NATIONAL TRANSITIONAL JUSTICE WORKING GROUP ZIMBABWE

Research and Discussion Paper on the Development of a Transitional Justice Framework for Zimbabwe

- Draft -

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Acronyms

ACHPR: African Charter on Human and Peoples Rights

ATJF: African Transitional Justice Framework

AU: African Union

CCPR: Convention on Civil and Political Rights

CSOs: Civil Society Organizations

DwP: Dealing with the Past

ICC: International Criminal Court

IDP: Internally Displaced People

ICTJ: Centre for Transitional Justice

ICTR: International Criminal Tribunal for Rwanda

ICTY: International Criminal Tribunal for the former Yugoslavia

JLOS: Justice Law and Order Section- Uganda

NPRC: National Peace and reconciliation Commission (of Zimbabwe)

NTJWG: National Transitional Justice Working Group

OHCHR: The Office of the High Commissioner for Human Rights

The Forum: Zimbabwe Human Rights NGO Forum

TRC: Truth and Reconciliation Commission

UN: United Nations

ZANU-PF: The Zimbabwe African National Union – Patriotic Front

ZRP: Zimbabwean Republic Police

1. Introduction

Zimbabwe has a strong legacy of gross violations of human rights. These include violations that date back as far as the colonial era up to today. There has never been an effort to address this past comprehensively. The establishment of the National Peace and Reconciliation Commission (NPRC) has opened space for a national conversation on this area. Yet even these efforts seem bound to fail unless Zimbabwe develops a comprehensive transitional justice programme which obliges all government entities to be seized with the national healing and reconciliation agenda and to put in place appropriate measures.

1.1. Objective

The objective of the research is the development of a discussion paper for a transitional justice framework for Zimbabwe. This research will cover aspects regarding the

- understanding of key transitional justice questions in Zimbabwe;
- analysis of the existing transitional justice policy framework in Zimbabwe;
- identification of critical actors for Zimbabwe's reconciliation process and their roles in the process;
- identification of legislative gaps and the proposition on how they are to be filled;
- incorporation of a comparative analysis from other countries;
- needs and expectations of transitional justice stakeholders in Zimbabwe

The research paper will also take into consideration the Updated Set of principles for the protection and promotion of human rights through action to combat impunity, also called the UN-Joinet-Orentlicher Principles. The discussion guide for a transitional justice framework will eventually guide stakeholders in the consultative process with the objective to come-up with an agreed TJ framework for Zimbabwe.

This research seeks a realistic approach based on the experience of truth commissions in other countries and the reality of the Zimbabwean situation, the latter taking into account the

- political environment with the main party Zanu-PF still in power since independence (so, from this point of view, the situation in Zimbabwe is not really "transitional" in the strict sense of the term);
- economic situation of the country characterized by a devastated commercial environment, severe financial constraints of the state and wide-spread poverty;

These factors will put its constraints on any form of Dealing with the Past in terms of implementation and financial support of the process. Consequently, the transitional justice process requires a measured and realistic approach that does not raise excessive expectations among the victims and the society.

1.2.Methodology

The chart below depicts the approach chosen to fulfil the tasks described above. This approach also supports the requirement of an evidence-based research.

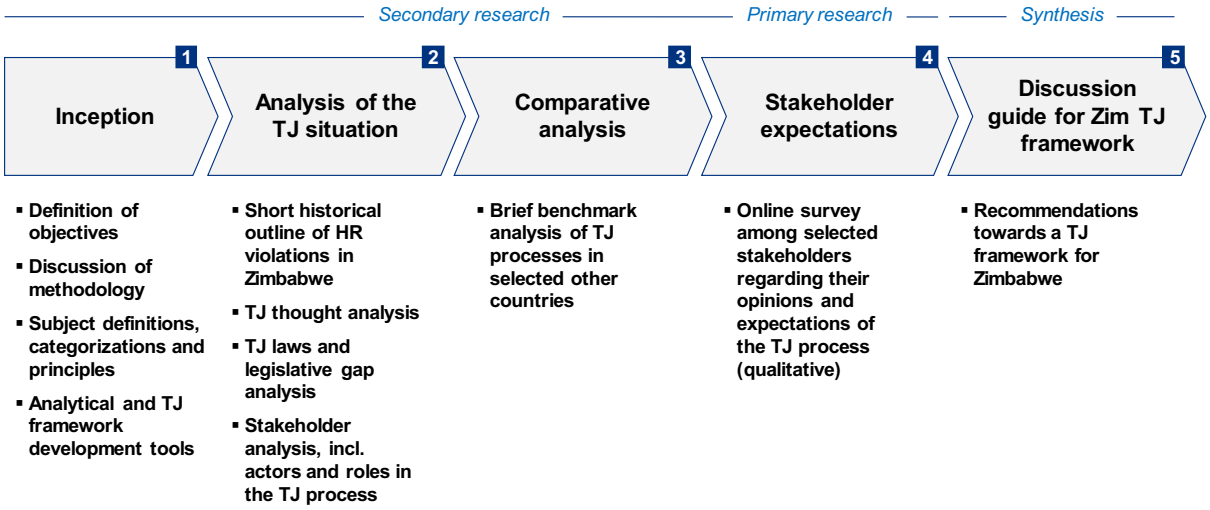

Figure 1-1: Research approach

The report structure will follow this approach, dividing the research into three sections:

- Chapter 1 - 6: Preceded by a section on defining the major terms and tools of the subject, followed by a brief outline of Zimbabwe's history of human rights violations and its efforts to Deal with the Past, a comparative analysis of other countries' closes this analytical section.
- Chapter 7: A brief (qualitative) opinion trend, via an online seeks to draw a picture of various stakeholders' expectations regarding the transitional justice process in Zimbabwe;
- Chapter 8: Finally, drawing from the research, a discussion guide for a draft transitional justice framework for Zimbabwe is being developed.

The documents that have been analysed in the research process include, but are not limited to:

- For analysis purposes: the swisspeace conceptual framework for Dealing with the Past.
- For the discussion guide for draft transitional justice framework for Zimbabwe: the African Transitional Justice Framework (ATJF).
- For various definitions: UN, AU, and other sources.
- Various, reports, articles,

The analytical process of the study relies to a large extent on the swisspeace transitional justice instrument, a tool to classify transitional justice aspects into different categories. For the development of a Transitional Justice Framework for the Zimbabwe the African Transitional Justice Framework (ATJF) is used, which, coming from an African perspective, comprehensively lists transitional justice measures. Both tools will be explained in detail in chapter "The Main Pillars of Transitional Justice".

2. Definition and Objectives of Transitional Justice

In this chapter, the study sheds some light on different definitions of and around transitional justice. This is important since some terms are not used consistently in the Dealing with the Past discussion.

2.1.What is Transitional Justice?

Human rights abuses, breaches and violations happen every day, particularly in dictatorial and undemocratic countries. These countries usually show poor governance and a lack of separation of power; they control their citizenries through suppression and often grant impunity toperpetrators.

The history of transitional justice begins with the Nuremberg trials[1].In the same fashion, numerous successor governments in various countries, after war, coup d'états etc., have tried to deal with past human rights violations through ad hoc tribunals, commission of inquiries and hybrid courts. What immerged out of these activities is the concept of transitional justice.

Over time, transitional justice processes and mechanisms have become a critical component of various international organizations for strengthening the rule of law.[2] The most prominent are the UN, the AU and the International Centre for Transitional Justice (ICTJ):

- For the United Nations, transitional justice is the full range of processes and mechanisms associated with a society's attempt to come to terms with a legacy of large-scale past human rights abuses. The aim is to ensure accountability, serve justice and achieve reconciliation.[3]
- The AU Transitional Justice Framework (ATJF) emphasises that, additionally to the UN definition, that transitional justice processes in Africa should be anchored on African conceptions of justice. In this regard, the framework suggests sketches and approaches that are adaptable to specific country situations in order to encourage affected countries to design appropriate, "culture-specific" transitional justice mechanisms.[4]
- The ICTJ defines transitional justice as the ways countries, emerging from periods of conflict and repression, address large-scale or systematic human rights violations so numerous and so serious that the normal justice system will not be able to provide an adequate response.[5]

All three definitions have the same aim: to deal with past gross and systematic human rights violations by using different processes and mechanisms to restore the dignity of the victim, bring healing for the individual and achieve reconciliation of the society at large.

[1]Between 1945 and 1949 after World War II was ended by the allies, Nazi party officials and other collaborators were indicted for crimes against humanity by committing genocide. The Nuremberg trials are the predecessor for dealing with the past in an innovative way, which ultimately developed to transitional justice mechanisms and processes; https://www.history.com/topics/world-war-ii/nuremberg-trials
[2]Guidance note of the secretary-general, United Nations Approach to Transitional Justice; https://www.un.org/ruleoflaw/files/TJ_Guidance_Note_March_2010FINAL.pdf
[3] UN approach to transitional justice; https://www.un.org/ruleoflaw/files/TJ_Guidance_Note_March_2010FINAL.pdf
[4] AU transitional Justice Framework (ATJF); https://www.legal-tools.org/doc/bcdc97/pdf/
[5]https://www.ictj.org/about/transitional-justice

Why is a special procedure like transitional justice necessary to deal with past human rights violations? The answer is that human rights and freedoms are in general individual rights. If there is a violation an individual can approach the courts to get redress. Transitional justice, on the contrary, deals with large-scale, serious ,gross, systematic human rights violations; many people and whole communities are usually affected and perpetrators have often been part of the governing system. In these cases, as identified by ICTJ, the domestic, "normal" justice system does not have the necessary structures to deal with these cases and special procedures and measures are needed.

2.2.Definitions of Human Rights Violations

The different UN human rights bodies have various definitions for human rights violations which the Vienna world conference on human rights summarized by stating that gross and systematic violations and situations include:[6]

- torture and cruel, inhuman and degrading treatment or punishment,
- summary and arbitrary executions,
- disappearances, arbitrary detentions,
- all forms of racism,
- racial discrimination and apartheid,
- foreign occupation and alien domination,
- xenophobia,
- poverty, hunger and other denials of economic, social and cultural rights,
- religious intolerance,
- terrorism,
- discrimination against women,
- lack of the rule of law.

The Office of the High Commissioner for Human Rights (OHCHR) has stated[7] that there is no uniform definition of gross human rights violations in international law, however it concludes that the following practices are included in the various definitions:

- genocide,
- slavery and slavery-like practices,
- summary or arbitrary executions,
- torture,
- enforced disappearances,
- arbitrary and prolonged detention,
- systematic discrimination.

