
Varieties of justice

*In the search for a better future there are useful precedents for confronting the past, writes **Priscilla Hayner**. International law will be hard to defy.*

It is a mistake, in any country, to allow the past to deter or prevent change that would lead to a better future. But it would be no less mistaken to believe that events of today and yesterday will not fundamentally shape that future and the manner in which change takes place. The challenge and the aim of transitional justice is to encourage and strengthen a change – a transition – by finding reasonable and appropriate means to address the need for justice.

It is unclear what Zimbabwe's justice policies might become. A multitude of questions remain open, and will require a national debate and close scrutiny in order to find the right manner of addressing the past. The issues of accountability and responsibility for current and past human rights abuses, economic crimes and other trespasses are among the critical outstanding questions which will loom large in any transition.

Recent years have seen public institutions weakened and politically compromised. The judiciary, police and other security institutions need to be fundamentally reformed in order to build independent and fully functioning systems that can protect the rule of law. Luckily, Zimbabwe has a still recent history of independent and high quality institutions, and many talents to draw on.

Economic crimes will also have to be addressed, in the context of a quickly crumbling economy. The theft and destruction of property, severe economic hardship and deaths must hold a central place in any historical review, and in any national plan to come to terms honestly with the country's past.

In part because of the economic devastation, those now in power may well have two different worries in relation to any political change. The more obvious is the risk of being held to account. But, equally, many of those in positions of power are likely to depend on their current status for access to economic, health and other benefits. Some of these may be little more than basic, or sometimes lavish, perks. In other instances, the benefits may be life-saving. Political change that puts these advantages at risk will be strongly resisted.

Amnesty, from Charles Taylor to General Pinochet

Much concern or debate, though still not debated widely enough, is focused on whether President Robert Mugabe and others will, or should, receive an amnesty in order to facilitate a transition. Leaders of the opposition are not in agreement on this issue. Morgan Tsvangirai has said that he is willing to consider granting an amnesty in order to secure change. Arthur Mutambara, in contrast, has ruled out such an option and insists instead on a policy of “victim-based and restorative justice.”

It is not clear how far any proposed amnesty might extend beyond the president, although it is known that many people have been complicit in abuses at both policy and operational levels. Meanwhile, fear of prosecution is understood to be a significant impediment to securing a peaceful resolution in negotiations with President Mugabe and those around him. Some may think that the best way to avoid prosecution is to remain in office for as long as possible, and it is apparently for this reason that some opposition leaders have favoured the offer of amnesty.

The international standards that have taken shape in recent years limit the possibility for such an amnesty. Legal obligations and prohibitions, which have been incorporated into international law through court decisions, treaty development and common state practice – referred to as “customary international law” – are now considered applicable to every state.

The United Nations, for example, has taken a firm line since 1999 in insisting on respect for principles which outlaw blanket impunity for certain serious crimes. These include genocide, war crimes and crimes against humanity. In effect, crimes of this order are now considered to be international crimes, deserving of international protection and attention.

In the context of Zimbabwe, it has been argued that crimes against humanity have taken place in recent years, and most particularly during the violent campaign of repression in Matabeleland in the 1980s. Crimes against humanity are defined as serious abuses committed in a widespread or systematic manner. The political reality, however, is that opposition leaders and the national parliament of Zimbabwe are independent actors and they may wish to grant immunity to persons, or groups of persons, regardless of the standards set out in international law.

If such an amnesty were unconditional, two questions would arise. The first is how the international community would respond to such an arrangement. In some contexts, donor states and others have strongly opposed amnesties that have been proposed in peace deals, even suggesting that future aid would be contingent on the removal of such clauses. The second question, which would be of concern to any recipient of an amnesty, is whether in fact such a blanket immunity arrangement will stick.

Restrictions set out in national law may already prohibit immunities in the case of serious crimes. Most national constitutions promise citizens access to the courts, and thus a blanket amnesty that prevented judicial access for past crimes could be found to violate the constitution. In any case, national laws only apply nationally. It is legally impossible to award an amnesty that extends outside the borders of a country. Recent developments in international law make such an amnesty even less palatable, and thus potentially would put recipients at risk.

The case of former Liberian president Charles Taylor has caught the attention of actors in Zimbabwe and elsewhere. Taylor was granted exile to Nigeria in 2003, only to be arrested two and a half years later and brought to trial. However, this should be recognized as a reaction in part to Taylor's own violation of the agreement under which the asylum was granted. One of the primary conditions of Nigeria's offer was that he refrain from involvement in Liberian or regional political affairs. It was widely believed that Taylor continued to meddle, from Nigeria, in the political affairs of the region through cell phone contact, and supported by his access to cash. Taylor continued to be seen as a potential destabilizing force until his arrest, and Liberians reported a sense of national relief when he was detained and turned over to the Special Court for Sierra Leone. His trial, concerning alleged crimes that took place in Sierra Leone, is scheduled to begin in early 2008.

Unlike Liberia, there is currently no international or hybrid court that has jurisdiction over crimes in Zimbabwe. It is highly unlikely that a new court will be created. President Mugabe is viewed as a hero by many African leaders and there would probably be little political will within the region to prosecute him in the same way. Rather than looking to Liberia, the more relevant precedent for Zimbabwe might be found in Latin America.

In Chile, former president, Augusto Pinochet, lived freely for years after departing from office under the terms of a self-awarded amnesty. After some time, and with the

strengthened understanding of human rights principles, his amnesty was slowly stripped away. This first became evident with a legal challenge outside Chile. During a trip to London in 1998, Pinochet was detained and placed under house arrest at the request of a Spanish judge in Madrid.

