

“WHO WANTS TO FORGET?”

Truth and Access to Information about past Human Rights Violations

“When considering the question *should we remember?* it is very important to firstly ask, has any victim forgotten? Could they ever forget? Secondly we should ask, who wants to forget? Who benefits when all the atrocities stay silent in the past?”

(Roberto Cabrera – Guatemalan human rights activist)

ARTICLE 19

The Global Campaign for Free Expression

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Introduction

In 1993 ARTICLE 19 published a report entitled *Malawi's Past: The Right to Truth*. It was a response to a call by relatives of victims of political killings for a full investigation into what happened. ARTICLE 19 argued at that time that Article 19 of the Universal Declaration of Human Rights, in its guarantee of access to information, included the right to facts about past human rights violations.¹

This report revisits that theme – it also revisits the country, Malawi, and several others in Southern Africa. As it happens, the case that prompted the 1993 report was the subject of a judicial commission of inquiry set up by Malawi's new democratic government in 1994 and then by (unsuccessful) criminal prosecutions. However, there was no generalized investigation of human rights violations under the ousted Banda regime – whether in the form of a truth commission or by some other means. In our 1993 report there was an unwritten assumption that the only (or anyway the best) means of getting at the facts in such a situation was an official commission of inquiry, or truth commission. Since 1993 there has, of course, been the largest ever systematic investigation of past human rights abuses, the South African Truth and Reconciliation Commission (TRC).

Seven years on, we continue to believe that the “right to truth” about past human rights violations derives from the more general right of access to information. This applies particularly strongly in situations where past violations have been on a massive and systematic scale. Although it is an independent right, it can also play an important role in assisting in the realization of other rights. However, the existence of this right in international law does not presuppose any particular means of exercising it.

¹ Article 19 states: “Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.”

A truth commission need not be the only way of accessing the truth about large-scale abuses. This is important to recognize because in many transitions out of internal conflict, or towards more democratic systems of governance, there is no truth commission. Yet this does not make the individual and collective need for information about the past any less pressing. A full and systematic official commission of inquiry may in most cases be the most effective solution. However, none of the three countries discussed as case studies in this report saw the establishment of a truth commission. Yet in Malawi, Zimbabwe and Namibia there has been a whole range of other types of initiative, many emanating from civil society. When these three case studies are considered alongside South Africa, a massive range of possibilities emerge for how to excavate the past, both literally and figuratively: commission of inquiry, media investigations, non-governmental investigations, criminal prosecutions, other types of court proceedings, reburials and the creation of memorials, academic study, literary work and museums.

The purpose of this report is twofold. Firstly, it aims to emphasize that the right to information about past human rights violations remains fundamental. This point is aimed at Government and those in authority who have an obligation to ensure that citizens are able to gain access to relevant information. Secondly, it seeks to survey the wide range of means whereby this can be achieved. This is aimed at those active in civil society – as well as funding agencies who might support these activities – to stress the variety of means that they can employ to help the people exercise that right.

The first chapter seeks to elaborate the foundation basis in international law of the “right to truth”. The following three chapters explore the efforts that have been made to realize this right in Malawi, Zimbabwe and Namibia in the absence of an official commission of inquiry or truth commission. These case studies illustrate both the problems that have arisen out of the governments’ failure to initiate full investigations into past human rights violations, but also the partial successes that have resulted from other types of initiative, especially within civil society. The final chapter summarizes the variety of means of investigating the past, drawing on examples not only from Malawi, Zimbabwe and Namibia, but also from South Africa (where the TRC has been accompanied by a whole range of other methods of looking at the past) and from other parts of the world, including Europe and Latin America.

1. Truth and the Right to Know

Mrs Chiyangwa² lives in Chitsungo, a village in the Zambezi valley of northern Zimbabwe. She wanted to tell ARTICLE 19 about events that had taken place more than 20 years earlier.

In 1979, at the height of the liberation war, the Zambezi valley was on the front line – infiltrated by guerrillas from across the border in Zambia and Mozambique and garrisoned by the Rhodesian army. There was a military strongpoint or “keep” in Chitsungo. Mrs Chiyangwa was required to report to the army every day because she was suspected (correctly) of feeding the ZANLA guerrillas. On one occasion she was taken into the “keep” and tortured.

One day Mrs Chiyangwa did not report to the soldiers and they came looking for her at her home. They saw a woman in the fields, apparently hiding from them and they shot her dead. It was not Mrs Chiyangwa, but her mother-in-law. Then the soldiers destroyed the home.

A few months later ZANU (PF)³, the party that Mrs Chiyangwa supported, won Zimbabwe’s first democratic elections and Robert Mugabe became Prime Minister. He stated publicly – and movingly – his wish to reconcile with the white population. The Lancaster House agreement that provided for independence contained an amnesty for crimes committed in the course of the war.

Ken Flower, the head of the Rhodesian Central Intelligence Organization (CIO), tells how Mugabe summoned him. He went in trepidation, knowing that the CIO had tried to assassinate the new Prime Minister in the course of the election campaign. But he was well received and was asked to stay on as head of the CIO. Mugabe assured him that he wanted to “draw a line through the past”.⁴

The question, of course, is whether Mugabe was entitled to draw that line without first consulting Mrs Chiyangwa. Hers is at the same time a personal tragedy and a commonplace of a country at war. What is so striking about her story is that two

² Not her real name.

³ Zimbabwe African National Union (Patriotic Front).

⁴ Ken Flower, *Serving Secretly: A Intelligence Chief on Record* (London, 1987).

decades on it has not been resolved. She still keeps the detritus of her wrecked home: the useless furniture and pots and pans. She keeps them because she still harbours the hope that one day two things will happen: she will learn who was responsible for the crimes against her family and she will receive some form of reparation for them.

ARTICLE 19 chose Zimbabwe as one of the case studies for this report because of the unresolved history of human rights abuse in Matabeleland. In the mid-1980s thousands of villagers were massacred by the army – under the orders of the ZANU (PF) government that remains in power today – for allegedly supporting armed insurgents. The accusation was almost always false, but is in any case irrelevant. The search for truth and justice by the people of Matabeleland has been a lonely one, almost without acknowledgement from the authorities. Given the politics of the Matabeleland killings, that is not surprising, despite the fact that Mrs Chiyangwa and many other liberation war victims are the natural constituency of the ZANU (PF) government.

When she spoke to ARTICLE 19, Mrs Chiyangwa was still a supporter of ZANU (PF), although a disillusioned one. One of the particular grievances she has relates to the payouts the government has made to liberation war veterans; in the case of some highly placed veterans these payments were very large. The general who commanded the Fifth Brigade in Matabeleland, for example, was found to suffer from 50 per cent disability, which entitled him to tens of thousands of Zimbabwean dollars in compensation. Government ministers and other high-ranking officials have received similar payments, Mrs Chiyangwa has received nothing, because she was not a combatant.

ARTICLE 19 is only indirectly concerned in this report with the question of justice, including forms of financial reparation. The organization's principal concern here is the right of victims of human rights violations – including the relatives of the dead – to information about what has happened to them. The question of information about past human rights violations is frequently discussed these days, but not usually in the context of freedom of information.

Information about past violations is usually seen from a number of perspectives:

- Bringing the perpetrators of human rights violations to justice;
- Bringing about reconciliation or resolving conflict between different groups;

- Providing compensation or restitution for the victims of human rights violations;
- Providing public acknowledgement of the suffering of victims of human rights abuses.

Information about past violations can indeed assist struggles for justice and reparation and promote efforts at national reconciliation. How far it does so will depend on the circumstances in any given country where truth, justice and reconciliation issues are prominent. In turn, justice-focused and reconciliation processes may themselves help to uncover the truth about past violations. For example, an investigation through the criminal justice system may uncover facts about abuses. However, important as these considerations are, the right to information about past violations has independent standing in international law.

In 1993, ARTICLE 19 published a report entitled *Malawi's Past: The Right to Truth*. As far as ARTICLE 19 was concerned at the time, the term “right to truth” was a new coinage, although it turned out that Guatemalan human rights activists were arguing along very similar lines at the same time. The argument of that report was that victims of human rights violations had a “right to truth” that was guaranteed under Article 19 of the Universal Declaration of Human Rights. The past seven years have strengthened our conviction that the “right to seek, receive and impart information” contained in that article, long recognized as crucial in the promotion of democratic accountability and participation, also places an obligation upon governments to facilitate the uncovering of information about past human rights violations. This obligation applies particularly strongly where violations have occurred on a massive, systematic scale and entire societies need to come to terms with the past. Importantly, given the focus in this report on non-official strategies for investigating the past, it also requires governments not just to establish their own means of establishing the truth about past violations, but to co-operate with civil society initiatives to the same end.

In sum, the “right to truth” about past human rights violations is an important aspect of the public’s wider right to know. A 1997 report by the French expert Louis Joinet to the United Nations Sub-Commission on the Prevention of Discrimination and Protection of Minorities includes an important definition of the right to know in this context:

This is not simply the right of any individual victim or closely related persons to know what happened, a right to the truth. The right to know is also a collective right, drawing upon history to prevent violations from recurring in the future. Its corollary is a “duty to remember”, which the State must assume, in order to guard against the perversions of history that go under the names of revisionism or negationism; the knowledge of the oppression it has lived through is part of a people’s national heritage and as such must be preserved. These then, are the main objectives of the right to know as a collective right.⁵

The right to know is not absolute. It is limited by the same exceptions that apply to the right of expression more generally under Article 19 of the International Covenant on Civil and Political Rights. Framed in general terms it also does not mean that governments are required to provide every individual with any item of information. For example, considerations of privacy will sometimes come into play. But any restrictions on the right of expression, including freedom of information, should be clearly and narrowly drawn and subject to strict “harm” and “public interest” tests. There should be a clear presumption in favour of the right to information about serious human rights violations and the onus should be on the authorities to justify a refusal to make information available on request.

A growing body of international and comparative jurisprudence confirms this obligation on governments to provide the public with certain types of information. Particularly important is a recent European case where the authorities were found to be under a positive obligation to produce certain environmental information that would have allowed residents to assess the risk of living in the shadow of a factory.⁶ The European Court did not, in fact make this finding under Article 10 of the

⁵ United Nations, Economic and Social Council, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, *The Administration of Justice and the Human Rights of Detainees; Question of the impunity of perpetrators of human rights violations (civil and political)*, Revised final report prepared by Mr. Joinet pursuant to Sub-Commission decision 1996/119, E/CN.4/Sub.2/1997/20/Rev.

European Convention on Human Rights (dealing with freedom of expression) but under Article 8 (respect for private and family life). Nonetheless, the European Court has decided that the obligation has a basis in law.

The African Commission for Human and Peoples' Rights found in 1998 that the expulsion of two Malawians from Zambia for political reasons was a breach of their right to freedom of expression, but also added:

To the extent that neither Banda nor Chinula were supplied with reasons for the action taken against them means that the right to receive information was denied to them (Article 9(1)).⁷

Principle 2 of ARTICLE 19's *The Public's Right to Know: Principles on Freedom of Information Legislation*, which have been endorsed by both the UN Special Rapporteur on Freedom of Opinion and Expression and the OAS Special Rapporteur on Freedom of Expression, states:

Freedom of Information implies not only that public bodies accede to requests for information but also that they publish and disseminate widely documents of significant public interest, subject only to reasonable limits based on resources and capacity. Which information should be published will depend on the public body concerned. The law should establish both a general obligation to publish and key categories of information that must be published.⁸

Finally, the UN Special Rapporteur has written:

The Special Rapporteur wishes to emphasize in this report, therefore, his continuing concern about the tendency of Governments, and the institutions of Government, to withhold from the people information that is rightly theirs in that the decisions of Governments, and the implementation of policies by public institutions, have a direct and

⁶ *Guerra and Ors v. Italy*, 19 February 1998 (ECHR).

⁷ *Amnesty International (on behalf of Banda and Chinula) v. Zambia* ACHPR, Communication 212/98, para. 33.

⁸ ARTICLE 19, *The Public's Right to Know: Principles on Freedom of Information Legislation* (London, June 1999).

often immediate impact on their lives and may not be undertaken without their informed consent.⁹

The argument that people are entitled to information about past violations does not derive solely from international human rights law. This is how one Irish human rights activist put it:

The question, should we remember, is usually asked by people who have a choice. For many of the people in Northern Ireland, however, as in South Africa and Guatemala and elsewhere, there is no choice about remembering. Many of those who have been traumatically affected by armed conflict wake up in the night with nightmares. Every time they pass a particular street or place, they remember the dreadful event that took place there. When the calendar moves towards certain dates, anniversaries of deaths or losses, the memories come flooding back uninvited. Remembering is not an option – it is a daily torture, a voice inside the head that has no “on/off” switch and no volume control”.¹⁰

And a Guatemalan activist underlines the point:

When considering the question should we remember? It is very important to firstly ask, has any victim forgotten? Could they ever forget? Secondly we should ask, who wants to forget? Who benefits when all the atrocities stay silent in the past?¹¹

The second point is extremely important because it again emphasizes that the argument in favour of disclosing the truth about past human rights violations is no different in essence from the broader argument in favour of freedom of information. Information should be routinely available to the public so that they can hold those in power to account for their actions. This clearly applies to, for example, the working of government committees. Surely it applies *a fortiori* to the commissioning and

⁹ *Report of the Special Rapporteur on the protection and promotion of the right to freedom of opinion and expression, Mr. Abid Hussain*, UN Doc. E/CN.4/2000/63, 18 January 2000, para 43.

¹⁰ Marie Smyth, “Remembering in Northern Ireland: Victims, Perpetrators and Hierarchies of Pain and Responsibility”, in Brandon Hamber (ed.), *Past Imperfect: Dealing with the Past in Northern Ireland and Societies in Transition*, (Derry/Londonderry, 1998) p.32.