[6] Vienna Declaration and Programme of Action, adopted by the world conference on human rights on 25 June 1993 in Vienna, point 30; https://www.ohchr.org/en/professionalinterest/pages/vienna.aspx
[7] The corporate responsibility to respect human rights - an interpretive guide, OHCHR publications, HR/PUB/12/02 © 2012 United Nations

- economic, social and cultural rights, if they are grave and systematic, for example violations taking place on a large scale or targeted at particular population groups.

The South African enabling law for the establishment of the Truth and Reconciliation Commission (TRC) defined gross violation of human rights as

- (a) the killing, abduction, torture or severe ill-treatment of any person; or
- (b) any attempt, conspiracy, incitement, instigation, command or procurement to commit an act referred to in paragraph (a).[8]

This restrictive definition had created a massive challenge for the South African TRC on what this definition includes or not.[9]Hence, this definition was amended in 1996 by adding to (b) *any attempt, conspiracy, incitement, instigation, command or procurement to commit an act referred to in paragraph (a) ... within or outside the Republic, and the commission of which was carried out, advised, planned, directed, commanded or ordered, by any person acting with a political motive*.[10]

The Zimbabwean National Peace and Reconciliation Act, which is the enabling law for the operalisation of Zimbabwe's National Peace and Reconciliation Commission (NPRC), does not provide a definition for human rights violations; the only violation it mentions is in Section 252 (e) instructing the NPRC *to develop programmes to ensure that persons subjected to persecution, torture and other forms of abuse receive rehabilitative treatment and support.*[11] This lack of definition might hamper the work of the NPRC as was the case with the South African TRC. There might be a need to amend the act by adding a precise definition, which type of violations the commission is mandated to deal with.

[8] Promotion of National Unity and Reconciliation Act 34 of 1995; http://www.justice.gov.za/legislation/acts/1995-034.pdf
[9] Nelson Mandela Centre of Memory: Chapter 1. Analysis of Gross Violations of Human Rights; https://omalley.nelsonmandela.org/omalley/index.php/site/q/03lv02167/04lv02264/05lv02335/06lv02357/07lv02398/08lv02399.htm
[10] NO. 104 OF 1996: Judicial matters amendment act, 1996; http://www.justice.gov.za/legislation/acts/1996-104.pdf
[11] National Peace and Reconciliation Commission Act (Chapter 10:32), https://zimlii.org/zw/legislation/act/2017/11

3. Why is there a Need for Transitional Justice in Zimbabwe?

Before its attainment of independence in 1980, Zimbabwe (then known as Rhodesia) had been under colonial rule since 1890. Between 1972 and 1979 there was a violent struggle for independence. In terms of reconciliation and justice, Zimbabwe's violent colonial past was never addressed by way of a co-ordinated transitional justice process. Following the attainment of independence, violent internal conflicts continued to impact seriously on Zimbabwe's development, killing, torturing, internally displacing thousands of people in particular:

- 1983-1984: The Matabeleland and Midland atrocities, called also the Gukurahundi, where over 20,000 people were killed.[12]
- 1998: The food riots, where the government deployed the army against riots over soaring food price; several people died.[13]
- 2000:An estimated 700,000 people in cities across the country have either lost their homes or their livelihoods or both, by the so-called operation Murambatsvina called by the state to restore order.[14]
- 2000: Led by war veterans, more than 1,600 commercial farms were, mostly violently, occupied by settlers.[15]
- 2008: In post- and pre-election violence, 193 citizens had been killed in political violence that targeted members of the opposition party.[16]
- 2018: In post election violence, at least 6 persons died.[17]

Following up these tragic events, however, Zimbabwe and its people are yet to experience justice, reconciliation and healing at the national and community level.

To develop a sustainable and comprehensive transitional justice framework for Zimbabwe, it is essential to map the types of violence and the types of perpetrators. This approach will assist to identify and prioritize state or non-state agencies who commit the violations.

The identification of the types of violations committed will enable institutions, state and non-state actors dealing with transitional justice to advocate and demand the implementation of the transitional justice pillars.

For this exercise, data from the Zimbabwean Human Rights NGO Forum database, which contains details of victims who were looking for support at the Forum between January 1, 1998 to October 14, 2014, has been used.

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[12] Breaking the silence, building True peace: a report on the disturbances in Matabeleland and the Midlands, 1980 - 1988 – a summary, The Catholic Commission for Justice and Peace in Zimbabwe & The Legal Resources Foundation; http://hrforumzim.org/wp-content/uploads/2010/06/breaking-the-silence.pdf

[13] A consolidated report on the food riots 19 — 23 JANUARY 1998;
Report compiled by the AMANI Trust on behalf of the Zimbabwe Human Rights NGO Forum;
http://www.hrforumzim.org/publications/reports-on-political-violence/food-riots-jan-1998/

[14] Report of the Fact-Finding Mission to Zimbabwe to assess the Scope and Impact of Operation Murambatsvina by the UN Special Envoy on Human Settlements Issues in Zimbabwe
Mrs. Anna KajumuloTibaijuka; http://www.un.org/News/dh/infocus/zimbabwe/zimbabwe_rpt.pdf

[15] https://www.hrw.org/reports/2002/zimbabwe/ZimLand0302-02.htm

[16] US department of state; country report, Zimbabwe 2009; 193 citizens had been killed in political violence that targeted members of the opposition party

[17] https://www.hrw.org/news/2018/08/03/zimbabwe-least-6-dead-post-election-violence

Regarding the type of committed human rights violations the analysis revealed the following classification:

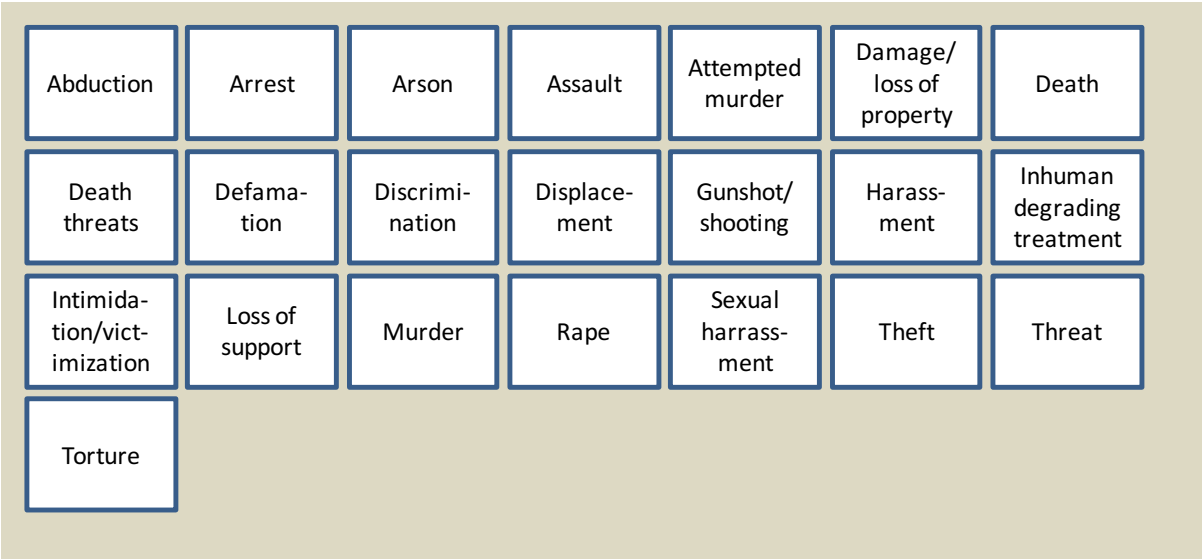


Figure 3-1: Classification of types of committed human rights violations

Regarding the type of perpetrators the analysis revealed the following classification:

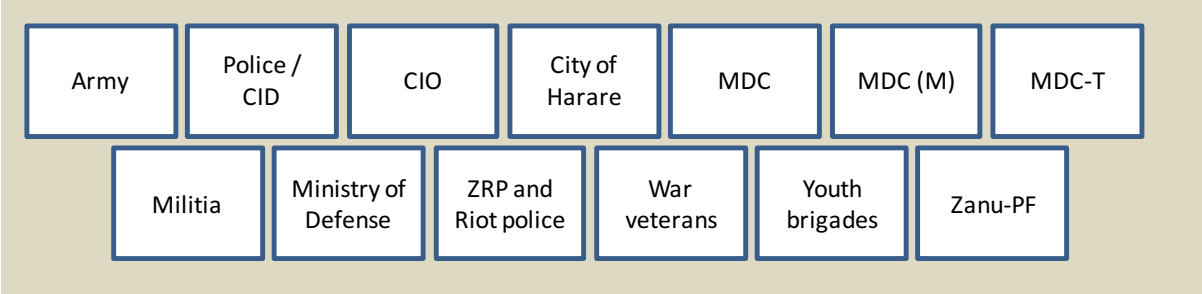


Figure 3-2: Classification of institutions / agencies that committed human rights violations

Mapping, i.e. crossing the two variables "perpetrators" and "types of violations", generates the following matrix:

Agencies / *Violations*	Army	Police / CID	CIO	City of Harare	MDC	MDC (M)	MDC-T	Militia	Ministry of Defense	ZRP and Riot police	War veterans	Youth brigades	Zanu-PF
• Abduction	7	6	4							6	2	1	81
• Arrest	50	39	9						2	251	14	3	273
• Arson													204
• Assault	120	28	14	1	21	1	1	3	9	236	25		1905
• Attempted murder													
• Damage/loss of property	13	1			28				1	171	6	7	1487
• Death		1											30
• Death threats		1											
• Defamation										1			
• Discrimination													1
• Displacement										2	2	1	121
• Gunshot/shooting	2								1	4			1
• Harassment	6	3							1	13	1		13
• Inhuman degrading treatment	11	3	3							18	1		145
• Intimidation/victimization	10	2	1					1	1	27	18	4	952
• Loss of support													
• Murder										1			6
• Rape	1												
• Sexual harassment										4			8
• Theft			1										
• Threat													19
• Torture	25	9	3						1	54	13	3	67
TOTAL	**245**	**93**	**35**	**1**	**49**	**1**	**1**	**4**	**16**	**788**	**82**	**19**	**5313**

Figure 3-3: Perpetrator-violation-mapping

The list of types of violations and perpetrators is not exhaustive; it includes only those types, which individuals/victims have reported. The number represents individual cases of violations

The benefit of this analysis is that it identifies the types of human rights violations in Zimbabwe and their perpetrators. It shows that, at least in the analysed time, Zanu-PF perpetrated the highest human rights violations followed by the Zimbabwean Republic Police (ZRP), the riot police, the army, war veterans and the youth brigades.

