabwe and abroad as unconstitutional, and as a further example of Zanu – PF's contempt for due process. Even Mugabe's Supreme Court may have difficulty in finding the new decree lawful.

ZIMBABWE: FROM IMPUNITY TO ACCOUNTABILITY

In this context, and conscious of the reality Zimbabweans face on a daily basis, REDRESS seeks to highlight what it believes are important considerations for civil society, and urges regional and international supporters to bear them in mind in the fight for justice for the many victims of gross and systematic human rights violations. It is hoped that this paper will contribute towards strengthening the struggle for reparations in Zimbabwe, and assist those who have set themselves the task of achieving it in reaching their goal. For those embroiled in the struggle *now*, looking ahead ought not to be regarded as an irrelevant luxury. From a human rights perspective, and particularly if the victims are to have any real possibility of achieving justice for what they have suffered, there is a real danger that failure to look ahead will, on the contrary, run the risk of a pyrrhic victory.

4. AMNESTY AND ACCOUNTABILITY

Amnesties are incompatible with the obligation to prosecute or extradite those accused of international crimes such as war crimes, genocide, crimes against humanity, and torture, and with the corollary obligation to afford full reparation to victims. It follows that amnesties are unlawful when applied to international crimes. There is a wealth of authority on this fundamental issue, including that arising from various international bodies such as the UN Human Rights Committee, the UN Committee against Torture, the UN Human Rights Commission, the UN Special Rapporteur on Torture, the Security Council, the General Assembly and the Secretary-General, as well as regional courts and commissions.¹³

Amnesties have also come to haunt victims and societies at large, and are widely seen as a factor contributing to the recurrence of

¹³ In January 2004 REDRESS submitted an *amicus* brief to the Special Court for Sierra Leone in support of the prosecution position that amnesties are unlawful when applied to international crimes: see the full submission at <http://www.redress.org/Briefs/AMICUS%20CURIAE%20BRIEF-%20SCSL1.pdf> It should also be noted that the symposium recorded at p.ix of the **Summary** (Appendix II): "... under international law and international humanitarian law, gross human rights violations should never be ignored or be the subject of an amnesty."

serious human rights violations, not least in Zimbabwe itself. The difficulties of prosecuting large numbers of perpetrators and the need to encourage truth-telling and foster reconciliation might sometimes be seen as justifications for the adoption of amnesties, and the South African process of conditional amnesties is often invoked as a model to be emulated in this context. Even there, however, the process has not been without its severe critics, despite what was seen as a necessary compromise to facilitate the political transition.¹⁴ REDRESS has consistently argued against the use of amnesties for serious violations of human rights and humanitarian law, not only because of their illegality under international law but also because of the apparent considerable opposition of victims to amnesties.¹⁵ Whatever the merits or otherwise of arguments in other specific situations, Zimbabweans at the symposium showed themselves to be aware of the dangers involved in amnesties, and their incompatibility with justice for victims and with building a society based on lasting peace.¹⁶

The pre-Independence crimes of the UDI period and before were never investigated, and neither were those of the liberation movements. These violations and the subsequent impunities created the foundations for the human rights abuses experienced in the 1980s and beyond. Behind closed doors at Lancaster

¹⁴ An attempt to challenge the amnesty aspect of the TRC as being unconstitutional was unsuccessful: see the case of *Azanian Peoples Organisation (AZAPO) and Others v The President and Others*, Constitutional Court of South Africa, Case CCT 17/96, 25 July 1996, discussed in the REDRESS *South African Country Study* at p.8-9 <http://www.redress.org/publications/Audit/South Africa.pdf>

¹⁵ The perceptions that torture survivors have of reparations indicate the wide range of components involved. What is clear is that many victims see an important aspect of their quest for justice to include punishment of perpetrators, which precludes amnesties: see REDRESS *Torture Survivors' Perceptions of Reparation – Preliminary Survey*, London, 2001: <http://www.redress.org/publications/TSPR.pdf> It has been recorded that numerous victim surveys have found that almost everyone, and especially victims, want accountability through some form of punishment: C. Barton, "Empowerment and Retribution in Criminal Justice", in H. Strang and J. Braithwaite's (Eds.) *Restorative Justice: Philosophy to practice*, England, Ashgate, 2000, p.59.

¹⁶ See the **Summary** (Appendix II) p.vii: "Insisting that strategies must be pursued that will cater for the needs of victims of violence and that victims will be consulted about their needs and what the victims perceived as being the most appropriate mechanisms for satisfying their needs," and "Understanding that lasting peace can only be achieved where human rights abusers are held accountable and meaningful steps are taken to try to heal the grievous wounds the violators inflicted on their victims and the society."

ZIMBABWE: FROM IMPUNITY TO ACCOUNTABILITY

House in 1979 a 'deal' to 'forgive and forget' was brokered and an agreement on a blanket all-round amnesty for all those involved in the struggle for and against majority rule. British Governor Soames then legalized the arrangement through two Orders-in-Council in December 1979 and March 1980 *before* Independence, leaving newly-elected Prime Minister Mugabe with little option but to proclaim the policy of 'reconciliation.' It is necessary for civil society to take a position on Mugabe's reconciliation policy, and to analyse carefully both the positive and negative aspects of it. There was obviously a minimum of reconciliation between the two liberation movements at the time, which lead rapidly and directly to the Gukurahundi¹⁷ of 1982-1987 and the widespread, systematic and organized violations in the southern and western regions of Zimbabwe during Government military operations. These too were followed by impunity for perpetrators.¹⁸ This is again what has been happening since 2000.¹⁹

Thus the history of Zimbabwe shows clearly that blanket amnesties, although they may appear to work politically in the short term, don't in fact do so. The symposium recognized this in unambiguous terms:

"The delegates noted that during the pre- and post-independence periods there have been successive amnesties and Presidential pardons for many of the persons who committed gross human rights violations. The failure to punish these violators, and to hold them accountable, created a culture of impunity and the potential for the re-emergence of violence and the abuse of human rights. The culture of impunity can only be ended if perpetrators of human rights abuses are held accountable for their abuses."²⁰

¹⁷ This is the name given to the post-Independence civil war. It means "the rain that washes away the chaff from the last harvest, before the spring rains."

¹⁸ See REDRESS *Zimbabwe Country Study*, *supra*.

¹⁹ *Ibid.*

²⁰ *Summary* (Appendix II) p. ix.

In mobilizing support inside the country to contribute positively to and influence the outcome of future political negotiations, civil society can usefully embark on an urgent campaign to educate the wider public as well as their colleagues as to what reparations can entail. Many lawyers, for example, see reparation only in the narrow sense of monetary compensation, while people in the health professions tend to focus only on rehabilitation, and so on. There is a need to make as many people as possible aware of the full breadth of measures that may make up a genuine 'justice package' for those whose fundamental human rights have been grossly violated. Only when there is a much deeper understanding of these aspects will politicians find it more difficult to further marginalize an already marginalized group, either before, during or after transition.²¹

It is suggested that in the course of such a campaign, entailing the different conceptions of reparations, the wants and needs of Zimbabwe's victims will more clearly emerge, as will the incompatibility of meeting those wants and needs without firmly confronting the scourge of amnesties. The important role of victims themselves in this process cannot be over-emphasised. Unless and until victims are made central to any examination of what reparations entail it will not be possible to fully unpack the different elements *relevant to the specifics of Zimbabwe*. Such an approach is fully in accordance with the symposium's position when proposing mechanisms for addressing the needs of victims:

"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 victims in a meaningful way. Prior to the establishment of these mechanisms, there must be an extensive process of consultation with the victims and the

²¹ For a survey of the wide aspects which make up reparation see below p.32-36.

ZIMBABWE: FROM IMPUNITY TO ACCOUNTABILITY

broader community about the mechanisms and the sorts of persons who should be made responsible for operating them. Civic organizations and the churches should assist in this process.”²²

It is important for civil society to try to develop these principled positions into concrete actions so that the victims feel they have, and do in fact have, ownership of the process. If civil society is serious about playing a role in ending the culture of impunity then it is incumbent on it to maintain the momentum on these fundamental issues.

