

**DEBATING THE EFFICACY OF TRANSITIONAL JUSTICE MECHANISMS: THE  
CASE OF NATIONAL HEALING IN ZIMBABWE, 1980-2011**

by

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**DECLARATION:**

I declare that:

DEBATING THE EFFICACY OF TRANSITIONAL JUSTICE MECHANISMS: THE  
CASE OF NATIONAL HEALING IN ZIMBABWE, 1980-2011

is my own work and that all the sources that I have used or quoted have been  
indicated and acknowledged by means of complete references.

Signature:

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## Abbreviations and Acronyms

ANC	African National Congress
AU	African Union
BBC	British Broadcasting Corporation
BSAC	British South Africa Company
BSAP	British South Africa Police
CCJP	Catholic Commission for Peace and Justice
CIO	Central Intelligence Organisation
COPAC	Constitutional Parliamentary Committee
CSO	Civil Society Organisation
DA	Democratic Alliance
DRC	Democratic Republic of Congo
ESAP	Economic Structural Adjustment Programme
GNU	Government of National Unity
GPA	Global Political Agreement
IBA	International Bar Association
ICC	International Criminal Court
ICJ	International Court of Justice
ICTJ	International Centre for Transitional Justice
ICTR	International Criminal Tribunal for Rwanda
IDASA	Institute for Democracy in South Africa
IDEA	Institute for Democracy and Electoral Assistance
IMF	International Monetary Fund
IMT	International Military Tribunal
LFR	Legal Resource Foundation
LRA	Lord's Resistance Army
MDC M	Movement for Democratic Change Mutambara
MDC N	Movement for Democratic Change Ncube
MDC T	Movement for Democratic Change Tsvangirai
MDC	Movement for Democratic Change
MISA	Media Institute of Southern Africa
MP	Member of Parliament
NANGO	National Association of Non-Governmental Organisations

NATO	North Atlantic Treaty Organisation
NCA	National Constitutional Assembly
NGO	Non-Governmental Organisation
NPA	National Prosecuting Authority
NPRC	National Peace and Reconciliation Commission
ONHRI	Organ on National Healing, Reconciliation and Integration
OSISA	Open Society Initiative of Southern Africa
OTP	Office of the Prosecutor
RAU	Research and Advocacy Unit
RF	Rhodesian Front
SA	South Africa
SADC	Southern African Development Community
SALC	South African Litigation Centre
SAPS	South African Police Services
SATRC	South African Truth and Reconciliation Commission
TRC	Truth and Reconciliation Commission
UN	United Nations
UNHCHR	United Nations High Commission for Human Rights
UNHCR	United Nations High Commission for Refugees
UNISA	University of South Africa
UNSC	United Nations Security Council
USA	United States of America
USAID	United States Aid Agency
WB	World Bank
WTO	World Trade Organisation
ZANLA	Zimbabwe African National Liberation Army
ZANU PF	Zimbabwe African National Union - Patriotic Front
ZAPU	Zimbabwe African People's Union
ZBC	Zimbabwe Broadcasting Corporation
ZCA	Zimbabwe Constitutional Assembly
ZCTU	Zimbabwe Congress of Trade Unions
ZEF	Zimbabwe Exiles Forum
ZIPRA	Zimbabwe People's Revolutionary Army
ZLHR	Zimbabwe Lawyers for Human Rights

## Abstract

This study is an exploration of transitional justice mechanisms available to post conflict communities. It is a context sensitive and sustained interrogation of the effectiveness of endogenous transitional justice mechanisms in post-colonial Zimbabwe. The study utilised Ruti Teitel's (1997: 2009-2080) realist/idealist theory as its theoretical framework. Using the case of Africa in general and Zimbabwe in particular, it analyses the application of imported idealist transitional justice mechanisms, mainly International Criminal Court (ICC) trials. It also debates the efficacy of realist transitional justice mechanisms, mainly the South African model of a Truth and Reconciliation Commission (TRC). The study explores the application of what it terms broad realist transitional justice mechanisms used mostly in rural areas of Zimbabwe to achieve peace building and reconciliation. These modes of everyday healing and reconciliation include the traditional institutions of *ngozi* (avenging spirit), *botso* (self-shaming), *chenura* (cleansing ceremonies), *nhimbe* (community working groups) and *nyaradzo* (memorials). The key finding of this exploration is that local realist transitional justice mechanisms are more efficacious in fostering peace building and reconciliation than imported idealist mechanisms such as the ICC trials and imported realist mechanisms such as the TRC. More value can be realised when imported realist mechanisms and local realist transitional justice mechanisms complement each other.

The study contributes to the literature on transitional justice in general and bottom-up, victim-centred reconciliation in particular. It offers a different approach to the study of transitional justice in post conflict Zimbabwe by recasting the debate away from the liberal peace paradigm which critiques state centric top-down approaches such as trials, clemencies, amnesties and institutional reform. The study considers the agency of 'ordinary' people in resolving the after effects of politically motivated harm. It also lays the foundation for further research into other traditional transitional justice mechanisms used for peace building and reconciliation elsewhere in Africa

**Keywords:** transitional justice, traditional transitional justice mechanisms, *ngozi*, Zimbabwe, reconciliation, human rights violations, reparation.

## Dedication

This thesis is dedicated in loving memory to my mother, Violet Chipo Benyera (nee Murwira). She taught me to believe in myself and always to excel in everything I do. This work also goes out to the ladies in my life, Sheilla my wife, my daughters Rukudzo Claire Chipo and Runako Chiratidzo, my sister Netsai and my niece Shanice Alexandra Mudzingwa. These ladies surrounded me with love which made this work worthwhile and at times even enjoyable. My father Leonard Chirango Benyera, who kept asking when I would complete my studies, this thesis is dedicated to you. Lastly, my dedication is to my paternal grandmother, Juliet Wanisai Benyera (nee Chigumira) aka vaMagirazi. She is a fountain of wisdom and is responsible for igniting my interest in traditional transitional justice mechanisms. Her stories of *ngozi* and *botso* formed the crux of this thesis.

## **CHAPTER 1: INTRODUCTION**

### **1.1 Introduction**

Transitional justice is a growing field of study and practice in restoring peace and fostering reconciliation in post conflict countries. As a field of study, it is concerned with the various mechanisms that post conflict communities, and increasingly conflict communities use to achieve lasting peace and establish viable democracies. This study considers the various transitional justice mechanisms available to Zimbabwe as it grapples with its legacy of gross human rights violations. It also considers the viability of three transitional justice mechanisms; two imported and one local. These imported mechanisms are trials at the International Criminal Court (ICC), the South African model of a Truth and Reconciliation Commission (TRC) and finally local, i.e., Zimbabwean, traditional transitional justice mechanisms. The study considers the viability of local, especially, traditional transitional justice mechanisms, by juxtaposing them with their two imported counterparts, the ICC trials and the TRC.

This introductory chapter will lay the foundation for the thesis by providing the background to the study, formulating the problem statement, stating the research question and sub questions and presenting the structure of the thesis.

### **1.2 Background to the problem**

As a field of study, transitional justice refers to the theories and research programmes that explain, justify, compare and contest specific practices of moral and social repair and the resultant mechanisms that are used by post conflict communities to come to terms with the legacy of human rights abuses (Andrieu 2010: 2, United Nations 2005: 3). Human rights abuses and transitional justice are not new either to Zimbabwe or globally as violent conduct has always been integral to statecraft. Over the last 70 years, the various approaches adopted by states and communities seeking historical accountability for human rights abuses have become known as transitional justice. The practice of transitional justice is usually associated with a wide range of processes and mechanisms that underpin post conflict societies' attempts at reconciliation and peace building. The most common and often

cited transitional justice mechanisms are the more formal ones such as amnesties, pardons, criminal sanctions such as prosecution before domestic or international tribunals, non-criminal sanctions like vetting and lustration, Commissions of Inquiry, TRCs and reconciliation processes (Minow 1998: 81, Kritz 1995: 48-50 and 2003: 157–70). Missing from this list of orthodox transitional justice mechanisms are traditional mechanisms which have been used in Zimbabwe and other post conflict states for decades, mainly by rural communities who seek historical accountability for past human rights abuses while reconciling the offenders and the victims.

Transitional justice scholars such as Teitel (2000: 39) argue that transitional justice, both as a field of study and as an internationally recognised and regulated state practise, emerged after the Second World War (1939-1945). Prior to the Nuremburg trials, the practice of transitional justice was left to individual states; who decided what to do with their violent past with no international obligations in place. Since the Allied Powers constituted the Nuremburg trials, which ran from 1945 to 1949, there has been a constant evolution of a range of transitional justice mechanisms such as Truth Commissions, culminating in the formation of the ICC aimed at, *inter alia*, addressing past human rights abuses and curtailing impunity. International human rights law now condemns impunity and gross violations of human rights committed by individuals and agents or former agents of the state. These laws include the 1948 Universal Declaration on Human Rights and the International Covenant on Civil and Political Rights and its two optional protocols which together form the International Bill of Human Rights.

Countries emerging from specific conflicts are now mandated by the ICC to undertake practical processes to address their violent legacies. Unwillingness or inability to institute transitional justice will result in the ICC's Prosecutor initiating prosecutions against alleged human rights violators in conflict and post conflict states. However, this is not always the case as there are situations where neither the state nor the ICC has instituted transitional justice programmes. In such cases, communities have tended to implement traditional mechanisms that filled this 'transitional justice vacuum'. In the case of Zimbabwe, most such traditional mechanisms discussed in this study existed since pre-colonial times and were adapted for use as transitional justice mechanisms. They include the institutions of

*ngozi* (avenging spirit), *nyaradzo* (memorials), *nhimbe/ilima* (community working groups), *botso* (self-shaming), *gata* (spiritual autopsy) and *chenura* (cleansing ceremonies). Their use appeared to have subsided in the early post-independence era, only to resurface prominently after 2000 owing to what can be argued to be the state's flawed way of handling gross violations of human rights.

Zimbabwe has experienced recurrent gross violations of human rights on a protracted basis since pre-colonial times (Ranger 2003: 21). These violent episodes were given various names such as First *Chimurenga* (War of Primary Resistance 1896-1897), Second *Chimurenga* (War of Independence 1965-1980), *Hondo Yeminda* (land reform programme 2000), *Gukurahundi* (genocide in the two regions of Matabeleland and Midlands 1983-1984), Operation *Mavhotera Papi?* (election related violence, meaning literally 'where did you place your vote?' 2008) (Ndlovu-Gatsheni 2010: 281-295, Diamond and Plattner 2010: 346, Sadomba 2011: 229). Prior to colonialism in 1895 the various Shona autochthons living in present day Zimbabwe were mostly hostile to each other, leading to regular episodes of belligerence (Mazarire 2010: 6). The arrival from present day South Africa of the Ndebele under the leadership of Mzilikazi in 1834 only intensified rivalry in a society that was already conflict riddled (Pikirayi 2001: 239). When Zimbabwe gained independence in 1980, Prime Minister Robert Mugabe announced an unwritten policy of reconciliation in his acceptance speech (Mashingaidze 2010: 22). This was followed by various other state sanctioned Commissions of Inquiry which purportedly looked into gross violations of human rights between 1980 and 2011 (Research and Advocacy Unit: 2009, Catholic Commission for Peace and Justice and Legal Resource Foundation: 1997). The amnesia policy announced by Mugabe in 1980, the various Commissions of Inquiry and the Organ on National Healing, Reconciliation and Integration form what this discussion terms the statist approach to transitional justice. Their efficacy and shortcomings will form part of this study.

This study positions traditional transitional justice mechanisms as viable options for seeking and attaining community and reconciliation in Zimbabwe. This is done against the background of imported transitional justice mechanisms such as TRCs and ICC trials which were utilised in countries such as Uganda, Sierra Leone and the Democratic Republic of Congo (DRC) with varying degrees of success. These

imported mechanisms are the South African model of a TRC and trials at the ICC. The formation of the Government of National Unity in Zimbabwe in 2009 resulted in an atmosphere of expectation as the nation hoped for the adoption and implementation of imported transitional justice mechanisms, albeit without first giving due consideration to existing local mechanisms. This excitement can be attributed to the perceived successes of imported transitional justice mechanisms elsewhere. It is their assumed efficacy which this study intends to explore. The study also examines the existence and appropriateness of local transitional justice mechanisms in chapters six, seven and eight in this thesis.

The study will achieve the above by examining how communities in Zimbabwe affected by decades of recurrent violence, chronic lawlessness and unfettered impunity (Kasambala and Gagnon 2008: 61, Zimbabwe Human Rights NGO Forum: 2008, Chitsike 2011: 162) addressed their desire for healing and reconciliation in the absence of victim-centred state led transitional justice programmes. This will be juxtaposed with the plans by the state to form a National Peace and Reconciliation Commission (NPRC) modelled along the structures of the South African TRC.

The apparent desire of post conflict states to borrow heavily from the South African model of a TRC emanates from the perceived success of this model in South Africa (Shea 2000: 5, van der Merwe and Chapman 2008: 191). This aspiration to rely on the South African model was expressed by Zimbabweans when their views were captured in the draft constitution of January 2013. Part 6, Sections 251, 252 and 253, deals with the establishment of the NPRC which is modelled on the South African TRC. This position found support from civil society organisations (CSOs), especially faith based organisations and women's groups who believed that the malleability of the South African model of a TRC renders it the most appropriate mechanism in addressing Zimbabwe's multi layered transitional justice conundrum (Catholic Commission for Peace and Justice and Legal Resource Foundation 2008: 119, Eppel and Raftopoulos 2008: 143, Research and Advocacy Unit: 2008).

These calls for the importation of the TRC model from South Africa were motivated, *inter alia*, by the fact that South Africa and Zimbabwe experienced almost similar patterns of atrocities and prolonged gross violations of human rights. This presents a

propitious opportunity for this study to test the suitability of the South African model of a TRC to Zimbabwe. While there are many ways of seeking transitional justice, the South African model of a TRC was highly rated by both CSOs (Catholic Commission for Peace and Justice and Legal Resource Foundation 2008) and academia (Christie 2000: 69, Hayner 2010: 198, Joyner 2005: 159) as the most suitable mechanism for Zimbabwe's transitional justice process. It was hailed by a number of scholars, with some describing it as effective (Cole 2010: 16, Darehshori 2009: 8) and as not an end in itself, but as a method of laying the foundation for communities to pursue reconciliation (Hayner 2010: 239, Graybill 2002: 202, Van der Merwe: 1998) and as a model with the capacity to positively alter the global transitional justice topography (Rotberg and Thompson 2010: 110, Christie: 2000). The South African TRC model has been credited with motivating efforts to establish Truth Commissions in Liberia, Ghana and Indonesia due to its perceived success in bringing reconciliation in post-apartheid South Africa. (Jenkins: 2000).

Unlike South Africa, Zimbabwe experienced post-independence political violence which was variously attributed to the ineffectiveness of the statist approach to transitional justice. Statist transitional justice is a term that describes a range of state led transitional justice initiatives. In Zimbabwe, these include the appointment of Commissions of Inquiry, trials in national courts, the formation of the Human Rights Commission and the Organ on National Healing, Reconciliation and Integration (ONHRI), or the Organ on National Healing.

The formation of the ICC in 2002 has a bearing on Zimbabwe's transitional justice options. It permanently altered the global transitional justice landscape as transitional justice policy options like amnesia are now illegal under international law. The ICC is equipped with mechanisms through which states that are either unwilling or unable to deal with their past atrocities can be dealt with at international level. The ICC's creation has thus been hailed as signalling the end of impunity (Boot 2002: 9, Schabas 2007: xii). It is this perceived role of the ICC which gave voice to the calls by Zimbabweans, mainly from the Movement for Democratic Change party and civil society, to advocate for the indictment of suspected war criminals and perpetrators of gross human violations (Todd 2007: 434).

However, in spite of its perceived success, the record of accomplishment of the ICC more than 10 years into its mandate deserves to be unpacked. It is possible that those who called for the ICC to indict perpetrators of human rights violations made the wrong decision, if its record of accomplishment, particularly in Africa, is anything to go by. Allegations that the ICC deliberately targeted Africa, while simultaneously casting the proverbial blind eye on human rights abuses committed by the more powerful and influential nations and their allies seriously tarnished the reputation of an institution which was expected to be the global vanguard of human rights. It is the seeming inadequacies and failures of both the ICC and the TRC as transitional justice mechanisms which prompted an exploration of the existence, usage and challenges of traditional transitional justice mechanisms in Zimbabwe in this study.

### **1.3 Problem statement**

Historical patterns of politically motivated violence indicate that Zimbabwe was a chronically violent state before colonialism, during colonialism and after independence in 1980. However, this study will focus primarily on the period 1980-2011. While Iliff (2009: 162) notes that gross violations of human rights predate colonialism, this study will focus on the period from Zimbabwe's independence in 1980 to 2011, which is the period just after the formation of the Government of National Unity (GNU). Post-colonial gross violations of human rights were mostly state orchestrated, and as a result reproduced violence was alleged to have attained the status of a preferred instrument of governance by the state (Ndlovu-Gatsheni: 2009a: 27, Kasambala and Gagnon 2008: 12). This compromises transitional justice mechanisms and renders them a travesty, more so when the political party accused of perpetrating the violations was still part of the government. More than a generation after independence, the state had still not initiated any victim-centred transitional justice mechanisms, preferring to institute commissions of inquiry, the reports of which were never been made public. Preliminary studies of victims by the Research and Advocacy Unit (2008) indicated that the majority of both victims and perpetrators considered transitional justice a necessity for national healing and reconciliation, with the South African model of a TRC emerging as the most widely accepted mechanism. Unfortunately, transitional justice models are not 'one size fit all'. It appears that importing transitional justice mechanisms is not the best option,

not only for Zimbabwe, but for all post conflict states, as conflicts and their aftermath are *sui generis*. So too are post conflict states, their cultures, traditions and belief systems which shape and inform these communities' conceptualisation of injustice, justice and reconciliation. There is a need to conceptualise transitional justice as a localised phenomenon, informed by specific local perceptions of justice and reconciliation. This conceptualisation of transitional justice is rooted in localised traditional belief systems and hence varies across races, cultures, ethnicities and religions.

The South African TRC model has evolved to become an integral tool in transitional justice. The question that this study attempts to answer is the efficacy of this model when adapted and adopted by Zimbabwe. Equally problematic and never lacking in controversy is the use of trials at the ICC to investigate human rights violations and to bring perpetrators to justice. The acrimonious relationship between the ICC and the African Union (AU) positions the ICC badly and undermines its ability to deliver on its mandate of investigating the most serious crimes of international concern(Rome Statute of the ICC: Article 1).

This investigation was motivated by the dilemmas and uncertainties facing transitional justice in Zimbabwe (Ndlovu-Gatsheni 2009c: 396, Zimbabwe Human Right NGO Forum 2006a: 6, Bamu: 2008, Eppel and Raftopoulos: 2008, Muvingi: 2009). Some transitional justice scholars have blamed this on Zimbabwe's incomplete regime transition (Saki and Katema 2011: 48, Bratton and van de Walle 1997: 116, Raftopoulos and Savage 2004: 120). According to the International Centre for Transitional Justice(2010:63), Zimbabwe was still undemocratic by December 2011 despite the formation of the GNU in 2009. The GNU was formed as a compromise to break the political impasse caused by the inconclusive and disputed national elections of 2008 (Donnelly 2011: 1). It was seen as presenting a window of opportunity for transitional justice to take place in Zimbabwe, as evidenced by the formation of a new state organ to deal exclusively with issues of national healing. The Organ on National Healing was formed by the GNU to advise it on the steps necessary to achieve national healing and reconciliation (Global Political Agreement: Article VII). It was co-chaired by three ministers, one from each of the three political parties which formed the GNU. The preponderous

circumstances under which the Organ on National Healing was formed inadvertently affected its mandate and this deserves to be explored.

It could be argued that many factors have contributed to the emergence of traditional transitional justice mechanisms as a key consideration in Zimbabwe's peace building landscape. These include, *inter alia*, the political bickering in the GNU. Citizens and communities seized the opportunity to initiate transitional justice in ways that best addressed their specific expectations. This resulted in the adoption and adaptation of traditional justice institutions for use as transitional justice mechanisms, especially in the rural areas. Preliminary research by CSOs such as the National Association of Non-Governmental Organisations (NANGO) (2008, 2009, and 2010) indicated that there were various transitional justice mechanisms in use at community level which warranted further investigation. Elsewhere, Non-Governmental Organisations (NGOs) such as Heal Zimbabwe assisted communities, mainly in rural areas, to implement these traditional transitional justice mechanisms (Heal Zimbabwe: 2010 - 2011 Programmatic Report).

The use of traditional transitional justice mechanisms appears to have been complicated by the polarisation of the desire to pursue either justice or peace; a situation which also presented itself in Zimbabwe (Bratton and Masunungure 2011: 356). While it was desirable to pursue both, conditions in Zimbabwe appeared to be unpropitious. These conditions included the presence in the GNU of the political party (ZANU PF) largely blamed for gross human rights violations (Machakanja 2010: 8). Theoretically, this leads to the question of how to balance two legitimate claims, one for political stability and the other for justice, in a state where it appears that the two cannot be pursued simultaneously. While the formal state structures were stuck and continued to grapple with the above conundrum, it appears rural communities were adapting traditional institutions as viable and useful transitional justice mechanisms, thereby finding healing, closure and reconciliation at the local level.

The official recognition and adoption of these traditional mechanisms was not a state priority, judging by the contents of the draft constitution of February 2013. The writing of the new constitution presented a favourable opportunity for the recognition of

traditional transitional justice mechanisms, as transitional states are usually granted a reprieve by new constitutions which also act as demarcations for the transitional period. Most importantly, these new constitutions will be useful as mechanisms to address these countries' past gross violations of human rights. This is so as transitional justice mechanisms and other safeguards meant to avoid relapses usually form integral parts of these new constitutions. However, this was not to be the case in Zimbabwe as evidence seems to point to the formation of a NPRC which would ostensibly take over from its predecessor, the Organ on National Healing. The Organ on National Healing's mandate was stated as to:

give consideration to the setting up of a mechanism to properly advise on what measures might be necessary and practicable to achieve national healing, cohesion and unity in respect of victims of pre and post-independence political conflicts (Global Political Agreement: Article 7 (1) (c)).

This study intends to answer the above questions by firstly contesting the perceived efficacies of imported transitional justice mechanisms, particularly the TRC and ICC prosecutions. These two mechanisms will be juxtaposed with an exploration of the existence, extent of usage and shortcomings of traditional transitional justice mechanisms in Zimbabwe.

#### **1.4 Research question**

The study will endeavour to answer the question:

What are the shortcomings of imported transitional justice mechanisms and the contributions hitherto made by traditional transitional justice mechanisms in Zimbabwe?

The question invokes an appraisal of the efficacy of two imported transitional justice mechanisms, the ICC trials and the South African model of a TRC. Such an appraisal is intended to position the need for transitional justice mechanisms that are locally relevant, reconciliatory, victim-centred and bottom-up. The study's sub-questions are stated below.

## **a. Sub-questions**

- i. How did the ICC handle cases of impunity in Africa generally and in Zimbabwe specifically?
- ii. How did the state in Zimbabwe deal with transitional justice from 1980 to 2011?
- iii. Is the South African model of a TRC suitable for Zimbabwe?
- iv. What traditional transitional justice mechanisms existed in Zimbabwe and what are their shortcomings, if any?

## **1.5 Study delimitations**

This study is limited to an exploration of the existence and extent of the application of traditional transitional justice mechanisms and the usefulness of imported mechanisms, primarily the South African model of a TRC and the ICC trials, for Zimbabwe. The thesis will be an exploratory study that will lay the groundwork for further comparative research that is not possible here due to its complexity and breadth. While it is generally agreed that the land redistribution programme is part of the transitional justice discourse in Zimbabwe, it will not be subjected to a detailed analysis here. This is because the complexity of the land issue predates colonialism, and its problems were intensified by colonialism and took on a new dimension with the post-independence land redistribution programme. These trajectories deserve a more nuanced analysis which is not feasible within the limits of this thesis.

A comparison of the sites and forms of abuse suffered by victims in Africa, South Africa and Zimbabwe is not possible either. This study is concerned with exploring the ways in which communities handle their history of gross human rights violations in the absence of state led official transitional justice programmes and whether the South African model of a TRC and trials at the ICC will be efficacious in addressing these genuine justice and human rights concerns. The issues of justice in general and social and economic justice in particular resonate in both South Africa and Zimbabwe and would benefit from a detailed comparative discussion and research which is beyond the focus of this thesis. The study will not focus on the identification of perpetrators of gross violations of human rights in Zimbabwe, nor will it attempt to

understand the details, patterns and forms of abuse and their authorisation and accountability. This study will be concerned with a more specific issue, which is the comparison of imported and local traditional transitional justice programmes in Zimbabwe.

## **1.6 Importance of the study**

The study is important in that it contributes to the formulation of a home-grown solution to transitional justice in Zimbabwe. This will be achieved by debating the suitability of imported transitional justice models and by providing an analysis of the contributions made by local traditional mechanisms, most of which are based on endogenous realities and cultures.

This study contributes to the existing body of knowledge on transitional justice. Specifically, its contribution is the demonstration that transitional justice is a discipline yet to come of age, one whose scope and boundaries are still fluid. The contours of the field and practice of transitional justice are continuously shifting and require constant mapping and remapping. Researchers will be persuaded to recognise and appreciate the existence of an alternative view of transitional justice which is Afro-centric, traditional, community based, bottom-up and, most importantly, victim-centred. The study addresses the scarcity of literature on the meaning and application of transitional justice that goes beyond the judicial forms of justice, by exploring traditional forms of justice which are based on the institution of the family.

This will be done while paying attention to cultural and traditional sensitivities inherent in the communities where gross human rights abuses were committed. The study is also important in that it contributes to an increasing understanding of transitional justice by broadening the conceptualisation of justice through the inclusion of all three forms of life in transitional justice discourse. These three forms of life are the 'living unborn', the 'living living' and the 'living dead'. The 'living unborn' are those who are yet to be born, that is, the future generations while the 'living living' are those present in this life. The 'living dead' are those family members who have transitioned from the 'living living' form to the spiritual form.

Readers will be informed on how the ICC dealt with gross human rights abuses in Africa in general and in Zimbabwe in particular. The academic public is expected to benefit from the interrogation of pertinent issues in transitional justice, including the functioning, mandate and objectives of the ICC. In particular, it will cover the contentions that the ICC represents victors' justice, follows the line of least resistance by 'targeting' Africa, thereby rendering Africa a guinea pig in the process of creating legal jurisprudence and setting legal precedents. This will be achieved through an exploration of the impact of the ICC on Africa in general and on Zimbabwe, in particular. The study will also debate whether the TRC presents a universal transitional justice panacea given that politics is an embedded phenomenon and conflicts are never the same, so are post conflict communities and their desires. The thesis will alter perceptions of the globalisation of transitional justice and its concomitant development into an industry.

The study will assist in disseminating information by documenting traditional transitional justice mechanisms, noting their shortcomings, and concluding whether they should be transformed into larger state or internationally led processes (*gacacalise*) or left to operate in their current and original form. It will consolidate traditional transitional justice mechanisms and present them in one analytical document, together with an assessment of the efficacies of the TRC and ICC trials. The strengths, weaknesses, impact and legitimacy of traditional transitional justice mechanisms within their respective communities has not been thoroughly or empirically explored and hence their positive impact remains largely unknown.

The study is intended to induce proactiveness among policy makers by offering work that allows them to make informed decisions regarding the importation of transitional justice models. Most studies conducted on this topic, especially on truth commissions in Africa, are *ex post facto* and react to transitional justice mechanisms currently being implemented or those which were implemented at some time in the past. Very few are *ex ante*, i.e., endeavouring to understand communities' attitudes towards transitional justice mechanisms, before such mechanisms are put in place. A theoretical appraisal of the TRC before its importation will help to inform policy makers on the value of importing such mechanisms. In the process, transitional justice debates are expected to be enriched by the study. A further contribution of

the study is that it will act as a guide to researchers in other areas that deserve further research.

## 1.7 Definition of Truth and Reconciliation Commissions

It is imperative for the study to define key terms such as TRC. This will place the study in perspective as there are multiple and often competing definitions for most phenomena in social sciences. A good starting point would be to consider Tomuschat's (2001: 235) definition that argues that TRCs are a product of a stalemate in a political power play, although it can be argued that some, as in the case of South Africa, were not established as a result of such a situation. Based on Tomuschat's observations, Zimbabwe's NPRC fits into this category of truth commissions since it was a product of a stalemate between the three main political parties, namely the Zimbabwe African National Union Patriotic Front (ZANU PF),<sup>1</sup>the Movement for Democratic Change led by Mr Morgan Tsvangirai (MDC T) and the MDC N led by Professor Welshman Ncube.

A Truth Commission is by definition a formal investigatory transitional justice mechanism implemented by the state following some type of transition from human rights abuses, usually to democracy, and is used to help societies to come to terms with past abuses, be they government-sponsored, politically motivated, or ethnically, racially, or socio-economically driven (Quinn 2004:1, Hayner 1994: 600-611, 2003, Teitel 2003: 62-94, 2005: 5, Kritz 1995: 226-227, Freeman and Hayner 2003: 122–24).

In this study the term democracy is used in the Robert Dahl sense to denote a system of government that meets three essential conditions: fair, regular, competitive and meaningful elections for all effective positions of government; a highly inclusive

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<sup>1</sup>Zimbabwe African National Union Patriotic Front is generally referred to by its acronym. However, the acronym takes various forms that include ZANU, ZANU (PF), ZANU PF, ZANU – PF and ZANU-(PF). This study will use the acronym ZANU PF to refer to the party formed after the 22 December 1987 Unity Accord and ZANU to refer to the party between 1963 and 1979. ZANU – PF will be used to refer to the party between 1980 and December 1987. ZANU adopted the suffix Patriotic Front (PF) in 1980 in order to distinguish itself from the patent party ZANU which was led by the Reverend Ndabaningi Sithole which later became known as ZANU Ndonga.

level of political participation in the selection of leaders and policies; and civil and political liberties, such as freedom of expression, freedom of the press, and the freedom to form and join organisations (Dahl 1971: 3-20).

It is generally agreed by practitioners and academics that a TRC is an *ad hoc* and autonomous body of inquiry set up and authorised by a state for the primary purposes of:

- i. investigating and reporting on the principal causes and consequences of broad and relatively recent patterns of severe violence or repression that occurred in the state during determinate periods of abusive rule or conflict and
- ii. making recommendations for their redress and future prevention (Vora and Vora 2004: 305).

The most obvious objective of a TRC is the use an official body to create an accurate record of the country's violent past, to clarify uncertain events and guarantee victims that the prior human rights abuses they suffered will be officially recognised (Hayner 2002: 25, Shea 2000: 50, Rotberg and Thompson 2010: 204, Kritz 1995: 294). By their nature, TRCs tend to be top-down creations of the political elites, often including some of those who were involved in the conflict that preceded the transition and these individuals will be far removed from the local context within which the violations occurred (Ndulo 2007: 166, Braithwaite 2010: 135, van der Merwe, Baxter and Chapman 2009: 18). The Achilles heel for the TRC as a transitional justice mechanism is that it is an imposition, in most cases by sections of the alleged perpetrators or those who ordered the violations, on the grassroots who form the majority of the victims (Stanley 2001: 525-546). As will be discussed in chapter five, Zimbabwe's NPRC can be categorised as a TRC because it is a creature of the state, mandated by the state and reporting to the state (Chiraya: personal communication: 19 September 2012).

### **1.7.1 Characteristics of a Truth and Reconciliation Commission**

The following are the characteristics of a TRC: it is *ad hoc*, official, temporal, semi or non-judicial institution, with a limited mandate, investigates specific periods or events, usually produces a report with recommendations for reparations, redress and

prevention of future abuses (Hayner 2000: 14, 221, Quinn 2011: 39, Rotberg and Thompson 2010: 278). The short-term goals of a TRC are to normalise societal relations by facilitating truth recovery, closure and reconciliation while the long-term goal is to foster democratic transformation (Emmanuel 2007: 1). According to the policy framework for the NPRC, the above mandates will be carried over from the Organ on National Healing, to the NPRC (Broad Policy Framework of the NPRC 2012: 1)

According to Brahm (2009: 4), the most widely used definition of a Truth Commission was postulated by Hayner (1994: 558), who noted that Truth Commissions are:

bodies set up to investigate a past history of violations of human rights in a particular country, which can include violations by the military or other government forces or armed opposition forces.

Theorising on the function of TRCs, Hayner (2001: 14) contends that truth commissions *investigate* past human rights abuses. The key is that TRCs only investigate past atrocities; they do not normally have the mandate to investigate on-going violations. Secondly, Hayner notes that TRCs examine a *pattern* of human rights abuses over time rather than a specific event. In Zimbabwe, this pattern of violence manifests itself as reproduced political and electoral violence. In order for violations to qualify for investigation by TRCs, they must be part of a pattern of events as opposed to isolated incidents.

Thirdly, TRCs are *temporary* bodies, implying that they have a limited lifespan. The rationale is that as transitional justice mechanisms, they are supposed to act as a buffer between a turbulent past and a democratic future where evil happenings of the past are supposed to have no place. It is this limit in their lifespan that places local transitional justice mechanisms as key complementary mechanisms capable of continuing the task of national healing and reconciliation long after the TRC has written and submitted its report. Finally, TRCs are *official bodies* sanctioned, authorised or empowered by the state. Herein resides the major shortcoming of TRCs. The state in some transitional countries would have been involved in human rights abuses. In cases where a TRC is commissioned in the absence of genuine

transitions, such commissions only act at least as public relations stunts and at most as instruments of political expedience.

Four Commissions of Inquiry serve as apt examples. These are

- the Ugandan Commission of Inquiry into the Disappearance of People in Uganda since 1971 of 1974;
- the Ugandan Commission of Inquiry into Violations of Human Rights of 1986;
- the 1983 Zimbabwe Commission of Inquiry into the Matabeleland Disturbances, commonly known as the Chihambakwe Commission of Inquiry;
- the 1982 Commission of Inquiry into Events Surrounding Entumbane, also known as the Dumbutshena Commission of Inquiry (Hayner 1994: 618-620, Catholic Commission for Peace and Justice 2003: 53).

In Zimbabwe, the findings of the Chihambakwe and Dumbutshena commissions were never made public. Based on Hayner's four parameters, which characterise TRCs, Zimbabwe's impending NPRC qualifies as a TRC. However, such a view can be contested on the grounds that the Commission's mandate will be to investigate both on-going abuses and isolated cases which do not form any particular pattern as postulated by Hayner (2010: 76).

Another classification of TRCs was provided by Cassell (1996: 197-230), who noted that there are six types of truth commissions. These categories are of importance in the classification of Zimbabwe's NPRC. Using examples predominantly from Latin America, Cassell came up with the following categories of TRCs:

- TRCs that bring out the unknown truth, such as the Argentinean Commission of 1983-1984;
- Victim-centred TRCs that use legal means to establish the truth, such as the Chilean Commission of 1990-1991;
- Victim-centred TRCs that aim to exonerate the moral positions of victims with the aim of having them tell their stories. Based on morals, such commissions usually rely on some religious authority such as the church. An example is the Guatemala Church Commission;
- TRCs set up only to identify the perpetrators of a specific period of human rights abuses. This type of TRC is usually employed when what occurred is general

knowledge and the aim is to identify actual actors. An example is the 1992-1993 El Salvador Commission;

- TRCs set up solely for the purpose of addressing the causality of the conflict. These could be historical, economic or political causes. The purpose of this would be establishing how best to address these causes. The 1994-1999 Guatemala state Commission belongs to this category;
- TRCs that emphasise their procedure and not their final report. These procedural commissions find meaning more in being carried out than in the outcome contained in their reports. The South African TRC of 1996-1998 fits into this category.

It could be argued that most of the details regarding human rights abuses that occurred in Zimbabwe between 1980 and 2011 are well documented, as are the individuals who ordered and orchestrated them. Also well documented are the names of some of the individual perpetrators. Some of these names have been circulated online by human rights activists and are no longer the subject of debate. Most of these individuals have also been on the sanctions lists of institutions such as the European Union and governments of countries such as Australia and the United States of America. This implies that Zimbabwe's TRC cannot be classified as belonging to the first five of Cassell's classes because, as will be elucidated in later chapters, the NPRC will not be victim-centred, neither will it try to establish the causality of the conflict as this is now public knowledge. It could be concluded that Zimbabwe and South Africa belong to the last of Cassell's six categories, as the NPRC will be used as a means to heal the nation more than to establish the truth. As such, the final report of the NPRC will not be an important part of its mandate. This issue will be discussed in more detail in chapter five of this study.

### **1.7.2 Defining other terms used in the study**

This section will define other terms used in the study. As with the definition of the TRC above, these definitions are intended to contextualise the study.

**Amnesia** – Amnesia is a medical term that is derived from a combination of Greek words implying a lack of memory usually caused by brain haemorrhage. When applied to transitional justice amnesia means a deliberate policy of forgetting past

human rights abuses, usually in a bid to forge ahead and establish a democratic future. In transitional justice, public amnesia can be wholly or partial and is usually paired with amnesty. The argument for amnesia is that if the past is suppressed this allows the emergence of a democratic government without digging the horrors of the past. It is argued that when exposed, past atrocities will fuel anger and hostility therefore compromising democracy and peace.

**Amnesty** –An amnesty is a legislative or executive act that prohibits or prevents the prosecution of an individual or group of individuals for one or more (named or unnamed) crimes (Doxtader 2004: 40). According to Doxtader and Villa-Vicencio (2003: xvi), there are three forms of amnesties. These are: amnesic or 'blanket' amnesties, compromise amnesties and accountable amnesties and are defined below:

- **Blanket amnesties** provide individuals or groups with broad protection from prosecution, often by a government that seeks to obscure the record of its atrocities (Boraine 2009: 139). They provide little if any opportunity for the investigation of past abuses or the provision of redress to victims. Typically, the beneficiaries of such amnesties are not named publicly. The Zimbabwean Amnesty Act [*Chapter 9:02*], is a case in point. Section 2(1) of the Amnesty Act states that, 'No legal proceedings whatsoever, whether civil or criminal, shall be instituted in any court of law in respect of any act to which this section applies, done within Southern Rhodesia or elsewhere, before the 21<sup>st</sup> December, 1979'.
- **Compromise amnesties** are narrower and usually a product of negotiations aimed at building a new government or as part of the broader peace building process. Boraine (2009: 139) calls these conditional amnesties. These are usually granted to specific individuals or groups of individuals or for specific crimes.
- **Accountable amnesties** apply only to individuals and they operate in accordance with a strict set of procedures for eligibility. They are premised on public disclosure of a crime and offer acknowledgement and compensation. The South African TRC amnesties fall into this category.

**Pardon** – A pardon is a release from the punishment that follows a formal determination of guilt when part or no part of the sentence would have been served by the offender (van der Merwe, Baxter and Chapman 2009: 47, Compagnon 2002: 220).

**Serious international crimes**– These are the four crimes laid out in the Rome Statute of the ICC. The Court is limited to cases involving genocide, crimes against humanity, war crimes and the crime of aggression (Rome Statute: Article 1).

**War crimes** – According to Slye (2002: 86), historically, war crimes could only be committed in an international armed conflict, i.e., an armed conflict between two or more states. However, since the formation of the ICC, acts may qualify as war crimes regardless of whether they are committed as part of an international or internal armed conflict. These crimes can be divided into two categories: war crimes provisions that regulate the methods and materials of the use of force and, secondly, those provisions that regulate the treatment of individuals, both civilians and combatants, in the context of an armed conflict.

**Five pillars of transitional justice**– The five pillars of transitional justice are considered to be accountability, truth recovery, reconciliation, institutional reform and reparation (Boraine 2004: 67-71).

**Genocide** – Genocide is an international crime against humanity. According to Article 2 of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, genocide is an act committed with the intent to destroy in whole or in part a national, ethnic, racial or religious group.

**Human rights violations**– The term human rights violations applies to genocide, arbitrary, summary or extrajudicial executions, forced or involuntary disappearances, torture or other gross physical abuses, and prolonged arbitrary deprivation of liberty (Human Rights Watch, Special Issue 2: 1989). Gross human rights violations imply an advanced state of human rights abuses usually as a result of the numbers of the victims involved or the longevity of the period during which the violations occurred (Gallagher 2010: 359).

**International human rights**—International human rights are freedoms established by custom or international agreement that impose standards of conduct on all nations (Gupta and Kapoor 2009: 252). They are distinct from civil liberties, which are freedoms established by the law of a particular state and applied by that state in its own jurisdiction (Davies 2007: 55). The United Nations bases its definition on the 1948 Universal Declaration of Human Rights and states that International Human Rights are:

(the) rights inherent to all human beings, whatever our nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or any other status. Universal human rights are often expressed and guaranteed by law, in the forms of treaties, customary international law, general principles and other sources of international law. International human rights law lays down obligations of Governments to act in certain ways or to refrain from certain acts, in order to promote and protect human rights and fundamental freedoms of individuals or groups (United Nations 2006: v).

According to Donnelly (2003: 15), specific human rights include:

the right to personal liberty, to freedom of thought, expression, religion, organization, and movement; to freedom from discrimination on the basis of race, religion, age, language, and sex; to basic education; to employment; and to property. Human rights laws have been defined by international conventions, by treaties, and by organizations, particularly the United Nations. These laws prohibit practices such as torture, slavery, summary execution without trial, and arbitrary detention or exile.

**Imported transitional justice mechanisms** —Imported transitional justice mechanisms are mechanisms that are exogenous to the communities where they will be implemented in order to restore peace and bring reconciliation. They are deemed to be imported into a community because they are not part of that community's culture and belief systems. Examples of imported transitional justice mechanisms in Zimbabwe are the TRC and ICC prosecutions. In direct contrast to imported transitional mechanisms are the local traditional transitional justice mechanisms such as the *gacaca* courts in Rwanda, the *magamba* spirits of Mozambique and Zimbabwe's *ngozi*.

**Justice** – Justice is generally understood to mean that which is right, fair, appropriate and deserved (Pearce 2012: 161). In transitional justice, it is achieved

when victims are made to feel 'whole' again and when offenders are held accountable for their wrongdoings. According to Villa-Vicencio (2004: 33), there are different kinds of justice, namely, retributive justice, deterrent justice, compensatory justice, rehabilitative justice, exonerative justice and restorative justice. Villa-Vicencio argues that each type of justice has its time and place in a given situation and that no one model of justice covers all the needs of the victims or the offenders.

**Memorialisation**– According to Impunity Watch (2012), memorialisation is about a number of activities and their possible material outputs. These outputs aim at keeping up or restoring the memory related to something past, in this case a past of gross human rights violations. These include deliberate memorialisation activities such as public gatherings to commemorate the struggle for independence, church services, funerals, exhumations and reburials for those who died in this struggle or at the hands of a repressive government. As aptly stated by Villa-Vicencio (2009: 136), memorialisation must be integrated into rituals since activities such as the erection of monuments alone is not a significant enough act to bring healing and closure to the victims of human rights abuses. It needs to be integrated into some sort of process such as, but not limited to, educational programmes and ritual ceremonies. In Zimbabwe, memorials for the deceased are effected through a series of ceremonies and rituals which bring closure to families and communities and which are held approximately a month after the burial ceremony.

**Ngozi**–This is a traditional justice system used predominantly by the Shona people in Zimbabwe and Mozambique, in which the deceased person returns in spirit to haunt his/her murderer's family until the members admit to committing the crime. This leads to their subsequent payment of compensation to the deceased's family, usually in the form of cattle and money.

**Political transition**–A political transition is regime change or regime transformation from one characterised by human rights abuse to one which is a more stable democracy (Huntington (1991: 21-26, Teitel 2000: 5).

**Politically motivated violence**– According to the Zimbabwe Human Rights NGO Forum (2001), politically motivated violence is a form of human rights abuse

committed with the aim of gaining political mileage or on the express orders of a person or group of persons invested with political power. In Zimbabwe, between 1980 and 2011, politically motivated violence intensified just before elections and at times after the announcement of the election results. This phenomenon was exacerbated when the election results were disputed by some of the candidates.

**Reconciliation**—Reconciliation involves the re-normalisation of relations between two parties, the victims and the offenders (von Heinegg and Epping 2007: 251). It heralds the beginning of cordial relations, trust and the willingness to talk to each other and is accompanied by a mutual capacity to listen and a readiness to take cautious risks (Villa-Vicencio, Doxtader and Goldstone 2004: 4). It regards justice as an essential ingredient in any settlement while recognising that there are different ways of achieving and understanding justice. For Villa-Vicencio (2004:3), genuine reconciliation does not involve outsiders to the conflict but is an internal process which culminates in the breaking of established patterns of violence. It requires time and space for mourning, anger and hurt as well as for healing (Berez 1998: 194). In order to enhance the possibilities of reconciliation, these processes must be accompanied by truth telling, justice and, where applicable, the paying of reparations by the offender to the victims.

**Reparation** – Reparation is both compensation and a promise; compensation for wrongdoing and a promise never again to repeat the same actions (Doxtader 2004: 25). Reparations convey a sense of returning to the victims what they were wrongfully deprived of, thereby restoring individuals and communities to their prior condition (Villa-Vicencio 2003: 8-9). According to the Permanent Court of International Justice (1928), reparations are an inviolable rule of law and must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation that would in all probability have existed if that act had not been committed. Reparations maybe monetary or symbolic and they are useful in serving the ends of restorative justice. In *ngozi* (avenging spirit) cases, reparation is payable in the form of cattle and money.

**Retributive justice** – This is a justice system that is concerned with crime as a violation of the law and relies on punishment and correctional action for wrongdoing

(Nabudere and Velthuisen 2043: 4). Sullivan and Tiff (2006: 411) argue that retributive justice is administered as a corrective measure that is due to the state in its capacity as the custodian of the rights of its citizens.

**Restorative justice** – Restorative justice is a justice system that emphasises reconstruction and restoration of relationships between individuals and the communities. Villa-Vicencio (2004: 34) argues that:

Restorative justice is a process that encourages all those involved in a particular offence to resolve collectively how to deal with the aftermath of an offence and its implications for the future. It includes the restoration of the moral worth and human dignity of all people which requires the emergence of a social order that provides for the basic needs of all citizens. This is a process to which victims, survivors and perpetrators as well as those who benefited from past abuses can contribute.

**Traditional transitional justice mechanisms**—These are communal, collectivist methods of conflict resolution, embedded in group rather than individual rights. These transitional justice mechanisms form part of broader indigenous African legal customs and are accompanied by rituals and ceremonies inherent in customary institutions such as *ngozi* (avenging spirits), *kutanda botso* (self-shaming) and *nyaradzo* (memorials). The Shona people of Zimbabwe believe that an individual holds his/her life on behalf of the community and, as such, a crime against an individual is perceived as a crime against the community who are believed to be the owners of the life held on their behalf by a community member. Justice must therefore be meted out to the satisfaction of the community which is made up of three groups of members, the 'living dead', the 'living living' and the 'living unborn'. *Midzimu* (ancestors), *masvikiro* (spirit mediums) and *madzishe* (traditional leaders) form the hierarchy that leads to *Mwari* (God) and which is used by the Shona in seeking and interpreting traditional justice (Rutsate 2011: 1).

**Transitional justice**— Broadly defined, transitional justice is a response that refers to a set of judicial and non-judicial measures implemented by post conflict communities in different countries in order to redress the legacies of massive human rights abuses. These measures include criminal prosecutions, truth commissions,

reparation programmes and various kinds of institutional reforms (International Centre for Transitional Justice: 2003).

**Victim-centred transitional justice mechanisms** – According to Lundy and McGovern (2008:279), victim-centred transitional justice mechanisms are various concomitant bottom-up mechanisms, institutions and methodologies used by post conflict communities in seeking historical accountability for past human rights abuses. The major characteristic of these mechanisms is that they are premised on local realities, cultures and customs, which renders them user-friendly and, in most cases, effective.

**Civil Society** – There is no consensus on what constitutes civil society organisations making their definition very illusive. According to Keane (2009: 1), the term civil society describes and anticipates a:

complex and dynamic ensemble of legally protected nongovernmental institutions that tend to be nonviolent, self-organising, self-reflexive, and permanently in tension, both with each other and with the governmental institutions that “frame,” constrict and enable their activities.

A simpler definition was offered by Judge (1997: 124-132) who noted that the term civil society denotes:

organised activity not associated with major institutional systems such as government and administration, education and health delivery, business and industry, security and organised religion.

Civil society organisations include international humanitarian organisations, faith based organisations, cooperatives, trade unions, academic institutions, think tanks, community and youth groups.

## **1.8 Structure and organisation of the thesis**

### **Chapter 1: Introduction**

This chapter has laid the foundation for the thesis by providing the background to the study, formulating the problem statement, research question and sub-questions and

explaining the structure of the thesis. Major terms used in the study were also defined and given contextual meaning.

## **Chapter 2: Theoretical framework**

After the introduction to the study in chapter one, chapter two will provide the theoretical framework upon which the whole study is grounded. The study uses Teitel's (1997: 2009-2080) realist/idealist theoretical framework to explore the trichotomous efficacies of ICC prosecutions, the TRC and traditional transitional justice mechanisms.

## **Chapter 3: The ICC and transitional justice in Africa**

The creation of the ICC when the Rome Treaty was signed altered the way transitional states were to behave. Key to the ICC was the Complementarity Principle which places the responsibilities of transitional justice on the post conflict state. Chapter three will discuss the impact of the ICC on Africa by debating whether its creation has reduced impunity on the continent. The chapter will conclude by discussing ways of making the ICC's work in Africa benefit victims, while endeavouring to end impunity.

## **Chapter 4: The ICC and transitional justice in Zimbabwe**

In chapter four, the impact of the ICC on transitional justice in Zimbabwe is considered. The chapter explores the various attempts at prosecuting alleged human rights violators in Zimbabwe, cognisant of Zimbabwe's non-membership at the ICC. The discussion will conclude by exploring the limitations of the ICC in implementing its mandate in non-member states such as Zimbabwe.

## **Chapter 5: A TRC for Zimbabwe?**

The suitability of the South African TRC model for Zimbabwe is explored in this chapter. The TRC model will be analysed in terms of its formation, mandate, timeframe, funding and structure, *inter alia*. This chapter employs a thematic

approach in its analysis of Zimbabwe's National Peace and Reconciliation Commission, which is earmarked to carry over the mandate of national healing from the Organ on National Healing, Reconciliation and Integration. Zimbabwe's draft constitution (February 2013 version) provides the base document for the assessment of the Zimbabwe's National Peace and Reconciliation Commission.

## **Chapter 6: Statist transitional justice in Zimbabwe**

In this chapter, the various transitional justice mechanisms that were used by the state in Zimbabwe between 1980 and 2011 are discussed, highlighting especially their shortcomings. The focus is on identifying, assessing and evaluating these mechanisms, thereby positioning traditional transitional justice mechanisms as viable complements. The statist approaches discussed are the policy of amnesia, the Zimbabwe Human Rights Commission, the Zimbabwe Commission of Inquiry into the Matabeleland Disturbances, also known as the Chihambakwe Commission of Inquiry, the Commission of Inquiry into Events Surrounding Entumbane, also known as the Dumbutshena Commission of Inquiry, and finally the Organ on National Healing, Reconciliation and Integration.

## **Chapter 7: Indigenous realist transitional justice in Zimbabwe**

After deliberating on the statist approach to transitional justice in Zimbabwe, chapter seven focuses on transitional justice mechanisms that have been used in Zimbabwe's rural areas to achieve healing and reconciliation. These mechanisms include traditional institutions such as *ngozi* (avenging spirit), *botso* (self-shaming), *guava* (bringing the deceased's spirit back to the realm of the living), *chenura* (cleansing ceremonies), *nyaradzo* (memorial services) and *nhimbe* (community working groups). Case studies will be used to illustrate the application of these traditional institutions as transitional justice mechanisms.

## **Chapter 8: *Ngozi* as a realist transitional justice mechanism**

In chapter eight the application of the main traditional institution used in transitional justice in Zimbabwe, that is, *ngozi* will be discussed. The institution of *ngozi* is defined and qualified as a mechanism that fulfils the qualifications of a transitional

justice mechanism and is preceded by a survey of the nexus between African tradition and the concepts of human rights. Two case studies, which occurred in two separate provinces, are used to prove the existence and extent of usage of *ngozi* as a transitional justice mechanism. The chapter concludes by discussing the advantages and disadvantages of the use of *ngozi*.

## **Chapter 9: Conclusion**

The conclusion summarises the thesis by answering the question: are imported transitional justice mechanisms suitable for post conflict states such as Zimbabwe where alternative traditional mechanisms already exist? Thus, the concluding chapter emphasises the importance of the origin of transitional justice mechanisms as a key determinant of their effectiveness. It also reflects on the theoretical and practical nature of the entire study, reaching an understanding of how the study was conducted and the challenges encountered in the process. Lessons learnt and pointers for further research in the area of transitional justice in Zimbabwe in general and traditional transitional justice in Zimbabwe in particular are also contained in this chapter.

## CHAPTER 2: THEORETICAL FRAMEWORK

### 2.1 Introduction

After periods of gross violations of human rights, ordinary citizens in many countries, including Zimbabwe<sup>2</sup>, delve into their own internal resources for post conflict justice and reconciliation. This often becomes the default position where governments exhibit both inaction and non-action towards the peace building and reconciliation needs of their communities, especially those at the grassroots. As observed by Mashingaidze (2010: 20) and Machakanja (2010: 6), between 1980 and 2011 the Government of Zimbabwe failed to adopt any victim-centred policies to deal with gross violations of human rights such as war crimes, genocide or victims' compensation. Using almost exactly the same words as he had for the past 32 years, President Robert Mugabe exhorted the nation to let 'bygones be bygones', pleading particularly with victims not to seek historical accountability for the sake of peace.<sup>3</sup>The precedent of letting past human rights abuses go unaccounted for was set during Mugabe's inaugural speech as Zimbabwe's leader at Rufaro Stadium in Harare, on 18 April 1980, where he urged Zimbabweans to forgive each other unconditionally (van Binsbergen 2003: 542). This policy adopted by Mugabe of pressing Zimbabweans to forgive and forget past violations of human rights has, over the years, necessitated the emergence of an indigenous African civil society to fill this policy vacuum by setting up and implementing its own transitional justice agenda.

The purpose of this chapter is to lay a theoretical foundation which will be used to anchor this study. Two broad theories, namely theories of transitional realism and transitional idealism will be used. These two broad typologies of transitional justice mechanisms were posited by Teitel (1997: 2009-2080) and will be discussed in

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<sup>2</sup> Cognisant of the various names present day Zimbabwe has gone through such as Southern Rhodesia (1923 - 1953), Federation of Rhodesia and Nyasaland (1953 - 1965), Rhodesia (1965 - 1979), Zimbabwe-Rhodesia (1979) and finally Zimbabwe (1980 to date), the name Zimbabwe is used to refer to the country's territorial boundaries throughout its history.

<sup>3</sup> See, for example, Prime Minister Mugabe's independence acceptance speech, available online at <http://blogs.timeslive.co.za/hartley/2010/04/16/robert-mugabes-independence-day-address-april-1980/> and the President's 2012 independence speech available online at <http://www.newzimbabwe.com/opinion-7753-Full+text+Mugabes+Independence+speech/opinion.aspx> (accessed on 21 June 2012).

greater detail in this chapter. However, before venturing into the two theoretical typologies of transitional justice mechanisms, it is imperative to define what is meant by political transitions. This is followed by a section which attempts to define, in broad terms, the various interpretations and conceptualisations of transitional justice in Zimbabwe. Specifically, the civil society, statist, and international definitions of transitional justice will be discussed. The chapter will also debate whether Zimbabwe was indeed a transitional state and will conclude by offering the theories of transitional realism and idealism as propounded by Teitel as the reference theory for the study. The aim is to create a detailed understanding of the process of political transition that forms an integral part of transitional justice, both as a practice and as a field of study.

## **2.2 Defining political transition**

At the core of transitional justice lies the fundamental issue of the relationship between the treatment of a state's past and the prospects of such a process leading to a democratic future (Igreja 2008: 20, 33, Teitel 2000: 34-37). This period constitutes what is termed the transitional period or political transition. Transitional justice, in this regard, refers to the programmes and actions used during and after the transitional period to seek historical accountability for past human rights abuses in a bid to foster reconciliation and build a more democratic future in the post conflict state. Loosely defined, a transition implies the act of passing from one phase, style or place to another. While it is difficult to prove the impact of relationships in defining the transition in transitional justice, it could be argued that there are certain characteristics that define this transition. For example, the transition of water from liquid to gas is characterised by the change in the nature of the molecular structure of hydrogen (H) and oxygen (O) which make up the compound water (H<sub>2</sub>O). In sport, transition is characterised by a team's change in tactics and player positions from defensive to offensive and *vice versa*. Likewise, the transition in transitional justice is characterised by the attainment of goals desired by those victims and communities who experienced gross violations of human rights. These aspirations must be those of the violated communities predominantly and not of any other external body or institution (Barsalou 2008: 6).

### 2.2.1 Characterising the transitional period

The nature of a political transition is that there is a past littered with human rights abuses to bear in mind (Kritz 1995: 226, Doxtader and Villa-Vicencio 2004: 153, Mendez: 1997). Theorising on the nature of political transitions and the possible obstacles, Bohl (2006: 561) contends that there are four obstacles likely to be faced by transitional states. Firstly, transitional states will most likely inherit a virtually non-existent criminal justice system. Secondly, international assistance for the rebuilding or creation of an effective criminal justice system will not be sufficient to cover the whole post conflict judicial reform process. Thirdly, states in transition are forced to pursue justice in times of extremely fragile peace, often resulting in a limited ability to impose criminal sanctions. Finally, transitional settings often shape a civil society whose interests and objectives conflict with the policy and resource limitations of the newly elected leadership.

Notwithstanding Bohl's four markers for transitional states, transitional justice scholars (Teitel 2000: 5, Bizos: 2005) and practitioners (Mindzie: 2009, Boraine: 1995) differ on what defines the transition in transitional justice. This has led scholars such as Sooka (2009: 21) to theorise about transitional politics as opposed to transitional justice. The general norm, especially for the period between the Nuremburg trials (20 November 1945 to 1 October 1946) and the South African TRC (15 April 1996 to July 31 1998), was that transitional justice mechanisms were instituted when the period of gross human rights violations ended. It needed the violations of human rights to end before any investigations could commence.

This view prescribes, for example, that transitional justice mechanisms should be put in place in Libya since Colonel Gaddafi's rule ended with his assassination on 28 October 2011. This practice is consistent with imported models of transitional justice such as TRCs which, according to Mamdani, in *Reconciliation without justice* (2000), treat transitional justice as a story of racism and individual violations, rather than one of long-term, structural, well thought out systemic abuses. Increasingly, the need to recognise the evolving imperative to institute national healing and reconciliation programmes even in the midst of violations of human rights has grown in urgency. Current trends point towards an evolving practice of addressing gross violations of

human rights even during more violations; leading to what Attafuah (2009: 187) terms the politicisation of transitional justice.

When reduced to its essential terms, a political transition is regime change or regime transformation from human rights abuse to a more stable democracy (Masunungure (2009: 1). For Teitel (2007: 2077), political transitions are characterised by an inherent contradiction in the relationship between law and politics in a period marked by what Leebaw (2001: 264) terms institutional and ideological fluxes. In this regard a political transition can be simply understood as the interval between one political regime and another (O'Donnell and Schmitter 1986: 6-7). For Bratton and van de Walle (1997:10), a transition is a shift from one set of political procedures to another, from an old political pattern to a new one.

The above characterisation of political transition necessitates a clarification of when a country is in transition. This will be attempted in the following section as an introduction to the discussion on whether Zimbabwe was a transitional state between 2009 and 2011, as argued by Masunungure (2009: 2), or between 1980 and 2011 as posited by Muzondidya (2011: 7). The perception of political transition as a period when violations are still occurring, as opposed to when they are over, is also evident in imported mechanisms of transitional justice. In an unprecedented move in the history of international law<sup>4</sup>, the International Criminal Court (ICC) issued warrants of arrest for two sitting presidents, Gaddafi of Libya (28 June 2011) and Omar al Bashir of Sudan (4 March 2009). In this regard, the transitional period is viewed as inherent in the period during which the violations of human rights occurred.

