**Do Amnesties Undermine Human Rights?**

**Zimbabwe as a Case in Point**

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# Introduction

This dissertation will examine the question whether amnesties undermine human rights or not, using Zimbabwe as a case in point. The question of amnesties in Zimbabwe cannot be discussed in isolation so this thesis will give an outline of some of the key, inter-related democracy and transitional justice issues that have a direct bearing on this question.

Since its inception as a modern state in 1980, Zimbabwe has become unique in three particular ways. It was founded on and is sustained by violence; has never had full democracy and amnesties have become official part of government statecraft in open defiance of international criminal and human rights law.

The dissertation begins with a literature review on amnesties in which this author identifies several key concepts which will serve to illuminate the discussion. First, amnesties can be said to have a Jekyll and Hyde or split personality character about them because they can be useful or effective mechanisms for strife-torn communities, the same time they deny justice to victims.

The author argues that this good-side, bad-side phenomenon has made it hard for international criminal and human rights law to ‘pin’ amnesties down and come up with a clear position on their legality or otherwise. Closely connected to this, are the contradictions in international law which appear to reinforce the split-personality character by openly legitimising amnesties, for example in 1977 Protocol II to the Geneva Conventions.

Second, the debate on amnesties seems to be afflicted with the same relativist thinking which has for so long dogged human rights discourses. According to this relativist thinking, amnesties are said to be situational and relational to conflicts. This author argues that this kind of particularism, which is advanced by scholars such as Louise Mallinder in rejection of what she calls the ‘one-size-fits-all’ approach, further complicates understanding of amnesties and their place in human rights.

Third, political processes and considerations far outweigh legal and social ones when it comes to amnesties. In this regard, amnesties are described as ‘judicial expressions of political acts’, which more often than not, relegate accountability mechanisms to the margins of peace-building efforts or even preclude them altogether in some cases. Fourth, victims of human rights violations not only lose out to political acts that are amnesties but are also subjected to what this author calls the double jeopardy of fear. First, victims are terrorised into acquiescence to amnesties by the violence of conflict, during conflict and then when perpetrators threaten a return to the violence if they are prosecuted in courts of law.

In most post-conflict situations, victims are voiceless onlookers as governments and perpetrators engage in amnesty negotiations whose outcomes are then announced in media outlets. In the case of Zimbabwe and according to some scholars, amnesties have become ‘high-level reconciliation processes for elite actors’ in government.

Chapter 2 gives a background on national violence and argues that the persistence of amnesties needs to be understood in the historical evolution of violence as a governance tool in pre and post-colonial Zimbabwe. Due to limitations on time, the thesis begins with the colonial war of liberation of 1965-1979 and for the post-colonial era, covers only the Matabeleland massacres and the fast track land reform programme (FTLRP) of 2000.

In chapter 3 is a discussion of three political transitions and the motivations behind them. It is common to see them characterised as being synonymous with notions of transitional justice because they came in the aftermath of serious human rights violations. This writer argues, however, that it is a mistake to do so because these political transitions did not have transitional justice embedded in them and tellingly, all three of them were founded on amnesties.

The first such political transition happened in 1980 and was premised on letting bygones be bygones dressed up as forgiveness; for the second one in 1987, it was denial of the Matabeleland massacres, which made it taboo to publicly discuss them and the third transition in 2008 was all about sharing political power following a hotly disputed election result.

Chapter 4 is a discussion of strategies political actors, human rights activists and victim support groups have used in an attempt to delegitimise the culture of violence, amnesty and impunity that has arguably taken root in Zimbabwe. Ruti Teitel’s realist and idealist notions of political change and rule of law appear to be the dominant strategies deployed by those campaigning for an end to authoritarianism and human rights abuses in Zimbabwe.

In the chapter ‘Explaining Transitional Justice in Zimbabwe’, this writer observes that the country has never been in a transition from authoritarian rule to democracy and argues that current thinking which routinely refers to transitional justice in Zimbabwe is misplaced at best and misleading at worst. This writer posits that what has been happening in Zimbabwe is ideation and debate of transitional justice on the one hand and its idealisation on the other hand.

The final chapter discusses amnesties in Zimbabwe and how they have been used by the government to deny justice to victims of human rights violations. The author observes that although amnesties have been persistently used, they are however, not the everyday reality of political repression in present-day Zimbabwe. For this reason, it would seem amnesties are not seen as the main cause of human rights abuses in the country per se.

# Chapter 1: Amnesties: A Literature Review

Amnesty is “a pardon, forgiveness, exemption or discharge from criminal prosecution or any other form of punishment by the State.”[[1]](#footnote-1)

This review will investigate the question whether or not amnesties undermine human rights. It is premised on the view that (1) amnesties symbolise attempts by governments to erase their crimes by preventing investigation and prosecution for those crimes (Bull, 2001) and (2) this author contends that amnesties have a Jekyll and Hide phenomenon about them, thus making them difficult to ‘pin down’ under international criminal and human rights law.

On the one hand they are said to embody notions of forgetfulness, oblivion or amnesia and on the other hand they are popular as a mechanism designed to deliver truth, memory and even accountability.[[2]](#footnote-2) This Jekyll and Hide characterisation is present in much of the scholarly writing which highlights the “split personality” condition of amnesties as a force for good in ending violence on the one side and the other ‘evil’ side which is that by their nature, amnesties slam the door shut on future prosecutions.[[3]](#footnote-3)

Another dominant theme in scholarly writing is that amnesties are diverse[[4]](#footnote-4) or changeable to fit particular human rights violations.[[5]](#footnote-5) It may well be the case that amnesty cases are different in their scope and character to suit different situations but this review will argue that such a (particularistic) perspective does not serve the debate well and lends itself to classic cultural relativism which holds that “principles used for judging behaviour are valid only with a particular culture.”[[6]](#footnote-6)

Particularist arguments have endlessly dogged the human rights discourse, for example in women’s rights and religion debates, even though there is today near universal recognition and acceptance of the universality, indivisibility and interrelatedness[[7]](#footnote-7) of human rights. The same universality cannot be said about opposition to or support for amnesties, with scholars such as Mallinder even rejecting what she calls the “one-size-fits-all”[[8]](#footnote-8) approach to amnesties and human rights violations.

This review will also argue that the diversity and therefore attendant particularism of amnesties must be thoroughly addressed in order to provide more clarity and ultimately, compatibility with the universal ethos of human rights law.

It would appear that amnesties in and of themselves do not undermine human rights but if this were to be true, first the authority of international criminal law must be (seen to be) enforced and its power to deter future human rights violations strengthened. Second, international treaty law would have to provide clear guidance on the legality or otherwise of amnesties. In the absence of such guidance, treaty-based arguments against the use of amnesties do not support the view that they undermine human rights.[[9]](#footnote-9)

## Legality of Amnesties

The status of amnesty under international law is unsettled. Recorded case law has not dealt with validity/legality of amnesties but focuses on victims’ right to redress.[[10]](#footnote-10)

International treaties are where to look for any statements on the status of amnesties for international crimes. There is, however, not a single multilateral treaty that explicitly forbids or discourages any kind of amnesty. This detail about amnesties and international human rights law, according to Freeman et al[[11]](#footnote-11), should make us question any claims of widespread state opposition to amnesties for human rights crimes.

It should also raise the question as to why international law, up to now, appears unwilling or unable to codify amnesties and end the ambiguity surrounding them. However, amnesties appear to be explicitly permissible in The 1977 Protocol II to the Geneva Conventions,[[12]](#footnote-12) which many states have used to justify their domestic amnesty laws for serious crimes.[[13]](#footnote-13) The position of the United Nations further complicates the question of legality of amnesties because the General Assembly[[14]](#footnote-14), the Economic and Social Council (ECOSOC)[[15]](#footnote-15) and the Human Rights Committee have all pronounced that amnesties violate international law.

The status or legality of amnesties is source of much of the controversy surrounding their place and usefulness in contemporary transitional justice. Human rights arguments against amnesties are centred on the three propositions that (1) state duty under international law is to investigate, prosecute and punish; (2) international law says victims have a fundamental right to justice and (3) criminal justice is good for democracy and the rule of law.[[16]](#footnote-16)

A fourth proposition which has been advanced by some is that customary international law is showing an emerging norm against amnesties and the concept of impunity associated with them.[[17]](#footnote-17) While amnesties are no longer assumed to be unconditionally lawful, there has emerged over the last 20-30 years a new class of “qualified amnesties”[[18]](#footnote-18) whose legitimacy is drawn from their acceptance in and compliance with international legal norms.

It would seem to this author that rather than seeing an emerging norm against amnesties, what in fact emerged and is now crystallising is the legitimation of amnesties which even the United Nations has at times accepted, though reluctantly, even when those amnesties include international crimes.[[19]](#footnote-19)

Laplante[[20]](#footnote-20) identified a gap between human rights law and international criminal law which she argued needs to be filled if the legality or otherwise of amnesties is to be established. To her, there is conflict between the two fields which sees international criminal law as being supportive of the theory of “qualified amnesties” in transitional justice situations, while international human rights law stands for the proposition that no amnesty is lawful in those situations.

Amongst scholars, two opposing positions appear to dominate the discourse on amnesties. On one side are those such as Chigara[[21]](#footnote-21) who argue for the total outlawing of amnesties based on Rawls’s pragmatic view of the need to uphold society’s previously established legal standards and hold those who break those standards to proper judicial account.

On the other side are scholars like Vriezen[[22]](#footnote-22) who hold that “If all amnesties for international human rights crimes in all circumstances were to be considered unacceptable and never to be accorded international recognition, this might seriously invalidate a [useful] tool for ending or preventing wars, facilitating the transition to democratic civilian regimes or aiding the process of reconciliation.” These two positions highlight a further point, which is that both sides are prepared to shy away from acknowledging and conceding that there is a lot of ambiguity in international human rights law as well as very little certainty about the tangible benefits of amnesties.[[23]](#footnote-23)

## Politics of Amnesties

Amnesties are “the judicial expression of a political act”[[24]](#footnote-24) intended to deliver particular sets of (pre-determined?) outcomes. From this inference, it can be argued that amnesties are blunt policy tools which are, first and foremost, subject to and driven by political considerations over and above those of human rights law. Ultimately, amnesties can be said to be beholden to rules of political expediency.[[25]](#footnote-25)

It would appear that the charge “politics trumps law”[[26]](#footnote-26) can be applied to the way in which amnesties are devised and implemented. This led to scholars like Teitel[[27]](#footnote-27) to assert that “the increased pragmatism in and politicisation of the law” weakened the justice element in transitional justice programmes.[[28]](#footnote-28) This writer argues that it would be far much better if this trend were reversed such that amnesties became judicial expressions of accountability measures less prone to being taken hostage by perpetrators of gross human rights violations.

Scholarly discourses about legitimacy and role of amnesties also reflect this pre-eminence of politics (Pensky, 2008). However, other scholars like Laplante[[29]](#footnote-29), have since argued that because the focus has swung back to criminal trials, in the form of the ICC and tribunal courts, there is less room for political considerations and manipulations in transitional justice situations. She even goes as far as saying this focus on criminal justice is the beginning of the end of amnesties.

Yet the number of amnesty laws crafted by states has not diminished. According to Mallinder, there continues to be a strong belief in states and the international community that amnesties may be a necessary [political] trade-off in the pursuit of peace.[[30]](#footnote-30) According to Mendez though, peace can be achieved without use of amnesties, which must not be seen as a prerequisite for the attainment of peace.[[31]](#footnote-31)

## Jekyll and Hyde Characterisation

The Jekyll and Hyde concept is associated with a mental condition called ‘split personality’, whereby more than one personality exists within the same body.[[32]](#footnote-32)

In almost all of the literature, amnesties are described as having a dual effect, so it would be apt to apply the Jekyll and Hide characterisation to them. They are hailed as popular, proven [political] mechanisms for ending conflicts, even only for a while in some cases. For this reason, amnesties have become popular parts of wider transitional justice programmes whose intended aim is to promote human rights in societies recovering from a violent past.