5. TRUTH, JUSTICE, RECONCILIATION

The symposium resolved that the main mechanism for dealing with past human rights abuses will be a Truth, Justice and Reconciliation Commission to examine a range of matters prior to 1960, and subsequent to 1960.²³ For such a body (hereafter referred to as the TJRC) to be effective it must be independent, credible, efficient, adequately resourced, accessible and victim friendly.²⁴ These ideas, guidelines and principles, and others relating to the TJRC recorded in the **Summary**²⁵ do not purport to be a scientific blueprint for the establishment of a TJRC or how it should operate. Instead, and arising from the spirit of the symposium, they reflect both the wishes of civil society as well as the recognition by it that unless the framework under which a TJRC is to be established and is to operate includes these points it will achieve very little. It is suggested that some of these key aspects are deserving of attention and debate.

²² **Summary** (Appendix II) p.ix-x.

²³ Ibid.

²⁴ **Summary** (Appendix II) p. x.

²⁵ In addition to the role of civil society and the churches in monitoring and supporting the operations of any TJRC, the **Summary** (Appendix II) refers to the following needs, p.xii: for it to have a gender balance; for it to be especially cognizant of the special needs of women and children victims; for the post-transitional government to commit itself to co-operate with and to support a TJRC, and to give an unequivocal undertaking to implement its recommendations wherever possible.

5.1 The legislative framework

In the transition from apartheid to democracy in South Africa it was the newly elected and first democratic parliament that enacted the legislation necessary for that country's Truth and Reconciliation Commission (TRC). This was in stark contrast to the all-embracing amnesties implemented in Zimbabwe just before Independence. If there must be a return to democracy in Zimbabwe *before* the abuses of human rights can be addressed, it follows that only *after* such a transition can any effective legislative machinery leading to a TJRC be set in motion.

Laws will need to be promulgated to create the TJRC. However, the present political crisis in the country relates directly to the illegitimacy of the process that saw President Mugabe retain power in March 2002 and Zanu-PF 'win' the June 2000 parliamentary elections, as well as the use/abuse of the Constitution and other laws in these processes. Some may therefore question whether there can in fact be a return to democracy without there first being serious electoral, constitutional and general legal reform²⁶. It is likely that these politico-legal questions will constitute much of the meat at the transitional negotiating table. Civil society, insofar as some sectors of it are committed to seeing constitutional and electoral changes, will obviously continue to make its voice (or voices) heard in these regards, as it seeks to influence what the political players will have to grapple with. At this stage nobody can predict the paths that such negotiations are likely to take, and in particular the extent to which there will be legal reform before a return to democracy. This in turn makes it equally difficult to predict whether any TJRC will be established under the present Constitution or under some other dispensation.

²⁶ The *Declaration* (Appendix I) p. i-iii calls, *inter alia*, for the repeal of all repressive and unjust laws such as the Public Order and Security Act (*Chapter 11:17*), the Access to Information and Protection of Privacy Act (*Chapter 10:27*), and the Broadcasting Services Act (*Chapter 2:06*), as well as for "the immediate and complete overhaul of electoral laws and institutions to enable all elections to be held under free and fair conditions."

ZIMBABWE: FROM IMPUNITY TO ACCOUNTABILITY

Given these imponderables, some might argue that it is premature to be concerned now with TJRC legislation when, as far as is known, serious political negotiations have not yet even properly started. It is suggested, however, that although useful discussion may be somewhat constrained given the imponderables already mentioned, it would be a mistake for civil society to wait until *after* transition before applying its mind to the required content of any future TJRC statute. While it may be too soon to be concerned with all the precise details that should appear in such a statute, in the sense of trying to construct a draft Bill so to speak, what is important is to seek to agree *now* on the principles that should be contained in it if indeed a TJRC is to be established.

Civil society should position itself to *assist* any new dispensation genuinely trying to craft an effective TJRC statute, and at the same time ready itself to *resist* any new dispensation that tries to back-pedal or side-step the problems involved. As has been said, nobody can tell what direction things are going to take, but undue optimism is probably as misplaced as undue pessimism. It would be wrong to think that it will be safe to leave everything to any Government to sort out the reparations machinery. A realistic approach is to acknowledge that there will be strongly competing calls for priorities and resources, given the scale of the over-all crisis and the depths to which the country has sunk economically, as well as in every other field. In this context the voices of victims will not be heard unless a special effort is made to prevent them from being drowned-out in the clamour that will follow the transition to democracy and the return to the rule of law.

It is important to go back to the **Summary**, which states clearly that an effective TJRC will need to be “independent, credible, efficient, adequately resourced, accessible and victim-friendly.” The *process* of establishing a TJRC is intimately connected with the likelihood of it arriving at truth, justice and reconciliation; the extent to which it comes into being as part of a genuine ‘overall transitional justice scheme’ will impact very directly on the intended outcomes actually being achieved, especially from the perspective of victims. Independence can only be achieved if those with vested party-political interests are not granted

excessive power to dominate the appointment procedure, and if the *result* of the process is a truly independent body of well qualified women and men who can be trusted to undertake their responsibilities in utmost good faith. The appointment procedure must not only be seen to achieve this aim but must obviously achieve it.

It would also be dangerous if a new Government blithely stated that there was no need for any fresh legislation at all, and that the whole issue of human rights abuses could be dealt with under the Commission of Inquiries Act (Chapter 10:07). Zimbabweans know only too well how this procedure has been abused and manipulated in the past. Where things were found not to the Government's liking it simply never made the results public, as with the inquiries in the 1980s relating to the Gukurahundi; more recently, the 1999 Constitutional Commission was not only heavily loaded with Government supporters all appointed solely by the President, but even then he unilaterally and substantially altered their recommendations.

What is needed is a system of initial nominations from a variety of sources, including any new Government, but also from other sectors of the nation such as civil society, churches, and trade-unions. The statute should set out the qualities required for nomination, going considerably further than generalizations about persons being of good character. It is submitted, therefore, that civil society should begin categorizing what qualities will be needed for appointment as a commissioner so that it can lobby for these specific qualifications to be spelled out in the future enabling legislation. For example, does civil society view it to be essential for all or some commissioners to have a genuine background in human rights work, or medical expertise? To what extent should gender balance or racial, ethnic or regional balance be taken into account? Another area is the selection procedure itself. How open should the selection process be?

5.2 The resources of a TJRC

The **Summary** records that for the TJRC to be effective it must also be adequately resourced. It will require both human and material resources, and the money to sustain them. It will have to be housed, it will need clerks and secretaries, computers and investigators, and everything that goes with a quasi-judicial body. Zimbabwe is all but bankrupt, and as has already been said above there will inevitably be a great deal of competition for scarce resources when the time comes to start re-building the country. It is inconceivable that Zimbabwe can be re-constructed without massive outside assistance. While there may be an injection of foreign investment after transition, which will form part of a general economic recovery plan, there will also be an obvious need for huge loans and grants and general financial support in cash and kind. The foreign debt is astronomical.²⁷ In this context who will want to spend money on the 'luxury' of a TJRC?

One can already hear the arguments that it would be better to concentrate on the present and the future: money can be better spent on health or education, or in re-building the ordinary administration of justice. Civil society ought to begin to counter these arguments *now*, and not wait until after transition. The potential future Government needs to have it made clear to it that civil society *demand*s justice for the victims, and that without it there will not be long-term peace in the country. So the issue should not be cast in the form of *should* resources be allocated to a TJRC, but *where* the money and other requirements will come from.

5.3 The timeframe

The **Summary** envisages a TJRC covering two distinct periods: before 1960, and after 1960.²⁸ Zimbabweans see 1960 as a turning point as it was then that the possibilities for a relatively

²⁷ A report in the *Zimbabwe Standard* newspaper on 22 February 2004 put it in the region of US\$6,000,000,000: <http://www.thestandard.co.zw/>

²⁸ (Appendix II) p.x-xi.

peaceful de-colonisation process began to evaporate rapidly, with the escalating political crisis culminating in UDI five years later. In general terms, therefore, the symposium saw the pre-1960 period (from approximately 1890) as being in need of scrutiny both to reveal specific human rights abuses and to place the more recent period (i.e. the past 44 years) in context and perspective.