¹¹ Robert Cabrera, “Should We Remember? Recovering Historical Memory in Guatemala”, *Ibid*, p.27.

execution of gross human rights violations. But as we shall see in the case studies, such arguments are still far from universally accepted or understood by governments and foreign donors.

2. Malawi

If the mechanism of a commission of inquiry is most appropriate in a society whose history was based on concealment, then Malawi should have been a prime candidate.

For 30 years, from 1964 to 1994, Malawi was ruled by Dr Hastings Kamuzu Banda and his Malawi Congress Party (MCP) as a one-party state. Malawi has one of the

most elaborate systems of formal censorship in Africa, buttressed by the widespread use of informers. The formal repressive apparatus of the state was reinforced by semi-formal or informal mechanisms, such as the Malawi Young Pioneers, an armed pro-Banda militia, the party Youth League and the *nyau* dance cult. At different stages, thousands of Malawians were imprisoned without trial – not necessarily for overt political opposition, but often for slight and inadvertent deviation from accepted political and social norms.

The exercise of these powers was whimsical and might even be considered amusing – had the human consequences not been so awful. A case that summarizes the plight of Malawians under Banda occurred in 1985. Mama Cecilia Tamanda Kadzamira, the “Official Hostess”, addressed a United Nations conference on women and development. In the course of her speech she said the words “Man cannot live with a woman” – a banal sentiment that was duly reported by the official media (there were no other) and plastered over the next day’s newspaper.

The problem was that by the next day Mama Kadzamira had decided that she did not say this. It therefore followed that she must have been misreported. The editor of the *Daily Times* and two journalists from the Malawi News Agency were thus detained without trial for a year for misrepresenting the Official Hostess’s words, joined for several weeks by a presenter from the Malawi Broadcasting Corporation who had the temerity to protest.

The power of official censorship was total: if slavish apparatchiks from the official media could be jailed for inadvertently accurate reporting, the dangers in uncovering the worst crimes of the dictatorship were too great. The result was that while all Malawians knew the immediate danger that they faced – hence the culture of silence – no one knew the broader picture. Those who dared might refer to political opponents of the MCP being “meat for crocodiles” – a phrase used by Banda himself – but no one truly knew the extent of the regime’s crimes.

When the end of the MCP regime arrived in 1994 it was quicker than most expected. Throughout the 1980s, the government had received various external shocks, in particular a massive influx of Mozambican refugees and a steady economic decline. By the end of the decade the first signs of popular protest began to emerge. By 1992 these gathered pace with backing from three important sources: the Malawian churches, a significant number of disgruntled MCP politicians, especially from the Southern Region, and a number of Western governments. While the Cold War was on and the *apartheid* regime in South Africa was battling against the communist onslaught, Dr Banda received generous Western backing. Now he was dispensable. He was a Presbyterian church elder and a *soi disant* moralist, so the churches had always been enthusiastic in their support for him. Southern Region politicians saw Dr Banda as favouring his own Central Region – a common popular perception that mobilized mass opposition in the North and South. But the point was that while ordinary Malawians had a considerable appetite for information about abuses, this was not shared by any of these three allies. The leaders of the new United Democratic Front government (almost all ex-MCP figures) were highly selective in which violations should be investigated. The Western diplomats and donors stressed the need to be forward looking, so that no one would look backwards at the role that they had played. The churches, with some honorable exceptions, stressed reconciliation rather than truth. Thus in a short time the head of the Council of Churches' human rights desk was able to make a seamless transition to chairman of the Censorship Board.

However, fact-finding was promised. Much interest in both the public and political spheres centered on the so-called Mwanza case. In 1983, the secretary-general of the MCP, two government ministers and a member of parliament died in what was officially described as a "car accident" near Mwanza in the Southern Region. Official explanations were confusing, but the gist was that their car crashed when they were fleeing the country. No one believed the explanation and some Malawians even began grimly to talk about the dangers of being "accidentalised". In fact, during an earlier period many hundreds of Malawians had been killed by the Young Pioneers and others, many of them Jehovah's Witnesses. In part the significance of the Mwanza case was that no one was immune. For the new leaders of the UDF the case was important because it was one of the factors leading many of them to become

disillusioned with the MCP. The thirst for truth by the relatives of the Mwanza dead was movingly expressed in 1993:

For ten years we have been distressed by the mystery of the deaths of people we loved dearly. For ten years we have been under constant fear of the Malawi police and the MCP political system. For ten years we have been under police surveillance. For ten years we have been made to feel that we are still alive and enjoying the (sour) “fruits of independence” because of the benevolence of the president. As we commemorate the tenth anniversary of the demise of the four deceased persons, we have resolved that we can no longer allow this state of affairs to continue. It is now the time for us to exercise our inalienable, undeniable and unquestionable rights to know the truth and we believe no one can blame us.¹²

At this stage, before the first democratic elections had taken place, some leaders of the UDF were promising that there would be a thorough investigation of the past through the medium of a truth commission. The sentiment of the Mwanza relatives that there was a “right to know the truth” was widely held. An overwhelming majority of Malawians had been victims of the MCP system in one way or another.

In May 1994 the UDF won presidential and parliamentary elections. There were high hopes that a full investigation of past human rights violations might still take place. In the event, the families of the Mwanza four were to gain some satisfaction, but this was not the case for other victims. President Bakili Muluzi announced the formation of a commission of inquiry, chaired by Justice H M Mtegha of the High Court.

The commission heard detailed testimony about the actual murder of four men – how they were dragged from their car and bludgeoned to death. But who exactly gave the orders was rather less clear: two of the key witnesses in the chain of command, the Inspector General of Police, Macmillan Kamwana, and the Secretary to the President and Cabinet, John Ngwiri, were dead. The effect of their absence was that there was no one to point the finger where everyone assumed the ultimate guilt lay: with Dr Banda himself and John Tembo, the uncle of Mama Kadzamira and the effective day-to-day ruler of Malawi. In the absence of hard evidence, the commission of inquiry nevertheless concluded that Banda and Tembo gave orders for the murders. The assumption was that in such a highly centralized and authoritarian society, it would

¹² Statement circulated by the relatives of the Mwanza dead, 16 August 1993.

have been impossible for the police to murder cabinet ministers without the authority of Banda, or at least Tembo.

As a consequence of the Mtegha commission findings, Banda and Tembo were charged with murder. Their subsequent acquittal does not in itself mean that they were not responsible: the standard of proof in a criminal trial is rightly more exacting than in a commission of inquiry. The missing links in the prosecution evidence proved crucial. Yet the MCO, not surprisingly, took the court verdict as a vindication of its leaders.

There is no doubt that the government's position would have been much stronger if it had launched an investigation with a wider remit than just the Mwanza case. It would not have made any difference to the outcome of a criminal prosecution, but if an inquiry had come up with convincing evidence of a whole range of political murders where Banda and Tembo were culpable, then the logic of the Mtegha commission in the Mwanza case would have been more compelling. For example, hundreds of Jehovah's Witnesses were murdered by the Malawi Young Pioneers on Banda's *public* orders in the late 1960s and early 1970s. However, the commander of the Young Pioneers was Aleke Banda, the secretary general of the MCP and by then Finance Minister in the UDF government. President Muluzi himself had also been secretary general of the MCP, so the prospects of a broad-ranging inquiry that might potentially implicate members of the new government were never high. However matters were not helped by the refusal of aid donors to fund a "truth commission" or any other form of investigation of the past.

Whether through a lingering sympathy for Banda, a reluctance to have their own misdeeds uncovered, or simply a failure to see the relevance of such an investigation, the donors stymied the possibility of the past being uncovered. Foreign donors effectively exercised a veto over the government budget and could have exercised strong pressure in favour of an investigation if they had chosen to. But they did not.

Nevertheless, the Mtegha commission transcript, which was published in its entirety, provides a fascinating insight into the governance of a one-party state – right down to the publisher of the *Daily Times* recounting how John Tembo, the effective head of government, dictated the newspaper's leader columns. It presented a great opportunity

for a much more comprehensive excavation of the past. There was certainly the appetite and the need for such an investigation. One of the new independent newspapers, *The Monitor*, began a series on the history of Malawi, which was enthusiastically received. Under Banda any political or historical works that reflected badly upon the “Life-President” were banned by the Censorship Board. Historians Leroy Vail and Landeg White (whose own work was banned) related this telling incident:

During the show trial of Orton and Vera Chirwa in 1984, when Vera Chirwa began her testimony with the statement, “When I founded the Malawi Women’s League...”, a tremor of excitement ran through the spectators. The simplest historical fact has become subversive.¹³

Ten years later, the names of the heroes of Malawi’s liberation struggle may have been a little better known, but the same tremor of excitement and appetite for historical fact remained. When it became clear that no thorough official investigation into the past was likely, a group of scholars at the University of Malawi tried to organize an alternative means of investigating the past. The group drew from a number of disciplines: history, public administration, law and psychology. The planned research became known as the Malawi History Project.

In Dr Banda’s Malawi, the stranglehold on academic life was such that scholars, whether national or foreign, steered clear of politically sensitive topics for the most part. The reasoning of the Malawi History Project was that this very absence of academic research on politically sensitive subjects meant that much of the repression was not documented and could only be recorded using the techniques of oral history. They argued that this was an urgent task, given that many of the witnesses of events in the early years of Banda’s rule were now very old. These scholars hoped to create a data bank of taped interviews that would be of use to academics from a variety of disciplines in future years – and would also capture in detail the nature of the human rights violations under one-party rule.

¹³ Leroy Vail and Landeg White, “Tribalism in the Political History of Malawi”, in Leroy Vail (ed), *The Creation of Tribalism in Southern Africa* (London, Berkeley and Los Angeles 1989), p. 184.

The problem that the Malawian scholars ran into is a common one, but no less galling for that: they did not have any money. Research anywhere requires funds and African universities provide even less of a financial cushion than their counterparts elsewhere. African academics are overworked and seriously underpaid. The Malawi History Project was a non-starter without funds. Yet of the dozens of donors approached, only one was willing to support the project – and this funding was conditional on other donors being found. In the event, money was raised to hold a conference, which was intended to kick-start a broader truth-finding process. It was a constructive conference, but ultimately the effort failed. Funding agencies simply could not see the point of “dwelling on the past”. The priority, they told hapless Malawian scholars, was to look forward.

Academic historical research on the Banda period is beginning and, in the long term, will no doubt change the generally accepted interpretation: that it was an orderly, well-run society, if perhaps overzealous at times in seeking social and political conformity. The thousands who died or lost decades of freedom in Banda’s jails will one day find a memorial in academic tomes. Not that this affects ordinary Malawians very much. Fewer than half of them can read anyway. The country is one of the very poorest in the world and has no money to import academic books. The value of the Malawi History Project was that it would have made the raw material of history available in a variety of easily accessible formats – for example, audio and video tapes. The donors who showed the Malawian academics the door were exceptionally short-sighted.

However, there have been two positive and potentially far-reaching outcomes of the History Project. At the conference it organized in Lilongwe in 1996 there was a constructive discussion about alternative methods of uncovering the truth. One suggestion tabled was that the Malawi Human Rights Commission (a body created by the 1994 Constitution but not yet formed by legislation in 1996) might be able to look into human rights violations that took place before its formation. Justice Elton Singini, the Law Commissioner, was present at the conference. Not only is he an *ex officio* member of the Human Rights Commission; he was also the person who drafted its founding law. The law, when drafted, placed no time limit on cases that the Human Rights Commission might investigate. The effect is that, in principle, there is no

obstacle to the commission either investigating an individual complaint of past violation of rights or initiating a broad inquiry into the past.

The second consequence of the 1996 History Project conference was a review of the workings of the National Compensation Tribunal (NCT). The NCT, like the Malawi Human Rights Commission, was set up under the 1994 Constitution. In its early months it came under heavy criticisms for making large payments to members of the new government. At the History Project workshop the chairperson of the NCT, Justice Mkandawire, was an invited speaker and he was sharply criticized by NGO representatives and victims of human rights violations. Justice Mkandawire listened carefully to the criticism and the practice of the NCT changed. It was clear that the funds available to the tribunal were limited. Instead of making a small number of large payments, the NCT decided to make interim payments of 20,000 Malawi kwacha (about US\$400) to all claimants whose applications could be verified. At the end of the NCT's 10-year life, it will be possible to determine final payments on the basis of the claims submitted and verified, and the funds available.

There have since been government attempts to interfere with the NCT's workings, to influence the tribunal to make larger payments to certain individuals. The NCT has resisted the pressure and the present chairperson, Justice Chimasula Phiri, has even threatened to resign over government interference.

At the time of ARTICLE 19's research visit to Malawi in late 1999, 10,460 claims for compensation had been submitted to the NCT. Of these, 3,121 had been investigated and verified. In these cases the claimants had received, or were eligible to receive, the 20,000 kwacha interim payment. What is most important, from the perspective of uncovering information about the past, is that the 3,121 verified cases constitute a very substantial database of information about human rights violations under the Banda regime. Unfortunately, at present there are no firm plans to use the information gathered for any other purpose: to produce a report, for example. However, Justice Chimasula Phiri told ARTICLE 19 that he was in favour of placing the files in the Mikuyu Museum – established on the site of one of the old regime's most notorious detention centers. There they would be available to *bona fide* scholars. If this falls a long way short of the relatively prompt and public disclosure that might be expected

from a truth commission, it may nevertheless prove to be an important and imaginative way to set the historical record straight.

In the last days of the Banda regime and in the early days after the multi-party elections of 1994, non-governmental organizations played an important role in gathering testimony from people who had suffered human rights violations. The Legal Resources Center (LRC), the Civil Liberties Committee (CILIC) and the Foundation for the Integrity of Creation, Justice and Peace (FICJP) took testimonies from victims and helped them to pursue their claims before the establishment of the National Compensation Tribunal. Presumably most of those who initially went to these NGOs finally ended up having their cases investigated by the NCT. Nevertheless, the NGOs played an important part in sustaining interest in the plight of the victims. It is important to note that, unlike Zimbabwe, for example, where the NGOs were well established and had worked with the victims of abuse for many years, the Malawian organizations only emerged in the final months of the one-party regime. They had little capacity or experience in working with victims of human rights organizations, but did an effective job nonetheless. One NGO, the Center for Human Rights and Rehabilitation, focused on the plight of Malawians returning from exile – often a neglected group.