The International Advisory Council on International Affairs and the Advisory Committee on Issues of Public International Law (2008: 8) conceded that transitional justice is a complex concept in which each word carries a number of implications. According to these two institutions, 'transitional' seems to suggest that there is a

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<sup>4</sup> The ICC's definition of international law is found in Article 38 of its Statute which states that the Court, in making decisions in accordance with international law, shall apply international conventions; international custom, as evidence of a general practice accepted as law; the general principles of law 'recognized by civilized nations'; and, as subsidiary sources, judicial decisions and the teachings of the most highly qualified publicists of the various nations.

specific legacy of large-scale gross human rights violations resulting from a conflict or another situation that is at an end by the time the mechanisms are established. The two institutions noted the increasing use of imported transitional justice mechanisms during conflicts and periods of gross violations of human rights as a practice which was becoming particularly common, thereby altering the implications of political transition. Any attempt to prosecute Mugabe while he is still the President of Zimbabwe must be viewed in this light. It can therefore be argued that transitional justice has evolved to a point where it is used as a tool to end gross violations of human rights.

From the above, the transition referred to in transitional justice appears, in fact, to be multiple transitions. For example, transition from a period of violence and gross human rights abuses to one of a new democratic dispensation, or a period of transition from one violent phase of history to another, such as the transition in Uganda during the reigns of Idi Amin (1971 to 1979), Milton Obote (1963–1971, 1980–1985) and Yoweri Museveni (1986 to date).

The presence of the noun 'transition' in the term transitional justice has caused difficulties when interpreting the meaning attached to the term. Transition can be viewed as the movement towards the establishment of a liberal democratic regime, both politically and economically, a regime where pluralist views coexist and where no one is given preferential treatment based on their political or ethnic origins (Kim 2007: 57). This interpretation leads to more attention being paid to human rights abuses linked to physical violence, at the expense of cultural, environmental, economic and other various forms of violence and abuse.

### **2.2.2 Transition to where?**

During the decades between the Nuremburg trials and the Rwandan genocide (1945-1994), transition was used to refer to a society's movement from dictatorship, war and gross violations of human rights towards democracy (Muro and Alonso 2010: 71). In the period after the Rwandan genocide, transition evolved and began to refer simply to the movement away from these gross violations of human rights. In most situations, transitional justice programmes are now being implemented

whenever and wherever there are gross violations of human rights, regardless of the absence of regime change. From a customary law point of view, this does not constitute a new phenomenon as communities have constantly fought and reconciled since pre-colonial times (Mazarire 2010: 4). This is illustrated by an array of traditional transitional justice and reconciliation mechanisms in most parts of Africa, such as Uganda's *mato oput*<sup>5</sup>, Rwanda's *gacaca*, Mozambique and Zimbabwe's *magamba* spirit<sup>6</sup>, *ngozi* and *kuputisana fodya*<sup>7</sup>. Generally, criticism of these mechanisms is of their inability to deal with gender related crimes, which unfortunately make up the bulk of war crimes (Klip and Sluiter 2005: 273-280).

Carothers (2002: 6) posits that transition is generally a movement away from gross violations of human rights with multiple possible destinations. He dissects what he terms the transitional paradigm and speculates that the meaning of 'transition' is largely influenced by the perception of major western institutions, singling out the United States-dominated democracy promotion community led by the United States Agency for International Development (USAID) (1999: 51). These 'democracy promoters', as Carothers calls them, designed an analytical framework for responding to what Huntington (1993) termed the third wave of democracy. He noted that this 'predictable, sequential process of incremental steps is vividly exemplified in USAID's Managing for Results assessment system', contained in the *Handbook of democracy and governance program indicators* (August: 1998). The model outlined in this 1998 handbook influenced the design of most transitional justice mechanisms including the marrying of transitional justice to broad post conflict development aid.

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<sup>5</sup> *Oput* is a tree that is indigenous to Uganda whose roots are bitter. Literally translated *mato oput* means drinking the bitter roots. Found and practised predominantly in Northern Uganda and some parts of South Sudan among the Acholi people, *mato put* refers to traditional conflict resolution practices and ceremonies marking the admission of guilt and reconciliation and occurs at clan level. During the *mato oput* ceremony the tree's bitter roots are mixed with a local brew and drunk by both sides to the conflict while their hands are tied to their backs. This is said to symbolise their willingness to swallow and wash away all the bitterness that once existed between them. *Mato oput* is voluntary and based on remorse and the readiness to accept responsibility for one's actions and does not involve courts of law.

<sup>6</sup> *Magamba* is a Shona word which means heroes. As a practice, *magamba* is found in both Mozambique and Zimbabwe predominantly among the Ndaou Clan. *Magamba* are generally the spirits of dead soldiers who are believed to return to the realm of the living to continue the fight for justice. In their varied meanings and manifestations, *magamba* both heal war-related wounds and play a pivotal role in the achievement of restorative justice among the survivors of war.

<sup>7</sup> *Kuputisana fodya*, also known as *ukukhumisa umlotha*, literally means sharing the tobacco. This is a traditional justice system which originated among the Ndebele people of Zimbabwe. It involves the sharing of tobacco after a dispute has been amicably resolved.

Carothers (2002: 7) urges that this model be discarded on the grounds that none of the countries categorised by the model as 'transitional', such as the Democratic Republic of the Congo (DRC), have followed the predictions of the model. In particular, he disputes the model's assumption that any country moving away from a dictatorship moves towards democratisation (Carothers 2002: 6-9). He concludes that democratic transition occurs in three stand-alone phases, namely, opening, breakthrough and consolidation. The consolidation phase is the most crucial and he characterises it as:

a slow but purposeful process in which democratic forms are transformed into democratic substance through the reform of state institutions, the regularization of elections, the strengthening of civil society, and the overall habituation of the society to the new democratic rules of the game (Carothers 2002: 7).

Carothers' observation that democratic transition occurs in three distinct phases is given credence by the fact that some countries actually move from one dictatorship to another while others simply stagnate within the transition period. These countries fail to move from the opening phase into the breakthrough phase. Uganda is a good example of a country that 'transitioned' from one dictatorship to another when it moved between the regimes of Milton Obote 1966-1971, Idi Amin 1971-1979, Obote 1980-1985, Tito Okello 1985-1986 and Yoweri Museveni 1986 to date, punctuated with violence attributed to Joseph Kony and the Lord's Resistance Army.

In these cases, the various openings brought by regime change did not materialise in democratic breakthroughs. Some transitional countries fail to fully democratise by regressing from the breakthrough phase backwards through the opening phase and into the zone of violence. Zimbabwe risks being classified as a country which took a step backwards from the breakthrough to the violence phase if the opportunity offered by the GNU is not utilised as a vehicle to carry the country into the crucial democratic consolidation phase.

Despite Carothers' three democratic transition phases, and as depicted by the diagram overleaf, it can be argued that political transition is not unidirectional, that is, it is not movement from violence towards democracy only. There are as many

possible routes which transitional states may follow as there are transitional states themselves.

**Table 2.1: Movement of countries in transition and the possible outcomes**

<b>Transition from</b>	<b>Transition to:</b>	<b>Example</b>
<b>gross violations of human rights</b>	Democracy	South Africa
	Stagnation/grey zone	DRC
	Worse violations of human rights	Uganda, South Sudan

According to the USAID model, any country that experiences a state between dictatorship and liberal democracy is in transition. Carothers (2002: 9–10) refers to these countries as grey zone states. The conclusion that can be reached from the above discussion is that the categorisation and characterisation of transitional states is still very fluid with porous boundaries. For this reason, no categorisation will be attempted beyond the analytical categorisation postulated above. Such categorisation deserves a more detailed analysis which cannot be undertaken in this thesis.

The strength of Carothers’ argument, however, is that it induces rethinking and even doubt in some regarding the ‘transition’ paradigm, both as an analytical framework and as a pragmatic characterisation of transitional states. Most importantly, it liberates the transitional justice discourse from the curse of the ‘transition’ paradigm, allowing for the communities in transition to be studied as individual analytical units as opposed to parts of a collective of transitional communities.

An alternative theoretical view of political transition has been offered by Skaar (1999: 1109-1128). This theory postulates that a society is in transition when the following three constants are present:

- identifiable victims of gross violations of human rights
- an outgoing regime
- an incoming regime.

This view will be employed in the next section to debate whether Zimbabwe was a transitional state between 2008 and 2011. However, before undertaking this analysis, the study will identify the various definitions of transitional justice used by the various institutions and sectors that were at the forefront of seeking transitional justice for victims of human rights abuses. These are the definitions of the international community, civil society organisations and the state. This will culminate in the postulation in this study of what it terms the broader realist transitional justice perspective.

### **2.3 Transitional justice: general view**

What it is that constitutes exactly the totality of transitional justice is not generally agreed upon and remains very much a contested area of study (Hoogenboom 2010: 183-198, and Teitel 2002: 893–906). Equally problematic is the categorisation of the various definitions of transitional justice that have been proffered by a plethora of organisations, scholars, institutes and governments. These challenges notwithstanding, transitional justice possesses certain defining characteristics such as the concepts of justice, reconciliation, reparations and political transition, normally from one regime to another, from authoritarianism or repressive rule to more democratic governance. In the transitional context, the concept of justice refers to the seeking of justice for victims by holding those accountable for past human rights abuses responsible for the wrongful actions. Over time, different definitions of transitional justice have been employed, usually in response hitherto contemporary developments.

There are three distinct periods in the conceptualisation of transitional justice. Founding transitional justice scholars associated the subject with 'periods of political change' and 'confronting wrongdoings' (Teitel 2000: 9, Hamber and Kelly 2009: 2, Forsythe 2009: 82). According to this view, transitional justice is implemented long after the human rights abuses were committed, such as in the case of the Japanese comfort women. In this case, the Women's International War Crimes Tribunal on Japan's Military Sexual Slavery convened on 8 December 2000 to gather testimonies from victims of Second World War abuses of women taken as sex slaves (Shoh 2008: 1, 97). In effect, the former comfort women waited for justice for two

generations (61 years). However, after the Balkan wars and the Rwandan genocide the definition of transitional justice began to focus on 'post conflict justice' implemented immediately after the violations (Nabudere and Velthuisen: 2013: 3). As alluded to earlier on, the most recent definition of transitional justice is one which conceptualises it as occurring during and in the immediate aftermath of atrocities, as is the case in Egypt, Libya, Kenya and Ivory Coast (Lyck 2009: 218, Cobban 2007: 22–44). According to this view, transitional justice is part of broad mechanisms that could be employed to end impunity and establish democratisation to bring lasting peace and respect for human rights (Schabas 2008b: 581, Hinton 2010: 96).

It can be argued that an analysis of primary trends in Zimbabwe between 1980 and mid-2011 leads to four broad categories of definitions of transitional justice. These are the statist, the international, the civil society and the broader realist definitions. Three definitions, the statist, international and the civil society definitions, are dominant in literature. This study will postulate a fourth definition for transitional justice in Zimbabwe, to be termed the broader realist perspective. The major difference between the dominant and the alternative definitions lies in their respective perceptions of who is at the centre of transitional justice. The dominant definitions put the offender as the central figure in transitional justice, while the alternative view advocates for the centrality of the victims and victimhood. The alternative view is aligned with transitional realism while the dominant views are aligned with transitional idealism which will be expounded on later in this chapter.

This study endeavours to offer a broader realist perspective of transitional justice, rooted in the needs and expectations of victims and capable of going beyond the perception of transitional justice as merely a movement towards the liberal type of democracy as advocated by the USAID (1998) and the Charter Foundation (in Kritz 1995: 42). This perspective is useful in analysing deeper structural patterns of exclusion and domination that characterise transitional justice. The study will introduce new frontiers to be accessed through the interrogation of the likely outcomes of transitional states by examining the confusion brought about by the end of ideological bipolarity, which saw 'transition' being used to imply movement from communism towards liberal western type of democracy (McFaul 2002: 212-244). In the midst of this confusion, two categories of transition emerged; one from violence

and another from communism, both assumed to be moving towards western liberal democracy.

Broadly defined, transitional justice refers to an array of both objectives and instruments of broad social transformation and rests on the assumption that societies need to confront past abuses in order to come to terms with their past and move on (Andrieu 2010: 2). As alluded to earlier on, while not widely agreed upon, the transition in transitional justice is generally understood to refer to movement from an authoritarian regime towards a liberal market oriented democracy. The most applied definition of transitional justice refers to the theories and research programmes that explain, justify, compare and contest specific practices of moral and social repair, and to the political and social movements dealing with the past. These include practices such as TRCs, prosecutions, administrative reorganisation, nation building, commemoration and reparation (Mendez 1997a: 255–282; Crocker 2000: 99; Teitel 2003: 69-94; Elster 2004: 181; Roht-Arriaza 1990: 449-513; and Eisikovitz 2009 in Andrieu 2012: 2). The concept of transitional justice has since broadened to include wider societal processes for dealing with legacies of violent conflicts and repression such as kleptocracy (financial impunity), religious impunity and environmental impunity (Muvingi 2011: 4).

### **2.3.1 The civil society definition of transitional justice**

Civil society organisations were active in assisting victims of gross human rights abuses in Zimbabwe, especially after the formation of the GNU. Their definition of transitional justice was widely applied in Zimbabwe's transitional justice literature (Zimbabwe Human Rights NGO Forum: 2008, Institute of Justice and Reconciliation: 2010). However, generalising civil society's conceptualisation of transitional justice is not without challenges as these organisations tend to express divergent views and hence lack consensus on what constitutes transitional justice, how it should be addressed, which periods to cover and who is a survivor, among other areas of contention. According to the Zimbabwe Human Rights NGO Forum<sup>8</sup> (2008: 1),

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<sup>8</sup> The Zimbabwe Human Rights NGO Forum, also known as 'The Forum', is a Non-Governmental Organisation based in Zimbabwe which acted as the umbrella body for civil society organisations in

hereafter The Forum, transitional justice generally refers to a range of approaches that states may use to address past human rights abuses and includes both judicial and non-judicial approaches. According to The Forum, transitional justice seeks recognition for the victims and the promotion of peace, reconciliation and democracy. This definition is prescriptive as it enumerates fundamental principles that any transitional justice mechanism adopted in Zimbabwe should follow. According to the Forum (2008: 8) these are:

...victim-centred; comprehensive, inclusive, consultative participation of all stakeholders, particularly the victims; the establishment of the truth; acknowledgment; justice, compensation and reparations; national healing and reconciliation; non-repetition (never again); gender sensitive; transparency and accountability, and nation building and reintegration.

### **2.3.2 The statist definition of transitional justice**

There is a divergence in conceptualisation between the state and civil society in terms of their perceptions of transitional justice. According to Zimbabwe's Ministers of Justice, Legal and Parliamentary Affairs and Defence, transitional justice is any such mechanisms and processes that deal with the past in a manner that ensures 'national unity'(Raftopoulos and Savage 2004: 265). Issues of national healing, reconciliation and reparations became secondary and hence were treated as 'nice to have' as opposed to 'must have'. This position was well articulated in 1980 by Mugabe during his independence speech when he officially announced the government's reconciliation policy, pleading with Zimbabweans to let bygones be bygones and to forgive and forget the past. Setting the tone for the state's subsequent attitude towards gross violations of human rights, the then Prime Minister said:

...if yesterday I fought as an enemy, today you have become a friend and ally with the same national interest, loyalty, rights and duties as myself. If yesterday you hated

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Zimbabwe. It was founded in 1988 by nine member organisations which have since grown to 19. Its broad mandate is to promote human rights in Zimbabwe through its Public Interest unit which makes compensatory claims on behalf of the victims of organised violence and torture. It has a Research Unit and a Transitional Justice Unit which were created in order to document and report on cases of human rights violations and to promote transitional justice processes.

me, today you cannot avoid the love that binds you to me and me to you (Mugabe, Independence speech, Rufaro Stadium, Harare: April 1980).

As if to emphasise this position on transitional justice, Mugabe went on to pre-empt any thoughts of having investigations, trials or any other sanctions by affirming that:

...Is it not folly, therefore, that in these circumstances anybody should seek to revive the wounds and grievances of the past? The wrongs of the past must now stand forgiven and forgotten (Mugabe, Independence speech, Rufaro Stadium, Harare: April 1980).

While Mugabe's words were noble, the whole reconciliation process he espoused in his speech lacked practical substance as to how specific modalities were to be operationalised. This exploratory study finds merit in examining whether this speech is the event which marked the death of state centric transitional justice in Zimbabwe or not. The manner in which the state conceptualised transitional justice necessitates an analysis of events that the peroration of each episode of gross human rights violations. The government's position must be understood against the backdrop of amnesties, pardons and clemencies that it issued at the end of most episodes of violence. Examples of these pardons and clemencies include *Amnesty Ordinance 3 of 1979*, *Amnesty (General Pardon) Ordinance 12 of 1980*, *Clemency Order No. 1 of 18 April 1988 (General Notice 257A of 1988)*, *Clemency Order Number 1 of 2000 (General Notice 457A)*, *Order No. 1 of June 2008 (General Notice 85A of 2008)* and *Clemency Order Number 1 of 2002*. In Zimbabwe, the legislation that sanctioned impunity most effectively was the *Indemnity and Compensation Act of 1975* which effectively granted Rhodesian Security Forces immunity in advance.

Arguing against the state's policy of collective amnesia, Professor Welshman Ncube, the then leader of one of the two main MDC factions noted that:

...Zimbabwe therefore began independence with what can be described as a terrible precedent. We had a blanket immunity in the absence of full knowledge. The effect of this was to say: 'We don't want to know who did what, we are not interested in truth, nor are we interested in justice — in order to have reconciliation, the nation must subject itself to a collective state of amnesia about its past, and proceed.(Quoted in Amnesty International (2002), *Zimbabwe the toll of impunity*.)

It can be argued that such behaviour is tantamount to an authorisation of impunity which is against international law and the letter and spirit of victim-centred transitional justice. In such circumstances, victims are the greatest losers as they remain unhealed, uncompensated, unreconciled and even forgotten.

### **2.3.3 The international definition of transitional justice**

The third category of the conceptualisation of transitional justice, which is part of the dominant narrative, is based on the 'international' definition of the concept. It is 'international' owing to its origin from multilateral organisations, mainly the United Nations. This definition seeks to universalise the concept as opposed to the particularity sought by traditional transitional justice mechanisms. This corresponds with the assertion that human rights based action has become one of the prime manifestations of globalisation. Falk (2006: 478-503) noted a new 'legal internationalism' that was leaving Westphalian state sovereignty behind. Mamdani (2008: 17–22) calls this phenomenon the new humanitarian order. This 'international' framework traces the roots of transitional justice to two sources, namely the human rights movement/international human rights and humanitarian law. According to this definition, the genealogy of transitional justice can be traced from its first appearance in the human rights discourse, then to the international law arena and finally to its current place in the field of democratisation (Joseph and McBeth 2010: 273). Muvingi (2009: 164) concurs and further postulates that transitional justice has evolved to a point where it is now a field of study on its own and not part of studies in democratisation.

It can be argued that there is a new phenomenon called the internationalisation of transitional justice, in which transitional justice has achieved industry status comprising teams of experts, consultants, standardised software packages or data management tools and a set of assumptions regarding how to do work around issues of memory and why memory matters in the healing process. Looking at the financial aspect of the internationalisation of transitional justice, Ooman (2005: 890-891) noted that funds transferred to 'developing' and 'transitional' states under the headings of human rights and legal and judicial development grew from less than US\$500,000 in 1988 to US\$581 million in 2002. This affirms the top-down one-size-

fits all nature of universal solutions to transitional justice. According to Thomson and Jazdowska (2012: 85), this narrow approach ignores the pressing need to engage societies more deeply and to assist them generally through their transition from human rights abuse to democracy. Characteristically, the internationalisation of transitional justice draws attention away from the vast majority of victims, ignores their complex array of needs, overlooking the problem of 'primary community interface' whereby victims, in some situations, continue to live with perpetrators in their midst.

At the international level, there are two widely applied definitions of transitional justice. One of these was put forward by the International Centre for Transitional Justice (ICTJ: 2010). It defines transitional justice as the set of judicial and non-judicial measures that have been implemented by different countries in order to redress the legacies of massive human rights abuses. Key to this definition is the phrase 'set of measures'. *Prima facie*, it denotes an existing pool of already made, ready to use mechanisms from which post conflict states and communities can choose. An example of these ready to use transitional justice mechanisms includes the *Rule of Law tools for post conflict states* designed by the Office of the United Nations High Commissioner for Human Rights<sup>9</sup> and USAID's Managing for Results assessment system, contained in the *Handbook of democracy and governance program indicators* (August 1998)<sup>10</sup>. These tools include guides, lists of do's and don'ts, results frameworks, manuals, costing, handbooks for indigenous peoples, minorities, professional groups, educational institutions and even paramilitary groups (Lundy and McGovern 2008: 268).

Epistemologically, this definition advocates for the globalisation of mechanisms for dealing with human rights abuses. The evidence is that the definition seeks the

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<sup>9</sup> Office of the United Nations High Commissioner for Human Rights, Rule-of-Law Tools for Post Conflict States available at: <http://www.ohchr.org/Documents/Publications/RuleoflawVettingen.pdf>(accessed on 7 June 2013).

<sup>10</sup> United States Agency for Internal Aid, Centre for Democracy and Governance, 1998, Handbook of Democracy and Governance Program Indicators, available online at: <http://www.google.co.za/url?sa=t&ndct=j&ndq=andesrc=sandfrm=1&ndsource=web&ndcd=1&ndved=0CC8QFjAA&ndurl=http%3A%2F%2Fwww.usaid.gov%2Fpubs%2Fads%2F200%2Findhndbk.pdf&nde=bms0UbqbKqmU0QW1i4COBQ&ndusg=AFOjCNEwc-9QPuCioFlyzjVRLCXd1D3YIA&ndsig2=B0NSOrN9pL39AeuibaXHDg>(accessed on 21 July 2012).

standardisation of transitional justice mechanisms at global level by encouraging the adoption of 'international norms and standards' when designing and implementing transitional justice programmes. This is then translated into the 'five pillars' of transitional justice (Boraine 2006: 22-37). The five pillars of transitional justice are considered to be memorialisation, reconciliation, prosecution, truth telling and reparations. A slight variation is the substitution of memorialisation by institutional reform. By implication, a society can never implement a successful transitional justice programme if one of the pillars is weak or missing. This definition is guilty of obliterating traditional and community mechanisms that favour restorative justice at the expense of retributive justice.

The definition of transitional justice that is most applied at international level was coined by the former United Nations Secretary, General Boutros Boutros Ghali, in his *Agenda for peace: Preventive diplomacy, peace-making and peacekeeping* (1992). This was subsequently amplified by his successor Kofi Annan in his 2004 report to the United Nations Security Council, *The rule of law and transitional justice in conflict and post-conflict societies*, where he defined transitional justice as:

the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These may include both judicial and non-judicial mechanisms, at times with differing levels of international involvement and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof (United Nations 2004: 4).

According to this definition, whatever combination is chosen must conform to international legal standards and obligations (United Nations 2010: 2). This positionality deprives victims of their agency and ownership of transitional justice programmes as mechanisms must conform not only to international transitional justice standards, but also to international *legal* transitional justice standards. The subsequent internationalisation and legalisation of transitional justice alienates rural victims in particular, forcing them to develop or revive local mechanisms that are bottom-up, victim-centred, non-legal and familiar to them.

According to Lundy and McGovern (2008: 268), the heyday of the international conceptualisation of transitional justice witnessed a proliferation of key international treaties such as the Convention on the Prevention and Punishment of the Crime of Genocide adopted by the United Nations General Assembly on 9 December 1948, the Universal Declaration of Human Rights adopted by the United Nations General Assembly on 10 December 1948 and the Geneva Convention on the Law of War and its Protocols of 1949. The end of the Cold War saw a consolidation of these functions into specialised agencies and international NGOs (Hayner 2002: 1-10). In this internationalisation process, legal theories, practices and institutions assumed the central role in the design and dispensation of transitional justice mechanisms, with the disenfranchisement of victims. Judging by the manner in which impunity continued to flourish in Africa, especially in resource rich countries such as the DRC and Sudan, it can be concluded that these international instruments and institutions could be likened to an instrument that is being constantly sharpened but rarely used; when used, the instrument will be used wrongly and in some cases, fatally.

### **2.3.4 Towards an alternative definition of transitional justice**

The challenge contained in the above definitions is that, as they are top-down, they alienate victims because they are conceived from non-victim constituencies. Such a scenario calls for an alternative view which treats victims as the focus of the transitional justice process. One such definition has been postulated by Bell (2012: 5-7), who notes that:

transitional justice is a broad concept which straddles three different notions: transitional justice as an on-going battle against impunity rooted in human rights discourse; a set of conflict resolution techniques related to constitution-making; and a tool for international state-building in the aftermath of mass atrocities.

Other definitions of transitional justice have tended to be general, describing it loosely as an array of mechanisms and instruments used in post conflict states to deter future abuses and seek historical accountability (Minow 1998: 4, Hayner 2002: 1, Elster 2004: 69). However, this definition is too general and also leaves out the crucial component of reconciliation. In an attempt to formulate an alternative view of transitional justice there is value in considering the views of classic realist theorists of

transitional justice. These emphasised truth commissions, reparations, lustration, museums and other forms of memorialisation as the most viable transitional justice mechanisms (Hinton 2010: 4, Kaufman 2012: 37, van der Merwe, Baxter and Chapman 2009: 88, Thomson and Jazdowska 2010: 75). The inadequacies of the above definitions points to the need for an exploration of other subtle mechanisms used in transitional societies other than the traditional ones mentioned above. There is also a need to move away from the perception that all transitional justice mechanisms are known and documented and that there is homogeneity between the rural and the urban perceptions of transitional justice in general and reconciliation in particular.

Contemporary debates on the institutional design of transitional justice mechanisms have resulted in the proliferation of various designs (Yarwood 2012: 34 and Hinton 2010: 36). However, most of these debates do not consider customary forms of transitional justice that have been used by rural communities for decades. Those who consider indigenous based traditional justice mechanisms do soon a case study basis with little or no attention to the existence of custom specific traditional transitional justice mechanisms. These include studies by Joanna Quinn (2007) and James Ojera Latigo (2008: 85-119) on Northern Uganda's *mato oput*, by Bert Ingelaere (2008: 25-60) on Rwanda's *Gacaca*, by Victor Igreja and Beatrice Dias-Lambranca (2008: 61-80) on Mozambique's *magamba* spirit, *kpaá mende* in Sierra Leone by Joe Alie (2008: 123-146) and Assumpta Naniwe-Kaburahe's study of Burundi's *bashingantahe* (2008: 149-178).

In Zimbabwe the work of Jeremy Brickhill (1992: 161-189) and the Mafela Trust focused only on freedom fighters from one section of the liberation movement, the Joshua Nkomo led Zimbabwe African People's Party (ZAPU) (1992: 161-189). The Mafela Trust worked to document the names of the Zimbabwe People's Revolutionary Army (ZIPRA) liberation war fighters, identifying their graves, conducting reburials and taking care of the welfare of liberation ex-combatants and their families (Brickhill 1995: 166). The Mafela Trust excluded combatants from other liberation movements, war victims, war collaborators and anyone other than a combatant from ZAPU's military wing, ZIPRA. Very little attention was devoted to

addressing the ways in which victims living in specific devastated social circumstances deal with the legacies of violence (Igreja 2007: 52).

The Mafela Trust's major weakness is the manner in which it treated victims' needs. The Trust tended to emphasise important values such as respect for and dignity of the victims yet allowed little or no room for the victims to voice their own views on how they wanted to be healed. Elsewhere, victims' rights and expectations were codified and packaged as if they were all known. A pertinent example is the international legal instruments that deal with victims' rights such as the *United Nations declaration of basic principles of justice for victims of crime and abuse of power* (1995) and its complement, *The handbook on justice for victims* (1996). Such codifications of victims' expectations are pre-emptive and obliterate other expectations which victims might have but which fall beyond the gamut of the above international instruments. Additionally, victims' ability to challenge the outcomes of imported transitional justice mechanisms, such as the TRC and ICC prosecutions, is seriously curtailed or rendered non-existent by such codifications. For example, the ICC makes no provision for victims to appeal or make representation to the court's judgements. For instance, Article 68 of the Rome Statute deals only with the protection of victims and witnesses and their participation in the proceedings, but not their entitlement to object to its judgements.

Since the major difference between the dominant definitions of transitional justice and the one being proposed in these pages pertains to the manner in which these definitions treat victims and victimhood, it is prudent to consider some philosophical arguments before postulating an alternative view of transitional justice. Philosophical arguments on the involvement of victims in deciding judgements have been debated extensively, with Vetlesen (2005: 221) arguing that, like the perpetrator, the victim is party to the event (or conflict) in question, hence both should be deemed unfit to judge the matter. According to Igreja (2007: 52), the absence of the voices of victims and, in the case of Vetlesen's proposal, the active suppression of the victim's voice, further complicates the debate. Vetlesen's view wrongly assumes that victims form a homogenous group. It suggests that reconciliation means the same thing to everyone and should follow the same paths, particularly by means of criminal justice (Eisikovitz 1998: 11).

What is lacking in the study and practice of transitional justice is a comprehensive approach where issues of meaning, relevance and priorities take centre stage. According to Amadiume and Abdllahi An-Na'im (in Igreja 2007: 53), African notions of transitional justice have their own way of achieving resolutions, for example, the use of rituals which imported transitional justice mechanisms do not recognise. The centrality of victims is accorded prominence in traditional reconciliation and peace building mechanisms. Krippner and McIntyre (2003: 185) and Sanahan and Veale (2010: 116-132) noted the availability of reception and reintegration rituals conducted for former child soldiers in Northern Uganda as a way of reconnecting them with their former alienated communities. Similar work was also done in post-civil war Mozambique (Bloomfield and Huyse 2003: 75).

Contributing to the centrality of victims in transitional justice, Ndulo (2007: 168) and Chan (2008: 327) concur that there is a need to acquire in-depth knowledge of the social practice of the actors being studied, especially everyday practical strategies geared towards the attainment of locally defined goals. The study of traditional transitional justice mechanisms where the political elites opt for amnesia and or amnesties is of particular relevance to this study since victims and perpetrators live together, usually at the scene of their violent experiences (Igreja 2007: 54). For Igreja, research of this kind into local communities affected by human rights abuses helps expand the current theoretical debates on transitional justice.

In lieu of a single ideal standard for assessing transitional justice efforts, Teitel (1997) proposes a continuum along which transitional options might be organised. These range from those that are most critical of the prior regime to those that aim to preserve the pre-existing legal order (Leebaw 2001: 264). In light of this, an alternative conceptualisation is being proposed which views transitional justice as a set of bottom-up, victim-centred, broad based, continuous redress mechanisms that heal and reconcile communities fragmented by impunity. This is the defence of all generations of human rights. In most of these cases the human rights violations would have been systematic, deep rooted, pervasive, almost always leaving in their wake a legacy of traumatised societies, weakened economies, shattered institutions generally lacking in credibility, and the absence of what Kritz (2002: 31-32) termed a culture informed by the rule of law. On the other hand, traditional transitional justice

mechanisms refer to a set of everyday endeavours made by communities in order to seek historical accountability and reconciliation. Most of these mechanisms are based on traditional institutions and customs that resonate with both the victims and the offenders. It is this locality that gives traditional transitional justice mechanisms an edge over their imported counterparts.

Having posited an alternative view of transitional justice, in the next section the study will discuss the various forms of political transitions. This is done as a forerunner to the debate on whether Zimbabwe can be regarded as a transitional state.

#### **2.4 Negotiated transition model and the mediated negotiation model**

The issue of Zimbabwe's political transition warrants further probing, as it does not fit perfectly into the categories of dominant theories of transition to democracy (Skaar 1999: 1109-1128, Carothers 2002: 5-21, O'Donnell and Schmitter 1986: 37; and Huntington 1993: 22-49). Basically, these theories all hold that the degree of economic development and power of the state are correlated with democratisation. O'Donnell and Schmitter (1986: 37) suggested two non-revolutionary transitions that might apply to Zimbabwe's case; transition from above and transition by negotiation. According to this theory, an authoritarian regime liberalises its control over a society due to the emergence of reformers within the regime (Huntington 1993: 14). Central to this theory is the existence of reformers within the ranks of the authoritarian regime who believe that continuing their strong dictatorship will not help them maintain power or improve the regime's legitimacy (Kim 1997: 2). When reformers adopt liberal policies, the result is the opening up of space for society, especially groups in civil society, who immediately and effectively seize the opportunity to mobilise their members and push for genuine bottom-up democratisation. This can be diagrammatically represented as follows:

**Table 2.2: Transition from above and transition by negotiation**

	<b>Transition from above</b>	<b>Transition by negotiation</b>
<b>Authoritarian regime</b>	Reformers	Hardliners
<b>Opposition</b>	Moderates	Radicals

McFaul (2005: 16) agrees with the above categorisation of hardliners and soft-liners (reformers) in the regime, moderates and radicals in the opposition and posits that the political interplay between these four groups results in particular modes of political transition. According to this model, when appointing negotiating teams, both the opposition and the regime nominate their hardliners to represent them. On the other hand, transition from above is quasi legal, piecemeal and is led through the joint efforts of the reformers in the regime and the moderates in opposition who take the lead in lobbying their respective parties to accept the changes.

Huntington (1991: 141) supports this, but arrives at a different result in the forms of transition. For him the result is one of the following three types of transition: transformation, replacement, and transplacement. Unlike McFaul, Huntington's transitional outcomes are determined not by the political interplay between groups from the opposition and the regime but by any one group of the three which takes the lead role in the transition process. Huntington argues that a transformation occurs when the soft-liners in the regime take the lead in bringing about democracy, while a replacement occurs when radicals in the opposition take the lead and the authoritarian regime collapses or is overthrown. The third category, called a transplacement, occurs when democratisation emanates largely from joint action by the regime and the opposition, usually through negotiations (1991: 114). The major actors in transplacement as identified by Kim (1997: 2) are the reformers in the authoritarian regime and the moderates in the opposition. The success of transplacement depends on the ability of the reformers and the moderates to control the hardliners in the authoritarian regime and the radicals in the opposition (Kim 1997: 3). This relationship is diagrammatically represented below.

**Table 2.3: Transformation, replacement and transplacement transitions**

	<b>Transformation</b>	<b>Replacement</b>	<b>Transplacement</b>
<b>Regime</b>	Soft-liners		Reformers
<b>Opposition</b>		Radicals	Moderates
<b>Resultant mode of transition</b>	Gradual transformation	Regime overthrow	Negotiations

A successful transplacement occurs when the dominant groups in both the regime and the opposition eventually realise that they are incapable of unilaterally determining the nature of the future of the political system in their society (Huntington 1991: 154). Huntington (1991: 114) further contends that the initial stages of a transplacement transition are characterised by denial on both sides with the regime believing that it can control or oppress the opposition effectively, while the opposition believes that the regime cannot hold on to power for long. However, when the opposition mobilises people and becomes strong enough to threaten the regime, the situation changes. The result is that the regime has to decide, either to take a risk and oppress the opposition further, or to negotiate with the opposition to draw up a new political pact (Huntington 1991: 114). Similarly, the opposition needs to believe that it can overthrow the regime with its mass mobilisations (Kim 1997: 4). Therefore, before a successful negotiation between the regime and the opposition can be established, a delicate balance of power must be attained in which neither is in control but where the situation cannot result in a revolution or the regime's unilateral victory (Guo: n.d.). Shapiro (1995: 267) agrees and notes that there should be a rough equality in power between the regime and the opposition in order for negotiations to start. As Huntington (1991: 153) points out, there should be:

a seesawing back and forth of strikes, protests, and demonstrations, on the one hand, and repression, jailing, police violence, states of siege, and martial law, on the other.

With this stalemate, in which the opposition could mobilise support while the government contains and withstands opposition pressure, a transplacement transition can occur (Kim 1997:4).

To some extent, the transition in Zimbabwe resembled a transplacement because for long periods there was a delicate balance of power between the opposition and the regime. Strikes, demonstrations and repression were common features with the opposition sensing victory and the regime feeling that it could still hold on to power. This delicate balance of power was more pronounced after the announcement of the 2008 Presidential election results in which neither candidate garnered enough votes to be appointed president.

The second type of transition is a negotiated settlement and occurs when there is the presence of a third party who wields power over either or both other parties. As Meyer (1960: 37) points out, the mere existence of a third party mediator may positively affect the outcome of the negotiation. The power and resources of the third party can facilitate negotiation more directly (Zartman and Touval 1985: 27). By participating in the dispute, the third party changes the bargaining structure from dyadic to triadic (Kim 1997: 4). Since Zimbabwe's transition possessed characteristics of both the transplacement and the negotiated settlement, its transition can therefore be termed a 'negotiated transplacement model' because of the negotiations that resulted in the transition and the balanced relationship that existed between the regime and the opposition. A more nuanced debate regarding the type of transition that ensued in Zimbabwe will be proffered in the following section, which attempts to determine whether Zimbabwe was a transitional state and if so, when?

## **2.5 Was Zimbabwe a transitional state?**

As noted in the discussion of the models above, there are certain characteristics that mark a transitional state. The model that best describes Zimbabwe's transition is one characterised by a delicate balance of power between the opposition and the regime. Huntington (1991: 153) notes that this delicate balance will be characterised by regular strikes, protests, and demonstrations spearheaded by the opposition and

repression, jailing, police violence, and repressive laws used in response by the regime. This adds weight to Teitel (2000: 54) and Forsythe's (2009: 85) views that political transitions occur during periods of altered relations between law, politics and justice. There is ample literature to support the existence of the markers of Huntington's transitional state in Zimbabwe. This includes work by scholars such as Moyo and Yeros (2007: 103-121), Bratton and Masunungure (2007), Kasambala, (2006), and Bond and Manyanya (2002). The existence of these markers in Zimbabwe is therefore not an issue of debate, as evidenced by the admission of the Government of National Unity in the preamble to the Global Political Agreement (GPA) where it is stated that:

Dedicating ourselves to putting an end to the polarisation, divisions, conflict and intolerance that has characterised Zimbabwean politics and society in recent times (GPA: Preamble).

What is questionable is the exact moment when Zimbabwe entered into the transitional phase. In that regard, Masunungure (2009) contends that Zimbabwe entered into the transitional phase when ZANU PF ceased to be the sole political party in power by entering into a power sharing agreement with its two biggest rivals, the two MDC formations. According to Masunungure (2009: 1), political transition in Zimbabwe is transition from ZANUPF's political hegemony to something other than its undiluted political domination. According to this view, Zimbabwe's transitional period began on 15 September 2008 when the three main political parties in Zimbabwe, namely, the two MDC factions and ZANU PF, signed a power sharing agreement otherwise known as the Global Political Agreement.

In contrast to the above, it can be argued that Zimbabwe's transition originated in early 1960s with the fight to end white minority rule. This view argues that Zimbabwe did not observe the basic tenets of democracy after its independence in 1980. Major proponents of this view are Murithi and Mawadza (2011) who argue that Zimbabwe had complex political problems with interlocking national, regional and international political dimensions rooted in both historical and contemporary factors and developments. For them, this is not unique to Zimbabwe as most post-colonial African states such as DRC, Central African Republic, Uganda, Rwanda, Burundi, Angola, Mauritania and Swaziland were in transition and blundering towards

democracy. From 1990, 34 of the (then) 47 African states were in this phase of transition and making some moves towards democracy (Bratton and van de Walle 1997: 219). Bratton and van de Walle (1997: 77) argue that Zimbabwe was among the many countries that failed to transform into a fully-fledged democracy and stagnated instead in the transitional zone.

Other scholars such as Bamu (2008) are convinced that Zimbabwe was a transitional state which entered into transition through a negotiated settlement between the three main political parties. Bamu does, however, concede the improbability of Zimbabwe becoming a fully-fledged democracy basing on ZANU PF's continued presence in power. He argues that as long as ZANU PF remained in power, chances were good that it would block meaningful efforts at accountability for past violations. This view therefore supports the notion that a political reform and not a democratic transition occurred in Zimbabwe. Bamu further contends that political reforms short of democratic transition was the likely scenario in Zimbabwe, because negotiated settlements rarely bring about complete democratic transition as complete transition would mean the highly unlikely dismantling of the ZANU PF edifice. It can be argued therefore that Zimbabwe was in a political transition phase, but with no transition towards democracy occurring as long as ZANUPF held substantial power which allowed it to stop any form of transitional justice that would mean the punishment of its own.

Eppel and Raftopoulos (2008: 142) take a more simplistic view of Zimbabwe's transition debate. They note that a transitional state is, *inter alia*, characterised by its efforts to seek historical accountability for its violent past. For them, the absence of a concrete clause dealing with transitional justice in the GPA is indicative enough of the absence of transition in Zimbabwe. The same view is shared by Muringi (2009: 139) who argues that as long as ZANU PF was in power, one way or the other, there was definitely no transition to debate. Transition here is taken as transition to democracy through the implementation of official transitional justice programmes. If the transitional period does not have any potential to enable the implementation of transitional justice then it is a pseudo transition. Muringi's analysis is premised on Boraine's (2004: 67) definition which envisages transitional justice as involving the following key components: accountability, truth recovery, reconciliation, institutional

reform and reparations. In an attempt to prove that Zimbabwe was not in transition, Muvingi (2009: 139) took each of these transitional justice options in turn and tested their likelihood, concluding that it was clear that none of them could be envisioned in Zimbabwe, before a radical political transformation. Mashingaidze (2011) also noted the impossibility of transitional justice in Zimbabwe in the absence of a genuine transformation.

Iliff (2009: 162) articulates an alternative view of the debate that resonates with the objective of this study. His position is that the excessive focus on the assumption that a nation is in transition when individuals most responsible for rights violations cease control of crucial state functions, is an oversimplification of reality. He argues that the expectation that a nation is in transition when there is regime change maybe to the detriment of more modest, local strategies that focus on community level reconciliation, dialogue and accountability. For Iliff (2009: 162-163), the situation in Zimbabwe presented a propitious moment for the analysis of existing and emerging grassroots reconciliation strategies, which suggest that in situations of on-going violations and in which international criminal accountability for gross violations remains out of reach, transitional justice advocates should bracket international crimes until more propitious circumstances prevail. Those who advocated for non-state transitional justice mechanisms believe the period around the formation of the GNU was ideal for the promotion of non-state, locally developed programmes to promote community healing and reconciliation. The aim of such programmes was to initiate the national healing process from the grassroots going up. Whatever strategies or mechanisms would be adopted by the state at a later stage would have their work reduced, thereby making reconciliation and national healing a reality. The non-state community based transitional justice mechanisms, which Iliff advocated, include the Tree of Life programme. This is a programme implemented in rural areas and involves the healing of all forms of trauma of victims of gross violations of human rights. Other measures include traditional transitional justice mechanisms such as *ngozi*, *botso*, *chenura* and *nhimbe*.

## 2.6 Zimbabwe's transitional period: a critique

When a country is in transition, there are certain demarcatory political and legal imperatives that were only briefly introduced in the above debates. These include legislative changes such as the amendment or the writing of new constitutions and the holding of referenda or elections. Participation in these political processes should be widespread and should include those political entities that were disenfranchised prior to the commencement of the transitional period. As of January 2013, the drafting of a new constitution in Zimbabwe was at an advanced stage with the government promising to hold a referendum on the draft constitution and general elections in the same year (2013). One contentious issue regarding the position of the rule of law during the transitional period is how the law should be treated (Teitel 2000: 24, Isser 2011: 121). The need to uphold the rule of law during transitional periods leads to alternative mediative constructions which Teitel (1997: 2021) termed transitional rule of law. Transitional rule of law addresses the dilemmas implied in the attempt to effect substantial political changes through and within the law during the transitional period. In other words, it helps transitional states to amend the law while remaining within the law and therefore not committing new injustices.

The inclusion of Articles 6, 7 and 11 in the GPA were central in ensuring Teitel's transitional rule of law, which in turn opens up socio-political spaces. Article 6 deals with the drafting of a new constitution, Article 7 addresses issues of equality, national healing, cohesion and unity while Article 11 saves about the rule of law, respect for the constitution and other laws. These articles are clear on what needs to be done regarding the new constitution, national healing and the rule of law. If the policy framework which contains the above articles is anything to go by, Zimbabwe will not stagnate in the transitional zone, but will instead mature into something else other than hegemony by ZANU PF. However, the successful implementation of the transitional agenda will depend heavily on the GNU's power, given that Zimbabwe was then aptly described as one country, two governments and two leaders (Masunungure 2009: 9). Zimbabwe's divided executive appeared to be confronting one another and rarely agreed on the implementation of major policy issues. This was exacerbated by the manner in which executive power was divided by the GPA between the two MDC formations and ZANU (PF). One party leader (Tsvangirai)

presided over the Council of Ministers while the other party leader (Mugabe) presided over the Cabinet, a situation which was tantamount to two cabinets in one.

Prior to the formation of the GNU in 2009, ZANU (PF) had not existed outside the state since independence in 1980. According to Weitzer (1990: 134) and Baynham (1986: 143), ZANU PF 'captured the state'. This rendered the de-politicisation of state institutions a priority for the transitional period (Bratton and Masunungure 2008, 41-42). This process is provided for in Article 13 of the Global Political Agreement under the heading State Organs and Institutions, which states that:

state organs and institutions do not belong to any political party and should be impartial in the discharge of their duties (GPA: Article 13, 1 and 2).

The same article goes on to list principles and requirements for a multiparty democratic system. This exercise is essential if Zimbabwe is to successfully undergo political transition and emerge as a democratised state. State institutions and organs that need to be de-politicised include the army, judiciary, police, secret service and, most importantly, the Organ on National Healing Reconciliation and Integration. De-politicisation of state institutions, what Masunungure (2009: 10) aptly termed the *de-Zanufication* of the state organs and institutions will determine the success of any transitional justice programme in Zimbabwe.

In Masunungure's view, given that the state in Zimbabwe was already in transition, what is debatable is how this transitional period will come to an end. The contemporary understanding of transition periods has a normative component of moving from less to more democratic regimes and evaluates the transitional period in relation to movement towards liberal democratisation (Huntington 1991:3-5, McFaul 2002: 309). According to Teitel (2000: 54), the end of the transitional period is marked by the return of the rule of law. Teitel (1997: 2013) uses the term 'liberalising' to refer to the direction of transitional justice. By applying the deductive law of syllogism, Zimbabwe experienced gross violations of human rights; there were no state policies addressing these violations. According to Masunungure, Zimbabwe was in transition; therefore grassroots community transitional justice mechanisms were in use.

However, all these debates regarding Zimbabwe's transition can be easily solved with the application of Huntington's (1991: 45-46) forms of transition, under which Zimbabwe falls into the transplacement category. This can be further qualified by supplementing Huntington with Kim's (1997) mediated transitional versus negotiated transition model. An amalgamation of these two produces a transplacement mediated transition. This is so owing to the role played by South Africa in ending the political impasse in Zimbabwe and the seemingly endless stalemate which the two major protagonists had reached. Election results in which there was no clear winner added to the impasse. In conclusion, it can be argued that, according to Huntington (1991: 114-141), Kim (1997: 131), Skaar (1999: 1109-1128), Carothers (2000: 6-21) and Masunungure (2011), Zimbabwe was a transitional state since the early 1960s. It follows that some transitional justice mechanisms were in use.

The next section comprises an exploration of an appropriate theory which best describes Zimbabwe's transitional justice programmes. This theory is transitional realism and idealism postulated by Teitel (1997: 2009-2080) and is explored in greater detail in the following section, starting with transitional idealism.

## **2.7 Transitional idealism**

Transitional idealism refers to those theories and practices that deal with the ideals of a 'better' world, state, politics and laws and is traceable to Plato's Republic (Herz 1957: 15) who is considered the father of idealism (Sharma 1991: 167, Nightingale and McDonald 2003: 555). Plato's contribution to the philosophy of idealism is contained in his masterpiece, *The Republic* (380 CE) which is concerned with the definition of justice and the order and character of the 'just city state' and the 'just man' and examines whether or not the 'just man' is happier than the 'unjust man'. Regarding idealism, Plato posited that:

...we are inquiring into the *nature of absolute justice* and into the character of the *perfectly just*, and into *injustice* and the *perfectly unjust*, that we might have *an ideal* (1901: 163; emphasis original).

It can be deduced that idealism is utopian and deals with the nature of absolute justice and the pursuit of an ideal society. Barusch (2012: 5) and Jayapalan (2002:

119) note that idealism endeavours to understand the character of the perfectly just who is desired, as opposed to the perfectly unjust who has no place in the ideal society or city. When extrapolated to transitional justice, transitional idealism is about the seeking of absolute criminal justice, not partial justice. This ideal type of justice is achievable through the application of the law in an effort to create a just and ideal society. Idealism deals with 'what ought to be' and is concerned with what is supposed to be happening (Herz 1957: 18). Distilled to its basics, transitional idealism holds that all criminals must be held accountable for their past violations of human rights. Transitional idealism's major, if not only, transitional justice mechanism is prosecution, either in local courts or international institutions such as the ICC.

In its quest to attain a just and ideal society, transitional idealism addresses its obstacles by applying the letter and spirit of the law, its consequences notwithstanding (Fuller 1958: 630-672). Idealism postulates that transitional justice has to be induced and realised as it resides elsewhere (probably in some institutions or similar bodies like truth commissions and courts) and not in the society or the victims. These transitional idealistic practices are believed to have gained prominence through the championing of the doctrine of universalism, which gained ground with the demise of communism (Herz 1951: 17). Its proponents argue that transitional idealism's major strengths lie in its ability to curtail vengeance by instituting individual accountability (Yarwood 2012: 55, Kritz 1995: 280 and Schabas 2008: 70).

Probably the strongest appeal of transitional idealism comes from its democratic peace theory which holds that states with similar modes of democratic governance do not fight one another (Hansel, Goertz, and Diehl 2000: 1173-1188, Huntington 1993: 22-49, and Fukuyama 1989: 3-18). Therefore, to deter the recurrence of violence, transitional idealists argue that all transitional states must transform towards an ideal type of democracy. Other proponents of idealism include former United States President, Woodrow Wilson, whose idealistic thought was embodied in his Fourteen Points speech (Rossini 2008: 63 and Garcia 2010: 27) which he delivered before a joint session of the American Congress on 8 January 1918.

The address was intended to assure the country that the Great War was being fought for a moral cause and for the sake of post war peace in Europe (Bradford 2009: 159). Wilson was also instrumental in the formation of the League of Nations, founded as a result of the Paris Peace Conference which brought World War One to an end. It was the first permanent international organisation to embody the idealist notion of maintaining world peace (Duncan, Jancar-Webster and Switky 2008: 171). According to its Covenant, the goals of the League of Nations included preventing wars through collective security and disarmament and settling international disputes through negotiation and arbitration (Knight 2001: 68). Arguably, these founding tenets of the League of Nations were the seed of the ICC. The origins of transitional idealism can also be traced to Immanuel Kant (1795) who proposed the concept of a peaceful community of nations in his work *Perpetual peace: A philosophical sketch* which outlined the idea of a league of nations to control conflict and promote peace between states.

In preparation for the next section, which will define transitional realism, it is prudent to precede that process by offering some preliminary differences between transitional idealism and transitional realism, using the theory of transitional jurisprudence. This theory articulates the nature and extent of the competition that exists between law and politics in the formulation of transitional justice mechanisms (Teitel 2000: 3). Both realists and idealists agree that the failure or success of a transitional justice mechanism is determined by its prospects for instituting democracy. For idealists, democracy is attained when the principle of the rule of law and the supremacy of the constitution are restored (Antoine 2009: 98).

There is a direct causal relationship between the strength and independence of the judiciary which drives transitional idealism and the possibility of idealist transitional justice being pursued in post conflict states (Lindsey 2007: 225, Tomuschat 2008: 374). A corrupt, partisan and captured judiciary will exist alongside impunity (Beebe and Kaldor 2010: 127) thereby necessitating the adoption of realist transitional justice mechanisms. An independent judiciary is more inclined to influence the adoption of idealist mechanisms to address past human rights violations (International Institute for the Rule of Law: 2003). In a nutshell, transitional idealism is narrow, legalistic and subscribes to the supremacy and primacy of the law in

dealing with past human rights abuses (Kritz 1995: 203). It is very formal and relies on trials as its major mechanism; a good example of transitional idealism are prosecutions at the ICC. Their efficacy as transitional justice mechanisms will be explored in chapters three and four of this study. In arguing for the broadening of transitional idealism beyond prosecutions, Ndulo and Duthie (2009) saw value in twinning transitional justice with broader post conflict development programmes rather than treating transitional justice as a standalone post conflict programme. This conceptualisation forms the basis of transitional realism which will be the focus of the next section.

## 2.8 Transitional realism

A number of scholars and philosophers have explored the relationship between realism and idealism (Kairys: 1990, Burley: 1993 and Boyle: 1992). As espoused by Teitel, transitional realism is a direct derivative of political realism. As a concept, political realism has been used in connection with theories claiming to be concerned with observance and analysis of political facts of the 'what is' of politics and history (Herz 1957: 15). Philosophically, realism is traceable to Baruch Spinoza (1677) who expressed his views on realism in a paper titled *Tractatus politicus (Political treatise)* which he wrote in 1675, but which was published posthumously in 1677. The treatise deals with a range of issues including an analysis of all forms of government, gender equality and peace. Spinoza noted that:

...on applying my mind to politics, I have resolved to demonstrate by a certain undoubted course of argument or to deduce from the very condition of human nature, not what is *new* and *unheard* of, but only such things that agree best with *practise*. I have laboured carefully not to mock, lament ... but to understand *human actions* (Spinoza in Nadler 2001: 342; emphasis original).

Certain tenets of political realism are observable in the above quotation. Realism does not deal with new concepts; rather, it concerns itself with what is already known and constituting general practice. Its key characteristic is that it endeavours to understand human actions (Forsythe 2006: 267). When applied to transitional justice it implies that realism is concerned with generally known transitional justice practices of societies which they have developed themselves and used over time.

Spinoza was one of the few philosophers to dwell on realism, the other being Machiavelli who in *The prince*, which was first published in 1513, using a Latin title, *De principatibus*, observed that realism is the political doctrine of expediency. According to Herz (1957: 18), realism deals with the 'what is' of politics as opposed to the 'what ought to be'. Transitional realism therefore deals with what is happening in post conflict societies as opposed to the absent ideal, which is desirable. In reaching realistic solutions and practices, transitional realism is cognisant of obstacles that are inherent in any rational solution. It is these obstacles that transitional realism manoeuvres around, not confronting them, in its quest to attain transitional justice. Transitional realism posits that transitional justice solutions are inherent in societal social facts and trends, which are bottom-up, less judicial, culturally relevant, reconciliatory, restorative, victim-centred, locally derived and less costly (financially) to implement.

By definition, transitional realism refers to an array of mechanisms and institutions that constitutes part of everyday life, used by post conflict communities to seek reconciliation, truth telling and reparation. This represents a radical departure from transitional idealism, which emphasises accountability mainly through prosecutions. Thus transitional realism is a local phenomenon based on local cultures, realities, traditions, perceptions and needs. Transitional realists perceive democracy as the opening up of spaces which were previously the preserve of the predecessor regime (Media Institute of Southern Africa n.d: 3). The opening of these spaces could be in the form of electoral, media and constitutional reforms. In addition and in agreement with transitional idealism, realism subscribes to the need for free and fair regular elections as a basis for democracy. This is in response to the broadened scope and application of the study and practice of transitional justice post the South African TRC (Muvingi 2011: 3). This broadening of transitional justice represents a movement away from the idealist, legalistic theoretical framework towards an inductive one that recognises an array of everyday activities turned into transitional justice mechanisms. One advantage of the broader realist transitional justice mechanisms is their capacity to address third generation human rights such as the right to development, the right to peace and the right to a clean environment (Tomuschat 2003: 48).

Transitional realism is about local transitional justice mechanisms which typify a rebuke of defeatist tendencies as they epitomise communities' initiatives to seize opportunities and initiate transitional justice. As a broader concept they are not definable in geographical terms alone, although geography is an integral part of their definition. In addition to geographical boundaries or place, local traditional justice mechanisms include local ownership and engagement of those most affected by the conflict (Lundy 2009: 321). They entail processes where local inhabitants have a real and significant say in the formulation, implementation and evaluation of transitional justice mechanisms that reflect their own perceptions of reconciliation, their specific culture and values. This elicits what Lundy and McGovern (2008: 1) termed the 'voice from below', local agency and popular participation. This represents a departure from the legalistic, top-down, 'one-size-fits-all' idealist transitional justice frameworks. This broader realist conceptualisation helps to address the shortcomings inherent in idealist imported mechanisms, such as their inability to deal adequately with the issue of resentment which manifests in the form of victims who refuse to forgive those who harmed them. Imported idealist mechanisms have tended to impose what Derrida (2005: 76) calls the conditional forgiveness of 'social therapy' on victims. Broader realism avoids this problem by encompassing a wide range of mechanisms which are victim-centred, locally sensitive and culturally relevant.

Realist transitional justice mechanisms deserve interrogation in order to ascertain their capacity to deliver what Minkinen (2007: 513-531) terms 'just' forgiveness. This eliminates the possibility of impunity disguised as pardons and amnesties which, according to Kant (1914: 337), constitutes the greatest wrong because they break the necessary formal link between crime and punishment. This broader realist view will assist in revealing transitional justice mechanisms that were used in communities which experienced what Shweder (2005: 181) terms the 'collision of cultures, rights and traditions'. Transitional realism takes into account factors such as the environment, culture, health, gender and religion, which transitional idealism rarely considers in its application of transitional justice (Klein 2009 265-281, Eppel: 2008, 2011). The exclusion of victims' voices and social practices does not permit one to fully comprehend the extent of the role which the presence of material, as well

as gender, socio-cultural and spiritual factors plays in the victims' perceptions and attitudes towards justice and reconciliation in post-conflict societies (Igreja 2007: 55-56). Igreja also believes that it leaves one ignorant of the judgements that victims make of the different politico-legal transitional justice mechanisms.

From the above discussion, key characteristics of realist transitional justice mechanisms can be listed and are victim-centred, locally conceived and locally implemented. The mechanisms are not alien or new to the communities as they include everyday reconciliatory community endeavours. Most importantly, they are bottom-up and very flexible in their response to the healing and reconciliation needs of the victims and the perpetrators. This is in contrast to dominant theories of transitional justice which share a common weakness in that they often presuppose foundations that are unavailable in the context of some political transitions (Leebaw 2001: 364). For example, advocacy for transitional prosecutions often relies on the premises that are drawn from the manner in which prosecution functions in a stable regime. Similarly, critics of prosecution who champion reconciliation, imply in this term a pre-existing homogenous community of victims which requires healing in order to progress toward the rule of law (Leebaw 2001: 264). The reality is that victims and perpetrators often reside in the same communities and, in some scenarios, the same individual who was a victim at one time turned perpetrator at another. Transitional idealism equally ignores the dynamics of local environments such as culture, religion and customs. Consequently, it lacks the capacity to deal with complexities such as victims who genuinely refuse to forgive and the problems associated with individuals who are both victims and offenders, something that is common in communities where violence was recurrent. The same theories emphasise ideals that appear to be very difficult for the local communities to comprehend in the aftermath of protracted mass violence. These ideals include such in-vogue phrases as *reconstruction*, *rebuilding*, *reuniting*, *refocusing*, *restarting*, and so on. At times, there will be no one to reunite with, nowhere to rebuild, nothing to refocus on and nowhere to restart.

The major characteristic of realism, as observed earlier on, is that its various mechanisms are bottom-up processes and not events. These bottom-up processes are generally inclusive and may utilise the concept of the 'living dead' (Villa-Vicencio

2009: 142) which is a central pillar in African traditional belief systems. These belief systems in turn give meaning to traditional transitional justice mechanisms. As an idealist universal concept, traditional transitional justice is difficult to conceptualise as it tends to be more particularistic, both in the way it is understood and in the way it is expected to deliver by individual victims and offenders (Layus 2010: 93). This individualistic conceptualisation renders rituals such as collective memory very difficult as gross violations of human rights affect individuals differently. The affected thus also expect different remedies and memorialise such events differently (Igreja: 2007, Eppel 2001: 8). These remedies vary according to a number of factors such as culture, gender and religion and whether one resides in an urban or rural area.