Even if a TJRC is to examine events only since 1960 this will be a huge task, in the sense that the sheer scale of events (UDI and the liberation war, Gukurahundi, and the period since 2000) will in themselves be extremely demanding. Is it therefore realistic to go back 'to the beginning' by casting the net over an earlier 70 years? Furthermore, why stop at 1890 and the advent of British colonialism; why not look at the pre-colonial struggles between Africans themselves, the grossly over-simplified and historically dubious conflict between 'Ndbele and Shona'?

Those present at the symposium did not have the time to debate fully these practical problems. Nevertheless, there was a clear consensus that the abuses of the last four and half decades cannot be properly investigated unless the build-up to this period is also closely examined. If this approach is to be followed it will contrast sharply with the course taken in South Africa, where the ambit of the TRC was limited to the period after 1960 only, rather than attempting the truly gargantuan task of examining over 300 years of human rights violations. Is 70 years more feasible than 300?

It is submitted here that Zimbabwe civil society should seriously consider re-visiting this issue. Certainly the pre-1960 period is critical to an understanding of what led to UDI, the war and post-Independence developments: the racially-based legal, social and economic imbalances arising from colonialism which necessitated the liberation struggle *and* which festered after Independence. The questions, though, are whether a TJRC is the correct vehicle to look at both these periods, and if so whether the ideal is to have two 'committees' working at the same time or whether the earlier period would be examined before the TJRC moves on to the post-

ZIMBABWE: FROM IMPUNITY TO ACCOUNTABILITY

1960 period. Matters like these will be clearly relevant to any time-scale.

For these reasons, and no doubt others, civil society needs to examine what it believes will be an optimum timeframe during which a TJRC should operate, so that it can position itself to effectively advocate for such a timeframe. Paradoxically perhaps, and although civil society is at the moment so involved in the day-to-day crisis that it may feel it cannot concern itself with such issues, the period *before* the establishment of a TJRC is imminent could be the best time to do just that. The distance that there still is from the reality of any TJRC gives those concerned an opportunity to draw creatively others, especially victims themselves, into the debate, not in an abstract way, but for the purpose of coming up with answers to these real practical questions. Conversely, if this is not tackled now there will be little time to think things through later, and instead party politics will be more likely to predominate and hasty decisions implemented - to the detriment and prejudice of human rights victims.

Finally on this aspect, experience from other truth commissions has shown that a considerable time is initially spent in actually setting up the body in question, before it can even begin its work. If this period, which may run to several months, is *included* in the legislative life span of a TJRC, it will not only severely cut into the time thereafter available for the real work to be done, but it is likely to confuse and demoralize victims and others concerned with the whole process. The obvious way to avoid these problems is to *exclude* the set-up time from the operational time, and the shorter the operational time the more important it will be to ensure that this arrangement is clearly legislated.²⁹

²⁹ An important book, examining many of the issues and problems with which any country in transition is going to have to grapple, is Priscilla B. Hayner's *Unspeakable Truths – Facing the Challenge of Truth Commissions* (Routledge: New York and London, 2001). Use has been made of her findings in this paper, which REDRESS acknowledges. The organisation for which Ms Hayner works is the International Centre for Transitional Justice (ICTJ), which can be accessed at <http://www.ictj.org>

5.4 The position of victims

In addition to the recommendation in the **Summary** document that there should be an extensive process of consultation with victims and the broader Zimbabwean community about the establishment of a TJRC, the document recognizes the *right* of victims of all past human rights abuses to redress, and further recognizes that the mechanisms to be established “must be victim-centred, and must be capable of addressing the needs of victims in a meaningful way.” One of the tasks which civil society must undertake, therefore, is to make specific proposals as to how victims are indeed to be assured a central position in the whole set-up.

There is a wealth of experience from other countries that have gone through similar transitions. It is a modern truism that no two countries will find themselves at an identical starting point, and that not only will the extent and types of violations differ from state to state but so will the historical, political, social, cultural and other contexts. However, this does not mean that Zimbabwe (or any other territory) trying to deal with the past through a TJRC has to re-invent the wheel. Obviously there should be a free and open debate on all aspects of a TJRC, but there should be no derogation from the fundamental and internationally recognized *right to a remedy and reparation for victims of gross human rights violations*. In as much as the TJRC is envisaged as playing a central (but not exclusive) role in upholding these rights, any attempts, innocent or otherwise, to sideline victims must be vigorously resisted.

Victims need to be consulted from the start as to how they see their interests being properly met. Once more it is stressed that if this is left to a later stage there may be a real danger of their concerns being brushed-aside in the rush of events. Specific attention should be focused on victim communities as well as individuals, and communication with them must not only be strengthened in the run-up to the establishment of the TJRC but must be maintained during its work, so that there will be feedback on the success or otherwise of the whole enterprise.

Experts (medical and legal) who work closely with victims of human rights abuses are aware of the dangers of re-traumatisation of victims, whether in court proceedings or before quasi-judicial or administrative-investigative bodies such as a TJRC. Proper and adequate support systems must be set up to deal with re-awakened trauma before, during and afterwards; victims must have the right *not* to be involved if they don't wish to be, just as much as their right to have their stories told if they want to must be protected and indeed entrenched at the heart of proceedings; questions as to whether all investigations and interviews of victims and witnesses will take place publicly, or whether some could be held behind closed doors, need to be asked and answered, as do ways of catering for any special needs of women and child victims, and victims of sexual crimes whatever their age or gender.³⁰

5.5 The relationship between a TJRC and a new government

Unless the Government has the political will to make a TJRC succeed, it won't. State resources of all kinds will have to be called upon to operate the organ, irrespective of how it is set-up,

³⁰ Leading international human rights organizations have recently done considerable work in developing concrete strategies for supporting the rights of victims who will be appearing before the International Criminal Court (ICC), more so than in any other previous international tribunals. Although a TJRC will be neither an international body nor a criminal court, Zimbabwe civil society has a golden opportunity to log-into the ideas and recommendations which are emerging from this network, drawing on the considerable expertise lying beyond Zimbabwe's borders, which can then be applied to the country's specific situation. Ideas emerging from the ICC victims-rights network which would seem to be of applicability include some of the following: the need for proper training for all those staff who will have contact with victims, including any lawyers involved; mechanisms to deal with complaints from victims of their treatment in the process; means of dealing with vicarious traumatisation of staff working closely with victims; the use of clear and easily understood forms and documents, as well as publicity materials, so that victims know what the process is all about as well as what it is not about (i.e. it is not a criminal or civil court) and the limits of the mandate of the TJRC; the wide dissemination of relevant information in appropriate languages and through optimum media, including radio and 'walk-in' availability; the use of specific strategies, programmes, materials and experts for situation-specific locations; the use of multi-disciplinary investigation teams with sufficient time to deal with things from the victims' perspective; whatever the reparation process of the TJRC is, the need for victims to know clearly how this fits in with the truth-telling and reconciliation aspects.

staffed and funded: it will not be some sort of entity operating in isolation and in a vacuum. The symposium recognized these political and practical realities and therefore recorded the necessity of the post-transitional Government committing itself to co-operate with and to support any TJRC.

Nevertheless, and this too relates to the requirements that it be “independent, credible and efficient,” a TJRC must operate and must be able to operate without *interference* from the Government. The closest analogy is to that of judicial courts which cannot exist except within the overall framework of the State and the Government but which in a democracy should never be subject to the undue influence of parliament, president or politicians. It follows that once it is up and running the TJRC must be allowed to get on with its work without constraint, obviously within the broad parameters of its legislative mandate.

The symposium also agreed that it was important to record that a new Government should “give an unequivocal undertaking to implement its [the TJRC’s] recommendations *wherever possible*”³¹ (emphasis added). It is suggested here that civil society needs to develop what its expectations are in these regards, including with respect to the proviso. Certainly a new Government should act in good faith and not seek to undermine a TJRC at any point, including in an *ex post facto* environment. An example of an important problem that has arisen in other countries is that where a commission has implicitly or explicitly called for the prosecution of perpetrators revealed in the course of its investigation, Government has at *that* point played the amnesty card. In other words, even if the issue of amnesties has been successfully resisted during transition and up to the establishment of a TJRC, civil society will need to be *permanently* on its guard against this possibility being raised at any time thereafter. The stronger any Government’s prior commitment to implement findings and recommendations and not to backtrack, the better the prospects for victims’ justice.