The lack of the rule of law in Zimbabwe is prevailing. The World Justice Project Rule of Law Index for 2017/ 2018 has ranked Zimbabwe at 108 just above, Cameroon, Egypt, Afghanistan , Cambodia and Venezuela.[18] The Freedom House Index for 2018 has stated that Zimbabwe is, regarding civil and political rights including civil liberties, not a free state.[19]These rankings indicate that Zimbabwe needs to adhere to the rule of law in order to deal with past human rights violations and to guarantee non-recurrence.

[18] World Justice Project Rule of Law Index , 2017–2018; https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2018-June-Online-Edition_0.pdf
[19] Freedom in the world 2008, freedom house; https://freedomhouse.org/report/freedom-world/2018/zimbabwe

4. The Main Pillars of Transitional Justice

Different UN bodies, lessons learnt from past transitional justice processes and mechanisms, Civil Society Organizations (CSOs) and academia have contributed to the development of tools, which are accepted and widely used in transitional justice processes and mechanisms:

- The swisspeace Transitional Justice Framework, which will be used for analytical purposes of transitional justice processes
- The African Transitional Justice Framework, which is well-suited, and will be used, as a development tool for transitional justice measures.

4.1.The swisspeace Transitional Justice Framework

According to swisspeace' conceptual ltransitional justice framework[20], which has summarized available fragmented frameworks for dealing with the past, there are basically four pillars:

- The right to know
- The right to justice
- The right to reparation and
- The guarantee of non-recurrence

These 4 pillars are based on individual and collective rights and are the erga omnes obligation of a state to ensure them. The following graph illustrates swisspeace's approach:

[20] A conceptual framework for dealing with the past, holism in principle and practice, swisspeace; http://www.swisspeace.ch/topics/dealing-with-the-past/framework.html

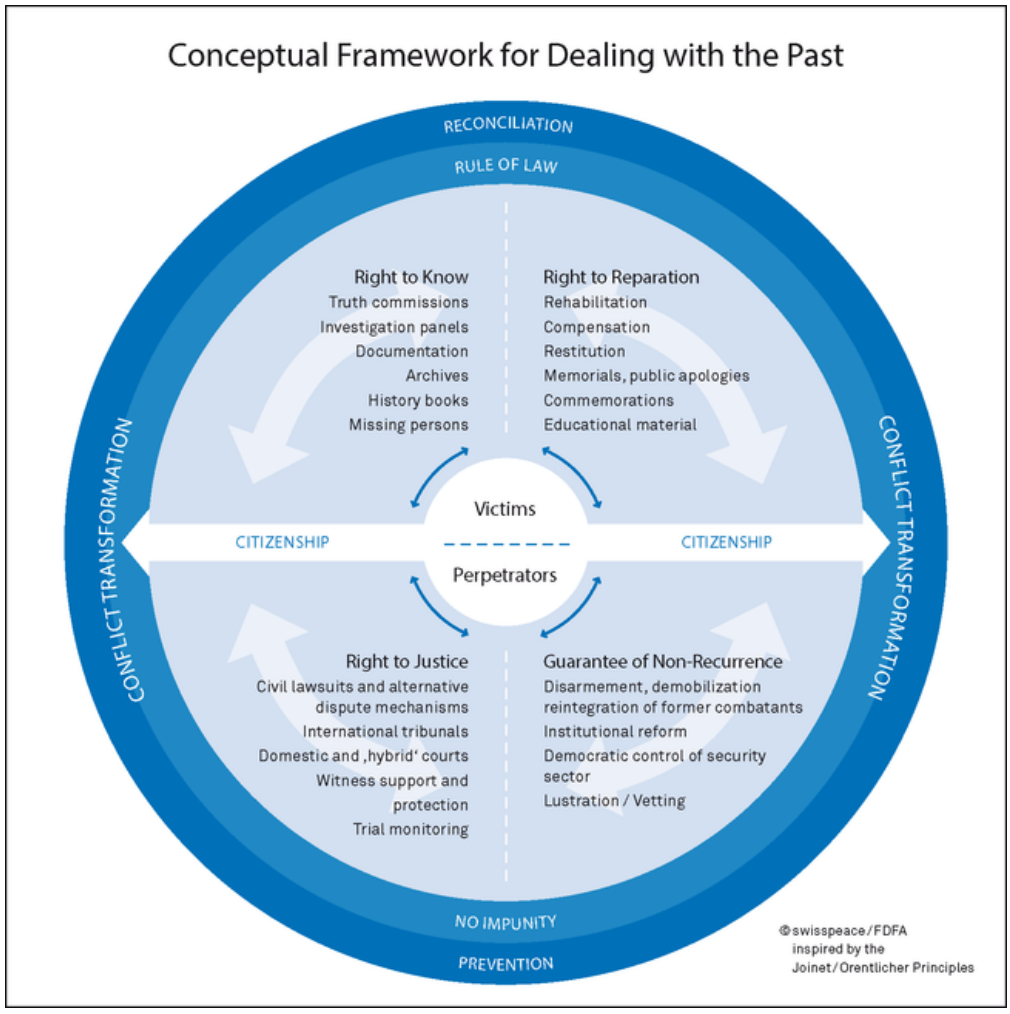


Figure 4-1: The swisspeace TJ framework

Each of the swisspeace's four pillars, contain different approaches for different cases. In the following, these four pillars will be further analysed.

The right to know

Individual victims, survivors, their dependents and also dependents and relatives of missing persons as well as the society as a whole have the right to know what kind of violations took place, why the violation had happened (cause) and who is responsible for the violations. This fulfilment of this right might lead to first steps of healing.

Different mechanisms can be applied to investigate the past violations and thus implement the right to know:

- *Truth (and reconciliation) commissions*: Usually established by the successor government of a country to deal with past atrocities of the predecessor government.
- *Commissions of inquiry*: The United Nations had and is still mandating through its different bodies – the Security Council, the General Assembly, the Human Rights Council commissions of inquiry, fact-finding missions and investigations to respond to situations of serious

violations of international humanitarian law and international human rights law.[21]Some states also set up their own commission of inquiry with the mandate to investigate independently and impartially certain incidents and come up with recommendations. As an example, in Zimbabwe after the 2018 harmonised elections, the President has set up a commission of inquiry to investigate the human rights violations.[22] The aim is to investigate the post-election violence in which over 200 human rights violations were documented in the course of two weeks. The violations included the extra-judicial killing of civilians who were shot by the military forces on 1 August 2018 following their deployment in unclear circumstances.

- *Archives*: Whatever body investigates human rights violations, it must be evidence based. Hence, the investigating body should have access to any information recorded by state and non-state actors. Archiving the history of violations and the dealing with the past process and making it accessible for future generations is also part of memorialisation as and the non-recurrence function of transitional justice.

The right to justice

The right to justice is a fundamental human right and the basis for the rule of law. International human rights law obliges states to protect, fulfil and enforce the human rights of its citizens. Citizens have the right to justice, if their rights have been violated. Impunity, blanket amnesty as well as the lack to appropriate access to justice are some elements which hamper the right to justice. Crimes against humanity are exempted from blanket amnesty, according to Article 7 of the Rome Statute of the International Criminal Court(ICC)[23], crimes against humanity means "any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- Murder;
- Extermination;
- Enslavement;
- Deportation or forcible transfer of population;
- Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
- Torture;
- Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;

[21] Recent UN missions of inquiry, are the ones for Syria, Mynamar, South Sudan. For further missions of inquiry and their reports, see; https://www.ohchr.org/EN/HRBodies/HRC/Pages/COIs.aspx
[22] The legal basis for Zimbabwean inquiry commission is the Commissions of inquiry act 10 07- https://www.parlzim.gov.zw/acts-list/commissions-of-inquiry-act-10-07; also see the analysis and statement of the NTJWG regarding this inquiry commission - http://www.ntjwg.org.zw/downloads/Response%20to%20the%20Appointment%20of%20the%20Commission%20of%20Inquiry.pdf
[23] The Rome Statute of the ICC entered into force on 1st of July 2002; https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf

- Persecution against any identifiable group or collectively on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
- Enforced disappearance of persons;
- The crime of apartheid;
- Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health".
- Genocide is also classified as a crime against humanity.[24]

According to the swisspeace framework, "*[for] each society undergoing a Dealing with the Past process decisions need to be made regarding the type of trial best suited to achieving a meaningful and legitimate form of accountability in a given context*".[25] **National prosecution** is the straight-forward way of delivering justice. However it is impossible, because of prevailing impunity and the lack of willingness of states to prosecute its own citizens because of crimes against humanity and genocide. Therefore other forms of trials are justified.

- **International tribunals**: The ICC is a **permanent** tribunal where the jurisdiction of the Court is limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this statute with respect to the following crimes: (a) The crime of genocide; (b) Crimes against humanity; (c) War crimes; (d) The crime of aggression.[26] Before this permanent court was established, the UN Security Council applying Chapter VII of the UN Charter[27] has establishes several **ad hoc tribunals**. The Nuremberg military tribunal was the first ad hoc tribunal. Later, after the ending of the cold war, several ad hoc tribunals had been established to deal with perpetrators who committed crimes against humanity and genocide, e.g. the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) were both created by the UN Security Council.[28]
- **Hybrid tribunals**: have mixed international and local experts and are usually located in the state to be investigated. In Africa, this was the case in Sierra Leone. It is important to note that this court was established by the UN after the Government of Sierra Leone requested the UN to create a special court to address serious crimes against civilians and UN peacekeepers committed during the country's decade-long (1991-2002) civil war. The court had its seat in Sierra Leone and was funded by voluntary funds.[29]

[24] Art 6, Rome Statute, see also Art 2 of the Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the General Assembly of the United Nations on 9 December 1948; https://treaties.un.org/doc/publication/unts/volume%2078/volume-78-i-1021-english.pdf
[25] DwP framework supra note…., 2.2.-the right to justice
[26] Art 5, Rome Statute
[27] Chapter VII of the UN Charter: action with respect to threats to the peace, breaches of the peace , and acts of aggression; http://www.un.org/en/sections/un-charter/chapter-vii
[28] https://www.icrc.org/en/document/ad-hoc-tribunals
[29] http://www.rscsl.org/

The right to reparation

Generally, individuals as well as collectives have the right to reparation. It has several different components: restitution, compensation and rehabilitation.

