

Interrogating the call for a truth - seeking enquiry by Zimbabwe's Parliament

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There have been calls for the establishment of a commission of enquiry into the violence that engulfed Zimbabwe around the ill - fated 29 March Harmonised Elections and the botched 27 June Run Off Presidential Run Off election. It is no longer news that there were serious and massive human rights violations largely state sponsored which led to deaths, torture, and violations on both men and women of a sexual nature among other violations. A motion for these investigations was officially moved in Parliament by Innocent Gonese, MP for Mutare Central in the MDC T faction.

In the past, numerous calls have been made before by human rights organisations, Zimbabweans and other interested stakeholders for such investigations to be carried. These calls have not been just for this epoch of violence but also for many others that have occurred in Zimbabwe's history. Whilst critical, this latest motion is interesting in a number of ways and raises a number of fundamental issues that will be pertinent if ever this exercise will see the light of the day. The first question that comes to the fore is on the time frame and specificity with which the call has been made. A call for an investigation into just this particular epoch would look almost foolhardy because it seems self - serving for the current MDC Parliamentarians. At face value and without any clear explanation it would look as if the other epochs of violence have been ignored for unspecified reasons. A truth seeking exercise of such a magnitude being called for by the MDC (assuming that the MDC T as a party agreed to this motion) is inherently vulnerable to politically imposed limitations as structure, sponsor, mandate, political support, financial or staff resources, access to information and political willingness. These issues will be discussed in this paper.

Judging from a positivist approach it would seem that propelling this motion would offer a unique opportunity for Zimbabwe to go through its past of human rights violations. This motion creates an expectation that 'a comprehensive truth' about the human rights violations attendant on the two 2008 elections will be known. Moreover,

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an expectation that the corollary retributive, restorative justices, rehabilitation, lustration, institutional reform and reconciliation will follow is also created for the many victims now in despair because of the culture of impunity in Zimbabwe.

Taking from the same positivist approach truth-seeking processes can contribute to the achievement of accountability. Truth seeking exercises can an important precursor to judicial action, working as an intermediate step for states not ready to endorse full-scale prosecutions such as Zimbabwe. As the commission of the Former Yugoslavia illustrates, the authoritative report of a truth seeking process can help muster the political will necessary for taking the next step toward bringing perpetrators to justice.² Rather than displacing or replacing justice in the courts, a commission may sometimes help contribute to accountability for perpetrators. Numerous truth commissions and truth - seeking processes pass their files on to the prosecuting authorities, and where there is a functioning judicial system, sufficient evidence, and sufficient political will, trials may result. The first well-known truth inquiry, Argentina's National Commission on the Disappeared, was popularly understood to be a preliminary step toward prosecutions that would follow, and indeed the information from this commission was critical to later trials. The unfortunate part is that Zimbabwe does not have any of these pre conditions in existence to support such justice initiatives.

Advocates of the truth seeking approach argue that truth-seeking processes are central to the promotion of reconciliation in divided societies such as Zimbabwe thereby healing wounds that trials and purges can deepen. It can as well be that for the family and friends of victims there can be no closure, no moving on and leaving the past behind, without knowing what happened to their loved ones. As a bereaved Uruguayan woman would confess, *"I am ready to forgive, but I need to know whom to forgive and for what"*.³

² See Security Council Resolution 827, U.N.SCOR, 48th Session 3217th Meeting, U.N. Doc. S/RES/827 (1993) (establishing Yugoslavia War Crimes Tribunal); S.C Res. 955, 49th Session 3453dmtg., U.N. Doc S/RES/955 (1994) (establishing Rwanda War Crimes Tribunal).

³ A Rigby, *Justice and Reconciliation After the Violence* (Boulder Co: Lynne Rinner Publishers 2001) at 8.