According to this line of reasoning, amnesties can instil a human rights culture which can override the negative or ‘evil-side’ effects of said amnesties. This author posits that generalisation of the ‘good-side’ of amnesties is arguably over-simplistic at best and inaccurate at worst. In the example of Zimbabwe for example, blanket amnesties have been enacted following serious violations of human rights and yet no human rights culture has developed there.[[33]](#footnote-33)

It would seem to this author that the efficacy of amnesties is thus singularly based on this ability for them to convince even the most hardened fighters to lay down their arms and begin to walk down the path of peace. This is the ‘good personality’. The ‘bad personality’, on the other hand, is that amnesties, on their own, are problematic because they block domestic prosecutions,[[34]](#footnote-34) thereby denying victims their right to justice.[[35]](#footnote-35)

Payne et al, make the point about this ‘split personality’ condition when they identify two key positions about amnesties. The first view is that they act as a block to democracy, to the rule of law and to human rights as they perpetuate impunity and are not compliant with international human rights law. The opposing view is that amnesties are a necessary evil and act as a useful tool for negotiations, aiding peace processes and the advancement of democracy.[[36]](#footnote-36)

For Parker, “Amnesty is a concept wrought with contradictions and paradoxes: on the one hand, it conjures feelings of benevolence and virtue that are extolled by the religious and cultural traditions of most societies; on the other, it contradicts the rule of law and seems to violate basic notions of justice.”[[37]](#footnote-37)

This ‘good personality/bad personality’ phenomenon of amnesties has been seen in play in situations where victim-survivor groups have strongly disagreed with amnesties while others like civil society groups have lobbied in favour of them.[[38]](#footnote-38) Some scholars like Schabas have even argued that promises of amnesty have little influence on perpetrators’ willingness or reluctance to take part in peace processes.[[39]](#footnote-39)

However, this dominant twin-view of amnesties as peace inducers on the one hand and respite providers for tormented communities on the other hand, is too narrow and fails to take into account other equally persuasive motivations for introducing amnesties. Mallinder describes other motivations, such as consolidation of power, that go beyond the dominant peace imperative and which may be useful in understanding why amnesties are in increasing use today.[[40]](#footnote-40)

## Diversity of Amnesties:

It used to be that amnesty was understood as a singular concept. Today, the concept of amnesty has proliferated into many types which, it is worth noting, have all retained the original raison d’etre – to foreclose criminal prosecution and civil suits.[[41]](#footnote-41) Almost every peace agreement[[42]](#footnote-42) referred to in most literature has, almost by default, accepted and included this traditional understanding of amnesty.

Blanket amnesties apply “across the board without requiring any application on the part of the beneficiary or even an initial inquiry into the facts to determine if they fit the law’s scope of application”[[43]](#footnote-43) and are said to “have the widest scope and the least legitimacy”[[44]](#footnote-44) because they cover all crimes committed during a particular period, without any conditions.[[45]](#footnote-45)

Blanket amnesties are also associated with institutionalisation of denial and cover-ups of atrocities by the state, in ways that do not engender trust amongst various sections of society.[[46]](#footnote-46) International law is said to consider blanket amnesties illegitimate, however, it would appear that some blanket amnesties attract international scrutiny or “special attention”[[47]](#footnote-47) more than others.

The measure of the legitimacy of amnesty is whether it excludes international crimes of genocide, war crimes and crimes against humanity.[[48]](#footnote-48) The inaccuracy of this standard of measurement may have contributed to blanket amnesties in places such as Zimbabwe - where there is contestation over the classification of the alleged human rights abuses - falling off the radar of international attention.[[49]](#footnote-49)

The proliferation of amnesties now includes self-amnesty, conditional amnesty and pseudo-amnesty.

## Amnesties and the Human Rights Movement

Most of the literature reviewed has highlighted the fact that there has been an increased use and acceptance of amnesties over the past 30 years or so and at a time when there has been near universal embrace of fundamental human rights in the world.

The position of the Human Rights Movement - which comprises international human rights NGOs, activists, lawyers and scholars – is that amnesties are unacceptable because they violate states’ obligations to ensure victims’ rights to truth, justice and reparations.[[50]](#footnote-50) This is what Slyle calls the victim’s rights argument.[[51]](#footnote-51)

The Human Rights Movement makes this assertion based on two main arguments, which are that (1) principles of international law now exist to prohibit amnesties for international crimes and (2) that there has been a growth of international justice mechanisms and instruments to repress these crimes at the national and international levels. They point to the establishment of the International Criminal Court (ICC) as a case in point.[[52]](#footnote-52)

Without clear, unambiguous guidance from international treaties prohibiting amnesties, the human rights movement’s position is based on the inference that amnesties, in so far as they may foreclose prosecutions for international crimes, are a violation of international law. The problem with this position is that there are opposing views which have been applied in practice and which show that amnesties can be compatible with international law. The challenge in transitional justice is how to balance universal human rights claims with [particularist] realities on the ground that tests the boundaries of those claims.[[53]](#footnote-53)

## Victims

Amnesties primarily involve two groups of people – perpetrators of human rights abuses and their victims. They have also become synonymous with greater social benefit even when they deny justice to victims for the wrongs perpetrated against them and underpinning this notion is their “claimed utility”[[54]](#footnote-54) as deliverers of peace.

This claimed impact of amnesties has however come under serious question from scholars such as Mark Freeman who holds that a distinction has to be made between correlation and causation. He argues that it would be a mistake to believe that if amnesties are followed by sustained improvements in human rights, it then proves that the amnesties are a direct cause of the improvements.[[55]](#footnote-55)

Amnesties are described as having potentially damaging consequences for victims, in a way that reinforces the ‘Jekyll and Hyde’ personification described earlier in this review. On the one hand, victims of a serious conflict would undoubtedly want to see an end to their suffering, if cessation of hostilities can deliver that. On the other hand, it is questionable in many amnesty situations whether victims would forgo justice in order to achieve peace for their communities.

According to Chigara,[[56]](#footnote-56) amnesty laws that foreclose prosecutions are a further violation of victims’ rights for three reasons. First, victims possess basic human rights, which belong to the individual concerned and that ownership of those rights must be proved to have transferred from victims themselves to the state before any government can give them away on behalf of victims by claiming and exercising the authority to amnesty individuals responsible for violating victims’ basic human rights.

Secondly, a gross violation of victims’ human rights instantly attaches international interest and responsibility which necessitates prosecution by states of perpetrators of those gross human rights violations. The third reason is that new governments often have real fears about the threats to peace posed by members of outgoing regimes who may have been responsible for gross human rights violations. Prosecution of these individuals is itself then seen as problematic and undesirable.

Victims, already having suffered terribly at the hands of their tormentors, then have to re-run the gauntlet between their former tormentors and a state that disregards their right to judicial remedy. While justice, in these situations, most certainly must defer to mechanisms aimed at securing political stability, it is arguable that it would become top priority once that stability is achieved.

Whereas earlier in this review it was said that politics trumps law, it would seem that another element is alluded to in amnesty discourses but not sufficiently proclaimed and it is that fear also trumps law. Realist or pragmatist arguments posit that peace is the holy grail of transitioning states, over and above legalistic demands for judicial processes such as prosecutions.

However, it is arguable that realist positions truly reflect the position of victims, who, unencumbered by political considerations, often express a desperate need for justice and healing. In order to heal, victims’ realist desires are to see their pain recognised or acknowledged by the state and outsiders, the perpetrators brought to justice and reparation for the damage caused.[[57]](#footnote-57)

## Amnesties: Justice or Peace?

This idea that perpetrators of gross violations of human rights will engage in further violations if not granted amnesty is dominant in most of the literature. It would appear that amnesties have generally become synonymous with peace, even though evidence on the ground would suggest otherwise.[[58]](#footnote-58) According to O’Shea, given a choice of peace on the one hand and prosecution, denunciation, deterrence and reform on the other, societies seeking progress would choose peace (pragmatism).[[59]](#footnote-59)

According to Laplante, there exists a stand-off between international retributionists[[60]](#footnote-60) or what Lutz and Sikkink (2001) called the justice cascade theory and national pragmatists when it comes to the legality of amnesties. On the one hand, international criminal law[[61]](#footnote-61) is very insistent on criminal prosecution for the core crimes and on the other hand, states’ practice tends to favour practical political solutions.

Pragmatists argue that amnesties are a necessary trade-off with justice in order to ensure peace and prevent further human rights violations. For them, amnesties are justified on the basis of their presumed potency to deliver transition, reconciliation, forgiveness and truth. Retributionist arguments against amnesties are centred on the notion of prosecution as punishment, denunciation, deterrence and reform.[[62]](#footnote-62)

However, Slyle argues that this depiction, such as it denotes a trade-off between victims and accountability for perpetrators is misplaced. According to him, the trade-off is between victims of past abuses and yet to be identified victims of future abuses.[[63]](#footnote-63) The peace versus justice debate in much of the literature is framed as a hard choice between forgiving, forgetting the past by using amnesties to promote peace and reconciliation on the one hand, and bringing perpetrators to justice, no matter the political costs or risks, on the other hand. It fails to identify the diversity and frequency of amnesty laws in solving political crises (Mallinder, 2012).

Amnesties for offences which have a prosecutorial obligation under international law impact on the liability of the alleged perpetrators and victims’ rights to have their case brought before a court of law.[[64]](#footnote-64) Governments and sometimes victims, have advanced the ‘peace without justice imperative’ argument to defend use of amnesty laws while, in ways the former ICC Prosecutor Moreno-Ocampo[[65]](#footnote-65) described as ‘blackmail’, whereby guerrilla fighters have been known to demand amnesties in exchange for peace [without justice].

The tendency by governments and international community to emphasise the peace delivery merits of amnesties produces an unjust peace whereby victims are denied any legal recourse to obtain redress for what they have suffered.[[66]](#footnote-66)

Instead of the debate being about a hard choice between justice and peace whereby they compete for priority,[[67]](#footnote-67) the two concepts should be made to reinforce each other in any given situation or conflict.[[68]](#footnote-68) Amnesties are increasingly used as part of transitional justice mechanisms for restoring order in strife-torn societies yet expose a very weak link between human rights and peace because they can include crimes that international law heavily condemns.[[69]](#footnote-69)

Bell also argues of the incompatibility of linking human rights protections with peace-building initiatives which she says is often challenged as biased in favour of amnesties.[[70]](#footnote-70) According to this author, the linking of amnesties with justice and peace is also problematic because while it is clear to see in “hard cases”[[71]](#footnote-71) such as Uganda, cases such as Zimbabwe present a different challenge because they are relatively peaceful and the choice there is no longer between peace and justice but justice and impunity.

## Let Bygones be Bygones

It is common practice for states to choose the amnesty route instead of prosecution when dealing with past human rights abuses.[[72]](#footnote-72) The mantra for states in these situations has been ‘let bygones be bygones’, a concept laden with a promise of a new and different future yet is underpinned by notions of forgetfulness (amnesty), denial and impunity which undermine that promise.

In some cases, such as Zimbabwe, this mantra has been repeatedly used to put a lid on past human rights abuses by the state and with blanket amnesties enacted as political tools to legitimise a culture of impunity that has arguably taken root there. Rather than these amnesties end the debate on the past in Zimbabwe, the opposite is true as victims of serious human rights violations such as the people of Matabeleland have never stopped their quest for truth and justice.[[73]](#footnote-73)

## International Human Rights Law Arguments against Amnesties

International human rights law does not explicitly forbid or discourage any kind of amnesty but appears to encourage their use at the end of an armed conflict.[[74]](#footnote-74)

Almost all of the scholarly writing identifies three main pillars of international law arguments against the use of amnesties, which are: the obligation to prosecute; the fundamental rights of victims to truth, justice and reparation; and social stability, deterrence and the rule of law.[[75]](#footnote-75) This legalism has been rejected by scholars such as Mark Freeman who posits that to oppose amnesties on the basis of law alone would be “legalism of the worst sort.”[[76]](#footnote-76)

International legal standards are opposed to amnesties even though the same legal texts do not explicitly prohibit their enactment and application in certain situations. Scholars are divided on whether there exists a duty to prosecute under customary international law,[[77]](#footnote-77) with some such as Diane Orentlicher arguing that failure to prosecute human rights violations is a breach of international customary law. Carlos Nino rejects this view and instead calls for substituting punishment with moral censure through what he calls “permissive retribution.”[[78]](#footnote-78) Others like Zalaquett also argue that prosecution of human rights violations must not disrupt transitions to democracy.