- *Restitution*: returning to the proper owner property or the monetary value of loss. In criminal cases, one of the penalties imposed is requiring return of stolen goods to the victim or payment to the victim for harm caused.[30]For victims who have been internally displaced (IDP) the right to restitution of their property is of utmost importance.
- *Compensation*: Where restitution is not feasible compensation in monetary form might be applied.
- *Rehabilitation*: This is related to the acknowledgment of past human rights violations, establishing memorialisation projects restoring the dignity of the victims.

The Guarantee of non-recurrence (non-repetition):

This last pillar of the swisspeace concept reflects and analyses why in the past gross human rights violations have happened and, to prevent them in the future, how the judiciary, the police and the security sector must be reformed and how laws, which deny citizens the full exercise of their human right and fundamental freedoms must be repealed or aligned.

Depending on the post conflict situation the guarantee of non-recurrence includes demobilisation of combatants, election and constitutional reforms, reforms of the security sector, reform of the legal system and denying former human rights violators any active role in the political and state structures (vetting and lustration).The aim is to build democratic structures where the rule of law and accountability prevail and impunity, including selective application of the law, is abolished.

4.2.The ATJF and Dealing with the Past

The AU Transitional Justice Framework (ATJF) is intended to assist countries emerging from conflict in their pursuit of accountability, sustainable peace, justice and reconciliation. The ATJF aims to

- serve as a guide that can be adapted by countries in the design and implementation of transitional justice mechanisms, and to
- improve the timeliness, effectiveness, and coordination of efforts by states emerging from conflicts and oppressive rule.[31]

It draws lessons from various experiences across Africa in articulating a set of common concepts and principles to constitute a reference point to strengthen peace agreements and transitional justice institutions and initiatives in Africa.

Especially, it compiles a comprehensive list of measure that can be used in transitional justice. These measure, which can and must be adapted to the specific case in question, include:

[30] https://dictionary.law.com/Default.aspx?selected=1831
[31] African Union - Transitional Justice Framework (ATJF)

1. Truth Seeking and Truth Commissions
2. Justice and Prosecutions
3. Measures to prosecute International Crimes
4. The Role of Regional Courts
5. The Role of Hybrid Courts and Special Chambers
6. Amnesty
7. Pardons, Plea Bargains and Mitigation of Punishment
8. Reparations
9. Defining a "Victim"
10. Official Acknowledgement and Apology
11. Memorialization
12. Guarantee of Non-Recurrence including institutional reform
13. Vetting
14. Gender Justice
15. Expanding the Mandate of Transitional Bodies to include a focus on Socio-Economic and Cultural Rights

The framework emphasizes that is important to

- not forget that there is no model transitional justice approach that can easily be transferred from one country to another. Each situation requires that the parties to the conflict, civil society, and victim groups negotiate the mechanisms appropriate to their circumstances.
- avoid a mechanistic application of the measures and, instead, follow a flexible normative approach;
- keep in mind that no single mechanism is capable of addressing the profound demands of justice and reconciliation;
- make a careful sequencing, planning and timing of the process, as it is not possible to implement all transitional justice mechanisms at the same time;
- balance carefully the demands for justice with the search for peace and reconciliation;
- make a country's transitional justice policy to be locally owned and informed by extensive public consultations among all relevant actors and constituencies.

4.3.Can the swisspeace and the African Transitional Justice Framework be applied to the Zimbabwean Situation?

The Swiss framework explains the four pillars of transitional justice. The question is can this framework be applied to the Zimbabwean situation? What makes Zimbabwe difficult for a proper transitional justice process until now? Is Zimbabwe a transitional state? What defines a country to be in transition?

Reeler argues that *"Zimbabwe is not in the kind of transition where transitional justice has any realistic chance of being applied"*.[32] This is true as, since independence, apart from the unity

[32] Tony Reeler et al.: Transitional justice in pre transitional times-are there any lessons for Zimbabwe? www.hrforumzim.org/news/transitional-justice-in-pre-transitional-times-2

government, Zimbabwe was and still is being ruled by one and the same party, the ZANUPF. After factionalism within the party, the military staged a silent coup d'état and replaced the President of Zimbabwe since independence, Robert Mugabe, with a new President, Emerson Manangagwa, who was always part of the establishment and also alleged to have been involved especially in the Gukurahundi atrocities.

With this background it will be very difficult to see a positive development in the transitional justice process and mechanisms in Zimbabwe. However, some argue that, despite the political system being the same and being governed by the same elites, some of these elites may champion some form of change[33]. This positive tendency could be observed in some acts by the Zimbabwean state, e.g. the incorporation of the NPRC in the new 2013 constitution and the establishment of the commission of inquiry on the post-2018-election violence.

The swisspeace model is a guide on the content, mechanisms and objectives of transitional, that it can be used adopting it for the Zimbabwean situation.

Concerning the ATJF, the comprehensive list of possible transitional justice measures, its open model character and the entrenchment of African shared values makes it ideal for its "adaptive" application in the development of a framework for Zimbabwe with its own history, culture and environment.

[33] https://www.wilsoncenter.org/sites/default/files/wp82_notes_on_transitions_from_authoritarian_rule_in_latin_america_and_latin_europe.pdf

5. Transitional Justice Actors and What the State Has Achieved or Not So Far in Zimbabwe

This chapter deals with what has been achieved in Dealing with the Past in Zimbabwe and what the state has so far failed to accomplish. In the first part, the positive roles of various stakeholders in the process is described; in the second part, the focus is on legal gaps in the transitional justice process.

5.1.Transitional Justice Actors and what they have achieved or not

Non-State Actors

The Zimbabwean CSO as a whole, including faith-based organisations and the trade unions, have to be applauded for their tireless advocacy for victims of gross human rights violations. CSOs – with their very professional, highly educated and, most of all, dedicated staff – were and still are the main institutions that documented and continuously document all the violations committed by state agents and the ruling party. CSOs, against the government's decisions initiated and compiled the first report on the Gukurahundi atrocities named "Breaking the Silence, Building True Peace" in 1997 by only interviewing the victims. The unofficial report documented that more than 20,000 people were killed by the state security forces. In addition, mass graves were discovered. It also recommended to initiate a national reconciliation process and offer a compensation package to those of affected victims. In 1988, President Robert Mugabe granted a general amnesty to the ruling party cadres and security forces who were responsible for the massacre at Matabeleland.

CSOs are the core players for victims and survivors in the Zimbabwean situation. They gave the victims a voice and a space to tell their stories. Victims and survivors approach CSOs when their rights have been violated instead of addressing the state whose institution lack credibility and trust. CSOs assisted them by providing pro bono legal advice and by representing them in courts when possible. It was not the state but CSOs who provided psychological and other necessary treatments for victims and survivors.

CSOs educated the citizens affected by the lack of the rule of law to demand their rights. The Zimbabwean CSOs outlined the minimum standards for an effective transitional justice process in Zimbabwe. Based on these they organized and held several conferences and meetings to exchange ideas with experts and practitioners from all over the world. They elected the National Transitional Justice Working Group (NTJWG), whose members serve voluntarily and are dedicated. The NTJWG, together with the CSOs, adopted the basic principles of transitional justice, the pillars of transitional justice. The group held several public meetings with victims and with communities. The NTJWG trained members of parliament on transitional justice issues.

It is to the merit of the CSOs that the NPRC was established as one of the independent commissions in the Constitution of Zimbabwe in 2013. CSOs made known to the world that the state has not acknowledged the various violations committed under the reign of the government by the state and state-sponsored individuals and institutions.

In 2009, the Zimbabwean NGO Human Rights Forum (the Forum)had carried out a vast outreach programme, to collect peoples' views on how to deal with the past.[34]

Despite, or because of their success story, CSOs have been harassed and indicted by the state. However, they continue even under unfavourable conditions to successfully execute their various mandates.

International Community

Without the enormous contribution of the international community, transitional justice advocacy, including assistance of victims and survivors, would have been impossible in Zimbabwe. Through their various agencies, trusts and other implementing organisations they had supported and still are supporting CSOs who are engaged in lobbying and advocating for the rule of law and the protection and promotion of human rights in Zimbabwe. They supply not only the necessary funds for various projects, but also provide expertise and personnel when requested. They raised their voice to articulate their opinion during international and regional conferences and meetings, e.g. during the peer review of the Universal Periodic Report (UPR) of Zimbabwe at the UN Human Rights Council. In conclusion, the international community is fulfilling its international human rights and humanitarian law obligations.

The Zimbabwean State

Concerning the Gukurahundi atrocities, the Mail & Guardian remarked. "The little that Mugabe has said since the 1980s on this taboo subject has been a mixture of obfuscation and denial. The closest he has come to admitting any form of official responsibility was at the death of Nkomo (1999), when he remarked that the early 1980s was a "moment of madness".

The Mugabe led government had set-up a Commission of Inquiry into the Matabeleland Disturbances (also known as the Chihambakwe Commission of Inquiry). The report of the commission handed over to Mugabe was never published.

During the 2009 Unity Government of Zanu-PF and MDC the parties agreed on a new constitution that stipulated the establishment of an Independent National Peace and Reconciliation Commission (NPRC). The new Constitution was adopted in 2013. After almost 4 years the enabling law for the operalisation was adopted by parliament. There are legislative and other obstacles which the NPRC will face.

5.2.What the State So Far Has Failed to Achieve

The only achievement from the state in Dealing with the Past (DwP) is to having established the NPRC. There is much to be done.

[34] The Forum : Outreach report; http://www.hrforumzim.org/publications/taking-transitional-justice-to-the-people-outreach-program-vol-2-report/attachment/tj-report-vol-2/

The right to the truth

Victims and survivors of gross human rights violations and missing people's relatives in Zimbabwe still do not know the truth about what happened, why it happened and who committed the violations. The NPRC established by the Constitution is mandated in section 252 (c) and in the Act *"to bring about national reconciliation by encouraging people to tell the truth about the past and facilitating the making of amends and the provision of justice".*

What is remarkable is that both legal foundations are encouraging people to tell the truth but not government institutions and parties. How can the victim make an evidence-based oral or written complaint (Act, 8(2)) without him/her or the legal representative having access to official documents, an access which the state has?

Zimbabwe, in unison with many other authoritarian states, tends to interpret the 'security' of the state extensively rather than victims' and survivors' knowing the truth. When we scrutinize section 10 (7) of the NPRC Act it states that *"… the Minister responsible for national security may, at any stage during an investigation by the Commission issue and lodge with the Commission a certificate to the effect that the disclosure of any evidence or documentation or class of evidence or documentation, is in his or her opinion, contrary to the public interest on the ground it may prejudice the defence, external relations, internal security or economic interests of the state."* The Act concludes that such hearings should be hold on camera.