³¹ *Summary* (Appendix II) p.xii.

6. THE MAIN MECHANISM FOR THE PAST: SOME ISSUES

The symposium averred that, “the *main* mechanism for dealing with *past* human rights abuses will be a Truth, Justice, and Reconciliation Commission” (emphasis added). Both of these aspects are significant, because they recognize that a TJRC, even an ideal one which achieves close to everything that it sets out to do, will not be a panacea for *all* past violations, and furthermore they acknowledge that a TJRC may not be the appropriate mechanism to prevent and/or deal with *future* violations.

An obvious additional mechanism for dealing with the past is through the criminal justice system: the prosecution of perpetrators through the courts. At first blush this is an obvious and simple issue. One of the concerns of civil society which arose in formal and informal discussions at the symposium, and which has been voiced in papers and documents from time to time, as well as having been discussed inside and outside of Zimbabwe for years, is the desire to see justice done as normally conceived in the form of ordinary criminal trials. Indeed, special emphasis has been placed on the *Justice* aspect of a TJRC, precisely to distinguish it from the South African TRC as well as from ‘Mugabe’s reconciliation’ of 1980. There is considerable skepticism in Zimbabwean civil society regarding some of the outcomes of the South African TRC (and in particular the ‘truth for amnesty’ aspect which was central to it), and not surprisingly perhaps this echoes the serious and on-going reservations of many South Africans themselves over the process. There would also appear to be near unanimity amongst Zimbabwean civil society activists that the 1980 ‘arrangement’, in that it contained no element of truth or justice, had grave shortcomings.

Thus, at a basic level, what will be the relationship between the TJRC and the ‘normal’ criminal justice system? Even assuming that the transition to democracy successfully avoids the trap of blanket impunity and sees the repeal of past amnesties where necessary, and that the work of the TJRC identifies many perpetrators of gross human rights abuses (it is taken for granted

here that this will be one of its main purposes), will criminal prosecutions necessarily follow? To date most people in Zimbabwe civil society would instinctively say ‘Yes’, and loudly, but is it as simple as that?

Civil society needs to examine closely and engage in further debate on this extremely important issue. Criminal proceedings in a transitional context can face all or some of the following problems:

- i)** the strain it can put on the criminal justice system, especially when there are hundreds if not thousands of perpetrators who are deserving of prosecution;
- ii)** the time and costs involved, given that criminal trials need evidence, witnesses, proof beyond reasonable doubt and the proper implementation of all the other aspects of criminal procedure, including appeals;
- iii)** if attempts are made to speed-up the process there can be the real danger of ‘summary, emergency or victors justice,’ and the further abrogation of rule-of-law norms;
- iv)** the difficulties caused by the aforementioned issues (numbers, time and costs) even in a country with a sound economy and a fully functioning legal system, will obviously be greatly exacerbated in Zimbabwe where the economy has collapsed along with many aspects of the administration of justice (e.g. corrupt prosecutors, magistrates and clerks, politically biased judges, a Zanu-PF police force), and where even those who are not corrupt or politically biased are demoralized and struggling to maintain the little that remains of minimum standards;
- v)** purely legal issues such as past amnesties and prescription (normally a criminal prosecution must be brought within 20 years of the crime, apart from murder) which, although they can be dealt with legislatively, can also further delay already lengthy judicial processes;
- vi)** prosecutions are essentially aimed at establishing *individual* criminal guilt, not political and/or moral responsibility, nor are they easily able or guaranteed to expose the wider patterns, causes and practices of state violence and torture which constitute gross and systematic human rights violations – some individuals can be

ZIMBABWE: FROM IMPUNITY TO ACCOUNTABILITY

punished at the cost of many others escaping altogether, along with the underlying problems and realities being minimalised and side-lined;

vii) the possible high political costs of multiple prosecutions where the country *is* trying to undergo a 'healing' process;

viii) a different form of political and social cost (and added trauma for victims) where high-profile prosecutions result in acquittals (as in South Africa, for example).

All of these, and others, are factors that Zimbabwe civil society needs to consider carefully.³² Although there are thus serious arguments that can be marshalled in good faith *against* prosecutions, there are also strong arguments that can be raised *in favour*. Some of these are as follows:

i) in international law there is a duty on states to prosecute at least the most serious of international law crimes, namely genocide, war crimes, crimes against humanity (essentially widespread and systematic human rights abuses of a gross i.e. horrific nature), and torture;

ii) there is a corresponding non-recognition of amnesties and impunity, both *de facto* and *de jure*, hence the principle of universal and extra-territorial jurisdiction for these crimes;

iii) a basic component of full reparation is the right of victims to see perpetrators tried and punished;

iv) to re-establish the rule of law and to build a positive human rights culture requires Zimbabwe to move away from selective justice, *de facto* as well as *de jure* amnesties, and the negative culture of impunity for 'political crimes' - there is need for all transgressors always to be equally liable before the law;

v) prosecutions make perpetrators directly accountable for individual victims whom they have terrorized;

vi) justice is done and is seen to be done, strengthening democracy;

³² A useful publication which Zimbabweans could examine is the handbook *Reconciliation After Conflict* (2003) produced by the International Institute for Democracy and Electoral Assistance (IDEA), which can be accessed at <http://www.idea.int> REDRESS acknowledges the use which has been made of IDEA materials in producing this paper.

- vii) failure to prosecute can lead to private revenge-seeking in which people take the law into their own hands, and which can then spiral into further retaliatory violence;
- viii) successful prosecution and incarceration of leading perpetrators removes them from society and increases general and individual security.

Civil society therefore needs to look carefully at all sides of this vital issue, in a genuine quest for a consensus. Should only the most serious violators be prosecuted, and if so who decides who they are – a TJRC, the usual prosecuting authorities, or some other organ? Whoever has this power, what criteria are to be applied? What is the role of victims in the decision-making process? Should there be *any form at all* of ‘truth for amnesty,’ and if so when can it be said that full disclosure has been made? There are no easy solutions or foolproof road maps. The experiences of other countries can help considerably but cannot be applied mechanically. Zimbabwean human rights activists need to find innovative ways to deal with the pros and cons of criminal prosecutions and retributive justice.

Another mechanism, which has developed to deal with past human rights abuses is restorative justice, seen as a way of avoiding or overcoming the problems and shortcomings of the punitive approach examined above. Instead of being so perpetrator-oriented as retributive justice, restorative justice seeks to work closely with the victims and the communities from which they and the perpetrators come, in ways which still make the perpetrator accountable, but more directly to the victims instead of ‘abstract’ entities such as the state or society in general as in the case of prosecutions. It is much less legalistic and procedural, and far more flexible, than courtroom justice, emphasizing restoration and reconciliation rather than punishment. The broad aim is to mend the social harmony that widespread human rights abuses have damaged. It has a strong voluntary component, and attempts to reach agreements and consensus through publicly acknowledged and community based solutions to the wrongs that have occurred, instead of imposed criminal sanctions. There are likely to be important roles for traditional leaders to play as

ZIMBABWE: FROM IMPUNITY TO ACCOUNTABILITY

arbitrators in these processes, and for the application of customary law and rituals when appropriate. However, the concept and implementation of restorative justice is not without its own problems, and can be open to abuse and manipulation. It is suggested here that civil society needs seriously to explore the suitability or otherwise of restorative justice as one way of dealing with the widespread violations which have taken place in different parts of the country at different times in the past.

A further method of dealing with some aspects of past human rights abuses is via the route of civil litigation – the suing of perpetrators for damages in the ordinary courts. This will be discussed below when reparation is examined in more detail.³³

It seems sensible, therefore, to see none of the various mechanisms as mutually exclusive. Zimbabweans ought to work towards finding a combination of ways and means to bring justice to victims of past abuses. A simple working hypothesis would be to see a TJRC as the chief mechanism for investigating, exposing, recording and documenting all the abuses of the past through all legitimate means, affording victims maximum opportunities to confirm and reveal their experiences in ways most conducive to their own well-being. Directly from the findings of a TJRC there could be prosecutions of the most serious perpetrators, with punishments being modified depending on the degree to which violators co-operated with and fully disclosed their participation in violations to the TJRC, and also depending on the extent to which they have engaged in meaningful reparation. At the same time, use might be made of restorative forms of justice, possibly more in rural than urban settings as the traditional structures in the former are stronger than in the latter; these forms would be aimed at dealing with the less heinous human rights violations, many of which have involved destruction of property rather than physical abuse.