# Chapter 2: Violence in Zimbabwe - A Background

## Permanent Violence in Zimbabwe

Zimbabwe had its own ‘moment in history’ - the triumph over the violent, racist ideology of colonialism which brought the possibility of a new social, political and economic post-colonial narrative. However, while colonialism was politically defeated in 1980, a new national narrative which sought to depart from and repudiate the old order has arguably never happened in Zimbabwe. Nation-building under the post-colonial government has not happened in ways that allow for the democratic tradition and a respect for human rights to take root.[[79]](#footnote-79)

Colonial history, far from being over, still infuses and permeates every level of contemporary Zimbabwe society, from politics and economics right down to culture and sport. It is therefore very useful for the question of violence in Zimbabwe to be interrogated and understood in the context of this repressive colonial history. The foundation and maintenance of the colonial settler state was predicated on the use of violence against native Africans who in turn resorted to violence in their struggle for independence.[[80]](#footnote-80)

The human rights abuses that were entrenched in law during the colonial era provided the framework for further abuses, first during the protracted 16-year civil war[[81]](#footnote-81) and at various stages in post-independent Zimbabwe.[[82]](#footnote-82) The persistence of organised violence and gross human rights violations appears alongside one other interesting feature of post-independence Zimbabwe, which is the prevalence of “high- level reconciliation processes for elite actors”[[83]](#footnote-83) as an answer to every cycle of violence.

With the repeated failure of political transitions to implement proper transitional justice mechanisms, Zimbabweans continue to search for ways this can be achieved. I identify two particular ways by which this search is being played out. I argue that on the one hand, there are those in Zimbabwe who believe that political change or regime change in the form of outright election victory is the only way transitional justice can be achieved. On the other hand are those who see promotion of the rule of law as a pre-requisite for change. Sometimes both arguments have been in play at the same time.

Given this backdrop, there are 5 key periods in the history of national violence in Zimbabwe worth discussing; the 1970s war of liberation, the Matabeleland massacres in the 1980s, launch of the fast track land reform programme, elections since 2000, and Operation Murambatswina displacement.

## War of Liberation

From 1965 to 1979 Rhodesia, as Zimbabwe was then known, was engaged in a brutal civil war involving the armies of the colonial government and the two liberation movements, the Zimbabwe African National Union Patriotic Front (ZANU-PF) and the Zimbabwe African People’s Union (ZAPU).

All three armies were involved in serious violations of human rights, with in excess of 30,000 civilians losing their lives during the conflict.[[84]](#footnote-84) Units of the Rhodesian army such as the Selous Scouts targeted civilians and used chemical and biological warfare as part of their war effort in contravention of the Biological Weapons Convention.[[85]](#footnote-85)

Forced resettlement, similar to the forced removals campaign in Apartheid South Africa[[86]](#footnote-86), was a form of violence widely used by the colonial state to subjugate local communities and prevent guerrilla-civilian contact.[[87]](#footnote-87) Nationalist armies of ZAPU and ZANLA were also involved in atrocities against civilians and even their own troops who were subjected to imprisonment, torture and summary executions for offences ranging from insubordination to mutiny.[[88]](#footnote-88)

The seeds for impunity were sown when the colonial government passed The Indemnity and Compensation Act (1975)[[89]](#footnote-89), amongst many similar pieces of legislation, which granted blanket immunity to members of the armed forces who had committed atrocities up to that point during the war of liberation.[[90]](#footnote-90) The history of state-sponsored indemnities and impunity in colonial Rhodesia is very important in understanding the motivations and persistence of amnesties in post-independence Zimbabwe.[[91]](#footnote-91)

## Matabeleland Massacres

The Matabeleland massacres, also known as Gukurahundi[[92]](#footnote-92) are arguably the first ever case of genocide in post-independence Southern Africa to date[[93]](#footnote-93) in which over 10,000 civilians were killed or disappeared by a North Korean-trained army unit called the Fifth Brigade. However, the massacres have been dealt a double question mark over their classification, as far as the Zimbabwe state and international community are concerned.

There was never any international declaration as to the status of the massacres, which meant that there was no immediate international awareness and outrage at the time. Part of the reason for this was that the government of Zimbabwe was very skilful in suppressing details of the massacres from reaching the rest of the citizens and the outside world.[[94]](#footnote-94) Another reason was the cold war politics of the time, behind which the government hid to commit gross human rights violations in Matabeleland and deflect international scrutiny.[[95]](#footnote-95)

It has been argued elsewhere that the 1994 murder of 800,000 people in Rwanda could have been prevented and stopped had the United Nations Security Council’s declaration of the killings as genocide not been vetoed by America and France.[[96]](#footnote-96) Similarly, it could be argued that had the Gukurahundi massacres got onto the agenda of the Security Council, the outcome would have been different from what happened in the end.

There is on-going contestation between victim-survivors and the government of Zimbabwe over classification of the massacres. While victim-survivors and human rights activists in Matabeleland and elsewhere[[97]](#footnote-97) are unwavering in their belief that the massacres were genocide and a crime against humanity, the same cannot be said of the government. The government counters this belief with its own narrative which refuses to acknowledge the massacres and even criminalises open discussion on the subject.[[98]](#footnote-98)

### 1. Forms of violence

#### (a) Ethnic Cleansing

The denialist narrative by the government is premised on the argument that there was a counter-insurgency to put down in Matabeleland, its response targeted at a political and military enemy and not the Ndebele[[99]](#footnote-99) ethnic group. However, according to Scarnecchia, “language of the Zanu-PF leadership [during the massacres] emphasised the ethnic dimension and attack on defenceless civilians”.[[100]](#footnote-100)

The ethnic factor is very hard to ignore, given the fact that the massacres took place in a region predominantly inhabited by the Ndebele people and in ways that seemed to rely on ethnicity determination. For example, a sort of language test was widely used whereby failure to speak in the Shona language of the soldiers resulted in torture and even death.[[101]](#footnote-101)

The government’s political rationale for the massacres appears to have been running parallel to an ethnically-charged campaign which came to be seen by some as revenge for 18th century attacks by the Ndebele on the Shona people.[[102]](#footnote-102) Trading on their own perceived victimhood, perpetrators of the massacres perpetuated the cycle of violence whereby yesterday’s victims become today’s perpetrators.[[103]](#footnote-103) Robert Mugabe used his victimisation by the Rhodesian state and the deaths of thousands of freedom fighters in the war of liberation, as justification for and defence of Gukurahundi.[[104]](#footnote-104)

The targeting of Matabeleland as a distinct linguistic and cultural population area from the rest of the country arguably had the hallmarks of ethnic cleansing, which is itself a crime against humanity.[[105]](#footnote-105)

#### (b) Abductions and Disappearances

Abductions, detention without trial and disappearances were the most common crimes committed by the army in Matabeleland during the massacres.[[106]](#footnote-106) Detention centres were set up by the army where thousands of people were held incommunicado for long periods of time, causing extreme anxiety for their families. Some of the people detained were never seen alive again and efforts by their families to find out what happened to them continue to be blocked by state authorities.[[107]](#footnote-107)

#### (c) Scorched Earth Policies

Beginning with a dusk to dawn curfew, the entire rural Matabeleland landscape was subjected to a devastating scorched-earth policy which resulted in the mass starvation of civilians.[[108]](#footnote-108) Everyday economic life was halted with shops forced to close, movement of people and access to their fields and animals severely curtailed. No food supplies were allowed in from urban areas.[[109]](#footnote-109)

At both the national and international levels, Gukurahundi has never been officially acknowledged as a crime against humanity or genocide. The United Nations, Southern African Development Community and African Union, while all aware of the massacres, have never labelled them as an international crime in the same manner they did in the case of the Rwanda genocide or Srebrenica massacres in the former Yugoslavia.

## Fast Track Land Reform Programme

In 1990, when the Lancaster House-brokered Constitution expired[[110]](#footnote-110), the government of Zimbabwe launched the beginnings of its land reform programme whereby white-owned farms would be taken without compensation being paid to the owners.[[111]](#footnote-111)

Billed the “fast-track land reform programme” (FTLRP), the government began the compulsory acquisition of commercial farms in 2000 and without due compensation to the owners.[[112]](#footnote-112) The takeover of white commercial farms was characterised by two seemingly different yet complementary approaches. The first approach, driven by the government and signifying executive and legal order in the management of state business described the exercise as ‘acquisitions’ while the other, concurrent approach was led by the war veterans and described as ‘occupations’.[[113]](#footnote-113) At the heart of these two approaches lay the visible hand of state-sanctioned violence against farm owners and workers, which was reflected not only in the actions of those who implemented government policy but also media reports of those events.[[114]](#footnote-114)

Violence during the FTLRP primarily involved two main groups in its planning, co-ordination and implementation. The main perpetrators were mainly veterans of Zimbabwe’s liberation war and government/Zanu-PF party militias.[[115]](#footnote-115) The government defended the land acquisitions and by extension, the violence that went with them, as long over-due justice for historical wrongs against black Zimbabweans during the colonial era.[[116]](#footnote-116) However, the political and electoral threat posed by the newly-formed Movement for Democratic Change (MDC) party is said to have been the real reason behind the government’s launch of the FTLRP.[[117]](#footnote-117)

The violence of the FTLRP was emphasised in the code-name ‘jambanja’[[118]](#footnote-118), given to the waves of farm invasions that began soon after the government of Zimbabwe removed the crucial clause 57 from the statute books, which then absolved it from any responsibility to compensate the dispossessed farmers.[[119]](#footnote-119) Farmers, their families and employees were subjected to a reign of terror including beatings, rape, murder and destruction of property.[[120]](#footnote-120)

As well as the physical violence of rape, torture, beatings and murder there was that of racialism which framed the land reform programme in terms of indigenous blacks versus white and black regional settlers in ways that resembled the racialism of colonial governments.[[121]](#footnote-121)

# Chapter 3: Transitional Politics: An end in itself or a means to an end?

Given the background of a very strong and persistent culture of violence as a policy tool in both pre and post-colonial Zimbabwe, it is necessary to apply the wide-angle lens of the political settlement approach in order to identify and understand the political imperatives that underpin it.[[122]](#footnote-122)

Zimbabwe has had three epochal political transitions and it could be argued that a fourth is currently playing itself out within the ruling Zanu-PF party.[[123]](#footnote-123) The first three political transitions were each received with high hopes by Zimbabweans who saw them as “windows of opportunity”[[124]](#footnote-124) to finally deal with the past and propel the country into full democracy. However, in reality, they became tools for burying the past and cultivating authoritarianism and a culture of impunity, with the result that true justice mechanisms are yet to be implemented in Zimbabwe.

While each of these transitions is routinely associated with notions of justice by most people[[125]](#footnote-125), the author argues that such analyses appear to be misplaced because they miss the crucial point, which is that they were about securing political stability and survival for the government, above all else.

The first political transition of note in Zimbabwe was the Lancaster House Agreement which was a negotiated transfer of power (ToP) from Rhodesia minority government to a black-majority one that ushered in independence in 1980.[[126]](#footnote-126) The operational code for this transition was the new Zanu-PF government’s internationally acclaimed policy of “let bygones be bygones”[[127]](#footnote-127), spelt out in a speech delivered by Robert Mugabe and which laid the foundation for the culture of impunity that bedevils Zimbabwe to this day.

This policy won the new government many international plaudits for its emphasis on forgiveness and national reconciliation over accountability by all three armies for serious human rights violations committed in the preceding war of independence. The new prime minister, reflecting the top-down, command-style of liberation movements[[128]](#footnote-128) simply announced in a televised national speech, a “high-level reconciliation process for elite actors”[[129]](#footnote-129) that did nothing to cater for the feelings and needs of ordinary citizens who bore much of the brunt of the independence war.

Underpinning this transition were security concerns on the one hand and economic necessities on the other. The new government faced possible destabilisation by the still very intact and powerful Rhodesia security and military apparatus comprising the army, intelligence, air force and police. On the economic front, the glaring material disparities between whites and blacks compelled the government to embark on a pragmatic programme to maintain and expand economic infrastructure.[[130]](#footnote-130)

The second transitional politics phase in Zimbabwe came in the late 1980s, in the form of The Unity Accord at the end of the Matabeleland massacres. This pact, as the name suggests, was a top-level political and hostile takeover of the opposition Zapu party[[131]](#footnote-131) which, it could also be argued, was a retrogressive political transition.

It was retrogressive because it effectively killed off multi-party democracy in Zimbabwe and laid the ground for a de facto one-party system of government, with Zanu-PF eventually emerging as the only political party in the country.[[132]](#footnote-132) The main aim for this phase was to peacefully vanquish the opposition Zapu party, having failed to do so militarily with the Gukurahundi massacres[[133]](#footnote-133) and using the “unity” smokescreen which implied involvement and buy-in of victim-survivors and wider Zimbabwean population.