Perchance, seeking the truth about the electoral violence might help Zimbabwe in reforming in its state security institutions. A few commissions such as in El Salvador and South Africa have named names of wrongdoers, thus providing a moral sanction, at least. Other sanctions that might be instituted without a full trial, such as removing abusers from positions in security forces where they might do further harm have also been instituted in other countries.⁴

Just as much as criminal prosecutions can be used contentiously to produce a deterrent effect, truth-seeking mechanisms can have the same capacity. Truth seeking mechanisms are well positioned to evaluate the institutional responsibilities for extensive abuses, and to outline the weaknesses in the institutional structures or existing laws that should be changed to prevent abuses from re-occurring in the future. It is possible that a truth seeking exercise might help prevent future abuses simply by publishing an accurate record of past abuses, with the hope that a more knowledgeable citizenry will recognise and resist any sign of return to repressive rule.

However, I still need to be convinced that this exercise could be effective without a complete transition from ZANU PF rule to a more democratic dispensation whether through Government of National Unity or any other arrangement that does not have ZANU PF in unilateral control of the executive. At the risk of sounding very pessimistic, it seems impossible that ZANU PF would fully cooperate with a structure that would smear and delegitimize their party unless they had an antidote to the bad image bound to further worsen their international standing from the exercise. Zimbabwe has refused before to take heed of calls to institute enquiries from diverse bodies such as the United Nations Human Rights Committee to the African Commission and the Commonwealth. It would be interesting to see the same government accepting such calls now when it is standing on one foot in terms of legitimacy.

⁴ PB Hayner, *Unspeakable Truths: Facing the Challenges of Truth Commissions* (New York and London Routledge 2002) at 29. For a more detailed discussion of transitional justice mechanisms see CT Call, 'Is Transitional Justice Really Just', (2004) 11 *Brown Journal of World Affairs*, 101

However, there could be prudence in this motion if it were to be used as a way of testing the feasibility of launching a comprehensive future truth - seeking process in Zimbabwe by starting at a micro level (the two 2008 elections).

The stated reasons behind setting up a truth seeking process have differed between countries. For example, some stress national reconciliation and the need to close the book on the past. Others have framed it as a step toward prosecutions that will follow; yet others see an inquiry into the past as a means to distance the new government's policies from the former regime and to highlight new rights – respecting era.

Elin Skaar in work that talks to some of the problems associated with instituting justice and truth seeking mechanisms notes that the choice of instituting truth commissions (read as commission of enquiry in this case), trials or nothing for countries wanting to deal with past human rights violations,

‘depends on the relative strength of demands from the public and the outgoing regime, the choice tending towards trials as the outgoing regime becomes weaker and towards nothing as the outgoing regime becomes stronger, with truth commissions being the most likely outcome when the relative strength of the demands is roughly equal’.⁵

This assertion could help possibly explain why the MDC now wants to take this route to investigate violations that occurred prior to, during and soon after the two elections.

International obligations to holding human rights violators accountable

Despite all the criticism that about the feasibility of such a process in Zimbabwe, the call by the MDC to have this motion in Parliament is well meaning and well founded in international law and domestic fundamentals to justice and redress. The need to hold systematic human rights violators accountable is well established in international law. Article 2(3a) of the International Covenant on Civil and Political Rights

⁵ E Skaar, ‘Truth Commissions, Trials – or Nothing? Policy Options in Democratic Transitions’, (1999) 20 Third World Quarterly 1109, at 1110. See also RG Teitel, ‘Transitional Justice Genealogy’, (2003) 16 Harvard Human Rights Journal, 69. She argues for a theory that a close relationship exists between the type of justice pursued and the relevant limiting political conditions.

(ICCPR)⁶ obliges state parties to undertake to ensure that victims of human rights violations ‘*shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity.*’ The UN Human Rights Committee (HRC) - the interpreter of the ICCPR, has repeatedly held that Article 2(3) does not provide a right in individuals to force a state to investigate, and thereafter to prosecute any suspects who have been convincingly identified.⁷ However, the HRC has said that blanket amnesty laws and pardons are inconsistent with the ICCPR because they create “a climate of impunity” and deny the victims this right to a remedy”.⁸ The African Charter to which Zimbabwe acceded in 1989 recognises victims’ rights to redress and accountability. In its article 1, it enjoins states parties to ‘recognise the rights, duties and freedoms enshrined’ therein ‘and shall undertake to adopt legislative or other measures to give effect to them’.⁹ The African Charter proscribes a myriad of human rights violations and demands comprehensive remedies by the state party if any breaches are committed.