³³ See p. 34-35.

Finally, and in the background so to speak, depending on the reality of developments, there would be international and foreign fora operating on the basis of treaties, customary international law and the principles of extra-territorial and universal jurisdiction to deal with any of the main culprits who may have tried to escape culpability one way or another, including moving abroad. Naturally, this simple model is no more than just that - a starting point for detailed and specific explorations within the framework of the numerous issues raised at the symposium and elsewhere.

In addition to the concerns already mentioned there are others, which will directly impact on the relationship amongst these different potential 'justice organs.' For example, because of the fundamental legal principle against self-incrimination, how does one get perpetrators to 'confess' to a TJRC if what they say is thereafter going to be used in evidence in criminal prosecutions? Yet another difficulty relates to the actual identification of perpetrators where the state has used terrorist gangs of 'war-veterans' and the youth militias, especially where these have been brought into communities from other areas precisely to disguise who they are, giving rise to the potentially complicated evidentiary issue of command responsibility. Experience also shows that it is not a straightforward matter to invoke the principles of extra-territorial and universal jurisdiction, and to enforce international criminal law, given the continued existence (although the number is steadily shrinking) of states offering safe-havens.

7. THE FUTURE: SOME ISSUES

For many years Zimbabwe civil society and international NGOs have not only tried to document the gross and systematic human rights violations that have occurred, but they have striven to publicize them nationally and internationally, and to go further: to analyze the reasons for the violations and the fundamental structural and other weaknesses in the legal system, the body politic and the institutions of Government and administration generally, and to propose solutions and reforms. The current crisis itself, in part grew out of civil society's efforts to galvanize

ZIMBABWE: FROM IMPUNITY TO ACCOUNTABILITY

Zimbabweans into challenging Zanu-PF's abuse of the Constitution.³⁴

Even after the cycle of impunity for human rights violations is broken, there will be an urgent need for radical reforms in other areas. One institution that requires specific attention is the Zimbabwe Republic Police (ZRP). More will be needed than rebuilding the professionalism and reversing the 'Zanunisation' of the ZRP. The fact is that the ZRP, as did the pre-Independence police force from which it developed, has always routinely resorted to brutality and torture to a greater or lesser extent in the course of ordinary policing, and not only during the maintenance of 'law and order' at critical political stages in the country's history, such as at present.³⁵ Until and unless this problem too is acknowledged and resolutely challenged, the scourge of torture and other violations at the hands of state officials will continue, albeit at a less systematic and widespread level than is the case now. In this Zimbabwe is not unique. Many other countries have faced this issue of how to police the police, and how to safeguard those in custody from unlawful abuse. The time is ripe for Zimbabwe civil society to insist that this too needs serious attention.

One of the basic problems is the inherent difficulty in relying on any institution to monitor itself, and the tendency especially of those in a service organization (be it the police, the army or the prison service) to close ranks and to cover-up violations. This tendency is not restricted to service organizations, but it is particularly prevalent in strictly hierarchical bodies where it is difficult for junior ranks to challenge the conduct of their seniors without themselves being victimized, along with a culture of patronage and the avoidance of responsibility which leads seniors

³⁴ From the mid-90s civil society organisations began to work with the Zimbabwe Congress of Trade Unions (ZCTU) to campaign for a new Constitution which would entrench human rights and curtail presidential power. Out of this alliance grew the National Constitutional Assembly (NCA) to oppose the Government's Constitutional Referendum. The MDC itself also grew out of this coalition.

³⁵ See REDRESS *Zimbabwe Country Study*, supra.

to condone or even encourage the criminal behavior of their juniors.

In addition to extensive efforts to properly train police officers not only in policing skills but in human rights norms, what is needed is an *independent* authority to investigate and deal with allegations of unlawful activity, including torture and ‘police brutality.’ This is an area where civil society can take the initiative in proposing such an independent organ, drawing on the experience elsewhere (including post-apartheid South Africa) where efforts have been made to solve the same problem. Any such organ, as with a TJRC, will only be effective if it is genuinely independent, properly staffed and adequately financed. Creating such a body on paper and through legislation is one thing, but making it work is another, requiring the political will of Government.

As with the ZRP, so with the Zimbabwe Prison Service and the treatment of prisoners generally. It is well known in the country that currently the jails are the scenes of on-going serious human rights abuses.³⁶ Of equal concern are the appalling conditions of gross overcrowding, the inadequacies of proper food, medical care and hygiene, and overall neglect, which singly and combined constitute cruel, degrading and inhuman treatment and punishment. Part of the reason lies in Zimbabwe’s catastrophic economic decline and endemic corruption: prisoners are entirely marginalized and at the mercy of their custodians, and in the current political climate they are subject to even greater degrees of brutality, extortion and abuse than ‘normal.’

³⁶ See for example the report posted on the ZWNEWS website on 6 February 2004: <http://www.zwnews.com/issuefull.cfm?ArticleID=8581>. Under the heading “Overcrowding leads to prison crisis,” it chronicled how jails designed for 16,600 have overshot that figure by more than 8,000 according to justice ministry officials. Prisoners take turns to sleep. The sheer number of deaths from infectious diseases has lead prison authorities to introduce a daily five-minute programme on national radio appealing for relatives to collect the bodies of the deceased. Critical food shortages mean inmates get maize porridge seasoned with salt for breakfast, and boiled cabbage for lunch and supper. The brutality of prison officers was revealed in a recent report presented to the justice ministry by a parliamentary committee. The large number of MDC leaders arrested and detained for various lengths of time in recent years has also revealed eye-witness accounts of appalling conditions for those awaiting trial, or who are incarcerated pending bail hearings.

ZIMBABWE: FROM IMPUNITY TO ACCOUNTABILITY

It needs to be recognized that even at the best of times Zimbabwe's prisons barely comply with minimum international standards, and a civil society serious about the protection of human rights across the board cannot overlook the problem of the country's penal institutions. In the past some local NGOs have attempted to work with the authorities to inculcate prison officers with at least a basic understanding of human rights norms, as well as trying to inform prisoners of their (theoretical) legal rights. These modest attempts have long since been abandoned given Zanu-PF's concerted and consistent attacks on all aspects of civil society, and the bridges will have to be re-built. However, more needs to be done, and again the concept of some sort of *independent* authority that could concentrate on protecting prisoners from gross ill treatment should be seriously examined.

The **Summary** refers to the establishment of a Human Rights Commission³⁷ (HRC) as an important instrument to protect citizens against future violations. This is not a new idea, and was proposed in the 1999 draft Constitution prepared by the National Constitutional Assembly (NCA). Many of today's human rights organizations were involved in the NCA, so it was consistent for them to repeat the call for such a body at the symposium. Once more, whether a HRC will actually achieve the worthy aims which it undoubtedly ought to will depend not only on the clarity and breadth of its remit but the commitment of a new Government to consistently support such an organ. Much of what has been said about the establishment, staffing, resources and independence of the TJRC applies with equal force to other institutions being mooted to act as checks and balances against the abuse of human rights, including watchdogs to monitor the police and prisons, and a HRC.

Creating such bodies through legislation should not be particularly irksome or even controversial, but if they then become sinecures for political cronies, they will be nothing but a waste of money. This is what has happened with the office of the Ombudsman,

³⁷ (Appendix II), p. xv.

which if it is not to be abolished will have to be entirely overhauled. In addition, however, such institutions have to have the political and financial backing of the Government, without undue interference from it. In a democracy these independent bodies are accountable to parliament and not to the executive, and civil society needs to do whatever it can to popularize them and to advocate for their implementation.

The **Summary** recommended the creation of several other independent commissions,³⁸ including ones to deal with corruption, the land issue, gender issues and so on. While these other commissions would not impact so obviously and directly on the interests of victims as a HRC would, they are all important, and indicate the recognition by the symposium of the broader social and economic factors which underpin human rights in a developing country such as Zimbabwe.