It drew up proposals for income generating activities and other measures to facilitate the reintegration of returnees into Malawian society.¹⁴ (Returnees, incidentally, are one category of victims of human rights violation not eligible for compensation under the NCT. They may be compensated for a specific act that made them flee – but not for the lost years as a refugee). All these NGOs supported calls for a full investigation into past violations. But again unlike Zimbabwe, none had the capacity or the experience to conduct the investigation themselves.

¹⁴ Centre for Human Rights and Rehabilitation, *A Report on the Analysis of Needs and Opportunities for Malawi Returnees*, Lilongwe, 1995.

3. Zimbabwe

On the face of it, Zimbabwe is a clear example of the dire consequences of failing to account for past human rights violations. Yet the failure of all official mechanisms has given rise to a number of innovative approaches by non-governmental organizations.

The 1979 Lancaster House agreement, which was the basis for Zimbabwe's independence the following year, contained within it an amnesty for all crimes committed on both sides in the course of the liberation war. This was enacted by the interim British administration in 1980 as the Amnesty (General Pardon) Act. The Rhodesian security forces had already been indemnified against prosecution under the 1975 Indemnity and Compensation Act. However, the new government went much further than it was obliged to do in compromising with those who had committed human rights violations in the past. The Indemnity and Compensation Act was retained. It was later repealed after it was controversially (and successfully) invoked by a Minister in the new government charged with the murder of a white farmer. But

it was replaced with indemnity regulations issued under the continuing state of emergency, which has the same effect.

Robert Mugabe, Prime Minister of the victorious ZANU-PF government in the 1980 Independence elections, retained the Rhodesian security chief, Ken Flower, as head of the Central Intelligence Organization, along with many other senior Rhodesian officials. The implications of this soon became apparent. When guerrillas of the two former liberation armies, ZANLA and ZIPRA,¹⁵ clashed in Bulawayo in 1981, former Rhodesian army and air force units were deployed against ZIPRA – who were loyal to the minority party ZAPU. In the mid-1980s the army Fifth Brigade was deployed in Matabeleland against ZIPRA deserters known as “dissidents”. However, most of their actions appeared to be directed against civilians, of whom thousands were massacred or “disappeared”.

The Fifth Brigade was a unit outside the normal army command structure, loyal to the ruling party and known as *Gukurahundi*, a Shona word meaning “the rain that washes away the chaff before the spring rains”. At the same time, police and CIO arrested hundreds of civilian ZAPU supporters. Many were tortured using methods inherited from the Rhodesian security forces – and indeed often by former Rhodesian personnel.¹⁶

The Zimbabwean authorities, like their Rhodesian predecessors, kept a tight control on the flow of information. The Zimbabwe Broadcasting Corporation was (and remains) the sole broadcaster, while at that stage the Harare *Herald* and its Bulawayo sister paper, the *Chronicle*, were the only daily papers. The company that owned them, Zimbabwe Newspapers (1980) Ltd, or Zimpapers, was ostensibly under the control of the Zimbabwe Mass Media Trust, an innovative attempt at public ownership of newspapers. In reality the Zimpapers editors were (and are) directly answerable to the Minister of Information. The effect of this control was to conceal what was happening in Matabeleland from the rest of Zimbabwe. However, the government was still under some political pressure to account for what was

¹⁵ The Zimbabwe African National Liberation Army was the military wing of ZANU (PF), and the Zimbabwe People’s Revolutionary Army, was the military wing of the Zimbabwean African People’s Union (ZAPU).

¹⁶ Richard Carver, “Zimbabwe: Drawing a Line Through the Past”, in Naomi Roht-Arriaza (ed.), *Impunity and Human Rights in International Law and Practice* (New York, 1995).

happening. Prime Minister Robert Mugabe set up two commissions of inquiry, the first chaired by Justice Enoch Dumbutshena into the clashes between ZANLA and ZIPRA, the second under Simplicius Chihambakwe into the killings in Matabeleland in 1983. In the second case especially, people took enormous risks to testify before the commission. Both commissions reported promptly but neither report has ever seen the light of day. Under the Commissions of Inquiry Act, the Prime Minister (subsequently the executive President) is not obliged to publish the report of a commission.

Almost inevitably, the tradition of granting amnesties to perpetrators of human rights violations became self-perpetuating. When the Matabeleland conflict ended, as a result of a unity agreement between the two main parties, those responsible for abuses were given an amnesty, whether or not they had been brought to justice. This benefited both the security forces and members of the “dissidents” who had committed abuses.

Among those who benefited were Morgan Sango Nkomo, known as “Gayigusu”, a “dissident” leader allegedly responsible for a particularly gruesome massacre of missionaries at Esigodini in 1987 and other atrocities. Also released were 75 members of the security forces who had been charged or convicted of offences relating to human rights abuses. Among them was a CIO official, Robert Masikini, who had been convicted just a week earlier of the cold-blooded murder of a political detainee in his custody. Also released were four Fifth Brigade soldiers convicted of the abduction and murder of two men and two women in Matabeleland in 1983. The Supreme Court, dismissing the soldiers’ appeal had commented:

...the appellants abducted the four unfortunate and innocent deceased from the petrol station and, after subjecting them to torture – and the two females to some degrading form of sexual abuse – they slaughtered them in a most atrocious, cruel and cold-blooded manner.¹⁷

This second round of amnesties, (the first being under the Lancaster House agreement), helped to reinforce a culture of impunity. The focus of military activity shifted to Eastern Zimbabwe, where the army was trying to limit incursions by the

¹⁷ Quoted in Richard Carver, “Zimbabwe: Drawing a Line Through the Past”, in *Ibid.*

Mozambican rebel movement RENAMO – a reprisal for Zimbabwean military support for the Mozambique government. Army tactics in the eastern province of Manicaland replicated the Rhodesian methods of forced removals of civilian populations to prevent them from providing food or other support to the rebels. The RENAMO leadership was largely drawn from the Ndaou – the same ethnic group as that which predominated in Chipinge District. Chipinge has usually returned members of parliament from the minority ZANU-Ndonga party, making it consistently the only Shona-speaking area not to support ZANU (PF). Thus Chipinge had the makings of a Matabeleland in miniature.

By the late 1980s, however, an important shift was taking place in Zimbabwean society. The end of the Matabeleland conflict had signaled a new boldness among the press. The first important sign of this came, rather surprisingly, from the government-controlled *Chronicle*.

In 1988-89, it exposed how several Ministers had corruptly resold cars acquired at reduced rate from the Willowvale assembly plant in Harare – the so-called Willowgate scandal. Although the *Chronicle* was reined in as a consequence – its editor was “promoted” and subsequently left for the private sector – a succession of other privately owned newspapers and magazines subjected the government to increasing scrutiny. The result was that although abuses by the security forces continued, they were more frequently exposed. The irony was that the thousands of deaths in Matabeleland still remained largely unknown, while a number of individual cases, serious as they no doubt were, acquired a high profile. The independent press questioned the official explanation for the mysterious death of Captain Edwin Nleya, for example, an army officer who had apparently tried to blow the whistle on military involvement in the illegal ivory trade.

Likewise, the “disappearance” of Rashiwe Guza, a woman last seen in CIO custody in 1990, was extensively publicized (though never explained). There is no question that the willingness of the private press to play a watchdog role – which the government controlled media had largely failed to do – contributed to the growing unpopularity of the government throughout the 1990s. What the media did not significantly achieve, however, was an adequate accounting for past human rights violations.

Immediately after the end of the Matabeleland crisis, there were few calls for truth-telling. The people of Matabeleland, by and large, were more relieved to have an end to their ordeal than they were desirous of having the truth revealed. There were some exceptions, however. A substantial number of people had “disappeared”. For example, some 200 men from Silobela in Midland province, mainly middle-aged and elderly, went missing from their homes in the space of a few weeks in early 1985. The official explanation, which always seemed improbable given their age, was that the men had slipped across the border to join the “dissidents”. Yet when the Unity Accord was signed and the “dissidents” amnestied, none of the Silobela “disappeared” returned home. These were not the only “disappearances”. In 1985 Edward Moyo was arrested in Tsholotsho, which in 1983 had been one of the centres of the Fifth Brigade’s activities.

Moyo had given evidence to the Chihambakwe commission of inquiry, which was believed to be the reason for his arrest. A few days later his brother Shadreck Denga Moyo was told to report to the CIO in Bulawayo. He did so and neither brother was ever seen again. Fraser Gibson Sibanda, a ZAPU official, was arrested at a church service in Bulawayo in 1985 and never seen again. Sibanda’s wife was the first relative of a “disappeared” person to get any sort of acknowledgement of what had happened through the court system. In 1989, she succeeded in obtaining an admission that the police were responsible for her husband’s unlawful killing – truth of a sort – but this was never followed by any criminal prosecution or the payment of any compensation or damages.

The wives of nine of the Silobela “disappeared” also filed a suit in the High Court in 1986. The court ordered a police investigation into the cases, but it was 1989 before it reported and even then it uncovered nothing that had not been in the women’s original affidavits. They had told how their husbands had been threatened by ZANU (PF) officials, how the abductors drove Nissan trucks that looked like those used by the security forces, and how the police failed to investigate the abductions at the time. There were allegedly five mass graves in the vicinity, (one had even been filmed by a BBC television crew in 1985), but even after the High Court order the police did not look at the graves, let alone commission a full forensic investigation. In 1992, the

court declared the nine men from Silobela to be dead, in a move that highlights the strengths and weaknesses of truth-telling through court actions of this sort. The declaration of the deaths resolved the practical problems concerned with the administration of their estates, which was one of the main reasons the suit had been brought in the first place. But it failed to explain what had happened to the men, still less assign responsibility or win damages for the relatives. Partly this was because of the role of the police. There is only a limited sense in which courts under a common law system conduct their own investigations. In practice, they depend upon the normal civilian investigation mechanisms of the police. Yet here, as in many similar cases, the police were either complicit in the “disappearances” or (at the very best) politically beholden to those responsible. There was no chance that they would carry out a full investigation. What was needed was an independent commission of inquiry with a skilled and impartial investigating team.

There had been just such a commission of inquiry. By the early 1990s demands were beginning to surface for the Chihambakwe Commission report to be published. In the late 1990s, human rights NGOs brought a High Court action to force the disclosure of the Dumbutshena and Chihambakwe reports. The government’s response on the first of these was the scarcely credible claim that only one copy of the report had ever existed, and that it had been lost.

Two factors prompted the resurgence of interest in explaining the fate of the Matabeleland dead. The first was simply the passage of time. A few years after the Unity Accord, the private media were finally subjecting the authorities to a degree of scrutiny over a range of issues; an economic structural adjustment programme made the government increasingly unpopular even in its own heartlands and the people of Matabeleland were simply less scared of a possible return of the army. The other factor was the serious drought of the early 1990s. This affected semi-arid Matabeleland worse than the rest of the country, which reinforced a sense of regional political identity. But even more importantly, the drought caused a soil erosion that uncovered several mass graves, notably in a number of disused mine shafts in Matabeleland South. Witnesses had named these mines as the sites of the mass graves. The new and gruesome evidence uncovered by the drought vindicated these allegations. Yet the government did nothing at all. It neither published the

Chihambakwe findings nor initiated a new inquiry. On the face of it, this was an extraordinary reaction. Suddenly there had been revealed *prima facie* evidence of mass murder and the authorities' response was business as usual. The fact that no one was surprised by this lack of response was a measure of how far the culture of impunity had taken hold.

Although no one was surprised, many people, not only in Matabeleland, were increasingly outraged. This outrage was the origin of one of the most extraordinary non-governmental truth-telling initiatives. Two NGOs that had been active throughout the Matabeleland violence, the Catholic Commission for Justice and Peace in Zimbabwe (CCJP) and the Legal Resources Foundations (LRF), set about researching the conflict.

They used a combination of archive material – interview notes and medical reports compiled at the time – and new interviews with survivors. The result was a remarkable report entitled *Breaking the Silence: Building True Peace*. There has seldom been an NGO report that has been so authoritative in its detail – a product not only of the researchers' diligence, but also the trust in which they were held by the local communities. Even so, it still only tells a small part of the story.

One interesting dimension of the CCJP/LRF report was that, as well as uncovering the facts about the past, it was forward-looking. It contained a series of recommendations. These included proposals for the widespread dissemination of the report, along with the as yet unpublished report of the official commission of inquiry in 1985, so that everyone in Zimbabwe should be aware of what had happened in Matabeleland. The CCJP/LRF report also proposed that those responsible for the atrocities should be removed from public office. Other proposals were less conventional, including the formation of a Reconciliation Trust for community reparations. Sadly, though not surprisingly, the government has not embraced any of these recommendations, although this has not stopped NGOs and the communities themselves from pressing ahead with setting up the Trust and with other initiatives. These include the excavation and disinterment of mass graves and the formal reburial of the remains. This has been an extremely important initiative from two perspectives. First, because it has added considerably to the knowledge and understanding of what happened to

the victims of army killings. Being able to do this – with the full consent of the communities – has overturned the assumption that a favourable political climate of the explicit government approval are needed before the complicated work of forensic excavation can be undertaken. Secondly, the ceremonial reburial of the Fifth Brigade’s victims has provided some resolution and comfort for their living relatives. The need to set to rest these “restless spirits” is, of course, often the reason why communities agree to the initial disinterment. Here is a very practical example of a link between truth and reconciliation – not reconciliation with the perpetrators of murder, but at least with the fact of the murder itself.