Broader realist transitional justice mechanisms are efficacious in addressing the central tenet of victim participation and local ownership of these mechanisms. Idealist mechanisms appear to utilise the ceremonial type of victim consultation in which imported mechanisms are imposed on local actors, often through the use of aid donors and non-governmental organisations (Nuttelfield 2010: 145). In contrast to the perceived ceremonial idealist victim consultation, broader realism implies the involvement of local people throughout the whole process of historical accountability culminating in reconciliation (Villa-Vicencio 2009: 130, Igreja: 2008). This is not guaranteed under imported idealist mechanisms whose main objective is not community reconciliation, but prosecution of those suspected of gross violations of human rights.

Transitional realism emphasises the seemingly obvious fact that victims are central to the dispensation of transitional justice as they are the primary wronged and they are the ones to be directly compensated and healed (although to some extent perpetrators need healing as well). In contrast, idealist mechanisms focus mainly on the offender and that justice is not only done, but is seen to be done. This difference is also manifested in the manner in which the two approaches view amnesties.

Idealists view amnesty as a violation of human rights (Martin 2006: 172, International Centre for Transitional Justice: 2003). For them, amnesty means that victims suffer twice as amnesty allows offenders to escape without being held accountable for their actions or paying compensation. Realists, on the other hand, view amnesties as a

'necessary evil' that aids the process of truth telling and truth recovery. Transitional idealists are concerned that transitional justice mechanisms such as amnesties are open to abuse by both politicians and perpetrators, to the detriment of victims. Latest evidence pointing to this kind of weakness in amnesties came from South Africa, where in 2002, President Mbeki pardoned 33 human rights abuse offenders under the Special Presidential Pardon programme (Institute of Security Studies News: 29 June 2012). Other amnesty beneficiaries such as Dirk Coetzee, the late co-founder and commander of the covert South African Police unit based at Vlakplaas, were granted amnesty as a last resort in their bid to avoid prosecution. In a television interview on SABC 2's morning show on 8 March 2013, former Truth and Reconciliation Commissioner Advocate Dumisa Ntsebeza expressed regret that perpetrators like Coetzee had managed to manipulate the amnesty procedure and receive pardon. This allowed Coetzee to go to his grave with the secrets of his hit squad, which included the whereabouts of many anti-apartheid and human rights activists who disappeared during apartheid. Such manipulations of amnesties discredit transitional realism and give credence to idealist transitional justice mechanisms, especially trials.

The strength of broadening transitional realism is that it enhances its capacity to extend the scope of transitional justice to include non-formal mechanisms such as those used at grassroots level and other mechanisms not traditionally classified as transitional justice mechanisms. This theory is ideal for contemporary Zimbabwe where the scope of transitional justice is broad and citizens have employed a diverse range of innovative mechanisms to seek healing and closure. Elsewhere, the transitional realism theory has been applied in other studies of reconciliation. Thomson and Nagy (2011: 11-30) applied it in their study of Rwanda's *gacaca* community courts, which focused on the relationship between law, power and justice as they impact on the lives of ordinary Rwandans. Their study proved that transitional idealism and transitional realism are not at the extreme ends of a continuum; rather, they can be stretched to create overlaps from which benefits from both can be enjoyed. This hybridisation is evident in the 'legalisation' process which the traditional *gacaca* institution underwent as it was applied post the 1994 genocide. It was a hybrid of the traditional process which was 'amended' in order to cope, *inter*

*alia*, with the complexities of modern day justice while still managing to be administered locally and thereby accessible to citizens.

Having explored transitional realism and transitional idealism, the next section takes this a step further by proposing the broadening of transitional realism. This is done in order to position traditional transitional justice mechanisms as viable peace building and reconciliation alternatives to idealist transitional justice mechanisms such as prosecutions at the ICC.

## **2.9 Towards a broader realist theory of transitional justice**

From the description of realist and idealist theories of transitional justice accomplished in the previous sections, it is imperative to note that a broader realist view is not only necessary, but overdue. This broader view consists of an array of traditional, community, non-state transitional justice mechanisms. Traditional transitional justice, also known as localised transitional justice, can best be described as a notion of place, people and processes (Lundy 2009: 321). It defines local transitional justice mechanisms as a set of locally informed reconciliation and peace building practices that emerge within a particular society and which are different or unique to that geographical place. Lundy (2009: 329) rightly states that:

the crux of the matter is how local populations are conceptualised, as active agents of change, stakeholders, sources of knowledge and expertise, or as passive victims and mere recipients.

The localised nature of broader realist transitional justice mechanisms allows for the nuanced analysis of customary practices which were turned into transitional justice mechanisms, especially in the rural areas of the Shona-speaking districts of Zimbabwe. The advantage of broader transitional realism is that it allows for an expansion of the current understanding of impunity beyond the legal definition to include other forms such as environmental impunity, religious impunity and financial impunity which will be defined below.

Environmental impunity is the wanton destruction of the environment during war or periods of gross violations of human rights. The most widespread form of

environmental impunity is the laying of unmarked landmine fields, destruction of forests, poisoning of rivers and the use of chemicals harmful to the environment during war. An example is the alleged use of anthrax by Rhodesian government agents and the contamination of several watercourses near the Mozambique border with the cholera bacteria and warfarin, which a blood thinning anti-coagulant commonly used as the active ingredient in rat poison. Poaching is also another form of environmental impunity. It mainly serves two functions; to provide combatants with food and to raise money through the illicit sale of products such as ivory and game leather (United Nations Environmental Programme 2007: 94). As a crime, environmental impunity was under investigated in Zimbabwe during the period 1980 to 2011.

On the other hand, religious impunity is the abuse of various religions for political gain. It involves, *inter alia*, the manipulation of religious leaders to execute or support certain policies, which ordinarily they would not have supported. It also involves the abuse of religious powers by the religious leaders for their personal political gain. Financial impunity is akin to embezzlement and occurs during war and similar political disturbances when individuals and organisations pilfer huge sums of money, sometimes siphoning it off into offshore accounts. This practice also involved supporting and propping up of illegal regimes in exchange for business opportunities and lucrative tenders and contracts. These factors appear to be elusive in the dominant views of transitional justice yet they are central to reconciliation as they inform the different expectations of both victims and perpetrators.

The manner in which the idealist theory defines political transitions as postulated by Huntington (1991) and O'Donnell and Schmitter (1986) is problematic. Defining the transitional period purely as a movement towards liberal democracy or some democratic procedure limits the conceptualisation of transitional justice. The concept of political transition should be broadened to include other non-state (apolitical), non-legal practices that seek historical accountability for human rights abuses, especially those that succeed in reconciling and healing conflict torn communities. These practices occur as a result of the shift in both the legal and the political situation from being radical towards being liberal. This leads to the creation of an opportune moment for citizens to seek transitional justice using the various mechanisms at their

disposal without necessarily waiting for the state to initiate such healing programmes. For idealists, the transitional period both constitutes and constructs the unique legal system in which it operates and in which prior injustices inform the conceptualisation of justice (Teitel 2000: 222).

Another shortcoming of transitional idealism is that it often presupposes the existence of willing, competent and unbiased judiciaries, either domestically or internationally. The reality is that criminal accountability occurs at two levels; that of the offender and that of the criminal justice system. The accountability of the latter is particularly crucial as its failure leads to impunity and warlordism. In a realist world dominated by power politics, this assumption appears farfetched as most violations of human rights happen in societies where the judiciary will be either biased or not independent (Iliff 2012: 19). This is why realists do not subscribe to the supremacy of law over politics, advocating instead for changes and amendments in laws to suit certain prevailing conditions. According to realists, transitional justice necessitates the departure from such punitive and repressive laws and a move towards the moral right and away from the legal right (Cobban: 2011, Hart 1958: 593-629).

In conclusion, the table below illustrates the main differences between broad realist transitional justice mechanisms and idealist ones. The next section is an extension of the idealist/realist debate and focuses on the role of the law during transitional periods as viewed by transitional idealists and transitional realists.

**Table 2: Differences between broad realist and idealist transitional justice mechanisms**

<b>Broad realist transitional justice mechanisms</b>	<b>Idealist transitional justice mechanisms</b>
Local to the (post) conflict zone	Imported into the (post) conflict zone
Central focus is the victims	Focuses mainly on the offender
Aim is to achieve healing, reconciliation and at times compensation	Aim is to ensure accountability
Uses various mechanisms that are	Uses only legal means to achieve justice

conflict and culturally sensitive	
Less costly to implement	Relatively costly to implement
Very credible and legitimate especially to the victims	Suffers from lack of credibility and legitimacy for the victims
Democratic as it is implemented by the victims in their respective communities	Accused of being dictatorial as they are implemented by external agencies, usually in contexts outside the scene of the violations
Particularistic	Universalistic

## 2.10 The role of the law during the transitional period

Transitional idealism is useful in understanding the relationship between the law and human rights, especially in a country where the rule of law is weak or compromised. The general characteristic of dictatorships and illegitimate regimes is constant clashes between human rights and the law (Kritz 1995: 97). These occur when dictatorships enact immoral laws to oppress citizens while simultaneously propping up their regimes, thereby turning citizens into subjects (Fridell: 2007: 57, Ndlovu-Gatsheni: 2011, Mamdani: 1996). This contest is cast as parliament versus the constitution (Eleftheriadis 2009: 1, Finnis 1973: 58) and occurs when individual human rights enshrined in the constitution are overridden and or suppressed through the deployment of institutions set up by democratic processes such as the army, intelligence and the police to brutalise citizens. Transitional realists argue that transitional periods are propitious for the rewriting of the constitution while idealists, as postulated by Hart (1958: 593-629), argue for the observation of all written laws, their immorality notwithstanding, until such laws are repealed or amended. In most cases, constitutions are forward looking, but in transitional periods they are remedial and backward looking as well (Teitel 2000: 225, Madhuku: 2010, Elias 2007: 4). These constitutions or constitutional amendments are useful in addressing past abuses and instrumental in seeking historical accountability, while deterring such abuse from happening again in the future.

The use of the constitution to propel transitional justice as propounded by idealists occurred in both Zimbabwe and South Africa. In South Africa, the interim Constitution of the Republic of South Africa Act 200 of 1993, which was later repealed by the current Constitution of the Republic of South Africa [Number 108 of 1996], stated in its preamble that:

...it is necessary for such purposes that provision should be made for the promotion of national unity and the restructuring and continued governance of South Africa while an elected Constitutional Assembly draws up a final Constitution.

In Zimbabwe, Constitutional Amendment Number 19 was the legal instrument that provided for the Global Political Agreement signed by the three major political parties which in turn made provisions for the writing of a new constitution. Article 7 of the same instrument specifically mentions and mandates the GNU to:

... give consideration to the setting up of a mechanism to properly advise on what measures might be necessary and practicable to achieve national healing, cohesion and unity in respect of victims of pre and post-independence political conflicts.

According to Teitel (1997: 2017), human rights violations are legally said to have occurred in circumstances when the value of legal change was in tension with the value of adherence to the principle of settled legal precedent. This is also called breaking the rule of law and this has happened in Zimbabwe since independence, as admitted by the GNU when it was inaugurated through the Global Political Agreement (Preamble to the Global Political Agreement: 2008).

For transitional idealists, the law remains superior during whatever form the state adopts including and during the transitional period. This is expressed in the dominant role of the law during transitional periods and the superiority of the law in terms of the supremacy of the constitution (Teitel 2009: 2014, Khan 2003: 255). According to this view, the law has a complex role to play in periods of political transformation from human rights abuse towards democracy. Idealists are aligned to Teitel's (2003: 69) definition of transitional justice as the conception of justice associated with periods of political change, characterised by *legal responses* to confront the wrongdoings of repressive predecessor regimes. While the superiority of the law is unquestioned by realists during peaceful times, they question the supremacy of

immoral laws enacted by dictatorships which they argue are akin to the proverbial fruits of a poisoned tree (Bohl 2006: 571). It is these contentious laws that realists argue should be discarded during the transitional period in order to enable the democratic transition to be effective and in order to prevent the state from sliding back into gross violations of human rights (Fuller 1958: 630, National Constitutional Assembly (Zimbabwe): 2001).

Teitel's (2003: 69) definition of transitional justice emphasises the centrality of law in idealist transitional justice. This role is viewed as 'shepherding' the state through the precarious transitional period, initially enabling judicial reform and subsequently holding those who committed human rights abuses accountable for their actions. According to Teitel (1997: 2009, 2000: 7) and Williams, Nagy, and Elster (2012: 59), law in transitional periods is commonly conceived as following idealist conceptions unaffected by the prevailing political context. The law is seen as separate from and superior to politics as enshrined in rigid constitutions and must be obeyed in all instances (Withana 2008: 57, Slapper and Kelly 2011: 455 and Hart 1985: 593). This translates to the superiority of the constitution over parliament as is the case in a constitutional democracy. On the other hand, transitional realism is concerned with the legislative environment during the transition period and the nature and role of law during these periods (Casper and Taylor 1996: 190, Teitel 1997: 2009). Idealist transitional justice mechanisms which are imported into post conflict societies, such as ICC prosecutions, are legally complex hence rendering transitional justice elitist (Hinton 2010: 59). Sriram, Garcia-Godos et al. (2012: 52) call this the 'judicialisation' of transitional justice. Realists oppose this 'judicialisation' of transitional justice, claiming that trials create fairly individualised accounts of human rights crimes which deprive the post conflict communities of a chance to understand the full extent of the patterns of human rights abuses which they suffered (Abou-el-Fadl 2012: 10). International Law Statutes, as interpreted and implemented by the ICC, are a complex set of procedural remedies that are too legalistic for most citizens to understand (Schabas 2010: 29, Lahai: 2012).

Teitel (1997: 2014) addresses the question of the stage during the political transformation period at which the law starts to apply in an idealist transitional state. For idealists, transitional justice should be concerned with gross violations of human

rights during the two regimes (predecessor and successor) ending with some objective political procedure like the writing of a new constitution or the holding of inclusive elections (Fukuyama 1992: 13, Bernal, Panizza and Rigobon: 2011). Idealists believe that the acceptance of the rule of law by all major political forces signifies the end of the transition period (Teitel 2000: 214, United Nations 2006: 294). According to Huntington (1991: 65), the transition period ends when the most powerful collective decision-makers are selected through fair, honest and periodic elections.

On the other hand, the manner in which transitional realism relates to the law has resulted in it being characterised as 'settled and unsettled, backward looking and forward looking, disclaiming past illiberal norms while reclaiming future liberal ones' (Teitel 1997: 2015). According to transitional realism, through the process of transitional jurisprudence, the law is constituted by borrowing from previous experiences and using them to predict possible political trajectories in order to preempt any future gross violations of human rights. For realism, the law is a preemptive mechanism that borrows from past experiences to avert future human rights abuses. It is settled in that it applies continuously across the two regimes, unsettled in that it is constituted and reconstituted during the transitional period (Naqvi: 2008). It is this confused, unsettled nature of the law which appears to have induced citizens to seek alternative mechanisms to implement transitional justice which are non-legal, more so when the law had displayed a great propensity for being annexed and abused by the ruling elite. It can be concluded that the main difference between transitional idealism and transitional realism is the manner in which they interpret the role of the law during the transitional period. This calls for a more nuanced analysis of the role of the law and, by extension, trials during the transitional period. This will be done as a critique of imported idealist transitional justice mechanisms.

## **2.11 Trials as the main tool of transitional idealism**

Transitional idealism uses trials as its major transitional justice mechanism. These trials maybe domestic or international or a combination of the two, as was the case in Rwanda where the National Organ Law Number 8 of 1996 was used concurrently with the Arusha-based International Criminal Tribunal for Rwanda (ICTR). Given the

compromised nature of domestic judiciaries in most post conflict states, any meaningful success of trials is usually put down to international judicial institutions, mainly the ICC. The main challenge of trials is that their efficacy as a transitional justice mechanism is not without controversy, at both the domestic and the international level (Schabas 2007: 525, Yanezi-Barnuevo and Hernandez and Schabas 2004: 51). Idealists use trials to demarcate legitimate from illegitimate rule (Bell 2009: 7). For transitional idealists, in the absence of domestic legal reforms and unwillingness by the regime to prosecute suspects of gross violations of human rights, they emphasise the need to enforce international provisions meant to assist such societies in achieving transitional justice (Rome Statute, Article 17 (1) (a) and (b)). In a globalised world, idealists subscribe to the view that the ICC was an attempt at creating universal norms for transitional justice (Quinn 2007: 89, Mazrui: 2001, Mamdani 2008: 17–22, Schabas 2000: 4, Bell 2008: 248).

In the aftermath of the two international criminal *ad hoc* tribunals, the ICC was set up in 2002 as a permanent mechanism to become the court of last resort for countries in transition seeking historical accountability for past human rights abuses. What discredits the use of imported transitional justice mechanisms, particularly ICC trials, is the court's track record in societies where it has intervened which is not convincing at the very least (Scharf: 1994, Schabas 2007: 519, Lattanzi and Schabas: 1999: 19, Otim and Wierda: 2010). A case in point is the ICC's involvement in a tug-of-war with Libya over two suspects of gross violations of human rights. In this case, the ICC was in violation of its own Principle of Complementarity which states that the ICC may only intervene when a state is unable or unwilling to prosecute suspects for crimes committed in its territory. Libya was willing and claimed to be able to prosecute the two contentious suspects, raising suspicion about the ICC's objectives in this case in particular and in transitional justice in general. It has to be conceded, though, that although the Nuremberg trials set an idealist precedent, the application of the theory to past historical events may be viewed as a chronicle.

Idealist transitional justice seeks to prescribe and universalise responses to past human rights abuses. This gives rise to what can be termed 'prescriptive universal idealism' which operates through the codification and classification of crimes which fall under the ICC's jurisdiction. There are four such crimes: war crimes, crimes

against humanity, genocide and the crime of aggression (Articles 5, 6, 7, and 8). Cobban (2006) and Schabas (2007: 115) express reservations at the manner in which the four crimes are defined in the ICC Statute, which to them is so narrow that many crimes against humanity go unpunished or even unnoticed. In contrast, former United States Foreign Secretary Henry Kissinger (2001: 86-92) worried that when discretion on what crimes are subject to universal jurisdiction and whom to prosecute is left to national prosecutors, the scope for arbitrariness widens. Other key concerns with prescriptive universal idealism are that it makes no provision for dealing with other grave international crimes such as terrorism, crimes against peace, human trafficking, drug trafficking and money laundering. It is this narrow worldview which realists castigate in their advancement of what they term a more realistic approach to transitional justice.

The major advantage of transitional realism over transitional idealism is that realism is particularistic and sensitive to local dynamics, while idealism is universalistic and prescriptive. These dynamics usually include the preserving of precarious peace by issuing conditional amnesties, as was the case in South Africa where the TRC issued amnesty in exchange for truth telling (Chapter 4, Promotion of National Unity and Reconciliation Act No. 34 of 1995). However, and as alluded to earlier, amnesties are not without their challenges. The major challenge facing amnesties is their struggle to balance the seemingly contradictory demands of the outgoing and incoming regimes (Elster 2004: 1990, Dugard 2006: 194). In turn, this balance is dependent on which of the two regimes will be favoured by the balance of power at the time of negotiations. More importantly, there are challenges regarding the legality of amnesties as they were found by the Inter-American Commission and the Court of Human Rights to violate the rights of victims (Jurdi 2011: 80, Ntoubandi 2007: 174, Schabas 2001: 68). According to the Inter-American Commission and the Court of Human Rights' ruling, there are five specific victims' rights that are violated by amnesties. These are the rights to justice, truth, judicial protection, reparations, and the right of access to a Court (Bohl 2006: 569).

For realists, during transitional periods the constitution faces three options: suspension, amendment or redrafting. Depending on where one places the beginning of Zimbabwe's transition, it could be argued that Zimbabwe pursued all

three options. The constitution was amended more than 18 times and a new one drafted. The relationship between the law and politics suggests that there was hardly any room for transitional idealism during Zimbabwe's transitional period. Evidence used to support this assertion is the rate at which impunity continued, a fact well documented by Amnesty International (various reports: 2008, 2009, 2010). Additionally ZANU PF strengthened its stronghold on state institutions, which it allegedly captured well before the formation of the Government of National Unity (Kriger 2003: 62). This resulted in the exacerbation of impunity, thereby rendering idealist transitional justice mechanisms ineffective in Zimbabwe (Compagnon 2011: 8).

Realists view the constitution as a political guide, constructed by the successor regime in order to, *inter alia*, regulate state civil relations (Mehta 2010: 333). In Zimbabwe, the end of each period of gross violation of human rights was marked either by a new constitution or by amendments to the existing one (Hatchard 2001: 210-216). The Zimbabwean constitution that was designed and agreed upon by the Zimbabwean nationalists, the Rhodesia-Zimbabwe government and the British government at the Lancaster House Conference of 1979 was introduced in 1980 when the Smith regime exited and the Mugabe government entered. The official end of *Gukurahundi*<sup>11</sup> in December 1987 ushered in the amalgamation of the two main political parties (ZANU PF and PF ZAPU). The constitution was amended through the Constitution Amendment Act Number 7 of 1987 to create the Executive Presidency. Similarly, the end of the 2008 violence saw the formation of the Government of National Unity through the signing of the Global Political Agreement with a new constitution drafted in 2012. The above political dynamics supports the realist perspective that the constitution is a living document that reflects the balance of power and is prone to be amended or rewritten in line with the ensuing shifts in the balance of power and political reality.

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<sup>11</sup> Violence in Zimbabwe did not end with the attainment of independence as the state was soon to respond disproportionately to a group of disgruntled soldiers by unleashing a specialised North Korean trained brigade to crush the 'dissidents' in Matebeleland North, Matebeleland South and the Midlands provinces. Estimates put the casualties at 20 000. This culminated in an agreement, this time called the Unity Accord between Joshua Nkomo's ZAPU and Mugabe's ZANU - PF to form ZANU PF in December 1987.

According to the realist theory of transitional justice, the nature and role of constitutions in negotiated transitions is largely conceived in political terms in which they are seen as extensions of ordinary politics and not as products of legal due processes (Teitel 1997: 2050, 2000: 197). Realism posits that the transition in transitional justice is characterised by the limited, partial and defined political parameters within which it occurs. In transitional states, idealism faces challenges when the law is suddenly caught between the past and the future, between backward looking and forward looking, between being retrospective and prospective (Teitel 1997: 2009). As witnessed in Zimbabwe and Kenya, in order to bridge the legal gap between the past and the future, realism adopts interim measures such as unity governments to act as a buffer between the outgoing and the incoming regime. For realists, transitional jurisprudence outlines a paradigm that acknowledges conceptions of justice as partial, contextual and multiple and based on the premise that conceptions of justice emerge in a language that is responsive to prior injustice (Leebaw 2001: 364). It is this partiality of the conception of transitional justice that necessitates the adoption of local multi-layered, multi-tooled contextual mechanisms.

Moving away from the prosecution-based idealist notion of universal prescriptive one-size-fits-all mechanisms, transitional realism asserts that there is no single correct response to the crimes of a prior regime. This is so because a state's response is contingent upon a number of factors, including the legacy of injustice, legal culture, the dynamics of the transitional period and the political circumstances under which human rights abuses ceased or subsided (Hatchard 2001: 210). Realist transitional justice affirms that it makes little sense to suppose that a single approach, such as prosecutions, could be an effective or even a just response to diverse legacies of injustice usually spanning long periods. In most cases, these injustices will be geographically wide, structurally deep and systemically protracted (Ndlovu-Gatsheni: 2011, Human Rights Watch: 2008, 2009, 2010, Amnesty International: 2010). Surely the prosecution or incarceration of a lone warlord like Thomas Lubanga or Don Bosco Ntagama will do little if anything to reconcile the Congolese people.

The challenges brought about by the predecessor/successor versions of justice that are inherent in idealist models of transitional justice are circumvented by the use of

realist models which amalgamate the two. This gives rise to what others term political transition as opposed to transitional justice (van der Merwe, Baxter and Chapman 2009: 117, Rotberg 2010: 213). There is value, therefore, in broadening realist transitional justice rather than abandoning it in favour of an alternative concept of political transition since the latter negates the justice needs of transitional communities. This leads to the next section, which positions decades old, bottom-up, victim-centred customary reconciliatory practices as viable transitional justice mechanisms.

## **2.12 Traditional realist transitional justice mechanisms**

The breadth of the realist theory of transitional justice and the unique nature of Zimbabwe's transitional period necessitates its demarcation into rural and urban realist mechanisms. Although such a demarcation is a contested phenomenon, it is meant here as an analytical categorisation, which does not imply that those in rural areas do not go to urban areas or *vice versa*. It is meant especially as a locator of the geographical sites where the processes, ceremonies and rites that constitute traditional transitional justice processes occur. Traditional realist transitional justice mechanisms, which are the concern of this study, are executed mostly in rural areas mainly because most of them are based on customary practices (Eppel et al: 2009: 29, Sachikonye 2012: 150, Iliff: 2012). Their opposite complements are modern and mostly found or practised in urban areas. These include the use of technology to broadcast messages otherwise deemed illegal by the oppressive regime, the circulation of online newspapers and of internet-based evidence of human rights abuses on media such as YouTube and the signing of online petitions. Such uses of modern realist technology-based transitional justice mechanisms was variously credited with the initiation and eventual perceived success of mass uprisings in the North African countries of Tunisia, Egypt and Libya (Olimat 2012: 91, Couldry 2012: 130). So pivotal was the role played by these broad realist transitional justice mechanisms that the Arab Spring revolutions were termed the Twitter revolutions as a way of recognising the role played by social media in mobilisation against human rights abuses. The existence of these mechanisms, their success and failure will not be addressed here as they deserve a more detailed analysis, one which is beyond the scope of this study.

### 2.13 Introducing traditional transitional justice mechanisms

This study is concerned with the exploration of customary transitional justice mechanisms. One main difference between urban-based mechanisms and their rural counterparts is the makeup of the core group. Those in urban areas are based on virtual communities or communities linked by common purposes while those in rural areas are pivoted on the family and kinship based structures (Igreja 2007: 298, Gahina 2013: 30). In terms of evolution, indigenous based mechanisms appear to be static or marginally evolutionary. This evolutionary stagnation can be attributed to the involvement of the 'living dead' in transitional justice (Nabudere 2004: 12, Eppel: 2011, Chavunduka 1980: 132, Lan: 1985).

Indigenous realist transitional justice mechanisms, while being region and at times ethnic specific and therefore lacking a national appeal, are able to effectively reach communities. This renders them more credible, especially to the victims and sustainable as opposed to once-off idealist imported mechanisms/national events such as truth commissions and international tribunals. Indigenous mechanisms are institutionalised and culminate in reconciliation ceremonies that are usually presided over by the village head or local chief (Ranger 1992: 698-707). Realist traditional transitional justice mechanisms utilise family structures and other customary institutions such as chiefdoms to seek accountability, reparations, closure and even memorialisation (Igreja 2007: 174). One such institution in use in Zimbabwe is the institution of *ngozi* (avenging spirit) which is used by the Shona people to seek accountability and reparations in cases of mysterious murders or politically motivated disputed fatalities, among others (Chavunduka: 1978: 14-18, 1980, 1986, Gelfand: 1956, 1973, Mawere: 2011: 85).

One distinct feature which separates indigenous from urban realist transitional justice mechanisms in Zimbabwe is the perception of the participants in a conflict. In rural areas, both perpetrators and victims are viewed as survivors (Eppel and Raftopoulos 2008: 7). They are survivors because they endured a violent phase in their lives, albeit on opposite sides, and both are believed to be in need of healing and closure (Brickhill 1995: 163). This is in contrast to urban realist mechanisms, which consider the victim as the lone survivor of a conflict and see no merit in treating the

perpetrator as deserving of mercy, let alone healing and closure. On this basis, it can be argued that urban realism operates in a manner that leaves little or no room for reconciliation. An example of this difference in the perception of justice was evident in the results of a countrywide survey by the Research and Advocacy Unit in 2009, in which it was found that 57percent of the rural respondents felt that there should be amnesty for lesser crimes committed between 1980 and 1987, yet the violence predominantly affected rural areas.

Indigenous realist transitional justice is a practice anchored in the expectations, not of victims alone, but also of their families and communities (Villa-Vicencio 2009: 130). The main advantages of these indigenous realist transitional justice mechanisms are embodied in their ability to address both individual and community justice needs, to offer sustainable justice, which is both given and negotiated, to provide both retributive and restorative justice options, to focus on both individual and social truth-telling, recognise the duality of victimhood and perpetratorship, foster both reparations and self-improvement, provide both verification through evidence and storytelling and to offer both ritual and procedural accountability (Igreja 2008: 274, Villa-Vicencio 2008:3).

Villa-Vicencio's argument on the efficacy of indigenous realist transitional justice mechanisms can be exemplified by events witnessed in rural areas of Matebeleland Province. A non-governmental organisation called Solidarity Peace Trust employed the services of expert forensic anthropologists to exhume and identify bodies of alleged victims of gross violations of human rights.<sup>12</sup> When properly executed, exhumation reveal a great deal about the nature and time of death. In describing the central role of exhumations in national healing and reconciliation, the Director of the Solidarity Peace Trust and anthropologist, Shari Eppel, noted that:

I have seen personally, how exhumations can result in healing of individuals and communities. I have heard the bones speak, as a result of experts listening very carefully to what they are trying to say. I have seen the voices of bones giving back the historical past to their families and villages – indeed, giving *themselves* back with

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<sup>12</sup> For an extensive presentation of the work of the Solidarity Peace Trust see their website at: <http://www.solidaritypeacetrust.org/1015/spt-zimbabwe-update-no-2/#more-1015> (accessed on 7 September 2012)

definite identities, to be buried where they are supposed to lie, so that at long last, after decades of silence, their spirits can rest in peace – and the living, that have mourned them for so long, can have closure (Solidarity Peace Trust, Zimbabwe Update Number 2, March 2011; emphasis original).

As a result of the above realisation, families voluntarily engaged the services of the Solidarity Peace Trust to exhume and scientifically identify the remains of late family members. Exhumations are carried out for a number of reasons: they allow for healing and closure not only for individual families but for whole communities; they give peace to the 'living dead'; they enable the 'living dead', the living and the 'living unborn' to be reunited through the performance of certain cleansing ceremonies and rites of passage (Eppel 2001: 2). This is done in order to enable the victim's eldest child to officially inherit the late parent's estate (Chavunduka 1998: 39).

It can be argued that the nature of transitional justice problems in rural areas is complex and totally different from those in urban areas. This is supported by the findings of the Amani Trust (2001: 3) which concluded that the problems of transitional justice in rural Matebeleland were those of aggrieved spirits and the presence of the murdered dead in culturally unacceptable graves. To this list Brickhill (1995: 163-173) adds the aggrieved spirits of many guerrilla fighters lying in unidentified graves. The significance of ancestral spirits in the Shona and Ndebele belief systems is of central importance to transitional justice in rural areas. It is the spirits of the dead that play essential roles in the lives of every family, guiding and nurturing them (Eppel 2001: 3, Gelfand 1959: 6, 1982: 42). In order for an ancestral spirit to fulfil its true task of protecting the family, it needs an honourable funeral which may be impossible or dangerous during periods of human rights abuses (Kumbira 1977: 123, Bourdillon 1974: 243, Chavunduka: 1994).

There are rites and ceremonies that have to be performed in the *right way* by the *right people* at the *right place* and during the *right time* of the year in order for a deceased person to return as an ancestor. The neglect of these rites constitutes injustice which must be corrected when the political environment allows. These traditional ceremonies unite the 'living dead', the 'living living' and the 'living unborn' and have different names across rural Zimbabwe (Gelfand: 1982, Kileff and Kileff

1970: 54-60). Among the Ndebele these rites are known as *umbuyiso* and referred to as *magadziro* by the Karanga of Masvingo Province while the Zezuru, Manyika, Korekore and Budya of Mashonaland East, Mashonaland West and the Midlands Provinces call them *kurova guva*.

The ceremonies of *umbuyiso*, *kurova guva* and *magadziro* enable generational inclusivity when the spirit of the dead is brought back into the community as an ancestor. This happens after the processes of exhumation and reburial (where applicable) or tombstone unveiling, also known as *nyaradzo*, which is a memorial service held in honour of those who have passed on. This enables the 'living dead' (ancestors), the 'living living' (community) and the 'living unborn' to carry out their respective duties. The absence of these rituals, for any number of reasons, implies that the deceased will not be honoured and consequently their spirits will become angry and restless, bringing bad luck to the family and the community at large (Eppel 2001: 3). Rural communities believe that transitional justice is an urgent priority as these angry and restless spirits are responsible for a wide variety of problems which befall them, such as bad behaviour in children, failure to marry, illness, drought, floods, crop failure, and even failure of development initiatives (Masaka and Chingombe 2009: 189, Eppel 2001: 3).

Indigenous realist traditional transitional justice mechanisms, as noted above, are premised on the centrality of the family as the core unit of human existence. In most cases, human life in rural Zimbabwe is a communal property (Mawere: 2010, Chivaura: n.d., Masaka and Chingombe: 2009, Gelfand: 1973). It is held by a community member on behalf of the entire community. This complex nature of ownership of property, which extends to human life, implies that gross violations of human rights are violations against the rights of the whole community of the victim. Whereas urban realist transitional justice mechanisms individualise victimhood and perpetratorship, the indigenous perspective takes cognisance of the fact that victimhood and perpetratorship are a communal and not an individual act. In the rural areas of Zimbabwe, Mr X versus the state or Mr X versus Mr Y becomes X family versus Y family. This communal ownership of victimhood and offendership allows communities to, *inter alia*, have a vested interest in the behaviour of their individual members. Collective victimhood and offendership tends to validate and authenticate

indigenous realist traditional justice mechanisms as they become locally owned. This dynamic affects the perceptions of reconciliation held by urban and rural populations.

Elsewhere, the credibility of imported idealist models of transitional justice has been questioned by Ndlovu-Gatsheni (2009c: 69), who noted the many implementation challenges they face, especially in Zimbabwe's rural areas. One of the main objectives of transitional justice is to foster reconciliation. Traditionally in rural Zimbabwe, reconciliation is a process often accomplished with the craft competency and craft literacy of a go-between. This implies that 'outsiders' like Truth and Reconciliation Commissioners are perceived as lacking a genuine *locus standi*. Importing transitional justice mechanisms in this regard becomes an absurdity. When used in rural areas, imported mechanisms demonstrate a lack of capacity to handle dynamics such as what Shari Eppel (2006: 267) terms 'healing the living dead', by focusing only on 'healing the living living'. Further complications exist in the prioritisation of projects by the rural population, where idealist imported transitional justice mechanisms rank below food and water access. According to Raftopoulos and Eppel (2011: 19), a pilot survey in Matabeleland in which people were asked to list their community's priorities found that 100 per cent of respondents rated food as the most urgent need, followed by water at 87 per cent (Masakhaneni Trust: 2008). This demonstrates the dynamics of rural life and the position imported idealist transitional justice mechanisms occupy in their lives.

Lastly, it is imperative to note that grassroots action does not automatically overcome all problems associated with elite driven transitional justice mechanisms. According to Thomson and Jazdowska (2012: 90), traditional rituals have a number of shortcomings. They argue that they rarely translate beyond their host ethnic group, may conflict with locally revered religious teachings and are sometimes incompatible with liberal notions of due processes. Their argument, in this respect, does not favour one particular method of transitional justice. The point is that the grassroots should have a determining role over the transitional policies to which they will be subjected (2012:89). This justice may be traditional or modern, but it is essential that it is locally owned and locally useful. If a society is to be reconstructed, healed and reconciled then change has to occur at the base, i.e., the grassroots.

## 2.14 Conclusion

This chapter laid the theoretical foundation for this study. It noted that the most applicable theoretical framework is Ruti Teitel's transitional idealism and transitional realism. As theories, the former emphasises the supremacy of law while the latter stresses the supremacy of contextual mechanisms that are sensitive to the precarious nature of political transitions. The issue of whether Zimbabwe can be regarded as a transitional state was also debated and it was concluded that, based on studies by Masunungure, Huntington, Skaar and others, Zimbabwe was indeed a transitional state. Political transitions were defined as periods of regime change accompanied by efforts at historical accountability for human rights abuses.

The chapter also considered the issue of when a state is considered to be in transition. It was noted that a nation's transitional period is usually marked by the existence of a precarious balance of power between the incoming and the outgoing regimes. Three likely outcomes for transitional states were identified as democracy, stagnation and more human rights abuses, as is the case in Uganda's various transitions since the Presidency of Idi Amin. Three major definitions of transitional justice were identified and discussed; these are the statist, the civil society and the international definitions. An alternative, albeit broader, definition of transitional justice was then proposed. It defines transitional justice as a broad range of bottom-up, victim-centred initiatives taken by communities in an endeavour to seek reconciliation and lasting peace. The major difference between this view and the other major ones is that the alternative view is less justice orientated and more reconciliation biased.

Indigenous realist transitional justice mechanisms were also identified and positioned as viable reconciliation and peace building mechanisms. These mechanisms are based on decades-old customary practices and rely on the connection between the three forms of life, i.e., the 'living unborn', the 'living living' and the 'living dead'. The passage of life through these three phases is accompanied by certain rites, rituals and ceremonies, the infringement of which constitutes injustice and hence must be corrected when the political environment permits.

Having introduced realist transitional justice mechanisms in the last section of chapter two, chapter three turns to an analysis of imported idealist transitional justice mechanisms, mainly ICC trials. It endeavours to broadly discuss the use of idealist transitional justice mechanisms in Africa through the interrogation of the ICC's track record on this continent. This will culminate in a discussion of the impact that the ICC has had on Zimbabwe's transitional justice trajectory in chapter four.

## **CHAPTER 3: THE ICC AND TRANSITIONAL JUSTICE IN AFRICA**

### **3.1 Introduction**

The application of idealist transitional justice mechanisms in Africa is discussed in this chapter. In particular, it focuses on the efficacy of imported transitional justice mechanisms, in this case International Criminal Court (ICC) trials, through the scrutiny of the Court's track record in Africa. The goal will be achieved by first providing the ICC's definition of transitional justice, which is a distillation of the international definition discussed in chapter two. This is followed by the positioning of the ICC as an idealist transitional justice mechanism the application of which is growing in Africa. This will be buttressed by an analysis of the effectiveness of the ICC's predecessor in Africa, the International Criminal Tribunal for Rwanda. This chapter culminates in an analysis of the suitability for Zimbabwe of the idealist ICC trials as a transitional justice mechanism.

An interrogation of the Court's track record in Africa will be undertaken, where applicable using Uganda, the Democratic Republic of Congo and Sudan as examples. The chapter also debates the likely benefits to the victims of human rights abuses should the ICC Office of the ICC Prosecutor (OTP) initiate investigations or the United Nations Security Council (UNSC) refer Zimbabwe for investigations to the ICC.

### **3.2 Positioning the ICC as an idealist transitional justice mechanism**

The ICC was formed by nation states that signed the Rome Treaty. It came into effect on 1 July 2002 (Schabas 2001: 191) and 1 July 2012 marked 10 years of its existence. After 10 years and having spent hundreds of millions of United States dollars on its work, the ICC had completed just one trial (Posner 2013: 1) by July 2012. According to the ICC's website (accessed August 2012), it had 700 employees and an annual budget in excess of USD\$100 million. The lone completed case was that of Congolese warlord Thomas Lubanga Dyilo who was convicted of recruiting child soldiers and sentenced to 14 years in prison (Townsend 2012: 294).

The Court's inception was hailed, mostly by Africans and NGOs, as an important step in combating impunity globally (Odaro 2011: 148). African countries formed the bulk of the countries that were instrumental in the formation of the ICC (Murithi 2013: 1). Debates are still on-going regarding Africa's motives for joining the ICC *en masse*, (Garuka2012: 59). The most vocal calls for Africa's withdrawal from the ICC came on 14 May 2012 from Sudanese Justice Minister Mohamed Bushara Dousa who encouraged the African Union (AU) meeting of government experts and Ministers of Justice/Attorney Generals to withdraw and activate the African Court of Justice, Human and People's Rights (Mendes 2010: 167) instead. Previous attempts by Sudan, Comoros, Djibouti, Senegal, Eritrea and Libya to organise an *en masse* African withdrawal from the ICC failed. Subsequently, at the Assembly of the African Union's 19<sup>th</sup> Ordinary Session held from 15 to 16 July 2012 in Addis Ababa, Ethiopia, a decision was taken regarding the implementation of the decisions of the ICC (AU-doc. ex.cl/731(xxi): 2), in which the AU agreed not to support the ICC's request for the apprehension of Sudanese President al Bashir.

It can be argued that if Africa voluntarily supported the formation of the ICC, it could be that African leaders hoped to use it as an alternative and counter mechanism to the United Nations Security Council hegemony in international justice. African countries with a record of gross violations of human rights such as Zimbabwe and Sudan did not join the ICC as it would have been self-defeating for a government with an unquestionably poor record of human rights abuses to join such an institution. Zimbabwe was also not a member of the now defunct SADC Tribunal, which it did not recognise, presumably for the same reasons that it did not want to be part of an institution which challenged its human rights record. The only international justice institution with jurisdiction over Zimbabwe is the AU Commission on Human and People's Rights. That notwithstanding, this does not imply that Zimbabwe is out of the ICC's reach as there are provisions in the Rome Statute allowing the UNSC to refer cases, including those from non-member states, to the ICC Prosecutor for investigation (Rome Statute: Article 13 (b) and (c)). The most important question remains: what peace building value has Africa realised from the ICC since its formation and has the ICC been useful in addressing human rights abuses in Africa in general and in Zimbabwe in particular?

In order to understand the transitional idealist nature and *modus operandi* of the ICC, it is necessary to trace its genealogy. This makes the link between power politics and transitional justice clear and therefore easier to comprehend, which in turn is a useful tool in positioning ICC trials as an idealist transitional justice mechanism. The ICC was a product of global power relations whose purpose can be traced back to the victors of the Second World War (Goldsmith: 2003, Forsythe 2011: 63, Duvall and Barnett: 2005). The structure of global power relations is such that the allied powers who won the Second World War control global affairs, not (always) through war, but through institutions whose creation they influenced in order to, *inter alia*, preserve their global hegemony (Mazrui: 2001, Morgenthau: 1954, Waltz: 1979). Mazrui (2001: 4) traces global power relations to the origins of globalisation whose trajectory he posits started with what he terms hemispherisation, followed by slavery, colonialism, neo colonialism and to the current phase of globalisation where economically and militarily weak nations exert minimum influence and suffer maximum marginalisation in global affairs. For Mazrui (2001), Bamyeh (2000) and Rupert (2000), the formation of United Nations specialised agencies signals the consolidation of power by the Second World War victors.

Of the five permanent members of the UNSC, only France and the United Kingdom are ICC members (McGoldrick 2004: 392). The United States of America, Russia and China are not ICC members (ICC website: June 2012). A great deal of debate has centred on why the United States is not an ICC member and the effects of its absence or opposition to the ICC (Scarf 1994: 130-119, Tucker 2001: 71-81, Kirsch 2001: 3-11 and Goldsmith 2003: 89-97). The greatest controversy concerning USA-ICC relations was generated by the 2002 American Service Member's Protection Act, also known as *The Hague Invasion Act*, which 'nullifies' the ICC by authorising the United States President to 'use all necessary means' to free United States service personnel detained by the ICC (Odero 2011: 158, International Federation of Human Rights: 2002). Unfortunately, relations between the USA and the ICC, including a more detailed discussion of the implications of the so-called Article 98 agreements which the United States entered into with other nations obliging these nations not to hand over American personnel to the ICC, is beyond the scope of this study.

According to Mazrui (2007: 12), the effectiveness of the ICC in combating global impunity was compromised by the manner in which global affairs were arranged and managed. For Mazrui, the UNSC controls global affairs through its subsidiary creations, which take care of its interests in the various sectors of life. These subsidiaries include the United Nations specialised units such as the World Trade Organisation (trade), World Health Organisation (health), World Bank (money), International Monetary Fund (finance), the ICC and the International Court of Justice (justice). At the apex of this pyramid, which sits above the ceremonial United Nations General Assembly, is the all-powerful five veto-wielding members UNSC. The function, mandate and objectives of the ICC must therefore be analysed in relation to the overall objectives of other United Nations specialised sister agencies and the UNSC.

The same views were expressed by Britain's Foreign Secretary William Hague when he addressed the ICC on 9 July 2012. Hague noted that the ICC, like all United Nations specialised agencies, was created in pursuance of the establishment of a rule-based international system. While there is nothing wrong with such a goal, what those opposed to such rule-based institutions object to is the manner in which the goals are set and the source of these contentious goals. There is no mechanism for all the nations of the world to contribute equally towards the establishment of a rule-based international system. The result is that a political organisation, in this case the UNSC, ends up dominating legal institutions like the ICC. For Mazrui and Mamdani (2008: 17-22), this is the genesis of the ICC's inability to curb impunity. This will be discussed further in the next section, starting with the ICC's definition of transitional justice.

### **3.3 The ICC's definition of transitional justice**

The way in which the ICC defines transitional justice is important in order to understand how the court operates. According to the ICC, transitional justice is the prosecution of those responsible for the most serious crimes of international concern, which are genocide, crimes against humanity, war crimes and the crime of aggression (once it has been defined) (Rome Statute: Article 5 a, b, c and d). This method of implementing transitional justice can be argued to be idealist as it focuses

mainly on trials, albeit limited trials in terms of the cut-off date and nature of crimes falling under the Court's jurisdiction (Rome Statute: Article 5).

One of the shortcomings of this definition of transitional justice, as contained in the Rome Statute, is the 'streamlining' of transitional justice. This was done through the watershed categorisation of crimes that fall under the court's jurisdiction (Kaul 2007: 276-580, Khan 2003: 89). According to Article 5 of the Rome Statute, crimes falling under its jurisdiction, hence subject to transitional justice procedures, are: genocide; crimes against humanity; war crimes and the crime of aggression. This definition limits transitional justice to what the court terms the *most serious crimes of concern to the international community as a whole* (Article 1). Three criteria are applicable in qualifying a case of human rights abuse as an international crime subject to the ICC's jurisdiction. Firstly, the crime must be the most serious; secondly, it must be of concern to the international community; and thirdly, the concern must be to the international community as a whole and not part of it.

Challenges that emanate from such a qualification of crimes include who decides the seriousness of the crime. Is it the victims or the international community, and more to the point, using what methodology or mechanism to qualify the seriousness of the crime? The international community is not defined in the Statute, yet for a crime to be labelled as serious, it must be of concern to the unqualified/undefined international community. Even if the international community was qualified in the Statute, in order for an act to qualify as a crime under the court's jurisdiction, it must be of concern to the totality of the international community and not just a part or even the majority. This renders prosecution almost impossible due to the many bottlenecks in the qualification of those eligible for prosecution at the ICC and deprives victims of their agency. In a way, this leaves room for the prosecutor and the UNSC to exercise discretion over who to prosecute or investigate, a fact which Zimbabwe fears renders it susceptible to victimisation by some members of the UNSC owing to its controversial land reform programme (Alden 2007: 63). The totality of the 'international community' is yet to be concerned about the violations of human rights in Zimbabwe, with the result that no prosecutions are likely by the ICC for those suspected of human rights abuses.

This top-down approach to transitional justice from the ICC negates local realities such as local perceptions, cultures and customs. Certain crimes, which are locally condemned and labelled as serious crimes, may be labelled internationally as not serious. The raping of men as a weapon of war was a common practice in Northern Uganda and Eastern DRC, yet no reference is made to this in the ICC Statutes and the crime has been accorded no recognition by the international community. Extensive work in the Eastern DRC and Northern Uganda by Storr (2011) uncovered widespread use of the rape of men as a weapon of war. This was further complicated by the fact that the justice that the ICC sought was not qualified; there are many forms of justice; retributive, deterrent, compensatory, rehabilitative, exonerative and restorative justice (Doxtader and Villa-Vicencio 2004: 67).

Another contentious issue is that a crime must be perceived to be serious by the 'international community' and not by the victims or perpetrators. This has the effect of disenfranchising key players in transitional justice, that is, the victims, thereby rendering the ICC elitist and idealist. This definition is also susceptible to criticism because of its lack of recognition of violations against second and third generation human rights such as the rights to housing, employment, education, health, a clean and sustainable environment, communication and cultural rights, especially those of minority populations. It almost exonerates former aggressors from blame for other harms they may have inflicted such as environmental degradation and the indiscriminate laying of landmines. The above shortcomings point to the inadequacies of imported idealist transitional justice mechanisms, placing realist models that are bottom-up and informed primarily by the needs of the victims as most suitable for Zimbabwe; this despite the fact that ICC prosecutions as a practice were increasing in Africa. The following section briefly situates the ICC as an idealist transitional justice mechanism.

### **3.4 The ICC as an idealist transitional justice mechanism**

The way transitional justice is defined by the ICC qualifies this body as an idealist transitional justice mechanism. The ICC is expected by its mandate to deliver transitional justice through the prosecution of those suspected of committing the most serious international crimes after 1 July 2002 (Article 1). Such a preoccupation

with trials, convictions and incarcerations as the major transitional justice mechanism positions the ICC as a transitional idealist mechanism. As alluded to earlier, an understanding of the relationship between the ICC and the UNSC is essential in order to fully comprehend how the ICC operates. As noted by Mazrui (2007: 12) and Mamdani (2008: 17-22), the UNSC controls global politics through the deployment of military and economic force in a manner in which the strong nations 'do what they can and the weak nations suffer what they must'. In their multipronged control of global affairs, economically and militarily strong nations use the ICC, which operates through legal means, and the UNSC, which operates through political means including the imposition of economic sanctions and the declaration and waging of war (Bourantonis 2005: 21). This positions the UNSC as the more powerful of the two since it possesses the means and ability to enforce its decisions while the ICC relies on the UNSC to enforce decisions on its behalf. This was demonstrated by the then ICC Prosecutor Luis Moreno-Ocampo who, in his speech on 2 November 2011 to the UNSC titled *Statement to the United Nations Security Council on the situation in Libya, pursuant to United Nations Security Council Resolution 1970*, admitted that the ICC was powerless without the enforcing capability of the UNSC. Such a dominance of the ICC by the UNSC probably accounts for the growing practice of prosecutions in transitional justice, mainly in Africa. This increasing use of ICC prosecutions will be discussed in the following section.

### **3.5 The ICC in Africa: a critical evaluation**

Having introduced the ICC in general and its prosecutions of alleged human rights violators in particular, it is imperative to discuss in detail some of the Court's shortcomings.

#### **3.5.1 Introduction**

In Africa, the goals of the victims of gross violations of human rights and those of the ICC were misaligned (Mendes 2010: 167). Understanding the operations of the ICC from the perspective of the Court is helpful in comprehending its work in Africa generally and its inaction in Zimbabwe specifically. The ICC's operations elsewhere in Africa are crucial as they had a profound effect on Zimbabwe's perception and

relationship with the Court. To begin with, the way former Liberian President Charles Taylor's case was handled by the ICC rendered it unattractive to both victims and offenders (Moghalu 2008: 125). There is value in believing that there was a strong positive correlation between the alleged suspects' of Zimbabwean war crimes resentment of the ICC and NATO's operations in Libya which culminated in the assassination of President Gadhafi in Sirte on 20 October 2011.

Rosenberg and Meredith (1999: 29) suggests that a country's decisions on how to deal with its violent past is predicated on a number of factors. These include the type of conflict endured, the type of crimes committed in the conflict, the level of societal complicity during the conflict, the nation's political culture and history, the conditions necessary for war to recur, the abruptness of the transition, and the new democratic government's power and resources. According to views sympathetic to Africa, these are factors not considered by the ICC in its operations. As an idealistic transitional institution, the ICC believes in the supremacy of the law and that the law is the answer to most problems, conflicts and struggles, no matter how bitter or how entrenched these conflicts are. Yet many struggles and conflicts, both within and between nations, exist precisely because law and the possibility of a legal settlement have broken down. Like most of Africa, Zimbabwe's conflicts have social, economic and political roots, which the use of the law will struggle to address (Ndlovu-Gatsheni 2011b:5). As will be demonstrated below there were cases in Africa where ICC prosecutions exacerbated the conflicts when they were meant to bring peace. After this has been discussed, subsequent sections address some of the shortcomings of imported idealist transitional justice mechanisms, specifically ICC prosecutions.

### **3.5.2 ICC prosecutions as a growing practice in Africa**

According to the Rome Statute, the ICC can only prosecute cases where the states concerned are unable or unwilling to do so (Article 17). This places the burden of ending impunity on national courts rather than on the ICC. In contrast, the inability of post conflict states, especially those in Africa, to try cases of human rights abuses implies that the ICC becomes the court of first resort. Countries whose domestic judiciary systems failed to prosecute war crimes that occurred in their jurisdictions include the DRC, Central African Republic, Kenya and Uganda, all of which

voluntarily referred their cases to the ICC. *Prima facie*, this accounts for the growing practice of using the ICC to prosecute war crime suspects. The Court's pursuit of prosecutorial justice and local communities' desire for peace has seen the two disagree in post conflict societies such as Northern Uganda. The insensitivity of the ICC to local dynamics in pursuit of prosecutions resulted in more conflict in the case of Eastern DRC's Ituri District, after the sentencing of convicted warlord Thomas Lubanga. A report by The Open Society Initiative for Southern Africa (OSISA) showed that contrary to common belief, the conviction and sentencing of Lubanga did not bring peace. Instead, it resulted in reprisal attacks by Lubanga's army which was still controlling Eastern DRC in general and Ituri District in particular. OSISA's views were corroborated by a resident of Ituri District, who told *Al Jazeera* news channel that:

...we don't know anything about the International Criminal Court or peace. All we know is running away, (Unidentified Ituri resident: Interview with *Al Jazeera*, 25 February 2013).

Such is the reality victims and communities face far away from The Hague where the ICC makes judgements with serious repercussions for their lives as witnessed in Ituri after the conviction and sentencing of Lubanga.

There are also sentiments that the growing practice of using ICC trials, especially in Africa, emanates from the need for the international justice system to have practical cases in which it is tried and tested (Meron 2011: 141). The argument is that Africa is believed to provide such testing grounds for the international justice system as it has less political power. Africa's limited political power diminished even mooring the aftermath of global bipolarity whose end reduced the importance Africa had hitherto enjoyed during the heyday of cold war politics.

That notwithstanding, it remains a fact that the use of the ICC as a transitional justice mechanism became a growing practice in Africa as seen by the increase in the number of situations and cases being investigated by the court. This led to the question of whether the ICC targeted Africa or not. In a world filled with wars and on-going human rights abuses, what made Africa the sole continent being investigated by the ICC? Other conflicts that occurred and were not investigated by the ICC

include the US led war on Iraq which toppled President Saddam Hussein, the US war on terror fought primarily against the Taliban in Afghanistan, the uprisings in Bahrain and Syria, the Russian war with Georgia, the Columbian armed conflict which started in 1964 and is still on-going (August 2012) with estimated fatalities of 600 000 (Brigham 2011: 323) and the insurgency in Europe's North Caucasus.

Further evidence of the neglect of other conflicts in the single-minded pursuance of Africa was provided through the use of scientific violent conflict monitoring tools such as the Uppsala Conflict Data Program. The tool was officially recognised by the United Nations and it placed Afghanistan, Pakistan and Iraq as the top three countries where war crimes were committed but never investigated. Sixty-one per cent of African countries are ICC members and Africa accounts for 27.3 per cent of these yet it accounts for 100 per cent of the cases investigated in the court's history to date (March 2013). This presents a strong motivation for the interrogation of the perception that Africa has been unjustly targeted by the ICC, a perception which will not be addressed fully here, because it deserves a more detailed analysis which is beyond the scope of this thesis.

A second problem militating against the growth of ICC applications in transitional states emanates from the Court's limited mandate. The ICC can prosecute two types of crimes, i.e., a crime committed (a) by a national of a signatory party, or (b) on the territory of a signatory party (Rome Statute: Article 12 (2a) and (2b)). This leaves loopholes for human rights violators who commit international crimes in their non-ICC member countries to avoid prosecution in the absence of a UNSC resolution for their prosecution. Even in Africa, idealist transitional justice mechanisms like ICC prosecutions can never realise their full potential because in some instances, as witnessed in Ituri District, the ICC became a real threat to peace (United Nations 2009: 127, Sengupta: 2008). In cases like Zimbabwe the threat of international prosecution to suspects of human rights violations was viewed as an impediment to conflict resolution and political transformation with ZANU PF digging in and simultaneously multiplying atrocities (Masiwa 2004: 204).

The same can be applied to Uganda, where the government and the ICC went against the advice and wishes of the local communities not to issue warrants of

arrest for Lord's Resistance Army (LRA) rebel commanders. The ICC was defiant and issued the warrants of arrest for Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen on 13 October 2005 (Schabas 2007: 38). What the community leaders had warned happened when the LRA escalated its attacks on local communities (International Crisis Group 2008: 8). This proved that the ICC was obsessed with prosecution at the expense of seeking peace for the predominantly Acholi people of Northern Uganda. Through their leadership the local Acholi communities had pleaded, with no success, with both the Ugandan government and the ICC to allow them to use the local traditional transitional justice mechanism of *mato oput* (Bornkamm 2012: 100, Katshung: 2006). However, there are conflicting views on whether the traditional leaders supported the ICC in issuing the warrants of arrest. Nolen (2005) argues that the leaders pleaded with the prosecutor to delay the prosecutions while Odokonyero (2005) believes that the leaders were supportive of the prosecutions. That notwithstanding. The warrants were issued with devastating consequences to the local communities.

An interesting fact in the Northern Ugandan case, and one that is relevant to Zimbabwe, is that the 12 community leaders who went to meet the ICC prosecutor in April 2005 had an alternative solution which they believed was more viable than prosecutions (Darehshori 2009: 29, Allen 2004: 49-64). The leaders proposed a local traditional method of mediation which was deemed incompatible with the ICC's mandate, much to the added suffering of the communities (Refugee Law Project and The Institute for African Transitional Justice: 2011, Sriram, Garcia-Godos and Herman 2012: 90). The conclusion drawn by the Ugandan people was that people in rich, peaceful and secure countries often advocate prosecution because they are not fully aware of what it means to live for 24 years under the threat of the LRA (Werner 2010: 66).

While it is statistically correct that the use of the ICC was growing in Africa, victims appear to be suffering from basic material deprivation while huge sums of money in the region of half a billion Euros per year are channelled to the international criminal justice system (McCarthy 2012: 327). Luf (2008) believes that the ICC has been selective, unrepresentative, without credibility and has pursued criminal justice while victims and affected communities sought an end to the violence, followed by

attempts to regain basic economic and social stability. Elsewhere, blanket and individualised amnesties have been highly rated by citizens in South Africa and Mozambique (Murungu 2011: 106, Cobban 2006: 3). After 15 years of civil war in Mozambique it was apparent that prosecutions would overload the justice system (Gahina 2013: 29, Igreja: 2007, Hamber 2009: 120). Research conducted in countries where amnesties were used such as Mozambique and South Africa showed that prosecutions do not deter future atrocities. Instead, they often have the unintended effect of an escalation of violence. On the other hand, amnesties have proved to be viable mechanisms in achieving peace, as witnessed in these two countries (Popkin 2000: 40, Cobban: 2006: 3, Igreja 2007: 21, Boraine 2000: 7).

Since the formation of the ICC in July 2002 and 2010, ICC trials were a growing transitional justice mechanism especially in Africa, yet local mechanisms continued to enjoy a number of advantages over their imported counterparts. Their ability to foster social reintegration and reconciliation is worth mentioning. This can be exemplified by findings of Helena Cobban in 2006. While researching on the efficacy of blanket amnesties in Mozambique, Cobban followed the case of two former war criminals, Domingos and Morais, who controlled a network of war criminals who perpetrated some of the worst atrocities human society ever knew. After the war, Domingos, formerly Renamo's Chief of Staff, moved on to become a parliamentarian, business executive and social thinker. Morais, the former head of Renamo's Special Forces, became a key leader and organiser of the country's new united military force, and then entered law school. These two men, the people they had commanded, and the people against whom they had fought and whom they had violated for 15 years all worked together to rescue their country from the abuses and intense suffering of the war. This showcases the ability of non-legal transitional justice mechanisms to bring together those who ordered human rights abuses, those who carried them out and their victims. Together these three sets of transitional justice stakeholders achieved more in Mozambique than similar individuals in Eastern DRC and Northern Uganda.