In general terms, therefore, the future protection of human rights and in particular the implementation of effective remedies for victims of violations, will necessitate the creation of new bodies as well as the strengthening and rebuilding of existing machinery. The country's economic collapse, widespread corruption, emigration of skilled officials, public service demoralization, and the abandonment of the rule of law, have all gravely undermined the administration of justice in recent years. This has created tremendous practical problems which will need to be tackled in parallel with the introduction of new innovative mechanisms such as a HRC, police complaints body and so on. The role of civil society should be to participate vigorously in all the necessary processes of assessment and consultation preceding the creation of these, and to keep them firmly on the agenda. A lot can be learned from regional and international developments in regard to institutional safeguards to help prevent the recurrence of human rights violations. A new Government will need all the help it can get, but civil society should not wait until it arrives to build and

³⁸ Ibid.

ZIMBABWE: FROM IMPUNITY TO ACCOUNTABILITY

strengthen bridges with outside organizations that can play an important supporting role.

In these regards civil society should also not neglect or downgrade the necessity of *strengthening itself*. Recent experience has shown how vital a robust civil society is in the armoury of weapons required to protect human rights in Zimbabwe, and indeed everywhere. Irrespective of how 'progressive' any new Government will be or will appear to be, a strong civil society will always remain an essential and central component of any strategy to monitor and help prevent human rights abuses, and to support victims. For a variety of reasons which space here does not allow further examination, local civil society was very weak during the first decade of Independence, giving space to the state to commit appalling human rights abuses.³⁹ It must now not only continue to fight for the organisational gains it made in the 1990s and survive the current onslaught against all remaining manifestations of democracy, but at the same time it must prepare to develop and broaden its future capacities once the rule of law returns. This will require an improvement in the *quality* of its services, strategic thinking and commitment.

8. LAW REFORM: FURTHER ISSUES FOR THE FUTURE

Some scholars in the field of reparation for victims of gross and systematic human rights violations have argued that judicial fora and the law ought not necessarily to dominate discussions for reparation in the context of political transition. The widely-used term 'transitional justice' is so clearly part of actual political processes that reparation can be considered partly as a matter of politics,⁴⁰ and calls for a more socio-political approach to the problem of finding measures to deal with large numbers of victims

³⁹ An honourable exception was the Catholic Commission for Justice and Peace, which almost alone spoke out against the Gukurahundi. The Law Society of Zimbabwe sat on its hands, as did most individual lawyers.

⁴⁰ A helpful publication which develops these ideas is the *Expert Seminar on Reparation for Victims of Gross and Systematic Human Rights Violations in the Context of Political Transitions* (Universiteit Antwerpen and Katholieke Universiteit Leuven, 2002).

– measures which other countries have found do not simply or easily fit into traditional court procedures. Dealing with past abuses undoubtedly requires multi-faceted, combined, holistic or hybrid solutions, some of which this paper has sought to examine.

Similarly, strategies to bolster the position of future victims must include a variety of mechanisms, including the creation of new institutions and systems as well as the re-building and strengthening of those existing ones badly damaged in recent years. While recognizing, therefore, that law reform in itself is only *part* of what will be needed, it should still be of particular concern to civil society. An obvious issue is the startling lack of confluence between aspects of Zimbabwe's domestic law and developments in the international arena. To a considerable extent this specialized topic calls for input from both local and outside experts, and is one towards which energy ought to be directed.

A stark example is that perhaps the most widespread of human rights abuses, namely torture, is not even a criminal offence *per se* in Zimbabwe. For years civil society has been calling upon the Zanu-PF Government to sign up the country to the 1984 UN Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, and its twenty-year refusal to do so speaks volumes on the nature of the Mugabe regime in general and its successive Ministers of Justice in particular. Civil society must make it an urgent priority for any new Government not only to make Zimbabwe a party to the Convention but thereafter speedily to bring domestic legislation into line with it. Torture must be made a specific statutory crime in Zimbabwe with appropriately severe punishment for convicted perpetrators, and the numerous other legislative and administrative reforms that the Convention obliges state parties to undertake must be expeditiously undertaken.⁴¹

This is but one of a number of fundamental international human rights treaties which the present Government has completely and

⁴¹ See **Summary** (Appendix II), p. xv-xvi.

ZIMBABWE: FROM IMPUNITY TO ACCOUNTABILITY

deliberately side-stepped since Independence. To its credit the MDC has publicly committed itself to bringing the country into the mainstream of international law, but it will need to be monitored to make sure that it does, and that all relevant domestic laws are amended accordingly. Local NGOs with a special legal focus have already done a lot of groundwork in this field, but the time is ripe for them to now consider drawing up a coherent program of proposals for human rights legislation, reflecting all of civil society's demands.

Even where treaties have been entered into there are optional protocols which have not; furthermore, reporting and monitoring obligations with which the Government ought to comply arising from international conventions have more often than not been neglected, distorted or dealt with years too late – not surprisingly, given Zanu-PF's propensity, even before the present crisis, to pay lip-service to human rights. It is one of the ironies of the Mugabe regime that the movement which fought to replace the pariah entity that was UDI Rhodesia, with an independent state inside the community of nations, has so successfully taken the country back to the international isolation which the Smith regime so richly deserved. Once democracy is established, there will be an opportunity and a moral responsibility for all the broken links to be mended as soon as possible, and civil society will have a crucial role to play in helping steer a new Government's efforts towards human rights-friendly law reform. While it will entail more than incorporating important international law norms into domestic law, this will nevertheless be of special significance to all those concerned with victims of human rights violations.

9. REPARATION

The symposium showed that a wide range of organizations could speak with one voice, and opportunities must be sought for this approach to be repeated and intensified. In finding ways to do this, the following components of a fully comprehensive reparation programme can be taken beyond the monitoring and the documenting of violations and the rendering of immediate

assistance to victims, essential though it is for those programmes to continue unabated⁴²:

- **Restitution**

By this is understood restoring the victim, as far as is possible, to the position he/she was in before the violation. In Zimbabwe some clear examples will include the return to places of residence for those unlawfully displaced, restoration of employment, return of property, restoration of family life and citizenship and other legal rights.

- **Compensation**

This deals with economically assessable damage proportional to the details of the violation, including: physical or mental harm, pain and suffering and emotional distress, loss of opportunities including education, material damage and loss of earnings, harm to reputation or dignity, costs for expert legal, medical, psychological and social services. In Zimbabwe thousands of victims fall under this heading.

- **Rehabilitation**

Here medical as well as psychological care is involved, as are legal and social services.

- **Satisfaction**

This is a wide component of nonetheless quite specific aspects, including: cessation of the violation(s); full verification of the facts

⁴² These components are based squarely on the UN Draft Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of [Gross] Violations of International Human Rights and [Serious] Humanitarian Law, Revised 24 October 2003. The Basic Principles are the bedrock of the quest for an internationally recognised standard, and Zimbabwean civil society ought to try to become more involved in this mainstream development. See also REDRESS: *Reparation: A sourcebook for victims of torture and other violations of human rights and international and humanitarian law*, London, March 2003, <http://www.redress.org/publications/Sourcebook.pdf>

ZIMBABWE: FROM IMPUNITY TO ACCOUNTABILITY

and public disclosure in a way that don't cause additional harm to the victim or witnesses; the search for the disappeared and proper recovery, identification and reburial of those killed, done in accordance with cultural rituals; an official declaration restoring the dignity, legal and social rights of the victims and those closely associated with them; apology and public acknowledgement of wrongs, and the admission and acceptance of responsibility; judicial (e.g. prosecutions) or administrative (e.g. truth commissions) sanctions against perpetrators; commemorations and tributes to victims; inclusion of the truth of what happened in national and international human rights training, and in educational materials. The abuses over all periods of the country's history give rise to countless examples of the absence of any form of satisfaction to date.

- **Guarantees of non-repetition**

Again this is a wide field of specific remedies, including: effective civilian control of the military and security forces; restricting military tribunals and in accordance with international standards; strengthening an independent judiciary; protecting human rights defenders, lawyers, doctors and journalists; priority training in human rights laws and norms at all levels in society and especially in the police, army and security services; promoting codes of conduct and ethical norms by public servants, and in the police, prisons service, military, media, medical and social services, and amongst the staff of economic enterprises; monitoring and preventing inter-social conflicts, and resolving them; law reform. Here also it is all too apparent how far short Zimbabwe has fallen.