One of the recommendations of *Breaking the Silence* was that the War Victims Compensation Act of 1980 should be amended to allow victims of security force action in Matabeleland to claim compensation. The abuse of war victims’ compensation became a critical political issue in the 1990s and is crucial to understanding several aspects of the current political situation in the country: the state of the economy and government finance; the alienation of many former ZANU (PF) supporters from the government; and the close relationship between President Mugabe and the war veterans.

In 1997 the Zimbabwe Liberation War Veterans Association mounted protests, including an unprecedented demonstration at State House, Mugabe’s residence, demanding cash payments. Mugabe instructed the government to pay an unbudgeted Z\$50,000, plus a Z\$2,000 monthly pension, to every veteran of the liberation war, creating a massive public finance deficit overnight.

By doing this, Mugabe created a loyal constituency. But, the loyalty cut both ways. Chenjerai Hunzvi, the war veterans’ leader, had spent most of the war in Poland training as a physician. It was he who signed medical certificates for a number of senior government members, showing that they had serious (and previously unimagined) disabilities entitling them to massive compensation payments. One official in the President’s office, for example, claimed 101 per cent disability, although the Compensation Commissioner found her to be a mere 96 per cent disabled – entitling her to nearly Z\$800,000. The President’s brother in law was found to be 95 per cent disabled (Z\$822,668). Hunzvi himself claimed to be 117 per cent

disabled, but was only awarded compensation (Z\$361,630) for 85 per cent.¹⁸ After the public outcry, Mugabe was obliged to set up a commission of inquiry into the scandal and Hunzvi now faces fraud charges. But many senior government figures remain beholden to him. His role in the scandal of the compensation payments explains in part the political power that he has wielded in Zimbabwe's unfolding crisis.

In Malawi, public criticism of the National Compensation Tribunal forced it to review the way that it organized its payments to public figures. The commission of inquiry under Justice Godfrey Chidyausiku into the administration of the War Victims Compensation Act offered a similar opportunity in Zimbabwe. Although some of the raw facts exposed in the Chidyausiku report are shocking and some criminal charges have resulted, there was no recommendation for a fundamental overhaul, despite submissions to that effect from non-governmental organizations. This means that not only will Matabeleland victims not benefit from its provisions, nor will civilian victims of torture and other abuses in the liberation war, like Mrs Chiyangwa.

The Amani Trust, an NGO engaged in community rehabilitation, has recommended that a register of survivors of abuse in the liberation war be created in each district, both as a form of acknowledgement and so that they may benefit from social welfare measures targeted at them. This is a practical, low-cost measure emanating from the survivors themselves, which involves elements of both truth-telling and rehabilitation. On the face of it, the refusal of the Zimbabwean authorities to contemplate this is puzzling – after all the ruling party's political rhetoric in recent months has been more than ever geared to a mythical rejoining of the battles of the 1970s, especially on the issue of land. Yet, on deeper consideration it is less surprising. The attraction to the government of invoking the 1970s is precisely that it can be done at a mythical level, without having to examine the messy realities. Older rural Zimbabweans, loyal to ZANU (PF) as they may have been for more than 20 years, are not starry-eyed. They remember, for example, the brutal treatment of alleged "sell-outs" in their communities, those who are alleged to have informed to the Rhodesian authorities. They also recall the intimidatory all-night *pungwes* organized by the liberation

¹⁸ *Report of the Commission of Inquiry into the Administration of the War Victims Compensation Act (Chapter 11.16)* (Harare, May 1998), Annex 1.

fighters to ensure the people's loyalty. The 200 parliamentary election campaign saw a revival of *pungwes* – described by a reputable international organization as “psychological torture”¹⁹ – and the denunciation of “sell-outs”.

The political violence of 2000 stems in a very direct sense from Zimbabwe's failure ever to account for the past. People in Matabeleland understand this in the most immediate sense. The deployment of soldiers in the red berets of the Fifth Brigade was accompanied by specific threats of the return of *Gukurahundi* if they supported the opposition. The former commander of the Fifth Brigade, Perence Shiri, was reported to be coordinating the occupation of white-owned farms by “war veterans” – a move ostensibly aimed at redressing social and economic grievances, but more immediately concerned with intimidating potential opposition supporters. Shiri, incidentally, was found to be 50 per cent disabled after a medical examination by none other than Dr Hunzvi.

The current political crisis is marked by a refusal on the part of the government, the ruling party and the war veterans to be bound by the rule of law: representatives of these bodies frequently declare that they are not obliged to respect the decisions of the courts on matters such as the illegal seizure of property and even unlawful arrest and detention and torture. This flows directly from the impunity that has been enjoyed repeatedly by state agents since the 1975 Indemnity and Compensation Act and the 1980 amnesty. The failure to carry out an honest excavation of the past allows the government to portray its own strictly partisan version as the sole acceptable truth in an independent Zimbabwe. The irony that one of the chief legal instruments of repression remains the Rhodesian Law and Order (Maintenance) Act is apparently entirely lost on the government.

¹⁹ International Rehabilitation Council for Torture Victims, *Organised Violence and Torture in Zimbabwe* (Harare and Copenhagen, June 2000).

4. Namibia

Namibia reached independence in 1990 after South Africa's illegal occupation of the country and the consequent long history of gross human rights violations. The reluctance of the new South West African People's organization (SWAPO) government to initiate an investigation into past abuses no doubt flowed in part from the same considerations as in Zimbabwe: a reluctance to jeopardize political stability or to drive out whites who controlled key sectors of the economy. The main factor, however, was SWAPO's unwillingness to allow any scrutiny of its own human rights performance as an exiled opposition movement. It was responsible for many known instances of torture, ill-treatment and killing of prisoners. Many SWAPO supporters disappeared in exile and remain unaccounted for. The need for a thorough investigation is no less now than it was a decade ago.

Abuses by the armed liberation movements of Southern Africa were a fairly widespread phenomenon that received little international attention at the time they occurred. In the case of Zimbabwe, both ZAPU and especially ZANU experienced massive internal tensions that led to serious human rights problems. These have never been seriously addressed. The only investigation was a Zambian commission of inquiry into the pre-independence murder of the ZANU leader Herbert Chitepo. It was not regarded as a very satisfactory exercise. Investigations by the African National Congress in South Africa, if belated, were far more thorough. The ANC set up two internal commissions of inquiry into allegations of torture and other abuses in ANC camps in exile, especially in Angola and Zambia. The findings of both inquiries were damning of the ANC security department and revealed what had happened in blunt and uncompromising terms. There were perhaps two main reasons why the ANC investigated these allegations more effectively than its Zimbabwean and Namibian counterparts. One is that it was a movement in which the exiled military wing was

only one component and, by the final days of apartheid in the early 1990s, not the most important. Internal ANC leaders, including the newly released Nelson Mandela, were shocked by the allegations and could not be implicated in the abuses.

The other factor was that the ANC wanted to dispose of the “torture camps” issue before submitting itself to the electorate. ANC abuses were investigated by the Truth Commission, but by then the issue had lost its political sting. But what distinguished Namibia from both South Africa and Zimbabwe was the extent and apparently systematic nature of the abuses. A Namibian NGO, the National Society for Human Rights (NSHR), estimates that SWAPO was responsible for more than 2,000 “disappearances” and the documented torture of more than 200 people who are still alive.

There is no doubt that in the 1970s and 1980s the issue of SWAPO abuses was neglected for essentially political reasons. The outside world dismissed the claims as South African propaganda. Inevitably the issue was taken up either by overtly right-wing organizations such as the International Freedom Foundation or by conservative human rights bodies such as the International Society for Human Rights. This had the unfortunate effect of reinforcing skepticism on the part of those opposed to South Africa’s occupation of Namibia. Within Namibia itself, however, the picture was quite different. The issue was initially raised by relatives of the victims, all of whom were themselves SWAPO members, organized in the Parents’ Committee. At independence, members of the Parent’s Committee established the NSHR, which has continued to pursue the issue.

A further organization of survivors of the SWAPO camps, Breaking the Wall of Silence, was set up after the publication in 1995 of a book by a German Lutheran pastor, Siegfried Groth, entitled *Namibia: The Wall of Silence*.²⁰ Groth, who had had a long association with Namibia, was appalled among other things by the reluctance, bordering on complicity, of the Namibian churches to address the issue of the SWAPO detainees. Another organization, the Project for the Study of Violence and Reconciliation was set up in 1996. More recently this was reconstituted as the PEACE Trust, with the primary aim of acting as a professional service to help with the rehabilitation of survivors of human rights abuse. Finally, in 1999, a powerful documentary film, *Nda Mona (I have seen)*, looked at truth and reconciliation issues

in post-independence Namibia. The story of uncovering the truth about past human rights violations in Namibia is largely a tale of civil society groups such as these campaigning against the odds.

The reluctance of SWAPO even to entertain any scrutiny of the detainee's issue was apparent from independence. The Namibian independence agreement, like the Zimbabwean, included an amnesty provision. But SWAPO went further by appointing many of those implicated in torture in Angola to key positions in the new state's security apparatus. Most notoriously, the head of the SWAPO security department, Solomon Hawala, known as the "Butcher of Lubango", was made head of the Namibian defence forces.

The independence agreement also obliged both South Africa and SWAPO to release all their prisoners.²¹ In 1989, as part of UN-supervised transitional process, a United Nations Mission on Detainees failed to resolve the question of the fate of the detainees. After independence the new National Assembly mandated the International Committee of the Red Cross (ICRC) to investigate in Angola. The ICRC reported in 1993 that none of the missing persons were found alive. This failure to provide any explanation fuelled demands for a fuller investigation.

The Namibian Government refused an offer from South Africa for the TRC there to investigate abuses in Namibia – it was, after all, the South African government that had been responsible – presumably for fear of having a proper impartial investigation of pre-independence human rights issues. The example of South Africa grappling with these issues stimulated demands from within Namibia for the formation of its own truth commission.

The campaign for openness on the SWAPO detainee issue was extensively covered in the independent press. It was these media that allowed the various NGOs and survivors' groups to maintain their momentum. The national broadcaster, the Namibia Broadcasting Corporation, did not share the concern of the private press. A radio

²⁰ Siegfried Groth, *Namibia: The Wall of Silence*, (Wuppertal, 1995).

²¹ UN Security Council Resolution 385 (1976).

programme containing pre-independence archive material was withdrawn at the last minute, apparently on the orders of the Minister of Information.²²

In 1990, President Sam Nujoma announced that over 11,000 Namibians had died in “war-related incidents” between 1966 and 1989. He also declared that a “team of former PLAN²³ cadres had been hard at work for a number of months to compile a comprehensive list of dead and missing Namibians”. He said that the list would be released by 21 March 1991 to mark the first anniversary of the country’s independence.²⁴ No such list appeared.

In 1994, the secretary general of SWAPO, Moses Garoeb, announced that a committee had been set up to study a “death register”, which contained “all or some of the particulars of all SWAPO fighters who had died during the war”. Garoeb said that the document would be released that year “not because the opposition of Phil ya Nangolob (of the NSHR) wants it, but because we are responsible to the people”. It was not published.

The following year saw the publication of Siegfried Groth’s book, the founding of Breaking the Wall of Silence and, importantly, an announcement by the Council of Churches of Namibia (CNN) that it would convene a conference on the SWAPO detainee issue in 1996. Up until that point, the CNN had been regarded as pro-SWAPO and reluctant to address the question of the movement’s abuses.

Finally, in August 1996, the “register” was published as a book entitled *Their Blood Waters Our Freedom*, also popularly known as the “Book of the Dead”. The NSHR welcomed the publication of the “Book of the Dead” (while commenting that it was strange how difficult it was to get hold of a copy) for five main reasons:

- The disclosures in the book confirm the common-sense belief that those Namibians who fled from South African repression and went into exile between 1960 and 1988 joined the SWAPO abroad; and

²² David Lush, “Namibia” in *Who Rules the Airwaves? Broadcasting in Africa* (ARTICLE 19 and Index on Censorship: London, 1995).

²³ People’s Liberation Army of Namibia, SWAPO’s military wing.

²⁴ *The Namibian*, 27 August 1990.

- They remove any illusions in the minds of many Namibians that there were still people under SWAPO's care either studying somewhere or in detention abroad;
- The information in the publication goes a long way in giving full or partial satisfaction to – and relieving the stress, anguish and psychological torture of – many relatives and friends as regard their desire to know the fate and whereabouts of their beloved ones who went into exile;
- The book purports to honour and give due recognition to those Namibians who, under SWAPO's auspices, had genuinely sacrificed their lives in the armed struggle and all those who had contributed to Namibia's independence; and
- The document generally makes it a lot easier for the NSHR and others to concentrate on the issue of "missing persons".

But the NSHR was highly critical of the quality of much of the information in the "Book of the Dead". It published a "Critical Analysis" which was not, it pointed out:

...intended to detract, in any way, from the positive contribution and sacrifices SWAPO has made in favour of independence for Namibia. Nor is it aimed at undermining or minimizing the Namibian Government's professed commitment to peace and reconciliation at national and international levels.²⁵

This was in response to a veiled threat contained in Nujoma's Foreword to SWAPO's book:

...the Government of Namibia takes a very grim view of anyone inclined to fomenting conditions of civil strife or agitating to drive nations to war.

Although it is not clear what this refers to, it is apparently about the desire of relatives to have information about the fate of their loved ones.

If the publication of "Book of the Dead" was a welcome development, its content raised more questions than it answered and, as the NSHR pointed out in its response, only strengthened the calls for a truth commission. The statistics in the book were

contradictory and begged questions. In 1990, for example, Nujoma had talked about 11,000 dead, but only 7,792 are listed as dead or missing in the "Book of the Dead". If the aim of publication was to silence disquiet about people who were unaccounted for, then a discrepancy of more than 3,000 was hardly the way to achieve this. In fact, the discrepancy was potentially even greater. SWAPO had talked elsewhere of some 70,000 people having been under its care in Angola. Forty-one thousand were repatriated by the United Nations High Commissioner for Refugees at independence. Taking into account those now acknowledged to be dead, this still left more than 22,000 unaccounted for. Of course, SWAPO's initial claim of 70,000 may have been an exaggeration – but if it was prepared to play fast and loose with the numbers, why should anyone believe this most recent set?