The reality, however, was nothing of the sort. The real operational code for this retrogressive political phase was silence and amnesia, both of which have been used by the state to bury discourses on the history and legacy of the Matabeleland massacres without so much as acknowledgement of the thousands of victim-survivors and the trauma they live with to this day. While the so-called unity accord secured the silence and amnesia of the political leadership of the dissolved Zapu opposition party, it was not successful with the victims of the massacres who continue to demand truth and justice to this day.[[134]](#footnote-134)

The third major political transition was the Global Political Agreement (GPA) of 2008 which culminated in the creation of the Government of National Unity (GNU) in 2009. Essentially a power-sharing settlement, the GNU is said to have been (for the MDCs) all about democratising the state,[[135]](#footnote-135) yoking as it did two divergent and competing ideologies – violence and secrecy of ZANU-PF and peace and openness of the two Movement for Democratic Change parties.[[136]](#footnote-136)

However, it is hard to believe a party like ZANU-PF, with its decades-long history of authoritarianism and violence would suddenly embrace the democratic virtues espoused by the GPA. Thus, for ZANU-PF, power-sharing was more about organising itself again in order to recover the legitimacy it had lost in the 2008 election defeat which it did by blocking the reform agenda of the GPA and re-asserting its grip on power.[[137]](#footnote-137) It could also be argued that in the GPA, Zanu-PF saw an opportunity to co-opt and ultimately undermine the opposition MDC party’s 2008 electoral and moral victory[[138]](#footnote-138) through formal state financial and material privileging of MDC leaderships in order to distract them from focusing on their stated goal of a democratic transition.

Arguably, Zimbabwe is currently undergoing a fourth political transition but whose outcome is uncertain.[[139]](#footnote-139) It is unique in the sense that it is a transition within, as opposed to, between political regimes, an intra-party process, unlike the other three previously mentioned. Robert Mugabe is approaching his final political swan song and a bitter battle to succeed him has ensued within his Zanu-pf party.[[140]](#footnote-140)

While this on-going transition is purely a Zanu-Pf internal affair, it nonetheless has very serious ramifications for the future direction and stability of the country and so cannot be ignored. Because many of the government elites are implicated in over 30 years of gross violations of human rights in Zimbabwe, they have reason to fear a post-Mugabe era which might leave them vulnerable to future prosecutions. Self-preservation and survival, and the protections that come with them, appear to be the ultimate goals of this latest intra-party transition.

All three political transitions discussed above have one thing in common. They were founded on amnesties and failed to become springboards for the next crucial (and so far elusive) phase in Zimbabwe, that of Transitional Justice. These transitions did not build reliable and secure institutions to deal with the myriad of problems afflicting Zimbabwean society, which in turn would have secured the consent of the citizens affected by those problems.[[141]](#footnote-141) They became ends in themselves rather than means to Transitional Justice ends. Even the on-going intra-party transition looks likely to go the same way too – Zanu-PF is unlikely to open itself up to scrutiny over its human rights records of the last 34 years.

Rather than see the end of violent history, violence seems to be an ever-present part of Zimbabwean political life, situated within the same historical discourse of freedom, democracy, justice and human rights. The same repressive laws, tactics and even perpetrators from previous orgies of violence have become permanent props on the Zimbabwe political stage.

For the ruling Zanu-Pf party, violence is and has always been a policy instrument to be deployed every time its grip on power is threatened by real or perceived enemies.[[142]](#footnote-142)

# Chapter 4: Political change and Rule of law arguments in Zimbabwe

With the repeated failure of political transitions to implement proper transitional justice mechanisms, Zimbabweans continue to search for ways this can be achieved. According to Teitel, “in the prevailing debates about the relation of law and justice to democratic development, there are two competing ideas, the realists versus the idealists. Either political change is thought necessarily to precede the establishment of the rule of law or, conversely, certain legal steps are deemed necessarily to precede political transition.”[[143]](#footnote-143)

I posit that Teitel’s observation is currently being played out in Zimbabwe between those who believe in political change or regime change in the form of outright election victory and others who see the rule of law as a pre-requisite for human rights, democracy and justice. To further understand the battle for human rights, democracy and justice in Zimbabwe, it is important to locate current struggles within these two ideological concepts. Both are at play in Zimbabwe, sometimes even at the same time as was seen in the early years of what was then a single, united opposition Movement for Democratic Change(MDC) party.[[144]](#footnote-144)

Of particular interest are the active disagreements between all the major political parties on what constitutes change, a concept which is routinely associated with only the opposition parties yet equally applies to the ruling Zanu-PF party.[[145]](#footnote-145) Competing political change agendas in Zimbabwe pit Zanu-PF’s radical, redistributive economic narrative[[146]](#footnote-146) against that of good governance pushed by the MDC parties, NGOs and civic actors.[[147]](#footnote-147)

At other times, one concept has been abandoned in favour of the other as was the case when the MDC–T party announced it would boycott all elections until electoral reforms were carried out or when opposition supporters do not bother with reporting to the police cases of attacks by ruling party supporters[[148]](#footnote-148), at the same time as their leaders are filing electoral challenges in the country’s courts.

These dynamics have generated intense debate amongst Zimbabweans as to which of the two – political change or rule of law - can best deliver the democracy and justice outcomes they desire. They therefore warrant further examination in the context of Zimbabwe’s persistent history of gross human rights violations, personified by the ruling Zanu-PF party, on the one hand and the new struggle for democracy and human rights led by the opposition MDC parties and human rights NGOs, on the other.

## Rule of Law arguments

Even though Zimbabwe is not a liberal democracy[[149]](#footnote-149), Rule of Law arguments in the country can be located within the midrange, liberal democratic concept of the rule of law whose principles uphold (1) that law is public, prospective, certain; (2) equality before the law; (3) guarantees of human and basic rights; (4) law making is by democratically legitimised institutions; (5) power is controlled by checks and balances and (6) independence of the judiciary.[[150]](#footnote-150)

Local human rights NGOs, human rights activists, opposition political parties and even foreign governments accuse the government of lacking the will to implement rule of law reforms and are the most vocal proponents of the rule of law argument,[[151]](#footnote-151) often tying it to economic development.[[152]](#footnote-152) For some human rights victim-activists, the rule of law is not necessarily contingent upon political change first, hence their on-going calls for the application of the law in its various forms; prosecution and punishment of offenders, truth inquiries and reparations.[[153]](#footnote-153)

In keeping with Morlino and Magen’s rule of law promotion strategies, they rely on two particular methods to bring pressure to bear on the government to respect the rule of law. The first strategy they use is public exposure. The Zimbabwe Human Rights NGO Forum publishes its own annual ‘Human Rights, Rule of Law and Democracy Report’ whose main objective is “to record and expose continuing human rights abuses in the country”.[[154]](#footnote-154)

Individual activists such as Ben Freeth and others frequently publish articles and organise public meetings outside the country to shame the government by focusing only on breaches of rule of law and linking them with human rights violations.[[155]](#footnote-155) International organisations such as the International Bar Association have also issued statements and reports condemning the government over its rule of law record.[[156]](#footnote-156)

The exposure and shaming strategy of these groups, individuals and campaigners is premised on the idea that the government cares enough about its reputation and is likely therefore to be perturbed by their negative public campaigns.[[157]](#footnote-157) However, in Zimbabwe this has not turned out to be the case. If anything, these campaigns may have hardened the government’s often repeated claims that it is being subjected to a well-orchestrated Western plot to discredit and ultimately remove it from power.[[158]](#footnote-158) The second dominant strategy used to promote the rule of law argument is that of conditionality[[159]](#footnote-159), whereby international aid organisations and governments attach rule of law reform conditions to financial aid programmes and development projects.[[160]](#footnote-160)

The ruling Zanu-PF party has eroded the rule of law by subverting and subordinating the independence of the judiciary and parliament, with the result that political party interests are now same as those of the state.[[161]](#footnote-161) Formal state institutions such as the police, army and broadcasting services have been stripped of their impartiality and professionalism and are now firmly embedded within party structures and programmes.[[162]](#footnote-162)

## Political Change

The idea of political change in Zimbabwe is sharply manifest in opposition politics and civil society groups, including human rights advocacy organisations with the deeply held belief that electoral processes are the ultimate vehicle by which change of government and ultimately, truth and justice can be achieved.

However, the notion of political change holds different meanings for different people. On the one hand and as stated earlier, is opposition political parties’ idea of change which is firmly rooted in the use of electoral processes to capture power from the ruling Zanu-PF party. Slogans of the Morgan Tsvangirai-led MDC party illustrate its ideological focus on and pursuit of ‘change’ which it has used to mobilise popular support amongst Zimbabweans.[[163]](#footnote-163)

The belief in and pursuit of political change through electoral processes is, however, no longer absolute within opposition political parties. The bigger and better organised of the two MDC parties led by Tsvangirai has vacillated between advocating peaceful electoral revolution[[164]](#footnote-164), mass uprising or ‘people-power’[[165]](#footnote-165) and total boycotts of elections.[[166]](#footnote-166) These policy gymnastics are revealing in themselves, in that they reflect the party’s awareness and appreciation of the power dynamics, the ever-present spectre of violence and the relationship between the two as far as Zimbabwean politics is concerned.

Thus, non-violence, expressed in the open-palm symbol of the MDC-T party and in sharp contrast to Zanu-PF’s tight-fist, alongside industrial strikes and protests by trade union movements and civil society groups are all forms of non-violent resistance to the overwhelming military power of the state.[[167]](#footnote-167) Opponents of the government use electoral processes to contest power while making the moral and strategic point that they will not compete for violence with the state.[[168]](#footnote-168) Thus, the attempt by the opposition to separate [state] power and violence from democratic practice is an ideological tool they are using to counter the government’s violence and war ideology.

As stated earlier, the notion of change in Zimbabwe is routinely applied to opposition forces, their allies in the trade union movements and civil society groups in a way that fails to acknowledge that there is not one notion of change but many, even conflicting ones.[[169]](#footnote-169) The ruling Zanu-PF party has its own competitive, if not authoritarian political change narrative which is centred round land and natural resources. Furthermore, the government counters the democratic renewal message of the opposition by labelling it a foreign sponsored regime-change agenda whose main aim is to reverse the gains of the liberation struggle.[[170]](#footnote-170)

# Chapter 5: Explaining “Transitional Justice” in Zimbabwe:

One of the biggest areas of contention is the question of transitional justice, which has so far been “elusive”[[171]](#footnote-171) in Zimbabwe. As argued earlier, Zimbabwe has only ever had transitional politics which, it is worth noting, have not lead, first to full democratic transition and in turn, the second crucial phase of properly dealing with the past - transitional justice.

Zimbabwe is yet to come out of the authoritarian grip of Zanu-PF and move on to full democratic transition which would allow for proper debates and ideas to develop as to how best to deal with the past. The past is not yet closed and could become the present or future yet again, given the worsening economic conditions and the socio-political fallout that could possibly arise as a result.

Zimbabwe would appear to be engaged in the “politics of the past”[[172]](#footnote-172) but not in a way that includes a critical examination of the past. On the one hand there is government rhetoric of patriotic history[[173]](#footnote-173) which is founded on the legacy of the 1970s war of independence. The government does not see its own conduct of large-scale human rights violations in post-independence era as particularly relevant for today’s politics and future prospects in Zimbabwe.

On the other hand, opposition political parties and to a large extent human rights movement are insistent on rejecting the government narrative of the past as irrelevant in building a more secure future for the country.

## Debate and Ideation

Civil society groups and human rights activists in Zimbabwe have been engaged in almost two decades of exploration of transitional justice concepts and how they can be implemented to make a break with the violent past.[[174]](#footnote-174) The author argues that Zimbabwe is currently at the ideation stage of transitional justice which, according to David Art’s three-step sequence, begins with “public debates that create and consolidate an ordered set of messages concerning some aspect of the political world” which are then used to “influence political behaviour”.[[175]](#footnote-175)

One important point to make about these debates is that, on the whole, they have been mediated events whereby professional and political elites, rather than ordinary citizens are doing most of the talking amongst themselves and then use the mass media to talk to the community.[[176]](#footnote-176) Thus, a truly national debate on transitional justice involving politicians, intellectuals, the media, ordinary citizens, religious organisations and human rights activists is yet to take place in Zimbabwe.

This is not to say that such debates of transitional justice have never taken place before but when they do, it is against the backdrop of institutional reforms rather than the controversial subject of justice on its own.[[177]](#footnote-177)

The author identifies two dominant stratagems that have emerged during the ideation process in Zimbabwe. The first strategy combines rule of law and political change arguments together with a faith in (reformed) institutions and especially new ones such as the National Peace and Reconciliation Commission (NPRC), which was established in 2013 in the wake of the 2009 Global Political Agreement.