Many other factors militate against the efficacy of ICC trials, their growing application notwithstanding. These include, as mentioned earlier, the ICC's lack of the powers of arrest war crimes suspects, a situation that forces the court to outsource such a

central component of the prosecutorial process. Restricted to the issuing of warrants of arrest only, the apprehension of suspects, especially war criminals, has proved to be the Court's Achilles heel. The ICC issues warrants of arrest and hopes that some national or regional authority such as the North Atlantic Treaty Organisation (NATO) will carry out the arrest. As a result, key suspects such as al Bashir not only continued about their normal lives, but continued to lead the very people whose rights they were suspected of violating. These and other shortcomings led Ndlovu-Gatsheni (2007b: 2-3) to advise on the need for vigilance against the international criminal justice system becoming a front for smart imperialism. By definition, smart imperialism is a continuation of imperialism through the use of laws and regulations rather than war and subjugation. In grappling with the issue of the ICC's growing application and smart imperialism, the next section will explore the universality of the ICC and debate whether it has become a front for the continued subjugation of the global South by the global West, to the detriment of local communities who desperately need to be healed and reconciled.

### **3.5.3 On the fallacy of universalism and the reality of smart imperialism**

Ndlovu-Gatsheni (2007b) makes very pertinent observations about the fallacy of universal justice mechanisms. He posits that universalism can never be used to attain democratic governance when it itself is not a product of democracy and consensus, but has been largely created through conquest and violence. For Ndlovu-Gatsheni:

the main crisis in the current human rights regime is that it has taken the form of Euro-American neo-liberalism masquerading as universalism, imposing its core values across the world as global values, and inevitably provoking contestations and resistance (2007b: 3).

In its quest for universalism, the ICC missed the opportunity to tap into the diverse needs of the victims and their cultural diversities and employ them as building blocks for common conceptions of human rights. Ndlovu-Gatsheni (2007b: 5) further contends that in its current form the ICC faces the challenges of 're-imagining, re-creating, re-making and re-ordering world justice in a manner that is inclusive of the subaltern voices that are the most violated'. This renders the universalisation of

transitional justice a fallacy. Posner (2013) believe that the best way of dealing with the fallacy of universalism lies in amplifying what they term the African voice. Others believe that amplifying the so-called African voice is pointless unless it is matched by a complimentary prioritisation of Africa's human rights needs by a deliberate ICC policy to treat Africa differently (Mathoma, Mills and Stremlau: 2000).

The absence of the voices of the subaltern led politicians such as Zimbabwe's Finance Minister Biti (2012) to allege that the ICC was part of smart imperialism whose claim to be championing universal criminal justice was in actual fact a ploy to target Africa as claimed by Rwandan President Paul Kagame (2008). The view that Africa and its people occupy a subaltern position in global governance and that their concerns remain inconsequential has some credence (Ndlovu-Gatsheni 2007b: 3). A case in point is the 2012 refusal by NATO to accede to the African Union's request to give dialogue a chance by deferring the proceedings against al Bashir of the Sudan (Assembly/AU/Dec.419 (XIX)). Ndlovu-Gatsheni (2007b: 3) believes that in order for transitional universalism to be effective, Africans must be heard rather than treated as a problem to be solved.

Ndlovu-Gatsheni (2007b: 7) made three arguments that are crucial in the ICC's quest to attain universal jurisdiction. Firstly, he stressed the need for Africa and Africans to be viewed not as a problem to be solved but a people with a problem to be solved. Secondly, he suggested the use of oral history as an ideal mechanism to bring the voices of the subaltern to the notice of the ICC. Finally, he proposed the re-examination of the pertinent question of whose values and whose voice should underpin the universal justice discourse. Ndlovu-Gatsheni's proposal augments Steve Biko's (1987:48) claim that as the West gave the world an industrial and military look, so Africa must give the world a human face.

This conceptualisation calls for the examination of Mugabe's claim that the ICC is blind and far from being a universal institution. Addressing the United Nations General Assembly in September 2011, Mugabe claimed that:

...the leaders of the powerful western states guilty of international crimes like [George] Bush and [Tony] Blair, are routinely given the blind eye. Such blatant

selective application of [international] justice eroded the credibility of the ICC on the African continent (The Zimbabwe Mail: 23 September 2011).

Schabas (in al Jazeera: 11 June 2013) also failed to locate the logic of the ICC when he questioned:

Why prosecute post-election violence in Kenya or the recruitment of child soldiers in the Democratic Republic of the Congo, but not murder and torture of prisoners in Iraq or illegal settlements in the West Bank?

A number of factors vilify the position taken by Mugabe, Kagame and other ICC detractors. However, before attempting to discuss the merits of these claims and the overall operations of the ICC in Africa, two factors must be asserted by way of a preamble.

The first factor involves the controversial circumstances under which the Rome Statute was ratified. Its ratification bar was lowered remarkably, ostensibly in order to accommodate the Court's lack of appeal to the countries that were present (Hoile: 2012). The court was approved upon ratification by only 60 of the 189 nations in the United Nations (Forsythe 2009: 113, Dugard, Bethlehem and du Plessis 2006: 117, Davenport: 2012). It could be argued that a ratification needing only 31.75 per cent of the United Nations' members is far too low for an institution intended to assume universal jurisdiction.

Besides the lowering of the ratification bar, the absence of global strategic powerhouses such as the United States, China, India, Japan and Russia left the Court with only small and medium nations to adjudicate. This raises questions about the kind of universal institution that excludes the world's leading and most powerful nations. According to Rosenthal (2012: 1), over 70 per cent of the world's population was outside the Court's jurisdiction. Seven of the ratifying nations (San Marino, Nauru, Andorra, Liechtenstein, Dominica, Antigua and Barbuda and the Marshal Islands) have a combined population of 347 000 which is almost 10 times smaller than the population of Harare alone and almost the number of students enrolled at the University of South Africa (Unisia) in 2012. By contrast, on the side of the non-ratifiers are the world's most populous nations such as India (1 billion), China (1.25

billion), Indonesia (230 million), Russia (150 million), Japan (125 million) and USA (312 million). The ICC's quest to be a universal court does not succeed based on the basic democratic principle of representivity as only 27 per cent of the world's population belong to it while 73 per cent do not. It is on these grounds that Zimbabwe's Justice and Legal Affairs Minister Patrick Chinamasa was correct in asserting that the ICC had no universal jurisdiction (The Herald, 9 May 2012).

Branch (2011: 213) takes the argument of universality further by arguing that by not having universal jurisdiction, the ICC fails to qualify for the label of a court. Branch bases this argument on the fact that the ICC's jurisdiction does not apply to some countries that were actively engaged in various military operations in African conflict zones. Complications would arise when citizens of non-ICC member states such as the United States of America are accused of human rights abuses in an ICC member state. Murithi (2013: 4) asks the pertinent question of whose responsibility it would be to administer international justice in such cases. He was convinced that neither the United Nations Security Council nor the ICC would assume such a responsibility. Schabas (2010: 147) notes that the view among those opposed to the ICC is that if the ICC demands accountability from African leaders, then the same justice should also be demanded from Western countries, especially Russia, USA and China whose leaders are perceived as having committed the most serious human rights abuses. These glaring omissions in the operationalisation of the Rome Statute render it suspect and susceptible to attack and to being labelled a neo-Western tool for disciplining poor and economically weak African countries.

#### **3.5.4 ICC interventions and the exacerbation of conflicts**

The contention that ICC interventions aggravate conflicts instead of curtailing impunity, thereby bringing democracy in Africa, is relevant to Zimbabwe as its conflicts are cyclical and reproduced especially around election time (Mathebula 2010:80, Kriger 2003:19). In Africa, the ICC has been involved in Libya, DRC, Central African Republic, Sudan and Uganda (Glasius 2009, 498-500, Freeland 2006: 214). Experiences in Northern Uganda and Darfur show that the issuing of warrants of arrest for international crimes by the ICC does not prevent violence (Mutua: 2010). In fact, it often produces the opposite effect, which is the escalation of

violence and the going underground of suspects. As observed earlier, the AU made the point to the UNSC that Sudan found itself in the midst of a precarious peace-making process in Darfur in which al Bashir was a key player together with the armed militia and other political actors. According to Murithi (2013: 3), al Bashir's crucial role in Sudan's peace building was not a factor to be ignored by either the ICC or the UNSC. The ICC's insistence on arresting al Bashir will only aid in prolonging the conflict and exposing victims of gross violations of human rights to further abuses.

This view was also raised by Kigome (1993), then Uganda's State Minister for Northern Uganda, who was tasked with convincing the LRA guerrilla rebels to lay down their arms. In an address in 1993, Kigome stated that the LRA commanders promised to turn themselves in on condition that they would not be handed over to the ICC. This sentiment was expressed by the retired Anglican Archbishop of Kitgum Diocese, Macleod Baker Ochola II, in a discussion with the researcher on Tuesday 22 September 2011 in Kitgum, Uganda. The retired bishop reiterated Kigome's point that Joseph Kony and his lieutenants were highly unlikely to hand themselves over for fear of being tried in The Hague. The sentencing of Taylor and Lubanga certainly hardened their resolve to continue on the run.

The issuing of warrants of arrest of Kony and his generals by the ICC was viewed by Acholi victims, especially those from Northern Uganda, as being dictatorial. This is because a dozen Acholi chiefs travelled to The Hague to dissuade the ICC from issuing the warrants, fearing that such a move would stall peace negotiations and escalate violence. In a focus group discussion held in Kitgum in September 2012, it was evident that Ugandans were becoming increasingly dissatisfied with the ICC, which they said had failed to respect their desire for peace.<sup>13</sup> What emerged from these focus group discussions was that Ugandans believe that Africa has a number of mechanisms capable of bringing peace and reconciliation which they feel must be

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<sup>13</sup> The researcher participated in these focus group discussions as part of the Second Institute for African Transitional Justice organised by the Refugee Law Project of the University of Makerere in Kitgum, Northern Uganda from the 20th to the 27th November 2011 under the theme: *Whose Memories Count and at What Cost?* Most of these views on the perception of the ICC by the victims of the LRA army atrocities were gathered in Kampala, Kitgum, Lira and Gulu during this period.

accorded a chance before escalating cases to the ICC. The conclusion reached by the victims was that intentionally or unintentionally, realist traditional reconciliation mechanisms such as *mato oput* were being undermined by the ICC.

In another key informant discussion with the leader of the Barlonyo village in Lira District in Uganda where the LRA committed some of the atrocities, Moses Ogwang argued that since they knew the perpetrators who had massacred 301 of his fellow villagers in 2004, they should be helped to reconcile with them so that they could once again live in harmony. For Ogwang, reconciliation had been hampered by the fact that the perpetrators feared apprehension and being handed over to The Hague. Ogwang posited that the ICC works for those who understand and believe in it, but not for him and his people for they neither understand it nor believe in it. He and the people he leads understand and appreciate the traditional mechanism of *mato oput*. They still believe that both sides to the conflict, the LRA and the government forces, must come and perform this as they have both committed atrocities against the people of Barlonyo. Ogwang did not expect people outside Africa to easily understand and believe in *mato oput*. But equally, he expected them to appreciate that the people of Barlonyo do not as yet understand and appreciate how the ICC works, especially in their favour.

These views were consistent with the research done by Vinck et. al. (2006: 126) in which it was revealed that the two Acholi Districts of Northern Uganda had the lowest support for trials, 28 per cent in Gulu and 39.3 per cent in Kitgum. The two districts were also in support of the use of traditional justice systems and ceremonies with 53.5 per cent in Gulu and 52.9 per cent in Kitgum in favour of using *mato oput*. Another interesting finding from Vinck's study was that only 26.7 per cent of the respondents knew the ICC and its work. The rest of the respondents (73.3 per cent) knew nothing about the ICC. This was ample testimony of the ICC's lack of visibility and popularity, let alone its effectiveness. Besides being inaccessible and unpopular, the ICC also stood accused by its detractors of using a lot of money in pursuance of prosecutions. Those opposed to this form of justice argue that this money could have been used for other forms of post conflict peace building mechanisms such as economic reconstruction and domestic judiciary reforms. These claims by those opposed to the ICC prosecutions will be debated in the next section.

### 3.5.5 Cost of administering international justice

The question of having international trials rather than funding the resuscitation of the domestic judicial system and implementing realist mechanisms deserves to be revisited. The debate concerning the huge costs of administering idealist transitional justice has become very emotional, with those opposed to the ICC arguing that the funds would be better utilised in offering material assistance to post conflict societies (Cobban 2006: 1). The huge sums of money consumed by the two *ad hoc* tribunals and the ICC could have gone a long way to achieving other forms of justice such as restorative justice, compensatory justice and rehabilitative justice. The one billion United States dollars (USD\$1 billion) used by the International Criminal Tribunal for Rwanda could have been alternatively deployed to develop Rwanda's domestic judicial system (Gahima 2013: 18, Schabas 2013: 345). In the case of Rwanda, using such huge amounts of money to fund a temporary board perpetuated Rwanda's judicial dependency on the international legal system. The case turnover rate of the Rwandan Tribunal was less than impressive. By 2004 it had tried only 18 suspects at a cost of US\$177 million (Mwakugu: 2004). This amounts to a cost of just under one million United States dollars (US\$ 983 333.33) per judgement. The conservative estimate of the Rwandan Tribunal budget stood at one billion United States dollars (Betts 2005:746) consumed at a rate of \$96,156,200 per year (Kimani: 2002).

Cobban (2007) compared the cost of completing an individual case at the ICTR, a South African TRC amnesty and the cost of administering a single *gacaca* case. The results, tabulated overleaf, indicate that it was almost 73 000 times cheaper to use local mechanisms such as the *gacaca* than imported mechanisms such as ICC prosecutions.

**Table 3.1: Cost per case for ICC prosecutions, the SATRC and *gacaca* courts**

Each case completed at ICTR	\$42,300,000
Each amnesty application at the South African TRC	\$4,290
Each case in Rwanda's <i>gacaca</i> courts (projected costs)	\$581

Adapted from Helena Cobban (2007: 45).

Besides the astronomical costs associated with imported mechanisms, these mechanisms suffer from lack of effectiveness. Corroborating Vinck's (2006) findings on the ICC in Northern Uganda, research by Gahima (2013: 104) in Rwanda proved that local communities were not even aware of the Tribunal and that some of the residents were also unaware of the national trials which were being held in Kigali. This proves correct the allegation that idealist mechanisms are not victim centred. In an international criminal trial, there are only two sets of facts: those of the prosecution and those of the defence. These two groups are the ones who fight the issues, with victims called in only as witnesses. The prosecutor and judges of the Rwandan Tribunal answered to the UNSC, and their counterparts at the ICC answer to the Assembly of States that ratified the Rome Statute. This gives the system an indirect line of accountability to the communities they are supposed to serve.

As a long-term solution, these huge budgets should be considered for deployment in the capacitating of local justice systems, such as the training of the judiciary and of the uniformed forces in human rights. Equally, the money could be used to train citizens on issues of democracy and human rights instead of using it to try a lone war criminal such as Liberia's Charles Taylor. All the above shortcomings of idealist transitional justice mechanisms emanate from the fact they have an external locus of control, external accountability, are external to the conflict's causality and also external to the geography where the violations physically occurred. Linked to the discord of the high costs of administering idealist transitional justice, are the allegations that the ICC has deliberately targeted Africa. An analysis of these allegations is beyond the scope of this thesis and will not be attempted here.

### 3.6 Conclusion

This chapter explored the role of the ICC in Africa. It started by positioning the ICC as an idealist transitional justice mechanism with an overreliance on trials. It also considered the ICC's definition of transitional justice which was noted to be an attempt at universalising transitional justice. The growth in the application of the ICC as the main resource for the attainment of transitional justice in Africa was presented and it was noted that there were cases where the *modus operandi* of the ICC exacerbated conflicts in Africa. Cases cited included the escalations experienced in Eastern DRC's Ituri District and Northern Uganda's Kitgum District after the sentencing of Thomas Lubanga and the issuing of warrants of arrest for LRA commanders respectively. Other issues mentioned in the chapter include the high costs of administering international justice. One key issue which arose in the chapter is that the absence of a system of global administration implies that international criminal justice will always be subject to the political judgements of individual nation states. The issue of politics versus law was also highlighted in an exploration of AU-ICC relations. While African leaders maintain their position of non-cooperation with the ICC and the latter maintains its 'legal fundamentalism', victim-centred transitional justice becomes the unfortunate casualty. The next chapter debates the impact of the ICC on transitional justice in Zimbabwe.

## **CHAPTER 4: THE ICC AND TRANSITIONAL JUSTICE IN ZIMBABWE**

### **4.1 Introduction**

Arieff, Margesson, Browne and Weed (2011: 6) argue that the International Criminal Court (ICC) was problematic right from its creation and that it quickly became part of the transitional justice problem in Africa. Hentz (2013: 19) allege that the international justice system stands accused of failing to curb the scourge of violence and war in general and the protection of children, women and indigenous minorities in particular. While this view can be contested on the grounds that avoiding war and armed conflicts is not the mandate of the ICC what is apparent is its typically idealist *modus operandi*, in which it sought to 'legalise' and 'universalise' transitional justice. This was done in a manner that eventually rendered any other non-legal transitional justice mechanism futile. It sought to use legal means to solve problems that were predominantly political and its prime focus on prosecutions implied that justice was more important than peace. A number of disadvantages accrued to Africa as a result of the use of ICC prosecutions. In all these cases the victims were either marginalised or completely disregarded, leading them to revive and implement traditional transitional justice mechanisms.

This chapter focus specifically on the exploration of the impact of the ICC on Zimbabwe in a bid to demonstrate the futility of imported idealist transitional justice mechanisms. The method adopted is an exploration of the various litigations and efforts to bring Zimbabwean President Mugabe before the ICC and other courts of law. These cases will be preceded by a discussion of the various attempts at bringing him before the ICC for prosecution and the status of his immunity from prosecution. This will be achieved by analysing the Rome Statute's Article 17, the Constitution of Zimbabwe and other relevant treaties that deal with the issue of the immunity of state officials from prosecution.

### **4.2 ICC jurisdiction and transitional justice in Zimbabwe**

The challenge in jurisdiction facing the ICC in Zimbabwe is that the Rome Statute restricts the Court to investigating only crimes committed after July 2002. This

implies that the most contentious periods in Zimbabwe's violent past lie outside the legal mandate of the ICC. These periods include the War of Independence (1965 – 1980), Gukurahundi (1982 – 1983), land redistribution related violence (2000 – 2005), and Operation Murambatsvina (2002). For the majority of the black population who lived under the white minority government of Rhodesia, the omission of the colonial period from the International Criminal Court's jurisdiction is a travesty of justice tantamount to the promotion of impunity.

Despite this, referrals of Zimbabwe to the ICC have been attempted by many countries, institutions and even individuals. The biggest stumbling block was encountered in the United Nations Security Council where permanent member China and rotational non-permanent member South Africa consistently refused that the case of Zimbabwe be put on the UNSC agenda. However, this was not the first time that Zimbabwe's case was brought before the ICC. Since 2005, various calls were made for the situation in Zimbabwe to be referred to the Court by the UNSC. The next section will outline the efforts made by various bodies and individuals in calling Zimbabwe to account for its human rights record, beginning with the case of Adella Chiminya Tachiona versus Mugabe.

#### **4.2.1 Tachiona versus Mugabe**

In a landmark lawsuit filed in the USA, Adella Chiminya Tachiona, widow of late MDC member Talent Chiminya, and Others sought a default judgement against Mugabe, then Foreign Affairs Minister Stanislaus Mudenge and ZANU PF. According to the court papers, the petitioners wanted Mugabe to be held personally liable for the assassination of Talent Chiminya and other damages which they claimed to have suffered at the hands of ZANU PF officials. The plaintiffs sought US\$68 500 000 in compensation and punitive damages (Mundis 2003: 464). The papers were served while Mugabe and the late Mudenge were in New York attending the Millennium Summit at the UN Headquarters. The United States District Judge Victor Marrero granted immunity to Mugabe and his co-accused but granted a default judgement against ZANU PF. The lawsuit was brought to the United States District Court, New York pursuant of the US alien Tort Claims Act, the US Torture Victims Protection Act and international human rights law (Mundis 2003: 432). In reaching his decision the

judge considered head of state immunity, the doctrines of absolute sovereign immunity and restrictive immunity, diplomatic immunity, personal inviolability and personal and subject matter jurisdiction. Part of the judgement read:

The district court held that Mugabe and Mudenge were also entitled to immunity from suit as heads of state because the Government had filed a suggestion of head-of-state immunity on their behalf (United States District Court of New York: Judgement in Tachiona and Others versus Mugabe and Others. Case number:00CIV6666VMJCF).

The judgement also noted that the United Nations Convention on Privileges and Immunities extended to Mugabe and Mudenge. This included the full range of immunities that diplomats enjoy under the Vienna Convention, including not only the immunity from legal process set forth in Article 31, but also the inviolability of the said person. The judgement also stated that:

the person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving state shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity(United States District Court of New York: Judgement in Tachiona and Others versus Mugabe and Others. Case number:00CIV6666VMJCF).

With the seemingly acrimonious relationship between Mugabe and the USA, it is worth noting that the later's justice system, with its alleged disregard for international law, found the former not liable for prosecution in the USA. This court judgement suggests that the prosecution of Mugabe, no matter how much desired, may never occur because when applied in earnest the doctrine of immunity outlaws his prosecution as long as he is Zimbabwe's State President.

#### **4.2.2 Governments of New Zealand and Australia**

Another attempt to get Mugabe to stand trial for his alleged human rights abuses was initiated by the New Zealand and Australian governments. In December 2009, then Australian Foreign Minister Alexander Downer led efforts to lobby the UNSC to indict Mugabe and his government at the ICC for crimes committed against humanity. In a televised interview with the Australian Broadcasting Corporation in December 2009, Minister Downer said:

I very much hold the view that as a country which is party to the ICC and bearing in mind the simply horrific things that have happened in Zimbabwe ... that it is worth a try to get an indictment.

Both Australia and New Zealand issued statements to the effect that continued failure of the Zimbabwean government to respect democracy and human rights needed to be addressed firmly by the international community. The two countries stated that they would specifically target their lobbying at France, Britain and the USA. It is more than three years since this lobbying started but no referrals have yet been made which can only be interpreted as failure of these efforts.

#### **4.2.3 The European Union**

In a separate attempt to have Mugabe brought before a court of law to answer allegations of human rights abuse, two European Union backed proposed resolutions condemning widespread human rights abuses in Sudan and Zimbabwe failed to pass a UN committee in 2009. In this case, Zimbabwe and Sudan had the backing of African countries led by South Africa, who argued that their moves were not a denial of human rights violations in Africa, but only for the purpose of countering the double standard of the EU (Smith 2006:163). In December 2009, Britain brought Zimbabwe to the UNSC to answer to human rights abuses related to Operation Murambatsvina (Dzimiri and Runhare: 2012: 193). The then British Ambassador to the UN, Emyr Jones Parry, called for UN Special Envoy on Human Settlements Issues in Zimbabwe, Anna Tibaijuka, to brief the council and answer questions. Algeria, Benin and Tanzania objected, stating that the case was not a matter of international peace and security and therefore should be left to the African Union to handle. This position was supported by China and Russia while Brazil abstained from voting on the matter.

In a similar case, a UN Draft Resolution intended to impose sanctions on Mugabe and his top leadership did not manage to pass through the UNSC during its 5933<sup>rd</sup> meeting of July 2008. Nine countries (Belgium, Burkina Faso, Costa Rica, Croatia, France, Italy, Panama, United Kingdom, United States) voted in favour of the draft,

while five voted against (China, Libya, Russian Federation, South Africa, Vietnam), with Indonesia abstaining (Council Doc SC/9396 of 11 July 2008).

#### **4.2.4 International Bar Association**

In 1994 the International Bar Association (IBA), accused Mugabe of a long list of atrocities and said that the ICC should bring him to justice since African nations had failed to do so (Moyo and Ashurst 2007: 193, Leonard: 2012). According to the International Bar Association's website (visited in August 2012), its executive director Mark Ellis argued that decisive action was required by both the United Nations and the AU to end impunity and violence in Zimbabwe. Beyond these public condemnations, the IBA did not take any meaningful steps towards starting the litigation process against Mugabe and his government. This could be attributed to the IBA's lack of *locus standi* in the matter.

#### **4.2.5 The British Conservative and Liberal Democrat parties**

One of the most sustained efforts to bring the Zimbabwe human rights issue to the ICC was made by its former coloniser, Britain. Various organs of the British state were involved in mobilising support to bring Mugabe before the ICC. These include efforts by the then Foreign Secretary David Miliband, who noted that Zimbabwe's 'state sponsored violence' had a very clear motivation, which was not ethnic cleansing *per se*, but the desire to remain in power. Miliband made these comments when he took part in an interview on Sky TV on 22 June 2008 in reaction to the news that opposition leader Morgan Tsvangirai had withdrawn from the Presidential election rerun which was necessitated by the inconclusive Presidential election results. Miliband continued his efforts, this time when he addressed the UNSC on 14 December 2008. He noted that the UN had yet to find its voice and called for a full discussion at the UNSC. Another British MP, William Hague, called for a relevant UN commission to look into what he termed 'grotesque abuses of human rights', with a view to recommending further action by the ICC.

Previously, in October 2006, the House of Lords had recommended that Mugabe's exhortations to the police to assault trade union demonstrators be used to arraign

him before the ICC for crimes against humanity (Pambazuka News: 20 October 2006). British MP, Baroness D'Souza, suggested that the British government use 'the full array of legal, diplomatic and other measures open to the it and the European Union for the sole purpose of amassing a critical mass of international likeminded opinion (Legal brief Today: 25 October 2006). This was intended to lead to the coordination of support for victims of violence in Zimbabwe whom she described as bearers of the 'unspeakable brunt of repression'. D'Souza cited the international community's obligations, as enshrined in the Rome Statute, specifically the duty to bring a prosecution at the Court.

Another failed attempt by the British government to arraign Mugabe before the ICC was contained in the report of the British Select Committee on Foreign Affairs. The report recommended that the United Kingdom start a campaign for the referral of Mugabe to the ICC for 'his manifold and monstrous' crimes against the people of Zimbabwe (Great Britain Parliament, House of Commons Foreign Affairs Committee 2005: 47). Similar sentiments are also contained in the Tenth Report of the Foreign Affairs Committee Zimbabwe Session 2001–2002: Response of the Secretary of State for Foreign and Commonwealth Affairs Presented to Parliament by the Secretary of State for Foreign and Commonwealth Affairs of October 2002. None of these efforts resulted in any action by the ICC on Mugabe.

#### **4.2.6 The Namibian National Society for Human Rights**

Pressure to take Mugabe to the ICC has not come only from Europeans, notably the British, but also from within the region. Such calls came, for instance, from Namibia, a country that ironically enjoyed cordial relations with Mugabe's government. In order to drum up support aimed at highlighting Zimbabwe's human rights abuses and the need for international justice to take its course through the indictment of Mugabe, a Namibian human rights watchdog, the National Society for Human Rights (NSHR), organised a demonstration in Windhoek in February 2007. According to the organisation's Executive Director Phil ya Nangolo, NSHR believed that Mugabe deserved to be hauled before the Zimbabwean or even Namibian courts. Noting the remoteness of these two options, ya Nangolo added that, 'if these two fail then Mugabe should be hauled before the ICC to face charges of, *inter alia*, war crimes

and crimes against humanity (The Namibian: 23 February 2007). Ya Nangolo's wish to have Mugabe prosecuted is yet to be realised.

#### **4.2.7 The South African government's position**

South Africa's position regarding its role (or lack thereof) in arraigning Zimbabwe at The Hague was brought to light in 2008 in a dossier submitted to the National Prosecuting Authority (NPA) concerning South Africa's obligations under the *International Criminal Court Act 27 of 2002*. The dossier was composed of a legal opinion compiled by Advocates Wim Trengove, Gilbert Marcus and Max du Plessis. The rationale for the dossier was to urge the National Prosecuting Authority 'to institute prosecutions where they had previously refused on account of a decision taken by the police not to investigate the allegations' (Stone<sup>325</sup> :2011). As mentioned earlier, the Southern African Litigation Centre and the Zimbabwe Exiles Forum appealed the decision and sought an order setting aside the decision not to prosecute these perpetrators and, moreover, to have these human rights violators arrested in the event they travelled to South Africa (Stone 2011: 323). The ostensible motive behind the submission of the dossier was to prevent South Africa from becoming a haven for those who commit crimes against humanity (Du Plessis: 2011, Stone 2011: 325). To date (March 2013), no Zimbabwean official has been arrested in South Africa despite many of them visiting and passing through the country on several occasions. This was especially the case after the collapse of Zimbabwe's national airline, Air Zimbabwe, which meant that most Zimbabwean officials travelling abroad travelled via South Africa. Not the Democratic Alliance (DA), the National Prosecuting Authority nor the Zimbabwe Exiles Forum took concrete steps to have these leaders intercepted and arrested in South Africa.

From these cases it can be deduced that Mugabe will not be appearing before the ICC anytime soon. This, despite the existence of mechanisms within the ICC to bring suspects such as Mugabe to answer allegations of human rights abuses. This can be attributed to the lack of political will both regionally and internally to prosecute Mugabe. The ICC provisions as contained in the Principle of Complementarity therefore deserve to be revisited and interrogated.

#### **4.2.8 The Democratic Alliance in South Africa**

Zimbabwe enjoyed the support of fellow SADC governments, who for various reasons opposed having the ICC investigate Zimbabwe. However, in South Africa, the opposition Democratic Alliance agitated for Zimbabwe's human rights record to be referred to the ICC. In 2008, two DA MPs who had formed part of the SADC observer mission in Zimbabwe announced that the DA wanted Mugabe to be tried at The Hague for crimes against humanity (The Post: 30 June 2008). The DA's leader Helen Zille added that they hoped that this action would set in motion a process 'that will result in Mugabe and his henchmen facing justice for the crimes they committed against the Zimbabwean people' (Politicsweb: 30 June 2008). These views were contained in a letter by the DA addressed to the UN Secretary General and copied to other institutions and governments such as the then UNSC chair (USA), the UN Commissioner for Human Rights, Human Rights Watch and Amnesty International. The DA noted that it wanted the matter referred to the ICC Prosecutor to initiate investigations with the view to prosecuting those guilty of human rights violations in Zimbabwe. Helen Zille quoted the Darfur probe by the UN as precedent setting and said it showed that although Zimbabwe was not a signatory to the Rome Statute the same Statute gave the ICC jurisdiction over non-party countries. Like others before them, Zille and the DA's efforts did not result in the arrest of Mugabe.

#### **4.3 Complementarity and transitional justice in Zimbabwe**

The ICC operates on the Principle of Complementarity which makes it the duty of every state to exercise criminal jurisdiction over those responsible for international crimes (Rome Statute: Articles 1 and 17). This is an improvement on the former *ad hoc* International Criminal Tribunals in Sierra Leone, Rwanda and the former Yugoslavia, which had primacy over national courts. The Principle of Complementarity works better when the ICC initiates investigations in states that would have proved unwilling or unable to carry out prosecutions on their own (Burke-White: 2005). On the other hand, the Principle appears ill equipped and inadequately prepared to deal with cases where countries do self-referral. The Principle of Complementarity assumes that countries will be reluctant to refer themselves to the ICC. With that in mind, the Rome Statute addressed the likely scenarios of countries

claiming state sovereignty and thereby refusing to be subjected to the court's jurisdiction. This left the ICC in a quandary when the opposite happened. As of December 2012, four out of the five African cases were all self-referrals (DRC, Uganda, Central African Republic, and Sudan (Darfur) plus Sudan which was referred by the UNSC in 2005.

With respect to Zimbabwe, scholars have argued that there may be cases where inaction by states is the appropriate rationale of action by the ICC (Stigen 2008: 199, Kleffner 2008: 104). The ICC added a third dimension to the Principle of Complementarity. According to Stone (2011: 325), this decision and its interpretation of Article 17 of the Rome Statute will probably not change the situation. Adding a third dimension test of 'inactivity' or 'inaction' beyond 'unwilling and unable genuinely' was also criticised by scholars such as Schabas (2008a: 731) as vague and open to abuse by powerful nations. However, it is this third prong test of 'inactivity' or 'inaction' which has the potential to be used by the 'international community' to bring case of human rights abuses in Zimbabwe to The Hague as evidence suggests that there were no genuine attempts by the government in Zimbabwe to investigate alleged cases of gross violations of human rights.

The refusal by the Zimbabwe government to make public several human rights abuse reports is a case in point. Unreleased reports include the 1983 Zimbabwe Commission of Inquiry into the Matabeleland Disturbances (also known as the Chihambakwe Commission of Inquiry) and the Commission of Inquiry into events surrounding Entumbane 1 and 2, otherwise known as the Dumbutshena Commission of Inquiry. The latter's mandate was to look into the clashes between former ZANLA and ZIPRA forces at Entumbane and the killings in Matabeleland in 1983 (Raftopoulos and Eppel 2009:13). The now almost defunct Human Rights Commission serves as a further example of Zimbabwe's unwillingness to investigate human rights abuses.

This section grapples with the possibility of Zimbabwe's alleged human rights violations being taken to the ICC as a result of evoking the Principle of Complementarity. This is highly unlikely given the vagueness inherent in the ICC's Principle of Complementarity which instead of revealing which cases the court

should investigate, sets out instead the specific ones the ICC *should not* investigate or prosecute (Rome Statute Articles 17 and 53). Beyond the reach of the ICC are those international criminal cases which states with jurisdiction over them are already investigating or prosecuting, as evidenced by a display of genuine willingness and ability to do so. Nor does the ICC consider cases where the crimes in question are not regarded as serious enough to concern the ICC, nor those cases where an investigation would not serve 'the interests of justice' (Kleffner 2008: 292). Under these circumstances, victims' interests become secondary to the primary concerns of investigation, conviction and punishment of the perpetrators. The inclusion of the 'the interests of justice' as a major selection criterion further diminishes the interests of victims in general and the need for reconciliation in particular.

The ICC Office of the Prosecutor has yet to define exactly what constitutes 'sufficient gravity' and what 'the interests of justice' entail (Schabas 2007: 186, 415, Clark : n.d: 38). According to Clark, the Prosecutor outlined four main criteria for determining the gravity of crimes. These are their scale, nature, the manner of their commission, and their impact. The criteria for the assessment of these circumstances have yet to be developed implying that, in the meantime, alleged perpetrators remain free. It can be concluded that rather than prosecuting suspects of gross violations of human rights, the ICC's Rome Statute is more concerned with preserving the sovereignty of certain states, particularly those opposed to its formation such as the USA. This is evidenced by the ICC's case selection criteria which are the subject of discussion in the next section.

#### **4.3.1 ICC case selection**

The ICC's record indicates the need to balance law and politics of its case selection. The ICC was caught between an idealistic vision of a global court designed to prosecute the cases that domestic jurisdictions could not or would not prosecute. This was compounded by the pragmatic concerns of the ICC as a new institution seeking judicial results to secure its legitimacy. Under these circumstances, case selection was a key ingredient in the ICC's endeavour to build a strong legal corpus and create legal precedent. According to the Rome Statute, situations can be

referred to the ICC in one of three ways: first, by a state party; secondly, by the United Nations Security Council; and thirdly at the instigation of the Prosecutor. In the third scenario, the Prosecutor must gain the authorisation of the Pre-Trial Chamber of the Court before launching investigations and must show that there are sufficient grounds to do so (Rome Statute: Articles 54 and 56).

According to Clark (2009), more than 10 years into its existence the ICC was still developing its broad strategy for case selection based on the rules outlined in the Rome Statute and its Principle of Complementarity. For Clark, three trends in the Prosecutor's approach emerged. First, the Office of the Prosecutor indicated that it would focus on perpetrators who bore the greatest responsibility for crimes. This meant that the OTP was likely to prosecute only government, military or militia leaders suspected of orchestrating or committing crimes under the ICC's jurisdiction. The challenge entailed in this approach is to determine who decides which suspect 'bears the greatest responsibility' for the crimes allegedly committed. Should it be the victims or the Prosecutor? Does the Prosecutor have the competence to adjudicate and apportion responsibility in crimes that he or she did not witness? Most importantly, whose word or what kind of evidence will the Prosecutor use to arrive at such a decision? These considerations work against the successes of the ICC's case selection and inversely feed the growth of impunity, mostly in Africa.

The second trend concerns the OTP's statement that the ICC:

will encourage national prosecutions, where possible, for the lower-ranking perpetrators, or work with the international community to ensure that the offenders are brought to justice by some other means (Stahn and Sluiter 2009: 220).

This point is meant to result in the prosecution of small numbers of high-level perpetrators, while encouraging domestic jurisdiction to help close any potential 'impunity gap' left by the ICC's focus on minority limited number of suspects. This highlights the challenges contained in the grading and ranking of crimes and criminals; there is no agreed instrument, tool or criteria with which to do this, leaving such an important aspect open to different interpretations and contestations.

Thirdly, the OTP indicated that it would take an extremely cautious approach to selecting which cases to investigate, acting only when it possessed enough evidence

to provide strong prospects for a successful investigation. It is likely then that the OTP will pursue cases only where state parties and other sources have already gathered substantial evidence. This reliance on third parties for such crucial aspects such as the gathering of evidence is out of place in the ICC. Outsourcing of evidence collection weakens the ICC as the motives for evidence collection differ, especially when this is done by those linked to the suspects or the victims.

#### **4.4 Zimbabwe's position regarding the ICC jurisdiction**

In a seemingly dismissive manner, Zimbabwe consistently treated attempts to have Mugabe arrested as foreign meddling in its internal affairs sponsored by its detractors. The President's Press Secretary, George Charamba, said that calls for Mugabe's indictment were attempts to tarnish the image of the President and the country. Charamba noted that Zimbabwe was not a signatory to the Rome Statute that had created the ICC and was therefore not legally bound by its dictates (Voice of America News: 31 October 2009). The same views were expressed by the Deputy Director of the Organ on National Healing, Integration and Reconciliation, Anderson Chiraya, who stated that the ICC had no role in Zimbabwe (Personal communication: 19 September 2012). He observed that the ICC was a foreign organ with no jurisdiction over Zimbabwe, or any Zimbabwean for that matter, just as it had no jurisdiction over the United States of America, Israel, any American or Israeli. For him, the irrelevance of the ICC to Zimbabwe is illustrated by the fact that Zimbabwe was never part of the ICC and, according to him, never would be. He gave the selective application of law and the deliberate targeting of Africa, especially its leaders, as the reason for Zimbabwe's resentment of the ICC.

#### **4.5 Mugabe and immunity from ICC prosecution**

The first test of Mugabe's immunity from prosecution on allegations of gross human rights abuses was a case discussed earlier on which was brought before the United States District Court, New York on the 7<sup>th</sup> of August 2002 by Talent Chiminya, widow of Trichina Chiminya who was killed together with fellow MDC activist Talent Mabika on 15 April 2000 (Blair 2002: 258). The allegations by Talent Chiminya were that Mugabe in his capacity as the leader of ZANU PF was responsible for her husband's

death who was allegedly killed by his party's officials. Amnesty International's 2002 report, titled *Zimbabwe the toll of impunity*, reported that the two were killed by Central Intelligence Organisation (CIO) agent Joseph Mwale and war veteran Kainos Tom 'Kitsiyatota' Zimunya, who was commanding a group of ZANU PF youths who carried out the murder. In the case, Mugabe's defence was predicated on his immunity from prosecution which the US court upheld, ruling that such a position was consistent with international practice.

The above judgement can best be understood if the two types of immunity that the ICC considers in such cases are explained; functional immunity and personal immunity. Functional immunity is commonly referred to as immunity *ratione materiae* while personal immunity is called immunity *ratione personae* (Akande and Shah 2010: 817). Personal immunity or *ratione personae* is attached to senior state officials while they are still in office. State as well as judicial practice indicates that this form of immunity applies even to international crimes, as held by domestic courts in cases involving former Libyan leader President General Muammar Gaddafi and Mugabe. The principles of immunity *ratione materiae* and immunity *ratione personae* were also discussed in the following cases: *Jones v Ministry of the interior of the Kingdom of Saudi Arabia* [2006] UKHL 26, [2007], *Bat v Investigating Judge of the German Federal Court* [2011] EWHC 2029 (Admin) and *Sosa v Alvarez-Machain*, 542 U.S. 692 (2004).

It can be deduced from these cases that functional immunity or *ratione materiae* can be invoked not only by serving state officials but also by former state officials in respect of their official acts while they were in office. This implies that Mugabe can claim this type of immunity even when he is no longer in power. The norm is that the state of the accused is allowed to choose whether or not its agents would be responsible under international law. Therefore it is the state's responsibility to determine the status of its official's claim to immunity.

The ICC becomes involved in cases where states abuse their sovereignty and fail to address impunity. Many countries in Africa have constitutional provisions that provide immunity from prosecution for their presidents or, in some cases, their prime ministers. These provisions include Section 30 of the Constitution of the Republic of

Zimbabwe (Presidential Immunity); Article 46 of the Constitution of the United Republic of Tanzania, 1977 (as amended); Article 98 of the Constitution of the Republic of Uganda, 1995; section 34(1)-(5), First Schedule to the Constitution of the Republic of Ghana, 1992; Constitution of the Fourth Republic of Ghana Law, 1992, sections 28(1), 34 and 35(1)-(3); Constitution of the Kingdom of Swaziland, Article 61; Constitution of Liberia, Article 48(4) and Constitution of the Republic of Sierra Leone, 1991.

Despite the existence of these constitutional provisions, international law on non-recognition of the immunity of state officials for international crimes exists in the form of Article 27 of the Rome Statute. This Article sets out the position in international law of the prosecution of individuals for international crimes before international courts. Zimbabwe should therefore not trust its domestic immunity provisions as a precedent was already been set with the indictment of al Bashir. That precedent notwithstanding, some leaders with terrible human rights abuse records, such as Uganda's Amin and Museveni and DRC's Mobutu Sese Seko, were never indicted by any international legal institution.

Zimbabwean politicians interpreted Section 30 of the Constitution as conferring the President with immunity from prosecution wherever and whenever. This is contrary to Subsection 1 (b) of the same Constitution which allows for the President to be held liable for his/her personal actions. Section 30 of Zimbabwe's Constitution reads:

(1) The President shall not, while in office, be personally liable to any civil or criminal proceedings whatsoever in any court. (2) Without prejudice to the provisions of subsection (1), it shall be lawful to institute civil or criminal proceedings against a person after he has ceased to be President, in respect of—(a) things done or omitted to be done by him before he became President; or (b) things done or omitted to be done by him in his personal capacity during his term of office as President.

The above contradiction in law warrants clarification by a competent legal entity, probably the whole bench of the Supreme Court of Zimbabwe. Such a clarification leaves no room for speculation and personal interpretation of the law regarding the Presidents' immunity from prosecution in Zimbabwe and elsewhere.

There is no framework in Africa which either outlaws or upholds the immunity of state officials in Africa. Only the AU has provisions that merely condemn impunity (Article 4(o): Constitutive Act of the AU). Article 4 of the AU's Constitutive Act contains the principle which is central to outlawing impunity in Africa as it allows the AU the right to intervene in a member state pursuant to a decision of the Assembly of Heads of States and Governments of the Union in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity (Article 4(h): Constitutive Act of the AU). While such a provision exists, its enforcement remains a distant reality despite the regular occurrence of war crimes, genocide and crimes against humanity in Africa.

There are numerous shortcomings inherent in this regional impunity prevention mechanism which makes it untenable in stopping impunity in Zimbabwe. The major shortcoming of this mechanism is that it makes no provisions for enforcement, thereby rendering it ineffective at law. According to Murungu (2011: 65), Article 4(h) does not have an express mandate to prosecute individuals who commit international crimes in Africa. This loophole was manipulated by African leaders who were liable for censorship by the AU for war crimes, genocide and crimes against humanity but were never cautioned owing to this shortcoming. Murungu further contends further that it is also difficult to infer whether intervention would include prosecution of perpetrators of international crimes in Africa. Another flaw in the AU's anti-immunity provisions is that nowhere is it specifically provided in the Constitutive Act that an African state official may be prosecuted for international crimes.

This implies that the AU's position on the international crimes of genocide, war crimes and crimes against humanity remains vague. The existence of the legislation notwithstanding, it can be argued that there is no African country with the political will to bring Zimbabwe before the AU to answer to allegations of gross violations of human rights as outlined in Article 4 of the AU's Constitutive Act. It can be argued that, if the solidarity shown by the AU in rallying behind al Bashir is anything to go by, the chance that the AU will act on Zimbabwe becomes extremely slim, if not non-existent.

An analysis of the sub-regional's (SADC) legal framework reveals a similar lack of legal instruments to fight impunity. It is debatable whether this absence is deliberate on the part of regional leaders or not. Not surprisingly, Zimbabwe was not a member of the International Conference on the Great Lakes Region of 29 November 2006 which passed the only protocol in Africa which explicitly condemns impunity. Zimbabwe is therefore not a part of the Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes against Humanity and all forms of Discrimination signed on this date. Members to the protocol are Angola, Burundi, Central African Republic, Republic of Congo, Democratic Republic of Congo, Kenya, Uganda, Rwanda, Sudan, Tanzania and Zambia. The Protocol is based on the Convention on the Prevention and Punishment of the Crime of Genocide which was adopted by Resolution 260 (III) A of the United Nations General Assembly on 9 December 1948 and the Rome Statute of the ICC of 1 July 2002. The relevant article of the Rome Statute is Article 12 which is almost a verbatim duplication of Article 17 of the Rome Statute which reads:

The provisions of this chapter shall apply equally to all persons suspected of committing the offences to which this Protocol applies, irrespective of the official status of such persons. In particular, the official status of a Head of state or Government, or an official member of a Government or Parliament, or an elected representative or agent of a state shall in no way shield or bar their criminal liability (Article 12: Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes Against Humanity and all forms of Discrimination).

It is imperative to note that the provision specifically mentions that official capacity, especially Head of State, does not exempt one from prosecution. Article 23 lays down the mandates of member states, including the duty to cooperate with the ICC. Section (a) specifically mentions cooperation with 'requests to the arrest and hand over of persons alleged to have committed crimes falling within the jurisdiction of the ICC'. The provisions of this Protocol, unlike those of the AU's Constitutive Act, are very clear on their mandate, their relationship with the ICC and on which crimes should be dealt with and in what format. It remains to be investigated whether the Protocol for the Prevention and the Punishment of the Crime of Genocide, War Crimes and Crimes Against Humanity and all forms of Discrimination was an attempt

by certain African countries to circumvent the AU by charting an alternative, decisive, unambiguous way to deal with impunity in Africa.

The AU's Constitutive Act almost abdicates the outlawing of impunity to national legislations, their well-documented lack of capacity and political will notwithstanding. At state level, very few African countries have legislation banning impunity. These countries include South Africa, Uganda, Senegal, Burkina Faso, Niger, Kenya, Congo, Burundi, Rwanda and Ethiopia. Recent developments in South Africa brought hope to those seeking to prosecute Mugabe and his fellow senior party officials. In a landmark lawsuit (*SALC and Another v NDPP and Others case 77150/09*), of March 2012, the North Gauteng High Court decided that the South African National Prosecuting Authority (NPA) was expected to prosecute any Zimbabwean accused of violating human rights in Zimbabwe should they come to South Africa. According to the South African Litigation Centre's (SALC) website (visited on 13 February 2013), the facts of the matter were that, 'the NPA and South African Police Services refused to initiate an investigation and SALC and the Zimbabwe Exiles Forum took this decision on review to the High Court'.

On 8 May 2012 Judge Hans Fabricius delivered judgement in SALC's favour, in which the High Court ordered the NPA and SAPS to initiate investigations into human rights abuses by the 18 Zimbabwean security officials cited in the case. From this it can be construed that in the absence of continental and regional legal frameworks to try those accused of impunity, reliance on national legislation like that of South Africa becomes the only realistic hope for the prosecution of those accused of gross human rights in Zimbabwe.

Beside South Africa, Ethiopia also set a promising legal precedent when it prosecuted its former President, Mengistu Haile Mariam, finding him guilty and sentencing him to death, albeit in *absentia*, ironically holed up somewhere in Zimbabwe. On a more positive note, the African Court of Justice and Human Rights sought to establish a Chamber with jurisdiction over persons who commit international crimes in Africa. Like the ICC, the African Court of Justice and Human Rights is a noble idea that can only be evaluated once it has been implemented. At the moment, hope of ending impunity in Africa remains with the ICC. However, the

ICC needs to undergo a metamorphosis of some sort if it is to become more relevant and appealing, especially to victims of gross human rights violations in Africa.

#### **4.6 Conclusion**

The study has demonstrated that transitional justice evolved from its early conceptualisation as a form of criminal justice, to a more complex, multi-dimensional and responsive phenomenon. As policymakers gain greater understanding of the causes of conflict and the nature of political, social and economic transition, it is inevitable that transitional justice processes will be increasingly called upon to address economic, social and cultural rights. The general conclusion of the two last chapters was that the ICC failed to evolve with the field and practice of transitional justice. The ICC lagged behind and risked being irrelevant to the transitional justice agenda, especially in Africa where its credibility and track record was seen to be unconvincing, especially by victims of human rights abuses.

The government of Zimbabwe was not a signatory to the Rome Statute and therefore not a member of the ICC and therefore does not recognise the ICC. However, this does not imply that the ICC was not in a position to act on Zimbabwe. As exemplified by the indictment of Sudanese President Omar al Bashir, where Sudan was not a member of the ICC, the Court could act on a referral from the UNSC to investigate a non-member state.

The ICC's non-cooperative methodology as witnessed in its dealing with the Acholi people of Uganda illustrates its obsession with prosecution at the expense of peace. Other reasons for this unwillingness to act relate to the ICC's jurisdiction in which cases committed prior to the entry into force of the Rome Statute in 2002 are considered out of the court's jurisdiction. Also noted as problematic was the ICC's occupation of a secondary role in which national judiciaries assume the first court of appeal status. This was untenable for victims of gross violations of human rights in Zimbabwe, as the state which was expected to lead the investigations was the prime suspect. The complexity of international law, especially international jurisprudence, renders the ICC a complex and implausible solution to local reconciliation needs. All

these drawbacks to idealist mechanisms position realist transitional justice mechanisms favourably in Zimbabwe.

Having dealt at length with the application of imported transitional justice mechanisms, particularly the ICC, the next chapter examines the suitability of a second imported transitional justice mechanism, namely the South African model of a TRC. Whilst the TRC is a realist transitional justice mechanism, it is an import into post conflict communities and not endogenous to them. In this regard, the TRC can best be described as a top-down imposition, usually by the state and the elites, on the victims and perpetrators.

## **CHAPTER 5: A TRC FOR ZIMBABWE?**

### **5.1 Introduction**

The previous two chapters debated the application of idealist transitional justice mechanisms in Africa generally and in Zimbabwe in particular. It became clear that the use of imported idealist transitional justice mechanisms could not guarantee national healing and reconciliation in a post conflict country. This chapter shifts the focus to an analysis of realist transitional justice mechanisms, particularly the South African model of a Truth and Reconciliation Commission (TRC). More specifically, the chapter explores Zimbabwe's quest to establish a National Peace and Reconciliation Commission (NPRC) modelled on the framework of the South African TRC.

The chapter will attempt to make three contributions. It will try, firstly, to expose the foundations for Zimbabwe's quest to establish a NPRC; secondly, to expose the shortcomings inherent in such an approach; and finally, to introduce traditional transitional justice mechanisms as viable transitional justice mechanisms at work in Zimbabwe. The overall aim of the chapter is to ascertain the suitability of realist transitional justice mechanisms that are modelled on imported mechanisms and in the process to position local realist mechanisms which are victim-centred, bottom-up and culturally sensitive as relevant mechanisms capable of bringing national healing and reconciliation.

This investigation will not attempt to prove that Zimbabwe's mechanism was modelled on the South African model of a TRC; rather, it will seek to debate the efficacies of truth commissions as mechanisms of transitional justice. This will be done in acknowledgment of the enormous contribution made by the South African model of a TRC to the study and practice of transitional justice in South Africa and elsewhere.

## 5.2 Exploring the appeal of truth commissions

The attraction of TRCs as transitional justice mechanisms deserves to be investigated. Statistics show that one third of all truth commissions<sup>14</sup> have occurred in Africa and most of them were employed within the last 10 years (Freeman 2006: 39). According to Freeman (2006: 41), African countries which have had truth commissions after South Africa include Nigeria, Sierra Leone, Ghana, Liberia, DRC and Morocco, while Congo, Chad, Uganda had them well before South Africa. Freeman observed that Zimbabwe, Kenya, Sudan, Ivory Coast and Burundi were almost certain to have TRCs in the future while in Namibia, Togo and Mauritania civil society groups continued to lobby for the establishment of truth commissions. Harris (2002: 2) explains the popularity of the South African model of a TRC in terms of its ground-breaking innovativeness. This innovation and its successes and challenges have been the subject of much scholarly work (Gibson 2006: 409 - 432, CSV: 1998, Hamber: 1997). Transitional justice scholars such as Shea (2000), Hayner (2003), Minow (1998) and Quinn and Freeman (2003) regard the South African TRC as the best transitional justice approach ever implemented. However, other scholars have questioned the usefulness of the TRC as a transitional justice mechanism and the legitimacy of reconciliation as a goal for the TRC (Emmanuel 2007: 2, Stanley: 2001, Llewellyn and Howse: 1999).

The point of departure for this chapter is the fact that both sides failed to notice and appreciate the role played by traditional transitional justice mechanisms in the perceived successes of the TRC in South Africa, notably the traditional institution of *ubuntu* which provided a strong base from which the South African TRC operated. Thus, it can be argued that the perceived success of the TRC in South Africa was premised on the traditional institution of *ubuntu*.

The methodology adopted in this chapter will be a thematic debate of, primarily, the South African model of a TRC and other Commissions in Africa with the view to extracting lessons for Zimbabwe from the discussion. This thematic debate will be

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<sup>14</sup> Truth commission, Truth and Reconciliation Commission and TRC will be used interchangeably but will essentially denote the same thing.

substantiated with outputs from discussions held with government officials and other respondents in September 2012. It must be stressed from the outset that there is no perfect model of a Truth Commission and that each Commission is adopted for a specific domestic situation. The obvious challenge with this methodology is that politics, conflicts and the remedies prescribed for these are *sui generis*, hence extrapolating lessons from one to the other raises ecological challenges and may be unfair to the TRC in question.

The term victim-centred is central to this chapter and its conceptual definition will be explained. As a concept, victim-centeredness has been used in many transitional justice processes, most often in an attempt to show that the process places the victim at its centre, usually in reference to the principle of restorative justice (SATRC 2003, Aldana 2006: 107-126). The term victim-centred will be used to define bottom-up transitional justice processes which are initiated by the victims themselves. These mechanisms arise in response to the explicit needs of victims, as defined by victims themselves, individually or collectively. A victim-centred approach requires a process, either of broad consultation with victims, and or their representatives, at all levels of the transitional justice process. This is the central tenet of the broad realist traditional transitional justice paradigm which will be explored in the following chapters.

Key to the understanding of Zimbabwe's transitional justice programme, and of its shortcomings, is the exploration of Zimbabwe's quest for a NPRC. It is significant that speculation about the establishment of a TRC ended when the Constitutional Parliamentary Committee (COPAC) released its Draft Constitution in mid-2012. Chapter 12, Part 6 of the draft constitution Section 251, 252 and 253 set out the composition, function and reports of the Commission. Once the constitution has passed the planned referendum, the NPRC will be constituted and operational for 10 years (Zimbabwe Draft Constitution: Part 6, Section 251 (Subsection 1)).

According to Emmanuel (2007: 3), the quest for a NPRC in Zimbabwe must be understood in relation to three factors: moral principles, legal principles and political pragmatism. In contrast, du Plessis and Ford (2009: 75) believe that this is not the appropriate time for Zimbabwe to introduce a national healing programme. They

argue that this is a propitious moment for Zimbabwe to earmark such a process for later establishment. Du Plessis and Ford are convinced that the identification of an official national healing programme is capable of incentivising Zimbabweans at various levels to denounce violence and impunity and to work together towards peace building which is central if a South African model of a TRC is to be effective. Du Plessis and Ford (2008) are concerned that any premature implementation of a national healing programme will expose it to what they term 'an unrepentant section of hardliners', risking the programme being overturned by recurrent violence.

Several scholars have theorised about Zimbabwe's transitional justice trajectory, with some debating possible mechanisms for use in Zimbabwe. These include Mashingaidze (2010), Muvingi (2009), Eppel and Raftopoulos (2008), Bamu (2008), and Iliff (2009). Among these works, Ford and du Plessis' (2009) analysis ranks highly in terms of its analysis of and relevance to the understanding of Zimbabwe's quest to establish a NPRC. Having defined the TRC in the first chapter and also explored some debates around the definition of TRCs, the next task of this chapter is to position TRCs as realist transitional justice mechanisms within the Zimbabwean context.

### **5.3 Truth and Reconciliation Commissions as transitional realism**

It has been demonstrated in chapter two of this thesis that idealist transitional justice mechanisms such as prosecutions at the ICC are procedural. Transitional idealism is concerned more with the ends (justice) while transitional realism is concerned more with the processes and the outcomes. Transitional realism aims to synchronise the means and the ends so that they work in tandem. TRCs are part of realist transitional justice mechanisms because they are cognisant of obstacles that are inherent in any rational solution to peace building and reconciliation.

What positions Truth Commissions as transitional realism is the manner in which they define justice. While idealism defines justice during transitional periods as that which is meted out by a competent court of law (Emmanuel 2007: 3), realism defines it broadly as responses to past human rights abuses that seek not only to repair the harm done, but also to restore the balance in a community affected by crime,

violence and conflict through acts such as reparations, memorialisation and counselling (Boraine and Villa-Vicencio in Emmanuel 2007: 3). Transitional idealism therefore defines justice as retributive while realism defines it as restorative. The form of justice pursued by Truth Commissions is a delicate balance between moral, political and emotional considerations, an approach which has no place in idealist mechanisms such as trials. In realist models of transitional justice, victims are central while in idealist mechanisms the offender is the central figure of the proceedings. According to Anglican Archbishop Emeritus Desmond Tutu, transitional realism seeks to repair not revenge, reconcile and not recriminate (in Abrams: 2012). Having located the TRC as a realist transitional justice mechanism, the next section delves into the analysis of Zimbabwe's quest to establish a NPRC.

#### **5.4 A National Peace and Reconciliation Commission for Zimbabwe**

This section addresses Zimbabwe's quest to establish a NPRC as a derivative of the South African TRC<sup>15</sup>. It will highlight the possible challenges and suggest that traditional transitional justice mechanisms are living concomitants capable of being successfully employed to account for some of the challenges faced by imported transitional justice mechanisms such as TRCs. Post conflict societies are confronted by many options regarding how they should address their past periods of gross violations of human rights. One of the common policy options employed in Southern Africa was amnesia, which is a policy of non-action about past atrocities. However, Mugabe's actions can be interpreted not as amnesia, but as deliberate and genuine attempts to deal with the matter of reconciliation. Amnesia as a transitional justice policy was followed in Mozambique, Namibia and Zambia (Cobban 2003: 1). Other countries used amnesties as Zimbabwe did at the time of its independence in 1980, while South Africa used the TRC whose main methodology was to offer amnesty in exchange for the truth (Shea 2000: 13).