The manifest mistakes and distortions in some of the individual cases were what most undermined the credibility of the book. Some of those listed among the dead were alive and living in Namibia, while others are listed twice. The sheer inadequacy of some of the information – inaccurate biographical information, sometimes the lack of a real name – was difficult to accept in an investigation that had supposedly taken several years. Most seriously, there are clear distortions in some cases. Some of those listed as "heroes and heroines" had previously been described as South African spies: a serious case of being unable to get their story straight and then stick to it. For example, in 1984 Nujoma himself had stated that a prominent SWAPO member, Tauno Hatuikulipi, had committed suicide by swallowing poison out of a tooth capsule. He was alleged to have been uncovered as an enemy agent. Yet in 1996 he was being claimed as a hero, who had died from bronchitis. Which, if either, version was true? Some of those who were now claimed to have died from natural causes had previously been the subject of a court action between the Parents' Committee and SWAPO. Why had the party not stated how they died then and produced evidence?

The most positive aspect of the efforts to uncover the truth in Namibia is that the relentless campaigning by survivors, relatives and human rights groups has kept the issue alive. Serious as the Matabeleland killings were, they only affected a minority community within Zimbabwe, which made it easy for everyone else to ignore them

²⁵ National Security for Human Rights, *Critical Analysis: SWAPO's "Book of the Dead"* (Windhoek, 1996).

for a long time. The SWAPO abuses, however, were much more pervasive. Victims and relatives are to be found throughout Namibian society. Official evasiveness and untruths have not made the issue go away, nor is there any prospect that it will.

Less positively, SWAPO has still not been sufficiently pressurized into offering more credible answers, or to agreeing to a more satisfactory mechanism for getting at the truth. As in Zimbabwe, the failure to hold SWAPO to account for its pre-independence atrocities has encouraged a sense of impunity. The constitution was casually amended to allow Nujoma to stand for a third term as President, while a growing security crisis on the Angolan border and in the Caprivi region has been met with violent methods and abuse of human rights.²⁶

Again as in Zimbabwe, SWAPO is likely to come under increasing challenge from a new opposition party and a younger generation which is unimpressed by “liberation fighters” who assume they will rule in perpetuity. As Namibian politics becomes more hotly contested, the failure to achieve truth and accountability will come to seem more and more dangerous.

5. Approaches to Uncovering the Facts

This chapter identifies and assesses a range of approaches which have been employed in different countries in the quest to uncover the facts about past human rights violations.

²⁶ Amnesty International, *Angola and Namibia: Human Rights Abuses in the Border Area* (AI Index: AFR 03/01/00, March 2000).

5.1 Official Commissions

As we saw in Section 1, the 1997 UN report by French expert Louis Joinet provides a broad definition of the victims' right to know – a collective, not just an individual right – and its corollary, the authorities' duty to remember. The document goes on to identify two principal means through which these rights and obligations can be honoured:

The first is to establish, preferably as soon as possible, extrajudicial commissions of inquiry, on the grounds that, unless they are handing down summary justice, which has too often been the case in history, the courts cannot mete out swift punishment to torturers and their masters. The second is aimed at preserving archives relating to human rights violations.²⁷

Joinet goes on to argue that commissions of inquiry should not be seen as an alternative to the process of justice:

Experience shows that care must be taken not to allow such commissions to be diverted from their purpose and to furnish a pretext for not going before the courts.

This is an important point of principle. Commissions of inquiry are fundamentally to do with the public's right to know rather than with their right to a remedy through the courts.

Nonetheless, it is important to acknowledge that in the context of messy and complex transitions out of internal conflict or toward a more democratic polity, in which no one party has achieved a decisive victory, it may sometimes be difficult to avoid "trade-offs" between truth and justice. For example, there has been fierce debate about this issue in the context of the South African TRC, which has a conditional

²⁷ United Nations, Economic and Social Council, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, *The Administration of Justice and the Human Rights of Detainees: Questions of the impunity of perpetrators of human rights violations (civil*

amnesty procedure: truth in exchange for immunity. In such practical situations, it is legitimate to consider whether some form of “trade-off”, however undesirable, may be in some circumstances “less bad” than the other options that are realistically available.²⁸

Joinet sets out guidelines to guarantee the effectiveness of such commissions of inquiry:

(a) Guaranteed independence and impartiality

21. Extrajudicial commissions of inquiry should be established by law. They may not be established by an act of general application or treaty clause in the event that the restoration of, or transition to, democracy and/or peace has begun. Their members may not be subject to dismissal during their terms of office, and they must be protected by immunity. If necessary, a commission should be able to seek police assistance, to call for testimony and to visit places involved in their investigations. A wide range of opinions among commission members also makes for independence. The terms of reference must clearly state that the commissions are not intended to supplant the judicial system but at most to help safeguard memory and evidence. Their credibility should also be ensured by adequate financial and staffing resources.

(b) Safeguards for witnesses and victims

22. Testimony should be taken from victims and witnesses testifying on their behalf only on a voluntary basis. As a safety precaution, anonymity may be

and political), Revised final report prepared by Mr. Joinet pursuant to Sub Commission decision 1996/119, E/CN.4/Sub.2/1997/20/Rev.1.

²⁸ For a fuller discussion of one such situation, see ARTICLE 19 and Forum of Conscience’s joint report, *Moments of Truth in Sierra Leone: Contextualising the Truth and Reconciliation Commission* (London, August 2000).

permitted subject to the following reservations: it must be exceptional (except in the case of sexual abuse); the chairman and a member of the commission must be entitled to examine the grounds for the request of anonymity and, confidentiality, ascertain the witness' identity; and reference must be made in the report to the content of the testimony. Witnesses and victims must have psychological and social help available when they testify, especially if they have suffered torture or sexual abuse. They must be reimbursed the costs of giving testimony.

(c) Guarantees for persons implicated

23. If the commission is permitted to divulge their names, the persons implicated must either have been given a hearing or at least summoned to do so, or must be given the opportunity to exercise a right of reply in writing, the reply then being included in the file.

(d) Publicity for the commissions' reports

24. While there may be reasons to keep the commission's proceedings confidential, in part to avoid pressure on witnesses and ensure their safety, the commissions' reports should be published and publicized as widely as possible. Commission members must enjoy immunity from prosecution for defamation.

A truth commission is clearly a species of what Joinet calls an extrajudicial commission of inquiry, although he performs a valuable service in reminding us of the other forms that these investigations can take. A truth commission is usually understood to be very broad in its mandate, and usually established at a moment of profound political change.

Yet a smaller scale investigation into a particular set of abuses may also be appropriate, whether or not there has been a major transition. It is doubtful, for example, that the Chihambakwe Commission in Zimbabwe could usefully be called a truth commission. Yet had it published its report, it would have been an extremely

useful exercise in uncovering facts about a pattern of gross human rights abuses. Both civil and common law legal systems have many examples of such commissions of inquiry.

The early truth commissions (which were not usually given that name) were to do with uncovering facts that had been denied.²⁹ Most obviously this applied to the phenomenon of “disappearances”: a form of human rights violation that by its very nature is to do with concealment. The commissions in Argentina and Chile were two classic early examples of this. It is worth remarking that they were primarily concerned with uncovering facts rather than the truth. This is not an obscure epistemological point. The Argentinean military, for example, might still believe the truth that they were engaged in a life and death struggle to save the nation from communism. But in arguing that *truth* they could no longer deny the *fact* that they abducted their opponents in the dead of night and threw them from aircraft. Michael Ignatieff has written that the function of truth commissions is “to narrow the range of permissible lies”.³⁰ In other words, their purpose is not so much to write the nation’s history (a highly ideological activity) but to provide some of the raw material from which various competing histories may be fashioned.

People are entitled to this information regardless of what they do with it, although what they do with it is clearly important. In recent years, the production of truth has become increasingly closely yoked to the achievement of “reconciliation”, largely in response to the experience of the South African TRC. Indeed, truth commission has been superseded in the jargon by truth and reconciliation commission. This could be dangerous, for it confuses a pragmatic solution adopted in one very singular case (South Africa) with a point of general historical principle.

The way the argument on truth and reconciliation originally proceeded was as follows: at moments of transition, human rights activities argued for a thorough investigation of past violations. Governments, often with the best of motives, replied that they would like to carry out such an investigation, but their prime concern was reconciliation. Usually they would also point out that they relied upon a security

²⁹ By far the most extensive comparative study of truth commissions is the forthcoming book by Priscilla Hayner: *Unspeakable Truths* (New York and London, 2000). See also, Priscilla Hayner, “Fifteen Truth Commissions – 1974 – 1994: a comparative study”, *Human Rights Quarterly*, 16, 1994.

apparatus that was itself implicated in abuse and could not risk testing its loyalty. Then the human rights lobby responded that proper reconciliation is not possible without uncovering the truth: you cannot ask people to reconcile unless they know what they are reconciling with. This was most succinctly put by Nelson Mandela on the first day of the South African TRC: “To forgive and forget we should know what actually happened”.

South Africa has gone further in lashing truth and reconciliation together. But if it is argued, (sometimes Archbishop Desmond Tutu seemed to be doing so), that once the truth is available the victim is obliged to reconcile, this violates the original logic that linked the two concepts. Few people have ever argued that once the truth was available then reconciliation was automatic. That would be unrealistic, unworldly, and probably undesirable. In some of the early TRC hearings, Archbishop Tutu seemed to be obliging victims to reconcile with the perpetrators of horrendous crimes. Many felt that this curtailed the victims’ right to use the information as they say fit. This was the argument put forward by some, such as the families of Griffiths and Victoria Mxenge and Steve Biko, who argued against making the production of information a “trade-off” for immunity. No one can predict how that will react to detailed information about the torture and death of a loved one. It is extremely unreasonable to require them to pledge in advance of receiving that information that they will “reconcile”. The argument that truth is a *precondition* for reconciliation still holds good. But that does not mean that reconciliation is an *automatic consequence* of the revelation of information, certainly not in the short term, but perhaps not in the long term either.

One aspect of this misunderstanding is that the process of national reconciliation is routinely described in terms of anthropomorphic metaphors. It is no doubt useful to talk about “healing wounds” or nations being “in trauma”, but only as long as it is understood that at a national level these are only manners of speaking. Societies are not single bodies but are structurally divided. Most relevant for these purposes is that they are divided between the perpetrators and victims of human rights violations (a

³⁰ Michael Ignatieff, “Articles of Faith”, *Index on Censorship*, 5/96.

division that may not be a simple one corresponding to the main political divides in society).³¹ The likelihood is that the process of uncovering information about the past will indeed have the effect of alienating the perpetrators of abuse from the new order. They, of course, would prefer that the new order were more like the old one, where secrecy and impunity are guaranteed.

A study of the reaction of white South Africans to the TRC may be illuminating. Only 14 per cent of those surveyed viewed those who had supported the National Party, the party of apartheid, as responsible in any sense for the repression of black communities. Responsibility for the atrocities of the past was primarily blamed on anti-apartheid activists and “troublemakers” in the black communities (57 per cent of respondents).

To a lesser degree the security forces and government were seen as responsible (46 per cent). 81 per cent of those interviewed saw no moral difference between acts committed in defence of the apartheid system and acts committed by the liberation movements. 56 per cent of respondents thought that victims of gross human rights violations should not be compensated, and two thirds were opposed to prosecuting those who had committed crimes against anti-apartheid activists. Those who carried out the survey are rightly cautious about its implications. The TRC had not completed its work when the research was carried out and there was a notable difference in attitude between older and younger whites, the latter being generally more committed to redressing past injustices. Nevertheless, the unavoidable conclusion is that much more is needed to expose the nature and responsibility for the crimes of apartheid, and to achieve reconciliation.³²

It is also appropriate to ask what the effect of truth is on the victims or survivors. South Africa has been the most studied of all truth processes, as well as the one where reconciliation was at the forefront. For many victims, one of the initial impacts of the

³¹ This can be seen most clearly in the example of Namibia. The post-independence government was a democratic one that succeeded after decades of gross human rights abuse, yet the new ruling party itself had been responsible for serious abuses and was therefore reluctant to sanction any investigation of the past. In South Africa too, the new governing party had been responsible for abuses, but the ANC had done a more effective job of carrying out credible investigations of its own crimes and misdemeanours.

³² Gunnar Theissen and Brandon Hamber, “A State of Denial: White South Africans’ Attitudes to the Truth and Reconciliation Commission”, *Indicator South Africa*, Autumn 1998, pp8 – 12.

TRC has been to increase the desire for justice. Although this is fairly obvious, the surprise with which it is greeted is indicative of how people have gone along with a particular idea of what reconciliation means. A psychologist might say that the anger prompted by the uncovering of facts about human rights violations is a necessary and healthy part of the process of reconciliation, not necessarily reconciliation between victim and perpetrator, but reconciliation of the victim with what has happened. This may or may not be true, but it does underline the point that it is highly undesirable to place conditions on what victims do with the information they receive.

Another reservation about truth commissions concerns their effectiveness in investigating broad patterns of informal violence. The South African TRC admitted in its final report that it had very little to add to the findings of the Goldstone Commission of Inquiry on the political violence of the late 1980s and early 1990s. The TRC was a very effective tool for uncovering information about the structured violence of the apartheid state. It was much less effective at revealing the dynamics of the unstructured violence – admittedly initiated by the security apparatus, but which then acquired a momentum of its own. Part of the reasons for this ineffectiveness is that communities have already adopted their own local compromises. They may not want it to be officially stated that so-and-so was responsible for such-and-such a crime, a revelation that would require some action, whether it be formal justice or a revenge killing.