The main attraction of this strategy lies in the belief and hope that reformed and/or new institutions will act as a bulwark against a return to the violent past and also engender new, positive ways of thinking amongst citizens at all levels of society.[[178]](#footnote-178) The main disadvantage of this strategy is that it attempts to transcend prevailing authoritarian political realities while also ignoring the lessons of history. It seeks to achieve transitional justice in an environment where conditions for such a process do not exist.

Such faith in institutions’ capacity to change society would appear to misread Zimbabwe’s recent history of false dawns and is therefore misplaced because as already discussed, hope in previous political transitions did not lead to official transitional justice processes. Instead, those hopes were dashed by heavy exploitation by political elites. The NPRC has suffered similar fate, having failed to operationalise since its inception in 2003.[[179]](#footnote-179)

The other strategy to emerge is a cultural one. To circumvent government intransigence and obfuscation, some civil society organisations and human rights activists have shifted their focus away from institutionalism (transitional justice) to community-driven cultural initiatives – transformative justice.[[180]](#footnote-180)

In the case of the Matabeleland massacre victims, civil society organisations such as the Amani Trust[[181]](#footnote-181) have been at the fore-front in calling for cultural and traditional re-burial ceremonies and rituals. Advocates of the cultural strategy argue that its main advantage is that it is largely free from political exploitation and can be implemented outside of a formal transitional justice process.[[182]](#footnote-182)

## Idealisation

What is routinely labelled as transitional justice in Zimbabwe is really an aspiration for the concept. Without full democratic transition and the space it could allow for examination of the past, Zimbabweans can only express ideal prescriptions of the type of transitional justice mechanisms they would like to see implemented.

As argues earlier in this thesis, political transitions in Zimbabwe have tended to be events or ends in themselves, rather than processes and a means to transitional justice. Transitional justice mechanisms were not part of these political transitions and as such, a move from authoritarian rule to democracy. The question of what is to be done and how, about Zimbabwe’s large-scale atrocities committed over the last 35 years remains unanswered.

There is no clear consensus amongst political elites, human rights activists and wider civil society as to what would be the best way to hold the incumbent government accountable for these atrocities. What is very clear though, is that there is now entrenched in Zimbabwe what Sikkink calls the impunity model[[183]](#footnote-183), with amnesties used to sustain it.

These circumstances, as they currently pertain, would appear to put Zimbabwe in the first phase of Teitel’s genealogy of the transitional justice field.[[184]](#footnote-184) It is this author’s contention that what passes for transitional justice in Zimbabwe is really idealisation of Teitel’s genealogy of the field. Idealisation by civil society groups and human rights activists in Zimbabwe is based on Boraine’s five key pillars of transitional justice, namely accountability, truth recovery, reconciliation, institutional reform and reparations.[[185]](#footnote-185)

It has produced what Raftopoulos and Eppel describe as “a wish-list of desirable processes and outcomes for transitional justice, which are unlikely to be implemented because of the balance of political power in Zimbabwe.”[[186]](#footnote-186) The idea that Boraine’s five pillars can be realistically implemented in Zimbabwe at the moment is problematic because first, it precludes a national democratic transition – which is yet to happen – and second, is at dissonance with the pertaining socio-political conditions in the country.

Given these obstacles, the author argues that it would be far much better for those exercised with the question of how best to hold government of Zimbabwe to accountable to devise and promote interventions that are founded on what can be readily implemented rather than a deep yearning for misplaced solutions.

Taking Boraine’s five key pillars of transitional justice as a guide, the author proposes the following two pre-transitional justice[[187]](#footnote-187) alternatives as the most suitable for Zimbabwe at this stage of the country’s highly polarised politics. It is the author’s argument that these two processes (1) give a clearer picture of what is possible in Zimbabwe at the moment, as far as dealing with the past is concerned and (2) they are a departure from current idealised and premature notions of “transitional justice.”

## Documentation, Recording and Welfarism

Currently, idealised prescriptions for transitional justice in Zimbabwe list truth commissions as one of the number one mechanism for healing the past.[[188]](#footnote-188) Such calls, however, do not sufficiently contend with the fact that in order for there to be a truth commission, the state must first of all officially acknowledge that atrocities were committed in the past. In the current climate, government in Zimbabwe will not acknowledge past atrocities, let alone allow for a proper truth recovery process like the one championed by rights groups.

This author proposes that instead of truth recovery by way of impossible truth commissions, rights groups should work with victims in affected areas to focus on documenting and recording personal narratives of what was done to them, by whom and the material and financial losses incurred.

This kind of preparatory and anticipatory approach to dealing with the past, the author argues, is suitable for situations like Zimbabwe because it identifies possibilities for action in a closed political environment, avoids the pitfalls of idealism and most crucially, has its eye on the future once democratic space is opened.

Victim compensation or reparations is another area of vocal action by rights groups in Zimbabwe.[[189]](#footnote-189) For the same reasons as stated in the preceding section above, reparation calls would appear to be premature because the government of Zimbabwe will never compensate victims who, as far as it is concerned, do not exist.

A far more realistic approach by local and international rights groups and campaigners would be to set up victim- community welfare programmes such as feeding schemes or periodic monetary grants to offset the long-term debilitating effects of state violence perpetrated against them.

# Chapter 6: Amnesties in Zimbabwe

According to Mallinder, amnesties today have become “a tool for facilitating investigation of past crimes” [[190]](#footnote-190) rather than suppressing or forgetting them, as was traditionally associated with the term.

Zimbabwe has been ruled by the same political party and president for the last 35 years. Although there have been brief periods of coalition governments - most notably the 1987 and 2009 political transitions – Robert Mugabe and his Zanu-PF party have always been in charge of all levers of state power.

It has a long history of using amnesties following episodes of grave violations of human rights, including international crimes, beginning with the founding amnesty in 1980[[191]](#footnote-191) which was granted to members of the three armies that had fought each other in the 1970s war of independence. Subsequent elections in 1985, 1990, 1995 and 2000 were also followed by amnesties[[192]](#footnote-192) that whitewashed government-directed violations of human rights leading up to those elections, including the Matabeleland massacres.

Zimbabwe government attitudes towards its past violent conduct and the ritualistic use of amnesties following periods of serious violations of human rights would seem to disprove Mallinder’s claim of amnesties as facilitators of truth. Instead, they confirm Bull’s observation that amnesties represent efforts by governments to hide their crimes by blocking any investigation and prosecution for those crimes.[[193]](#footnote-193)

The question of amnesties in Zimbabwe - like in international law – would appear to be unsettled. There are differences of opinion, regarding their place in contemporary society, amongst politicians on both government and opposition sides, citizens, and human rights activists. A majority of Zimbabweans have said they would like to see perpetrators of human rights abuses account for their actions and human rights activists, particularly those campaigning on the Matabeleland massacres, reject the idea of amnesty.[[194]](#footnote-194)

Two types of amnesty have been consistently enacted in Zimbabwe since 1980 – self amnesty and blanket amnesty. Whenever they have been used, the motivations behind them have been [political] self-preservation and prevention of future prosecution of government officials.

Self-amnesties are “designed to ensure impunity for authoritarian rulers and their associates, including members of the security forces.”[[195]](#footnote-195) Although said to be the least popular type of amnesty, the rate at which they have been enacted in the 30 years between 1978 and 2007 has stayed the same due in large part to Zimbabwe, which is responsible for nearly one-third of self-amnesties in that time period.[[196]](#footnote-196)

Zimbabwe’s first self-amnesty was enacted in 1980 in the after-math of the liberation war and included international crimes such as rape, murder and enforced disappearances. There was a second one in 1988 which protected government security forces, including army, police and intelligence officers who took part in the Matabeleland massacres. In 2000, yet another self-amnesty was enacted by the government on behalf of ruling party supporters and militias who were implicated in the commission of international crimes such as torture and rape.

Blanket amnesties have also been used by the government to conceal serious human rights violations and have cast a cloud of impunity which has followed Zimbabwe throughout its post-independence history. Three elements derive from repeated enactment of blanket amnesties in Zimbabwe. First, Slyle’s observation comes alive where, because of repeated use of blanket amnesties following serious violations of human rights and the denial of victims’ right to redress, a seemingly permanent culture of violence and impunity has taken root in Zimbabwe.[[197]](#footnote-197)

Secondly, denial of human rights abuses ever having happened is now institutionalised[[198]](#footnote-198), with almost every arm of government refusing to openly acknowledge them and the victims thereof.[[199]](#footnote-199) This is more pronounced in the case of Matabeleland massacres where efforts by victim-activists to engage in public debates are met with government repression.[[200]](#footnote-200) Thirdly and as a consequence of denial, blanket amnesties in Zimbabwe denied victims recognition of their unresolved grief. The net result of denial and unrecognition has been the total disenfranchisement of victims from key national processes such as voting in elections or enrolling in schools.[[201]](#footnote-201)

Furthermore, Snyder and Vinjamuri’s observation that amnesties can facilitate the creation of “robust administrative institutions that can predictably enforce the law”[[202]](#footnote-202) has not been borne out in the case of Zimbabwe where the rule of law has come under serious assault from the government.[[203]](#footnote-203) On the contrary, perpetrators of human rights abuses and who belong to the ruling party have been consistently acquitted by courts that are staffed by judges who are politically aligned with the government and will not enforce the rule of law.[[204]](#footnote-204)

## Confronting or Burying the Past

Zimbabwe has a dark history of atrocities which has never been addressed in any meaningful way. This writer identifies three ways in which the question whether to confront or bury the past is being tackled in Zimbabwe. First and whereas some scholars have referred to Zimbabwe as being mired in transition,[[205]](#footnote-205) this author argues that a more accurate description would be to say it is mired in denial of and amnesia over the past. The government has not moved from its much-vaunted policy of “letting bygones be bygones”[[206]](#footnote-206) which is credited with ensuring a peaceful transfer of power from colonial government to the new Zimbabwe state in 1980.[[207]](#footnote-207)

Furthermore, this writer argues that in an inverse way, various forms of amnesty have assumed “logic of appropriateness”[[208]](#footnote-208) by becoming a normal standard of behaviour by which government of Zimbabwe informs and guides its actions. To that end, amnesties have not only become policy caskets in which to bury the past but have also engendered a culture of impunity which continues to create future pogroms and victims.

Secondly, human rights activists and NGOs in Zimbabwe seem to be focusing on two particular areas. The first is centred round the obligation to uncover the truth about past atrocities and lobbying the government to publish reports of two judicial inquiries into the Matabeleland massacres.[[209]](#footnote-209) Others have called for truth commissions to be established as a way of addressing the past and moving forward.[[210]](#footnote-210)

As Zimbabwe is currently not in a national transition, prospects for transitional justice and confronting the past have diminished considerably because the government is more concerned with its own intra-party squabbles than a national programme for dealing with the violent past.

## Victims

There are plenty victims who have never benefitted from amnesty laws enacted in the aftermath of government-directed atrocities in Zimbabwe. The opposing view, which is dominant amongst politicians, is that Zimbabweans have benefitted from amnesties which brought to an end the violence.[[211]](#footnote-211)

Transitional justice ideation and idealisation debates between victims, human rights NGOs and government in Zimbabwe reflect the Jekyll and Hyde or split personality characterisation of amnesties referred to earlier in the literature review which means that amnesties can have good effect on victims at the same time as they disapprove of them.[[212]](#footnote-212) Some victims have welcomed amnesties because they brought an end to their suffering but others continue to insist on accountability for perpetrators and are opposed to the idea of amnesties.

Government of Zimbabwe has tended to speak for victims when it comes to amnesties without soliciting their views about the nature and scope of those amnesties.[[213]](#footnote-213) Renee’s charge that ‘politics trumps law’ is evident in the case of Zimbabwe where political actors dominate the amnesty discourse, to the total exclusion of victims.

To this writer, it would seem that foreclosure of victim participation or consultation in the development of amnesty laws is something that is often understated in research on victims in Zimbabwe, where the focus is on the foreclosure of end-of-line processes such as prosecutions and reparations. It would also suggest that victims’ rights were undermined by the government, in accordance with Magara’s view that an individuals’ rights do not belong to the state for it to give them away on their behalf when deciding to amnesty perpetrators of gross human rights violations.[[214]](#footnote-214)

Current efforts by human rights NGOs, activists and survivors do not appear to put amnesties as the number one cause of human rights abuses in Zimbabwe. While these groups have condemned the use of amnesties by government, they seem to regard state political repression and authoritarianism as the main cause and have directed a lot of their effort into challenging it.

This shift in focus is interesting for two reasons. First, it could be a very bold attempt to re-cast and frame the struggle for human rights in less legalistic tones which emphasise criminal justice and prosecution for serious violations of human rights abuses.