Another option in dealing with past human rights abuses is to hold suspects criminally responsible for their actions and to prosecute them in a court of law, locally

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<sup>15</sup> The structure of this section borrows from the Institute of Security Studies Paper Number 164 of June 2008 authored by du Plessis and Ford, titled. 'Justice and peace in a new Zimbabwe: Transitional justice options'.

or internationally. Zimbabwe had the following investigative mechanisms at its disposal: human rights commissions, local Commissions of Inquiry, international Commissions of Inquiry and parliamentary or presidential committees of investigation (Freeman 2006: 40). The TRC model presents a middle ground as it allows for the provision of amnesty while simultaneously pursuing criminal trials. What is illusive in literature is an explanation for the current state of affairs where the idea of implementing a Truth Commission is an automatic assumption usually at the expense of local mechanisms.

The main attraction of the TRC for Zimbabwe lies in its ability to balance political expediency and international and local pressure for justice. This was revealed by a state official in Zimbabwe who refused to be named on the grounds that they lacked the official capacity to address the matter.<sup>16</sup> The TRC affords Zimbabwe the chance to adopt a position somewhere between the two extremes of comprehensive criminal trials and blanket amnesty or collective amnesia (du Plessis and Ford 2008: 3). Another attraction for Zimbabwe is the TRC's capacity to deal with large numbers of victims and perpetrators in a relatively short period.

Since the Nuremberg Trials, large-scale criminal prosecutions have not been a popular transitional justice option owing to complications such as allegations of lack of partiality (Chapman and Ball 2001: 23). Such prosecutorial limitations arose from the fact that the scale of collective violence in certain countries, such as Rwanda, was so vast that it was simply impossible to prosecute all the alleged offenders. Very few post conflict countries have the legal capacity and resources for successful prosecutions (Chapman and Ball 2001: 23). Judging by the scale and extent of the violence, it can be argued that the number of perpetrators in Zimbabwe was too large for the criminal justice system to handle. This included those perpetrators who wilfully and knowingly ordered or presided over human rights abuses as well as those who did not know that some of their actions during the political violence era constituted perpetration. The situation was further exacerbated by capacity challenges in the Justice, Legal and Parliamentary Affairs Ministry which were

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<sup>16</sup> Personal discussion with a Zimbabwean state official on 22 September 2012 in Harare.

acknowledged by the responsible minister, Patrick Chinamasa, when he addressed the Bulawayo Press Club in February 2012.

Another attraction of the Truth Commission for Zimbabwe lies in the fact that a TRC is a credible institution which can ascribe institutional responsibility for human rights abuses and outline weaknesses in the institutional structures or laws that should be eradicated to prevent future abuses (du Plessis 2002:10). However, ascribing institutional responsibilities to past human rights abuses will prove to be a key challenge for the NPRC, given the state's consistent refusal to acknowledge its role in past atrocities (Chitiyo 2009: ii). Judging by the NPRC's proposed mandate and structure, it appears as though it is deliberately being set up to investigate small scale, irregular patterns of abuse rather than organised international crimes such as the 1982-1983 Matebeleland and Midlands genocide.

Zimbabwe's desire to adopt the South African model of a TRC as expressed by participants at the Kariba National Healing Consultative Forum in May 2009 can be interpreted in the light of the sheer renown of the South African TRC. Although the South African TRC was the 16<sup>th</sup> Truth Commission in the world, it gained popular acclaim as it had particular characteristics not seen since the first TRC in Uganda in 1974 (Hayner 2001: 291, Gibson 2006: 409, Shea 2000: 51). The key incentives which led Zimbabwe to consider the South African model can be summarised as follows:

the inclusion of reconciliation as an objective; its funding mechanism which allowed for regional offices and interdisciplinary staff exceeding 300 persons; individualised amnesty while no blanket amnesty was granted; public hearings for victims, perpetrators and public institutions; openness to the media; transparent website; establishment of the Human Rights Violations Committee; setting up of smaller truth commissions at the most localized institutes like schools, factories and churches (Freeman 2006: 40).

Zimbabwe could select from a wide range of innovations in the South African model and include them in its NPRC. Such aspects are not available to transitional states when they choose idealist mechanisms such as the ICC prosecutions.

As noted before, du Plessis (2002: 10) argued for institutional reforms to be undertaken first, before the NPRC commenced its mandate. The reasoning behind this argument is that reforms are necessary in state institutions such as the army, the judiciary and the police in order to ensure the compliance of the support structures of the NPRC. Du Plessis' concern was that, without any institutional reforms, the NPRC would be sabotaged by what he and Masunungure (2009: 5, 9 and 15) term 'regime hard-liners' within these institutions. For example, ZANU PF is believed to be in possession of well-oiled violence machinery in the form of vigilante groups, such as Chipangano in Harare's oldest suburb, Mbare, the Chinhoyi Top Six and Jochomondo in Hurungwe (Zimbabwe Human Rights NGO Forum (2012: 4). Ruhanya (2012) agrees and is concerned that this infrastructure of violence, which has been politically dormant, could be recalled to destabilise the NPRC if the major political protagonists within ZANU PF do not support the institution. Given the absence of genuine political transformation anchored in institutional reform, any premature setting up of the NPRC will be counterproductive. This could potentially sabotage the process of transitional justice as even the South African model which was implemented after some genuine transformation was still found wanting (Ndlovu-Gatsheni, Personal communication: 11 June 2012).

In the light of the above, it could be concluded that Zimbabwe's NPRC runs the risk of being premised on the need to adopt a mechanism which political elites will be able to manipulate for their benefit. The following sections therefore interrogate the NPRC's suitability for post-conflict reconciliation in its form as a derivative of the South African model of a Truth Commission.

#### **5.4.1 Imported mechanism and the challenges of semantics**

The issue of semantics is significant for the NPRC of Zimbabwe as it influences perceptions about the body (Emmanuel 2007: 2). The name of the institution, the terms used and the official meaning attached to it all have significant implications for the discourse of peace building and reconciliation in Zimbabwe. It is imperative that the official name of the Commission is the result of wide consultations as any inappropriate naming may lead to the underperformance of the Commission. Debate has been raging in Zimbabwe, especially among civil society organisations; names

such as 'The Truth and Reconciliation Commission' are castigated for omitting the word 'Justice', seen by many as an integral part of most Truth Commissions. The draft constitution gives the name of the institution as the National Peace and Reconciliation Commission (NPRC). However, such a name, Just as in the case of the Organ on National Healing, Reconciliation and Integration, which preceded it, is an imposition. No democratic consultations were held, supporting claims that national healing in Zimbabwe is elitist. The omission of the word 'justice' appears to be a deliberate attempt to dampen the expectations of the people. Most NGO managers that the researcher discussed the matter with indicated that the grassroots victims they worked with preferred the name 'The Truth, Justice and Reconciliation Commission'.

These views were expressed in a petition by victims of human rights abuses drafted at a Survivors Summit held on 20 September 2010 in Harare, Zimbabwe. This was signed by 250 victims and representatives of victims of post-independence political violence from the country's 10 provinces. The purpose of the summit was for victims to deliberate on the national healing process, its form, route and content. Addressing the Ministers of Justice, Legal and Parliamentary Affairs and the Organ on National Healing Reconciliation and Integration, victims expressed their desire to have a Commission whose mandate would be to investigate, prosecute and adjudicate on human rights violations. In contrast, the Draft Constitution does not promise a body with investigative, prosecutorial or adjudicative powers. Part 6, Section 252, Subsections (a) to (j) contains the Commission's mandate which is framed in such a way that it is expected to 'ensure... develop ... bring ... and receive ...'. Key words such as 'investigate', expected in a mandate of this nature, do not occur. This will be dealt with in greater detail in the next section.

The absence of words considered by the victims to be central to transitional justice discourse, such as 'justice' and 'truth', suggests that the NPRC will be akin to a ceremonial institution as it will have no powers to *subpoena*, search or seize. Omitting the words 'truth' and 'justice' both from the name and from the mandate renders the NPRC susceptible to failure before it even commences its duties. Following the example of the South African, Argentinean and Salvadoran Commissions, the NPRC must also be designed in such a way that it will be capable

of carrying out its own investigations in order to supplement testimonies if the whole truth is to be established and documented.

A key lesson for Zimbabwe from the South African model is that there are semantic issues embedded in the work of an institution such as the NPRC. Certain words, concepts and even events need to be officially defined so that there is no ambiguity from the outset.<sup>17</sup> This emphasises the need for wide consultation in defining such terms as they are central to the work of the NPRC.

#### **5.4.2 The mandate of the National Peace and Reconciliation Commission**

The mandate of Zimbabwe's NPRC is provided for in the Draft Constitution (Zimbabwe Draft Constitution: Chapter 12, Part 1(e)). Other Truth Commissions have been set up through a Presidential Decree (Argentina, Chile, Haiti, Sri Lanka, Chad, Uganda), by Peace Accords (Sierra Leone, Liberia, DRC, El Salvador, Guatemala) or by the national legislature, such as in South Africa (Eppel 2009: 17, Hayner 2010: 45, 245). The greatest limitation of any Truth Commission lies in its enabling mandate. For example, in Sri Lanka, Uruguay and Argentina, the Commissions were mandated to investigate disappearances only (Hayner 2010: 75, 2011: 72). This implied that other human rights abuses such as torture, abduction and sexual abuse lay outside their mandate. The Sri Lankan Truth Commission mandate was so narrow that it excluded from its mandate forms of human rights abuses that were rampant during the period covered by its Truth Commission. Such limited and narrow mandates risk achieving very little in curtailing impunity and in that regard, Zimbabwe can learn from the Sri Lankan example how not to draw up mandates.

The mandate of the South African Truth and Reconciliation Commission (TRC), in existence between 1995 and 1998, was considered to be the most complex of any Truth Commission to date (Gibson 2006: 421, Shea 2000: 7). Notably, it set international standards in three areas; recognition of public participation in setting up

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<sup>17</sup>These concepts include violence, peace, justice, truth, impunity, reconciliation, human rights abuse and reparation. The development of a handbook defining such terms in the country's major languages is highly recommended although it has never been done by any commission.

the Truth Commission; the importance of public hearings; and the right to reparations and rehabilitation (Centre for Conflict Resolution 2007: 6). Its mandate was to establish as comprehensive picture as possible of the causes, nature and extent of gross violations of human rights committed under apartheid from March 1960 to December 1993, later extended to May 1994 (Republic of South Africa, Office of the President: 1995, Mamdani 2000: 176). This mandate was described as ambitious, yet it was also the best resourced TRC to date (Emmanuel 2007: 1). Key lessons on drawing up the mandate for the NPRC can be learnt from several countries such as South Africa, El Salvador (Popkin 2000: 3), Guatemala and Nigeria (Centre for Conflict Resolution 2007: 6).

Truth Commissions in these countries had broad mandates allowing them to cover all forms of gross violations of human rights. In El Salvador, the mandate was wide enough to allow for the investigation of a diverse range of abuses. The Commission investigated 'serious acts of violence ... whose impact on society urgently demands that the public should know the truth' (Hayner 2011: 73). As stated in Chapter 12, Part 6, Section 251, Subsections (a) to (j) of Zimbabwe's Draft Constitution, the functions of the NPRC will be:

- a. To *ensure* post conflict justice, healing and reconciliation
- b. To *develop* and *implement* programmes to promote national healing, unity and cohesion in Zimbabwe and the peaceful resolution of disputes
- c. To *bring about* national reconciliation by encouraging people to tell the truth about the past and facilitating the making of amends and the provision of justice
- d. To *develop* procedures and institutions at a national level to facilitate dialogue among political parties, communities, organisations and other groups, in order to prevent conflicts and disputes arising in the future
- e. To *develop* programmes to ensure that persons subjected to persecution, torture and other forms of abuse receive rehabilitative treatment and support
- f. To *receive* and *consider* complaints from the public and to take such action in regard to the complaints as it considers appropriate
- g. To *develop* mechanisms for early detection of areas of potential conflicts and disputes, and to take appropriate preventive measures
- h. To *do* anything incidental to the prevention of conflict and the promotion of peace
- i. To *conciliate* and *mediate* disputes among communities, organisations, groups and individuals and

- j. To *recommend* legislation to ensure that assistance, including documentation, is rendered to persons affected by conflicts, pandemics and other circumstances.

Unlike similar Commissions whose mandates were written in precise language, the NPRC's mandate is almost vague. For example, the mandate lacks the specifics of how some of its aspects will be implemented. Thus 'to ensure post conflict justice, healing and reconciliation' is expressed without stating how the 'ensuring' will be achieved. This mandate is inclined more to stopping on-going and future atrocities with little regard to historical accountability. Subsections (f), (g), (h), and (i) are all concerned with the prevention of conflict. Justice which forms an integral part of any transitional justice programme is mentioned only once in the mandate where it is stated, 'ensure post conflict justice, healing and reconciliation', but how the Commission will ensure justice is unclear. It is also obvious that a good mandate alone will not ensure the effectiveness of a Truth Commission. The DRC TRC had a good mandate but this was not followed up with serious investigations with the result that the Commission targeted only low level offenders in the end (Bollero 2004: 20). A good mandate must therefore be backed up by a Commission with the necessary powers and authority, in the form of the power to *subpoena*, search and seize, which is not the case in Zimbabwe.

Besides the challenges raised by the shortcomings inherent in the mandate, there are other structural and institutional challenges that await Zimbabwe's Commission. The final decision in most political matters in Zimbabwe lies with parliamentarians, implying that citizens do not have a direct, decisive role to play in the design of the NPRC and this leaves it open to manipulation by the very politicians whom victims accuse of causing and benefitting from human rights abuses. This creates a conundrum which results in citizens turning to traditional transitional justice mechanisms.

Linked to the monopolisation of the process by politicians is the emergence of powerful civil society movement. One such group of non-state actors capable of derailing the national healing process in Zimbabwe are the war veterans. They emerged as the power brokers in Zimbabwe's politics during the early stages of the land reform programme (Onslow 2011: 4, Chitiyo 2009: 5). Although they are not a

formal state body, they have amassed so much power that they are capable of derailing the NPRC if their demands, whatever these might be, are not met. One of the war veterans, Betserai Madziire, suggested that war veterans would demand one of their members to be appointed to the Commission as a Commissioner (Personal communication: 18 September 2012).

The second group that could disrupt the work of the NPRC comprises ZANU PF youths and women. While not as powerful as the war veterans, ZANU PF's youth and women's leagues are key protagonists in the establishment of the NPRC. The blurred lines of authority between the state and ZANU PF will not make the task of the NPRC any easier. According to the Human Rights Watch Briefing Paper (June 2003), it is worrying to note that the military also became very involved in non-military issues, such as running the census, food distribution and election monitoring to such a point that one cannot rule out their possible involvement in the NPRC. All these dynamics will affect the Commission's mandate and effectiveness as an institution.

Emphasising the centrality of ZANU PF hardliners in Zimbabwe's transitional process, three senior army officers are on record as saying that the army will not salute any other president besides Mugabe (Madenyika 2006: 64, Mutyasira 2002: 77, *The Standard*: 26 October 2012). These three army officials are 3 Brigade Commander Brigadier-General Douglas Nyikayaramba (*The Zimbabwean*: 29 May 2011), Chief of Staff General Staff, Major General Martin Chedondo (*The Herald*: 9 May 2012) and Major General Trust Mugoba (*Short Wave Radio Africa*, 6 June 2012). On a different occasion, Defence Minister Emmerson Mnangagwa and ZANU PF Spokesperson Rugare Gumbo were accused by the Tsvangirai led MDC of planning to subvert the will of the people when they separately announced that they would not accept any electoral outcome other than that which authenticated ZANU PF. Mnangagwa told the BBC that his party and the military would not accept Tsvangirai's electoral victory in the 2013 elections, while Gumbo warned that it would be 'messy' if Tsvangirai won the elections. Gumbo told South Africa's e-News Channel Africa that hardliners would find it difficult to hand over power to Tsvangirai (*The Standard*: 21 October 2012).

The success of Zimbabwe's transitional justice programme is predicated on not only the mandate of the Commission, but also on other equally powerful factors. These include party politics, interest group politics, the interpretation of the mandate by the Commission and finally the support, or lack thereof. All these factors point to the possibility that the NPRC will be a stillbirth, thereby positioning traditional transitional justice mechanisms as viable tools for national healing and reconciliation in Zimbabwe.

#### **5.4.3 The timeframe**

Three decisions about time frames are crucial if the NPRC is to achieve its mandate. These are, firstly, what periods to cover during the hearings, given that violence in Zimbabwe has been recurrent since pre-colonial times; secondly, when to commence the mandate; and finally, the duration of the mandate. A number of factors will determine how this will be addressed. These include the availability of resources, especially funding. These decisions about timeframes will be discussed in more detail below.

#### **5.4.4 Periods to be covered by the NPRC**

The timeframe which the mandate of the South African TRC covered was not difficult to formulate during the design phase of the Commission (Maepa: 2005). This is attributable to a number of factors; violence in South Africa was continuous and directed from the same source to the same recipients over the years (Hunt 2012: CSVR 2007: 161). Added to this, South Africa's transitional period was clear and unquestionable. While violence has been a continuum in Zimbabwe (Ndlovu-Gatsheni: 2010), it has also been thematic (Chitiyo 2009: 4) and can be clearly classified as follows:

**Table 5.1: Thematisation of violence in Zimbabwe**

<b>Theme of the violence</b>	<b>Period</b>	<b>Targets and victims</b>
Pre-colonial	Until 1895	Ndebeles against Shonas and Shonas against Shonas
Colonial violence	1896 – 1964	White settlers against blacks
Liberation violence	1965 – 1979	Blacks against whites, blacks against blacks, whites against whites
Operation Gukurahundi	1982 – 1984	The state (army) against predominantly Ndebeles in Matebeleland and Midlands
Operation Murambatsvina	2005	The state (police) against urban shack dwellers
Third Chimurenga	2000 ff	Blacks against white commercial farmers, blacks against black commercial farmers aligned to the then MDC
Election related violence	2000 ff	ZANU PF supporters against MDC supporters and vice versa

Consolidated from Mazarire (2010: 1), Beach (1994: 19-21) and Chitiyo (2009: 4)

The NPRC needs to be clear as to which conflicts it will be covering and, most importantly, which ones it will be excluding. Adopting timelines which exclude the coverage of the Matabeleland genocide appears inappropriate as this decision runs the risk of reopening ethnic fault lines; these are not yet fully covered even within ZANU PF structures where, for example, leadership positions are allocated on an ethnic basis and not on meritocracy (George Kahari, Personal communication: 22 September 2012).

Du Plessis (2002: 24) suggests that with regard to the period of history that the NPRC would investigate, there might be practical reasons (such as concerns about economic resources) for limiting the mandate to an investigation from 2000 onwards. This option leaves those communities seeking pre-2000 historical accountability out of the mandate of the Commission, thus rendering them potential candidates for

traditional transitional justice mechanisms. The best way out of this conundrum is for the Commission to resist imposing any timeframes but, instead allowing victims to go back as far as their memory takes them. This enhances healing while minimising the alienation of certain groups of victims and is premised on the fact that transitional justice is a qualitative and not a quantitative process.

Evidence of the communities' preference in terms of which periods the Commission should cover was provided by the results of a 2008 national survey carried out by the Zimbabwe Human Rights NGO Forum (2009: 9). This revealed that 41percent of respondents wanted the period from 2000 onwards to be the prime focus of investigations. Only three per cent of respondents were interested in covering the colonial period. Eighteen per cent wanted the period just after independence to be the watershed while 14 per cent preferred the investigations to start with the period just before independence. ZANU PF's position on this issue can be extrapolated from their submissions to the Human Rights Bill in which they stated that human rights atrocities must cover both the colonial and post-colonial periods instead of focussing on the post-independence period alone. Articulating the state's official position on this issue, Organ on National Healing, Reconciliation and Integration Deputy Director Anderson Chiraya observed that the wish of the state was to have cases investigated from the colonial period. While at face value this appears to be an inclusive approach to transitional justice, reading between the lines reveals that it could be interpreted as an attempt by the state to include the colonial period during which most of the current leaders were abused by the colonial government. This approach works in the favour of ZANU PF as its leaders, accused of post-independence human rights abuses, will be portrayed as victims, diluting their role in the post-independence atrocities.

Civil Society Organisations also weighed into this debate. In 2003, over a dozen Civil Society Organisations gathered for a symposium on transitional justice in Zimbabwe. The symposium was held in Johannesburg from 11to 13 August 2003 and it was agreed that atrocities from 1960 right through to the present should be investigated. This encompassed those atrocities committed by the Rhodesian armed forces during the liberation struggle and throughout independence (with Gukurahundi occurring in the 1980s). In response to the same question in 2008, respondents were divided;

those who felt investigations should extend from 2000 to the present and those who felt that investigations had to encompass Gukurahundi (from 1980 to the present) if they were to bring any kind of national healing. In part, this divide is a generational difference, with the youth having no clear memory of the impact of Gukurahundi. However, it is also in part an ethnic divide between the Shona and the Ndebele, and it is at this level that the time period for investigations could trigger a divisive dialogue and cause conflict if not handled carefully. Disgruntled members of either ethnic group or age group would probably turn to traditional mechanisms of transitional justice to seek closure, healing, reconciliation and, in some cases, reparations.

#### **5.4.5 Commencement of mandate**

As far as commencement of the mandate is concerned, it is obvious that the quicker the NPRC begins its work the more it will improve its chances of success. However, if broader political stability is not achieved in Zimbabwe by the Commission, it will be extremely difficult to achieve meaningful reconciliation. This may be particularly important where participatory civil society and democratic institutions are weak (Chitiyo 2009: 5) and where in the early stages of transition the window of support for the NPRC may be most open to submission, testimonies and pleas. Lessons from Sierra Leone are that Truth Commissions are more effective when implemented after all violence has ceased and the country has undergone complete transition (Svard: 2010, Graybill and Lanegran 2004: 9). The Sierra Leone TRC started operating in 2000 before the violence ended and was disrupted by episodes of violence only to begin work in earnest in 2002 (Nkansah: 2011). In Ghana, the Truth Commission was established nine years after the restoration of democracy (Valji 2006: 2). This is a considerable period to wait before establishing the truth and most Commissions are established within the first five years of a turn of democracy.

The South African model is not the best example to cite as it took 18 months to be put into operation, almost equal to the time spent by other Commissions executing their mandates. For example, the 1991 Truth Commissions in Chad and Sierra Leone took 18 months and two years respectively to complete their investigations (Hayner 2010: 231). It is ideal for the NPRC to start work as soon as it is established

while the window of peace provided for by the Global Political Agreement still exists (Mahiya, Personal communication: 26 September 2012). Hayner (2011: 221) believes that early Commissions tend to be successful as they build on the inertia of the transitional period and are useful in dealing with residual cases of resistance among the former regime's hardliners.

According to Chief Njerere,<sup>18</sup> Paramount Chief in Gokwe District of the Midlands Province, the slow pace at which the NPRC was instituted resulted in communities, and especially victims, instituting traditional transitional justice mechanisms. This occurred mostly in cases where the perpetrators were known to the community (Personal communication: 18 September 2012). Research by Heal Zimbabwe (2012) in Buhera District, Manicaland Province indicated that 69 per cent of all politically motivated human rights abuses were carried out by known community members. Former Town Clerk of Gokwe, Tapiwa Marongwe, concurred and noted that the state risked being left behind together with its initiatives as communities waited for too long for the state to initiate transitional justice programmes (Personal communication: 17 September 2012). Marongwe noted further that the possibility that state led mechanisms would-be ineffective were real, judging by the outcomes of past similar state endeavours.

#### **5.4.6 Duration of mandate**

The third timeframe to consider is the duration of the Commission's mandate. Most Truth Commissions have had tenures ranging between 18 and 24 months (Hayner 2011: 227). However, three months either way is a reasonable period for laying the administrative and logistical foundations and writing the report. Argentinean, Chilean and Salvadoran Commissions had only 18 months to complete the investigations and present their reports (Hayner 2011: 24). The problem that arises when trying to draw parallels with situations that took place in countries like Argentina and El Salvador is that in Zimbabwe the party accused of the most violations is still part of

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<sup>18</sup> Chief Njerere's jurisdiction covers both Shona and Ndebele speaking areas. Among the Ndebele speaking people he is referred to as Chief Njelele, while the Shona speaking people call him Chief Njerere. He confirmed that he was comfortable with either name as it epitomised the diversity of people under his jurisdiction. However, for purposes of this study, he will be referred to as Chief Njerere.

the government, whereas in these countries, the perpetrator party was out of government. In this case, there are always problems in trying to resolve human rights abuses where ZANU PF is part of the government and the main alleged perpetrator at the same time.

According to Chapter 12, Part 6, Section 252, Subsection the Draft Constitution, the lifespan of the NPRC will be 10 years from the date of its creation. This represents probably the longest lifespan for any truth Commission and ten years is a very long time for a Commission to put together a report. In line with the earlier observation that the mandate of the Commission was too weak, too broad and lacking in authority to enforce its own decision, giving it such a long timeframe is tantamount to rendering it ineffective.

#### **5.4.7 On the status of previous amnesties and the possibilities of more**

Since the days of the South African TRC, amnesties have become an integral part of Truth Commissions. The greatest challenges in including amnesties as part of the national healing process come from two sides; firstly, the type of amnesties that should be awarded and, secondly, the timing of the awarding of amnesties. The main lesson for Zimbabwe to take from the South African TRC is that amnesties must be individualised and exchanged for truth telling in its totality. Secondly, Zimbabwe needs to learn how to time the awarding of amnesty and the payment of reparations. In South Africa, amnesty was awarded immediately after the TRC hearings, while recommendations for reparations were passed on to the parliament by the TRC (Hart 2001: 17). This led to victims alleging that the TRC had constituted deals with the 'devil' (Freeman 2006: 40). In a key discussion with the researcher at the University of Zimbabwe on 12 September 2012, African Languages Professor George Kahari observed that the NPRC needed to have the power to grant amnesties and reparations without outsourcing either function to third parties such as the parliament. He drew from the writings of international experts in arguing that the blanket type amnesty (seen in Chile) ought to be avoided and that only amnesties such as those granted by a quasi-judicial amnesty committee functioning as part of a NPRC would be internationally acceptable.

Whatever form of amnesty is chosen in the Zimbabwean context, it should be limited in terms of the nature of the offences so that, at the very least, no amnesty is granted for international crimes of torture, war crimes or genocide. In addition, the mandate of the NPRC should allow it to revise previous amnesties, both blanket and individual, in order to unearth the truth buried beneath these multitudes of amnesties, indemnities and clemencies. These pardons and amnesties include the Amnesty Ordinance 3 of 1979, Amnesty (General Pardon) Ordinance 12 of 1980, Clemency Order No. 1 of 18 April 1988 (General Notice 257A of 1988), Clemency Order Number 1 of 2000 (General Notice 457A), Clemency Order No. 1 of 2008, (General Notice 85A of 2008) and Clemency Order Number 1 of 2002.

In short, it can be posited that the granting of blanket amnesties for perpetrators of crimes defined as international crimes by the ICC will only delay the healing process in Zimbabwe. A delicate peace building resource like an amnesty deserves a carefully measured deployment.

#### **5.4.8 The role of civil society and the international community**

The role of civil society and the international community can be understood against the background of the limits to what outside peacekeepers can achieve (Braithwaite2002: 187). An undisputed key role that both the international community and civil society can play is the raising of public awareness and general media campaigning to enhance public interest in the NPRC's work. This could take various forms such as the printing of information, education and publicity materials, the funding of debates and outreach campaigns, the translation of key materials such as constitutions and Commission mandates and the funding of radio and television programmes and advertisements that focus on publicising the work of the Commission. Deputy Director in the Organ on National Healing, Reconciliation and Integration, Anderson Chiraya, noted that the position of the state was that the international community and civil society organisations should partner the state in implementing transitional justice programmes (Personal communication: 22 September 2012).

In South Africa, the media was an integral part of the work of the TRC, broadcasting future hearing venues and raising public awareness (Wilson 2001a: 21, Shea 1999: 4). The media also facilitated the live broadcast of the hearings, thereby helping to bring the work of the TRC to the nation (Krabill 2001: 567-585). This generated public interest, enhanced participation and, arguably, played a part in bringing reconciliation. Civil society and the international community could assist the NPRC in the production and distribution of its outputs on an on-going basis. These outputs could be monthly or annual reports of the NPRC, the dissemination of which would act as integral components of the peace building process.

In addition, civil society and the international community have the potential to play a key role in making the outputs available in several formats such as televisual, children's versions, adults' versions and in braille for the blind. It is also recommended that the outputs be translated into all languages spoken in Zimbabwe; the three major ones (Shona, Ndebele and English) but also minority languages such as Afrikaans, Venda, Tsonga, Tonga, Nambya, Kalanga, Chewa, Chikunda, Lozi, Ndaou and Tswana. Given the Zimbabwean state's lack of financial resources, funding from the international community is essential to ensure the success of this programme. However, the acrimonious relationship between the state and the majority of the international community, particularly the European Union and the United States of America, makes it unlikely that Zimbabwe will be offered any such financial help.

NGOs working on transitional justice in Zimbabwe, such as Heal Zimbabwe, have indicated their willingness to support the process with the provision of technical support, expertise and even personnel in support areas such as communication, logistics, advertising and data analysis. The same can be said for NGOs working on transitional justice such as the Zimbabwe Human Rights NGO Forum, International Centre for Transitional Justice, Research and Advocacy Unit and Zimbabwe Lawyers for Human Rights. Their visibility and participation in various ways is argued by the International Centre for Transitional Justice (2004) as having the ability to bring international credibility to the whole process, as was the case in South Africa (Boraine 2000: 71, Sarkin 1996: 621).

Regionally, Civil Society Organisations in Zimbabwe's neighbours, particularly South Africa, have a key role to play. Two of them were instrumental in securing a landmark victory which made it mandatory for South Africa to prosecute anyone accused of human rights abuses in Zimbabwe should they pass through South Africa. As mentioned earlier, around 2008 Civil Society Organisations started exerting pressure on the South African government to bring to book those Zimbabweans accused of human rights abuse. A ground-breaking example of this is the case brought before the North Gauteng High Court by the Zimbabwe Exiles Forum and the South African Litigation Centre (*SALC and Another v NDPP and Others case 77150/2009*). Delivering judgement, Judge Hans Fabricius ruled that South Africa's domestic courts had a duty to invoke their national legislation dealing with international criminal law to pursue the prosecution of any Zimbabwean accused of violating human rights. To date (February 2013), no such arrests have been made. South Africa indicting any Zimbabwean suspected of human rights abuses is likely to remain a distant reality. This position became even clearer when the AU officially communicated its stance of non-cooperation to the ICC after the 13th African Union summit of Heads of State held in Sirte, Libya, in July 2009. Internationally, the African Union and the United Nations could support the NPRC at various levels, including endorsement of the process, staff secondment, material and financial support.

#### **5.4.9 Resources and funding**

For the NPRC to achieve its aims of reconciliation and establishment of the truth, full funding should be committed and available at the start of its work. Lack of funding was experienced in Uganda, where the first Truth Commission was established in Africa (Hayner 2010: 217, Quinn 2004: 89). The Ugandan Commission of Inquiry into Violations of Human Rights between 1962 and 1986 suffered from a severe lack of funding and political support which resulted in irreparable operational difficulties (Freeman 2006: 40). The revenue from diamonds, platinum, gold and other minerals notwithstanding, the state in Zimbabwe was officially bankrupt and funds for the establishment of the NPRC and other Commissions will be difficult for the treasury to secure, given the backlog of competing priorities. These include the holding of by-elections, national elections and the referendum. The country's Finance Minister,

Tendai Biti, admitted to parliament on 14 March 2012 that the state had no money for the establishment of the NPRC. Worse still, he made a further announcement that shocked the whole world in January 2013 announcing that Zimbabwe was left with US\$217 (R1600) in its account against the \$104 million needed for the general elections alone (The Washington Post: 30 January 2013). Also in 2012, Biti told parliament that against an empty treasury, the state needed US\$37,2 million to carry out the 2012 population census for which a provision of US\$22 million had been made in the 2012 National Budget. This meant that the balance of US\$15,2 million was to be sourced from Zimbabwe's development partners who were reportedly fast developing donor fatigue (New Zimbabwe: 14 March 2012).

Thus the state's few available funds were overcommitted and the NPRC became a contending casualty of the state's bankruptcy. This lack of funding and the pursuant unlikely launch of the NPRC positions traditional transitional justice mechanisms as the major panacea for Zimbabweans seeking truth, healing and reconciliation. While the lack of sufficient funds is a worrying factor for Zimbabwe's transitional justice programme, other concerns also exist, such as weak governance systems and structures. According to the International Anti-Corruption Index, as far back as 1999 Zimbabwe had the second weakest governance structures in SADC, after war-torn DRC. These results were consistent with similar ones from Transparency International's Corruption Perceptions Index, the Heritage Foundation Index on Economic Freedom and the World Bank 2009 Worldwide Governance Indicators. This implies that chances are realistic that the funds, even if they were to be secured, stand a very good chance of being misappropriated.

Regarding the funding of reparations, lessons from South Africa could empower the Commission to offer urgent, smaller, interim standard payments to victims or their families (SA TRC Report Volume 1 Ch. 6: 135, Vol. 6 Section 1 Chapter 2: 34). However, research by the Catholic Commission for Peace and Justice (CCPJ) (1997: 29) in Matabeleland revealed that individual compensation was not well supported by victims there or in parts of the Midlands Provinces. A key recommendation from the research was the use of communal reparations, specifically through the formation of *Uxolelwano* (Reconciliation) Trusts. However, such a move would be treated with suspicion as previous well-meaning endeavours

were looted by the politically well connected. Earlier compensatory schemes which offered cash, such as the War Victims Compensation Scheme of 1998, were severely plundered with some beneficiaries falsifying injuries and creating fictitious stories just to receive compensation (Carver: 2000, Buford and van der Merwe 2004 in du Plessis and Ford 2008: 9). Revesai (2011) described Zimbabwe's top politicians as leeches and not as scorpions owing to their ability to continuously and ceaselessly siphon money off well-intended projects such as housing for the poor (New Zimbabwe: 11 December 2009). According to Biti (2011), in Zimbabwe only US20 cents out of every US\$1 paid by the taxpayer was used for legitimate national causes. The rest haemorrhaged through overt and covert acts of corruption. The award of individual financial reparations must therefore be considered both in the light of the distortions that such monetary compensation attracts as well as victim's rights to compensation of their choice.

This being the case, the fact that Zimbabwe was at one point bankrupt should not impede its quest for an NPRC as there are many examples of Truth Commissions that received external funding. For example, El Salvador's Commission was fully funded (to the tune of \$2.5 million) through voluntary contributions by UN members (Shea 2000: 64, Kritz 1995: 332, Hayner 2011: 217). The South African TRC also received financial support from international donors who supplemented the money provided by the South African government (Quinn 2011: 42, Hayner 2011: 224). In this regard, the state in Zimbabwe intends to form a Peace and Reconciliation Fund to be funded by resources mobilised from bilateral, international and local partners (Organ on National Healing, Reconciliation and Integration 2011: 11). However, given that the NPRC will have a 10-year mandate, funds and resources may become a major stumbling block to its operations, as has been the case with other well-funded mechanisms such as the *ad hoc* International Criminal Tribunal for Rwanda. It is when such sources of funds and resources are depleted that citizens will turn to traditional transitional justice mechanisms that do not require much funding.

By contrast, the only payment due in most traditional transitional justice mechanisms is a token in the form of a chicken, goat or cattle known as *musumo*. This is a token paid before presenting a case to traditional authorities and is owed to the presiding Chief in cases brought before their courts. Some traditional leaders even defer the

payment of *musumo* and proceed to hear the cases brought before them (Chief Ngonidzashe Marongwe, Personal communication: 21 September 2012).

#### **5.4.10 Independence and staffing**

The biggest challenge for Zimbabwe will be how to assemble a balanced set of Commissioners who represent the desires of all Zimbabweans, especially the victims of atrocities that were committed over time in Zimbabwe. It has been argued that the effectiveness of any peace building mechanism lies mainly in the credibility and ability of its senior staff members (Sarkin 1999: 804, Hayner 2002: 215). A highly politicised country, such as Zimbabwe stands a greater chance of succeeding by employing international experts as Commissioners as this will strengthen the credibility of the Commission in the eyes of the outside world. However, the problem that will remain is how the government will view the findings of a Commission staffed by non-Zimbabweans. The dismissive manner in which the government treated the United Nations Special Envoy on Human Settlements, Anna Kajimulo Tibaijuka's findings on Operation Murambatsvina in 2005 serves as an example. According to the draft Constitution of Zimbabwe, the employment of non-Zimbabwean Commissioners in NPRC is outlawed.

South Africa and Sierra Leone present contrasting lessons for Zimbabwe on the issue of the nationality of staffing. South Africa used local commissioners only who were selected by the public (Shea 2000: 24-26), while Sierra Leone was the first country in Africa to use international Commissioners and also the first to operate in tandem with a hybrid criminal tribunal, the Special Court for Sierra Leone (Forsythe 2009: 455). Its TRC comprised four Sierra Leoneans and three international experts as Commissioners.

According to Chapter 12, Part 6, Section 251, subsection (1a), the President will appoint the Commission Chairperson in consultation with the Judicial Services Commission and the Parliamentary Committee on Standing Rules and orders. Subsection 1(b) states that the Commission will have a total of eight Commissioners all to be appointed by the President from a list of a no fewer than 12 nominees submitted by the Parliamentary Committee on Standing Rules. Part two of

the same Draft Constitution states that in order for one to be appointed as the Chairperson of the Commission, that individual must have served as a legal practitioner in Zimbabwe for longer than seven years. A criterion for the selection of the Commissioners is that they must have expertise in the areas of mediation, conciliation, conflict resolution, reconciliation and peace building.

A perusal of the criteria used for the public selection of Commissioners in South Africa will complicate the selection process in Zimbabwe. These qualities include impartiality, moral integrity, known commitment to human rights, reconciliation and disclosure of the truth, absence of a high party political profile, and lack of intention to apply for amnesty (Sarkin 1999:807). NGOs in South Africa were even allowed to make representations about the human rights record of potential Commissioners, something which is unlikely in Zimbabwe as some sections of the government have serious misgivings about civil society organisations which are involved in areas such as democracy and human rights.

In a series of processes similar to those used in the selection of Commissioners in South Africa, the draft National Policy Framework for NPRC (2011: 8) proposed that the first selection criterion for the envisaged nine Commissioners will be based on gender grounds, that is, at least four women should be included. This will be preceded by an open nomination process allowing citizens to compile a list that will be submitted to parliament for vetting, before being appointed by the President. The nine Commissioners will then select their own Chairperson (National Policy Framework for Peace and Reconciliation Commission 2011: 11). While this appears to be rational, any process that is brought before parliament in Zimbabwe is likely to be subjected to party politicisation and bickering, with each party pushing for its own candidates regardless of their merits. This compromises peace building and reconciliation as other considerations such as party affiliation take precedence over ability and qualification. Political employees also have a higher propensity for derailing such well-meaning projects for political expediency.

The most likely result is a Commission in which the Commissioners are distributed in a manner that reflects political party representation in parliament. Unlike in South Africa, the nine Commissioners in Zimbabwe will be civil servants, accountable to a

minister and politicians (through parliament). This practice will curtail the independence of these Commissioners as they will be expected to investigate the parliamentarians to whom they report. Conversely, Parliament can choose to appoint Commissioners who are sympathetic to the views of senior politicians, most of whom could be asked to give testimonies as human rights abuse suspects. It is a paradox that the leading alleged instigators of violence will have the final say in who investigates them. This is bound to render the NPRC another of the pseudo human rights watchdogs, just like the Human Rights Commission (Daimon: 2000).

The appointment of foreigners as Commissioners has its own shortcomings. From Guatemala's fully foreign TRC, it was observed that being foreigners, the Commissioners and staff could not fully comprehend the local nuances, thereby depriving locals of the chance to write their own history (Sarkin 1999: 808). On balance, the mixed model of national and international Commissioners appears to function well. Such a mix allows national familiarity and international expertise to complement each other, but in Zimbabwe it is to be doubted whether the government would agree to any foreigners serving on the Commission (du Plessis 2002: 19).

For the Commission to be effective it needs to have clear and unquestionable autonomy, especially from the government (du Plessis and Ford 2008: 164). This autonomy is even more important as the Commission interprets its own mandate, develops its procedures, writes its reports and makes its recommendations (Hayner 1994: 179). The international community and civil society can contribute experts and expatriate staff and help ensure operational efficiency, publicity and independence of the Commission (du Plessis and Ford: 2008). While Hayner (2002: 217) believes that positions such as social workers, psychologists, interpreters, data entry staff, drivers, information technology technicians and security personnel can be filled by both local and international staff, it must be borne in mind that employment creation is an on-going project in Zimbabwe, as is the case elsewhere. Where available, local skills must be preferred over the hiring of foreigners. The use of local skills enhances local ownership and participation. More importantly, it helps to interpret local events and phenomena that might be unknown to foreign experts.

#### **5.4.11 The NPRC and the land question**

The complexity of land rights in Zimbabwe is undeniable (Moyo 2011: 493-531, Scoones, Marongwe et al.: 2010) and the centrality of the land question in Zimbabwe's transitional justice programme cannot be overemphasised. As such, there are legitimate expectations that any transitional justice process in Zimbabwe should address this contentious issue (Ndlovu-Gatsheni 2009: 4, Sukume and Moyo: 2003). The NPRC presents a propitious opportunity for the land question to be effectively addressed. Du Plessis (2002: 21) suggests the establishment of a dedicated lands claim body as part of the NPRC and adds that its mandate should include considering compensation due to farmers and farm workers, mainly for the loss of their livelihoods. The South African Land Commission is a good example for Zimbabwe of how to set up institutions that deal with the loss of livelihoods, productivity and damage to property that occurred specifically during land redistribution. Zimbabwe can also draw lessons from its earlier land reform programme of 1982 to 1985, which, according to Chiremba and Masters (2003: 4), was very successful as the government redistributed 3,498,440 million hectares to 71,000 families.

Articulating the attitude of chiefs to how the national healing process ought to handle the land question, Chief Njerere noted that land reform must first be depoliticised, as land should not be made a 'political asset'. The Chief's views are in tandem with those expressed by du Plessis and Ford (2009: 75), that the land issue should be handled separately as its complexity warrants dedicated institutions to effectively address the decades old challenges of land ownership in Zimbabwe. The Chief stressed that whatever mechanism or institutions are to be used, they should not exclude traditional leaders. Commenting on the complexity of involving land related issues in transitional justice processes, the Oxford Analytica Daily Brief Service (2003: 13) noted that there are three main arguments against having transitional justice mechanisms considering land issues. These arguments are presented below.

#### **5.4.11.1 Capacity constraints**

The first argument against the NPRC handling the land question relates to its capacity to exercise its functions. The criteria for the selection of Commissioners as outlined in the Draft Constitution does not include certain skills such as those needed to dispense of redistributive justice. Yet these skills are a prerequisite should the NPRC decide to handle the land issue. Secondly, the primary focus of most transitional justice activities has been on gross human rights abuses, such as murder, arbitrary detention and torture (Arbour 2006: 15). Most transitional justice programmes have struggled to deliver justice even on this limited and relatively focused mandate (Allen 1999: 315-353). Increasing the mandate to cover complex, protracted and multi-disciplinary issues such as land rights can only hasten the failure of the NPRC.

#### **5.4.11.2 Economic impact**

The impact of radical land policy changes will certainly have serious effects on the economy, as did the previous land reform programme of 2000 onwards (Kinsey 1999: 173-196, Moyo: 1995). These effects would cover a wide range of sectors, such as social, economic, political, health and education among others. Of these sectors of the economy the one likely to be worst affected by another radical land policy is the economic sector.

The inclusion of land rights in Zimbabwe's transitional justice programme will affect other issues such as food security and the productivity of the already underperforming agricultural sector. These economic imperatives must be debated before Zimbabwe decides whether to include them in the mandate of the NPRC.

#### **5.4.11.3 Racial, tribal and gender tensions**

Land ownership in Zimbabwe is historically a racialised, tribalised and genderised phenomenon. This was a contested phenomenon well before colonialism, and brings with it the potentially divisive question of traditional land ownership. This has the

potential to open the proverbial 'Pandora's Box' of divisive issues linked to ethnic, racial and gender identities. Lessons can therefore be drawn from Kenya, which showed a reluctance to consider land claims which dated back to the colonial period (Oxford Analytica: 4 March 2008).

The exclusion of the land question from the transitional justice programme in Zimbabwe is also tantamount to addressing the symptoms but not treating the disease. An analysis of the conflicts in Zimbabwe always leads one to the same conclusion, that conflict is structurally driven and that land related injustice deserves to be dismantled. This observation was also made by the former United Nations High Commissioner for Human Rights, Louise Arbour (2007: 3), who noted that Truth Commissions should investigate abuses of economic, social and cultural rights. In this regard, Zimbabwe should learn from and improve on the South African and Guatemalan TRCs, where they had mechanisms separate from the TRC dealing with land and property rights issues. In the process, traditional authorities and their related mechanisms of adjudicating land related disputes should be incorporated as alienating these two will create further injustices. The merit of including land related issues in Zimbabwe's transitional justice programme is the centrality of land to Zimbabwe's history of which the War of Independence was started and fought primarily over land (Chung 2005: 300, Ndlovu-Gatsheni 2009c: 58).

## **5.5 The NPRC and traditional transitional justice mechanisms**

Zimbabwe's traditional leaders, the custodians of traditional transitional justice mechanisms, made representations to the Organ on National Healing, Reconciliation and Integration on their views regarding national healing. During the National Dedication Week Towards National Healing, Reconciliation and Integration held in 2012, Zimbabwe's traditional leaders bemoaned the erosion of their powers, while emphasising the existence of what they termed 'rich traditional and cultural systems of healing and reconciliation'. Those who participated in the week-long event constituted the majority of traditional leaders rendering their views representative enough to be valid.

Some of these views had been expressed earlier by traditional leaders in their presentations during the National Healing and Reconciliation outreach programme which culminated in the National Dedication week held from 24-26 July 2009. More views were gathered in September 2009 by the Organ on National Healing, Reconciliation and Integration when it embarked on a national outreach programme to gather the views of Zimbabweans on issues of national healing and reconciliation. During this outreach programme the Organ on National Healing met with traditional authorities such as Chiefs, Headmen and Village Heads who expressed the following views, *inter alia*:

...that the state must begin by admitting its role in sponsoring and feigning violence, that certain cleansing ceremonies and rites were long overdue, that all forms of violence must end, that the state must be exemplary in reconciliation and not to be divided and expect citizens to be united (Government of Zimbabwe, Report of the Provincial Consultative Outreach Engagements Undertaken by the Organ on National Healing, Reconciliation and Integration in the President's Office: 2009).

In other words, the traditional leaders called for peace, reconciliation, ritualisation, truth telling, accountability and reparations. The traditional authorities also recommended that the state should officially recognise traditional transitional justice mechanisms so that their application could be standardised. Linked to the recognition of traditional transitional justice mechanisms, they also noted that lower level traditional authorities such as Headmen and Village Heads should have their courts' decisions rendered binding and enforceable by magistrates so that lower level human rights offenders could be prosecuted at village level. This would relieve the burden on magistrates' courts and most importantly, bring justice to the grassroots. In such cases, justice would not only be done but also seen to be done.

In the same report, Paramount Chiefs noted that ceremonies and rituals about death vary according to customs, hence the need for the state to provide resources such as cattle and funds for use in traditional area-specific cleansing ceremonies (Government of Zimbabwe, Report of the Provincial Consultative Outreach Engagements Undertaken by the Organ on National Healing, Reconciliation and Integration in the President's Office: 2009). According to these chiefs, if their areas were not ritually cleansed according to their specific customs,

any state-led transitional justice programme would be futile as the land needed to be appeased first. The support that all the traditional authorities expressed for the use of traditional transitional justice mechanisms implies that such mechanisms have been used in their jurisdictions and with their approval and participation. This fact attests to the extent not only of the existence but also of the vast application of traditional transitional justice mechanisms in Zimbabwe as not one of the over 100 traditional leaders spoke out against the use of traditional transitional justice mechanisms in their jurisdictions.

## **5.6 Conclusion**

In this chapter it has been pointed out that Zimbabwe needs to deviate from the norm of treating the South African model of a TRC as the standard practice and a paradigm to be directly applied to other domestic situations. The chapter also explained that the circumstances in Zimbabwe did not favour a TRC as the best transitional justice mechanism to achieve reconciliation and national healing; the universalistic nature of a TRC denies it the flexibility required to address 'deep', 'wide' and 'long' gross violations of human rights as experienced in Zimbabwe. It can be concluded that the use of a TRC alone in Zimbabwe would probably be an inadequate framework and would require complementation by other interventions, programmes and rituals that address other specific cultural and religious challenges, including land reform and economic development. This is so because the TRC does not fully integrate its work with traditional transitional justice mechanism.

Zimbabwe's proposed NPRC must be an integral component of a holistic approach to peace building. The remaining components must be traditional rituals, memorialisation, criminal prosecutions, institutional reform and reparations. The 'depth' and 'width' of Zimbabwe's human rights abuses requires that its transitional justice programmes be multi-tooled, multi-layered and place-specific for their particular domestic situations. This approach compels the NPRC to encompass already existing practices and rituals such as *ngozi* as complementary mechanisms, especially in rural areas where these rituals are part of everyday life. Additionally, Zimbabwe should undertake research to ascertain the actual contribution to

reconciliation made by the TRC in South Africa as current perceptions are based on either limited research or assumptions.

Peace building is a process and not an event. It is a dynamic, adaptive and an ever evolving process hence the need to augment once-off peace building processes like NPRC hearings with traditional rituals and ceremonies that form part of everyday life, taking into account citizens' peculiar ways of life. While it was imperative for the study to interrogate the NPRC's ability to bring reconciliation in Zimbabwe, much depends on the state's transitional justice history that plays a crucial role in shaping perceptions about justice, injustice and reconciliation. The next chapter therefore explores the state's transitional justice record in Zimbabwe between 1980 and 2011.

## **CHAPTER 6: STATIST TRANSITIONAL JUSTICE IN ZIMBABWE**

### **6.1 Introduction**

The previous chapter debated the suitability of imported realist transitional justice mechanisms, particularly the Truth and Reconciliation Commission (TRC) model, to Zimbabwe. It was concluded that imported transitional justice mechanisms are not a panacea for national healing and reconciliation in post-conflict communities. This chapter traces the Zimbabwean state's record in implementing transitional justice mechanisms with the aim of demonstrating that the state had, for long periods, failed to implement mechanisms that bring national healing and reconciliation. This led to communities implementing traditional transitional justice mechanisms. An exploration of Zimbabwe's attempts at national healing and reconciliation during the years 1980 to 2011 will be undertaken in this chapter. The year 1980 is an important one for Zimbabwe as the country achieved its independence on 18 April and had a realistic chance of instituting victim-centred state-led transitional justice programmes. On the other hand, 2011 is considered a transitional justice watershed year, because the state announced its intentions to form the NPRC and, secondly, Zimbabweans initiated the process of writing a new constitution.

The methodology of this chapter will be a chronological exploration of the various mechanisms used between 1980 and 2011. A case study will be used to illustrate the statist approach to transitional justice. The chapter will be concluded by proffering national healing lessons that emanated from the case study.

This investigation preludes the next chapter that will introduce indigenous realist transitional justice mechanisms. However, before analysing the statist approach to transitional justice, it is imperative to contextualise the debate by providing a historical background of politically motivated violence in Zimbabwe.

## 6.2 Historical background of violence in Zimbabwe

Zimbabwe's founding history has been marked by conquest, subjugation and repression over many decades. The country has known very few years of relative peace as it vacillated between what Ndhlokoyo (2012: 22) calls relative peacelessness and complete peacelessness. Ndlovu-Gatsheni (Personal communication: 9 April 2011) agrees with this and suggests that the history of Zimbabwe is one of violence coded under different names, such as the various wars between the Ndebele and the Shona which occurred between 1840 and 1900 (Beach 1986: 634). Other episodes of violence include the First *Chimurenga* (first anti-colonial uprising), colonialism, The Second *Chimurenga* (War of Independence), *Gukurahundi* (Matebeleland and Midlands genocide), Third *Chimurenga* (Land Reform Programme), Operation *Murambatsvina* (Operation Restore Order) and Operation *Wavhotera Papi?* (Operation who did you vote for?). Ndlovu-Gatsheni describes violence in Zimbabwe as a continuum and not as a fragmented and isolated episodic phenomenon. That violence predates both the arrival of the Ndebele and colonialism is undisputable as evidenced by, *inter alia*, the names of the kingdoms that existed on what Beach (1984: 7) termed 'the plateau between the Zambezi and the Limpopo Rivers', now Zimbabwe. Mutapa<sup>19</sup> (1450-1902) and Rozvi<sup>20</sup> (1690-1830) are just two such examples of these kingdoms which preceded Morden day Zimbabwe. The arrival of Mzilikazi in 1834 (Mazarire 2010: 31-34) and subsequently the pioneer column in 1890 (Mazarire 2006: 2) only increased competition in an already violent and belligerent environment. The existence of violence in these pre-Ndebele, pre-colonial Shona communities implies the existence of mechanisms that dealt with post-conflict healing and reconciliation.

After the pre-colonial violence, the next wave of violence to occur in Zimbabwe affected all the inhabitants of the then colonial state. It was unleashed by the colonial British South Africa Company (BSAC) under the leadership of Starr Jameson who

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<sup>19</sup> Mutapa is derived from the Shona word *kutapa*, meaning to enslave. Oral history has it that early Portuguese traders translated the title to *Munhumutapa*, meaning the owner or Lord of the conquered land.

<sup>20</sup> Rozvi is derived from the Shona word *kurozva*, implying a way of depriving someone in an absolute manner. These names indicate the characters of their rulers who were raiders of wealth and women and enslavers of men for military purposes. The name indicates that once raided you were left with no women, soldiers or livestock which, according to Mudenge (1974: 25), were the cornerstone of pre-colonial wealth.

entered Zimbabwe in search of mining opportunities (Muir 2001: 180, Rotberg 1998: 288). There were separate efforts by the Ndebele and the Shona to ward off the invading BSAC in 1896 (Ndlovu-Gatsheni 2009: 39), leading to what is now termed the First *Chimurenga*. These anti-colonial uprisings were crushed between June 1896 and October 1897 and Cecil John Rhodes' company assumed direct administration of the plateau, effectively starting colonialism (Beach 1979: 395-420). The displacement of local inhabitants from fertile lands and their subsequent forced resettlement into less fertile and drought prone regions is the origin of the land problem in Zimbabwe and also marks the origin of social, economic and political injustice which transitional justice need to address (Moyo: 1995, Dowson 2011: 144-153).

Another wave of violence came with the War of Independence, also known as the Second *Chimurenga* of 1966-1979. The three main protagonists, ZANUPF, ZAPU and the Rhodesian Front all committed gross human rights violations (Mtisi, Nyakudya and Barnes 2009: 142, Godwin and Hancock 1995: 85-86, Martin and Johnson 1981: 2). The war was so gruesome and so protracted that conservative estimates put the number of fatalities at 30 000 and injuries at 80 000 (African Royal Society 1996: 302) while others, like Cherry (2011: 138), put the figure for fatalities at 60 000. This culminated in the Lancaster House Agreement which ushered in independence on 18 April 1980 with Mugabe as Zimbabwe's Prime Minister (Chiumbu, Minie and Bussiek 2009: 1, Gregory 1980: 11-18).

Violence did not end with independence as the state was soon to respond disproportionately to a group of disgruntled ex-ZIPRA soldiers by unleashing a specialised North Korean-trained brigade to crush the alleged dissidents in Matebeleland and in parts of the Midlands Provinces (Chitiyo 2009: 3, Catholic Commission for Peace and Justice 1997: 142). So excessive was the state's response that the Catholic Commission for Peace and Justice and the Legal Resource Foundation put the number of fatalities at 20 000 (1987: 6). This implies that Operation *Gukurahundi* (literally meaning the first rains that wash away the chaff) was executed with utter brutality and extreme barbarism as its fatalities over just two years of operation equalled those of the war of liberation which was fought over 14 years by more than four armies. This culminated in another agreement,

between ZAPU and ZANU-PF, called the Unity Accord. This resulted in the formation of ZANU PF on 22 December 1987 (Moyo 1992: 29, Chiwewe 1990: 242-287).

Questions also arise regarding the continued existence of colonial repressive laws such as the *Emergency Powers Act [Chapter 11:04]* which came into effect on 2 December 1960 and remained in effect until 1990 (Legal Resource Foundation 1994: 2, Crisis in Zimbabwe Coalition 2003: 1996, Eppel 2006: 1). According to Eppel's analysis, this implied that the state had *supra* legal powers at its disposal which could be deployed to commit human rights abuses.

The Unity Accord was followed by a few years of relative peace between 1988 and 1990 (Muzondidya 2009: 179). This period was short-lived as the International Monetary Fund (IMF) induced Economic Structural Adjustment Programme (ESAP) began to exert a negative impact on the general economy (Vambe 2008: 12, Muzondidya 2010: 188, Phimister and Raftopoulos: 2004, Freeman: 2005) and particularly on the livelihoods of the working class and the poor (Mhone: 1992, Brand, Mpedziswa and Gumbo: 1992). ESAP was introduced to, among others, stimulate economic growth, attract foreign investment, expand employment and reduce government expenditure through economic liberalisation measures (Mandishona 1996: 37).

Workers and their trade union umbrella body, the Zimbabwe Congress of Trade Unions (ZCTU), formed a new opposition political party called the Movement for Democratic Change (MDC), led by the Secretary General Morgan Tsvangirai. Around the same time that the MDC was formed, Civil Society Organisations such as the National Constitutional Assembly (NCA) led by University of Zimbabwe Law Professor, Lovemore Madhuku, began agitating for constitutional reforms (Sithole 2001: 161, Tendi, 2010: 14, Laakso: 2002). For Sithole (2001: 160-169) this marked the beginning of the downfall of ZANU PF as its Constitutional Commission backed Draft Constitution was defeated in a referendum in February 2000. Cox (2005 35-48, 2005: 133) and Sithole (2001: 160) argue that this episode was iconic in Zimbabwe as it marked ZANU PF's first defeat in any form of democratic contest. Conversely, it necessitated a change in tactics for the then ruling party. The state's response to the constitutional referendum's loss was a swift deployment of nationalist sentiments

against past white economic injustices (Alexander 2003: 100-101). The results were a chaotic land reform programme and gross violations of human rights on the farm owners and their workers (Chaumba and Scoones 2003: 533-554, Nading 2002: 737-800). The enduring land-related violence displaced many and caused thousands of injuries and hundreds of fatalities. Exact figures of the affected cannot be ascertained because of the pervasive nature of the atrocities and the alleged state effort in deliberately concealing them.

Violence in Zimbabwe was reproduced and episodically predicted. For example, each General and Presidential Election has been accompanied by violence, as was the case in the 2000, 2002, 2005 and 2008 elections (Kasambala and Gagnon 2008: 11, Sachikonye 2011: 48). However, in May of 2005, a new type of violence in the form of a police/military operation to rid the urban areas, mainly Harare, of shack dwellers was witnessed. Code-named Operation *Murambatsvina* (drive out the trash), these police/military operations saw the massive destruction of informal housing and informal trading points (Mufema 2007: 13, United Nations: 2005). According to a United Nations report, an estimated 650 000 to 700 000 people were displaced (UN Report of the Fact-Finding Mission to Zimbabwe to assess the scope and impact of Operation *Murambatsvina* 2005: 7). The crisis in Zimbabwe led to regional tensions on how best to deal with what became known as the Zimbabwean issue.

An initiative only came in March 2007 when the Southern African Development Community (SADC) mandated South Africa's then President Thabo Mbeki to facilitate a settlement between ZANU PF and the opposition as a way of solving the binary crisis presented as a political and economic crisis. Previously, Mbeki had been instrumental in the holding of the harmonised elections in which local government, parliament and the presidency were contested simultaneously in March 2008. ZANU PF lost its majority in the House of Assembly for the first time, and in the presidential race Mugabe was defeated by MDC leader Tsvangirai by 47.9 per cent to 43.2 per cent, a margin which did not give Tsvangirai the 50 per cent plus one vote necessary to avoid a run-off (Chan 2010: 18, Sithole 2001: 161, Tendi 2010: 258, Mawere 2011: 91). Thus Tsvangirai's failure to garner sufficient votes to avoid a run-off presented ZANU PF with an opportunity to re-strategise. This was done by

means of instituting a ruthless election campaign rooted in violence and impunity (Masunungure and Bratton 2008: 41-55).