Yet this is precisely the pattern of abuse that was prevalent in Kosovo, Sierra Leone and East Timor. In each case it was announced at the moment of transition that a TRC was to be established. In practice each of these three countries has followed a rather different course. In Sierra Leone, much thought has been given to the difficulties of a formal investigation in such complex circumstances. A key test of the Sierra Leonean TRC will be the extent to which it is able to work with complementary community and civil society initiatives.³³

³³ ARTICLE 19 and Forum of Conscience, *Moments of Truth in Sierra Leone*. See footnote 28.

This discussion of the problems which official commissions can present does not mean that they do not have much to recommend them. The main advantages of official commissions are their official status, the fact that they often enjoy formal powers to compel the production of information and seek a standard of proof that is credible (while falling short of the exacting evidentiary requirements of a criminal trial). These are specialized bodies established for the purpose of uncovering facts about the past (or a specific aspect of the past) and their findings are awaited as a definitive statement of the historical record. So official commissions, whether called truth commissions or not, have been a deservedly popular option. In each of the three countries studied in this report, a credible and effective official commission would have been welcome and valuable. But it is clear that an uncritical emphasis on establishing official commissions as a means of uncovering the facts about the past can be just as problematic as other possible courses of action. It is to these we now turn.

5.2 Opening the files

Another limitation of an official commission as a means of satisfying the right to know, is that in practice it will have to be selective rather than comprehensive in the cases that it investigates. The approach taken in a number of East European countries was quite different from the official commission model. It sometimes involved opening the records of the old regime to public inspection and often entailed the “lustration” or purging of those implicated in support for the former security apparatus.

In its most sophisticated form, as in the former East Germany, this has involved setting up by statute a mechanism to allow the public access to the files held on them by the former secret police.

It is important to note that this approach is also recognized in Joinet's report, alongside commissions of inquiry, precisely because such a commission can never hope to address every individual case. Joinet sets out how transitional governments might address opening the files:

25. The right to know implies that archives must be preserved, especially during a period of transition. The steps required for this purpose are:

- (a) Protective and punitive measures against the removal, destruction or misuse of archives;
- (b) Establishment of an inventory of available archives, including those kept by third countries, in order to ensure that they may be transferred with those countries' consent and, where applicable, returned;
- (c) Adaptation to the new situation of regulations governing access to and consultation of archives, in particular by allowing anyone they implicate to add a right of reply to the file.

The process of opening the files was most thoroughly achieved in Germany. There were two main reasons for this. First, the East German secret police, the Stasi, was arguably the most assiduous and comprehensive of the Communist intelligence agencies. It had an estimated 111,000 full-time employees, used countless informers and maintained files on literally millions of individuals, both Germans and foreigners. The second reason is that the East German state did not simply collapse, as other Communist states did, to be followed by an awkward transitional period.

Its functions were rapidly taken over by the developed and efficient West German apparatus, into whose hands the State records fell.³⁴ This is a set of historical circumstances that are unlikely ever to be repeated. But the experience of the Stasi Records Act is worth examining as a paradigm of the "opening the files approach, if not as something that can be precisely emulated elsewhere.

Any freedom of information law, (the Stasi Records Act of 1992 is really just a singular species of that type), entails a delicate balance between the interests of openness and those of privacy. The Act tries to resolve these questions by distinguishing between various categories of applicant who may have access to the

³⁴ The West German apparatus had the capacity to employ more than 3,000 people to administer the Stasi records.

records, as well as various types of person about whom information may be held. The categories of people or institution who may have access to the files are individuals, public and private bodies and those carrying out political or historical research. Thus, for example, a “data-subject”, the person on whom the file has been kept, may apply to have it “depersonalised”. This means the removal of all identifying details, and will be agreed to if there are no other parties who have an interest in the information for purposes of evidence, and limited other reasons. An employee or informer of the Stasi has rights of access to their own files, but only subject to the privacy rights of the “data-subjects”. They may not have their files “depersonalised”.³⁵

To protect the privacy of others named in the file, the documents requested are photocopied, revelatory personal details about others blacked out and then the document photocopied again so that it cannot be read when held up to the light. This is to cover up personal information not directly relevant to the inquiry being made. But as writer and journalist Timothy Garton Ash asked, when he gained access to his Stasi file: “What is not relevant to understanding a secret police which worked precisely by collecting the most intimate details of private life?”³⁶

The effect of opening the files was necessarily quite awful in many cases. One political activist discovered that her husband had been informing on her ever since they met. A writer discovered that his brother had been informing on him. Garton Ash comments: “Had the files not been opened, they might still be brother and brother, man and wife – their love enduring, a fortress sure upon the rock of lies.”³⁷

In principle, there is no reason why a similar approach should not be adopted anywhere where the repressive apparatus has been characterized by systematic record-keeping. Ethiopia, Malawi, South Africa, the United Kingdom would all be cases in point. The general reluctance on the part of governments to do this flows, perhaps, from two reasons – one legitimate, the other not. The first is that the information contained in the files of repressive agencies is not necessarily accurate. This can be

³⁵ Graeme Simpson, “Truth, Recovery or McCarthyism Revisited’: An evaluation of the Stasi Records Act with Reference to the South African Experience”, Occasional Paper, Centre for the Study of Violence and Reconciliation, February 1994.

³⁶ Timothy Garton Ash, *The File: A Personal History* (London, 1997), p.18.

³⁷ Garton Ash also remarks that the need to have a file becomes a political status symbol. How dreadful to apply to the Authority and discover that there is no file on you. One could almost describe the syndrome in Freudian terms: file-envy.” *Ibid.*, p.19.

particularly damaging when false allegations are made of complicity in the repressive structure. The Czech Foreign Minister Jan Kavan, for example, was the victim of this sort of claim. It is arguable that information should be mediated through an expert body that is capable of interpreting it for the ordinary citizen.

In Poland in 1992, the Interior Minister sent a list of politicians and officials suspected of being former secret police agents to parliamentary deputies. In the ensuing row, even President Lech Walesa was accused of having been a secret police informer. There were two consequences. One was that Walesa dismissed the government within a matter of days. The other was an impassioned public debate on the use of secret police files. It centred upon the inherent unreliability of material in the files – which, after all, were often assembled with the intention of blackmailing the subject – and the inflammatory consequences when their contents were suddenly lobbed into the public arena. One of the more considered responses in defence of Walesa's action came from Adam Michnik, a journalist and dissident of many years standing and widely respected for his integrity. His conclusion was that the archives should remain sealed for 50 years and the following course of action adopted instead:

The public accusations should be fully clarified, just as those responsible for making false allegations must be made answerable for them. The whole issue of secret police agents must be depoliticised immediately. It shouldn't remain accessible as an instrument of political struggle, even in the worthiest of hands. This aspect of contemporary politics is too important to be left to politicians. What is required is a body formed not of political figures, but of lawyers, historians and sociologists who would examine the authenticity of the document and draw up a report based on their findings. This should expose in full the workings of the entire mechanism of crime and terror, the amorality of some and the suffering of others.³⁸

This does not sound so very different from a truth commission.

The second reason why the authorities are reluctant to open the files is the same as their customary opposition to freedom of information legislation: the citizen is not trusted with access to official information. In fact, one would hope that new democratic governments would introduce access to information laws and that the scope of such laws would include information held by the old regime.

³⁸ Adam Michnik, "Poland: Testament of lies", *Index on Censorship*, 5/96.

Another neglected mechanism for gaining access to information about past human rights abuses is access to information laws themselves. None of the three countries studied in previous chapters has such a law, although Malawi has a constitutional right to freedom of information.³⁹ The potential weaknesses of freedom of information laws to gain access to information about past violations are twofold. First, most such laws are to do with allowing *individual* members of the public, rather than the public at large, access to information. This right of access is sometimes qualified by the requirement that access to such information should be necessary for the individual to exercise other constitutionally or internationally guaranteed rights. In this instance, that is not a problem: the information is necessary, for example, for an individual to exercise his or her right to seek redress. However, the individual nature of queries under most freedom of information acts means that they will not provide the same broad account of the past as a truth commission. But if the act is well drafted, the scope may still be wide. The US Freedom of Information Act, for example, remains an important source of information for journalists and others investigating the misdeeds of successive Administrations.

The second limitation on the use of a freedom of information act will come if the exemptions are drawn too broadly, encompassing all information held by security agencies. Access to information that may affect national security should be restricted only on a very limited basis: namely that it will actually harm national security (as opposed to any particular agency that purports to protect national security).⁴⁰ In practice, of course, many human rights violations are committed in the name of

³⁹ Subject to any Act of Parliament, every person shall have the right of access to all information held by the State or any of its organs at any level of Government in so far as such information is required for the exercise of his rights. (Article 37).

⁴⁰ See, for example Principle 2 of the Johannesburg Principles:

- (a) A restriction sought to be justified on the grounds of national security is not legitimate unless its genuine purpose and demonstrable effect is to protect a country's existence or its territorial integrity against the use or threat of force, or its capacity to respond to the use or threat of force, whether from an external source, such as a military threat, or an internal source, such as incitement to violent overthrow of the government.
- (b) In particular, a restriction sought to be justified on the ground of national security is not legitimate if its genuine purpose or demonstrable effect is to protect interests unrelated to national security, including, for example, to protect a government from embarrassment or exposure of wrongdoing, or to conceal information about the functioning of its public institutions, or to entrench a particular ideology, or to suppress industrial unrest.

ARTICLE 19, *The Johannesburg Principles: National Security, Freedom of Expression and Access to Information*, Media Law and Practice in Southern Africa, No. 3, November 1996. The Johannesburg Principles were adopted in October 1995 by a group of experts in international law, national security and human rights convened by ARTICLE 19, in collaboration with the Centre for Applied Legal Studies of the University of Witwatersrand in Johannesburg. They are based on international and regional law and standards, evolving state practice and universally recognised general principles of law.

“national security”. It is only by making the question of national security a matter of public scrutiny and contention that it will cease to be used as an effective cover for abusive behaviour.

5.3 Criminal Justice and civil compensation

There is a tendency in the discussion of post-transitional measures to counterpose justice and truth: it is assumed that truth is what you get if justice is impossible. But although there have sometimes been “trade-offs” between the two in practice – South Africa is the best known case – the relationship between the two is more complex than that. Most obviously, no criminal prosecution arising from a situation of human rights abuse can succeed unless it can provide compelling information about those abuses. Conversely, in situations where criminal prosecutions are not possible, the public exposure and opprobrium created by a truth process may itself be a form of justice. Truth processes may also help to promote measures of financial and symbolic compensation.

In practical terms, after the end of a pattern of serious human rights violations, it is unlikely that the justice system will be able to address more than a tiny proportion of the individual crimes that were committed. A truth process is often thought of as filling the gaps. Yet historically, it has often been criminal proceedings that provided the symbolically important evidence of serious human rights abuse: the Nuremberg trials are the most obvious example. Some countries emerging from a history of abuse today choose to adopt a strategy of criminal prosecution as a means of uncovering the truth. But such a strategy can also be highly problematic.

Sierra Leone mounted a series of prosecutions after the restoration of civilian rule in 1996, a process that was halted by the military coup of 1997. International observers attending the trials concluded that the formal rights of the accused were observed and that the trials were fair – indeed the authorities seem to have been bent over backwards to ensure that the process was seen to give all necessary guarantees to those on trial. From the standpoint of international human rights standards, there were two main flaws with these trials. First, in many cases the death penalty was imposed, an outcome that pleased many Sierra Leoneans but which raises serious human rights questions. The second was Sierra Leone’s failure to incorporate many contemporary

developments in international human rights and criminal law into its domestic justice system. The result was that many of those who stood trial were charged with treason rather than specific human rights-related offences. Hence the grotesque outcome of journalists being sentenced to death for their alleged support of the military regime. Another consequence of the use of treason charges rather than those specifically relating to human rights crimes was that the trials achieved little in uncovering details about past violations.

The strategy of the Ethiopian government since the overthrow of the Dergue dictatorship in 1991 has been explicitly aimed both at bringing human right violators to justice and establishing a permanent historical record. The first trial, for example, which began in 1994, is of more than 40 Dergue members alleged to have planned genocide and murder.

The charges, which are set out in 269 pages, identify individual victims of the alleged genocide under three basic heads: 1823 killings, 99 who suffered “bodily harm”, and 194 enforced disappearances. In principle, the trial process was to be conducted in a number of phases. First, the general pattern of abuses and the collective responsibility of the Dergue was to be established. Then evidence was to be led from the Dergue’s own records – the Ethiopian regime kept meticulous records. Finally, independent experts, such as the Argentine forensic anthropology team, would give evidence.

The Ethiopian Special Prosecutors’ Office is perhaps the most ambitious attempt to try human rights violators, with the possible execution of the post-genocide trials in Rwanda. What is especially remarkable is the explicit attempt to use the trials to link the justice process with a quasi-truth commission function. This makes it all the more disappointing that the effort has largely failed. The reason for this failure has largely been the slow progress of the trials. The defence has argued that the delay has been partly due to the fact that the trials have tried to take on functions that more properly belong with a truth commission. Whether or not this is true, there is no question that the country’s justice system, which was practically non-existent in 1991, has been unable to sustain the burden of these massive cases. A Public Defenders’ Officer was established, with foreign donor funds, to provide a legal representation for the Dergue defendants. But it no longer has external funding. The number of lawyers in the office has dwindled to a handful and it only exists effectively in Addis Ababa. It is almost

inevitable that a country emerging from dictatorship will not have an effective justice system. The large scale trial of alleged human rights violators will not only be impractical, but may impede the reform of the criminal justice system as a whole. This has been the experience of Rwanda, as well as Ethiopia. Extensive external aid to strengthen the judiciary is no doubt desirable – but is not usually forthcoming.

Criminal trials are not the only relevant form of judicial proceeding. Indeed, other types of case may play a broader role in establishing patterns of human rights violations, without the limitations imposed by the high evidentiary standards of criminal cases. A civil claim for damages would be an obvious example.