In the context of the above five forms of reparation, it is also apparent how limited the 'traditional' remedy of civil damages is to the problems arising from gross and systematic violations. This is not to say of course that individual civil proceedings are irrelevant – their potential must be included in any reparation programme – but even at the best of times it is a slow and expensive route. When one is dealing with large numbers of victims and many perpetrators, all the 'ordinary' hazards of litigation are multiplied a hundredfold, including the problems caused by statutes of

limitations or prescription. Many of the difficulties relating to criminal prosecutions of perpetrators apply *mutatis mutandis* to the bringing of civil actions against them, as do some of the arguments in favour of court proceedings. Clearly, judicially-based compensation is important, but inherently problematic.

Civil society needs to understand the existence of the real constraints without abandoning the strategic use that can be made of this method. As a necessary aside it should also be noted how in periods of economic chaos and hyper-inflation such as presently being suffered in Zimbabwe, the claiming and payment of civil damages can become an almost meaningless exercise. Another issue which has been mentioned already and which relates to the weakness of litigation damages is the difficulty in suing perpetrators when the state has taken deliberate steps to disguise their identity. On the positive side innovative use can be made of class-actions.

What needs stressing is that *all of these forms of reparation deserve equal recognition*, although their applicability will vary from victim to victim, perpetrator to perpetrator, and country to country. Further practical considerations, based in international law but which will unfold in the wider socio-political context, arise from the clearly established rule that the State of Zimbabwe as well as the individual perpetrators have an obligation to provide these recognized forms of reparation. The **Summary's** practical call, therefore, for the Government to establish a reparations fund⁴³ for victims, is firmly rooted in both law and principle, and is an extremely important concept which civil society needs to develop. Whether it wishes to or not, a successor Government cannot legally shirk its responsibilities to victims of the previous regime or regimes. Ways must also be found to recover the ill-gotten gains of perpetrators to boost such a fund.

Zimbabwe's civil society has a tremendously onerous task ahead. It must struggle to maintain the invaluable programmes it has

⁴³ (Appendix II), p. xiii.

ZIMBABWE: FROM IMPUNITY TO ACCOUNTABILITY

bravely developed in the face of vicious, often physical attacks from the Government and its agents. It must do so in a country where most things previously in place no longer exist, such as a secure transport and communication system, a free press, and the rule of law, let alone many basic necessities, and all this in the context of hyper-inflation and growing personal danger. If it is to successfully take on additional burdens to intensify the campaign for justice for the tens of thousands of victims of gross and systematic human rights violations, it will need maximum support and understanding from the international human rights movement. The least that those outside can do is to continue to keep the eyes of the world focused on Zimbabwe, and not allow it to drop off the agenda. Indeed, if Zimbabweans are expected to intensify their struggle for justice and democracy then their allies should do likewise: anything less would be betrayal.

APPENDIX I

Declaration of the Johannesburg Symposium 11 - 13 August 2003

Preamble

Mindful that a political solution is urgently required to overcome the crisis in Zimbabwe, and in the understanding that there is or may soon be dialogue between the major political parties in Zimbabwe, a number of Zimbabwean civic leaders convened a symposium to enable civic society leaders to have a forum at which to discuss issues of human rights and justice in Zimbabwe.

The Zimbabwean participants resolved to make representations to the negotiating political parties with recommendations on issues of human rights and justice that they desire should form part of any political settlement reached by the political parties.

1. The recommendations are as follows:
2. That human rights abuses of the past - both during the colonial and post-colonial eras - must be redressed;
3. That mechanisms be put in place to guarantee that human rights abuses never again occur in Zimbabwe;
4. That blanket amnesties for human rights abusers should not be allowed, and specifically that there should be no further general amnesty for human rights abusers;
5. That the necessary institutions be set up to deal with past and present human rights abuses, and that such institutions be empowered not only to investigate and seek the truth, but also to recommend criminal prosecution, provide for redress and reparations for victims, and lead to healing of the nation. Such institutions must encourage and sensitively deal with the special needs of victims. This is particularly important in dealing with women and children as victims;

6. That the Constitution guarantees future respect for human rights and set up a justice system and other institutions to give effect to such guarantee;
7. That the government must enable Zimbabweans to take advantage of the protection and remedies offered by international human rights instruments;
8. That there should be an investigation into corruption and asset stripping, and the repossession of all assets misappropriate from state and private enterprise, or acquired through corruption and other illegal means.

In the short term, we make the following demands on the Zimbabwean Government:

1. That there be an immediate end to political violence and intimidation, an immediate disbanding of the militia, and an immediate return to non-partisan police, army and intelligence services and non-selective application of the law;
2. That there be an immediate repeal of all repressive legislation and unjust laws such as the Public Order and Security Act, the Access to Information and Protection of Privacy Act and the Broadcasting Services Act and charges brought before the repeal of these laws should be withdrawn and sentences previously imposed be annulled;
3. That there be an immediate opening up of political space, including the immediate and complete overhaul of electoral laws and institutions to enable all elections to be held under free and fair conditions;
4. That the economic and humanitarian crisis in Zimbabwe must be immediately addressed.

We also call upon the United Nations to immediately send a Special Rapporteur to Zimbabwe to assess the human rights environment.

We also call upon the African Commission on Human and People's Rights to immediately release the report of the findings of its mission to Zimbabwe.

APPENDIX II



11-13 AUGUST 2003

Summary

Civil Society and Justice in Zimbabwe: A Symposium

The symposium

A symposium was held from 11-13 August 2003 in Johannesburg. Its theme was Civil Society and Justice in Zimbabwe.

This symposium brought together leaders from 74 civil society organizations in Zimbabwe, colleagues from civic organizations in South Africa and a number of experts from other jurisdictions.

The main purpose of the symposium was to explore how best to achieve justice in the broadest possible sense for the many victims of past and present human rights abuse in Zimbabwe.

The symposium noted that civil society organizations are non-partisan and are independent of any particular political party. Their main functions are to bring about a culture of human rights, justice and social and economic improvement and to promote and advance the interests of marginalized and victimized people.

In this document persons affected by human rights abuses are referred to as victims or survivors.

The process

The Zimbabwean participants of this symposium compiled this document and agreed upon the recommendations contained in it.

The Zimbabwean participants recognized they had initiated a process aimed at achieving justice for victims. They undertook to engage in wider consultation within their own organizations, other civic bodies not represented at the symposium and the general public. They will then incorporate these views into a final action plan. The civic organizations that endorse this plan, and agree to participate in its implementation, will present the plan to the political parties and other actors, and demand that that it will be fully taken into account in all deliberations relating to political transition. These civic organizations will monitor the political discussions pertaining to political transition to ensure that the needs of victims are fully met in the transitional and post-transitional periods.

Preamble

1. Mindful that a political solution is urgently required in order to overcome the serious and rapidly worsening crisis in Zimbabwe that has resulted in such widespread suffering;
2. Requiring that the Zimbabwean people and civil society organizations be given a full opportunity to make an input into the process taking place to bring about transition to a new political order to influence the human rights content

of any settlement that may be reached, not the political outcome of the negotiations.

3. Recalling the United Nations General Assembly resolution 53-144 of 9 December 1998 which outlines the rights and responsibilities of individuals, groups and organs of society to promote and protect universally recognized human rights and fundamental freedoms.
4. Emphasising the important role that individuals, civil society organizations and groups play in the promotion and protection of human rights and fundamental freedoms.
5. Fully accepting that historical social and economic imbalances must be remedied in order to achieve social and economic justice in Zimbabwe;
6. Insisting that strategies must be pursued that will cater for the needs of victims of violence and that the victims will be consulted about their needs and what the victims perceived as being the most appropriate mechanisms for satisfying their needs;
7. Understanding that lasting peace can only be achieved where human rights abusers are held accountable and meaningful steps are taken to try to heal the grievous wounds the violators inflicted on their victims and the society;
8. Recognising that it is imperative to preserve and fully and accurately record the past history of human rights violations.