Consequently, the investigation power of the NPRC is limited by the NPRC Act. However it cannot base its investigation only on the narratives of the victims or survivors; it needs supporting documents from state and none-state agencies. It is unfortunate that this clause was included in the Act of an independent commission which should uncover past human rights violations, without any interference from the state apart from providing all the necessary support. It has to be noted that the right to the truth, if fully and effectively exercised, provides a vital safeguard against the recurrence of violations[35], another pillar of transitional justice.

In conclusion, there is a need to repeal any laws which hinder the access to information and undeniably, there is a need to enact a law for *access to information* by anyone. The right to the truth can only be exercised, when all legislative gaps have been dealt with. Apart from access to information there is need for a standalone witness protection act.

The right to justice

In general the right to justice implies the right of any individual to access to justice without discrimination and have a fair trial.

[35]Principle 2: The inalienable right to the truth: Updated set of principles for the protection and promotion of human rights through action to combat impunity; E/CN.4/2005/102/Add.18 February 2005.

The core obstacle in Zimbabwe for individuals to exercise their right to justice is impunity and the selective application of the law[36] followed by the lack of access to justice. All these core obstacles have been and still prevail In Zimbabwe, the last example being the deployment of the army killing 7 people after the 2018 elections.[37]

The right to justice is enshrined in the Zimbabwean constitution. Additionally, human rights treaties like the CCPR, which Zimbabwe has acceded to, obliges member states:

a. To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

b. To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

c. To ensure that the competent authorities shall enforce such remedies when granted.

The Zimbabwean state does adhere to these basic international human rights and humanitarian law principles.

For example, in its concluding observations to the first and only periodic report submitted by Zimbabwe to the CCPR the treaty body had urged the Zimbabwean government to take action citing as an example the food riots in 1998:

"The committee urges that all cases of alleged excessive use of force committed by members of the police or the army be investigated by an independent and impartial body, that actions be taken against those officers found to have committed abuses and that compensation be paid to the victims"[38].

This recommendation from the CCPR treaty body is from 1998! Apart from great efforts from Zimbabwean NGOs supported by various international donors, the state has done almost nothing to enforce the right to justice. Legislation alone is not enough; it's only the first step. The implementation adhering to the rule of law is the ultimate evidence that citizens are exercising their right to justice equally.

Principle 19 of the updated principles to combat impunity prescribes that *"States shall undertake prompt, thorough, independent and impartial investigations of violations of human rights and international humanitarian law and take appropriate measures in respect of the perpetrators, particularly in the area of criminal justice, by ensuring that those responsible for serious crimes under international law are prosecuted, tried and duly punished".*

Is this happening in Zimbabwe? This has not and is not happening in Zimbabwe. What is the obstacle to exercise this right?

[36] It has been observed that the Zimbabwean police force tend to be not impartial, by applying the law as it sees fit, ignoring the rule of law; The Forum: statement on the outbreak of violence and the selective application of the law; http://www.hrforumzim.org/wp-
[37] http://www.hrforumzim.org/news/2018-post-election-violence-monitoring-report-updated/
[38] CCPR/C/79/Add.89, 6 April, 1998

Impunity in Zimbabwe has a long 'culture' the Gukurahundi atrocities were just labelled a 'moment of madness' by the then Prime Minister, Robert Mugabe. As a cosmetic, two inquiry commissions were established and their reports never made official. The same disregard shows with all kinds of gross human rights violations. If impunity is not properly addressed in Zimbabwe there will not be any trust in the society let alone healing and reconciliation. The NPRC cannot address impunity. It can only make recommendations on what measures to take to address impunity.

In 1982, the Zimbabwean government had established an ombudsman with the mandate to *"… investigate action taken by any officer or authority … in the exercise of the administrative functions of that officer or authority in any case where it is alleged that a person has suffered injustice in consequence of that action and it does not appear that there is any remedy reasonably available by way of proceedings in a court or on appeal from a court."*[39]

However, further on in this Act, adhering to its impunity and selective application of the law, the state prescribes that the Defence Forces, the Police Force and the Prison Service are not to be investigated.[40] In its 2017 Human rights report the forum has documented that, quantitatively, Zanu-PF and the Zimbabwe Republic Police (ZRP) were the main perpetrators of human rights violations.[41] In its first periodic report to the African Human Rights Commission the state noted that in 1985 dissidents committed murders and rapes and confirmed for itself that there was no report against the government for human rights violations. [42]

This approach of the state, blaming 'dissidents' for the atrocities committed during its reign in an officially submitted report, should be an eye-opener for the NPRC and other stakeholders dealing with transitional justice issues in Zimbabwe. The state has denied any involvement and it can be fairly assumed that it will further deny any involvement in any gross and systematic violations of human rights. The right to justice is thus compromised.

The right to reparation

Victims of gross human rights violations have the right to reparation. As per the definition of the UN: *"Victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law."*[43]

According to the UN, *"[r]eparation should be proportional to the gravity of the violations and the harm suffered ... a State shall provide reparation to victims for acts or omissions which can be*

[39] Ombudsman Act (chapter 10 :18); https://www.parlzim.gov.zw/acts-list/ombudsman-act-10-18
[40] Section 8, ibid
[41] Blessing Gorejena, Executive summary: The state of human rights report Zimbabwe I 2017;
[42] Summary of the Zimbabwean first report to the African Human and Peoples Rights Commission; www.achpr.org/files/sessions/12th/state-reports/1st-1986-1991/staterep1_zimbabwe_1992_eng.pdf
[43] General assembly resolution, A/RES/40/34

attributed to the State and constitute gross violations of international human rights law or serious violations of international humanitarian law".[44]

The ACHPR commission has defined reparation as an eminent factor of healing, including *"restitution, compensation, rehabilitation, satisfaction - including the right to the truth, and guarantees of non-repetition.* The comment has defined reparation as an eminent factor of healing as follows: *"The ... overarching goal of these forms of reparation is to provide healing for victims of torture and other ill-treatment. Healing entails making whole that which has been broken and wounded. It seeks to restore the dignity, humanity and trust violated by torture and other ill-treatment. It recognises and facilitates the journey of coming to terms with the torture and other ill-treatment and dealing with the consequences of trauma and other injuries. It has physical, psychological, social, cultural and spiritual dimensions and helps break the cycle of violence at individual, family, collective, institutional and societal levels."*[45]

In this guideline, it is also stated that also a person, a legal person, or another entity than the state if found liable for reparation to a victim, such party should provide reparation to the victim or compensate the State if the State has already provided reparation to the victim. This is a very interesting aspect also in the case of Zimbabwe: not only the state but identifiable individuals have illegally overtaken farms, occupied diamond and gold mines, whereby evicting people from their lands. Former land owners have not been compensated. Diamond revenues have just been pocketed, people evicted from the mine areas have not been compensated. All this was and is being done with the encouragement and the knowledge of the state.

Apart from human suffering, state-run illegal mining activities and occupation of farms, the environment has suffered and communities were displaced. The UN guideline states in these cases that *"[i]n cases of substantial harm to the environment, restitution, if ordered, should include, as far as possible, restoration of the environment, reconstruction of the infrastructure, replacement of community facilities and reimbursement of the expenses of relocation, whenever such harm results in the dislocation of a community".*[46]

The right to reparation for victims of gross and systematic human rights violations goes beyond the reparation demands and rights of a criminal victim. Whereas a criminal victim can demand some kind of reparation from the perpetrator according to the law, the victim/victims of state induced violations find it difficult, if not impossible, to demand reparation.

The UN says: *"Where public officials or other agents acting in an official or quasi-official capacity have violated national criminal laws, the victims should receive restitution from the State whose officials or agents were responsible for the harm inflicted. In cases where the Government under*

[44] Basic principles and guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law; adopted and proclaimed by general assembly resolution 60/147 of 16 December 2005
[45] General comments No. 4, African Charter on Human and Peoples' Rights: The Right to Redress for Victims of Torture and Other Cruel, Inhuman or Degrading Punishment or Treatment (Article 5right to be free from torture and ill-treatment), adopted during the African Commission's Extraordinary Session on 27 February 2017; http://www.achpr.org/instruments/general-comment-right-to-redress/
[46] Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power A/Res/40/34)

whose authority the victimizing act or omission occurred is no longer in existence, the State or Government successor in title should provide restitution to the victims."[47]

Has there been any kind of reparation for the victims and their dependants of gross human rights violations in Zimbabwe? The answer is clearly negative. The state is in denial of having committed any atrocities, thus there has been no effort to compensate or rehabilitate the victims and survivors.

One well-known human rights defender, who had been abducted and tortured by state agencies in 2008, has been compensated after her years long litigation against the Zimbabwe Republic Police (ZRP). This is an individual case. Thousands of victims are still waiting for any kind of acknowledgment, truth, just and reparation.[48]

So, what can be done? Wait for the recommendations of the NPRC? Which might be implemented or not? And if implemented it will be a very time consuming legal process, whilst in the meantime victims and survivors are still living in misery and losing hope. The first stage of reparation is identifying the victims and survivors. The second stage is identifying their needs. The third stage is applying legal and non-legal mechanisms to implement reparation. The Zimbabwean CSOs have identified the victims, have identified their needs. The third stage - implementing - is the duty of the Zimbabwean state.

The proposed discussion guideline for a transitional justice framework in Zimbabwe will outline possible methods to accelerate transitional justice in Zimbabwe.

[47] *Ibid*
[48] https://www.newsday.co.zw/2018/10/mukoko-wins-150k-compensation-for-torture/

6. Comparative Analysis of Transitional Justice Practices in Selected Jurisdictions

Different transitional justice approaches have been and are still being applied in many countries to deal with gross human rights violations with the aim of achieving healing, reconciliation and sustainable peace. The following brief case studies show that the history of each country, its culture, tradition, the level of human rights awareness within each society, political will and the involvement of civil society are decisive in determining the kind of approach and mechanism(s) to be applied.

Of the many examples of these truth commissions worldwide, a small selection of cases allows for a glimpse into the wealth of approaches. The examples presented here in short profiles have been selected according to the cultural proximity to Zimbabwe and their outstanding – positive and negative – methods. The question is, what are the lessons learnt from the TJ process in other countries?