An inquest, or judicial investigation of a violent death, would be another. The latter is an approach that is under-used, depending as it does on a degree of initiative on the part of judges that is often absent. But most legal systems impose an automatic obligation on the judiciary to investigate violent deaths. Often this obligation may apply even if the death occurs outside the jurisdiction: it could, for example, apply to an investigation into the deaths of Namibians in Angola.

Claims for damages are usually seen as something quite separate from criminal justice. Yet traditional African justice often places a high emphasis on the restorative character of justice – the punishment for a crime will often comprise the payment of compensation from the perpetrator to the victim. Hence the call for compensation payments by Mrs Chiyangwa and many like her are not only (or even primarily) intended as restitution for the loss suffered, but more as a symbolic process of justice.

Logically, obtaining information about the past precedes other steps, such as the award of compensation. But in practice, a compensation body itself may be an important means of documenting the facts of past abuses. That, for example, is the role that the National Compensation Tribunal (NCT) in Malawi has taken on, in the absence of any more systematic investigation into human rights violations by the one-party regime that ruled the country until 1994.

By contrast, the compensation process in Zimbabwe has become so discredited that it arguably obscures rather than unveils the truth about human rights violations under the white minority regime before independence. It became, in essence, a mechanism

for large (and often fraudulent) payments to senior government officials. The Malawi NCT in its early months was plagued by a similar problem: the payment of large sums to top officials. To its credit, the tribunal listened to criticism from NGOs and others and has since allocated its limited funds to claimants in the forms of relatively small interim payments. When the scale of the claims finally becomes apparent it will determine how much can be paid to each. The tribunal has successfully resisted continuing pressure to make larger payments to favoured public figures.

5.4 Other sorts of national institution

A truth commission is not the only form of national institution that can effectively investigate past abuses. In some countries, a national human rights institution may have a mandate – explicit or implicit – to look into human rights violations that took place under an earlier regime, usually even before the institution itself came into existence. Such institutions include permanent national human rights commissions, Ombudsmen and *Defensores del Pueblo*. Often a human rights commission will have a time limit on complaints, customarily a year, which will obviously restrict the possibility of probing further back into the past. But where such a limitation does not exist, the possibilities are important and hitherto rather neglected. In one or two instances, a national human rights commission may have a specific mandate to investigate the past. This is the case, for example, in Ghana, where the Commission on Human Rights and Administrative Justice (CHRAJ) is empowered by the Constitution to restore property confiscated by the two previous military governments, under certain specified conditions. However, the same commission refused to investigate a case of “disappearance” under the previous military government – partly because a 12-month time limit had expired and partly because the opposition politician who brought the complaint was deemed not to have sufficient personal standing in the case. Yet many national human rights institutions have the power to conduct investigations *suo motu* (on their own initiative) which could easily get round the problem. (The Ghanaian CHRAJ does not explicitly have such a power, although it has initiated its own inquiries in the past).

Malawi is another instance where a national human rights commission has considered investigating the past. The Law Commissioner, who is an *ex officio* member of the human rights commission, and who also drafted its founding law, was an active

participant in the civil society debate about the need for a truth commission after the end of the Kamuzu Banda one-party regime in 1994. The Malawi Human Rights Commission Act was drafted in such a way that there would be no restriction on the commission looking into past violations, as well as current ones.

The Northern Ireland Human Rights Commission (NIHRC), like many in Africa, was created as part of a peace settlement when a long history of conflict and human rights violations appeared to be drawing to a close. This is both its strength and weakness: there was a consensus by all parties to the Good Friday peace agreement that stronger mechanisms were needed to protect human rights in the future. But equally, as in most conflicts, the very concept of human rights had become so politicised that it was difficult to see how the NIHRC could function as an independent and impartial arbiter. Northern Ireland is somewhere where the possibility of a truth commission as such has scarcely been mooted. But the NIHRC has indicated that it may take on investigations into past abuses.

The national human rights commission with the greatest success in exposing past violations has been the Australian Commission. In particular, it has uncovered abuses against the Aboriginal population, including the forced removal of Aboriginal children from their families – the so-called “Lost Generation”. The Australian Human Rights and Equal Opportunity Commission (HREOC) has been able to do this because of the system of public inquiries that it pioneered. The HREOC is not purely complaints-driven and can therefore identify broad systemic human rights problems for thorough investigations. Reports such as the “lost generation” one have created public outcry and forced governments to act on their recommendations.

5.5 The media

Curiously, the importance of the media in uncovering past human rights violations is often downplayed. They may be vital in uncovering human rights abuses as they occur – indeed the role of the South African media in documenting government complicity in the “third force” of the early 1990s has not been superseded by later investigations. But they may also be vital in documenting past abuses. Examples

include the exposure of US service personnel to damaging nuclear tests and the eugenicist policy of Swedish governments.

In Romania in 1990, shortly after the fall of the Ceausescu regime, a series of television documentaries entitled *Memories of Pain* gave the public a profound insight into events under the old system through the use of oral testimony. The series ran for several years and became an essential reference point because of its thoroughness and perceived impartiality. It began long before the official commission of inquiry into Ceausescu's crimes got under way and, without doubt, had a far greater popular impact.⁴¹

In the Soviet Union, from 1989 writer Aleksandr Mil'chakov launched a campaign in *Vecherniaia Moskva*, the capital's main evening newspaper, to get information about the identities of those executed and buried in mass graves by the KGB. He had stumbled upon the issue when he was researching a novel and discovered from cemetery workers that in the 1930s hundreds of bodies with bullet holes in the foreheads had been thrown into unmarked common graves in Moscow cemeteries. After the publication of several articles the KGB produced lists of those buried. From December 1990 *Vecherniaia Moskva* began to publish a weekly column of photographs and short biographies of the dead.⁴²

The media may often act in conjunction with a more formal investigation of the past. The South African Broadcasting Corporation (SABC) coverage of the TRC, for example, has been vital in bringing proceedings to the broad public. This took place above all through a weekly Sunday night television programme, *TRC Special Report*, introduced by the respected former editor of *Vrye Weekblad*, Max du Preez. The programme attracted up to 1.2 million viewers a week. *Vrye Weekblad* had been one of a small number of independent newspapers to carry out highly effective investigation of the crimes of the *apartheid* state – in particular the development of “third force” hit squad tactics. So du Preez was a highly credible presenter for the TRC's Weekly findings. At the same time SABC radio was broadcasting the TRC's

⁴¹ Edwin Rekosh, “Romania: A Persistent Culture of Impunity” in Naomi Roht-Arriaza (ed.), *Impunity and Human Rights in International Law and Practice* (New York, 1995).

⁴² Kathleen E. Smith, “Destalinization in the Former Soviet Union” in *Ibid.*

proceedings, often live. The hearings, of course, were not at peak listening hours (unlike du Preez's programme) but the broadcasts still attracted a significant audience. An earlier and less celebrated truth commission in Uganda had discovered something similar in the late 1980s. The Commission of Inquiry into Violations of Human Rights chaired by Justice Arthur Oder also had highlights of its proceedings broadcast weekly. It must be said that Ugandan television at the time had few alternative attractions – certainly not the diet of sport and imported US action series that characterizes SABC. But the enthusiasm of the Ugandan public was largely to do with the fact that mysteries that had long remained concealed were now being uncovered – such as the murder of Archbishop Janani Luwum on the orders of President Idi Amin. The role of television was especially important in the Ugandan case because the commission was extremely slow in reporting. It was under-resourced from the start and on several occasions had to stop work because of lack of funds. Its final bulky report appeared, inevitably, when the events under review had receded even further into the past and, equally inevitably, will have been read by few Ugandans. Yet those television broadcasts kept the commission in the public eye and revealed many of its findings at a much earlier stage.

5.6 Museums

It makes sense to distinguish between the process of fact-finding and that of truth-telling. Some institutions, such as truth commissions or criminal proceedings clearly entail an investigation of the past. Yet this may not fully discharge the rights of the victims or the public at large to receive that information. A number of other types of institutions may be involved in the process of placing information about human rights violations in the public domain.

In discussions of investigating or remembering the past, the role of museums is often neglected. This is slightly surprising, since so many ordinary people use museums as a way of forming their view of the past – far more than read history books, for example. And museums have been a common way of both teaching and commemorating a history of human rights violations. The most obvious examples are the many Holocaust museums, especially in the United States.

The national Holocaust Museum in Washington, for example, is a centre for a combination of public education, commemoration and academic research. But memorials to the Holocaust have been heavily criticized in some quarters. They are often claimed to have a contemporary political agenda. The currently fashionable round of Holocaust memorializing (not just in museums, but in works of popular art, like the television series *Holocaust* and the film *Schindler's List*) began more than 20 years after the events being commemorated, coinciding with the United States' more aggressive support of Israel. Also, it is not clear that the Holocaust museums always succeed in their objective of public education. Writer Philip Gourevitch recently visited the Holocaust Museum in Washington to interview members of the public there. He quotes from the Visitors' book:

We really enjoyed learning about all of the horrible things that happened in Nazi Germany.

And a teacher with a school party told Gourevitch:

I believe that the Jews are God's chosen people. But they don't recognize that Jesus Christ is the messiah, that He came already. If they had, I think the Lord could have heard their prayers a lot more.⁴³

Gourevitch concluded:

As Americans observe the bloody unravelings of the post-cold-war world, the Holocaust Museum provides a rhetorical exercise in bearing witness to dehumanization and mass murder from a seemingly safe distance.⁴⁴

Gourevitch's opinion is worth listening to, since he is the author of one of the most widely respected studies of the Rwandan genocide.⁴⁵

⁴³ Given that the Holocaust was carried out by Christians against Jews, this reaction is mind-boggling evidence of a failure of public education. Compare the reactions of white South Africans to the TRC cited above.

⁴⁴ Philip Gourevitch, "What They Saw at the Holocaust Museum", *New York Times*, 12 February 1995.

⁴⁵ Philip Gourevitch, *We Wish to Inform You That Tomorrow We Will Be Killed With Our Families: Stories from Rwanda* (New York, 1998).

It may be the distance, in both time and space, that makes it difficult for Americans, especially young ones, to identify the Holocaust as much more than a cinematic episode, or a vindication of their own religious beliefs. Perhaps museums such as the Anne Frank House in Amsterdam, located in the hiding place of the Jewish girl who died in a Nazi concentration camp, are more effective because they're situated in the places where the genocide took place. Yet a moving account of a South African Jew using the Holocaust Museum to trace the fate of his family members who died in the Nazi camps is just one of many that suggests that museums have a role to play, not only in general public education, but also in the hard business of providing information to the relatives of victims.⁴⁶

This would explain why there is such enthusiasm for creating museums – a mixture of memorial, education and scholarship, when dictatorships fall. In Romania in 1992, one of the buildings on the former Revolution Square in Bucharest was transformed into a Museum of the Resistance. The building formerly housed a division of the feared secret police, the Securitate, and the museum's first exhibit was sheets three storeys high containing the names of political prisoners who had died under the Communist regime. A further Museum of Totalitarianism was announced to be established in Sighet, one of the most notorious political prisons.⁴⁷ Likewise in Malawi, in his inaugural speech in 1994, President Muluzi announced the closure of several of the most notorious prisons used to house political detainees under the old regime. One of these, Mikuyu, near Zomba, was to house a museum.

But the most celebrated recent example of a prison transformed into a museum has been Robben Island in South Africa. Robben Island was for many years symbolic of the apartheid system – whether from the point of view of the regime itself, as a sign of its uncompromising attitude, or in the more widely held condemnation of its abuses. In fact, Robben Island had become such a symbol of international distaste for South Africa that there were plans to change its use long before the transition to democracy of the 1990s. Plans were publicly aired to turn it into a nature reserve or a holiday

⁴⁶ Steven Robins. "Silence in my father's house: memory, nationalism and narratives of the body", in Sarah Nuttall and Carli Coetzee (eds), *Negotiating the past: The making of memory in South Africa* (Cape Town, 1998).

⁴⁷ Edwin Rekosh, "Romania: A Persistent Culture of Impunity" in Naomi Roht-Arriaza (ed.). *Impunity and Human Rights in International Law and Practice*.

resort – “a great place to escape to”, as one Cape Town newspaper described it. The prison’s most famous inmate, Nelson Mandela, objected to plans that would turn the island into a “circus”, while another eminent former prisoner, Ahmed Kathrada, objected to the “vulgar commercialism” of plans for casinos and nightclubs that would exploit Mandela’s popularity.⁴⁸ In the end, the involvement of former Robben Island prisoners in developing the museum has been important in avoiding the worst excesses and ensuring that it has an educative role. A private venture to market memorabilia under the label “The Original Robben Island Trading Store” was stymied because of opposition from former prisoners. But this has not avoided a degree of commercialization: Robben Island T-shirts, souvenir teaspoons and even a wine marketed as “Robben Island Red”.⁴⁹

South Africa has a number of other museums that commemorate the victims of past human rights violations, such as the District Six Museum in Cape Town, which celebrates the “Coloured” area destroyed in one of the apartheid regime’s most celebrated examples of forced removal. The Robben Island Museum differs in that it is not primarily aimed at exposing the human rights violations of the past, although that is one of its functions. It is more a celebration of the victory of democracy over apartheid. It certainly has an echo of Gorée Island in Senegal. The latter was a holding prison for slaves about to be transported to the New World. It has become a museum of the horrors of the slave trade, but also an institution promoting democracy and tolerance. It is not coincidental that a conference there in 1987 played an important part in the negotiations that brought the end of apartheid.

5.7 Memorials

Museums are, in part, a public memorial intended to influence popular perceptions of the past. The experience of Matabeleland – ceremonial reburials and the creation of monuments shows how important that process can be. The neatly piled skulls and

⁴⁸ Harriet Deacon, “Remembering tragedy, constructing modernity: Robben Island as a national monument”, in Sarah Nuttall and Carli Coetzee (eds.), *Negotiating the past: The making of memory in South Africa* (Cape Town, 1998).