In addition to these specific purposes some observers argue that finding and making public the truth about abuses is an obligation of the state. Article 19 of the Universal Declaration of Human Rights¹⁰ considers that there is a right to know the truth, which is embedded within its “right to seek, receive and impart information”. The African Charter on Human and Peoples Rights¹¹ also cites the ‘right to receive information’. Human rights advocates also point to the ruling of the Inter American Court of Human Rights in the Velasquez Rodriguez¹², which concluded that the state has a duty to investigate the fate of the disappeared and disclose the information to relatives.

⁶ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.

⁷ For a comprehensive and incisive discussion of this matter see C Jalloh and A Marong, ‘Ending Impunity: The Case for War Crimes Trials in Liberia’, (2005) African Journal of Legal Studies 53 at 62 – 64.

⁸ Comments of the Human Rights Committee, Consideration of Reports submitted by States Parties under Article 40 of the Covenant, 10 UN. Doc. CCPR IC/79/Add.46 (1995).

⁹ The African Charter on Human and Peoples’ Rights (adopted 27 June 1981, entered into force 21 October 1986) 21 ILM 58 (Banjul Charter).

¹⁰ Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Resolution 217 A (III) (UDHR).

¹¹ Ibid, Banjul Charter supra note 36.

¹² Velasquez Rodriguez Case, Inter American Commission on Human Rights 35 at 166, OEA/ser. L/V/III.19, doc.13 (1998).

In international human rights law a state is obliged to carry out a number of tasks in response to past human rights abuses. Mendez reiterates that these tasks are first to investigate, prosecute, and punish the perpetrators. Secondly to disclose to the victims, their families, and society all that can be reliably established about those events. Thirdly to offer the victims adequate reparations. Lastly to separate known perpetrators from law enforcement bodies and other positions of authority.¹³

Mendez reiterates the position held in international law that the state's obligations to uphold human rights correspond to a set of rights for individuals and groups. The rights are outlined as follows: the right of the victim to see justice done, the right to know the truth; an entitlement to compensation and also to non monetary forms of restitution; and a right to new, reorganised and accountable institutions.¹⁴

Ensuring accountability through truth recovery.

Truth recovery represents one of the key approaches to justice. Aryeh Neier argues in defence of official enquiries that:

By knowing what happened, a nation is able to debate honestly why and how dreadful crimes came to be committed. To identify those responsible, and to show what they did, is to mark them with a public stigma that is a punishment in itself, and to identify the victims, and recall how they were tortured and killed, is a way of acknowledging their worth and dignity.¹⁵

Practical issues for consideration in Zimbabwe

The first issue that needs to be considered by the MDC T faction is being careful not to expose and further endanger the victims they claim to want to protect. It is trite to note that the moment this 'official' process will start, documents, statements and affidavits will be collected. It is almost a given that this information will be in the hands of government officials heavily controlled by ZANU PF who will keep the data. The information collected if not properly handled, can give away vital information to ZANU PF as to where their violence was most hard hitting. This has the potential of attracting more legal suits than are already in the court system now against the state, ZANU PF and even some sections of the MDC T faction especially.

¹³ JE Mendez, 'Accountability for Past Abuses' (1997) 19 Human Rights Quarterly 255 at 260.

¹⁴ See The Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violators of International Humanitarian Law (adopted 16 December 2005 UNGA 60th Session, Resolution 147 (A/Res/60/147))

It is a given as well that there will be more information than is available now on the perpetrators, levels of violence, motives and who was most responsible for the violence. This again has the potential of mapping violence trends for ZANU. The levels of the violence perpetrated by ZANU PF will also become very exposed and it is most likely that without any serious guarantees to non-recurrence victims documented through the proposed exercise will be met with more violence to silence them for good.