6.1.Nigeria

Country: Nigeria[49]

Independence: from the United Kingdom: October 1, 1960 followed by almost 30 years military rule and coup d'états. Nigeria returned to civil rule on 29 May 1999

Truth Commission: Human Rights Violations Investigation Commission (later called: The Judicial Commission for the Investigation of Human Rights Violations) also called the Oputa Panel, after its chairman

Dates of Operation: June 14, 1999 – May 2002 (2 years, 11 months)

Enabling law: Tribunals of Inquiry Act [50]

Time to be investigated: January 15, 1966 to May 28, 1999

Mandate:

- Ascertain or establish the causes, nature and extent of all gross violations of human rights committed in Nigeria between the 15th day of January 1966 and the 28th day of May 1996;
- identify the person or persons, authorities institutions or organizations whichmay be held accountable for such gross violations of human rights and determine the motives for the violations or abuses, the victims and circumstances thereof and the effect on such victims and the society generally;
- determine whether such abuses or violations were the product of deliberate state policy or the policy of any of its organs or institutions or whether they arose from abuses by state officials of their office or whether they were the acts of any political organization, liberation movement or other groups or individuals;

[49] https://www.usip.org/publications/1999/06/truth-commission-nigeria
[50] Tribunals of Inquiry Act , 1966 Chapter 447 Laws of the Federation of Nigeria 1990 http://www.nigeria-law.org/Tribunals%20of%20Inquiry%20Act.htm

- recommend measures which may be taken whether judicial, administrative, legislative or institutional to redress past injustices and to prevent or forestall future violations or abuses of human rights.

More than 10,000 petitions were received by the commission which included cases of *"i) physical and mental torture, ii) unlawful arrest and detention iii) murder/assassination, iv) assault/battery, v) intimidation/harassment, iv) communal violence, vii) disappearances"*.[51]

Findings: The commission concluded that the Nigerian military had been responsible for gross human rights violations and that besides the military elite, powerful and rich civilians had collaborated with the military to prepare the numerous coups.[52]

Public report: released unofficially

Recommendations: The unofficially published report states that the commission has attempted to provide an overview of the extent of (our) moral, physical and institutional decay under military rule.[53] It also stated its disappointment that three former Heads of State and several former top government functionaries, when summoned by the commission, did not appear. It also stressed the unfortunate fact that regime security became an excuse for the excesses of state security agencies, leading to various gross human rights violations.

The commission recommended compensations and reparations to the victims. It also recommended reform and restructuring of the security sector reforms, the armed forces and the police.[54]

The Nigerian government responded by annulling the commission. The government of Obasanjo did not respect the recommendation of its own panel that it set up and, consequently, refused to implement any of its recommendations.[55]

Challenges faced: The commission was under-resourced and had limited powers: it could only make recommendations, not ensure arrests or prosecutions.[56] Additionally, civil society was not given the opportunity to set the transitional justice agenda in the country.[57]

Lessons learnt: Although the truth commission was set up by the government to investigate past human rights violations, military and police perpetrator who were summoned by the commission did not appear, with no consequences. Moreover, the commission's vast report and recommendations were ignored.

[51] Guåker, Elisabeth: A study of the Nigerian truth commission and why it failed; http://bora.uib.no/handle/1956/6215
[52] Charles Manga Fombad: Transitional Justice in Africa: The Experience with Truth Commissions; http://www.nyulawglobal.org/globalex/Africa_Truth_Commissions1.html
[53] Human rights violations investigation commission report, Nigeria 2002; http://asabamemorial.org/data/oputa-report.pdf
[54] Guåker, Elisabeth: A study of the Nigerian truth commission and why it failed; http://bora.uib.no/handle/1956/6215
[55] Guåker, Elisabeth: A study of the Nigerian truth commission and why it failed; http://bora.uib.no/handle/1956/6215; see also Hayner, Priscilla B. Unspeakable Truths: Facing the Challenge of Truth Commissions. New York: Routledge, 2002
[56] Human Rights Watch; https://www.hrw.org/legacy/wr2k2/pdf/nigeria.pdf
[57] The Centre for the Study of Violence and Reconciliation and the "NIGERIA – The Colonial Legacy and Transitional Justice https://www.africaportal.org/documents/18022/Nigerian-Report-Electronic.pdf

This case is an example why a country when dealing with past atrocities should have institutions and mechanisms in place that could implement and enforce a commission's demands, and not depend on a truth or inquiry commission alone.

Unfortunately, in its 2017/2018 report, Amnesty International confirmed that torture and other ill-treatment and unlawful detention by the police and the State Security Service continued in Nigeria.[58]

6.2.Uganda

Country: Uganda[59]

Independence: from the United Kingdom 9 October 1962

Truth commission: Commission of Inquiry into Violations of Human Rights

Dates of operation: 1986 – 1994 (8 years; due to financial problems ,its work was interrupted in 1987)

Enabling Law: The Commissions of Inquiry Act Legal Notice No. 5

Time to be investigated: October 9, 1962 – January 25, 1986

Mandate: To inquire into all aspects of violations of human rights, breaches of the rule of law and excessive abuse of power, committed against persons in Uganda by the regime and government agents and agencies.[60]It was to pay specific attention to arbitrary arrests, detentions and killings. The commission's broad mandate also included forced displacement, disappearances, discrimination, and it authorized the commission to recommend ways to prevent future abuses. [61]
Its mandate was extremely broad and vague[62]. Additionally, the terms of the appointment of the commission were such that it was forbidden for the commission to look at issues which had occurred after January 1986, when Museveni had taken power and a lot of abuses were taking place.[63]

Public report: The commission's final report had an extremely limited publication, and even these copies were poorly, if at all, distributed.[64]

Recommendations: The report is not available, no recommendations have been implemented and most of the citizens of Uganda have no knowledge of this report.

Challenges faced: There was a lot of hostility towards the commission; their work was sabotaged as files, audio and video recordings disappeared; the chairman of the commission had to move around with a body guard.[65] The commission had also had inadequate resources and funds.

[58] https://www.amnesty.org/en/countries/africa/nigeria/report-nigeria/
[59] https://www.usip.org/publications/1986/05/truth-commission-uganda-86
[60] The Commissions of Inquiry Act, legal notice No. 5 (May 16, 1986); https://www.usip.org/sites/default/files/file/resources/collections/commissions/Uganda86-Charter.pdf
[61] Professor Bishnu Pathak1; Commission of Investigation on Enforced Disappeared http://www.icla.up.ac.za/images/un/commissionsofinquiries/files/Uganda%20Truth%20Commission%201986-1994.pdf
[62] Joanna R. Quinn: The Politics of Acknowledgement: An Analysis of Uganda's Truth Commission; https://www1.essex.ac.uk/armedcon/themes/international_courts_tribunals/analysis2.pdf
[63] ibid
[64] Ibid

Lessons learnt: *The Commission of Inquiry into Violations of Human Rights failed because it did not provide the citizens of Uganda a real opportunity to acknowledge and thus address violations of human rights which had been committed.*[66]Museveni has also emphasized that Uganda should not dwell on the past.

Special notice: Already in 1974, Uganda had a Commission of Inquiry into the Disappearances of People in Uganda since January 25, 1971. The mandate of the commission was to investigate and report on disappearances in the first years of Idi Amin's government from January 25, 1971 until 1974.The commission worked for 6 months. The commission identified a total of 308 enforced disappeared persons. Most of the enforced disappearances were carried out by Amin's public security unit and the national investigation bureau.[67]The report was not made public and none of the families of the enforced disappeared persons received justice and reparations.[68]

In 2008, the Justice Law and Order Sector (JLOS) in Uganda established the Transitional Justice Working Group, a high-level policy-making entity to draft a national policy and law on transitional justice for Uganda.[69] The Working Group has thematic sub-committees, including international crimes prosecutions, truth and reconciliation and traditional justice.[70] As of October 2018, no such policy has been adopted by parliament.

Lessons learnt: The Uganda experience is an indication that in some cases the state does not have the political will to enforce recommendations of a commission which it itself had established. The state had raised expectations for the victims and survivors, which it did not meet.

6.3.Kenya

Country: Kenya [71]

Independence: from the United Kingdom December 12, 1963

Truth commission: Truth, Justice, and Reconciliation Commission

Dates of operation: The commission was initially given a two-year mandate from 2009 to 2011, which was extended three times

Enabling act: Truth, Justice and Reconciliation Commission Act[72]

Time to be investigated: December 12, 1963 – February 28, 2008

Mandate: Establish an accurate, complete and historical record of violations and abuses of human rights and economic rights inflicted on persons by the state, public institutions and holders of public

[65] ibid
[66] Joanna R. Quinn: The Politics of Acknowledgement: An Analysis of Uganda's Truth Commission; https://www1.essex.ac.uk/armedcon/themes/international_courts_tribunals/analysis2.pdf
[67] Ibid
[68] Ibid
[69] http://www.scielo.org.za/pdf/ahrlj/v12n2/06.pdf
[70] Ibid
[71] https://www.usip.org/publications/2009/07/truth-commission-kenya
[72] The Truth, Justice and Reconciliation Commission Act no. 6 of 2008; Revised Edition 2012 (2008). Published by the National Council for Law Reporting with the Authority of the Attorney General; www.kenyalaw.org

office, both serving and retired.[73]The commission was also mandated to investigate, as thorough as possible, the causes, nature and extent of the gross violations of human rights and economic rights which were committed during the period.[74]The commission was also mandated to provide victims, perpetrators and the general public with a platform for non-retributive truth telling that charts a new moral vision and seeks to create a value-based society for all Kenyans.[75] This includes determining means of redress for victims and recommending the prosecution of perpetrators as well as reparations for victims.[76]

Public Report: The final report was handed over to the president on May 2013. However, three international commissioners unofficially declared dissenting opinions, charging that government officials from the Office of the President had meddled in the commission's affairs, particularly changing the landownership part of the final report.[77] They further declared that "*the Kenyan commissioners had been coerced into giving an advance copy to the president and were required to alter paragraphs in Volume IIB, the Land Chapter, to diminish allegations of illegal conduct against former President Jomo Kenyatta and his family.*"[78] The report is available publicly, but only in English.