Second, whereas this thesis has highlighted the highly politicised nature of amnesties, actions of human rights actors in Zimbabwe highlights an equally politicised attitude towards the wider question of human rights in the country. They no longer regard the political arena as out of bounds and see it as a tactical and strategic means to put more pressure on the government to respect human rights of citizens. That the government of Zimbabwe frequently attacks the human rights movement as agents of regime change is testament to this fact.

# Conclusion

This thesis has attempted to answer the question whether amnesties undermine human rights and in particular reference to Zimbabwe. To do so, it has explored the literature on amnesties, discussing some of the key concepts; critiqued political and transitional justice conceptions in Zimbabwe to highlight how they misread and misrepresent what is happening in the country.

The Jekyll and Hyde phenomenon, where they are both good and bad at the same time, together with what the author calls the particularism of amnesties makes it difficult for international law to ‘pin’ them down. However, what can be said in the case of Zimbabwe is that amnesties, true to their Jekyll and Hyde character, have undermined human rights and also not done so. According to Chigara (2002), a victim possesses basic human rights which belong to him or her alone and which cannot be transferred to the state or government for it to give them away on behalf of the individual concerned.

Human rights arguments against amnesties are based on legalism whose main tenets are that states have a duty to prosecute human rights offenders, more so if international crimes have been committed. Slye (2002) augments this view with what he calls the victim’s rights argument, whereby states have an obligation to ensure victims’ rights to truth and justice and to that end, amnesties are an unacceptable breach of that obligation. However, Mark Freeman dismisses such a basis as ‘legalism of the worst kind’ when pointing out the ambiguity of international law.

Zimbabwe has never been in full democratic transition although it has had political transitions after serious violations of human rights and in which amnesties have been used to hide those violations and block prosecution of perpetrators. On this reasoning, amnesties appear to have undermined human rights in Zimbabwe because victims were not consulted nor involved in the enactment processes - government simply made unilateral executive order proclamations.

On the other hand, Zimbabwe is now relatively peaceful even though the spectre of violence hangs over it. It could be argued that this fragile peace is as a result of amnesties but as Mark Freeman (2009) has argued, scientific investigation of amnesties is needed before it can be said whether or not amnesties cause improvements to human rights. This thesis has shown how political transitions have squandered opportunities for a critical examination of the past by becoming ends in themselves rather than means to transitional justice ends.

The question of whether amnesties undermine human rights in Zimbabwe could be helped by re-thinking current conceptualisation and understanding of what is commonly referred to as transitional justice. This thesis has attempted to that by applying ideation and idealisation concepts as well as Ruti Teitel’s realist and idealist theories to democracy and justice contestations in Zimbabwe.