Questions of political will when handling the issue of setting up such a process are necessary and need probing. Without any political support for this body from ZANU PF, it is bound to fail. Infact, the imminent danger that can be foreseen now is that ZANU PF can set up whoever will get into that institution for failure by letting the processes go on and refuse to give the body much needed political clout and support. Furthermore, given the involvement of all the state security agents in the perpetration of violence during the elections, it would be important for the proposed body to enquire into the possible cooperation of such institutions before investigations start. There is a very high possibility that these state agents will resist such activities if there is no real threat to their guarantees from prosecution.

The almost moribund judiciary in Zimbabwe is already compromised and generally Zimbabweans do not trust it. Given this situation, it would be important to know well in advance the terms of reference and modus operandi for such a body in relation to the judiciary. It is clear that without clear guidelines and terms of reference, information gathered in such processes could be held to be inadmissible by the local courts. The courts could even find aspects of reports from such a process as naming names of perpetrators to be infringing on the perpetrators' rights and bar the release of such names. Thus, in the very process of uncovering a part of the truth and granting it the status of official, and authoritative record, the truth seeking exercise could serve to cover up other aspects of the truth. In the cases of the Latin American truth commissions, their official tasks prevented them from naming and identifying the actual individuals responsible for the abuses. From the perspective of the survivors, this meant that the perpetrators continued to enjoy impunity. Not only did they escape

¹⁵ A Neier, 'What Should Be Done About the Guilty?', (1990) 37 New York Review Books at 32.

any kind of judicial trial, but also they were not even required to acknowledge their shameful deeds. It is thus an unpleasant paradox that truth-seeking bodies can in fact cover up exactly those aspects of the past they might be expected to uncover. For this reason some observers have criticised the Latin American type of truth commission as a relatively cost free way to meet popular demands for an accounting, creating the impression that the past has been dealt with, so that people will be prepared to move on and face the future together.¹⁶

Moreover, there is no guarantee that even if the courts were to find perpetrators identified from this process guilty they would be incarcerated. It is folly looking at utterances from the violence that happened during the election periods when the police told victims to go and report their cases to Morgan Tsvangirai that the police, army and CIO would be arraigned before the courts or even by imprisoned by the police. Infact, it would be unimaginable that the same people who were responsible for the violence for a particular political cause as they want everyone rightly or wrongly to believe would then go on to investigate one of their own and take to prison. The exercise would also need to take into cognisance the fact that a number of victims who will be investigated already have their cases being heard in Zimbabwean courts. An interrogation into issues of dealing with court cases in the public and the implications for both victims and alleged perpetrators will have to be carried out. There is a real risk that the exercise could jeopardise cases that are already undergoing judicial processes at a local level.

A number of fundamental weaknesses in the Zimbabwean constitution also present serious challenges for such an exercise if ever it were to come to being. Examples that give clear precedent are available and the most vivid one is the Chihambakwe Commission report from the Gukurahundi Massacres. A number of issues emerge under this strand. Firstly, there is a real risk that President Mugabe could use his discretion to block the publishing of any findings of such an exercise for public consumption, which would defeat the whole exercise. Secondly, even if the report were to be made public, which is most unlikely under the current regime, the President could give the identified perpetrators amnesties and pardons thus

¹⁶ Ibid Rigby at 9 and CT Call supra note 4 at 105.

dampening any room for pursuing retributive and punitive justice for the perpetrators. Without any constitutional protection this exercise is bound to be a complete sham and an embarrassment for the MDC. There are a number of examples, so this must not be seen as feat that has been achieved by anyone because the victims from all these epochs are crying foul and would wonder what the strategic importance of investigating this epoch would be.

Culture of impunity in Zimbabwe

In terms of amnesties, Zimbabwe is littered with policies that have perpetuated impunity since the days of colonialism to the present day. The Indemnity and Compensation Act of 1975 sanctioned this tradition. The key provision of this Act was that ‘if any member of the security forces, defined as the army, the police, and the CIO, or if any civil servant or any minister of government, acting in good faith, committed a breach of the law and became liable criminally or civilly, no court of law could hold them accountable.’