Findings: The commission found that for the period it had to investigate all the governments were responsible for numerous gross violations of human rights. All governments had perpetrated torture, political assassinations, arbitrary arrest and detentions, illegal and irregular acquisitions of land, economic crimes, grand corruption, extrajudicial executions, sexual violence, looting and burning of property, and enforced disappearances.[79] The commission considered that tackling impunity is a necessary and urgent step in the full restoration of the rule of law in Kenya, in establishing lasting peace and stability, and in fostering reconciliation. For this reason, the Commission has recommended that specific individuals should not hold public office in Kenya's constitutional order on account of their past conduct and/or decisions which resulted in gross violations of human rights.[80]

Recommendations: The commission recommends that the president, state security agencies and, in particular, the Kenya Police, Kenya Defence Forces and the National Intelligence Service offer a public and unconditional apology for gross violations of human rights committed by their predecessor agencies between December 12, 1963 and February 28, 2008, especially for acts of extra-judicial killings, arbitrary and prolonged detention, torture and sexual violence.[81]

The commission finds that in most cases, the state has covered up or downplayed violations committed against its own citizens, especially those committed by state security agencies. During

[73] Ibid
[74] Ibid
[75] Ibid
[76] Ibid
[77] Truth, Justice, and Reconciliation Commission, "Final Report - Dissent by International Commissioners" (2013).I. Core TJRC Related Documents. 8. https://digitalcommons.law.seattleu.edu/tjrc-core/8
[78] Christopher Gitari Ndungú: Lessons to be learned: an analysis of the final report of Kenya's truth, justice and reconciliation commission, ICTJ briefings; https://www.ictj.org/sites/default/files/ICTJ-Briefing-Kenya-TJRC-2014.pdf
[79] Ibid
[80] Report of the truth, justice and reconciliation commission; http://knchr.org/Portals/0/Reports/TJRC_Volume_4.pdf
[81] Ibid

the entire mandate period (1963-2008), the state demonstrated no genuine commitment to investigate and punish atrocities and violations committed by its agents against innocent citizens.[82] The commission also recommended the establishment of an independent Committee for the Implementation of its Recommendations. [83] The commission recommended, justice, reparation and memorialisation mechanisms to be implemented for the benefit of the victims.

Challenges faced: The commission faced resistance from the onset regarding legitimacy and credibility of its chairperson, Ambassador Bethuel Kiplagat .Critics alleged that the chairperson was involved in a massacre and has allegedly grabbed public property through illegal and irregular allocation.[84] Fellow commissioners of the chairperson also petitioned the Office of the Chief Justice to establish an inquiry tribunal on this matter, because they were concerned about the allegations and its negative impact on the operation of the commission as a whole.[85] The vice chair of the commission resigned after the petition to the Office of the Chief Justice remained unattended to. After a long delay, the Office of the Chief Justice established a tribunal to investigate the allegations of the chairperson. The chairman announced his resignation from the commission citing that he wants to devote his full attention clearing his name through the tribunal.[86] The commission also had to struggle with finances and resources.

Lessons learnt: The Kenyan Truth, Justice and Reconciliation Commission experience shows that the credibility of commissioners is of utmost importance. The credibility issue should not be a subject matter before the appointment only, but continuously during the operation time of a commission. Moreover, commissioners might be intimidated by various state agencies and even willingly share confidential information. Thus, it is recommendable to include foreigners in such kind of a commission. The Kenyan case has shown that it was only the foreign commissioners who were able to resist intimidation and have a dissenting view.

6.4.South Africa

Country: South Africa

Abolishment of apartheid: 1994

Truth commission: Commission of Truth and Reconciliation (TRC)

Dates of operation: 1995-2002(7 years; the original mandate ended in 1998 but was extended)

Enabling law: Promotion of National Unity and Reconciliation Act, No. 34 of 1995

Times to investigate: 1960-1993

Mandate: *"To provide for the investigation and the establishment of as complete a picture as possible of the nature, causes and extent of gross violations of human rights committed during the*

[82] Ibid
[83] Ibid
[84] Truth, Justice, and Reconciliation Commission, "Civil Society Petition to Chief Justice on Kiplagat" (2010).V.Kiplagat Tribunal and Related Documents. 2.; https://digitalcommons.law.seattleu.edu/tjrc-kiplagat/2
[85] Truth, Justice, and Reconciliation Commission, "TJRC Petition to Chief Justice - TJRC Petition for Tribunal" (2010).V.Kiplagat Tribunal and Related Documents. 9. https://digitalcommons.law.seattleu.edu/tjrc-kiplagat/9
[86] Truth, Justice, and Reconciliation Commission, "Slye Statement on Withdrawal of Resignation" (2010).V.Kiplagat Tribunal and Related Documents. 3. https://digitalcommons.law.seattleu.edu/tjrc-kiplagat/3

period from 1 March 1960 to the cut-off date contemplated in the Constitution, within or outside the Republic, emanating from the conflicts of the past, and the fate or whereabouts of the victims of such violations; the granting of amnesty to persons who make full disclosure of all the relevant facts relating to acts associated with a political objective committed in the course of the conflicts of the past during the said period; affording victims an opportunity to relate the violations they suffered; the taking of measures aimed at the granting of reparation to, and the rehabilitation and the restoration of the human and civil dignity of victims of violations of human rights; reporting to the Nation about such violations and victims; the making of recommendations aimed at the prevention of the commission of gross violations of human rights; and for the said purposes to provide for the establishment of a Truth and Reconciliation Commission, a Committee on Human Rights Violations, a Committee on Amnesty and a Committee on Reparation and Rehabilitation; and to confer certain powers on, assign certain functions to and impose certain duties upon that Commission and those Committees; and to provide for matters connected therewith."[87]

Findings: The commission is of the view *"that gross violations of human rights were perpetrated in the conflicts of the mandate era. These include: The state and its security, intelligence and law-enforcement agencies and the ANC."*[88]The commission found that the South African government condoned the use of torture as official practice.[89]

Public report: Officially published [90]

Recommendations: The TRC recommended a reparations program including financial, symbolic and community reparations and that each victim or family should receive approximately $3,500 USD each year for six years. The commission recommended prosecution in cases where amnesty was not sought or was denied. [91] Only few of the recommendations have been implemented by the government.

Challenges faced: Particularly the human rights violations committee faced challenges with definitions deriving or missing from the Act. The Act prescribes that the TRC should focus on *"the violation of human rights through the killing, abduction, torture or severe ill-treatment of any person."*[92] Whereas the inclusion of 'gross human rights violations' in the Act was decisive, it limited the investigation of the committee on human rights violations pertained during the apartheid time. These violations were the denial of freedom of movement through the pass laws, forced removals of people from their land and denial of the franchise to citizens, by discrimination in such areas as education and work opportunities.[93]

[87] Promotion of national unity and reconciliation act (Act 95-34, 26 July 1995); https://fas.org/irp/world/rsa/act95_034.htm
[88]Legal Framework: The legal framework within which the commission made findings within the context of current international law, TRC report volume 6; http://www.justice.gov.za/trc/report/finalreport/vol6_s5.pdf
[89] Ibid
[90] Volume V of the TRC of South Africa report, this report is produced by the TRCs Committee on Human Rights Violations; http://www.justice.gov.za/trc/report/finalreport/Volume5.pdf
[91] ibid
[92] Ibid
[93] Ibid

Also with to other two terms–'severe ill treatment' and 'damage to property'–, the commission had difficulties to decide exactly what constituted an act of sufficient severity or damage. [94] Eventually, the committee was able to define, after many debates, a working definition for the two subjects, e.g. arson would be considered as 'severe ill treatment' if it resulted in the destruction of a person's dwelling to an extent that the person could no longer live there.[95]

The first human rights violations hearing took place in a context that was very antagonistic to the work of the commission with threats coming, presumably, from the right-wing sector. There was a determined effort to silence the voices of the victims and to stop the commission from exposing the atrocities that had taken place in the past. This experience reinforced the commission's concern that stringent security measures needed to be maintained.[96]

Although the commission endorsed the international human rights norm that apartheid was a crime against humanity the TRC did not base its work on the effects of the apartheid laws and policies in the society. The commission has been criticised for this approach.[97] The TRC also concluded that records were systematically destroyed between 1990 and 1994.

Lessons learnt: Clear and precise definitions of terms are needed on which a truth commission can base its investigation. The definition of terms should not only include international human rights and humanitarian law definitions but also consider the modus operandi of a state and its agencies, whilst violating human rights. It is of utmost importance to have proper legislative and implementation mechanisms for the protection of victims and witnesses, during public hearings and afterwards.

Reports of a commission should not be to legalistic. Transitional justice is victim-based, as such the reports should be understandable for them and not only for those proficient in legal terms. At least there should be a summary of the findings and the recommendations in the languages of the victims and survivors. Securing records on-time is very essential to conduct an evidence-based investigation, thus in its preparatory work a TRC should push for the archiving of records and documents.

6.5.Non- Judicial Transitional Justice method-the case of Rwanda

After the genocide in Rwanda in 1994, leaving over one million people dead and thousands of rape victims, judicial and non-judicial transitional justice methods and processes were applied in a parallel way. The state decided to use the traditional non-judicial method 'gacaca' in an institutionalized way to resolve conflicts and reconcile the nation.

Gacaca *"refers to 'a bed of soft green grass' on which a community and leaders known for their integrity and wisdom gathered to discuss and resolve conflicts. The traditional dispute resolution system dealt with issues within or between families and members of the* ***same community****, by sharing a drink as a sign of reconciliation"*.[98]

[94] Ibid, for example does teargas produce sever ill treatment? Or does arson fall under 'damage to property?
[95] Ibid
[96] Ibid
[97] Legal Framework: The legal framework within which the commission made findings within the context of current international law, TRC report volume 6; http://www.justice.gov.za/trc/report/finalreport/vol6_s5.pdf
[98] http://gacaca.rw/about/

Whereas the aim of the traditional Gacaca court was to reconcile the community and integrate the perpetrators back to the community, the primary goal of the modern Gacaca system *"included the acceleration of prosecutions, the punishment of the guilty, freedom for the victims, the establishment of the truth as well as reconciliation between the Hutus and Tutsis"*.[99] These courts have tried since 2005 approximately 1.2 million cases.[100]

The *positive* outcome of the Gacaca courts[101] include

- Extensive involvements of communities.
- Understanding the root cause, which led to genocide and what really happened during the genocide.
- Partially it has eased the tension between the two main ethnic majority groups.
- Swift dealing with the cases, easing also prisons who were filled beyond capacity.
- Victims and their relatives heard the truth about the death of their relatives.
- Integration of perpetrators into community/society through dialogue and community service.
- Courts gave lower sentences if the person was repentant and sought reconciliation with the community.
- Dialogue was promoted between victims and survivors.

The *critical* points about the Gacaca courts [102] include

- Killing and intimidation of survivors of genocide, witnesses and judges.
- Judges were accused of participation in crimes of genocide (1.226 individuals identified).
- Partial confession of crimes causing re-categorisation or maximum penalties.
- Serious trauma cases, due to lack of physiological support.
- Lack of the fair trial rights of the accused.
- Lack of the right to counsel (perpetrators had no rights to a defence lawyer
- Allegation of corrupt judges
- Most judges had limited training, most of them had little or no formal education and, in most of cases, no formal legal experience or training.
- No vetting of judges.