According to Masunungure and Bratton (2008: 51) and Sachikonye (2011: 11), during the run-up to the Presidential Election rerun, war veterans, the military, the intelligence and ZANU PF militia, known colloquially as the Green Bombers owing to their green uniform, were involved in a bloody campaign of intimidation, torture, rape and murder. Estimates by the Zimbabwe Human Rights NGO Forum put the number of victims of the violence at tens of thousands (various reports 2008-2010). It can be argued that, judging by reports on the ferocity, tenacity and brutality of the violence, the intensity of the 2008 violence surpassed the land reform related violence. The MDC refused to participate in the second round of the elections under such circumstances. Consequently, Mugabe became the sole candidate and winner of the Presidential Election. Masunungure (2009: 97) described the elections as 'militarised election without a choice'.

The results were hotly contested in Zimbabwe and were not internationally accepted, culminating in the formation of the Government of National Unity under the Global Political Agreement (GPA) on 11 September 2008. It was in the GPA that a non-committal provision for transitional justice was hinted at and where the Organ on National Healing, Reconciliation and Integration was formed. It is on these grounds that scholars such as Mapuva (2010: 274-263) argue that governments of national unity must now be officially recognised both as a conflict prevention strategy and a transitional justice mechanism. Zimbabwe's GPA signified two things: the *deZanufication*<sup>21</sup> of statecraft and a radical departure from the previous dilemmas associated with the state's transitional justice policy of amnesia, which will be elaborated on in the next section.

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<sup>21</sup> The term *dezanufication* is a term used by those who believe that the state in Zimbabwe was captured by ZANU PF. The term assumes that the ruling party and the state evolved to become one and the same thing and that there is merit in separating them. *Dezanufication* refers to the reversal of that capturing thereby rendering the state free from the ruling party and in the process enhancing democracy and the rule of law.

### 6.3 Contextualising statist transitional justice in Zimbabwe

It is human nature that when a wrong action is committed, i.e., when human rights are violated, human beings require response that acknowledges the transgressions and in some way balances the score. In order to be balanced, however, it seems essential that the resulting obligation must be costly for offenders, too ghastly for them to contemplate. The ideal situation is for criminals to be prosecuted and victims to be compensated for the harm and loss suffered. However, the world is unfortunately not an ideal place. The ideal is not possible, especially in the aftermath of massive gross violations of human rights. Post-conflict communities face two options; to do nothing or to confront past violence. South Africa chose to face its past while Zimbabwe, Mozambique, Namibia and Zambia chose to ignore theirs and attempted instead to induce national amnesia in their people. This was intended to persuade their nations attain national healing by forgiving and forgetting the past. This option presents challenges as both victims and perpetrators fail to heal and reconcile. In addition, it creates conditions promoting the recurrence of gross violations of human rights.

Judge Richard Goldstone (1998: x) posits that in dealing with past gross violations of human rights, societies seek to fulfil six objectives: the proper recording of history, compensation, reconciliation, prosecution, deterrence and legitimacy. He adds that the attainment of these objectives is limited by political, military and economic realities. Given the extent of politically motivated violence in Zimbabwe, as demonstrated in the previous section, the need to institute transitional justice programmes cannot be over emphasised. Yet state led transitional justice programmes in Zimbabwe have consistently failed to address central issues of national healing and reconciliation.

As Amilcar Cabral (1969: 56-57) astutely observed, the problem of transitional justice in Zimbabwe can be traced to the end of white minority rule. Cabral traced the failure of statist transitional justice programmes to 'independence' where, he noted that there was an absence of blacks (and whites who were sympathetic to the cause of black majority rule) who were capable of taking control of the state apparatus, leaving a 'vacancy' within the structures of state. The black working class hardly

existed as a defined class due to a plethora of legislation aimed at disenfranchising them. These repressive laws included the *Migrant Workers' Act of 1948* and the *Industrial Conciliation Act of 1959*, which excluded black workers from the definition of employees. Most black workers could neither read nor write and suffered from what Karl Marx termed the curse of the peasants, referring to their general political illiteracy and inability to utilise their numbers to their political advantage (in Draper 1978: 365). The black entrepreneurs also hardly existed in effective numbers as the colonial state machinery was effective in repressing black entrepreneurship). What was left was a spectrum of people who were in the service of colonialism, well-schooled by the white minority rulers in how to manipulate the statecraft for individual benefits. A remnant of the settler workforce and sections of the African elite were the only ones capable of utilising the state machinery used by the settlers against the black majority. These two classes inherited the reins of colonial state power. Hence, at 'independence' there was no political transformation but only political inheritance. The post-colonial state is therefore an inherited colonial state that did not emerge from the society. The black elites who inherited the state were themselves a product of colonialism and favoured colonial methods of dealing with people, including violence. To borrow from Antony Giddens's theory of structuration (1987: 195-223), the black elites were conditioned by the structure to articulate the grievances of the agency to a point where the agency was wrongly convinced that the structure was part of the agency.

It can be posited that the state in Zimbabwe was an imposition on the people, both in the colonial and post-colonial periods. The post-colonial state did not emerge from local (Shona/Ndebele/Kalanga) traditions and ethos, for example, but from the colonial Rhodesian state, which itself was an imposition on locals by white minority settlers. This explains two situations: firstly, the continued existence of repressive colonial laws; secondly, the state's inaction in initiating victim-centred transitional justice programmes. When a state is imposed on the people, they usually resist and the result is friction between the people and the state that is supposed to serve them. The state then indigenises itself by violently disciplining society. For Mamdani (1996: 217) and Ndlovu-Gatsheni (2009: 99), this is when the state turns its citizens into what they term subjects, referring to the extent to which the state violates the citizens it is supposed to serve.

The post-colonial state never experienced any transformation as it remained the same; top-down, racially hierarchised, Western centric, Christian centric, imperial and capitalist (Grosfoguel 2007: 214). The multi-layered nature of violence during and after colonialism needed a mechanism capable of dealing with intricacies that included the decolonisation of knowledge in addition to the decolonisation of power and being (Mignolo 2007: 155-167). Such a mechanism will have to be supported by a conscious process of resuscitating indigenous forms of knowledge and justice, developed by Africans over decades, and which have been subsequently marginalised by the state, leading them to assume the status of myths and folklore.

The state in Zimbabwe preferred to engage in elite pacts that buried the unresolved past while trying to forge a new beginning as part of its transitional justice programmes. The Lancaster House Agreement of 1979, the Unity Accord of 1987 and the Global Political Agreement of 2009 were all measures aimed at burying the state's violent behaviour. Not dealing officially with a country's past violations of human rights has proved to be very costly, even more so than retribution because it does not allow for closure (Amstutz 2005: viii). Neither reconciliation nor national healing are possible under a deliberate policy of blanket 'forgive and forget'. In contrast to what Wood (2005: 258) calls Zimbabwe's state sponsored pseudo peace agreements, the South African TRC was touted as exemplary, especially after pioneering individualised amnesty applications in exchange for telling the whole truth. Similar efforts at transitional justice in many countries drew lessons from the South African model. However, missing from these transitional justice efforts and debates are explorations of traditional transitional justice mechanisms that are victim-centred, bottom-up and culturally sensitive.

#### **6.4 The state and transitional justice in Zimbabwe**

Transitional justice in Zimbabwe is broadly understood and is open to various contested interpretations. The predominant interpretation is the statist approach in which the state is expected to play a leading role in initiating transitional justice programmes. This statist conceptualisation of transitional justice can be traced to the dawn of independence in Zimbabwe when technical planning ministries variously attacked traditional transitional justice mechanisms and traditional authorities as

anachronisms that stood in the way of progress. According to the 1985 Communal Lands Development Plan of the Ministry of Lands, Resettlement and Rural Development, traditional authorities and their healing and reconciliation mechanisms were viewed as largely irrelevant. Lan (1985) articulates this view by arguing that the erosion of traditional authorities and the discrediting of traditional justice mechanisms in general were engineered by the colonial government as a tool to disenfranchise the black majority. In agreement with Lan, Ranger (1982: 14) observes that the state's interpretation of transitional justice after independence did not make provision for Headmen and Chiefs, the custodians of traditional transitional justice mechanisms. Bratton (1978: 50) was more direct in noting that no major administrative role awaited traditional authorities in Zimbabwe after independence. While traditional authorities were fighting to assume their rightful place in the administration of post-colonial Zimbabwe, traditional transitional justice mechanisms lay dormant. Their resuscitation and resurgence can be attributed to the recurrence of violence and the concurrent lack of political will on the part of the state to implement mechanisms to bring closure and national healing (Mbofana 2011: 199).

There are three possible interpretations of the state's unwillingness to implement transitional justice mechanisms between 1980 and 2011. Firstly, it can be argued that the state wanted to use unhealed, unreconciled citizens as a source of political mileage, a political resource of some kind. This view finds credence in ZANU PF's election campaign strategy, especially between 1982 and 2000, which was premised on threatening voters with a repeat of violence should they fail to vote for them (Kriger 2003: 195, Makumbe 1991: 1, Sachikonye 1990:92-99). Secondly, the state benefited directly from violence both as a tool of governance and as a source of power (Kasambala and Gagnon 2008: 15, LeBas 2006: 420) and derived its power and authority from violently subjugating citizens who were of a different political persuasion (Sachikonye 2011: 206). Thirdly, ZANU PF has been ruled by violence since its formation in 1965. Violence has played a central role in the management of ZANU PF as an organisation and was the pillar of ZANU PF strategy, as manifested in the words of the song often sung in Parliament by ZANU PF members, '*ZANU ndeye ropa baba*' (ZANU PF is made of blood).

This approach expects the same state which was allegedly active in committing human rights abuses to indict itself. This expectation could be the result of growth in human rights movements which has seen a move away from amnesia towards accountability. This led Muvingi (2011) to argue that transitional justice in Zimbabwe can be traced back to the formation of the National Constitutional Assembly which advocated what it termed 'the writing of a constitution by the people' (Raftopoulos and Savage 2004: 242). The Global Political Agreement (Article VII), which calls for the promotion of equality, national healing, cohesion and unity and which led to the formation of the Organ on National Healing, Reconciliation and Integration, is also a hallmark effort towards statist transitional justice in Zimbabwe (Machakanja 2012: 3, Ndlovu-Gatsheni 2009: 240).

The history of transitional justice in Zimbabwe has been characterised by amnesties, clemencies and pardons by the state to those who ordered and or carried out gross violations of human rights (Zimbabwe Human Rights Forum 2006: 11). These can be traced back to 1979 when the outgoing Rhodesian Front government indemnified itself from crimes it committed during its reign. This marked the death of transitional justice in Zimbabwe as it set a precedent for amnesties, indemnities, clemencies and executive pardons that were to characterise Zimbabwe's transitional justice trajectory. Likewise, the two main armies fighting against the Rhodesian Front, the Zimbabwe African National Liberation Army (ZANLA) and the Zimbabwe National People's Army (ZIPRA) were also soon to be indemnified, presumably on the grounds that they were fighting a just war. Yet as indicated earlier, there is evidence that these three armies committed war crimes.

For instance, ZIPRA combatants shot down two civilian aeroplanes resulting in the loss of many lives. On 3 September 1978, an Air Rhodesia Viscount flight, bound for the town of Kariba with 54 passengers on board, was shot down by a Russian heat-seeking Sam 7 missile (Grundy and Bernard Miller: 1979, Dyke 2009: 232). Eighteen of the 54 people on board survived the crash but 14 of them were then shot by ZIPRA combatants (Caute 1983: 274). On 12 February 1979, ZIPRA again shot down a passenger plane, killing all 54 passengers and five crew members returning to the then Salisbury from Kariba (Caute 1983: 310). Both these attacks were in blatant contravention of the Geneva Protocol of 1977. The explanation offered by

ZIPRA commanders for these actions was that they had sufficient intelligence information to convince them that General Peter Walls<sup>22</sup> was one of the passengers on the flights in question.

The white minority-backed Rhodesian Front, on the other hand, was notorious for bombing refugee camps, as they did ZANLA's Nyadzonia camp on 9 August 1976, Chimoio and Tembue from 23 to 25 November 1977 in an Operation code named Dingo (Lyons 2004: 123). So devastating was Operation Dingo that its fatalities were put at more than 3 000 ZANLA combatants with 5 000 wounded while defending themselves. On the other hand, ZANLA only managed to kill two Rhodesian soldiers and wound six (Petter-Bowyer 2005: 304, 315, Moorcroft and McLaughlin 2008: 150). ZIPRA's all-female Mkushi Training Camp was also attacked by Rhodesian forces on 19 October 1978 and Freedom Camp on 23 November 1978 (Petter-Bowyer 2005: 333, Mtisi, Nyakudya and Barnes 2009: 149).

ZANLA was also notorious for class conflicts and gender based violence, one example of which led to the Nhari Rebellion of December 1973 (Nyarota 2006: 104, Sithole 1999: 89, Martin and Johnson 1981: 185). In response to the confrontation between young freedom fighters and women and ZANU PF High Command, ZANU PF crushed the Thomas Nhari led rebellion ruthlessly in what Masipula Sithole (1979) termed 'the struggles within the struggle'.

This presents a totally different picture from South Africa where even before the setting up of the TRC, the ANC first commissioned the 1993 Motsuenyane Commission to investigate *Certain allegations of cruelty and human rights abuse against ANC prisoners and detainees by ANC members*. Former South African President Nelson Mandela accepted collective responsibility for the violations on behalf of the ANC leadership (Kritz 1995: 257, Christie 2000: 79, Das 2001: 79). In contrast, and as mentioned in earlier chapters, at the dawn of independence in Zimbabwe Mugabe announced a policy of reconciliation anchored in the need to forget the past and face the future.

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<sup>22</sup> General Peter Walls was the Commander in Chief of Rhodesian Security Forces which rendered him a legitimate military target.

Mandaza (1999: 79) discussed this matter at length and argued that the 1980 policy of reconciliation was a class conspiracy by 'black bourgeoisie' and their 'white counterparts' to undo justice. His views are supported by the fact that there is no record of any Rhodesian accused of human rights violations during the colonial period who asked for forgiveness. Ndlovu-Gatsheni (2006:18) notes Mandaza's views that reconciliation was:

...the mourn of the weak, even when pronounced from positions of apparent moral and political superiority over oppressors and exploiters of yesterday... the reconciliation exercise, therefore, serves largely a political function, facilitating the necessary compromise between the rulers of yesterday and the inheritors of state power, within the context of incomplete decolonisation.

This is akin to an elite clique of black and white bourgeoisie agreeing to forgive each other without the participation of the victims in the process. This elitism runs through Zimbabwe's transitional justice discourse, with ZANU PF and ZAPU doing the same in December of 1987 when the Unity Accord offered a blanket amnesty for all *Gukurahundi* perpetrators. In arguing against further probing of the *Gukurahundi* atrocities, Mugabe said:

if we dig up history, then we wreck the nation, we tear our people apart into factions, into tribes, and villagism will prevail over our nationalism and over the spirit of our sacrifices....We have sworn not to go by the past except as a record or register. The record ... will remind us what never to do. If it was wrong, if that went against the sacred tenets of humanity, we must never repeat. (Mugabe, cited in Mashingaidze 2010: 23.)

If the words of MDC T leader Tsvangirai are a reflection of his party's policy then MDC T and ZANU PF will most likely to forge another elitist pact to deal with transitional justice in Zimbabwe sooner rather than later. Addressing a Southern Africa Political Economy Series seminar in Harare in 2011, Tsvangirai noted that Zimbabwe needed to 'balance the fears of the perpetrators and the demands of the victims' (The Zimbabwe Independent: 11 January 2013). This is evidence that the GNU tinkered with the idea of a blanket amnesty at most, or at least an amnesty of some kind. With such an aptly demonstrated ability to forgive itself, forge elitist

alliances and offer clemencies, amnesties and pardons *ad infinitum*, it can be argued that it will be difficult for victims to trust or even expect the state to spearhead victim-centred transitional justice. This leaves an opportunity for non-state interventions such as traditional transitional justice mechanisms.

## **6.5 The state's transitional justice track record in Zimbabwe**

Transitional justice has become a growing concern for Zimbabweans over the past three decades, i.e., 1990-2011 (Raftopoulos and Savage 2004: 38), and even more so in the nine years preceding the formation of the GNU on 13 February 2009 (Ndlovu-Gatsheni 2009: 340). By December 2011, the only state response to past violence took the form of a stated 'reconciliation' policy, spoken about by Mugabe in his speech at independence, the formation of an aborted Human Rights Commission and the appointment of two Commissions of Inquiry in the 1980s. No policy or institutions were put in place to carry the policy of reconciliation forward to implementation. Even efforts to compensate war victims through the establishment of a War Victim's Compensation Fund failed as most of the US\$2 billion was looted by the politically connected in a period of just six years (Centre for Public Integrity 2004: 392, Zimbabwe Project Trust 2000: 12, International Centre for Transitional Justice 2008: 63).

There were some attempts to discuss transitional justice in the past, beginning with the publication of the CCJP/LRF report on the gross human rights violations of the 1980s (CCJP and LRF: 1997). A more substantive consideration of the transitional justice options took place in Johannesburg in 2003, which recommended the setting up of a Truth, Justice and Reconciliation Commission to cover the violations from 1960 to 2003. One of the recommendations of the 2003 Civil Society Symposium was for wide consultation with the victims, but this never happened in any meaningful way.

In summary, the state's track record in instituting transitional justice between 1980 and 2011 can be itemised as follows: amnesia, Commissions of Inquiry and finally the Organ on National Healing, Reconciliation and Integration which culminated in

the NPRC. Soon after independence, Mugabe announced a policy option in which Zimbabweans, black and white, should forgive and forget the past. This was followed by a number of Commissions of Inquiry into several episodes of human rights abuses, notably the genocide in Matabeleland and Midlands. The final attempt at transitional justice by the state was the formation of the Organ on National Healing, Integration and Reconciliation and its incarnate, the NPRC. These will be discussed in more detail in the following paragraphs. A common denominator for the above initiatives is their lack of victim centeredness and consultation.

### **6.5.1 Amnesia**

Amnesia is a transitional justice option which puts a country's past behind it without taking any steps to address past human rights abuses. In practise, amnesia is usually paired with amnesty. Plunkett posits that 'many often feel that amnesia is useful to help make certain that there is a peaceful transition to democracy'. Amnesia works by repressing the past with the hope that a new democratic dispensation will emerge. Exposing past human rights abuses is deemed unnecessary as it is assumed to possess the propensity to fuel anger and hostility, thereby compromising the unfolding democratisation process (Bull 2007: 167, Rotberg and Thompson 2010: 113).

As a transitional justice approach, amnesia's major weakness is that it does not recognise past violations, with the result that these become a perpetual burden to the perpetrators (Stovel 2008: 305-324). This view is supported by documented cases of ex-combatants in Sierra Leone who burst into tears when they were faced with their victims in the absence of healing and reconciliation processes. Besides robbing perpetrators of an opportunity to get closure, amnesia leads to the loss of memory, hence the distortion of history. The major advantage of amnesia as a transitional justice tool is that it has led to democratisation in countries where it was employed (Kritz 1995: 617). In Mozambique and Namibia, amnesties were used with mixed results (Cobban 2007: 53). The case of Spain exemplifies how public amnesia can be beneficial to a country's transitional process. Spain experienced a brutal civil war led by Francisco Franco between 1936 and 1939 in which more than 190 000 people died (Dugard, Bethlehem and Plessis 2006: 266, Laybourn 2011: 70-76).

After the civil war, Spain embarked on a successful democratic transition anchored in forgetting the past (Amstutz 2005: 20). This led to Spain emerging as one of the best examples of democratic transition from human rights abuses (Stern 2010: 494). It can therefore be claimed that collective amnesia worked very well in the case of Spain after Franco.

Amnesia brings out the political nature of transitional justice and obliterates its legal dimension. The painful reality of transitional justice is that what is good for the victim is not always good for transition in the country (Plunlett: 2011). This is what Leebaw (2008: 95–118) terms the irreconcilable goals of transitional justice. As mentioned above, the first effort at transitional justice in Zimbabwe was Mugabe's inaugural speech as Zimbabwe's leader, cited in chapter 2 on page 37.

Amnesia was included as a constituent element in the Lancaster House Agreement (Elster 2004: 71). The main argument for forgetting and forgiving the past was that the newly independent country could avoid wasting time and resources in digging up its painful past. Searching for the truth was deemed undesirable and counterproductive by both the outgoing and incoming governments, which urged that doing so would reopen old wounds and damage the politics of reconciliation. This strategy drew a veil over the human rights violations by the Rhodesian Secret Service, army and police. It was, at the same time, appreciated by the leaders of the liberation movements because it meant closing the books on their own war crimes as well.

Information about the colonial and liberation war atrocities was not completely lacking. Domestic NGOs such as the Catholic Commission for Justice and Peace in Rhodesia and the Catholic Institute for International Relations documented torture, resettlement and eviction in the 1970s. Amnesty International published reports on war crimes in Rhodesia (Bloomfield and Huyse 2003: 36). In the reports, female members of the liberation movement spoke out about sexual assaults by their male companions in the camps. That notwithstanding, any official acknowledgement of the horrors of the past has consistently failed to materialise. As noted above, amnesia has its institutional expression in legal immunity and amnesty. It thrived in both Rhodesia and Zimbabwe and the consequence is a culture of impunity.

According to the International Institute for Democracy and Electoral Assistance (IDEA) (2003: 34-39), reconciliation through amnesia in Zimbabwe failed because of a number of issues.

- (i) The project was conceived and developed at the elite level of the state.
- (ii) There was no society-wide debate or involvement of citizens, civil society organisations or other stakeholders such as faith based organisations.
- (iii) More specifically, victims and survivors were not consulted; rather, they watched powerlessly as many perpetrators of human rights violations went unpunished and even took on key roles within the new Zimbabwean National Army, Zimbabwe Republic Police, Air Force and CIO.

IDEA argues that these factors resulted in the general public's failure to internalise the need to forgive. Imposed reconciliation fed, rather than eased the unresolved grudges (Bloomfield and Huyse 2003: 37).

The 1980 reconciliation policy was meant to operate mainly on two fronts; white-black and intra-black reconciliation. However, this was overshadowed by a series of clemencies and amnesties that continued to pardon perpetrators of human rights violations, in turn making reconciliation very difficult for the victims to contemplate. A Clemency Order of 1988 pardoned all violations committed by all parties between 1982 and the end of 1987, thus including the Gukurahundi genocide (Compagnon 2010: 290). Amnesty International's report of 2002 on impunity in Zimbabwe noted that the 1995 Presidential Amnesty:

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

This set a further precedent for yet another Presidential pardon for political violence, Clemency Order Number 1 of 2000, which was declared after the June 2000 Parliamentary Elections (Chitsike 2011: 162, Bloomfield and Huyse 2003: 38). Once again, those involved in human rights violations such as kidnapping and torture, but

excluding murder, rape and fraud, were placed beyond the reach of the justice system.

### **6.5.2 Commissions of Inquiry**

The second transitional justice mechanism used by the state in Zimbabwe between 1980 and 2011 was the constitution of Commissions of Inquiry. By definition, a Commission of Inquiry is a permanent or temporary body usually established by an Act of Parliament to look into the factual circumstances and true causes of specific issues as contained in the Commission's terms of reference (Prokhorov 1982: 49, Brassil 2004: 125). The main feature of a Commission of Inquiry is that it is an officially constituted body tasked to investigate specific issues and to issue a report of its findings and recommendations within a certain time limit. The efficacy of a Commission of Inquiry lies in the perceived expert opinion offered by the Commissioners in their reports. These expert opinions are considered unbiased and well balanced. However, there are rare cases where Commissions of Inquiry are set up as part of a greater scheme to conceal facts (van Bael 2011: 149). As will be discussed in the following section of this thesis, there is evidence to support the view that Zimbabwe is one of these cases.

Faced with growing calls from the local and international community to investigate human rights abuses, the state in Zimbabwe was very calculating in its response. It managed to appease the disgruntled voices by appointing, at strategically propitious moments, what Anusa Daimon (2000) termed state-crafted pseudo-Commissions of Inquiry. For Daimon, these 'Commissions of Inquiry' were part of a cover-up of the human rights abuses committed by the state and its agencies. There were three Commissions of Inquiry in Zimbabwe between 1980 and 2011. These are the Human Rights Commission of 2009, the 1983 Zimbabwe Commission of Inquiry into the Matabeleland Disturbances, commonly known as the Chihambakwe Commission of Inquiry and the 1982 Commission of Inquiry into Events Surrounding Entumbane, also known as the Dumbutshena Commission of Inquiry. These will be discussed in greater detail in the following sections.

### 6.5.2.1 The Zimbabwe Human Rights Commission

The Human Rights Commission was appointed in 2009 when the Zimbabwe Human Rights Commission Act of 2009 came into effect. It was one of many Commissions resulting from the formation of the GNU. The Human Rights Commission was established to:

counter the large scale orchestration of alleged violations and the falsification, exaggeration, orchestration, and stage-managing of human rights violations by detractors (du Plessis and Ford 2009: 7).

While it had noble goals, the biggest flaw in the Human Rights Commission was that its enabling Act, the *Human Rights Commission Act of 2009*, only allowed it to investigate cases of human rights abuses committed after 13 February 2009. Part III Clause 9 (4) (a) which covers the jurisdiction of the Human Right Commission reads:

The Commission shall not investigate a complaint unless the complaint is made within three years from the date on which the action of omission occurred; provided that such investigation shall not relate to an action or omission that occurred earlier than 13th February 2009.

This rendered all cases of human rights abuses committed between 1980 and 12 February 2009 inaccessible to the Human Rights Commission. The Zimbabwe Human Rights NGO Forum (2011) attacked the Human Rights Commission Bill's mandate, stating that the Bill should have been given a mandate that enabled it to investigate the 2008 violations, which according to them were the most violently contested elections in Zimbabwe. The Forum, however, felt that the Commission had the potential to strengthen human rights protection in Zimbabwe and in order to fulfil this potential, the Commission should be in harmony with international human rights law and international standards and best practices (Zimbabwe Human Rights NGO Forum 2011: 7).

Other institutes were very critical of the Zimbabwe Human Right Commission. Among them was the Media Institute of Zimbabwe which likened the Human Rights Commission to the Biblical wicked Leah who appeared when the nation had waited, hoped and prayed for the beautiful Rachael (New International Version Bible:

Genesis 29 v 16-28). Equally vocal was the parent organisation, the Media Institute of Southern Africa (MISA) which also doubted the impartiality and objectivity of the Commission, arguing, albeit sarcastically, that the Commission was appointed to disappoint (The Zimbabwean: 16 July 2010).

This expectation, which soon crumbled into disappointment and despair, was aptly summed up by National Constitutional Assembly Chairperson, Professor Lovemore Madhuku, who noted that:

we want a Human Rights Commission since there are several unreported and unattended to cases of human rights abuses since 1980 but especially in the last six years. But the commission we want is one which all people will claim ownership to, not this one which [Minister] Chinamasa and [President] Mugabe are planning (Zim Online:27 March 2006).

The Commission's perceived impartiality originates from its being the brainchild of ZANU PF's politburo, which represents ZANU PF and not the nation. Its preposterous birth notwithstanding, the Commission also failed to get off the ground in what civil society argued was not a genuine failure, but a deliberate and engineered one. It is disappointing to note that the Human Rights Commission will eventually be disbanded without having done anything tangible to achieve national healing and reconciliation in a country desperately in need of such an institutional safeguard. Nothing concrete occurred to the Commission between its announcement by the ZANU PF politburo in 2006 and the Constitution Amendment Act No. 19 of February 2009, which made provisions for the Commission. The Commission then lay dormant, only to resurface in September 2009 when the Parliamentary Committee on Standing Rules and Orders merely shortlisted candidates to serve as Human Rights Commissioners. In October 2009, a final list of 16 prospective Commissioners was submitted to the President in line with the constitutional provisions. The President only made the appointments five months later in March 2010. This lack of urgency on the part of the state is indicative of the peripheral status that human rights enjoy in the state's priorities.

The Zimbabwe Lawyers for Human Rights joined MISA in discrediting the Human Rights Commission arguing that:

a Commission crafted in an environment of state-perpetrated authoritarianism aided by repressive laws is a mockery of the populace seeking protection from the constitution (Zimbabwe Lawyers for Human Rights 2006: 2).

It viewed the move to appoint the Commission in a piecemeal way, as a way of introducing the very clauses that was rejected by the nation in the February 2000 constitutional referendum. For the Zimbabwe Lawyers for Human Rights, the priority should have been the removal of laws that infringed on citizen's constitutional rights, such as the *Public Order and Security Act [Chapter 11:17]*, the *Miscellaneous Offences Act [Chapter 9:15]*, the *Access to Information and Protection of Privacy Act [Chapter 10:27]* and the *Broadcasting Services Act [Chapter 12:06]*.

It can also be argued that the Zimbabwean Human Rights Commission does not meet international standards. The international norm is that Human Rights Commissions are set out according to the United Nation's Paris principles. According to the United Nations Handbook of 1995 (Paragraph 14: 7), international standards in the setting up of Human Rights Commissions were defined and agreed upon at the first International Workshop on National Institutions for the Promotion and Protection of Human Rights held in Paris between 7 and 9 October 1991. These principles were adopted by the United Nations Human Rights Commission as Resolution 1992/54 of 1992 and Resolution 48/134 of 1993 and related to the status and functioning of national institutions for the protection and promotion of human rights. They contained recommendations on the role, composition, status and functions of national human rights instruments. The five principles are:

- (i) the institution shall monitor any situation of violation of human rights which it decides to take up
- (ii) the institution shall be able to advise the Government, the Parliament and any other competent body on specific violations, on issues related to legislation and general compliance and implementation with international human rights instruments
- (iii) the institution shall relate to regional and international organisations
- (iv) the institution shall have a mandate to educate and inform in the field of human rights
- (v) that some institutions may be given quasi-judicial competence.

By establishing a Human Rights Commission that does not follow the Paris Principles the government in actual fact pre-empted such a move. Human rights advocates from Zimbabwe feared that the government wanted to use the Commission to avoid human rights complaints being taken outside the country. The African Commission on Human and People's Rights dealt with many human rights complaints from ordinary Zimbabweans and organisations (Murray 2000: 65, Human Rights Watch 2003: 7). With the establishment of the Human Rights Commission, complainants will first have to exhaust local remedies before taking their complaints to regional and international bodies. This becomes a classic example of how Human Rights Commissions can be used to cover up human rights abuses.

In agreeing with the above assertion, the Zimbabwe Lawyers for Human Rights (ZLHR)(2008) noted what it termed critical issues in the effectiveness of a Human Rights Commission. It noted factors relevant to the effectiveness of the Commission, among others: issues of composition; the appointment process; the Commission's mandate; its reporting structure, especially its relationship with the Executive; how the Commission's decisions will be enforced and by whom; resources for use by the Commission; budget and accounts; political will to allow it to be independent; the existence of functioning institutions of protection such as a non-partisan police force and an independent judiciary; and a permissive and non-repressive legislative environment (Nyaira 2006: 6).

The nation's hopes of a proper Human Rights Commission lay with the new Constitution that was to be put to a referendum (as of February 2013). However, judging from the current trajectory of the Constitutional Parliamentary Committee (COPAC), the Human Rights Commission will be provided for in the new Constitution as stated in Part 3, Section 242 of the Draft Constitution. While this is the case, chances are that it will not be any different from the previous Commission, which existed only in name. Budgetary constraints will not make the case for a Human Rights Commission any easier in Zimbabwe.

### **6.5.2.2 Chihambakwe Commission**

The Zimbabwe Commission of Inquiry into the Matabeleland Disturbances, commonly known as the Chihambakwe Commission of Inquiry, was set up by the government in November 1983. It was chaired by Harare lawyer Simplicius Julius Rugede Chihambakwe. The Commission's mandate was basically to investigate atrocities in Matabeleland (Auret 1992: 156, Compagnon 2010: 58) following disturbances at Glenville, Ntabazinduna and Entumbane military camps (Eppel and Raftopoulos 2009: 16, Kriger 2003: 79, Catholic Commission for Peace and Justice 2008: 53). According to Nyarota (2006: 142), Chihambakwe was appointed owing to his connections with the then ruling ZANU PF party. He served his law articles and joined law firm Gill, Godlontons and Gerrans (G G and G) before teaming up in 1979, with John Chirunda to form Chirunda Chihambakwe and Partners. His connections with ZANU PF can be traced back to the liberation struggle when he was part of ZANU PF's legal team at the abortive 1976 Geneva conference. He was also a ZANU PF election agent for the 1980 elections (Nyarota 2006: 140).

In January 1984, the Chihambakwe Commission began collecting evidence of army atrocities in Bulawayo (Auret 1992: 156, CCPJ 2008: 97). According to the report of the Catholic Commission on Justice and Peace and the Legal Resource Foundation (LRF), the Commission found hundreds of people waiting to give evidence with the result that it had to return in March to hear more testimonies (1999: 15). The CCPJ and the LRF reported that, 'the Commission was given plenty of evidence of atrocities involving hut burning, mass beatings and executions by the 5 Brigade' (CCPJ and the LRF 2008: 97).

However, against the expectations of the nation, in November 1984 the government announced that the Chihambakwe Commission's report would not be made public (CCPJ 1998: 98, Auret 1992: 156, Stokke, Suhrke and Tostensen 1998: 401, Nyarota 2006: 142). In November 1985, Minister for State Security Emmerson Mnangagwa made a further announcement that the report would not be released (Compagnon 2010: 58, Nyarota 2006: 142). The CCPJ and the LRF took the government to court, demanding the right of the nation to see the Chihambakwe

Report (Peterson 2001: 205). The court ruled in favour of CCPJ and the LRF, but the government then announced that there was only one copy of the report and that it had been lost, so they were unable to comply (Eppel and Raftopoulos 2008: 18). To date (January 2013), the contents of the Chihambakwe Commission of Inquiry Report are unknown to the public. This represents a gross miscarriage of justice, both for the victims and for those who gave testimonies to the Commission. The state squandered a propitious moment to make the truth known and officially recognised as a part of the families', communities' and the country's history.

### **6.5.2.3 Dumbutshena Commission**

The 1983 Commission of Inquiry into Events Surrounding Entumbane, also known as the Dumbutshena Commission of Inquiry, was the first Commission to be appointed in Zimbabwe to look into human rights violations (Raftopoulos and Savage 2004: 59, Kriger 2003: 120, Compagnon 2011: 283). It was chaired by prominent Bulawayo based lawyer Justice Enoch Dumbutshena and was mandated to look into the clashes between former ZANLA and ZIPRA forces at Entumbane and the related killings in Matabeleland in 1983 (CCPJ and LRF 2008: 53). Enoch Dumbutshena was appointed as the first black High Court Judge and the first black Chief Justice on 24 February 1984 (Nyarota 2006: 107, Meredith 2009: 122, Vivian 2005: 5, Compagnon 2011: 146). According to Vivian (2005), Dumbutshena was appointed as a High Court Judge immediately after independence in 1980, proving the trust which the new government had in him as a competent judge. Vivian (2005) also observes that, unlike Chihambakwe, Dumbutshena had never been a member of ZANU PF prior to his appointment.

It is significant that under the *Commissions of Inquiry Act [Chapter 10: 07]*, the Prime Minister (subsequently the President) was not obliged to publish the report of a commission. According to the lawsuit which pitted the Zimbabwe Lawyers for Human Rights and the LRF against the President of the Republic of Zimbabwe and the Attorney General (Civil Application No. 311/99), the terms of reference for the Dumbutshena commission were to:

inquire into the mutinous disturbances which took place during February 1981 at Glenville Military Camp, Ntabazinduna Military Camp, and Entumbane ZANLA and ZIPRA Camps for the purposes of determining the causes underlying, or which led to, the mutinous behaviour and of identifying, if possible, the persons and organisations responsible for planning or promoting the disturbances; and to make recommendations for the resolution of the problems identified.

According to Ndlovu-Gatsheni (2002: 14), the circumstances which gave rise to the Dumbutshena Commission were disturbances which emanated from efforts made to integrate the three armies, namely, ZIPRA, ZANLA and the Rhodesian Armed Forces. There were open confrontations, especially between ZANLA and ZIPRA forces at Chitungwiza, Connemara, Ntabazinduna and Entumbane Assembly Points, which resulted in open warfare (Nyarota 2006: 132). Like the Chihambakwe Commission of Inquiry Report before it, the Dumbutshena Commission of Inquiry Report was never published (CCPJ 2003: 53, Stiff 2000: 91, Compagnon 2011: 283), and likewise, its concealment meant that the nation was deprived of an opportunity to learn the truth and to find healing and closure. This applied particularly to the families of the combatants who died in the confrontations at these Assembly Points.

### **6.5.3 Organ on National Healing, Reconciliation and Integration**

The fourth attempt by the state at transitional justice after the three commissions and the policy of reconciliation and collective amnesia was the establishment of the Organ on National Healing, Reconciliation and Integration. As mentioned earlier, Masunungure (2009) argues that the formation of the GNU was a watershed moment in the history of Zimbabwe as it ushered in a new political dispensation. This dispensation was characterised by a movement away from ZANU PF's unfettered rule and was accompanied by an admission by the state that the country's violent past must be addressed. This culminated in the formation of the Organ on National Healing, Reconciliation and Integration (ONHRI). The mandate of the ONHRI was contained in Article 7, Section 1, Subsection (c) of the GPA which provides that:

The Parties hereby agree that the new Government shall give consideration to the setting up of a mechanism to properly advise on what measures might be necessary

and practicable to achieve national healing, cohesion and unity in respect of victims of pre and post-independence political conflicts.

The Organ on National Healing was formed in 2009 and comprised three ministers, one each from the three parties to the GPA, namely Sekai Holland (MDC-T), the late John Nkomo (ZANU PF) and the late Gibson Sibanda (MDC-M), who was replaced by Moses Mzila Ndlovu. As an approach, this representation of the three main political parties was intended to give the Organ on National Healing a universal appeal, thereby enhancing its effectiveness.

The blurred mandate which set up the Organ on National Healing notwithstanding, a number of inevitable pitfalls awaited this peace building institution which can be likened to a sole *organ* in a complicated *system*. The Organ on National Healing, which was set in the context of a temporary two-year GNU, can be likened to a person trying to grow grass in an environment where elephants are fighting. Using this analogy, it is clear that the efforts of the Organ on National Healing should be directed at preventing the elephants from fighting. Only then will the grass grow and in fact, under these circumstances the grass would grow on its own. The micro and grassroots efforts of the Organ on National Healing will be futile as long as there is animosity at the highest political level.

According to Ndlovu-Gatsheni (Personal communication: 10 June 2011), the Organ on National Healing was dangerous and injurious to transitional justice in Zimbabwe. Ndlovu-Gatsheni argued that it sabotaged transitional justice by starting from a misguided standpoint that the people of Zimbabwe had always wanted to kill each other. By concluding that communities should be united by implementing such state programmes as the aborted *kuputisana fodya*, literally meaning sharing the tobacco, the Organ on National Healing was being prescriptive. Its by-line that 'an eye for an eye makes Zimbabwe blind' exaggerated violence and negated the fact that it is the politicians who have divided otherwise peaceful communities. In its *Concept Paper* (ONHRI 2010: 22) the Organ on National Healing also alluded to the 'recognition and reinforcement' of 'traditional means and cultural mechanisms of settling disputes/conflicts' in their quest for a transitional justice mechanism, but failed to

mention and hence recognise any of these mechanisms beyond *kuputisana fodya* (sharing the tobacco).

A perusal of the Organ on National Healing's vision and mission statement shows that the word justice was mentioned in the preamble only when referring to the future Zimbabwe, the one to be 'found on justice, fairness, openness, transparency, respect, dignity and equality'. By mentioning justice as an integral part of a future Zimbabwe, the Organ on National Healing was really admitting that justice had no place in contemporary Zimbabwe. The Organ on National Healing recognised the use of violence by various past regimes and stated that survivors ought to be accorded the opportunity to 'survive the peace'. This sound token and ceremonial, especially when not backed up by any victim-centred approached modalities on how these victims will 'survive the peace'.

The functions of the Organ on National Healing are stated as:

...to study the physical, including emotional, social and mental trauma afflicting most Zimbabweans with the view to addressing it and to promote programs to compassionately address the economic and social needs of victims of political violence and related maladies (ONHRI: 2009).

Its focus areas were given as:

identifying the sources of the conflicts, identifying a relevant national healing framework, restoration of Zimbabwe's Africanness, *hunhu/ubuntu* (ONHRI: 2009)

It was clear that the Organ on National Healing was preoccupied with identifying the causes of violence and describing what had happened. Whilst it is important in transitional justice to establish causality, it should not be allowed to overshadow the prime issue of redressing past wrongs. No mention was made of the need to document past atrocities; rather, the Organ on National Healing spoke of identifying sources of conflict, examining national healing frameworks, focusing on gender and youths, involving the Diaspora and restoring African traditional values. These are important but peripheral issues which must be subservient to the provision of justice and truth-telling, and not the other way round.

The Organ on National Healing listed its strategies for conflict resolution as anchored in Zimbabweans admitting their violent past and exhibiting a willingness to forgive and to be forgiven. Of interest to this study is the strategy of 'engaging victims and perpetrators of violence to achieve pledges of forgiveness and reconciliation'. For the Organ on National Healing, simply pledging to forgive someone who harmed one was an adequate strategy to resolve past conflicts. The provision of engaging victims and perpetrators appears to be so trivial to the Organ on National Healing that it is listed as item number 17 out of 19.

In a case akin to the proverbial putting the cart before the horse, the state appeared obsessed with memorialisation before it had established the truth. The norm in transitional justice is that truth-telling, reparation (where applicable) and reconciliation precedes memorialisation. The state initiated a series of new memorialisations, particularly after the formation of the GNU. Chief among these was a Presidential Proclamation published in the Government Gazette Extraordinary of 15 July 2009, General Notice 92 of 2009, in which the President proclaimed that:

In the spirit of the Interparty Political Agreement, I do hereby declare, set out and dedicate the 24<sup>th</sup>, 25<sup>th</sup>, and 26<sup>th</sup> July 2009, as a period during which the nation may dedicate the Inclusive Government, our new found peace, our freedom, our new spirit of nation building, National Healing, Reconciliation and Integration to inspire the nation going forward (Government Gazette Extraordinary, 15 July 2009, General Notice 92 of 2009).

The state also initiated the lighting of the Peace Torch by the President in adherence with the AU resolution on Peace and Security (ONHRI: 2011). According to a leaflet entitled 'Major highlights', the Organ on National Healing was involved mainly in sector stakeholder sensitisations, networking and outreach programmes. What the Organ on National Healing did not do was the most important part as it was supposed to initiate debate on the transitional justice methodologies favoured by citizens. Unfortunately, the Organ on National Healing appeared to be agitating for reconciliation without any form of justice, which was akin to ordering victims to reconcile with those who harmed them, without sanctioning the offenders.

More concerns arose from the wording of Article 7 of the GPA that sets up the Organ on National Healing with its wording too general, ambiguous, uncommitted and vague. The Article was vague on the steps to be taken in setting up structures for transitional justice and it did not set a timeframe for the commencement of the transitional justice processes. Nor was there an exit strategy for both the Organ on National Healing and the mechanisms it would have helped put in place.

The state's lack of commitment is also evident in the use of phrases such as, 'the government *will ensure...*' (GPA Article 7.1 (a) and (b): 2008). Key words such as *justice* and *reconciliation* are missing in the wording of the Article, with the word *reconciliation* appearing only in the name of the Organ on National Healing. There is general lack of clarity as conflicts from different governments and episodes of gross violation of human rights are lumped together and not individually acknowledged or addressed.

Article 7 of the GPA was littered with examples of unwillingness and lack of government commitment, which bordered on casting a blind eye on impunity. For example, Section 7.1(c) stated that the government *shall...inconsideration*. If something is in consideration, it implies that the resultant action or lack of action is acceptable and failure or lack of action will be equally acceptable. Section 7.1 9(d) stated that, 'the government *will strive...*' Again, striving to end intolerance and politically motivated human rights violations implies that the government was prepared to fail in its endeavours to end violence and intolerance.

The statist approach to national healing and reconciliation outlined above lacked popular participation and relegated both victims and perpetrators to the ranks of policy consumers as opposed to including them as central players in the design and implementation of transitional justice mechanisms. This is the outcome when such transitional justice mechanisms are designed by the state which was, ironically, was believed to be the major beneficiary of violence in Zimbabwe (Chitando and Manyonganise 2011: 90, Ndlovu-Gatsheni: 2010, Nyarota 2006: 326).

Subscribers to the statist perspective believe that the state had a role to play in Zimbabwe's transitional justice processes on condition that certain requirements

were met. These include legislative reforms, political will to end impunity, greater civil society community engagement, truth-telling, education for national healing and reconciliation, research and counselling on trauma and grief, memorialisation and ritualisation and, most importantly, funding for the above initiatives (Machakanja 2010:12-15).

Given the policy trajectory of the GNU, such reforms and conditions were highly unlikely. This left only traditional transitional justice mechanisms as a viable vehicle to achieve national healing and reconciliation. After all, expecting the state to spearhead the correction of wrongs it was accused of masterminding and benefitting from is imprudent. The state appeared to be comfortable appointing 'ceremonial' bodies such as the Organ on National Healing in order to pacify the population while appearing to be fulfilling certain expectations and conditions imposed mostly by external bilateral and multilateral institutions.

The above debate can be put into perspective by locating the source of statist transitional justice goals. At national level, objective goals of transitional justice are usually set by the government of the day and these goals tend to be binary in nature. This binary perception of post conflict societies classify citizens into 'winners and losers', 'victims and perpetrators' and 'them and us'. Under these circumstances, victor's justice becomes a real possibility. As of December 2011, transitional justice goals in Zimbabwe were, to a large extent, defined by ZANU PF, the party most accused of gross violations of human rights. If transitional justice is to be implemented while ZANU PF is still in power, in whatever capacity, the mechanism(s) will probably include some amnesty, blanket or otherwise. However, if there is a complete change of government, electorally or otherwise, it is likely that Zimbabwe will witness criminal trials as a form of transitional justice, with those who designed and presided over gross violations of human rights being handed over to the ICC.

In order to put statist transitional justice in perspective, it is imperative to explore the awareness of the Organ on National Healing in Zimbabwe. This will be done as a precursor to a case study in which the state led the exhumation of the remains of

victims of human rights abuses in Mount Darwin District in Mashonaland Central Province.

### **6.5.3.1 Awareness of the work of the Organ on National Healing**

From its inception, the Organ on National Healing was a relatively unknown state institution in Zimbabwe. A 2011 survey indicated that 74 per cent of the respondents had never heard of the Organ on National Healing, indicating that its visibility or effectiveness was limited (Zimbabwe Human Rights NGO Forum: 2004). The majority of the 74 per cent who had never heard of the Organ on National Healing lived in rural areas while the majority of the 26 per cent who knew about the Organ were from urban areas. This points to the lack of knowledge or effectiveness of state-led transitional justice mechanisms in rural areas of Zimbabwe. Of the 26 per cent who knew about the Organ on National Healing, only 32 per cent gave it a positive rating, 45 per cent rated it negatively, while 23 per cent had no opinion on its performance. Put differently, only 8.32 per cent of the respondents believed that the Organ on National Healing was effective.

From these statistics it can be concluded that the Organ on National Healing was relatively unknown in rural areas when compared to urban areas and that only a third of those who were aware of it believed that it was effective. The relative anonymity of the Organ on National Healing can be best represented by the words of a 71-year-old respondent who noted that he had not yet been born when the Organ on National Healing was formed (quoted in Zimbabwe Human Rights NGO Forum 2011: 13). If the Organ on National Healing, which was mandated to lay the foundation for national healing in Zimbabwe, was this anonymous, the effectiveness of any state-led transitional justice programmes remained a serious doubt, positioning traditional transitional justice mechanisms as viable options or complements. This was further evidenced by a mere three per cent of respondents who felt that the Organ on National Healing should lead the processes of national healing in Zimbabwe.

The statist approach to transitional justice can best be assessed using the case study of the Chibondo exhumations. Chibondo presented a propitious moment for the state to demonstrate its willingness and ability to initiate and engage in victim-

centred national healing initiatives. However, as will be discussed below, the exhumations were botched, not performed procedurally and conducted by unqualified personnel and finally used as a propaganda tool by ZANU PF.

## **6.6 Case study 1: Chibondo exhumations**

The state was presented with a great opportunity to prove its mettle in spearheading national healing when a mass grave was discovered at Monkey William Mine situated on Chibondo Farm in Mt Darwin District in Mashonaland Central Province. According to the Zimbabwe Broadcasting Corporation (ZBC) (31 March 2011), the mine contained more than 640 bodies of victims of human rights abuses. These remains were discovered in 2008 by an illegal gold miner who crawled into the shaft when digging for gold. Initially, the exhumations were undertaken by a voluntary organisation, composed mainly of ZANU PF aligned war veterans called the Fallen Heroes Trust. Eventually the exhumations were taken over by the Ministry of Home Affairs. As shown on Zimbabwe's state television, the bodies were bundled into plastic bags and old sacks, presumably awaiting reburial. The official discourse, as dispatched by the state broadcaster, the Zimbabwe Broadcasting Corporation, was that the exhumed bodies were of those killed by the Rhodesian Security Forces in the 1970s. Calls came from various sectors in the country to engage qualified personnel in the whole exercise, starting with the exhumations. However, in a move which can be likened to the deliberate contamination of a crucial crime scene, the state was reluctant to commission such an exercise.

Articulating the state's position on calls to engage forensic experts to identify the remains, local politician and Indigenisation and Empowerment Minister, Saviour Kasukuwere, was quoted in the media as saying:

forensic tests and DNA analysis of the remains will not be carried out, instead, traditional African religious figures will perform rites to invoke spirits that will identify the dead (The Daily Mail Reporter: 31 March 2011).

Kasukuwere reiterated that this was in line with the demands of the spirits of the war dead, which had long 'possessed' villagers and children in the district. While the ZANU PF part of the GNU was blaming the whites, as revealed by Kasukuwere's

position, the MDC T part of the GNU blamed ZANU PF. While delivering a public lecture at the University of Zimbabwe in May 2011, Deputy Minister of Justice and Legal Affairs Obert Gutu is on record as blaming the state broadcaster for fanning violence, national hatred and divisions (ZimEye: 2 April 2011). Gutu also blamed the state for double standards, arguing that blaming Smith without admitting its own atrocities would not bring national healing. For Gutu, the state had to begin by admitting its own atrocities, apologising for the Gukurahundi genocide and then holding a national memorial in honour of all the victims of human rights abuses.

The decision by the state to use spirit mediums<sup>23</sup> to identify the bodies of the victims exhumed at Chibondo was treated with suspicion by leading forensic anthropologist Shari Eppel who called for the use of what she termed an 'expert eye' at the site (CBC News: 31 March 2011). According to Cordner and McKelvie (2002: 867-884), there are three categories of experts needed to establish the truth about exhumed human bodies beyond any reasonable doubt. These are medical and health care experts, specialist scientists and, finally, other professionals who include crime scene examiners, interviewers, ordinance experts, mortuary technicians and fingerprint experts (Cordner and McKelvie (2002: 870). None of these experts were available at Chibondo when Monkey William Mine was exhumed. ZANU PF's opposition to alternative perspectives on politically motivated harm and impunity in Zimbabwe can be explained on the grounds that the party needed to present a narrative consistent with its perception that it played the major role in liberating the country while simultaneously suffering the most injustice inflicted by the settler regime. This explains why the party engaged in self-serving selective reading of the country's catalogue of harm and impunity. Based on the above, it can be concluded that instead of opening up the space for national healing the Chibondo discoveries created and were subsequently surrounded by serious controversies. These are discussed below.

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<sup>23</sup> A spirit medium is part of the Shona spiritual hierarchy which begins with family spirits (*midzimu yemusha*), also known as *masvikiro emusha* these report to area spirits (*midzimu yedunhu*). In turn these report to national mediums (*mhondoro dzenyika*). The pinnacle of this hierarchy is Mwari Musikavanhu (God)

### **6.6.1 The controversies surrounding the Chibondo exhumations**

The foremost controversy emanating from the Chibondo exhumations was that they were conducted by persons with no forensic training. The result was that whether done knowingly or unknowingly, this appeared as a deliberate attempt by the state to contaminate the scene, thereby giving credence to the view that the state intended to conceal some evidence. According to Michelle Kagari, Amnesty International's Deputy Director for Africa, the state never called any experts to work on the site; instead it actually turned away experts who wanted to be involved in the project (New Zimbabwe: 7 April 2011).

The exhumations by unqualified private citizens were stopped only when the ZAPU military wing, ZIPRA, obtained a High Court order stopping the Fallen Heroes Trust from exhuming human remains at William Monkey Mine. Amnesty International Senior Researcher Simeon Mwanza noted that professional handling of the site was lacking, which in turn deprived the investigators of a chance to establish the truth and the families of the victims a chance to achieve closure (The Zimbabwean: 7 April 2011). Consistent with the views noted above, Mwanza posited that the Chibondo mass grave was not treated as a crime scene where exhumations require professional forensic expertise to enable adequate identification of the victims, determination of cause of death, determination of time of death and the consequent criminal investigations (if any). Forensic identification of the bodies was required to ensure that families of the victims were given the remains of their family members for burial in accordance with their traditional and religious belief systems.

Contrary to the state's version of events, that the victims buried at Chibondo were all victims of the Rhodesian Security Forces killed around the 1970s, some of the bodies were still decomposing or still had flesh on them (*The News Monitor*: 15 April 2011). More evidence suggesting that at least part of the atrocities were a recent occurrence was found in the clothing of the victims, which had not yet decomposed. Most interestingly was the fact that some clothing and shoes were recent brands such as Weinbranner shoes. This points to a possible double act by the Smith and Mugabe regimes as both may have used the same disused mine shaft to get rid of bodies of human rights abuse victims. According to Shaw and Gotora (2011), the

presence of some corpses still with skin, hair and body fluids raised doubts over claims that white colonial-era troops had committed the massacres more than 30 years before. University of Pretoria forensic anthropologist Maryna Steyn agreed and noted that human remains should not give off a strong stench after 30 years (quoted in *The News Monitor*: 15 April 2011).

There was also a strong likelihood that the site was contaminated as it was not sealed off in line with international best practices in exhumations (Naidoo, in *The News Monitor*: 15 April 2011). International standards of exhuming human remains stipulate the proper establishment of the cause(s) of death, ensuring proper identification and, where possible, the return of the remains to family members. None of the above occurred. As noted by Mawanza, the mishandling of Chibondo set a precedent that has serious implications for possible exhumations of other sites in Zimbabwe, including the remains of victims of the Gukurahundi genocide. During the exhumations, war veterans and predominantly ZANU PF supporters sang songs that denounced former Rhodesian Prime Minister Smith, Tsvangirai and the West in general. A 'traditional' ceremony was conducted to 'appease the victims' and some of the words sung included, 'down with whites, not even one white man should remain in the country' (*The Daily Mail*: 31 March 2011). These words are not consistent with the national healing mandate that the state purported to pursue through the Organ on National Healing, Integration and Reconciliation.

The lack of involvement of key national healing stakeholders, primarily the Organ on National Healing and liberation movements, raised serious questions about the sincerity of the state in instituting transitional justice. It is difficult to comprehend why the exhumations were undertaken by a voluntary organisation and subsequently taken over by the Ministry of Home Affairs, when the country had a state organ formulated solely for the handling of such issues. This was clear evidence of a deliberate attempt to exclude other stakeholders from the process. This runs counter to the tenets of transitional justice, including inclusivity and popular participation. Besides guaranteeing authenticity to the transitional justice programmes, inclusivity and popular participation have proved to be the tools most instrumental in any peace building initiative. The opposite is true of exclusivity and lack of popular participation.

The timing of the announcement of the discovery of the human remains at William Monkey Mine was also controversial. While official reports indicated that these remains were discovered by an illegal gold miner in 2008, no explanation was given as to why the discovery was only made public in early 2011. The state merely hinted that the exhumations were taking place because illegal gold miners were vandalising the mineshaft (Newsday: 8 May 2011). Even more controversial was the fact that a constitutionally unaccountable body, independent of the established criminal justice structures, undertook and oversaw the entire exhumation and reburial exercise. A definite conflict of interest existed as the Fallen Heroes Trust, aligned to ZANU PF, which was itself implicated in the atrocities, spearheaded the exhumations and later reburials, even when the ZIPRA Veterans Trust had secured a High Court order stopping the exhumations. The reburial of the unidentified bodies was tantamount to the concealment of evidence as no results were provided by the state regarding the identification of the bodies, the cause(s) or time of death. One can only speculate that if the results were available, then they were not consistent with the state's version of events. The way Chibondo was handled has serious implications for national healing in Zimbabwe. These implications will be discussed below.

### **6.6.2 Implications of Chibondo for national healing**

The seemingly deliberate mishandling of Chibondo was a clear case of the obstruction of transitional justice by the state. This was meant to prevent the establishment of the truth through the use of forensic experts, a process which had been successful in establishing historical accountability elsewhere. These include studies by Kuhl (2005) on the el Mozote massacre in El Salvador (1993, 1999-2003), the use of chemical weapons in Iraqi Kurdistan (1992), mass graves in the former Yugoslavia (1992-1993), the Vukovar Hospital mass grave in Croatia (1992-1993, 1996), the Srebrenica genocide (1996) and Kigali and Kibuye mass graves in Rwanda (1996) which 'offer invaluable insights into how mass grave investigations contributed significantly to the success of truth seeking and justice' (quoted in *Zimbabwe Legal Affairs*: 11 April 2011). Locally, the Solidarity Peace Trust exhumed bodies of human rights abuse victims and identified them forensically with the help of a team of scientists from Argentina called *Equipo Argentino de Antropología Forense* (The Argentinean Forensic Anthropology Team) (EAAF).

The state, through the ZBC, seized the opportunity presented by the mass grave to encourage Zimbabweans to visit the disused mineshaft to 'witness for themselves the atrocities committed by the colonial regime', thereby fanning hatred and discouraging national healing and reconciliation (Various ZBC news bulletins: March to April 2011). The state even involved primary school children, whom they ferried to the site, presenting unverified opinions as facts to the pupils (ZBC: 14 April 2011). This squandered a valuable opportunity to teach young Zimbabweans the value of national healing and reconciliation. Chibondo presented a missed opportunity for Zimbabwe to conclusively establish the truth, get closure and enhance national healing. Eppel, quoted on CBC News (31 March 2011), agreed and noted that:

what is happening ... is a travesty. Bones speak quietly and in a language only an expert can hear. Let's not silence them forever, but bring them the help they need to be heard.

The unsatisfactory manner in which the state handled the Chibondo exhumations also has implications for other known pre and post-independence mass graves, both inside and outside the country. Some Zimbabweans who were killed during the War of Independence were buried in mass graves in neighbouring countries such as Mozambique and Zambia (Gumbo 1995: 23). These include mass graves such as those at Mukushi, Tembue, Nyadzonya and Chimoio, places which were rightly turned into national shrines by the Zimbabwean state with the permission of the governments of Mozambique and Zambia (Todd 2007: 367). However, more and more mass graves will continue to be discovered, especially inside the country and with such a bad precedent set by the state, constitutionally unaccountable interest groups such as war veterans associations are likely to take control of such events in the future. This sabotages the process of national healing as these mass graves will be used for other purposes such as gaining political mileage.

It will be difficult for the victims of human rights abuses in Zimbabwe to trust the state with any transitional justice initiative given the way it (mis)handled Chibondo. The Chibondo debacle signalled the failure of statist transitional justice in Zimbabwe, which the state had resuscitated with the formation of the GNU. Instead, it

strengthened the resolve of citizens to use alternative non-state transitional justice mechanisms.