As part of the Lancaster House agreement of 1979 that led to Zimbabwe's independence the Amnesty Ordinance (3) of 1979 and the Amnesty (General Pardon) Ordinance (12) of 1980 were legislated to grant an amnesty to all of those who had participated in the struggle for African self-determination or the defence of then-Rhodesia for any human rights violation they had committed such as killings, rape, assault or torture.

The culture of impunity originally conceived to deal with the human rights violations of the liberation war period, also became a driving force in the independence era. A Clemency Order of 1998 pardoned all violations committed by all parties between 1982 and the end of 1987 – thus obscuring the Matabeleland atrocities.

Clemency Order (1) of 1995, officially excused the politically-motivated beatings, burning of homes and intimidation perpetrated by supporters of ZANU-PF during the 1995 elections, by granting amnesty to those liable to criminal prosecution for or convicted of these crimes. This set a further precedent for yet another presidential pardon for political violence, Clemency Order (1) of 2000, which was declared after the violent June 2000 parliamentary elections. Once again, those involved in human

rights violations - such as kidnapping and torture, but excluding murder, rape and fraud could not be held accountable for criminal or civil claims through the justice system.

Further concerns

Another danger that must be borne in mind by the Parliament is that they must not re-traumatise and falsely raise hopes for victims who will not necessarily benefit in any real terms from the exercise. Whilst it is true, that victims care more about knowing the truth about what happened to them, it is important to know that the victims also require rehabilitation, restitution and compensation – issues which are more important especially now in the Zimbabwean scenario where nearly 75% of the country is faced with starvation and a general humanitarian crisis. This process cannot be one where there would be no remedies such as monetary compensation, restitution, repatriation, rehabilitation and institutional reform. This aspect is most critical because ZANU PF could well support rightly or wrongly the setting up of this body and exercise to help them manipulate the public perception of its tarnished image, in order to promote a more favourable view of the country's human rights policies and practices.¹⁷ The fact that investigations can be carried out does not necessarily mean that they will bring relief to victims and neither will that bring an end to the human rights violations. For instance, Zimbabwe still has a large number of undocumented internally displaced people that the government has failed to acknowledge. Therefore, this process should not be carried out if does not have all these safeguards in mind. The kind of restitution that will be given to victims needs to be established whether the government or perpetrators will do it. Perpetrators of violence in the period that needs to be investigated are well known to be young boys and men who do not necessarily have anything on them except their tattered shorts and party t - shirts. If someone lost his or her chickens and goats and the perpetrator cannot afford to pay back what would happen. Would it mean that the perpetrator would go to prison and then the victim would demand better food, medication and clothing from taxpayers money whilst the government withheld those same amenities from the victims.

¹⁷ PB Hayner 'Fifteen Truth Commissions – 1974 to 1994: A Comparative Study' (1994) 16 Human Rights Quarterly 597 at 608.

Other questions that would beg answers would be on the composition of the body. The Parliament would need to interrogate whether the exercise would consist of members from both parties or would it seek neutrals from the international or domestic community to do the work on their behalf. This question is pertinent in the sense that because of the polarisation and allegations of the involvement of both parties in the violence this might not go down well with victims and the carrying out of a fool proof research and documentation process.

Moreover, the process would need to be able to define clearly what it seeks to do and achieve by carrying out the exercise. It would be folly for such a body to argue that it needs information on the violence for posterity purposes. This information is already available and has been meticulously recorded and reported by a number of human rights organisations without and within Zimbabwe. The Election Monitoring bodies that were in the country during the two elections have this information just as much as most United Nations, Southern African Development Community (SADC), The European Union (EU) and the African Union AU. Thus the proposed exercise should only carry out the investigations if the reasons are to obtain prosecutions, and trying to establish the truth about command responsibility, to hold to account the most responsible and to gather information that is still not yet in the public domain. Parliament cannot do this without consulting their constituents. Thus again there is serious need for Parliamentarians to consult with civics and their constituents on what information remains missing and how they want the violations addressed.