Eventually, Pinochet was sent home rather than extradited to stand trial in Spain, due to concerns for his health. Back in Chile, he found his immunity weakened by a reinterpretation of the amnesty, as more robust courts became willing to act in human rights cases. This was not a case of a specialised international court pursuing a former head of state, but the result of a generalised strengthening of international human rights norms. The case of Pinochet demonstrates that restrictions on such norms may be challenged virtually anywhere, internationally or nationally.

Conditional and limited amnesties

Zimbabweans interested in receiving immunity could take the gamble. If national authorities decide to flout international standards on immunity, perpetrators of abuses can hope that a national amnesty would stand the test of time. Given the growing weight of international precedents, however, Zimbabwe might be smarter to stay within the law and accepted international parameters. These prohibit blanket and unconditional amnesty for international crimes, although it is not entirely clear what kind of judicial response and punishment are required. Again, Zimbabwe might look internationally, and especially to Latin America, for creative and appropriate responses that could be acceptable to all.

There are now many different types of amnesties. Stronger international standards and procedures have encouraged creative national responses which make every effort to stay within the bounds of international law. Many offer a process which differs from a strict legal regime of prosecutions.

A distinction should be made here between the potential conditionalities of amnesty versus the breadth of coverage: in other words, an amnesty might require certain actions on the part of the perpetrator, making it conditional – the amnesty could be revoked if such conditions are violated. Alternatively, whether conditional or not, an amnesty might explicitly exclude certain crimes, thus making it limited. Further, some amnesties are individualised, perhaps requiring an application process. Others, often referred to as “blanket” amnesties, cover a large group of people and are applied collectively.

In international law, the Geneva Conventions encourage amnesty for former combatants as long as serious international crimes are excluded. Amnesties that are conditional and individualised might be considered acceptable, depending on the nature and severity of the crimes covered.

The best known of these is the South African model, where perpetrators had to apply for amnesty for specific crimes, demonstrate that their crimes were politically-motivated, and fully disclose details of their crimes. Because the South African amnesty covered serious international crimes, experts disagree on whether this kind of amnesty regime would be seen to comply with international law in its current form.

More recently, more creative models of conditional arrangements have evolved whereby alternative or lesser sentences are offered which avoid amnesty *per se*. These go further than the South African model, requiring not only truth from the perpetrator, but also in some cases repayment of stolen assets – as in Colombia, or community service and apology – as in East Timor.

As I write, the most interesting experiment in conditional amnesty is taking place in Colombia. Persons responsible for serious crimes may receive considerably reduced sentences in exchange for disclosure of their crimes, cooperation with the peacemaking process and a contribution to victim reparations, among other requirements. While this has recently met legal challenges, it is an important case to watch carefully, as a testing ground for a scheme which provides incentives for perpetrators to cooperate with justice. Initially, at least, the Colombian arrangement has facilitated the demobilisation of an important government-aligned armed group.

A deep transition

Some legal and policy work on Zimbabwe in recent years has considered options for transitional justice. Many of the emerging recommendations have emphasized non-judicial approaches to justice, with a strong emphasis on rebuilding for the future. In particular, they have called for a truth inquiry, reparations for victims and fundamental reform of state institutions to prevent further abuse.

At a conference in Johannesburg in 2003, representatives of Zimbabwean civil society and international experts recommended a truth commission that would encourage disclosure from perpetrators. It also insisted that the inquiry extend to well before 1960.

Such a long historical view would be essential to take into account the abusive practices under white minority rule, and the legacy of this inequality which remains today. Such an inquiry would also need to consider the critical issue of land ownership.

A truth commission could also facilitate a deep transition in Zimbabwe. This approach to understanding and coming to terms with the past has become almost universally attractive, with over thirty such commissions operating to date in varied contexts around the world. Zimbabwe should be wary of too much influence from neighbouring South Africa, where the truth commission set up after apartheid was different in some important ways from those in other parts of the world.

“Because the South African amnesty covered serious international crimes, experts disagree on whether this kind of amnesty would be seen to comply with international law in its current form.”

Some aspects of the South African model resulted in significant frustrations on the part of victims and others. A robust process to respond to victims’ needs, in parallel to a truth commission, would address some of these frustrations. The experiences in Peru, East Timor, Morocco, Sierra Leone and the truth commission recently set up in Liberia are instructive.

To construct an appropriate transitional justice policy, and the right institutions to carry it out, one must first identify the principal needs and public desires. A formal statement of truth, but with continued denial by state authorities or those directly involved, might be of little value to victims. In some contexts, acknowledgement and apology carries greater emotional weight for survivors than spelling out the specific details of events. In other cases, family members of those killed are most interested in recovering the remains, or at least knowing where the bones are buried. Attempts to cover up or deny serious and widespread abuses, such as in Matabeleland in the 1980s, may demand special attention.

In order to identify priorities and give shape to these programmes, Zimbabwe should undertake a process of broad public consultation. For practical purposes, this probably means that the specific mechanisms of a new transitional justice policy should not be determined until a political transition is underway. Only then will there be space for such an open conversation.

A further consideration may be the need to ensure stability immediately after a change in power. The consultation process, and the concomitant delay in determining the finer points of policy, could provide vital breathing space. Such a process should be seen by Zimbabweans as one of healing and rebuilding, while avoiding any suggestion of impunity. Impunity is no basis on which to build the rule of law.

Zimbabwe's future will indeed be shaped by its past. That fact is true everywhere and would be hard to escape. Getting to the future – in particular a positive future, involving change and rebuilding – means grappling with this past, as difficult as that is, and confronting the depth of damage that has been done.

Priscilla Hayner *is co-founder of the International Centre for Transitional Justice and director of its programme on peace and justice in Geneva.*