⁴⁹ Patricia Davison, “Museums and the reshaping of memory” in *Ibid.*

other bones to be seen on the roadsides of Uganda's Luwero Triangle in the mid-1980s were a similar, spontaneous attempt to create a memorial to the dead – and one with the very specific and conscious aim of drawing attention to massacres which had been official denied. The display of human remains in Uganda ran completely counter to cultural practice on how to treat the dead, while the Matabeleland reburials are in that sense the complete opposite: the completion of cultural rituals that could not be addressed at the time because of the nature of the “disappearance” and death. They had, nevertheless, a common purpose, which included drawing attention to facts that had been denied.

In fact, cultural practices in relation to the dead do not differ so much from continent to continent. The importance of memorialising the dead was so great in the last days of the Soviet Union that the principal civic organization developed massive support as it aimed to do precisely that – and took the name Memorial. This was not the first time the question of memorials had come to the fore. During the Khrushchev de-Stalinization period of the late 1950s and early 1960s, Stalin's corpse was removed from Lenin's mausoleum and reburied in the Kremlin walls. Since 1991 there have been repeated efforts to have Lenin's embalmed corpse removed from Mausoleum and buried. An important symbolic moment was the popular destruction of a statue of Felix Dzerzhinsky, the founder of the Soviet secret police. Of far greater significance, however, to those who suffered human rights abuses have been the positive efforts to commemorate victims. Khrushchev in 1961 had called for consideration to be given to erecting a monument in Moscow “to commemorate the memory of the comrades who became victims of arbitrariness.” But this never happened. Memorial aimed to commemorate the victims of repression by a variety of means. These included the building of physical monuments, as well as historical research, newspaper articles and assistance to the victims of repression and their families.⁵⁰

It might be said that memorials are more to do with the commemoration of accepted facts than the process of investigating the past. Yet in practice, the process of creating memorials involves excavating the past, literally and figuratively. This is certainly the experience of Matabeleland, where memorials represent the culmination of a process that combines fact-finding, truth-telling and reconciliation with the reality of what has happened. Similarly, in South Africa, where a number of communities have created

⁵⁰ Kathleen E. Smith, “Destalinization in the Former Soviet Union” in Naomi Roht-Arriaza (ed), *Impunity and Human Rights in International Law and Practice*.

memorials with the aim of commemoration and reconciliation, it is the process that leads to the final physical outcome that is most important. Such a process is not always easy. In Mamelodi near Pretoria, for example, the African National Congress and the local civic organization created a memorial stone for Stanza Bopape, a prominent local activist who was killed by the apartheid state. He was said to represent all the dead in Mamelodi in the anti-apartheid struggle. Yet the families of other victims objected to this and created a board, near the local hospital, containing the names of 50 dead activists. Within months, the board was vandalized, leaving the relatives further distressed. In Thokoza on the East Rand, the process of creating a monument was also dogged by political conflict, but it did result in the gathering of 667 names of victims of political violence in the township – no small achievement, which was important both in fact-finding terms and as public acknowledgement.⁵¹

5.8 NGOs and civil society initiatives

There is one very compelling argument in favour of official investigations of past human rights violations: they constitute a formal *acknowledgement* of the wrong that the government (or some of its agencies) has done to members of society. There is a subsidiary practical argument that only official investigations will have the power to compel the attendance of witnesses and the production of evidence. None of this is to deny the vital role of investigations by non-governmental organizations and other sections of civil society.

Human rights NGOs compile reports on continuing human rights violations as part of their daily work – whether at the local, national, regional or international level. These are drawn from a number of sources: media reports, publicly available material, such as court documents, confidential communications from trusted sources on the ground and first-hand interviews with victims or witnesses of human rights violations. Yet human rights violations are, by their nature, often surrounded in secrecy, and occur in places where human rights monitors have no access: prisons, police stations or parts of the country where travel is restricted. So even the best NGO report on current or continuing human rights violations can only be seen as “work in progress”.

⁵¹ Lazarus Kgalema, “Symbols of Hope: Monuments as Symbols of Remembrance and Peace in the Process of Reconciliation”, Centre for the Study of Violence and Reconciliation, Johannesburg, 2000.

NGO investigations of *past* violations, however, can and should be something rather different. Sometimes, as in Malawi, the end of a period of dictatorship will see the flowering of several new human rights organizations, whose activists may not even have been born when the old regime was put in place. These organizations do not have the chance to investigate allegations of abuse when these occurred, but at the moment of transition they may set about documenting them for a number of purposes: so that the crimes of the old government may be fully exposed; so that the perpetrators may be brought to justice; so that the victims may be compensated; and to strengthen the argument for setting up a more comprehensive investigatory mechanism, such as a truth commission. In Malawi, the official investigation of the Banda period is still partial and inadequate, so these NGO records retain their importance.

In Zimbabwe and Namibia, official investigations have been almost completely absent. Therefore, the role played by NGO investigations has been central. In Zimbabwe in particular, community and NGO initiatives have been innovative and have succeeded in shifting popular perceptions of the past.

What is particularly interesting, however, is that even in countries where there have been formal truth processes, the same sort of civil society initiative has proved necessary. This can be seen in South Africa, where victims' support groups like the Khulumani Victim Support Group have worked in parallel to the TRC.⁵² Similarly in Sierra Leone, where a truth commission is being formed, the civic group Forum of Conscience is planning similar work with communities affected by abuses in the course of the civil war. Perhaps the most striking example has been in Guatemala, where a formal truth commission, the Commission for Historical Clarification (CEH) was set up under the peace accords that ended a 36-year civil war. The Recovery of

⁵² See Hugo van der Merwe, Polly Dewhirst and Brandon Hamber, "Non-governmental organisations and the Truth and Reconciliation Commission: an impact assessment", *Politikon*, (1999) 26(1), pp55-79 and Brandon Hamber and Steve Kibble, *From Truth to Transformation: The Truth and Reconciliation Commission in South Africa*, Catholic Institute for International Relations (London,

the Historic Memory (REMHI) project ran in parallel to the official CEH – the latter coming under considerable criticism for its inadequacies. REMHI was an initiative of the Roman Catholic church. Its initiator, Monsignor Geradi, was murdered two days after the REMHI report was presented to the public in 1998. The report *Guatemala: Nunca Mas* (Guatemala: Never Again) documented the cases of 55,021 victims of human rights violations, based on 5,180 testimonies gathered from survivors. Very importantly, it identified more than 300 mass graves that had been kept hidden by the army. One commentator observed of REMHI:

While augmenting the likely impact of the Commission (CEH), the REMHI project will also serve to highlight its many shortcomings, and to help fulfil some of its neglected functions. Uniquely the REMHI report will name both perpetrators and victims on both sides of the political divide. In addition, the project is working for a longer period than the CEH and more closely with local communities.⁵³

There are several reasons why such work is needed to complement the work of a formal inquiry. First, in a situation where there has been widespread violation of human rights, a single centrally-organised investigation is never going to get to the bottom of everything that happened. Local in-depth inquiries will always be needed to supplement that.

In Guatemala, the REMHI initiative greatly strengthened the work of the official commission, whose final report was far better than had initially been expected. Second, a locally organized, non-governmental inquiry is always likely to be more sensitive to the wishes and needs of the affected communities. Thirdly, in Africa at least (but also in many other parts of the world) the popular focus is much less on the individual “victim” and more on the impact of serious human rights violations on the entire community. Supplementary investigations that are under the control of the communities themselves can be more sensitive to those needs.

5.9 Academic Study

1999). Both offer an interesting general discussion of the relationship between NGOs, civil society and the TRC.

⁵³ Richard Wilson, “Violent Truths: The Politics of Memory in Guatemala”, *Accord: An International Review of Peace Initiatives*, http://www.c-r.org/acc_guat/wilson.htm.

Curiously, academic study of past human rights violations never figures very highly on anyone's method of investigating the past. Yet most would claim to derive their view of the past (at least indirectly) from the work of academic historians. The continuing, highly-politicised battles over Holocaust-denial show that the role of academic study in documenting human rights abuses does not end even when the reality of those abuses is commonly acknowledged.

There can be a great disparity between academic study of human rights abuses and popular perception. For example, academic study of the Matabeleland killings has established various facts that are well known to the participants, no doubt, but not widely acknowledged by others. In another southern African example, a book by Stephen Ellis and Tsepo Sechaba – historian and activist respectively – was vital in placing the issue of abuses by the African National Congress on the political agenda.⁵⁴ This was not the first time that such allegations had been heard, but the fact that they were documented from a politically impartial and academic standpoint made the claim harder to deny. The ANC itself was soon obliged to set up its own commissions of inquiry to investigate abuses and the topic ultimately also became a matter for the TRC.

It may be difficult for academics to make such a large contribution to the understanding of ongoing events. This was certainly the case in Malawi, where an elaborate formal censorship mechanism prevented any academic inquiry into politically sensitive events at the time. Hence the importance of the proposed investigation by the Malawi History Project – and the disappointment that it came to nothing.

In some countries, control of the past has been so centralized that the entire system is thrown into disarray when that past is questioned. In the Soviet Union, for example, there was effectively no historiography but the official one. In the late 1980s, the popular press began to question the official version of history – and indeed the First Secretary of the Communist Party began to rehabilitate Old Bolsheviks like Bukharin who had long been regarded as agents of imperialism. This was more than the edifice

⁵⁴ Stephen Ellis and Tsepo Sechaba, *Comrades against Apartheid: The ANC and the South African Communist Party in Exile* (London, 1992).

of Soviet historiography could take: the spring 1988 history exams were cancelled and plans initiated for writing a new textbook. The problem with producing a “new” version of history (or a new truth) is that this notion of truth was being hotly debated in society at large. This was not just a matter for professional historians, but for writers in general, many of whom illuminated historical developments through literary means, and the public at large. The healthy outcome of all this was that a new style of historiography emerged that took much greater account of oral testimony, personal reminiscences and literature, in addition to more “traditional” types of historical source material.⁵⁵

Conclusion

This report has argued that people have a right to information about past human rights violations for its own sake. But there is also a very strong pragmatic argument for fact-finding exercises. The Malawi History Project failed because of lack of funds. Donors did not see the value of looking backwards in order to move forward. Yet the democratic government of Malawi since 1994 has not been a model of openness, efficiency or good governance. Why? Largely because it continues with the methods and the low standards of probity and accountability that characterized the years of single-party rule. One result of this is that donors’ money is spent inefficiently and often corruptly. Surely a thorough investigation that documented the nature of abuses under the old regime could lead to reforms that would facilitate better governance under the new.

⁵⁵ Kathleen E. Smith, “Destalinization in the Former Soviet Union” in Naomi Roht-Arriaza (ed.),

Lack of accounting for the past also creates a sense of popular alienation that is likely to have a negative effect on future economic development. Research by Amani Trust in Zimbabwe has shown that victims of human rights violations in the 1970s are *still* less economically productive than their neighbours. Comparing survivors of organized violence and torture (OVT) with a control group, Amani found a consistent pattern of economic disadvantage on the part of the survivors, manifested in:

- Greater illiteracy
- Higher unemployment
- Higher spending on health care
- Have less income in the past week
- Less earnings in the past year
- Lower household expenditure
- Poorer housing
- Less food security
- More likely to use charity or Social Welfare.⁵⁶

Nor are these survivors an insignificant minority group. The Amani Trust estimates that those suffering from psychological disorders as a result of OVT are about one in ten adults over the age of 30 in Mashonaland Central province – that is liberation war survivors. In Gwanda District in Matabeleland South, where there was organized violence in both the 1970s and 1980s, half of all clinic patients over the age of 18 were clinically anxious or depressed. Of this latter group, more than 90 per cent were survivors of OVT.⁵⁷ Of course, uncovering the facts about this violence will not make the problems go away – indeed the South African experience is that the process of truth-telling may increase the burden on psychological services in the short term.⁵⁸ But there is no doubt that these problems can only be dealt with by fact-finding and public acknowledgement.

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⁵⁶ Amani Trust, *The Psycho-Social Needs of Survivors of Organized Violence and Torture in the Community* (Harare, 1998).

⁵⁷ Amani Trust, *Living with Torture: Justice and Reparation after the Liberation War* (Harare, 1998).

⁵⁸ Brandon Hamber, “The Burdens of Truth: An Evaluation of the Psychological Support Services and Initiatives Undertaken by the South African Truth and Reconciliation Commission”, *American Imago*, Vol.55, No.1, pp.9-28.

For donors fixated with the bottom line, is that not reason enough to favour a process of accountability? And this is not to mention the broader picture: the commander of the Fifth Brigade in Matabeleland, for instance, re-emerged as military commander of the Zimbabwean forces in the Congo – and then as coordinator of the wave of “farm invasions” that were in reality an attempt to stop rural Zimbabweans from voting for the opposition. In a society where there was openness and accountability this simply could not happen.

This report has aimed to do two things: to stress that the victims and survivors of human rights violations have a fundamental right to information about what has happened to them – and that this right is one to be exercised by society at large, not simply by individuals. Secondly, while emphasizing the importance in many cases of official commissions as a means of uncovering hidden facts, the report has explored a host of other means which, if pursued, can complement formal fact-finding commissions.

Governments have an obligation to facilitate these other means by freedom of information measures and access to government records; through museums and memorials; through the justice system; and by a variety of other actions. In particular, NGOs and community organizations have a vital role to play. They can be the most effective guarantors that efforts to uncover the facts about past human rights directly respond to the wishes and needs of the victims and do not simply become vessels for official or mythologized views of the past. This brief study has not even taken into account other more personal means of uncovering the past – for example through fiction, poetry, autobiography or music.

All the approaches to uncovering the facts about past human rights violations discussed are important because they are mechanisms of accountability – they help the government keep some track of the governors. As such, they are not a luxury but an absolute precondition for those who are trying to put a history of abuse behind them and construct new societies based upon dignity and respect for human rights.