If the investigative exercise were to take off, the body mandated to do so would specify whether they would be investigating all perpetrators including the so called foot soldiers in our case ‘the green bombers’ etc or would it be looking into the activities of the instigators, planners, funders and or those who sent commands or did not do anything to stop the mayhem when they had the power to do so. The types of violations to be investigated would still need to be established. Would the body investigate torture cases, rapes, assault, violations against women and children and would the investigators also have the necessary expertise and moral standing to carry out the exercise.

This exercise presents an opportunity for the whole world to know what happened in Zimbabwe during the 2008 elections. However, this only presents other questions on whether this body would be supported by the judiciary and state to subpoena alleged perpetrators to testify. For instance, Zimbabwean law is quite clear that the President cannot under the law be summoned to any court and neither would he under normal circumstances allow that to happen to him. So if there are no guarantees that his body would be fully protected by law then it does not make sense for the MDC to want to embark on a futile exercise that would further endanger victims, cause fatigue through more interviews and give false hopes for justice to these victims.

The modalities of operation for the exercise would need to be established and known by all stakeholders, which would mean the whole nation. For instance, the public would need to know if the body would carry out a public consultation process or a private process that would be on a one on one basis with the body and the victims. More importantly, this body would need to take into cognisance the gendered dimensions of human rights violations and its effects. Furthermore, this body would need to be clear on how to conduct its exercise of interviewing women victims, rape victims and children scarred by the violence. There is also a serious need to be clear on how to deal with structural violence such as the withholding of food, medication by doctors, and other such violations and measure how they contributed to the physical violence that was attendant on the two ill - fated elections.

The other question is on whether the MDC would be ready to accept liability for any violations alleged to have been perpetrated by their own for example the allegations against some of their MPS, which are in court at the present moment. Or would they argue that the violations were really defensive attacks and would require amnesty and to be treated differently or as the ANC would say that 'the struggle cannot be criminalised' and what implications this would have on ZANU PF perpetrators who also argue that they act in defence of sovereignty, land and against imperialism.

The involvement of civil society groups in the setting up of such a body is most critical. Civics and other Zimbabwean citizens have cried foul not necessarily about the content of these activities but about processes that lead to the creation of such bodies. The MDC needs to be careful not to walk on ground that ZANU PF has

treaded before by choosing not to consult civics. It would be foolhardy for them to think that they can walk the road to the recovery of truth and healing of victims on their own. The MDC need not be reminded that civil society organisations are the repositories of most of the information on human rights violations and take care of the same constituents that the MDC and even ZANU PF boat are theirs. Thus they still need to be consulted.

The call for the establishment of such an exercise is long overdue even for the whole history of Zimbabwe as has already been done by the call for a comprehensive exercise through a Truth, Justice and Reconciliation Commissions at a Symposium on Justice in Zimbabwe held in Johannesburg in 2003¹⁸. However, the conditions for doing such must be right. At times it is difficult to know when the time is ripe to institute such exercises but at least some considerations as the ones discussed in this paper have to be taken into consideration before a bulldozing act that will have Zimbabwe undergoing such a process would be enacted. If the MDC or Parliament cannot get it right the first time then they should not do it at all until the time and conditions permit. A number of demands from the Zimbabwe Human Rights Forum might be instructive in guiding how those calling for such truth seeking exercises, transitional justice or what forms of justice might want to go through the processes. The Forum has called among other things for no amnesties on crimes against humanity, torture, rape, no guarantees of job security for those found liable for human rights violations.

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¹⁸ Declaration of the Johannesburg Symposium, August 2003, in Civil Society and Justice in Zimbabwe Summary of Proceedings of a Symposium held in Johannesburg 11 – 13 August 2003. <http://www.santep.co.za/satz/zim2003.htm>