Based on these general considerations, the Zimbabwean participants resolved as follows:

The abuses in the past

Throughout colonial occupation, black Zimbabweans were oppressed by the regime and denied all civil and political rights. They were deprived of their land, and socially and economically marginalized. From 1960 until 1980, they suffered even more widespread and systematic gross human rights violations. These violations, and the subsequent impunities, created the foundations for the human rights abuses experienced in subsequent decades.

In the 1980s, large-scale human rights violations occurred in the southern and western regions of Zimbabwe during military operations ordered by the government. These again were widespread, systematic and planned.

From 2000 onwards, there have been increasing levels of violence resulting in pervasive human rights abuses. All available evidence indicates that the government has engaged in a widespread, systematic, and planned campaign of organized violence and torture to suppress normal democratic activities, and to unlawfully influence electoral process. The government has also created, and the law enforcement agencies have vigorously applied, highly repressive legislation. These measures were directed at ensuring that the government retained power rather than overcoming resistance to achieving equitable land redistribution and correcting historical iniquities.

The human rights abuses, and the social and economic injustices suffered by the people are not merely the product of colonial injustices, but also the product of misgovernance, massive corruption, and asset stripping by state officials, persons within the private business sector, and others.

Accountability

The delegates noted that, during the pre- and post-independence periods, there have been successive amnesties and Presidential pardons for many of the persons who committed gross human rights violations. The failure to punish these violators, and to hold them accountable, created a culture of impunity and the potential for the reemergence of violence and abuse of human rights. The culture of impunity can only be ended if perpetrators of human rights abuses are held accountable for their abuses.

The participants noted and acknowledged that, under international law and international humanitarian law, gross human rights violations should never be ignored or be the subject of an amnesty.

Mechanisms for addressing the needs of victims

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 victims in a meaningful way.

Prior to the establishment of these mechanisms, there must be an extensive process of consultation with the victims and the broader

community about the mechanisms and the sorts of persons who should be made responsible for operating them. Civic organizations and the churches should assist in this process.

The main mechanism for dealing with past human rights abuses will be a Truth, Justice, and Reconciliation Commission. This Commission will have the following functions:

Regarding the human rights abuses prior to 1960, the Commission's main functions will be:

- to investigate human rights abuses that occurred prior to 1960 and compile a full and accurate record of these abuses;
- to determine the social and economic effects of these abuses;
- to establish the extent to which these historical abuses continue presently to negatively impact upon the rights of Zimbabweans;
- to make appropriate recommendations about remedial steps to address the needs of victims of these abuses and present injustices emanating from past injustices;
- to refer cases involving gross human rights violations to the Attorney-General for possible criminal prosecution.

Regarding the human rights abuses subsequent to 1960, the main functions of the Commission will be:

- to take steps to ensure the protection and preservation of evidence of human rights abuses;
- to investigate human rights abuses that have occurred between 1960 and the date upon which this Commission commences its operations, including violations

during a transitional period, and compile a full and accurate record of these abuses using available documentation, victim statements, and testimony from perpetrators;

- to require persons accused of human rights violations, but who deny that they committed such violations, to appear before the Commission so that these cases can be fairly investigated and findings can be made;

- to require persons who admit to having committed human rights violations over this period to appear before the Commission, make full and accurate admissions about their involvement;

- to recommend that those found to have committed gross human rights abuses should be removed from any positions of power and authority that would allow them to commit further human rights abuses in the future;

- to recommend that the remedial steps needed in order to provide reparations to victims should encompass the basic rights framework outlined by the Economic and Social Council of the United Nations; namely, the right to know, the right to justice, the right to non-recurrence, and the rights to restitution, compensation and rehabilitation;

- to explore the desirability of facilitating genuine community reconciliation;

- to facilitate processes of community-driven exhumation, reburial and memorialisation.

To be effective this Commission must be independent, credible, efficient, adequately resourced, accessible and victim-friendly.

Civic organizations should monitor and support the operations of this Commission.

Victims appearing before this Commission must be treated with sensitivity and respect and be given protection against reprisals.

There is need for a proper gender balance on this Commission and particular attention must be paid to the special needs of women and children victims.

The government formed after the transition must commit itself to co-operate with and to support the activities of this Commission, and must give an unequivocal undertaking to implement its recommendations wherever possible.

The participants called for the conducting of a comprehensive people driven constitutional reform exercise that will lay emphasis on the protection of all human rights and the establishment of a number of Commissions to protect and promote these human rights.

There should be special Commissions to deal with land, gender issues and economic crimes such as corruption, asset stripping and debts incurred by previous governments in connection with human rights abuses.

The mandate of the Commission on economic crimes should include:

- referral of cases to the Attorney-General for possible prosecution;
- in conjunction with other appropriate state agencies, taking of vigorous steps to recover misappropriated state assets:
- imposition of financial penalties upon those who were financial beneficiaries of human rights abuses.

A substantial portion of the assets recovered by this process should be devoted to compensating individuals and communities harmed by past human rights abuses.

All these Commissions must be given an explicit mandate to recommend measures aimed at redressing socio-economic injustices of the colonial and post-colonial periods.

The new Government must immediately establish a reparations fund to compensate victims of human rights abuses. Concerted efforts must be made to tap all possible sources of local and international finance for this fund, including assets recovered by the Economic Crime Commission. If financially feasible, full compensation should be paid to those who suffered the greatest harm as a result of grave human rights abuses, and some more limited compensation should be paid to other victims. The fund should also be used to establish local development projects in areas particular badly affected by past human rights abuses.

All victims must be provided with free and proper health care and social support to deal with the lifetime disability that can arise from violations of their human rights.

Future human rights abuses

The decades of conflict and abuses human rights abuses have badly weakened the institutions that should provide protection against human rights abuses and provide remedies for those harmed by human rights abuses.

A culture of respect for human rights will need to be re-established in Zimbabwe Existing institutions will need to be strengthened and other institutions established institutionalize this new culture. The justice delivery system should be re-designed a way that will allow for accessible remedies for victims of human rights abuse.

The law enforcement agencies and prison service will need to be overhauled so the they once again become professional, politically neutral forces that respect the human rights of all Zimbabweans and enforce the law on a fair and impartial basis. Officer who planned and instigated or perpetrated particularly serious human rights abuses should be removed from law enforcement agencies and all law enforcement officers must be made to undergo thorough re-training focused on the protection of human rights.

Civic organizations should monitor law enforcement agencies to ensure that they do not commit human rights abuses and, when they do, to assist injured parties to obtain redress.

All militias and other irregular para-military forces must be immediately disbanded. There must be rehabilitation programmes to reintegrate members of these forces back into normal society.

The independence and impartiality of the judicial system and of the prosecution service has been undermined and public confidence in this system will need to be restored.

There must be effective constitutional mechanisms to ensure that judicial appointments are made on the basis of professional competence and suitability and that there is no political interference in the judicial process.

The human rights protections contained in the Constitution must be strengthened and made to conform to international standards on human rights.

A Constitutional Court should be established to ensure the enforcement of human rights and credible, politically neutral and competent judges should be appointed to this court.

A number of Commissions should be established to ensure the observance of human rights and provide accessible means of redress to those harmed by human rights abuse. These should include a Human Rights Commission, a Commission on Gender Rights, a Commission of Economic Crimes, and a Land Commission.

International remedies for victims

The new government should take steps to facilitate access by Zimbabweans for human rights abuses.

The new government should try to make full and effective use of the Rome Statute of the International Criminal Court.

It should enable all Zimbabweans to rights and protections of all regional and international rights instruments by becoming a State Party to such treaties as the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Optional Protocol to the International Covenant on Civil and Political Rights. It should also make a declaration under Article 14 of the Convention for the Elimination of All Forms of Racial

Discrimination. The provisions of all of these treaties must be incorporated into domestic law.

Conclusions

Over many years innumerable Zimbabweans have fallen victim to human rights abuses. All Zimbabweans earnestly look forward to a new era in which there is peace and stability that will allow for equitable economic growth and development and in which the fundamental rights of all Zimbabweans are respected.

As is stated in the preamble to the United Nations Universal Declaration of Rights "Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world."