## **6.7 Conclusion**

This chapter chronicled the statist approach to transitional justice between 1980 and 2011. This was achieved firstly by providing a synopsis of the historical background of violence in Zimbabwe. It discussed the dilemmas that faced Zimbabwe as it tried to come to terms with its violent past. It noted that reproduced violence in Zimbabwe became a tool of governance and that violence was cyclical. Three statist transitional justice mechanisms were discussed. These are amnesia, Commissions of Inquiry and the Organ on National Healing, Integration and Reconciliation. It was noted that amnesia as a state policy was announced by the then Prime Minister at independence and involved the mass unconditional forgiveness of the perpetrators by the victims, notwithstanding the fact that perpetrators had never asked to be forgiven. Examining the young country's violent past was deemed an unnecessary detail for such a promising democracy. However, the battle between former ZANLA and ZIPRA combatants at assembly points and the Gukurahundi resulted in the appointment of two Commissions of Inquiry. The findings of the Chihambakwe and Dumbutshena Commissions of Inquiry were never made public. Zimbabwe also established a Human Rights Commission as one of the products of the GNU. However, the Commission proved to be stillborn.

The chapter considered one case study of the exhumations at William Monkey Mine in Chibondo. These exhumations were deliberately mishandled by the state, presumably in an attempt to conceal its role in post-independence human rights abuses while simultaneously heaping all the blame on the Smith regime. On the basis of this chapter, the failure of the state to initiate victim-centred transitional justice mechanisms can therefore not be denied. The chapter demonstrated beyond reasonable doubt that the state rendered itself incapable of healing and reconciling the nation. Consequently, citizens used mechanisms that were at their disposal to heal and reconcile among themselves without involving the state. Mechanisms used to achieve national healing include traditional transitional justice institutions, the focus of the next chapter.

## CHAPTER 7: INDIGENOUS REALIST TRANSITIONAL JUSTICE IN ZIMBABWE

### 7.1 Introduction

The purpose of this chapter is to demonstrate the viability of realist traditional transitional justice mechanisms at work in Zimbabwe's rural areas. This analysis resonates with theoretical calls for Africa to reinvent its traditions in order to solve its transitional justice problems made by, among others, Ranger (1993: 62-11) and Bangura (2006: 11). African tradition is founded in African philosophy and Bangura believes that in order for the philosophy of African solutions for African problems to work, African scholars need to revisit African history, especially oral history, in their search for the best practices to identify and implement these solutions. These solutions are underpinned by African philosophical values such as *hunhu/ubuntu* and ought to be incorporated into global human rights instruments such as the International Criminal Court (ICC) Statute and other similar human rights declarations (Samkange and Samkange: 1979). Characterising the role of *hunhu/ubuntu* in transitional justice, Biko (2002: 46-47) noted that *hunhu/ubuntu* is the human face to transitional justice which Africa offers to the world. Indigenous realist transitional justice mechanisms are anchored in this African philosophy in which humanity is crystallised around communal solidarity. By definition, *hunhu/ubuntu* encapsulates the key idea that the self is defined in terms of relationships with other beings, to acknowledge that happiness and fulfilment are to be found within relations between individuals (Nabudere 2011: 10, Ndlovu-Gatsheni 2007b: 26).

### 7.2 Situating indigenous realist transitional justice mechanisms in *hunhu/ubuntu*

Indigenous realist transitional justice mechanisms are premised on *hunhu/ubuntu* which, according to Samkange and Samkange (1979), is an ideology of reciprocity, a tradition of giving as well as taking and of limiting the powers of authority and a respect for human rights. For Ndlovu-Gatsheni, the strength of *hunhu/ubuntu* as a philosophical base for African realist transitional justice mechanisms is its ability to permeate the broad spectrum of African civilisations. For Bangura (2005: 13-53), the

efficacy of *hunhu/ubuntu* as the base theory for indigenous realist transitional justice can be located in its ability to transcend pedagogy, andragogy, ergonagy and heutalogy.

There are certain characteristics that underpin *hunhu/ubuntu* which are relevant to the conceptualisation of indigenous realist transitional justice. These are reciprocity, limitation of power, respect for human rights, acknowledgement of wrongdoing, communal solidarity, unity, humanity despite differences and the inextricability of humanity. These ideals are already inherent in most rural societies and recalling them when implementing transitional justice programmes is easy, unlike the use of idealist mechanisms such as the ICC trials, most values of which are alien to the victims. All these must be pursued in a manner that endeavours to balance restorative and retributive justice (du Plessis and Ford 2008: 3). Retributive justice goes beyond punishing the offender and leans towards vindicating the victim (Morse and Maxwell 2001: 3). Restorative justice emphasises bottom-up processes found in ordinary citizens' experiences and is concerned with taking steps that the victims feel will set things right. This is in contrast to imported idealist mechanisms involving elites who present themselves in various forms, such as peacemakers, Truth Commissioners, prosecutors, attorneys and the like (Braithwaite: 2000).

In Africa in general and in Zimbabwe in particular, traditional transitional justice mechanisms gained popularity and acceptance in the aftermath of the South African Truth and Reconciliation Commission (TRC)(Yarwood 2012: 139). This may be attributed, *inter alia*, to the United Nation's position on traditional transitional justice articulated by then Secretary General Kofi Annan who, in his August 2004 *Report on rule of law and transitional justice in conflict and post conflict societies* wrote that:

due regard must be given to indigenous and informal traditions for administering justice or settling disputes, to help them to continue their often vital role and to do so in conformity with both international and local tradition(United Nations Report: 2004).

Locally, the traditional institutions of *dare/idale* (traditional courts) are known to preside over both civil and criminal cases, including transitional justice cases. Customary law still exists in Zimbabwe with the rulings of chiefs being recognised both by the actors and by the state (Mararike in Machakanja 2012: 7).

### 7.3 Relativity and universality in transitional justice

Before exploring the indigenous realist transitional justice mechanisms, it is imperative that the issues of relativity and universality are addressed. This is done as a means of situating indigenous realist transitional justice mechanisms within the corpus of transitional justice mechanism origination. The design and implementation of transitional justice mechanisms is positioned between two seemingly contradictory positions, the particular and the universal. Transitional idealism is aligned with universalism while transitional realism is aligned with relativism. The bulk of transitional justice mechanisms are located somewhere along this continuum with the particular and the universal at the extreme ends. According to Donnelly (1984: 400-419), cultural relativism is defined as a doctrine that holds that (at least some) variations in mechanisms used to address human rights abuses are exempt from legitimate criticism by outsiders. Donnelly further contends that notions of self-determination and communal autonomy are the chief drivers of the doctrine of cultural relativism (1984: 402). A second distinction between transitional universalism and transitional relativism is that the latter is believed to act in the self-interest of the community while the former is principled. In disputing the notion of cultural relativism as an important factor in determining transitional justice mechanisms, Donnelly (1984: 400) argues that because human rights are the rights that every human being possesses by virtue of simply being human, they qualify for a universal definition as all humans are essentially the same.

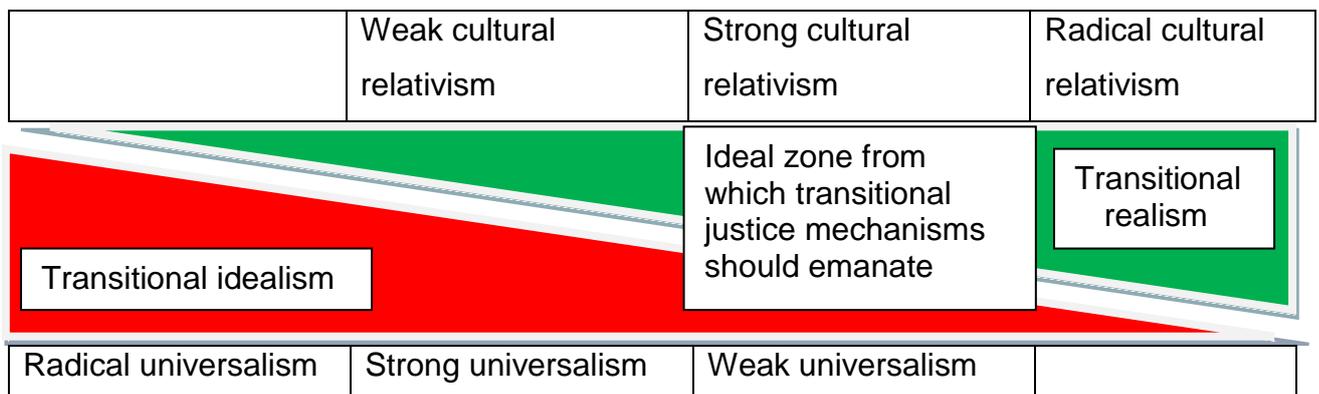
Given the fact that cultural relativism is an undeniable fact, transitional justice is faced with the challenge of reconciling the competing claims of relativism and universalism. Put at the most extreme ends of the continuum, the two can be cast as radical cultural relativism and radical universalism (Donnelly 1984: 401). Their perceptions of the validity of moral rights and rules are predictably at variance with radical cultural relativism, holding that culture is the sole source and validation of moral rights and rules. On the other hand, radical universalism would disagree and instead posit the insignificance of culture in the validation of rules and moral rights. Realist transitional justice mechanisms are located somewhere along this continuum, but more towards radical cultural relativism. These mechanisms would seek to strike a delicate balance between universalism and cultural relativism without negating one

in favour of the other. Transitional idealism, on the other hand, tends to lean more towards radical universalism and further away from radical cultural relativism.

Donnelly (1984: 411) concedes that culture has an important role to play in designing transitional justice mechanisms, hence he advocates the adoption of what he terms weak cultural relativism as opposed to strong cultural relativism. By definition, strong cultural relativism is a notion that holds that culture is the principal source of the validity of rules and that right actions and wrong actions must be culturally determined. This paradigm gives the role of universalism as that of regulating the excesses of cultural relativism. Such a relegation of universalism to the role of spectatorship gives too much power to cultural relativism; yet cultural relativism is not without its own challenges. Most of these challenges relate to gender insensitivity and the use of culturally accepted human rights violations such as the paying of murder restitution in the form of young virgin girls (Mawere 2011: 86, Daneel 1988: 140, Tonucci 1999: 37).

An obvious compromise would be the adoption of transitional justice mechanisms based on weak cultural relativism. As a doctrine, weak cultural relativism holds that culture may be an important factor but is not the principal source of the validity of a moral right or rule (Donnelly 1984: 104). Diagrammatically represented, the choices confronting the design and implementation of transitional justice mechanisms can be illustrated as follows:

**Diagram 7.1: Relationship between relativism and universalism in the choice of transitional justice mechanisms**



From this diagram, it can be deduced that a combination of weak universalism and strong cultural relativism is the most attractive option as strong cultural relativism recognises and accepts the universality of human rights, while weak universalism recognises the importance of local dynamics.

#### **7.4 Locating realist transitional justice mechanisms in the social contract**

One might question the location of realist transitional justice mechanisms in political theory. The answer lies embedded in Jacobin Club member Jean-Jacques Rousseau's 1762 philosophical treatise *The social contract* in which he grapples with the legitimacy of political authority. Rousseau (1762, republished 1988: 9) argued that in order for man to move away from the undesired state of nature, he must enter into a social contract with others, thereby legitimising the state to use force over them. This is so because, according to Thomas Hobbes, without the social contract the state of nature dominates and in it:

[There are] no arts, no letters, no society, and which is worst of all, continual fear and danger of violent death and the life of man, solitary, poor, nasty, brutish, and short (Hobbes: 1651).

In this social contract, everyone will be free because all forfeit the same number of rights and impose the same duties on all. This is the law-making basis of the modern state in which enforcing that law becomes the core function of the state. Both Hobbes and Rousseau contributed to the construction of the social contract theory; Hobbes provided the basis for the state monopoly of collective violence while Rousseau laid the foundations for the understanding of the social contract as a theory applicable to modern democracies (Krahmann 2010: 22).

The formulation and implementation of transitional justice programmes in Zimbabwe forms a social contract between the citizens and the state. However, if this social contract is unclear, unfair to certain groups or if the state has limited capacity to fulfil this contract then the marginalised sections of the population are likely to generate systems of transitional justice that suit their needs and express their values (Scharf 1997: 2).

Realist transitional justice mechanisms exist not to antagonise their idealist counterparts, but to play a complementary role as explained by the relativism/universalism diagram. This complementarity is justified because once-off official mechanisms like Truth Commissions need the support of local mechanisms so that when they are no longer in existence, the local mechanisms can continue with the process of peace building and reconciliation. Realist transitional justice mechanisms derive their strength from the fact that they are rooted in the family, which, according to Rousseau (1762, republished 1988: 6), is the most ancient and strongest form of society. The family is made up only of natural bonds that permeate, as if through osmosis, from the family nucleus to the whole community. In the process, individual needs are subservient to the general good of the family first and then to the community. This traditional African way of life is rooted in the African religion in which perception of human rights is predicated on spirituality as the family is believed to have three integral constituencies. These are the 'living dead' (spirits), the 'living living' and the 'living unborn' (Nabudere 2004: 12, Mbiti 1990: 83). In order to understand the notion of transitional justice, especially as espoused and practised by rural communities, it is imperative to explore the restorative element of traditional transitional mechanisms.

## **7.5 Traditional transitional justice mechanisms as restorative justice**

There are primarily six types of justice in transitional justice theory. These are retributive justice, deterrent justice, compensatory justice, rehabilitative justice, exonerative justice and restorative justice (Villa-Vicencio 2004: 33, Doxtader and Villa-Vicencio 2004: 67). Traditional transitional justice mechanisms are restorative in nature, owing mainly to their cultural relativity. Restorative justice is a theory of justice that emphasises repairing the harm caused or revealed by criminal behaviour (Cohen, 2001: 209, Hostettler 2009: 297). According to McLaughlin, Fergusson and Hughes (2003: 58), restorative justice is a bottom-up victim-centred process that endeavours to address the hurts and the needs of both victims and offenders in such a way that both parties, as well as the communities which they are part of, are healed. It can be noted that there are three general principles upon which restorative justice is based. Firstly, crime causes injury which must be addressed. Secondly,

victims, offenders and communities must have an active interest in seeking redress. Thirdly, the roles of the community and the state are such that they complement one another. Restorative justice restores the dignity of the offender, the humanity of the victim and the solidarity of the community. Restorative power is measured not only in material terms but also in other terms such as community relations.

Theorising on the nature of restorative justice, Reverend Don Misener (2001 in Batley 2005: 21) argues that there are five 'R's making restorative justice possible through connecting the offender to the victims. These are reality, responsibility, repentance, reconciliation and restitution. Their relationship with traditional transitional justice mechanisms will be discussed in more detail below.

### **7.5.1 Reality**

According to Misener (in Batley 2005: 22), facing reality is the first step in restorative justice, one which also constitutes the first expense to the offender. In traditional transitional justice there are mechanisms that are employed in order to force offenders to realise and come to terms with their wrongdoing. These include inexplicable misfortunes that befall the offender and his/her family members such as ailments in family members and livestock. These misfortunes are designed to force the offender to face reality and initiate reconciliation processes. Some of the realities that the offender must face include the psychological impact of the feeling of being guilty. Reality is not the preserve of the offenders only as the victims also face the reality of the 'perpetration'. This reality usually sinks in long after it has been visited on them. When they finally come to terms with their loss, both material and emotional, victims expect certain steps to be taken in order to even the score. This takes the form of various traditional transitional justice mechanisms which are the subject of this chapter. This brings us to the second 'R', responsibility.

### **7.5.2 Responsibility**

In Misener's argument (in Batley 2005: 22) is that after facing the reality of human rights violations that were committed the next step is for the offender to accept responsibility. This is premised on the fact that all wrongdoings must be accounted

for. This is crucial to transitional justice because without anyone taking responsibility there will only be victims and no offenders with whom to reconcile. In this regard, Misener argues that accepting responsibility makes possible other steps such as recognising and attempting to offer a personal response that is deemed due to the victim. In cases where the perpetrator is known to the victim, responsibility takes the offence from the family and apportions it to an individual family member. It is the responsibility of the individual family member to seek the help of the immediate family in trying to achieve the overall aim of reconciliation. In cases where human rights abuses were perpetrated as part of so-called 'orders from above', responsibility is the preserve of the individual who carried out the violations and not the ones who ordered them. This implies that in order to achieve reconciliation, the offender needs first to repent. This is the third 'R'.

### **7.5.3 Repentance**

Repentance is a pledge by the offender never to commit the same offence again in his or her lifetime. Repentance usually occurs in four stages. Firstly, it occurs within the individual. Secondly, the offender repents before his or her family members. Thirdly, repentance is taken to the victims and their family and finally to the community. This entails four distinct stages of repentance before different audiences and represents the sorrow and sincere regret for the actions committed by the offender. It is a realisation that the actions were wrongful and should not have occurred. As will be explored in the following paragraphs, there are certain ceremonies and rites that accompany repentance and the last two stages of the peace building process, namely reconciliation and restitution. When one repents, one makes a promise to the victims, their families, the community and the 'living dead', otherwise known as ancestors, never to repeat the same heinous act again.

### **7.5.4 Restitution**

This is the zenith of the peace building process as it demonstrates that the offender is remorseful for his or her wrongdoing. Paying restitution is a physical expression of the emotional status of the offender. The penalty can never be equated to the loss

suffered by the victim but serves simply as a gesture. In Misener's (in Batley 2005: 11) opinion, it is a way of demonstrating the credibility of verbal apologies and of expressing gratitude for the acceptance of the apology, and of celebrating the prospects of reconciliation. This is a valid assertion because restitution is seen as a viable mechanism for adding significant value to the practice and experience of restorative justice. It does so by providing feasible ways and mechanisms through which remorse can be expressed by the perpetrators, such as through the payment of restitution, thereby nurturing the spirit of healing and closure.

### **7.5.5 Reconciliation**

The final 'R', and the final stage in traditional transitional justice mechanisms, is reconciliation. Misener notes that, 'willing to face the full force of wrongfulness, and refusing to take refuge in excuses or rationalisation makes it possible to realise reconciliation with the wronged person' (in Maepa 2005: 22).

In order for reconciliation to be realised the offender must unconditionally accept full responsibility and, in most cases, the family of the offender should share the responsibility. In traditional transitional justice mechanisms, reconciliation is a ceremony signifying the culmination of a series of events that were started by the committing of an offence by the offender. In the *Spiritual roots of restorative justice*, Headley (2001: 15) notes that while Misener's (2001) five 'R's were formulated from a predominantly Christian perspective, they have an appeal that is common to most religions including Judaism, Hinduism, African traditional beliefs and Islam. This gives restorative justice a universal appeal, yet allows it to retain some degree of particularity in terms of how the individual 'R's are addressed. This universalism is consistent with the universality of the concept of human rights whose violations are considered to be universal crimes on these grounds.

## **7.6 Exploring Zimbabwe's traditional transitional justice mechanisms**

Chief Njerere shed some light on the connection between African tradition and transitional justice mechanisms (Personal communication: 22 September 2012).

Gokwe District was chosen as a case study because it has vast populations of both Shona and Ndebele, Zimbabwe's two biggest ethnic groups by population. It is also the site of some of the most horrifying episodes of human rights abuses, including the 1982-3 Gukurahundi genocide. Yet literature and most studies on traditional transitional justice mechanisms tend to focus either on Matebeleland, which is predominantly Ndebele-speaking or on Mashonaland which is predominantly Shona-speaking.

During the discussion, Chief Njerere observed that the people of Zimbabwe ascribe great importance to their 'living dead'. They are 'living dead' because about a year after their death, certain rites and rituals, variously referred to as *kurova guva*, *magadziro/umbuyiso*, are performed by the right people, at the right time and in the correct manner. These rituals are believed to allow the return of the dead person's spirit to the family so that s/he can assume the ancestral responsibilities of protecting and blessing the family. If one dies unnaturally, the family and the community feels aggrieved because they would have been deprived of the protection and blessings of one of their ancestors. The dead person also feels aggrieved because of being robbed of the opportunity of becoming an ancestor and contributing to the prosperity and security of the family from the afterlife. It is against this background that traditional transitional justice mechanisms have gained popularity and widespread application rather than prosecutions. In this regard, those who died as a result of politically motivated violence in Zimbabwe deserve to 'return home' so that they can protect their families and communities from circumstances similar to those which led to their own demise. However, if a deceased person is to return as an ancestor, certain rites and rituals must be performed. These traditional institutions have found application and relevance in transitional justice and will be discussed in the next section.

## **7.7 Traditional rituals performed in transitional justice**

A combination of traditional transitional justice mechanisms, with minor degrees of variation, have long been used in rural Zimbabwe. Professor of African Languages and Literature at the University of Zimbabwe, George Kahari, revealed that

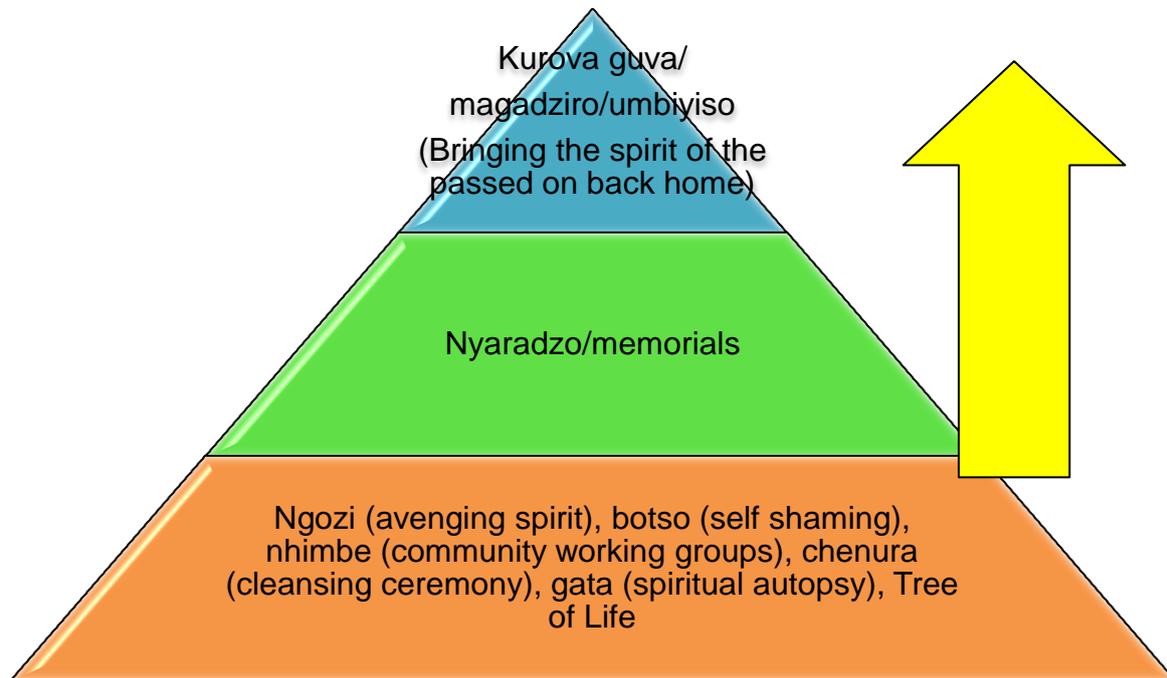
traditional rituals that predate colonialism were adapted to fill the void created by the twin catastrophe of the lack of an official transitional justice programme in Zimbabwe and the blatantly biased manner in which the judiciary operated (Personal communication: 29 September 2012). In a separate key discussion in Harare, Human Rights lawyer Advocate Kumbirai Machingura of the Zimbabwe Human Rights NGO Forum concurred and noted that mass violence by civilians on civilians was a relatively new phenomenon to Zimbabwe. He argued that, prior to the land reform related human rights violations, violence in Zimbabwe was predominantly perpetrated by soldiers on soldiers or by soldiers on civilians, something which the rural communities justified as systemic violence necessary for the attainment of greater emancipation (emancipatory violence). The same is true of the 1982-3 Matebeleland genocide perpetrated by the North Korean trained 5<sup>th</sup> Brigade on predominantly Ndebele-speaking civilians.

This new form of mass violence, perpetrated by civilians on civilians, resulted in the use of traditional transitional justice mechanisms in order to fight injustice perpetrated, not by state agents, but by predominantly known civilians, usually from the same communities. In order to accomplish both justice and reconciliation, the following rituals were noted as commonly practised in Zimbabwe's rural areas: *nyaradzo* (memorial service), *ngozi* (avenging spirit), *kurova guva* also known in some parts of Zimbabwe as *magadziro* or *umbuyiso* (bringing back the spirit of the deceased) and *botso* (self-shaming). However, in order for these rituals to take place other ceremonies were used to bring the victims and the perpetrators together in the presence of the community, and usually for the first time since the violence took place. This formed the first part of the reconciliation process namely, facing reality. These institutions guarantee not only that offenders face the reality of their wrongful actions, but also that they face their victims in person in the presence of the whole community, so that as offenders they realise the magnitude of their wrongdoing. In order to facilitate the process of facing reality, certain traditional ceremonies and institutions were practised, including *nhimbe/ilima*, loosely translated as community working groups. These community working groups also formed the platform upon which other processes such as taking responsibility through truth-telling occurred. Repentance occurred publicly during these community working group sessions. Issues of restitution were also discussed and moderated during these sessions by a

'go-between', usually a family friend of the offender. The final stage in the reconciliation process was the holding of a memorial service (*nyaradzo*) and then another set of rituals and ceremonies meant to bring back the spirit of the deceased as an ancestor (*kurova guva*). The ultimate aim of these ceremonies was to reconcile the two families and in the process bring closure to both the victim's and the perpetrator's families.

Heal Zimbabwe Director Rashid Mahiya revealed that these rituals and ceremonies could not occur during the periods of politically motivated violence when the atrocities were committed (Personal communication: 19 September 2012). In a way, they were shelved pending the normalisation of the political environment which occurred when the GNU was formed. In cases where the perpetrators were unknown, or when they were known but unwilling to reconcile with their victims, the institution of *ngozi* was employed by the victim's family as a last resort to force the family of the perpetrator(s) to initiate the reconciliation process (Chief Ngonidzashe Marongwe, Personal communication: April 2013). *Ngozi* proved to be efficacious in forcing offenders to face reality and take responsibility, thereby securing confessions (truth telling) which led to the payment of restitution and culminating in reconciliation. Only when this had been accomplished could the central rituals of *nyaradzo* and *kurova guva* occur. Other institutions used to support the above rituals and ceremonies were *husahwira* (family friendship), Tree of Life, *botso* (self-shaming), *chenura* (cleansing) and *gata* (spiritual autopsy). When diagrammatically represented, traditional transitional justice mechanisms appear to form a triangle. Base rituals and ceremonies precede the ones above them and they all culminate in ceremonies to bring back the spirits of the deceased so that they can assume the roles of ancestors, that is, to bless, protect and occasionally punish the family.

**Diagram 7.2: Traditional ceremonies as transitional justice mechanisms**



### **7.7.1 *Nhimbe/ilima* (community working group)**

*Nhimbe/ilima* is the most basic of the traditional transitional justice mechanisms that were observed in rural Zimbabwe. It ensured that the offenders faced reality and took responsibility for their wrongdoings. It was used mostly in cases where the offenders were known to the victims and lived in the same community. Most of the *nhimbe/ilima* that occurred were supported by a non-governmental organisation called Heal Zimbabwe, formed in 2008 with the aim of assisting perpetrators in the main to seek closure and reconciliation with their victims' families. Heal Zimbabwe achieved this by creating an enabling environment for the two estranged families to come together and talk about their differences. *Nhimbe/ilima* is a traditional communal African practice in which communities come together to pool their resources and labour to offer assistance, usually to the vulnerable members of the community. Ordinarily *nhimbe/ilima* is a community food security mechanism that has been harnessed and turned into a peace building and reconciliation mechanism. It is a traditional social security mechanism, which, *inter alia*, ensures food security and operates by means of gathering community members to perform certain tasks

with which the vulnerable family is struggling to cope. Its strength lies in its numbers. Where a family of two would toil in the field for weeks, several dozen community members would perform the same tasks in hours.

When used as a transitional justice mechanism, *nhimbe/ilima* depends on a third party known as *shire* (family friend). *Sahwira* initiates the process by going to the two families and suggesting that they hold a *nhimbe* in the victim's field. This will have been agreed upon in advance by the headman who will also attend the function. When the villagers gather at the victim's field, work starts in earnest. This might be hoeing the field or picking a ripe crop of cotton. It is during this work that the family friend breaks the proverbial ice and brings the issue of human rights abuse into the discussion. As will be discussed later, the perpetrator would be asked to narrate what happened on the fateful day, with the family of the victim asking questions, usually through the family friend who would have assumed the role of mediator. This process, in transitional justice terms constitutes the process of truth telling and aids in the healing process in that the family of the victim and the entire community will hear the exact circumstances that led to the victim's death.

The efficacy of this mechanism is that it allows for truth telling and, in some instances, reconciliation with further promises of reparation where necessary, leading to memorialisation. These are all key pillars of an effective transitional justice mechanism. Where in the past communities were afraid to attend or organise community working groups, Heal Zimbabwe created an enabling environment to turn these occasions into opportunities for community peace building, healing and reconciliation, usually by inviting the police to deter any violence.

#### **7.7.1.1 Truth telling and reconciliation during *nhimbe/ilima***

Two key components of transitional justice are truth telling and reconciliation. In realist transitional justice mechanisms, these components are embedded in the consummation of *nhimbe/ilima*. While pooling labour for a disadvantaged community member is the original thrust of *nhimbe/ilima*, in the aftermath of intra-community human rights abuses, truth seeking, truth telling and reconciliation have emerged as

the primary objectives of these traditional institutions. As noted above, these objectives has been achieved through bringing the perpetrators (if present) and their family to the homestead of their victims in the presence of the community and local traditional leadership to provide labour, usually in the fields of their victim or the victim's family field. In most of the cases covered by the researcher, Heal Zimbabwe was approached by the perpetrators or their families to facilitate the truth telling and reconciliation process. The local headmen were then officially notified of the process which was to take place in their jurisdictions.

In some cases, such as in the rural areas of Murewa and Mutoko, local headmen elevated the message by sending it to their paramount Chiefs. As stated in the above section, the actual reconciliation process was preceded by a truth seeking and truth telling session which occurred as the two families were joined by the community in working in the victim's fields. It was the responsibility of the family friend (*sahwira*) to initiate the truth seeking process by posing probing questions to the perpetrator (if present) or to their family (in their absence). Typical questions included:

Now that we are all here and no one can beat you in front of the whole community and the Headman, Tobias, tell us exactly what happened the night John disappeared.

Once the perpetrator or a family member started providing answers, the victims, their families, the other community members and even the headman would begin to probe the circumstances around the incident further. In facing the reality, offenders would tell the truth, not blaming those who ordered them to commit human rights abuses but taking full responsibility for their actions.

Given this non-punitive opportunity to tell the truth, perpetrators would often seize the opportunity to unburden themselves of the truth in a bid to secure forgiveness, closure and reconciliation. It is the prerogative of the *sahwira* to declare the question and answer session over, usually by summing up what has happened and pleading with the victims, their families and the community to forgive the offender. It was during one of these engagements that the younger brother told his elder brother that he understood why he had killed their elder brother, but was at a loss to understand

why he had killed his brother's dog as well. These sentiments cannot be expressed in a court of law yet are crucial if families and communities are to reconcile fully.

At the end of the day's work in the fields, the whole community would congregate at the victim's homestead to conclude the ceremony. In most cases, this was done by partaking of traditional beer brewed specially for the ceremony. During the night there would be dancing, celebrating the rebirth of cordial relations. The rising of the sun on the following morning was taken to signify the new relationship and the official acceptance of the perpetrator's apology. In rare cases, this was followed up by an invitation from the offender's family to the victim's family to attend another ceremony at the perpetrator's homestead. The final stages of the ceremony would involve communication between the 'living living' and the 'living dead'. A ceremony called *nyaradzo* (memorial service) would take place to console the victim's family and to accord them closure. This final ceremony is known as *kurova guva*, and occurs when the spirit of the deceased is brought back to the realm of the living in order to perform the duties of an ancestor.

It is interesting to note that even after such public confessions were made by offenders, none would be arrested by the police. The presence of the police would be merely to ensure that no violence occurred. *Sahwira* proved to be instrumental in mediating the payment of reparations (where due) and reconciliation. Other traditional ceremonies and institutions are complementary to *nhimbe/ilima* and include *gata* (spiritual autopsy), *botso* (self-shaming) and *chenura* (cleansing ceremony). They will be analysed in detail in the following paragraphs.

### **7.7.2 Gata (spiritual autopsy)**

According to the Shona people of Zimbabwe, all deaths are caused and hence the causality of such deaths must be established in order to avoid the recurrence of these calamities (Chavunduka 1980 129-147, Gelfand: 1956, 1962, 1965 and 1985, Bourdillon: 1976, Aschwanden: 1987). The ceremony of *gata* is usually performed before burial. However, in cases where death occurs as a result of politically motivated violence and where burial has not taken place according to ritual, *gata* is performed when time and political space allow. The purpose of *gata* is to establish

the cause of death (Masaka and Chingombe 2009: 190). Mahiya (Personal communication: 2012) notes that spiritual autopsy took on various dimensions among the families that his organisation (Heal Zimbabwe) worked with, with some of these families having consulted faith healers in addition to or as substitute for traditional healers.

#### **7.7.2.1 The relevance of *gata* to transitional justice**

As a mechanism for establishing the cause of death, *gata* has relevance to transitional justice in that it allows the truth to be uncovered. When applied to Reverend Misener's five 'R's, *gata* ensures that the family of the victim faces the reality of the cause of their family member's death. It also helps them to apportion responsibility to the right agent. More importantly, where restitution is due, they know who to claim from, allowing the two families to reconcile after the performance of the appropriate rites and ceremonies. Truth telling is achieved through asking the traditional or faith healer to reveal the cause of death. Cases where perpetrators would have been identified using this practice were reported in Buhera and Gokwe Districts. In such cases, once the truth about the perpetrators was learnt the offenders were notified through traditional communication channels, that is, through the village headman or the Chief. When the perpetrators or their families refused to cooperate or acknowledge their wrongdoing, the spirit medium invoked the spirit of the deceased to visit misfortune and illness on the perpetrator's family. This is known as *ngozi*. It can therefore be argued that the relevance of *gata* is found in its ability to reveal the truth in cases of mysterious death or disputed fatalities. In a way, this destroys impunity. In cases where the perpetrator is revealed to be a blood relative of the victim, such as a parent, sibling or offspring, an institution called *botso* is used to atone for the wrongs before the *nyaradzo* and *guva* ceremonies.

#### **7.7.2.2 Challenges presented by the use of *gata* in transitional justice**

The major challenge associated with the use of *gata* relates to the proliferation of fake traditional and faith healers. This has resulted in the practice of *gata* being infiltrated by pseudo mediums and prophets who have only added to the confusion

by, *inter alia*, guessing the cause of death for financial gains. In most cases, this has resulted in further divisions within families and communities instead healing and reconciliation. Tied in with this is the inability of many mediums to invoke the spirit of the deceased to inflict misfortunes on the perpetrators in a bid to force them to own up to their atrocities. Some mediums have claimed that they invoked the deceased person's spirit to punish the offenders, but no misfortunes have befallen the known, unrepentant offender. This has rendered *gata* a mere formality in many instances, a procedure without any enforcing mechanisms. However, others argue that the purpose of *gata* is simply to identify causality and that remedying or avenging belongs to other realms, those of herbalists and the deceased themselves.

### **7.7.3 *Botso* (self-shaming)**

*Botso* is an institution that is used to atone for intra-family wrongdoing, usually when a child abuses a parent. As a transitional justice mechanism, *botso* works in that it allows the whole community to know the truth as the process involves the perpetrator wandering around the community telling every person he or she meets the wrongs that they committed. In the process of roaming the villages the perpetrator collects an assortment of grains to be used for brewing beer for his/her cleansing ceremony. This practice is not widespread as cases of intra-family violence are usually solved at family level without elevating the matter to the spiritual level.

#### **7.7.3.1 *Botso* case study**

Professor Maurice Vambe of the University of South Africa's Department of English Studies narrated a case of *botso* known to him which is of relevance to this analysis (Personal communication: 22 October 2012). The case occurred during Zimbabwe's war of liberation when four ex-combatants were attacked by unidentified enemy forces, resulting in the death of three of them. Vambe's brother was among this group and he survived the attack. Years later, one of the deceased's daughters was possessed with the spirit of her late father. In a trance, she led her family members to the surviving ex-combatant who was now a senior police officer in the Zimbabwe

Republic Police. The possessed girl instructed her 'fellow ex-combatant' to lead her family to the specific location where they had been attacked. The senior police officer, the girl and her family then embarked on a journey to the former battlefield where the three ex-combatants had perished and had been buried in shallow graves.

Upon failing to identify the exact location of the shallow graves due to overgrown vegetation around the area and the growth in new settlements, the girl became possessed once again with the spirit of her late father. She led the entourage to the place where her father had been buried together with the other three ex-combatants. The grave was excavated and three sets of human remains were found. While the entourage was at a loss as to how they would identify the three sets of human remains, the spirit of the late ex-combatant possessed his daughter yet again. She went and lay next to her father's remains as a way of identifying him among the three.

The remains were then transported to the deceased's family and before burial the girl became possessed once again and this time requested that those responsible for her father's death confess. One of the deceased's brothers confessed to consulting a witchdoctor who gave him a *muti* (death charm) to use together with the carcass of a sheep at exactly 1pm, the exact time that the ex-combatants were fatally attacked. He confessed that he had orchestrated his brother's death so that he could take over his estate, primarily his cattle and wife. As reparation, the spirit of the deceased demanded that the deceased's remains be placed in his guilty brother's bedroom for seven days. When the perpetrator went to bed and again when he woke up he would see the remains of his brother, whose death he had caused. After the seven days, certain rites and rituals were to be performed informing the deceased that he was now home, his brother was sorry and that he could now rest in peace.

### **7.7.3.2 Interpretation of *botso* as a transitional justice mechanism**

*Botso* is a system of appeasing an aggrieved, deceased family member wronged or killed by another. If one kills, causes another to be killed or otherwise angers a relative, in most cases the mother, and does not seek forgiveness before the

wronged one dies, the offender must pay reparation by participating in the process of self-shaming (*kutanda botso*). Using Misener's (2001) five 'R's reveals that this institution is premised on reality, responsibility, repentance, restitution and reconciliation. These can be otherwise expressed as admission of guilt, self-shaming, paying of reparations and reconciliation.

The first step as described in the incident above is that there was the dual *reality* of a disappeared ex-combatant on one hand and that of a young girl inflicted with a series of unexplained misfortunes including the failure of the onset of her menstruation periods, despite her age. The deceased took the *responsibility* of having his spirit possess his daughter and provide directions to the shallow grave. *Repentance* was sought by the brother who engineered and caused the deaths. The offender publicly admitted to committing the wrong and asked for forgiveness. Inherent in this process of repentance is truth telling which constitutes an integral part of transitional justice. The truth was also revealed when the spirit of the deceased led the family to the shallow grave where he had been buried.

*Reparation* was paid and shaming accomplished when the guilty brother spent seven nights sleeping in the same room as the remains of his brother. This served as a reminder to the offending brother of his wrongdoing which he had thought would go unpunished. Finally, *reconciliation* was achieved when certain rites and rituals were performed after the seven day punishment. As proof that the ceremonies had been accepted by the deceased, afflictions and illnesses which had troubled family members suddenly disappeared. For example, the girl who was possessed by her late father's spirit started menstruating, something which had never happened despite her reaching the right age for such biological processes to occur. It was reported by Vambe that this occurred soon after the rites and rituals had been performed. This was taken by many as a sign that reconciliation, healing and closure had taken place.

As noted earlier, among the Shona people the three processes of reconciliation, healing and closure occur at the three levels of life, i.e., the 'living unborn', the 'living living' and the 'living dead'. The next section discusses another form of traditional

transitional justice mechanisms, *nyaradzo*, which when loosely translated means memorial service.

#### **7.7.4 Nyaradzo (memorial service)**

*Nyaradzo* is a transitional practice meant to bring closure to the family of the deceased and is usually performed a month after burial. Most of the victims of politically motivated violence in rural Zimbabwe were not properly mourned, with some having their *nyaradzo* postponed due to security reasons. As a transitional justice mechanism, the purpose of *nyaradzo* is to assist the immediate family of the victim to achieve closure. Most of the victims of such atrocities were buried either hurriedly or improperly as their families feared further fatalities. This was likened to a postponed burial by the Executive Director of Heal Zimbabwe, Rashid Mahiya, who observed that these memorials acted as a platform to sensitise communities to the dangers of committing human rights violations. This invested the mechanism with the capacity of a deterrent, a key aspect of an effective transitional justice mechanism. In this case, during the *nyaradzo*, religious leaders and local traditional leaders were invited to attend. It was during the speeches that formed part of the *nyaradzo* that issues of politically motivated violence were discussed. Victims' family representatives and those supporting the perpetrators were also given a platform to air their views, with perpetrators or their family representatives openly asking for forgiveness and warning others not to commit the same crimes. Since most of the families were poor, Heal Zimbabwe donated tombstones and these were erected as part of the memorial service. *Nyaradzo* culminated with the erection of these tombstones as memorials, to remind the community of the gross violations of human rights and as a mechanism of deterrence.

Mahiya was convinced that the programme was effective because all the communities with which his organisation worked sympathised with the victims' families, publicly acknowledging the wrongs of the individual perpetrators and sharing the blame for allowing an individual member (or members) of the community commit such an atrocity. In the process, community leaders and the head of the perpetrator's family also showed remorse for failing both the victim's family and the

community at large in their leadership as they argued that these fatalities were committed under their jurisdiction. Such acts of public acknowledgement are not found in idealist transitional justice mechanisms such as prosecutions. This further strengthens the role of traditional transitional justice mechanisms in reconciling post-conflict communities.

In the absence of the rigours of due process of cross-examination, truth telling was usually not difficult to achieve under traditional transitional justice mechanisms. This rendered healing and closure possible, bringing the prospects of reconciliation even closer. Mahiya stated that he was happy with the progress his organisation made because the public acknowledgement of wrongdoing made by family heads, community leaders and traditional authorities put pressure on political leaders who had either ordered or presided over the human rights abuses to acknowledge their wrongdoing. This is unlikely to happen in prosecutions.

Having discussed the use of *nyaradzo* as a transitional justice mechanism, the next sections provide case studies as evidence for the existence and extent of the application of the institution of *nyaradzo*.

#### **7.7.4.1 Case study 1: Nyaradzo for Mafi and Acquiline Gumare**

Mafi and Acquiline Gumare were abducted from their homestead in Headlands District in Manicaland Province by a group of about 200 youths on the evening of 25 June 2010. In the process of their abduction their homestead was set alight and they were tied together and assaulted to a point at which the husband (Mafi Gumare) died. The reality of their abduction, torture and the eventual death of Mafi only came to light when Acquiline, who was left for dead, was able to narrate what had happened to those who attended to her and her late husband. Unlike Mafi, who died on the spot, Acquiline died two days later. Their burial was problematic as the traditional leaders who were accomplices in their murder refused permission to have 'opposition' people buried in their jurisdiction.

Their *nyaradzo* was held in 2012 and attended by 85 people, including family, friends, traditional leaders, political leaders and some of the perpetrators. The Village Head who was also the local ZANU PF ward chairman, whose children were alleged to have been among the perpetrators, gave a very painful testimony. He narrated how he was torn between his roles as neighbour, Village Head and politician. He revealed the inherent conflict of interests between the three roles and how their usually conflicting mandates had taken their toll on him. For him, the roles (one political, one traditional and one social) constantly clashed, causing him untold inner turmoil that he confessed he could no longer live with. In his confessional speech he bemoaned the fact that he had to face the aggrieved villagers alone while those who gave him orders were wining and dining in the capital city of Harare. Most importantly, he promised the villagers that he would make sure that such events never recurred as he had learnt his lesson. Despite the fact that the perpetrators were known and that their leader had publicly confessed, no arrests had been made as of September 2012 and such arrests seem increasingly unlikely.

#### **7.7.4.2 Case study 2: Nyaradzo for Master Kachuwaire**

The second case study is one of intra-family politically motivated violence. It involved Master Kachuwaire, his wife Winnie Kachuwaire and Master's elder brother. Born in 1974, Master Kachuwaire was abducted in 2008 from his bedroom after his brother who was from a rival political party informed that party's youth of his whereabouts. Master was severely assaulted together with his eight months pregnant wife, Winnie Kachuwaire. Both Master and Winnie died from their injuries within a month of each other. Their new-born baby girl also died. Since no cause of death was established for the new-born, speculation was that it died of injuries sustained while in the mother's womb. The couple were survived by four children who, at the time of this study, were not attending school because no one was paying their school fees.

The couple's *nyaradzo* was held at Mugavanhu Village in 2011 in Muzarabani District, Mashonaland Central Province and was attended by 230 people including traditional and community leaders. The ceremony provided an opportunity for the two elder Kachuwaire brothers who belonged to ZANU PF and MDC T respectively to

come together and discuss Master and his wife's death openly for the first time. Subsequently, the brother who 'handed over' Master and Winnie to their killers apologised in tears for his wrongdoing and his role in the murders. Since these memorials the Kachuwaire family have begun to come together to discuss family matters, including the welfare of the four orphans.

#### **7.7.4.3 Case study 3: Nyaradzo for Charles Mutendebvure**

Charles Mutendebvure was born on 5 April 1943, murdered on 6 May 2008 and his memorial service was held on 8 June 2010. The circumstances leading to his death were that he was dragged from his home to a 'political party base' that had been established at the nearby Chiwenga School at Chiwenga Village, Muzarabani District in Mashonaland Central Province. Ironically, Charles and his brother were instrumental in the establishment of the school in the early 1990s. It was reported that animosity arose when the new school was about to be named. Charles and others opposed a decision to name the school after Zimbabwe's Defence Force Commander and former member of the ZANLA High Command, Constantine Chiwenga who hails from that area<sup>24</sup>. Charles' wife believed that her husband's opposition to the naming of the school caused his death. Charles and two others, named as Lazarus Mushayavanhu and Givemore Kanodoweta, were beaten at a political party base and allegedly died as a result of the assault. When Charles died his entire family fled the village and relocated to Harare. As if the murder of the family head was not enough, the perpetrators then dragged thorn tree bushes through Charles' ripe cotton field, thereby depriving his family of the livelihood that they had nurtured for the entire season. Charles' wife, who was also severely assaulted in the process, spent two days in the same room as her late husband's decomposing corpse as the villagers were afraid of assisting her to bury him. The burial took place hurriedly and unprocedurally when some villagers braved the politically charged atmosphere and buried him.

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<sup>24</sup> This version of events is contested on the grounds that General Constantine Chiwenga comes from Wedza District in Mashonaland East Province and not from Muzarabani District, Mashonaland Central Province as alleged by the victims. A possible explanation for this discrepancy could be that General Chiwenga is originally from Mashonaland Central Province but has since migrated and settled in Mashonaland East Province.

Charles' *nyaradzo* served a number of purposes. Firstly, it was instrumental in the return of his family to their home after almost two years of living as internally displaced persons (IDPs). Secondly, it gave Charles' family an opportunity to meet with the community in person and to share their grief with them. It also allowed the family to express their gratitude to the community members who had risked their lives to bury Charles and finally it was the start of a journey towards healing and closure. The *nyaradzo* was attended by 80 community members, among them local Anglican Church members. However, the traditional leaders in the area did not attend the memorial for undisclosed reasons even though they had been invited as per traditional custom. Heal Zimbabwe assisted with tombstones for both Charles and his wife. These twin tombstones will act as a permanent reminder of the sterling work Charles did in the establishment of the school, which may ironically have brought about his death.

#### **7.7.4.4 Case study 4: *Nyaradzo* for Givemore Kanodoweta**

According to Heal Zimbabwe's 2010 Annual Report, Givemore Kanodoweta was born on 19 September 1968 and murdered, together with Charles Mutendabvure and Lazarus Mushayavanhu, on 6 May 2008 at Chiwenga School, Muzarabani District, Mashonaland Central Province. Just like Charles' widow, Givemore's widow, Gertrude, was ordered to collect her husband's body. Givemore's parents lived in another village 40 km away and his widow had to transport his body alone, using an ox cart. Gertrude reported the trauma that she experienced and the 'sell-out' to his parents' home. She was also very anxious about the reception she would receive in Givemore's village. Fortunately or unfortunately, upon arriving Gertrude found that there was no one in the village as her parents-in-law were in hiding, also fearing for their lives. A few villagers assisted with the burial in the absence of Givemore's family.

The *nyaradzo* was attended by some of the alleged perpetrators, including the local political leadership of both the main MDC T and ZANU PF. In stark contrast to the half dozen people who buried Givemore, his *nyaradzo* was attended by 340 people.

Most importantly, those believed to have ordered the abduction of Givemore assisted in the construction of his tombstone. These included the ZANU PF Muzarabani District Chairperson, the Muzarabani District Youth Chairperson and the local Councillor for Hoya ward.

Givemore Kanodoweta's *nyaradzo* served a number of purposes in the Hoya villagers' bid for peace building and reconciliation. Gertrude and Givemore's family were given the opportunity to properly mourn his death. They were also able to visit his grave for the first time since 2008, as they had become internally displaced persons. Thirdly, Gertrude was reunited with her four children who had been given to Givemore's brother who lived 60km away in the local town of Centenary. Most importantly, this *nyaradzo* brought the reality of violence to Hoya village. In addition to bringing together the leadership of different political parties, the *nyaradzo* was used as a platform to denounce violence, with the villagers pledging never to allow it to happen again. Thus five memorial services were held in Muzarabani District in the month of June alone 2010, as indicated in the table below.

**Table 7.1: Nyaradzo held in Mashonaland Central Province, Muzarabani District**

Date	Victim	Village	Attendance		
			Males	Females	Total
8 June 2010	Charles Mutendebvure	Chiwenga	27	53	80
9 June 2010	Master Kachuwaire	Mugavanhu	70	160	230
9 June 2010	Givemore Kanodoweta	Hoya	140	200	340
10 June 2010	Fana Dhlamini	Kairezi	57	50	107
10 June 2010	Tendayi Chizengeya	Chizengeya	166	196	310
<b>TOTAL</b>			<b>460</b>	<b>659</b>	<b>1119</b>

(Source: Heal Zimbabwe programme report 2010-2011: 5)

*Nyaradzo* were also held in 2010 in the Midlands Province. The attendance was huge throughout, proving the applicability and acceptability of *nyaradzo* as a peace

building, healing and reconciliation mechanism. As reflected in the following table, five memorials were held in the month of July 2010.

**Table 7.2: Nyaradzo held in Midlands Province, Gokwe District**

Date	Victim	Village	Attendance		
			Males	Females	Total
21 July	Daniel Ngondo	Munyatipanzi	69	215	284
21 July	James Zinonex	Tsungai	25	30	55
22 July	Rangarirai Gomwe	Tsungai	30	35	65
23 July	Manomano Ndawi	Gumunyu	58	65	123
23 July	Abinos Njodzi	Gumunyu	65	80	145
<b>TOTAL</b>			<b>247</b>	<b>425</b>	<b>672</b>

(Source: Heal Zimbabwe programme report 2010-2011)

Some of these *nyaradzo* were attended by politicians from central government. One such example was the memorial for Isaka Zindere held at Mavanga village in Chief Gumunyu's area in Gokwe, attended by Finance Minister Tendai Biti who was also a negotiator in the establishment of the GPA. His attendance gave the memorial a political outlook, served to authenticate it and also presented him and his political party an opportunity to give support to the families of the victims.

In Manicaland Province, 13 *nyaradzo* were held between 24 and 30 January 2010, in Murambinda, Birchenough Bridge, Mombeyarara and Munemo. Total attendance at the 13 memorials was 901 people, including traditional and political leaders. In Mashonaland East Province, memorials were held in Murewa District between 23 and 26 February 2011.

The wide application and acceptability of *nyaradzo* (memorials) as a transitional justice mechanism is evidenced in the summary table of attendance below which reveals that just fewer than 3000 people across the country attended *nyaradzo* between 2010 and 2011.

**Table 7.3: Summary of *nyaradzo* in 2010-2011**

Province	District	Men	Women	Total
Mashonaland Central	Muzarabani	460	659	1119
Midlands	Gokwe	247	425	672
Mashonaland East	Mutoko	125	150	275
Manicaland	Buhera	364	537	901
	<b>Total</b>	<b>1196</b>	<b>1771</b>	<b>2967</b>

(Source: Heal Zimbabwe programme report 2010-2011)

### **7.7.5 *Kurova guva/magadziro/umbuyiso***

The traditional ceremony of *kurova guva/magadziro/umbuyiso* is common among both the Shona and the Ndebele people. It is the culmination of all the rituals meant to ensure that the spirit of the deceased rests in peace before being summoned by the 'living living' and authorised by the 'living dead' to return as an ancestor. The purpose of *guva* (which literally means grave) is to bring back the spirit of the dead so that s/he can reside with the family, protecting and blessing it while occasionally punishing it for misbehaviour by, for example, allowing calamities to befall it. In most cases, *nyaradzo* must be performed before *guva* and an adult's *guva* ceremony happens approximately a year after burial. The modalities, consultations, ceremonies and rituals that accompany the institution of *guva* are unfortunately beyond the scope of this discussion.

This study is concerned with a specific issue: exploring how the institution of *guva* was transformed to function as a transitional justice mechanism. The answer is found in the additional roles that the institution fulfilled. Most importantly, it offered the families and communities final closure while reuniting them with the spirit of their dead relative. This completed the threeness of life forms of Shona and Ndebele belief, which are the 'living dead', the 'living living' and the 'living unborn'. An absence of one of these three life forms is deemed unjust and considered an abomination, capable of bringing the most unbearable calamities, as there is no

connection with God. This is believed possible only through the intercession of the 'living dead' on behalf of the 'living living' and the 'living unborn'.

Employing the two theoretical frameworks of the five pillars of transitional justice and the five 'R's of restorative justice to ascertain the efficacy of *guva* as a transitional justice mechanism reveals that it is probably the best bottom-up, victim-centred mechanism at work in rural Zimbabwe. The five pillars of transitional justice are truth telling, reparations, collective memory and memorialisation, trials and institutional reform (Chitsike 2012: 3), while the five 'R's of restorative justice are reality, responsibility, repentance, restitution and reconciliation (Misener: 2000). In addition, *guva* is efficacious as a form of education. As a transitional justice mechanism, *kurova guva* fulfils the following functions. Firstly, it serves to officially communicate with the 'living dead', especially those recently departed to rest in peace. Secondly, it enables the eldest living male offspring of the deceased to inherit his father's estate, and lastly, it serves as a forum for the collective and public memorialisation of the dead.

Other ceremonies and rituals that are performed before *guva* such as *nyaradzo*, *botso*, *chenura*, and *gata* are prerequisites of *guva*. *Gata* as a form of spiritual autopsy that ensures that the cause of death is ascertained and that those responsible are notified so that the processes of reparation leading to reconciliation can commence. In cases where a child has killed a parent, especially a mother, the perpetrator has to undergo a self-shaming process called *kutanda botso*. This requires dressing in rags and roaming the villages, confessing while collecting donations of grain to be used in his/her cleansing ceremony. Reparations are paid by the perpetrator to the victim's family and the traditional leaders. Reparations are considered due to the traditional leaders because spilling innocent blood is a crime against the land. This crime warranted that cattle be paid to the Chief as an admission of guilt and in reparation to the traditional authorities. The cattle are used in part for the traditional cleansing of the land over which the Chief presides. Since these ceremonies are attended by all community members, they present a perfect platform for collective public memorialisation.

### **7.7.6 *Chenura* (cleansing ceremonies)**

Once the family and community-based rituals of *nyaradzo* and *guva* have been performed, the healing process in rural areas usually takes on a grander dimension in which the land is cleansed of spilt blood, made holy and ready to receive the blessings of rain and bumper harvests. The essence of cleansing ceremonies as realist transitional justice mechanisms is that human rights abuses defile the land, leading the ancestors to withdraw blessings, chief among them rain and peace. Such cleansing ceremonies reconnect the communities with their ancestors. In these circumstances, realist traditional justice mechanisms are the only key to unlocking these blessings, which the communities believe they are entitled to. These cleansing ceremonies are presided over by traditional leaders. During the ceremony, an animal provided by the offender is slaughtered, traditional beer brewed and drunk as part of the ceremony.

These ceremonies are conducted under the leadership of the area spirit medium in consultation with the Chief. One such cleansing ceremony was held in Zaka's Ward 24 under Chief Bota in Masvingo Province on 4 December 2010. All the Headmen who fell under Chief Bota's jurisdiction were invited and they attended together with their respective subjects. The cleansing ceremonies were celebrated as they had managed to bring perpetrators and their victims together. Politicians from both ZANU PF and the main MDC were also present. Villagers discussed the issue of politically motivated human rights abuses on Saturday 5 December and devised mechanisms to avoid a recurrence and to help victims, especially widows and orphans. The holding of this cleansing ceremony by Chief Bota implied that his respective Headmen could handle criminal cases committed post-2008 in their own traditional courts, something that was almost impossible before the cleansing ceremonies were held. Besides handling such cases, the Headmen were mandated by the Chief to initiate their own healing and reconciliation initiatives at local level.

Another cleansing ceremony was held in the Midlands Province, Gokwe District in Madzivazvido at Chief Chireya's homestead. In terms of attendance, this was

probably the biggest *chenura* held post the 2008 election related violence. Addressing the more than 700 people who attended, Chief Chireya noted that:

...lives were lost... and blood was spilled, that angered the spirit mediums and that should never be repeated again. We say this because we are Chiefs and have a duty to protect the people...

The *chenura* was attended by most Sub-Chiefs and Headmen who fell under Chief Chireya. These included Chiefs Mashame, Nembudzia, Goredema, Makore, Gumunyu, Nemangwe and Madzivazvido. These combined Chiefs and Sub-Chiefs have a combined jurisdiction with a population of 358 650 (Zimbabwe census 2012: 42). Gokwe Senator Mutingwende, representing politicians, also attended. The police, army and the civil service were also strongly represented signifying the importance of the *chenura* to the country's peace building process. The implication is that cleansing ceremonies and related traditional transitional justice mechanisms have potentially reached over 350 000 people in Gokwe District alone. This attests to their wide application.

#### **7.7.7 The extent of the application of *nhimbe/ilima***

While most of the *nhimbe/ilima* were performed without any documentation, Heal Zimbabwe alone managed to conduct 100 ceremonies in one calendar year (2011). The organisation also assisted in the erection of 100 tombstones on graves of victims of politically motivated violence. These were in six of the country's 10 provinces, as tabulated below.

**Table 7.4: The extent of the application of *nhimbe/ilima* as a transitional justice mechanism in Zimbabwe**

<b>Province</b>	<b>Districts covered</b>
1. Mashonaland Central	Muzarabani, Chiweshe, Chaona, Mazowe
2. Midlands	Gokwe North Gumunyu
3. Manicaland	Headlands, Rusape, Buhera
4. Masvingo	Zaka, Mwenezi

5.	Mashonaland East	Mutoko, Murewa
6.	Harare	Harare

In these six provinces, Heal Zimbabwe identified a total of 217 victims of politically motivated violence (Heal Zimbabwe Programmatic Report 2010-2011: 4). In total, the organisation assisted 217 families in holding memorial services for victims of human rights abuses between 2010 and 2011. Theoretically, this transitional justice mechanism can be defined as restorative as it endeavoured to restore the dignity of the victim's families, the humanity of the perpetrator and the peace of the community. These tenets are unlikely to be achievable using idealist transitional justice mechanisms such as prosecutions.

What epitomises these realist traditional transitional justice mechanisms is that, unlike prosecutions, they are bottom-up and victim-centred. This is demonstrated by the fact that in all the 217 cases cited above, either the perpetrator's or the victim's family approached Heal Zimbabwe, asking for assistance in holding memorials and erecting tombstones. Realist traditional transitional justice mechanisms responded well to the transitional justice needs of the rural communities in that they were able to address the challenges inherent in systemic violence, which, according to Heal Zimbabwe, saw 90 per cent of the victims being male breadwinners. This implies that the victim's survivors were financially unable to carry out the *nyaradzo* and subsequently *kurova guva* (Heal Zimbabwe Programmatic Report 2010-2011: 4). While not completely discrediting prosecutions, 80 per cent of the 217 victims' families felt that perpetrators should only be tried after proper reconciliation and reparation, as these two processes would lessen the work of the courts. Starting with trials and ending with incarceration deprives the two families of the chance to reconcile as the absence of the perpetrator renders truth telling almost impossible. In cases of successful prosecution and incarceration, communities assume an additional burden of providing materially for the families of the incarcerated offenders.