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14. See Declaration on the Protection of all Persons from Enforced Disappearance, UN Doc A/RES/47/133 (1992), Article 18(1). [↑](#footnote-ref-14)
15. See E.S.C. Res. [↑](#footnote-ref-15)
16. Laplante, L. (2009) ‘Outlawing amnesty: The return of criminal justice in transitional justice schemes’, *Virginia Journal of International Law,* vol. 49. [↑](#footnote-ref-16)
17. Freeman, M & Pensky, M. supra note 9. [↑](#footnote-ref-17)
18. Mallinder, L. supra note 4. [↑](#footnote-ref-18)
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32. See <https://en.wikipedia.org/wiki/Strange_Case_of_Dr_Jekyll_and_Mr_Hyde> [↑](#footnote-ref-32)
33. Each blanket amnesty in Zimbabwe has been followed by more serious human rights violations. Visit <http://www.hrforumzim.org/> for more information. [↑](#footnote-ref-33)
34. Sikkink, K. *The Age of Accountability: The Global Rise of Individual Criminal Accountability, in* Amnesty in the Age of Human Rights Accountability: Comparative and International Perspectives (Lessa, F & Payne, L.A (Eds), 2012). [↑](#footnote-ref-34)
35. Wilson, R.A. (2001). The Politics of Truth and Reconciliation in South Africa; Legitimising the Post-Apartheid State. [↑](#footnote-ref-35)
36. Payne, L.A et al (2013). Amnesties in the Age of Human Rights Accountability. Chatham House. London. [↑](#footnote-ref-36)
37. Parker, R (2001). Fighting the Sirens’ Song: The Problem of Amnesty in Historical and Contemporary Perspective. 42 *Hungarian Journal of Legal Studies*, 69, p.88. [↑](#footnote-ref-37)
38. Acholi, Iteso and Madi community leaders in Northern Uganda opposed amnesties for Joseph Kony while William Tayeebwa, in a column for “New Vision”, a Ugandan newspaper, wrote ‘Don’t Prosecute Kony’. [↑](#footnote-ref-38)
39. Schabas, W.A. (2007) “The Sierra Leone Truth and Reconciliation Commission”, in Roht-Arriaza, N & Mariezcurrena, J. (EDS) *Transitional Justice in the Twenty-First Century*: *Beyond Truth versus Justice,* Cambridge University Press, Cambridge. [↑](#footnote-ref-39)
40. Mallinder, L. supra note 4, p.41. [↑](#footnote-ref-40)
41. Vriezen, V. (2012). Amnesty Justified? The Need for a case by case approach in the interests of Human Rights. Cambridge. Intersentia Limited, p.58. [↑](#footnote-ref-41)
42. For example, see Article IX of the Peace Agreement between the government of Sierra Leone and the Revolutionary United Front, 7 July 1999; In Mozambique, the 1992 peace accord. [↑](#footnote-ref-42)
43. Meintjes, G & Mendez, J.E. (2000). Reconciling Amnesties with Universal Jurisdiction. *International Law FORUM du droit international* 76, p.85. Cited in Mallinder, L, supra note 4, p.6. [↑](#footnote-ref-43)
44. Burke-White, W.W. (2000). Protecting the Minority: A Place for Impunity? An Illustrated Survey of Amnesty Legislation, Its Conformity with International Legal Obligations, and Its Potential as a Tool for Minority-Majority Reconciliation, *Journal on Ethnopolitics and Minority Issues in Europe, 2, p.5.* [↑](#footnote-ref-44)
45. Vriezen, V. supra note 34, p.39. [↑](#footnote-ref-45)
46. Boraine, A. (1996). Alternatives and Adjuncts to Criminal Prosecutions (Presentation at the conference: ‘Justice in Cataclysm: Criminal Tribunals in the wake of Mass Violence’, Brussels, 20-21 July). Cited in Mallinder, L. supra note 4, p.14. [↑](#footnote-ref-46)
47. Ibid, p13. [↑](#footnote-ref-47)
48. Freeman, M. supra note 23, p.25. [↑](#footnote-ref-48)
49. Serious violations of human rights, particularly the Matabeleland massacres, have never been classified as international crimes even though victims and human rights activists believe they were genocide and crimes against humanity. Because the massacres were largely seen as a local, internal feud the blanket amnesty that followed them was never contested by international community. [↑](#footnote-ref-49)
50. Mallinder, L. supra note 4, p.144. [↑](#footnote-ref-50)
51. Slye, R.C. (2002). The Legitimacy of Amnesties under International Law and General Principles of Anglo-American Law: Is a Legitimate Amnesty Possible?, *Virginia Journal of International Law,* vol. 43. [↑](#footnote-ref-51)
52. Freeman, M & Pensky, M. supra note 8. [↑](#footnote-ref-52)
53. Ibid. [↑](#footnote-ref-53)
54. Chigara, B. supra note 21, p. 2. [↑](#footnote-ref-54)
55. Freeman argues that scientific investigation of impact of amnesties is necessary to establish to establish whether 1. Amnesty or trial cause human rights improvements, and how; 2.amnesty or trial cause a minor improvement; 3. Amnesty or trial register no measurable impact; 4. Improvements in human rights happened despite the amnesty or trial. See Freeman, M. (2009) *Necessary evils: Amnesties and the search for justice,* Cambridge University Press, New York, p.25. [↑](#footnote-ref-55)
56. Chigara, B. supra note 21, p.21-22. [↑](#footnote-ref-56)
57. Vriezen, V. supra note 34, p.157. [↑](#footnote-ref-57)
58. Zimbabwe has had at least 5 blanket amnesties in its 35-year history yet the country cannot be said to be a peaceful one. In fact, amnesties have been used to deal with the same recurrent issues of state-led mass violence over and over again. [↑](#footnote-ref-58)
59. O’Shea, A. supra note 1. [↑](#footnote-ref-59)
60. Laplante, L. supra note 15. [↑](#footnote-ref-60)
61. See UN General Assembly, *Rome Statute of the International Criminal Court* (last amended 2010), 17 July 1998. Available at www. <http://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf> [↑](#footnote-ref-61)
62. O’Shea, A. supra note 1. [↑](#footnote-ref-62)
63. Slye, R.C. supra note 50. [↑](#footnote-ref-63)
64. Ntoubandi, F.Z. (2007) Amnesty for crimes under international law, Martinus Nijhoff Publishers, Leiden. [↑](#footnote-ref-64)
65. See Eleventh Diplomatic Briefing of the International Criminal Court, The Hague, 10 October 2007. Available:<http://www.icc-cpi.int/NR/rdonlyres/E1900488-5437-4771-BA50-45271FD9AE72/278578/ICCDB11IP_en.pdf> [↑](#footnote-ref-65)
66. Mallinder, L. supra note 4. [↑](#footnote-ref-66)
67. Freeman, M & Pensky, M. supra note 8. [↑](#footnote-ref-67)
68. Mallinder, L. supra note 4. [↑](#footnote-ref-68)
69. Chigara, B. supra note 18, p.10. [↑](#footnote-ref-69)
70. Bell, C (2000) *Peace Agreements and Human Rights,* Oxford University Press, Oxford, p.5. [↑](#footnote-ref-70)
71. Snyder, J & Vinjamuri, L. supra note 25, p.6. These countries had conflicts whose horror that attracted international scrutiny and intervention, whereas Zimbabwean violence is now mostly periodic, happening around election times and for short periods. [↑](#footnote-ref-71)
72. O’Shea, A. supra note 1. [↑](#footnote-ref-72)
73. Between 1982 and 1988, over 20,000 people were tortured, maimed, killed and disappeared by Zimbabwe government troops in what is known as the Matabeleland Massacres. Perpetrators were amnestied and up to now, the massacres have never been officially acknowledged. [↑](#footnote-ref-73)
74. Renee, J. supra note 2. [↑](#footnote-ref-74)
75. Chigara, B. supra note 18. [↑](#footnote-ref-75)
76. Freeman, M. supra note 20, p.9. [↑](#footnote-ref-76)
77. Renee, J. supra note 2. [↑](#footnote-ref-77)
78. Ibid, p.62. [↑](#footnote-ref-78)
79. Ndlovu-Gatsheni, S.J., 2009. Nation building in Zimbabwe and the challenges of Ndebele particularism, *African Journal on Conflict Resolution,* 8(3), pp. 27-55. [↑](#footnote-ref-79)
80. For accounts of Zimbabwe’s colonial history, see B. Raftopoulos & A. Mlambo (eds). ‘*Becoming Zimbabwe. A History from the Pre-colonial Period to 2008*.’ [↑](#footnote-ref-80)
81. Ibid. [↑](#footnote-ref-81)
82. Eppel, S. & Raftopoulos, B., 2008. *Political Crisis, Mediation and the Prospects for Transitional Justice in Zimbabwe.,* Johannesburg: Solidarity Peace Trust. [↑](#footnote-ref-82)
83. Murambadoro, R. & Wielenga, C., 2015. Reconciliation in Zimbabwe: The conflict between a state-centred and people-centred approach. *Strategic Review for Southern Africa,* 37(1), p. 7. [↑](#footnote-ref-83)
84. Ibid, p. 34. [↑](#footnote-ref-84)
85. Brickhill, J., 1992-93. Zimbabwe’s Poisoned Legacy: Secret War in Southern Africa. *Covert Action Quarterly,* 43. [↑](#footnote-ref-85)
86. More than 3 million Africans were forcibly removed from their homes in the 1960s and dumped in remote areas as part of the government’s disenfranchisement programme. [↑](#footnote-ref-86)
87. Schmidt, H.I. 2013. Colonialism and violence in Zimbabwe. A history of suffering. Oxford: James Currey. [↑](#footnote-ref-87)
88. See Tshabangu, O. 1979. The March 11 Movement in Zapu. Revolution within the revolution. York: Tiger Papers. [↑](#footnote-ref-88)
89. The Act gave security forces complete freedom to commit acts of torture, murder and destruction of property. See Weitzer, R.J., 1990. Transforming Settler States: Communal Conflict and Internal Security in Northern Ireland and Zimbabwe., Oxford: University of California Press Ltd, p.95. [↑](#footnote-ref-89)
90. Bhebe, N., 1999. ZAPU and ZANLA Guerrilla War and the Lutheran Church in Zimbabwe., Gweru: Mambo Press, p. 113. [↑](#footnote-ref-90)
91. Similar conditions existed in Apartheid South Africa. See Sitze, A., 2013. *The Impossible Machine: A Genealogy of South Africa’s Truth and Reconciliation Commission.* Ann Arbor: University of Michigan Press. [↑](#footnote-ref-91)
92. *Gukurahundi* in the Shona language of Zimbabwe means “the first rain that washes away chaff before springtime”. See CCJP report on Matabeleland massacres at <http://www.sokwanele.com/pdfs/BTS.pdf> The report covered only two out of five districts which make up Matabeleland province in Zimbabwe. The true scale of those killed or disappeared is yet to be determined because the government of Zimbabwe refuses to allow any studies to be conducted. [↑](#footnote-ref-92)
93. Others describe the massacres as “the worst case of brutality in the modern history of Southern Africa.” See <http://cahz.org/genocide.html> [↑](#footnote-ref-93)
94. Scarnecchia, T. 2008. Rationalizing Gukurahundi: Cold War and South African Foreign Relations with Zimbabwe, 1981 – 1983, p.93 in Scarnecchia, T & Urban-Mead,W (eds.), Special Issue on Zimbabwe (II). Concerned Africa Scholars, 80. [↑](#footnote-ref-94)
95. Ibid, pp 87 & 88. [↑](#footnote-ref-95)
96. Supra note 10. [↑](#footnote-ref-96)
97. *Genocide Watch*. (2010) Genocide Watch calls for prosecution of Zimbabwe’s Robert Mugabe for genocide. Available at http://genocidewatch.net/2013/03/19/genocide-alerts-zimbabwe/ [Accessed 20 July 2015]. [↑](#footnote-ref-97)
98. Visual artist, Owen Maseko was arrested and his Gukurahundi exhibition in Bulawayo pulled down by government authorities. See <http://www.newzimbabwe.com/showbiz-21763-Gukurahundi+exhibition+pulled+down/showbiz.aspx> [↑](#footnote-ref-98)
99. The Ndebele people inhabit the Southern part of Zimbabwe and have their own languages and culture. [↑](#footnote-ref-99)
100. Supra note 94, p.101. [↑](#footnote-ref-100)
101. Msindo, E. 2012. Ethnicity in Zimbabwe: Transformations in Kalanga and Ndebele societies, 1860-1990. Rochester: University of Rochester Press. [↑](#footnote-ref-101)
102. Alexander, J et al. 2000. Violence and Memory: One hundred years in the ‘Dark Forests’ of Matabeleland. Oxford: James Currey, p. 222. The Ndebele people are an off-shoot of the Zulu in South Africa and dislodged many communities, including the Shona, on their way to establishing their kingdom in present-day Zimbabwe under King Mzilikazi in 1834. [↑](#footnote-ref-102)
103. See Mamdani, M. 2001. “When victims become killers: Colonialism, nativism and the genocide in Rwanda”. Oxford: James Currey. [↑](#footnote-ref-103)
104. Supra note 94, p.100. [↑](#footnote-ref-104)
105. See article 7(1h) UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998. [↑](#footnote-ref-105)
106. Catholic Commission for Justice and Peace in Zimbabwe & Legal Resources Foundation Zimbabwe. 1997. *Breaking the Silence, Building True Peace: A Report on the Disturbances in Matabeleland and the Midlands, 1980 – 1988.* Harare: Catholic Commission for Justice and Peace in Zimbabwe, p.142. [↑](#footnote-ref-106)
107. For example, 200 men from Silobela were disappeared by the army in 1985 and were never seen alive again. To this day, their families still do not know what happened to them or where their remains are buried. See Article 19, “*Who wants to forget”? Truth and Access to Information about past Human Rights Violations. Available at* [*https://www.article19.org/data/files/pdfs/publications/freedom-of-information-truth-commissions.pdf*](https://www.article19.org/data/files/pdfs/publications/freedom-of-information-truth-commissions.pdf) [↑](#footnote-ref-107)
108. Supra note 90, p71. [↑](#footnote-ref-108)
109. Supra note 102, p.15. [↑](#footnote-ref-109)
110. Under Section 16 of the Constitution, titled ‘Freedom from Deprivation of Property’, no property was to be forcibly taken except under the authority of a law and if it was, adequate compensation would be paid. [↑](#footnote-ref-110)
111. Romero, S. 2007. Mass forced evictions and the human right to adequate housing in Zimbabwe. Northwestern Journal of International Human Rights, 5(2), p. 277. [↑](#footnote-ref-111)
112. Human Rights Watch. 2002. Fast track land reform in Zimbabwe. New York: Human Rights Watch. Available at <http://www.hrw.org/reports/2002/zimbabwe/> [↑](#footnote-ref-112)
113. Ibid. [↑](#footnote-ref-113)
114. Local Zimbabwean and international news media used words synonymous with violence to depict the events surrounding the fast track land reform programme. Interestingly, Lionel Cliffe et al argue that words such as ‘expropriation’, ‘occupation’, ‘invasion’, ‘seizure’, ‘confiscation’ and ‘take-over’ are partisan. See ‘An overview of Fast Track Land Reform in Zimbabwe: Editorial Introduction’, p. 913. Available at <http://www.tandfonline.com/doi/pdf/10.1080/03066150.2011.643387> [↑](#footnote-ref-114)
115. Human Rights Watch. 2002. Zimbabwe: Fast Track Land Reform in Zimbabwe. Human Rights Watch 14(1) A, p.2. Available at <http://www.hrw.org/reports/2002/zimbabwe/ZimLand0302.pdf> [↑](#footnote-ref-115)
116. Mamdani, M. 2008. ‘*Lessons of Zimbabwe*.’ London Review of Books, 30(23), pp 17-21. Available at <http://www.lrb.co.uk/v30/n23/mahmood-mamdani/lessons-of-zimbabwe> [↑](#footnote-ref-116)
117. Supra note 108, p. 913. [↑](#footnote-ref-117)
118. A Shona word meaning “violence” or “angry argument” [↑](#footnote-ref-118)
119. Supra note 108, p.914. [↑](#footnote-ref-119)
120. Ibid, p18-19. [↑](#footnote-ref-120)
121. Mamdani, M. supra note 112. [↑](#footnote-ref-121)
122. According to Bratton, M. 2014. Power politics in Zimbabwe. London: Lynne Rienner Publishers, p15, “the political settlements approach offers the possibility of understanding both the sources of political instability and the challenges of building enduring institutions”. [↑](#footnote-ref-122)
123. The ruling Zanu-PF party is embroiled in a bitter internal squabble over who will succeed the nonagenarian Robert Mugabe. [↑](#footnote-ref-123)
124. Nyakudya, M. 2013. ‘Sanctioning the Government of National Unity: A Review of Zimbabwe’s Relations with the West in the Framework of the Global Political Agreement, in Raftopoulos, B. (ed). The hard road to reform: The politics of Zimbabwe’s Global Political Agreement, Harare: Weaver Press, p.189. [↑](#footnote-ref-124)
125. For example, see Murambadoro, R. 2014. The politics of reconciliation in Zimbabwe: Three times failure – Will the fourth time count? Available at <http://forums.ssrc.org/kujenga-amani/2014/12/17/the-politics-of-reconciliation-in-zimbabwe-three-times-failure-will-the-fourth-time-count/#.VbEpSsoZ6kY> [↑](#footnote-ref-125)
126. Signed in London in 1979, the Agreement set out a timetable for elections and a new constitution and also the terms for the first seven years of independence in Zimbabwe. [↑](#footnote-ref-126)
127. Robert Mugabe, as new Prime minister, addressed the nation on 4 March 1980 extolling the virtues of forgiveness and reconciliation after 16 years of civil war. [↑](#footnote-ref-127)
128. Raftopoulos, B., 2004. Current politics in Zimbabwe: Confronting the crisis.. In: D. Harold-Barry, ed. *Zimbabwe: The Past is the Future..* Harare: Weaver Press, pp. 1-19. [↑](#footnote-ref-128)
129. Supra note 7, p.31. [↑](#footnote-ref-129)
130. Romero, S, supra note 35, p. [↑](#footnote-ref-130)
131. Raftopoulos, B, supra note 59, p. xiii. [↑](#footnote-ref-131)
132. In 1984, both Zanu and Zapu held their party congresses. Zanu Congress re-affirmed its commitment to the establishment of the one-party system of government while Zapu rejected the idea. See South African Institute of International Affairs, Background Briefing No. 27. Available at <http://dspace.africaportal.org/jspui/bitstream/123456789/33037/1/Zimbabwe%20-%20The%20One%20Party%20State%20Issue.pdf?1> [↑](#footnote-ref-132)
133. Bratton, M, Supra note 46, p55. [↑](#footnote-ref-133)
134. Ibid, p. 59. [↑](#footnote-ref-134)
135. See Moyo, K. 2015. “Timing and the implementation of Transitional Justice in Zimbabwe”. Available at <http://www.ntjwg.org/article.php?id=147> [↑](#footnote-ref-135)
136. Masunungure, E.V & Shumba, J.M. 2012. Zimbabwe, Mired in Transition, Harare: Weaver Press, p. xiv. [↑](#footnote-ref-136)
137. Raftopoulos, B. 2013. Introduction, in ‘The hard road to reform: The politics of Zimbabwe’s Global Political Agreement’, Harare: Weaver Press, pp xi & xii. [↑](#footnote-ref-137)
138. ‘Mutasa says MDC should have marched to State House in 2008’, *New Zimbabwe,* 26 June 2015. Available at <http://www.newzimbabwe.com/news-23300-MDC-T+won+the+2008+polls,+Mutasa/news.aspx> [↑](#footnote-ref-138)
139. Moyo, K. supra note 57. [↑](#footnote-ref-139)
140. Mail & Guardian. 2015. “*Whither Zimbabwe After Mugabe?”* Available at <http://mgafrica.com/article/2015-07-10-whither-zimbabwe-after-mugabe-it-could-all-go-badly-or-surprise-with-a-happy-ending-part2> [↑](#footnote-ref-140)
141. Bratton, M. Supra note 46, p.15. [↑](#footnote-ref-141)
142. Meredith, M. 2002. Mugabe: Power and Plunder in Zimbabwe. Oxford: Public Affairs. p.241. [↑](#footnote-ref-142)
143. Teitel, R.G. (2000). Transitional Justice, New York: Oxford University Press, p.3. [↑](#footnote-ref-143)
144. In its early days as sole opposition party, the MDC pursued both concepts to challenge the ruling Zanu-PF party. [↑](#footnote-ref-144)
145. Raftopoulos, B. supra note 59, p. xv. [↑](#footnote-ref-145)
146. Ibid, p.2. [↑](#footnote-ref-146)
147. Ibid, p.6. [↑](#footnote-ref-147)
148. [↑](#footnote-ref-148)
149. Widner, J & Scher, D. 2008. ‘Building judicial independence in Semi-Democracies: Uganda and Zimbabwe’, in Ginsburg, T & Moustafa, T (eds), Rule by law: The politics of courts in authoritarian regimes, New York: Cambridge University Press, p. [↑](#footnote-ref-149)
150. Zurn, M et al (eds). 2012. Rule of law Dynamics in an Era of International and Transnational Governance, New York: Cambridge University Press, p.22. [↑](#footnote-ref-150)
151. For example, the Zimbabwe Human Rights NGO Forum’s ‘Human Rights, Rule of Law & Democracy 2014 Annual Report makes more than one reference to the rule of law in its recommendations, calling on the government to; enforce the rule of law, align all laws with the constitution, observe the rule of law. Available at <http://www.hrforumzim.org/publications/human-rights-rule-of-law-democracy-2014-annual-report/> [↑](#footnote-ref-151)
152. Ibid, recommendation no.5, ‘Continue to underscore the importance of the rule of law to Zimbabwe’s long-term sustainable prosperity. As a gatekeeper of foreign direct investment, satisfactory progress to the IMF standards would potentially open up foreign direct investment.’ [↑](#footnote-ref-152)
153. Activists campaigning on the Matabeleland massacres have said they want to see perpetrators brought before a court of law. Also see Mambo, E. ‘Zimbabwe must return to the rule of law: EU Ambassador’, *The Zimbabwe Independent,* 11 September 2015. Available at <http://www.theindependent.co.zw/2015/09/11/zim-must-return-to-the-rule-of-law-eu-ambassador/> [↑](#footnote-ref-153)
154. Zimbabwe Human Rights NGO Forum, supra note 147. [↑](#footnote-ref-154)
155. Ben Freeth is a former landowner in Zimbabwe and describes himself as “a victim of Zimbabwe-style land reform”. He is also a leading campaigner for rule of law and property rights reform in Zimbabwe. See his argument ‘How to fight Zimbabwe-style land grabs’, *New Zimbabwe,* 21 March 2015. Available at <http://www.newzimbabwe.com/opinion-21366-How+to+fight+Zim-style+land+grabs/opinion.aspx>

     Also see Kwari, T. ‘Zimbabwe needs a new political culture’, *Zimbabwe Independent,* 29 May 2015. Available at <http://www.theindependent.co.zw/2015/05/29/zim-needs-a-new-political-culture/> [↑](#footnote-ref-155)
156. For example, see press release ‘President Mugabe comments undermining the independence of the judiciary in Zimbabwe condemned by IBAHRI’. Available at <http://www.ibanet.org/Article/Detail.aspx?ArticleUid=e8abed5a-b67d-4bfa-810f-a6c5e4b574a8> [↑](#footnote-ref-156)
157. Heupel, M. 2012. Rule of Law promotion through international organisations and NGOs, in Zurn, M et al (eds), Rule of Law dynamics in an era of international and transnational governance, New York: Cambridge University Press, p.135. [↑](#footnote-ref-157)
158. Widner, J & Scher, D. supra note 72, p.256. [↑](#footnote-ref-158)
159. Heupel, M. supra note 81, p.145. [↑](#footnote-ref-159)
160. See ‘German envoy insists on rule of law, economic reforms’, *New Zimbabwe,* 24 March 2015. Available at <http://www.newzimbabwe.com/news-21440-Germany+envoy+insists+on+rule+of+law/news.aspx> [↑](#footnote-ref-160)
161. Masunungure, E. 2004. Travails of opposition politics in Zimbabwe since independence, in Harold-Barry, D (ed), Zimbabwe: The past is the future; Re-thinking land, state and nation in the context of crisis, p.149. [↑](#footnote-ref-161)
162. Ibid, p.177. [↑](#footnote-ref-162)
163. The party’s slogan is “Guqula Izenzo, Chinja Maitiro” which loosely translates as ‘now is the time for change’. [↑](#footnote-ref-163)
164. Opposition parties in Zimbabwe have participated in every critical election since 2000, despite the violence that has accompanied those elections. [↑](#footnote-ref-164)
165. See Blair, D. ‘Tsvangirai calls for violent halt to Mugabe’s rule’, *The Telegraph,* 1 October 2000. Available at <http://www.telegraph.co.uk/news/worldnews/europe/1368494/Tsvangirai-calls-for-violent-halt-to-Mugabes-rule.html> Also see Chung, F. 2004. ‘Opportunities for political renewal in Zimbabwe, p. 243, in Harold-Barry, D. (ed), *Zimbabwe: The Past is the Future..* Harare: Weaver Press. [↑](#footnote-ref-165)
166. ‘Tsvangirai launches ‘No reforms, No elections’ rallies, *News Day,* 23 April 2015. Available at <https://www.newsday.co.zw/2015/04/23/tsvangirai-launches-no-reforms-no-elections-rallies/> [↑](#footnote-ref-166)
167. Carter, A. 2012. People power and political change: Key issues and concepts, Abingdon: Routledge, p.9. [↑](#footnote-ref-167)
168. Chitagu, T. ‘Mugabe to go this year – Tsvangirai’, *The Standard*, 26 April 2015. Available at <http://www.thestandard.co.zw/2015/04/26/mugabe-to-go-this-year-tsvangirai/> [↑](#footnote-ref-168)
169. Raftopoulos, B, supra note 137, p. xv. [↑](#footnote-ref-169)
170. Ndlovu-Gatsheni, S. (2012). *Elections in Zimbabwe: A recipe for tension or a remedy for reconciliation?* Wynberg: Institute for justice and Reconciliation, p.9. Available at <http://www.ijr.org.za/publications/pdfs/IJR%20Zimbabwe%20Elections%20OP%20WEB.pdf> [↑](#footnote-ref-170)
171. Moyo, K. supra note 57. [↑](#footnote-ref-171)
172. Art, D. 2006. The politics of the Nazi past in Germany and Austria, New York: Cambridge University Press, p.4. [↑](#footnote-ref-172)
173. Ranger, T. (2004. Nationalist historiography, Patriotic history and the history of the nation: The struggle over the past in Zimbabwe, *Journal of Southern African Studies,* 30(2), p.215. [↑](#footnote-ref-173)
174. Chitsike, K. 2012. Transitional options for Zimbabwe: A guide to key concepts, Wynberg: Institute for justice and Reconciliation, p.3. [↑](#footnote-ref-174)
175. Art, D. supra note 98, p.1. [↑](#footnote-ref-175)
176. Ibid, p.25. [↑](#footnote-ref-176)
177. For example in 2013 when the Zimbabwe Human Rights NGO Forum and other civil society groups met at a conference in Johannesburg to discuss “how to make Zimbabwe’s National Peace and Reconciliation Commission competent and effective”. See their report at <http://www.hrforumzim.org/wp-content/uploads/2014/07/ICTJ-II-Conference-Report.pdf> [↑](#footnote-ref-177)
178. Art, D. supra note 98, p.19. [↑](#footnote-ref-178)
179. See ‘NPRC delay a deliberate ploy to expire body’, *News Day,* 12 June 2015. Available at <https://www.newsday.co.zw/2015/06/12/nprc-delay-a-deliberate-ploy-to-expire-body/> [↑](#footnote-ref-179)
180. For a definition ,see Gready, P & Robins, S. 2014. From transitional to transformative justice: A new agenda for practice, *The International Journal of Transitional Justice*, 8(3), p.340. [↑](#footnote-ref-180)
181. See Eppel, S. 2014. ‘Bones in the forest’ in Matabeleland, Zimbabwe: Exhumations as a tool for transformation, *The International Journal of Transitional Justice*, 8(3), p.3. [↑](#footnote-ref-181)
182. Gready, P & Robins. Supra note 106. [↑](#footnote-ref-182)
183. Sikkink, K. 2011. Justice Cascade, cited in Jeffrey, R. 2014. Amnesties, Accountability, and Human Rights, Philadelphia: University of Pennsylvania Press, p.6. [↑](#footnote-ref-183)
184. According to Ruti Teitel, the first phase of transitional justice came after World War II and was about finding ways to hold Germany accountable for the Holocaust and other atrocities. See ‘Transitional Justice Genealogy’, 2003. *Harvard Human Rights Journal, 16,* p*.70.* [↑](#footnote-ref-184)
185. Boraine, A. 2006. Transitional Justice: A holistic interpretation, *Journal of International Affairs,* 60(1), pp 17-27. [↑](#footnote-ref-185)
186. Eppel, S & Raftopoulos, B. 2008. Developing a transformation agenda: Political crisis, Mediation and the Prospects for Transitional Justice in Zimbabwe, South Africa: Solidarity Peace Trust, p.5. [↑](#footnote-ref-186)
187. I call them “pre-transitional justice” to argue that they are preparatory in scope because Zimbabwe is still two steps before the term “transitional justice” can be applied - full national democratic transition and national debate. [↑](#footnote-ref-187)
188. Ncube, N. ‘RIGHTS-ZIMBABWE: Women call for Truth, Justice and Reconciliation’, *Inter Press Service*, 25 August 2015. Available at <http://www.ipsnews.net/2009/05/rights-zimbabwe-women-call-for-truth-justice-and-reconciliation/> [↑](#footnote-ref-188)
189. Mushava, E. ‘Compensate victims of human rights violations’, *News Day,* 24 July 2015. Available at <https://www.newsday.co.zw/2015/07/24/compensate-victims-of-human-rights-violations/> [↑](#footnote-ref-189)
190. Mallinder, L. 2007. Exploring the Practise of States in Introducing Amnesties: Study Submitted for the International Conference ‘Building a Future on Peace and Justice’, Nuremberg, 25-27 July, p.i. Available at <http://www.peace-justice-conference.info/download/WS4-Mallinder_NurembergStudy_070502.pdf> Accessed 27/08/2015. [↑](#footnote-ref-190)
191. Amnesty (General Pardon) Act, Ordinance 12/1980. Came into force on 21 March 1980. [↑](#footnote-ref-191)
192. Clemency order of 1988 (General Amnesty), General Notice 257A; Clemency Order of 1990, General Notice 424A; Clemency Order of 1995 and Clemency Order of 2000. [↑](#footnote-ref-192)
193. Bull, C. 2001. “Amnesty”, Interim Office, Commission for Reception, Truth and Reconciliation in East Timor, cited by Mallinder, L. supra note 187, p.9. [↑](#footnote-ref-193)
194. *New Zimbabwe,* ‘Activists reject survey claim that Matabeleland wants Gukurahundi killers pardoned’, 27 August 2015. Available at <http://www.newzimbabwe.com/news-24504-Gukurahundi+Activists+reject+pardon+claim/news.aspx> Accessed on 28 August 2015. [↑](#footnote-ref-194)
195. Jeffrey, R. 2014. Amnesties, Accountability, and Human Rights, Philadelphia: University of Pennsylvania Press, p.41. [↑](#footnote-ref-195)
196. Ibid. [↑](#footnote-ref-196)
197. Slyle, R.C. supra note 50. [↑](#footnote-ref-197)
198. Boraine, A. supra note 45, p14. [↑](#footnote-ref-198)
199. “We receive several cases of these people whose parents were killed during the [Matabeleland] massacres in this district and have no identification cards  but  there is no way we can help them. Government doesn’t recognise them.” Comment by officer in Registrar General Office. *Daily News. (2013)* Matabeleland’s No Vote. 13 March. Available from: <http://www.dailynews.co.zw/articles/2013/03/13/matabeleland-s-no-vote>. [Accessed 1 September 2015]. [↑](#footnote-ref-199)
200. *New Zimbabwe. (2015)* Police block Gukurahundi memorial. 24 January. Available from: <http://www.newzimbabwe.com/news-20124-Police+block+Gukurahundi+memorial/news.aspx> [Accessed 3 September2015]. [↑](#footnote-ref-200)
201. Daily News, supra note 197. [↑](#footnote-ref-201)
202. Snyder, J & Vinjamuri, L, supra note 25, p.6. [↑](#footnote-ref-202)
203. See Zimbabwe Human Rights NGO Forum, supra note 147. [↑](#footnote-ref-203)
204. This is in contravention of principles 1-10 of United Nations Basic Principles on the Independence of the Judiciary. [↑](#footnote-ref-204)
205. For examination of the notion of transition and whether it applies to Zimbabwe, see Masunungure, E.V & Shumba, J.M (eds). 2012. Zimbabwe: Mired in Transition, Harare: Weaver Press. [↑](#footnote-ref-205)
206. Amnesty in all but name. [↑](#footnote-ref-206)
207. Supra note 123. [↑](#footnote-ref-207)
208. Snyder, J & Vinjamuri, L. supra note 25, p. 7 contend that it is human rights groups that promote normative change. Author argues that government’s ritualistic use of amnesties is itself a form of norm-setting, though a negative one. [↑](#footnote-ref-208)
209. See *Zimbabwe Lawyers for Human Rights and Another v President of the Republic of Zimbabwe and Another* [2003] 311/99 (Supreme Court of Zimbabwe). Available at <http://www.zimlii.org/zw/judgment/supreme-court/2003/12> [Accessed 6 September 2015]. [↑](#footnote-ref-209)
210. See Zimbabwe NGO Human Rights Forum, (2015). *NGO Forum calls for truth on human rights violations*. [online] Available at: <http://www.crisiszimbabwe.org/advocacy/local-advocacy/item/1298-ngo-forum-calls-for-truth-on-human-rights-violations.html> [Accessed 6 Sep. 2015]. [↑](#footnote-ref-210)
211. The amnesty following the Matabeleland massacres is often credited with bringing an end to the atrocities and restored peace to the communities affected. [↑](#footnote-ref-211)
212. Mallinder, L. supra note 4, p.365. [↑](#footnote-ref-212)
213. Every amnesty enacted in Zimbabwe since 1980 has been by presidential decree. [↑](#footnote-ref-213)
214. Chigara, B. supra note 21, p.21-22. [↑](#footnote-ref-214)