## 7.8 Conclusion

This chapter explored realist transitional justice mechanisms in rural Zimbabwe. It demonstrated the existence of peace building initiatives that are victim-centred and bottom-up and, most importantly, it proved that transitional justice does occur in Zimbabwe, without the involvement of the state. The traditional transitional justice mechanisms discussed in this chapter utilise the family and the community as the core units around which reconciliation is centred. It was noted in the chapter that the people of rural Zimbabwe believe that all deaths are caused. The advent of mass civilian-on-civilian violence in addition to uniformed force-on-civilian violence has necessitated that traditional transitional justice mechanisms are adapted to the new realities of gross human rights abuses, usually by known perpetrators. In the rural areas of Zimbabwe, a plethora of these mechanisms have been used to good effect to force offenders to face the reality of their wrongful actions, to take responsibility, seek repentance, pay restitution and reconcile with their victims. In other words, these traditional transitional justice mechanisms have ensured truth telling, compensation and forgiveness, resulting in reconciliation. Where reparations have been due, offenders have used the institutions of *botso* and *ngozi* to seek forgiveness and achieve reconciliation. However, the use of these realist transitional justice mechanisms in dealing with modern atrocities such as gross violations of human rights poses some challenges. Chief among these is the contamination of these mechanisms by pseudo mediums and their counterparts, pseudo prophets, who in most cases are only intent on enriching themselves. The next chapter discusses in greater detail how the institution of *ngozi* operates when deployed as a traditional justice mechanism.

## CHAPTER 8: NGOZI AS A REALIST TRANSITIONAL JUSTICE MECHANISM

### 8.1 Introduction

The previous chapter explored indigenous realist traditional justice mechanisms. It delved into what can be termed traditional transitional justice mechanisms owing to their minimal involvement of the 'living dead'. If victims are the most important stakeholders in peace building and reconciliation then the idea that communities and countries cannot recover from conflict on their own and the argument that international intervention is the best strategy for state-building demands serious interrogation. Many African countries possess complex community-based justice and peace building systems that have been active for generations, managing conflict between families, clans, tribes and villages. Their uniqueness stems from their ability to bring perpetrator and victim together. One of these mechanisms is the customary institution of *ngozi*, which is the zenith of indigenous realist transitional justice mechanisms. This can be compared to the metaphorical trump card owing to its ability to inflict a series of misfortunes on offenders in an endeavour to force them to face the reality of their wrong actions. This chapter aims to position *ngozi* in relation to the human rights abuses as a prevalent and viable transitional justice mechanism. This will be achieved first by defining *ngozi*, then by positioning it as a transitional justice mechanism. The final section of this chapter will explain the advantages and disadvantages of using *ngozi* as a transitional justice mechanism. The methodology employed in the chapter is a mixture of thematic exploration and case studies of *ngozi* ceremonies. The chapter will first situate the institution of *ngozi* in African religion and then in the broader human rights discourse. This is done because the institution of *ngozi* is part of the broader aspect of African religion.

### 8.2 African religion and human rights

Gerrie ter Haar (2009), in *How God became African: African spirituality and Western secular thought*, rightly observes the differences between the goal of religion in western cultures and in Africa. Ter Haar notes that the goal of western religions is to find the meaning of life, while the essence of African religions is interactions with

spiritual forces, what she terms the invisible world. This led ter Haar to conclude that African religion had not abandoned the spiritual roots found in African traditional religions which formed the backbone of the way African societies perceive human rights.

Elvey (2012: 920) expands on ter Haar's notion of an African religion anchored in its tradition by further establishing the link between African tradition and its practice and ideology. Elvey does this by arguing that 'Africa still relies on its traditional roots to inform its practice and ideology'. The African perception of evil affects how African communities, especially those in rural areas, define human rights and how these are to be addressed when violated. Notions of human rights abuse, healing and reconciliation find common ground in the spiritual world. Ter Haar (2009: 25) is correct in advising transitional justice scholars, advocates and practitioners on the importance of understanding the African worldview, especially the African perception of human rights, reconciliation and healing. Research has revealed that rural communities in Zimbabwe linked human rights abuses to evil and wickedness. If this is a fact, then one needs to understand how rural communities define evil and wickedness.

Ter Haar (2009: 29) defines evil as 'a metaphysical entity that is often experienced as real, concrete, and almost tangible'. For the Shona, an evil is a sin committed against the three realms of life; the 'living living', the 'living dead' and the 'living unborn'. It is also perceived as a sin against the land and the traditional leaders who are the custodians of authority among the 'living living' on behalf of the 'living dead' and the 'living unborn'. Accordingly, when evil happens there are prescribed ways of redressing these three categories of the aggrieved.

Contrary to ter Haar's (2009: 37) views that 'evil spirits should never be accommodated and must be driven away in order to provide safety for those who are haunted by them'. Chavunduka (1978: 24) argues that evil spirits are a manifestation of wrongdoing and the only way to remove them is to compensate the aggrieved family. For Chavunduka, the evil person is the one trying to find impunity in branding his or her aggrieved tormentors as evil spirits.

Having established the basis of human rights in Africa, the next step is to theorise on the relationship between human rights and African traditional beliefs. Idealist transitional justice mechanisms define human rights in terms of the living having their rights violated by the living whereas, in rural areas of Zimbabwe, human rights violations are perpetrated by the 'living living' on the five constituencies mentioned earlier ('living living', 'living dead', 'living unborn', the land and the traditional authorities). According to Silk (1990: 305), human rights abuses and their redress which are rooted in African traditional beliefs form an integral part of transitional justice in most parts of Africa, including Zimbabwe. If this nexus is ignored, any transitional justice programmes risk further violating the human rights of the already violated, a phenomenon termed secondary violations of human rights. This calls for the adoption of a middle ground approach between Donnelly's (1984: 400) two positions of cultural relativism and universalism. The design and implementation of transitional justice mechanisms should therefore take into account cultural perspectives and the specifics found within these cultural contexts. This perspective calls for an understanding of the Universal Declaration of Human Rights as a noble cause that finds relevant local expression in the different cultures of the world. This is a departure from the biased perception of human rights that views them as a western construct validated only through the adoption and implementation of western cultures and traditions and through idealist mechanisms such as prosecutions at the ICC.

### **8.3 Defining *ngozi***

Before positioning *ngozi* as a transitional justice mechanism, a working definition will be developed. Professor George Kahari observed that when a Shona adult dies s/he comes back to the earthly realm either as an ancestor or as a *ngozi* (avenging spirit) (Personal communication: 21 September 2012). According to Kahari, what determines the form in which the spirit returns is the nature of the death, with those who die of natural causes becoming ancestors and those who die unnaturally becoming *ngozi*. Augustine Tirivangana (PhD thesis, University of Zimbabwe: 2010) defines five types of *ngozi*. These are: archetypal *ngozi*, which is directly linked to murder; marital *ngozi*, which occurs when a woman commits suicide in her marital home; transactional *ngozi*, which is related to credits; political *ngozi*, where territorial

spirits encouraged guerrillas to fight during the Second *Chimurenga*; and ethical *ngozi*, which occurs when children abuse their mother (*kutanda botso*).

Death to the Shona is a transition, not an extinction, in which the being, not the spirit, dies (Gombe 1986: 59). Gelfand (1982: ii) posited that a Shona adult who dies is not thought of as passing out of the family. This person remains a family member but a spiritual family member. According to Mawere (2011: 83), the body is physical and the spirit metaphysical and death is a 'rite of passage', a process that facilitates the separation of the spirit from the body. Through this transition, the spirit reaches a higher and purer form of existence. Kahari observed that for the Shona, death is not a final destination but the beginning of a newer existence, one which is free from material constraints. At this juncture, a living human being, *munhu*, becomes an ancestor, *mudzimu*, a life without a being.

*Ngozi* does not have a direct English translation but can be defined as an avenging, angry spirit of the deceased that returns to haunt its murderers and their families, forcing them to make an admission of guilt and to pay compensation. According to Mawere (2010: 214), *ngozi* can be best understood as a theory of justice that aims at the promotion of a virtuous moral society (Mawere 2010: 214). The institution and practice of *ngozi* deals with conflict, not only at community level, but even at national level as it is able to affect the offenders regardless of their geographical location. Chivaura (in Mawere 2011: 86) regards *ngozi* as a crime the appeasement of which is an admission of guilt epitomised by the payment of restitution. Chivaura traces the genesis of *ngozi* and believes that it only arises when innocent blood has been shed. Mararike (in RAU: 20 July 2012) views *ngozi* as the consequence of depriving a family of their most valuable asset, the life of a member, and the resultant failure or refusal to appease.

Whenever an adult is deprived of the chance of becoming an ancestor, there is a risk that s/he will become *ngozi* (Gelfand: 1970). This happens mainly in cases of unnatural death such as murder or suicide (Aschwaden 1987: 42). The purpose of *ngozi* is to force the unwilling offender or his/her family to compensate and reconcile with the victim's family and to restore the equilibrium between the two families (Howell: 1985). In essence, *ngozi* is a metaphysical phenomenon, a cultural practice

and a belief system stemming from a particular cosmology. The system can be characterised as holistic because it encompasses different levels (visible and invisible forces) of intervention in the resolution of conflicts (Igreja 2007: 274). *Ngozi* must therefore be conceptualised as a concrete transitional justice mechanism as well as a conflict management and prevention tool.

However, in order for *ngozi* to function, it must be invoked. There are various explanations regarding how *ngozi* is invoked. The most usual explanation is that offered by historian Phatisa Nyathi (2005: 99) who argued that a murderer would not automatically be affected by *ngozi*. He believes that *ngozi* is not innate and does not happen automatically. Certain 'things' have to happen for it to take place. These include the invoking or summoning of the deceased's spirit to return and fight the perpetrators as, in most cases, only the deceased will know exactly who killed them. Nyathi notes that a number of methods are used to invoke the deceased's spirit. These include the performance of rituals on the corpse before burial, or on the grave or by using soil from the grave (The Standard: 23 May 2010). In some cases no such rituals are necessary, particularly when victims were ritually 'medicated' and 'fortified' by inserting medicine into incisions, known as *nyora*, in their bodies, when they were still alive. The living thus have a certain agency in invoking *ngozi*, a kind of avenging leverage in case perpetrators are unwilling to make amends.

#### **8.4 Positioning *ngozi* as a transitional justice mechanism**

It is imperative to note that the Shona spiritual world is hierarchical. Latham (1986: 49-60) notes that at the bottom of this hierarchy lies the village, or the family spirits (*midzimu yemusha*). Above them are the ward spirits (*midzimu yedunhu*) who in turn report to tribal spirits (*masvikiro edzinza*). The next level report to *mhondoro* who are the national spirits. It is the duty of national spirits to communicate with God (Mwari, Musikavahu). Ideally, traditional leaders in Zimbabwe report to the spirit mediums in their areas. These mediums then report to God through the spiritual chain of command outlined above. There are other complementary spirits such as rainmaker spirits (*masvikiro emvura*), hunter spirits (*mashave ekuvhima*), divination spirits (*mashave ekurapa*) and war spirits (*mashave ehondo*) (Mbingi 1997: 49).

If one is to position *ngozi* as a transitional justice mechanism, then the state's perception of *ngozi* must also be taken into consideration. The state's attitude to *ngozi* has not changed since colonial times (Sadomba 2008: 17). *Ngozi* has yet to be officially recognised by the state. This weakens its application as it does not have civil representation in Zimbabwe's judicial system. Vambe 2009: 68) traces this problem from the creation of a dual legal system which commenced with the passing of the *Witchcraft Suppression Act* [Chapter 9:19] in 1899 and amended in 2001. The Act and other related legislations allowed both customary and constitutional laws to apply to blacks without expressly stating the relationship between the two legal systems.

Secondly, there is a great deal of stigma attached to *ngozi*, especially by faith based NGOs. This is illustrated by the fact that no non-governmental organisation has worked on or funded any transitional justice programmes to do with *ngozi*. *Ngozi* has been viewed as unchristian and pagan. Maxwell (1995: 201) noted the need to appease not only *ngozi* but other spirits that are part of the life of the Shona people. Working on the evolution of Christian religion among the Hwesa people of Katerere area of North East Manicaland, Maxwell discussed how *ngozi* and other spirits feared by the Hwesa people were dealt with, both by using the traditional methods and through Christian methods, which mischievously recast them as demons and not aggrieved spirits. The extent of the application of *ngozi* was demonstrated when Maxwell discovered that most victims of human rights abuses and indeed perpetrators had little knowledge of and little regard for Western concepts such as post-traumatic stress disorder or post-traumatic counselling. This was collaborated by The Amani Trust (1995) which found that communities especially in Matebeleland did not have any knowledge of modern psychological terms, and that they still valued their age-old traditions of appeasing the spirits.

Among the Shona people, when a murder is committed and not acknowledged, the spirit of the murdered individual returns to haunt the family of the murderers. This is consistent with the concept of 'healing the dead to transform the living' (Eppel: 2006) and its extension, the 'resurfacing bones of unsettled war dead' (Fontein: 2011). This is manifested in two ways; firstly, through the spirit of the deceased which takes direct possession of a medium and speaks through that medium (Gelfand 1973: 6),

and secondly, through the death or illness of the perpetrator's family members (Bourdillon, 1987: 233–5). These circumstances persist until the perpetrator realises that he or she must pay restitution for the crime and take practical action towards reconciliation.

### **8.5 Functions of *ngozi***

*Ngozi* has a variety of functions in transitional justice. These include making family members conform to socially accepted norms of behaviour (deterrence), as an offence by one family member affects the whole family. This is in contrast to western justice systems where accountability is individualised and where perpetrators commonly spend life in prison or undergo other such punitive measures when convicted by competent courts of law. Other functions of *ngozi* include enforcing accountability, preventing impunity, fostering reconciliation and post-conflict peace building. These are achieved when the family of the perpetrator is tormented until it identifies the victim's family (if unknown). Mirrored against Reverend Misener's five 'R's this forms the first 'R' which is *reality*. *Responsibility* is assumed by the perpetrator when he or she begins the negotiations for the paying *restitution*. However, before restitution is determined or accepted, the perpetrator must *repent*. This leads to the final phase of *reconciliation*.

The link between *ngozi* and justice becomes apparent when one analyses the nature of ownership of property among the Shona. According to Chivaura (in Mawere 2011: 86), the Shona people have tangible and intangible assets. Tangible assets are earthly material possessions while intangible assets are spiritual aspects. All the assets owned by individual family members belong to the family. Deprivation of material or immaterial possessions of any member of the group is a deprivation of all the members. Thus, life among the Shona is collectively owned hence identity is always expressed in the plural, not in the singular; to the Shona, identity is always collective. Committing murder is committing a crime against the dead, the living, the unborn, the land and above all the traditional leadership because the most important intangible assets shared by members of the same blood are the ancestors and the lives of their members. In its cosmological existence, the spirit of the victim plays a

key role in the way in which the offenders suffer and provides the context in which *ngozi* should be understood.

When the guilty family deliberately fails to pay restitution, *ngozi* will strike viciously and harshly, targeting not the perpetrator alone but the whole family (Mawere 2010: 217). What makes *ngozi* effective is that when it attacks, it attacks suddenly, mercilessly and ceaselessly (Bourdillon: 1976, Masaka and Chingombe 2009: 192), a strength which is also its major weakness as human rights abuses are committed in the process. However, a different perspective is that *ngozi* cannot commit human rights abuses since these are offences of which only mortals can be accused. In a way, the spiritual world cannot be accused of human rights abuses. The only way to stop *ngozi* attacks is by the admission of guilt, expressed through the payment of restitution and culminating in reconciliation. Collective ownership of an offence and victimhood makes reconciliation easier because more people will have a stake in the case.

*Ngozi* as an institution does not exist in isolation. There are a many other complementary traditional social devices such as *runyoka* (the fencing of a wife/husband using a charm), *rukwa* (fencing property using a charm) and *zviyerwa* (taboos) (Mawere 2010: 210). These are central to maintaining a peaceful, moral and virtuous society. *Ngozi* does not signify transitional justice; it rather signifies the search for transitional justice. This only happens when the two families finally reconcile, hence the saying, *mushonga wengozi kuripa* (the remedy for *ngozi* is restitution). *Ngozi* as an institution is buttressed by the use of idioms and metaphors. One of them is that *ngozi yerombe igandanzara*. This implies that the avenging spirit of a vagrant impoverishes the offender's family. The role of this and other idioms is to deploy popular language to deter the abuse of the poor by the rich. The reparation process the *kuripa ngozi* (appeasing the spirit) takes many forms, usually a combination of cattle and money. As a transitional justice mechanism, *ngozi* plays an important role in bringing to justice perpetrators who may not otherwise be willing to face their crimes. This is very effective in criminal cases where there are no witnesses. The murdered becomes the witness. This gives *ngozi* an advantage over other forms of transitional justice in that it is holistic, covering truth telling and repentance, reparation and reconciliation.

## **8.6 Awareness of *ngozi***

The awareness of traditional transitional justice mechanisms has been increased by the growing media attention they have received. *Ngozi* cases that have been widely published in the media are believed to be the influence behind the adoption of such themes on popular television programmes such as the soap opera *Akanga nyimo*. This programme ran on ZTV from September 2012 until late 2012. Other various media such as the print media also extensively covered various cases of *ngozi*, which assisted in increasing the awareness of *ngozi*. The next section is a case study of *ngozi* case which occurred in Gokwe District in the Midlands Province.

### **8.6.1 Case study 1: Moses Chokuda**

#### **8.6.1.1 The circumstances surrounding Moses' death**

What qualifies Moses Chokuda's case as a transitional justice *ngozi* is that he was murdered in a conflict that was not generated by everyday relationships but was in fact politically motivated. Moses' case took just under three years from original arrest to trial. A degree of collusion was involved as Moses Chokuda was murdered by four people. One of them, Farai Machaya, is the son of the Midlands Provincial Governor and the others are Abel Maphosa and brothers Edmore and Bothwell Gana. Edmore Gama was a member of the Zimbabwe National Army (ZNA) and ZANU PF Midlands Province Youth Secretary and the son of ZANU PF Gokwe District Coordinating Chairperson Ignatius Gana. His brother Bothwell Gana was also a ZNA soldier. Moses was the MDC Gokwe District Organising Secretary. This case study was narrated by Moses Chokuda's father, Tawengwa Chokuda, at his homestead in Chipere Village between 17 and 24 September 2012. Moses was a member of the main Movement for Democratic Change and his murderers are related to senior ZANU PF officials.

According to Tawengwa, circumstances leading to Moses' death were that on 21 March 2009 Moses was on his way to attend an MDC council meeting. He was abducted at the Gokwe Business Centre and put into a white vehicle and driven away. Moses' body was found, abandoned in the bush two days later on 23 March.

He had sustained serious injuries and a medical report gave the cause of death as severe cervical spinal injury.

#### **8.6.1.2 Invoking *ngozi* as the last resort**

It is interesting to note that the family did not use *ngozi* as their first option because initially they tried in vain to register their case with the courts. It actually took almost three years to secure just the initial court hearing, with the passage of two years before the case was officially registered at Gokwe Magistrate's courts. Before that, on 26 April 2011, Tawengwa had written to the Attorney-General pleading for the state to bring the case before the courts so that the family could have closure. It was after failing to register the case that Tawengwa decided to go the traditional route. He was reluctant to reveal what he did in order to invoke the *ngozi* but that he took some action is clear from the series of calamities that befell the accused in quick succession. The conduct of the police in the matter was questionable. In a move tantamount to endorsing impunity, the police were reported to have initially refused to help the victim's family, urging them instead to approach the courts. Then they began to put pressure on the family to bury Moses. In the interim, they arrested the victim's brother and charged him with extortion.

#### **8.6.1.3 Strange happenings: *Ngozi* in action**

When Moses' body was taken to the Gokwe District mortuary, it was reported that strange things began to happen. These events were widely reported in the media and subsequently confirmed by Tawengwa. Moses' body 'refused' to be buried and the magistrate who granted bail suddenly became mentally disturbed. In a subsequent discussion with the researcher, the now former magistrate, who has since retired due to his deteriorating mental condition, confirmed his mysterious experiences. However, he refused to discuss the specific details of the matter citing employee-employer confidentiality. The NewsDay of Saturday 5 February 2011 reported that:

...countless efforts to have the deceased buried had failed due to various inexplicable occurrences ... a magistrate who had granted the accused persons bail when they first appeared in court was affected by a mysterious mental affliction and

is roaming the streets of Gokwe. The coffin did not move when about 10 police officers tried to lift it out of the mortuary to bury him against the will and without Chokuda's family's consent...

The position of Moses' family was unambiguous. His father Tawengwa refused to bury Moses until his murderers had apologised and explained the motive for the murder and compensated his family with cattle and money. Tawengwa said he finally accepted the accused's restitution of 35 cattle and US\$ 15 000 cash (Personal communication: 23 September 2012). At one time, in September 2011, the compensation demand escalated to 100 cattle when the accused were showing reluctance to pay. This was reduced to a more moderate demand of 35 cattle by the local Chief who mediated between the two families.

This incident reflects one of the features of *ngozi*, which is the escalation of compensation by the victim's family in order to induce compliance. When Moses was murdered in March 2009, his family initially demanded seven cattle; by February 2011, they were demanding 15 cattle, a number which was raised to 100 cattle by September 2011 (Tawengwa Chokuda, Personal communication: 23 September 2012). This poses a serious credibility dilemma for *ngozi*, as the process tends to degenerate into extortionist justice. Sometimes the unreasonable level of the escalation justifies views that *ngozi* must be banned as a form of justice. However, the feasibility of legally banning a metaphysical phenomenon militates strongly against this idea. The solution lies in the codification of crimes and the resultant penalties across chiefdoms. This is easily achievable if the state works with the Council of Chiefs in standardising such penalties (Chief Njerere, Personal communication: 22 September 2012).

In various discussions conducted by the researcher with Gokwe residents on 29 July, they corroborated the stories in Zimbabwe's mainstream media, notably *Newsday*, *The Standard* and *The Herald* newspapers, with respondents revealing that countless efforts to bury the deceased had failed due to various inexplicable occurrences. Commenting on the issue that the family was being forced by the police to bury Moses, Deputy Minister of Justice Obert Gutu, who belongs to the same political party as the victim, was quoted as saying:

...there was no law which could be applied to force Moses' family to bury him and negotiating with the family was the only solution (*NewsDay*: 13 March 2011).

The Justice Deputy Minister Obert Gutu also conceded that a pauper's burial was not possible because:

I know of no law that compels the relatives of the deceased to bury their loved one because of both the legal and cultural implications. In our culture, we know that relatives should bury their own so that their spirits can rest... Paupers' burials can only take place when the relatives or identity of the deceased are unknown over a reasonable time or in a case where the relatives have failed to bury their own due to poverty.

In contrast, the Attorney General, who allegedly belongs to the same political party as the murderers, was of a different opinion. He threatened to charge the victim's father for contravening Section 8 of the *Burial Cremation Act [Chapter 5:03]* stating that:

It is a criminal offence against the body of the deceased and the law ... but if he continues in that extortionist behaviour, we will charge him. (*NewsDay*: 13 March 2011)

Tawengwa Chokuda described four more unusual occurrences in the Governor's family. Firstly, their daughter deserted their family home and took shelter in the graveyard. When asked what she was doing there, she reportedly replied that she was with the late Moses. Secondly, the police tried to bury Moses' body without Tawengwa's consent. In a case confirmed by the then Town Clerk of Gokwe, Tapiwa Marongwe, up 10 police officers failed to lift Moses' coffin from the ground. It was reported that the coffin became so excessively heavy that the 10 police officers gave up after numerous attempts to lift it had failed. Thirdly, the late Moses was reportedly seen in the flesh by several people. The most credible sighting was by three government officials from the Attorney General's Office who had come to Chipere Village to convince Tawengwa to drop the murder charges against the Governor's son and his co-accused and to bury Moses. Tawengwa told them to wait and speak with Moses in person. It was reported that the three officials saw the deceased and fled on foot, abandoning their vehicle in the process. The last sighting relates to the

then Magistrate of Gokwe District. He became ill the moment he granted bail to the accused. He subsequently lost his job on grounds of mental ill health and was seen roaming Gokwe and behaving like a mentally disturbed person. Upon conclusion of the case through the payment of compensation, the former magistrate suddenly became well again. In a personal discussion with him at his house in Gokwe on 22 September 2012 he could only comment on the challenges caused by concurrent jurisdictions as an area which warranted immediate judiciary attention.

#### **8.6.1.4 The negotiations**

The settlement of Moses' murder case was a very lengthy process. The initial position of the two parties was that the Governor flatly denied that his son had been involved, let alone committed the murder. On the other hand, Tawengwa was confident that Farai was the murderer. Tawengwa took his case to the local traditional Chief, Chief Njerere, pleading with him to inform the Governor of the crime committed by his son. Chief Njerere said that he received a very unusual reception from the usually friendly Governor. In the Chief's own words, the Governor said:

*Chief kana mainga nyaya yekwa Chokuda dzokerai henyu. Magweta angu arikuona zvekuita.* (Chief, if you are here because of Moses' death, kindly go back home. My lawyers are busy with the case.)

It was after the Governor refused to accept responsibility for his son's actions in orchestrating the murder of Moses that the strange events began. As a mediator, the Chief had a dual responsibility as the case fell under his traditional jurisdiction. This became an advantage in the reparation negotiation phase, as he was able to reduce the number of cattle that Tawengwa had originally demanded to 35, a figure upon which both parties finally agreed.

#### **8.6.1.5 Case resolved: Restitution and reconciliation**

This case was finally resolved when the accused were found guilty of murder with actual intent and each sentenced to 18 years in jail by the High Court. In what signified the defeat of impunity the Governor's family admitted wrongdoing and was quoted in *The Herald* of Wednesday, 28 September 2011 as saying:

I sincerely extend my apology to the bereaved family. Now that the courts have done their part, we will meet as the Machaya family and engage the Chokuda family with a view to compensating them in line with our own culture that seeks to harmonise relations among families whenever such tragic events happen.

On the other hand, Tawengwa said that the outcome of the court notwithstanding, he refused to bury his son before receiving admission of guilt and compensation. His refusal to bury his son was also widely reported in the media with the *Newsday* of 26 September 2011 quoting him as saying:

We will wait for them [offenders' families] to come and sit down with the [Chokuda] family so that we can bury our son. The only way to appease *ngozi* is by paying and before that is done nothing is going to happen. I will not bury my son.

The admission of guilt and paying of compensation took place through the mediation offered by the victim's local chief, Chief Njerere. It is imperative to note that it was the Chief's intervention that reduced the compensation to 35 cattle, in line with the customary laws of the area as administered by the Chief. The Governor's family also paid US\$15 000. The final phases of the case consisted of mediated meetings between the two families culminating in the offering of formal acceptance of guilt and apologies. The whole process was closed by the reconciliation process, which was expressed through the sharing of a meal by the two families.

In another twist to the case which attracted various interpretations, one of Moses' murderers was himself later murdered by the three men he was sharing a cell with at HwaHwa prison in the Midlands Provincial capital of Gweru. Prison officials reported the case as murder. However, given the fact that when the murder took place (April 2012) the deceased murderer's family had not yet paid compensation to Chokuda's family, there is some credence in believing that the three cellmates were possessed by Chokuda's *ngozi* spirit when they murdered their cellmate.

### **8.6.2 Case Number 2: Joseph Chinotimba**

The second case study involves the Chairperson of the Zimbabwe National War Veterans Association, Joseph Chinotimba. Chinotimba was accused of orchestrating

many cases of politically motivated violence in Manicaland Province in general and Buhera District in particular. Chinotimba is also widely credited with the initiation and subsequent orchestration of farm invasions, which preceded the state's land reform programme.

#### **8.6.2.1 The circumstances around Mupango Chokuse's death**

Mupango Chokuse was the Ward 27 Chairperson for the MDC T in Buhera District, Manicaland Province. There were serious political disturbances in Ward 27 on 12 May 2008, which lasted all day. At the end of the day, the 30 perpetrators were eventually overpowered by the villagers. They returned again on 16 May 2008 but were once again overpowered. When they returned for the third time on 17 May they were in the company of soldiers and they numbered around 600 men. Sensing danger, Chokuse fled and took refuge in a toilet but was later found and brought out. Two of the people who abducted Chokuse, named as Dick and Chitima, were members of the police and they were armed with guns that they used to intimidate the villagers.

They took Chokuse to a local political party base to show him to their leader, Zimbabwe National War Veterans Association leader Joseph Chinotimba. It is alleged that Chinotimba was the 'commander' of the 'operation'. Chokuse was severely assaulted with an assortment of weapons. When Chinotimba realised that Chokuse was almost dead, he ordered the youths to put him in his car so that he could take him to the local clinic for treatment. Chokuse died in Chinotimba's car.

#### **8.6.2.2 Strange happenings: *Ngozi* in action**

Chokuse's body remained in Birchenough Bridge mortuary for three months as the police were not sure of what course of action to take. They finally disposed of Chokuse's body by throwing it into the nearby crocodile infested Save River. However, this plan backfired as the police reportedly found Chokuse seated on his coffin and raising his hand in the MDC T slogan. Those who tried to move his body reported strange events such as hearing Chokuse's voice demanding to know why

he had been killed. These mysteries were reported in the mainstream media and also received a great deal of online coverage.<sup>25</sup>

The same *ngozi* was reportedly affecting Chinotimba's accomplice, army colonel Morgan Mzilikazi. This was confirmed by Buhera South Member of Parliament, Honourable Naison Nemadziva, who acknowledged receiving reports on *ngozi* terrorising offenders who had committed murder during the 2008 Presidential election rerun. Honourable Nemadziva was also quoted in the press as saying:

The stories might sound unreal but it is true. Most of these perpetrators have fled from their homes. I can confirm three reports on avenging spirits in Buhera South, that of Chokuse, Chibamba and Chokuda who have been haunting those responsible for their deaths, asking them why they killed them (Nehanda Radio: 3 June 2010).

Buhera South Ward 24 Councillor, Bodias Nendanga, also confirmed the incident and acknowledged both the murder and the havoc wreaked by the *ngozi*. He stated that:

Although the perpetrators were yet to confess to traditional leaders, it was common knowledge that the murderers are no longer enjoying the comfort of their homes. Their victims knock on their homes during the night and some actually see them (Nehanda Radio: 3 June 2010).

Chokuse's case was, as per Misener's five Rs discussed in chapter 5, still at the reality stage at the time that fieldwork was conducted. Judging from the ferocity and tenacity with which the *ngozi* was avenging his death, subsequent stages of responsibility, repentance, reparation and reconciliation were imminent. Having discussed these two case studies of *ngozi*, the next section discusses the advantages and disadvantages of *ngozi* when deployed as a transitional justice mechanism.

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<sup>25</sup> Media reports on the Chokuse case mysteries include: 'Ngozi haunts ZANU killer', Nehanda Radio, 3 June 2010, available online at: <http://nehandaradio.com/2010/06/03/ngozi-haunts-zanu-pf-killers/>, 'Ngozi haunts killer, New Zimbabwe Forums, 10 December 2012, available online at: <http://forum.newzimbabwe.com/index.php?topic/64065-scary-stuff2008-run-off-violence-perpetrators-have-since-died-or-are-now-mentally-ill-in-most-of-mash-centralor-have-since/>, Chinotimba implicated in MDC's activist's murder in Buhera, 20 May 2008, available online at: <http://www.swradioafrica.com/news200508/killerchinoz200508.htm>

## 8.7 Advantages of *ngozi*

The next section will discuss the advantages of *ngozi* as a transitional justice mechanism. It will consider the costs involved in administering the mechanism as its key advantage and also consider its ability to enable victims to be compensated while simultaneously reconciling the two families.

### 8.7.1 Costs

Generally, realist traditional transitional justice is financially less expensive than idealist transitional justice methods such as trials. This makes them more applicable as their accessibility does not usually require huge resources. According to Chief Ngonidzashe Marongwe in Shurugwi, one needs only 10 American dollars (US \$10) to have one's case fully resolved by the Headman and 15 dollars (US\$15) when one's case is referred to the Chief<sup>26</sup>. These facts carry some weight because being a Chief himself, Marongwe was writing from an informed point of view. In cases where the offender was quick to admit guilt and sought to pay restitution and reconcile, reparation was set at six cattle in most traditional jurisdictions. In Chief Marongwe's opinion that rendered *kuripa ngozi* (paying restitution for an avenging spirit) one of the most affordable restitution mechanisms as the cattle were not payable immediately. Once accomplished, this paved the way for other distinct advantages that transcended mere justice, such as the opening up of opportunities for genuinely healing the communities affected by violence. Chief Marongwe clarified what he meant by healing through quoting David Maxwell (1995: 329) who defined it as:

[The] totality of activities and ideas which help both individuals and wider community to come to terms with the experience of violence and bereavement caused by war, in a manner which allows them to continue their daily existence.

Thus *ngozi* is an economically affordable method of restoring both the physical and the emotional well-being of both the perpetrators and the victims. This is even more

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<sup>26</sup> Unpublished PhD thesis. University of Western Cape. Chapter 4, page 23.

the case given the fact that paying restitution is the only method of appeasement, one which in turn restores the balance between the 'living living' and the 'living dead'. Tony Reeler of the Research and Advocacy Unit noted that *ngozi* enjoys the distinct advantage that the perpetrator is not incarcerated and therefore can work to raise resources for both reparation and for his/her own family's upkeep (Personal communication: 19 September 2012). Incarcerating offenders creates an additional burden on the family and the community, as they must look after the family of the jailed. This includes obligations such as paying school fees and feeding the family. For Reeler, this accounts for the fact that a man will never support the incarceration of his brother because in a way he will also be sentencing himself.

### **8.7.2 Local participation and ownership**

The settlement of *ngozi* is premised on inclusivity and dialogue. As illustrated in the case studies above, dialogue between the two parties, the offender and the victim, is essential for the realisation of reconciliation. According to Misener's five 'R's, this constitutes part of reality and part of responsibility. Local communities own the process, they face the consequences of a member's actions and they take responsibility for ensuring reconciliation. This may be achieved through various mechanisms, such as lending the offender some cattle in lieu of labour so that he can settle his restitution debt. The inclusion of family members, the community and traditional leadership ensures authenticity and acceptance of *ngozi*. In a way, this feeds into the preservation of local cultures and indigenous knowledge systems that can be relied on in future when solving similar problems should they recur. Unlike external bodies such as courts and Truth Commissions, community members who constitute the forum through which reconciliation is achieved will have a genuine interest in local peace building. Local ownership and participation therefore ensures that the interests of peace and reconciliation occupy the principal position in the community's priorities.

### **8.7.3 Compensation**

One key pillar of transitional justice is reparation. The payment of compensation to the families of the victims ensures that traditional transitional justice mechanisms

fulfil their expectation of being bottom-up and victim-centred. Reparations serve four functions. Firstly, they act as an acknowledgement of wrongdoing. Secondly, reparations are a gesture indicating the readiness to reconcile. Thirdly, reparations bring parity between the offender and the victims by symbolically replacing the lost value, and finally, when accepted by the victim's family reparations become the first step in the peace building and reconciliation process. Compensation has been very effective in bringing closure, as indicated in Chokuda's case study. However, reparations are a means towards the end of reconciliation and should therefore not be construed as an end in themselves.

#### **8.7.4 *Ngozi* as deterrent**

The major strength of *ngozi* lies in its demonstrated ability to act as a deterrent to impunity. With *ngozi*, perpetrators have little option other than to come out, tell the truth and pay reparation so that the processes of reconciliation can culminate in peace. The deterrent nature of *ngozi* is also embedded in other Shona customs and in language where *ngozi* is accorded the status of the most serious crime.

#### **8.7.5 Reconciliation**

The ultimate goal of *ngozi* is reconciliation (Mucherera 2001: 137). *Ngozi* brings the prospects of reconciliation within the reach of communities. It is local in both its formulation and execution. This gives it an advantage over trials in that at the end of the process both the perpetrators and the victims emerge triumphant, victorious over violence. In trials, the convicted offender is sent to jail, mostly for long periods. Incarcerations therefore deprive the two parties of any chance of reconciliation. The offenders suffer most in that in many cases they serve their jail terms while carrying a heavy burden of guilt.

#### **8.7.6 Closure and healing**

*Ngozi* has a distinct advantage of the courts in that it makes healing and closure possible, even in cases where it is impossible to return the bodies of the victims to their families. According to Reeler (Personal communication: 19 September 2012),

the use of symbolic burials has assisted families known to him to get closure and healing. Symbolic healing is a practice that involves the dressing of a carcass, usually of a goat, in the clothes of the deceased. Funeral rights and ceremonies are then performed over the animal's body as if it was the person. This culminates in the burial of the animal in a proper grave in the family cemetery. The grave is treated not as that of a goat but rather as the grave of the deceased family member, complete with tombstone and inscription bearing the dates of birth and death. Subsequent rites and ceremonies such as *guva* are performed, based on this grave. This brings closure in that there is a physical grave that can be seen, where family members can go to grieve or, in other circumstances, ask for blessings.

## **8.8 Disadvantages of *ngozi***

This section discusses the disadvantages of *ngozi* as a transitional justice mechanism. Chief among them is its gender insensitivity and ineffectiveness in intra family feuds.

### **8.8.1 Gender insensitivity**

There are reported *ngozi* cases where the victims, families have demanded virgin girls or young boys as reparation. The idea behind this is to allow the bloodline of the victim to be resuscitated by the replacement. Where the victim is a male, a female is demanded as reparation. This is intended to allow a male relative to marry the girl and bear children for his deceased relative. The children born from this union do not belong to them but to the deceased and this ensures that the deceased's bloodline is not terminated. Where the victim is female, a girl is also demanded so that she can go to the family of the victim to be married to a male relative of the victim. Children born out of this relationship belong to the deceased female relative of the male who procreated with the 'replacement' on behalf of the victim.

This system has since been declared illegal as it contravenes certain laws such as the Constitution, Child Protection and Adoption Act [Chapter 5:06], and the Customary Law and Local Courts Act [Chapter 7:05]. Increasingly, families have been using cattle and money as the currency of reparation. The idea behind this is

that the family of the victim can use these to pay *lobola* (bride price) for the designated family member, thereby resuscitating the bloodline of the victim within the bounds of the law.

### **8.8.2 Community versus individual human rights**

The issue of clashes between individual and community rights has been comprehensively addressed by Comaroff and Comaroff (2003: 445-473). Cases of human rights abuses have been recorded in the process of settling *ngozi* cases. These include the practice noted above of using children (both boys and girls) as reparation. In such cases, the human rights of individual citizens are violated in the name of inter-family reconciliation.

### **8.8.3 Ineffectiveness in intra-family feuds**

*Ngozi* manifests by way of inflicting a series of misfortunes on the family of the offender. This creates complications in cases where the victims and the offender share the same bloodline, and poses serious challenges for reconciliation and peace building in countries like Zimbabwe where politically motivated violence knows no kinship. Complementary institutions such as *botso* (self-shaming) are used in most cases to address intra-family human rights abuses.

### **8.8.4 Cultural specificity**

*Ngozi's* major advantage is also its main disadvantage. *Ngozi* is culturally specific and therefore not flexible. Those who do not belong to the same culture have a propensity to ignore *ngozi*, the negative consequences of such actions notwithstanding. Cases of human rights involving blacks and whites, for example, are out of reach of *ngozi*.

### **8.8.5 Concurrent jurisdictions**

The issue of parallel legal jurisdiction poses a major threat to the institution of *ngozi*. Specifically, there are no legal provisions in Zimbabwe to deal with *ngozi*. Thus,

when brought before the magistrate's court, cases of exorbitant reparation, bordering on extortion, are dealt with out of context. As seen in the Chokuda case, families of the offenders usually prefer to deal with modern courts of law while families of victims prefer to deal with the traditional courts. This creates difficulties as the case will be dealt with by two court systems. More often than not, the court outcomes differ, creating more confusion and hatred instead of peace and reconciliation.

#### **8.8.6 Reliance on spiritual connections**

The institution of *ngozi* relies heavily on the spiritual world, particularly on the spirit of the deceased, to wreak havoc in the family of the offender. A challenge arises from the fact that, being mortals, our knowledge of the afterlife is limited. A dark hole exists with regard to what should be done to the living so that when they die unnaturally, their spirits rise and avenge.

#### **8.8.7 Delayed justice**

It is well known among the Shona that *ngozi* cases have a delayed effect. There are cases that come to light decades after they were committed. Present generations of both the offending and the victim families may not be aware of these cases. Such delays amount to a denial of justice.

Delays could also arise from situations in which there is no agreement within the offending family as to how reparations should be paid. This is often the case when the primary offender, i.e., the one who committed the actual crime, is no longer alive. Other cases of delayed justice occur when the offender agrees to pay reparations but is genuinely unable to raise the amount or nature of the resources required. Such cases are usually passed down from one generation to another.

### **8.9 Conclusion**

This chapter addressed the institution of *ngozi* as a traditional transitional justice mechanism. It started by contextualising the broader aspect of African religion and human rights. This was followed by the positioning of the institution of *ngozi* as a

traditional transitional justice mechanism. Two *ngozi* case studies from two different provinces of Zimbabwe were also discussed. These case studies revealed the efficacies of *ngozi* as a peace building and reconciliation mechanism. This culminated in a broader discussion of the advantages and disadvantages of using *ngozi* as a transitional justice mechanism.

Major advantages noted were that *ngozi* is efficacious as a deterrent to committing human rights abuses within the confines of the same cultural context. It also presents a more financially viable method of making reparation for such human rights abuses. Some of its other advantages include its ability to reconcile the offending and the victim families. On the other hand, *ngozi* at times amounts to extortionist justice. Furthermore, more human rights abuses have reportedly been committed in the process of making reparations. *Ngozi* also represents delayed justice as it can take long periods to have effect. Most importantly, as a transitional justice mechanism, *ngozi* suffers from cultural specificity thereby rendering it ineffective in human rights cases involving people from different cultures.

## **CHAPTER 9: CONCLUSION**

### **9.1 Introduction**

Transitional justice has evolved over the last 50 years, both as a practice to end impunity and as a field of study within the discipline of Political Science. Its conceptualisation has also evolved and yet this remains a highly contested phenomenon among both practitioners and scholars of transitional justice. Academically, it has now acquired a status that warrants that it be studied as a subject in its own right and not simply as an aspect of studies in human rights, democratisation or international relations. Universities should consider the idea of offering degree courses in transitional justice as opposed to the current scenario where the subject is offered as modules only.

The study demonstrated the need for post-conflict states to consider certain issues before settling for a particular transitional justice mechanism. These issues include existing traditional transitional justice mechanisms, especially those mechanisms that communities have used in the past to foster peace building and to ensure reconciliation. This thesis exhorts post conflict communities, particularly academics and policy makers, to desist from the practice of using imported transitional justice mechanisms such as prosecutions at the ICC and the TRC as if they are able to fit into any post-conflict community and deliver national healing and reconciliation.

This chapter concludes the thesis by summarising the research findings, noting the contributions made to both the theory and practice of transitional justice. The chapter also considers the limitations of this study. Areas for further research are also included in this concluding chapter.

### **9.2 Summary of findings**

The main finding of the study is that the contemporary debate on transitional justice in Zimbabwe can be cast theoretically as that between the particular and the universal; the universal being the various idealist imported transitional justice mechanisms and the particular, the many realist traditional justice mechanisms.

While each of these two forms of transitional justice has its own merits and demerits, there is value in anchoring such an analysis in the expectations of the victims. Herein resides the strength of realist traditional transitional justice mechanisms. Their central focus on the victim and victimhood renders them most effective, especially when applied in indigenous communities that experience imported idealistic transitional justice mechanisms as legalistic and overly focussed on offenders, especially their punishment.

Another factor that was found to have a significant impact on the efficacy of transitional justice mechanisms is the mechanism's locus of control. Imported idealist transitional justice mechanisms possess an external locus of control, external to the geographical conflict zone and foreign in their origin and purpose. The ICC is not directly answerable to the victims, but to member states that are signatory to the Rome Statute. In contrast, local realist transitional justice mechanisms are bottom-up, locally conceived and based on local realities, customs and traditions.

### **9.2.1 The ICC and impunity in Africa and Zimbabwe**

Trials at the ICC were proved ineffective as a peace building and reconciliation tool in Africa in general and in Ituri District in Eastern DRC and Northern Uganda's Acholiland. As a transitional justice mechanism, prosecutions were seen as punitive. This was illustrated in the cases in Ituri District in Eastern DRC and Northern Uganda where ICC prosecutions actually resulted in the escalation of conflicts. The study found that the ICC, as of January 2013, faced major challenges in its endeavours to end impunity. These included the fact that major global powers such as the United States, China, Russia and India lay outside the Court's jurisdictions. This left the Court with only a few smaller nations to adjudicate over. Statistical evidence also showed that 70 per cent of the world's population was out of the ICC's jurisdiction, rendering its quest to be a universal justice system difficult to attain basing on the principle of representativeness.

Allegations that the Court targeted Africa proved difficult to refute, given that the ICC has it on record that all its cases have included Africans in a world where human rights abuses abound and cut across all continents. Until the ICC indicts a non-

African alleged human rights abuser, preferably a politically high profile, white westerner in the fight against impunity, it will remain an obstacle to peace building in Africa. The acrimonious relationship between the ICC and the African Union only fuels an already uncertain relationship and the longer it prolongs, the more victims of human rights abuse will continue to suffer.

One of the key issues that militate against the performance of the ICC in Africa is its inability to negotiate the volatile issue of peace versus justice. The Court's heavy bias in favour of justice, especially in Uganda and Darfur, saw it fail to respect the mandates of other key stakeholders such as organisations conducting precarious peace talks. These organisations included the Court's key continental stakeholders such as the African Union. Such a blatant obsession with legalism has cost the Court both its reputation and its role in Africa, a situation which will prove very difficult if not impossible to reverse.

### **9.2.2 The state's transitional justice record between 1980 and 2011**

Transitional justice in Zimbabwe between 1980 and 2011 existed through the application of the policy of reconciliation, amnesia and various Commissions of Inquiry, and culminated in the formation of the Organ on National Healing, Integration and Reconciliation and its incarnation, the National Peace and Reconciliation Commission. These efforts were punctuated by the granting of clemencies, amnesties and executive pardons, which only helped to fuel impunity and render unlikely any prospects of national healing. It was also found that the state-led transitional justice efforts were characterised by elite pacts that manifested variously as the Unity Accord of 1987 between ZANU-PF and ZAPU, culminating in the formation of ZANU PF, and the Government of National Unity of 2009 between the two MDC formations and ZANU PF. The state robbed the victims of agency and forgave themselves for the evils they perpetrated on these victims. Any transitional justice mechanism, if it is to be effective, must put the victims at the centre, thereby building mechanisms that are bottom-up. These elite pacts only serve to postpone real transitional justice, as they become vehicles for hiding the truth. The state must lead the process of reconciliation by first admitting its past human rights abuses,

including but not limited to Operation *Gukurahundi*, Operation *Murambatsvina*, land reform related abuses and the various election related human rights abuses.

The thesis also noted the various shortcomings inherent in the state's efforts in transitional justice for the period 1980-2011. To illustrate this a recent case of human remains discovered at a disused mineshaft at William Monkey Mine in Mount Darwin was discussed. This case proved that the state deliberately misled or mishandled the case in a bid to conceal the truth. This deliberate mishandling was perpetrated through the authorisation of an unconstitutionally accountable private voluntary organisation to carry out the exhumations, identification and reburial of the human remains found in the mineshaft. Major controversies which arose as a result of the state's handling of the case were discussed and it was noted that such mishandling of crime scenes by the state set a precedent for the treatment of other mass graves that might be discovered in Zimbabwe and neighbouring countries.

Most importantly, the mass grave revealed evidence of a double act by the colonial and the post-independence regimes in committing mass atrocities. This case proved that human rights abuses in Zimbabwe did not end with the achievement of independence. Also lacking in the same period were state led transitional justice mechanisms to address these atrocities. In the absence of state led, victim-centred transitional justice mechanisms, victims of such abuses tended to use traditional transitional justice mechanisms to attain healing and closure. The fact ZANU PF captured the state, including its institutions such as the judiciary, police and army, only fuelled the use of realist traditional transitional justice mechanisms.

However, there was hope for statist transitional justice mechanisms with the writing of the new constitution, which made provision for the establishment of the National Peace and Reconciliation Commission. Unfortunately, judging by the effectiveness or lack thereof of similar institutions, the National Peace and Reconciliation Commission could soon join the list of other well-meaning institutions of human rights protection that have achieved very little, if anything. A case in point is the Human Rights Commission, which has remained inactive since its inception. All this can be traced back to political bickering at the highest level and to a lack of genuine democratic transition in Zimbabwe.

### **9.2.3 South African model of a TRC and Zimbabwe's NPRC**

Based on the observations made by the researcher, the South Africa model of a TRC should not be regarded as a 'one-size-fits-all' model. Admittedly, the Commission brought a number of positive features to the field of transitional justice, such as the issue of individualised amnesty granted in exchange for the whole truth. However, the perceived successes of the TRC in South Africa are not a guarantee that it would succeed elsewhere. Politics, violence and reconciliation are embedded phenomena that are intertwined in a very intricate manner. They influence each other, give each other meaning and authenticate one another. Similarity in politics, having a common coloniser or experiencing the same mode of violence must not be taken to imply that transitional justice mechanisms, which succeeded in South Africa, or elsewhere for that matter, should be adopted wholesale in Zimbabwe.

Zimbabwe's quest to establish the NPRC risks being stillborn if the structural and institutional impediments, which are stalling full democratisation, persist. Without judicial reform, reforms of repressive legislative laws, restoration of the rule of law and security-sector reforms through the upholding of human rights aimed at achieving democratic peace, statist transitional justice programmes in Zimbabwe, including the NPRC, will remain a farce. The absence of the all-important political will to achieve reconciliation as, for example, was demonstrated by Nelson Mandela when he assumed responsibility for all crimes committed by the ANC which he led, does not aid the state in its efforts to heal the nation.

The universalistic nature of a Truth Commission as a transitional justice mechanism denies it the flexibility required to address structurally deep, institutionally wide and periodically long and reproduced gross violations of human rights such as those experienced in Zimbabwe between 1980 and 2011. On its own, the NPRC is likely to be an inadequate framework for dealing with complex patterns of human rights abuses in Zimbabwe. The NPRC should thus be an integral component of a holistic approach to peace building and reconciliation. The 'depth', 'length' and 'width' of Zimbabwe's human rights abuses require that its supplementary and complementary transitional justice programmes be multi-tooled, multi-layered and, most importantly, place-specific. This calls for the need to complement any official transitional justice

programmes with further interventions, programmes and rituals that address specific cultural and religious challenges, including land reform and economic development. These include already existing practices and rituals such as *ngozi*. Such customary institutions have been practised for centuries, especially in rural areas where they have become a part of everyday life. Regarding the perceived efficacy of the South African model of a TRC, there is pressing need in Zimbabwe for empirical research to ascertain the actual contribution to reconciliation made by the TRC in South Africa. This is so because current perceptions of the TRC are based on intuition, limited research, assumptions or a combination of the above.

#### **9.2.4 The application and shortcomings of traditional transitional justice mechanisms**

Zimbabwe's political transition has been erratic, difficult and potentially painful. This has rendered futile any transitional justice mechanisms other than a home-grown one. The dynamics and embeddedness of Zimbabwe's politics and resultant transitional justice process require a particular and not a universal solution. This thesis has demonstrated that the correct solution to transitional justice must be home-grown, bottom-up and victim-centred. This solution is a broad-based realist mechanism of transitional justice that takes into account domestic activities in which communities engage in order to achieve historical accountability and reconciliation. These broad-based realist transitional justice mechanisms are sensitive to the differing perceptions of transitional justice in various regions of the country.

The study has demonstrated the extent of the application of realist transitional justice mechanisms in Zimbabwe, especially in rural areas. The increase in the use of these mechanisms was attributed to a number of factors but mainly to the failure of state-led transitional justice mechanisms, as noted above. The state's use of clemencies, amnesties and pardons has alienated victims of human rights abuses and rendered national healing and reconciliation very difficult processes in Zimbabwe. The advent of the Government of National Unity opened a window of hope for victims, offenders, Civil Society Organisations and other stakeholders, promising as it did the opportunity to implement local transitional justice mechanisms. Most of these mechanisms have not been documented for countless reasons and this thesis has

explored a mere handful. Many of these local mechanisms, such as Tree of Life, deserve academic scrutiny because, based on their popularity, they appear to be a very effective peace building mechanisms. This thesis dwelt on the traditional institution of *ngozi* and its complementary institutions such as *botso*, *chenura* and *nyaradzo* that are used as transitional justice mechanisms in Zimbabwe. The effectiveness one of the mechanisms, *ngozi* is summarised below.

### **9.2.5 Wither impunity: Enter *ngozi***

The traditional institution of *ngozi* in which the spirit of a deceased person returns to haunt his/her murderers and their families, forcing them into an admission of guilt and payment of compensation is efficacious in curtailing impunity and ensuring reconciliation. The perpetrator is then obliged to pay reparations to the victims' family. The study used case studies of instances where perpetrators of human rights abuse were forced by the afflictions of *ngozi* to face the reality of their offences, take responsibility and start the reparation negotiations. Most cases resulted in reconciliation. The case of Moses Chokuda is a case in point. It involved the murder of an opposition member by high ranking and well-connected members of ZANU PF. The victim's family tried in vain to settle the case with the offenders until they resorted to deploying *ngozi*. This was one of the many cases of human rights abuses that were settled in this manner and serve to emphasise the growth and acceptance of *ngozi* as a viable transitional justice mechanism in Zimbabwe. Its major advantage over imported mechanisms is that it resonates with local realities such as the cultural and religious beliefs of local communities. This is the case especially in situations where both the offender and the victim reside in the same community. *Ngozi* was found to be effective in fostering peace and reconciliation, especially in rural areas

A grey area with regard to the institution of *ngozi* is the manner in which it is invoked in order to make it effective sooner rather than later. That notwithstanding, *ngozi* has a number of shortcomings which tend to discredit it. These include the committing of further abuses in the process of peace building and reconciliation, such as the practice of using human beings as reparations. Cases where girls were demanded as reparation for human rights abuses were rife in the past. Besides being unlawful,

such cases have been cited by those against *ngozi* as proof that it is an archaic institution that tries proverbially to use 'two wrongs to make a right'.

A second factor threatening *ngozi's* viability is the doubts over its effectiveness when deployed against those who do not believe in it either as an institution or as a transitional justice mechanism. Most people who doubt the effectiveness of *ngozi* do so based on religious grounds. To those who believe in it, what positions *ngozi* favourably in Zimbabwe is that most human rights abuses were committed by known perpetrators, some of whom come from the same community as their victims. This renders the deployment of *ngozi* efficacious, as the offenders know to whom to pay compensation and in what manner, before the case escalates and is referred to the courts. With the fate that befell high-ranking political figures such as Midlands Province Governor Machaya, the use of *ngozi* to fight impunity is on the ascendance.

### **9.3 Contribution to transitional justice theory**

The study employed the realist/idealist theory of transitional justice postulated by Ruti Teitel. It noted that transitional idealism is aligned with trials while transitional realism is aligned to various non-punitive transitional justice mechanisms, mainly TRCs. Transitional idealism is punitive while transitional realism is restorative. The study contributed to this theory by extending the conceptualisation of transitional realism beyond Truth and Reconciliation Commissions to cover traditional transitional justice mechanisms, such as *ngozi* and the set of complementary institutions such as *gata* (spiritual autopsy), *botso* (self-shaming), *chenura* (cleansing ceremony), *nhimbe* (community working group), *guva* (bringing back the spirit of the deceased) and *nyaradzo* (memorials). The study's specific contribution was that it demonstrated that transitional justice is a discipline in its infancy, especially in Africa where domestic realities have been neglected. This is thus an institution the scope and boundaries of which are still fluid, malleable and ductile. The contours of the field of study of transitional justice are continuously shifting and require constant remapping, which this study has done.

The study also filled a gap in the literature as it addressed the intersection between traditional authority and traditional transitional justice mechanisms, an area which has

not been addressed to any extent in the literature up to now. As presented in chapter 1, one of the major aims of this thesis was to make a contribution to the literature in what was termed an emerging field of traditional transitional justice mechanisms. While this was achieved, one area that deserves more thorough interrogation is how best to achieve reconciliation and healing using local traditional transitional justice mechanisms which resonate with local grassroots realities without the unintended legitimisation of 'unjust' local structures of authority.

#### **9.4 Study limitations**

Studying a sensitive area such as the effects of politically motivated violence comes with certain risks to the researcher. These obvious limitations relate to the fear of physical harm in cases of encounters with hostile groups opposed to the investigation and documentation of cases relating to human rights abuses. This limited the number of case studies that could be included in this study.

Linked to this was the inaccessibility of dozens of case studies across the country as most families were still not in a position to narrate their stories to the academic world. In addition, traditional transitional justice mechanisms used in Zimbabwe are mostly private family or community affairs, rendering them inaccessible to scholarly analysis. This limited the analysis of the extent of the usage of these mechanisms. Another limitation was an ethical dilemma related to the contradiction between the official position of state officials and events on the ground. Personal discussions with them revealed contradictions between their official and personal positions, especially as revealed by what the officials practise in reality. A state official would officially denounce the ICC, for example, but express an opposing view in confidence and off the record after the discussion. In such cases, the researcher was faced with an ethical dilemma regarding which data to process, the official 'lie' or the unofficial truth.

A third limitation relates to the subject matter of *ngozi*, which is usually a private community affair and not open to outsiders; most families and communities afflicted with *ngozi* deal with it privately. This implies that such cases will never be brought into the public domain and therefore remain out of reach of academic scrutiny. Those

families who opened up did so on the condition that they were telling me as a fellow Zimbabwean but not for my academic benefit. Such cases have-not been mentioned in the study, neither were they mentioned to third parties.

A further limitation pertained to the study of the South African TRC as a transitional justice mechanism. While the TRC was one of the official transitional justice mechanisms in South Africa, other community and traditional mechanisms might have played a role in influencing the outcome of the TRC. These 'background' institutions, cultures and traditions may not have been formally regarded as part of the TRC, yet they played a part in South Africa's transitional justice outcome. Hence, an appraisal of the efficacy of the South African model of a TRC for Zimbabwe was limited by the knowledge available on these institutions and traditions.

The study of transitional justice has been dominated by Western scholars who have tended to concentrate on the legal aspects of transitional justice. This created a scarcity of literature addressing traditional transitional justice mechanisms in Zimbabwe. Most of the literature available addresses transitional justice as an emerging field of study, traceable only to the Nuremburg trials, yet as consistently demonstrated by the study, traditional transitional justice mechanisms in Zimbabwe predates colonialism.

Lastly, there were numerous cases where respondents refused to cooperate unless they were paid, reasoning that the researcher would benefit financially from the studies in the end and they thus also deserved remuneration. Such respondents were not included in the study because, if paid, their versions of the truth may have been doctored in order to present what they perceived as a more favourable response. This would imply, for example, the exaggeration of injuries, the faking of victimhood and the manufacture of cases of human rights abuses and avenging spirits.

## 9.5 Suggestions for further research

The study concentrated on the application of traditional transitional justice mechanisms, mostly among the Shona people of Zimbabwe. Further research among other groups is also required, notably the Ndebele, in order to explore the traditional justice mechanisms they employ. Alternatively, one could also explore the extent of application of the institution of *ngozi* among the various Shona sub-ethnic groups such as the Manyika, Korekore, Zezuru, Karanga and the Budya.

An area that also warrants further study relates to the various mechanisms and institutions that are used to invoke *ngozi*. Though of a metaphysical nature and thus potentially complex, such studies could reveal the facts. As of now, this knowledge remains the preserve of a few individuals.

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# 11 APPENDIXES

## 11.1 Map of Zimbabwe