Lessons learnt: The success or failure of traditional conflict resolution methods greatly depends on the type of human rights violations. In the case of *gross* human rights violations this cannot be the preferred method. However, the Rwanda situation was very different and called for alternative

[99] Haberstock, Lauren (2014) "An Analysis of the Effectiveness of the Gacaca Court System in Post-Genocide Rwanda, "Global Tides: Vol. 8, Article 4. Available at: http://digitalcommons.pepperdine.edu/globaltides/vol8/iss1/4
[100] Human Rights Watch: Justice compromised, the legacy of the Rwanda community based gacaca courts, https://www.hrw.org/report/2011/05/31/justice-compromised/legacy-rwandas-community-based-gacaca-courts
[101] UN: Background Information on the Justice and Reconciliation Process in Rwanda;http://www.un.org/en/preventgenocide/rwanda/about/bgjustice.shtml ; Haberstock
[102]http://gacaca.rw/about/achievements; https://www.hrw.org/report/2011/05/31/justice-compromised/legacy-rwandas-community-based-gacaca-courts

reconciliation measures.. The prisons were over-full of alleged perpetrators of the genocide, burdening the economy. The conventional courts, including the International tribunal for Rwanda, would have taken a long time to investigate the millions of cases. Thus, the state decided to accelerate the process and established the Gacaca courts with semi-judicial powers, although the judges didn't even have basic knowledge of the rights of victims and perpetrators making the balancing of community-based conflict resolution practices with fair trial standards very challenging.

However, traditional conflict resolution methods are very useful as preventive tools. They can be used as early warning systems; they are tools to re-integrate perpetrators into the community; they are tools to bring morality back to the community.

6.6.Summary of Lessons Learnt

From the cases of Nigeria, Uganda, Kenya, South Africa and Rwanda the following conclusions can be drawn:

- Truth commissions do not or only very partially achieve the transitional justice goal of truth, justice, reparation, healing and reconciliation.
- It is in the power of the governments that have set up a commission of inquiry or a truth commission to dissolve them anytime.
- Governments do not have the political will to implement the recommendations of the commissions.
- Victims' and survivors' expectations are raised but because of lack of enforcement of the recommendations they are being re-victimized.
- Commissions are deliberately scarcely funded by governments.
- Documents and records are destroyed by state agencies.
- The credibility of commissioners is not always vetted properly, members of a commission should be vetted continuously.
- Commissioners can be intimidated by government agencies and thus have rarely dissenting views.
- Military, police and state security high command members do not appear when summoned by commissions, with no consequences.
- In some cases, witness protection was lacking.
- Lack of clear and precise definitions of different legal terms in the enabling acts hinders the work of commissions.
- The reports produced by the commissions, if at all published, are too legalistic to understand for ordinary citizens, thus they cannot demand the implementation of the recommendations.
- The success or failure of traditional conflict resolution methods, greatly depends on the type of human rights violations.
- Non-judicial methods are not suited for dealing with past gross human rights violations, but are very useful in preventing violence at a community level.
- Together with the official judicial system the traditional methods can only work at the 'grass root' level to bring healing and reconciliation to a society.

7. The Expectations of Stakeholders Regarding the TJ Process in Zimbabwe

A study on Dealing with the Past is not complete without shedding some light on what the different stakeholders – victims, dependents, CSO, policy makers, donors – think about the transitional justice process and the work of the NPRC so far. For that purpose, a brief study has been conducted in October 2018, which sent an online questionnaire with 10 questions to the members of Forum's client data base; 153respondents returned their answers.

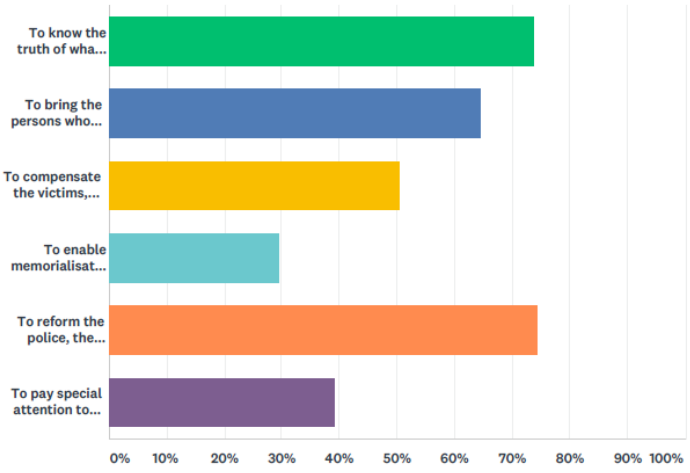
Note that the survey is non-representative and illustrates merely an opinion trend, in contrast to than a nation-wide opinion poll that mirrors reliably the society's views on the topic. The results can be found below.

During the data analysis, interesting differences in opinions between various stakeholders have been observed. Hence, the display of the results has been split in the following way: The first chart for each question always shows the totality of the respondents, whereas the second chart shows the answer separately between the two groups of the Community and the Civil Society (other stakeholders' responses were not enough to deliver meaningful results, so have not been cross-tabulated).

The responses

Q1 What do you think are the most important issues in Zimbabwe when dealing with past human rights violations? Please indicate your opinion by checking only the items you deem very important

Answered: 153 Skipped: 0

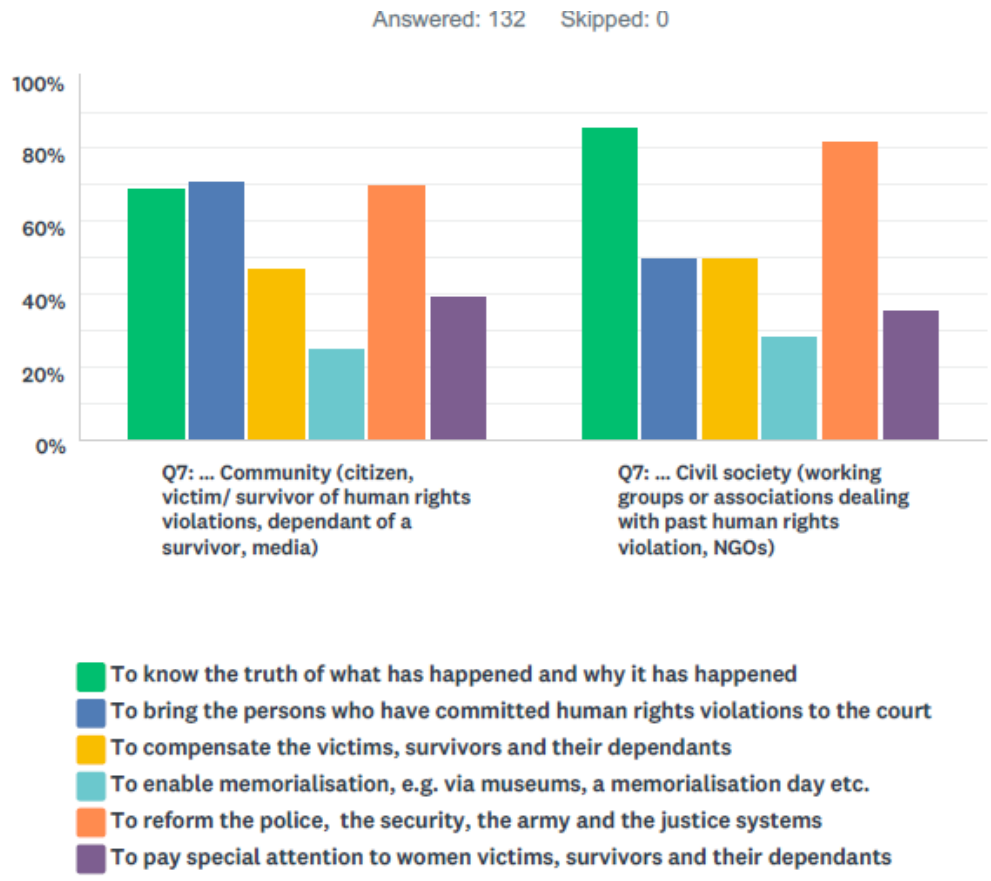


ANSWER CHOICES	RESPONSES	
To know the truth of what has happened and why it has happened	73.86%	113
To bring the persons who have committed human rights violations to the court	64.71%	99
To compensate the victims, survivors and their dependants	50.33%	77
To enable memorialisation, e.g. via museums, a memorialisation day etc.	29.41%	45
To reform the police, the security, the army and the justice systems	74.51%	114
To pay special attention to women victims, survivors and their dependants	39.22%	60
Total Respondents: 153		

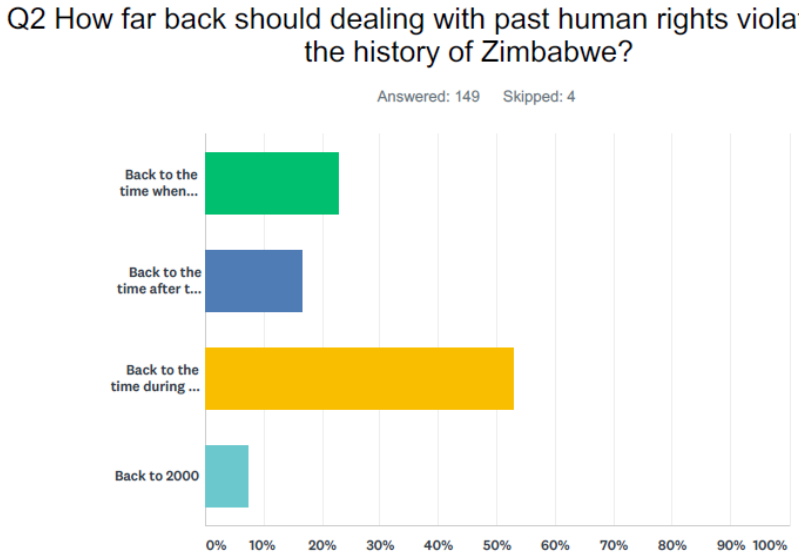
This question allowed for multiple responses. The vast majority of answers went to three items: reform of state institutions, truth (75%) and justice (65%). Compensation (50%), special attention to women's topics (38%) and memorialization scored lower in the respondents' mindsets (29%).

Interestingly, institutional reform, truth and justice are considered more important than compensation.

The next chart shows the answer of the two different groups Community and CSO on the same question.

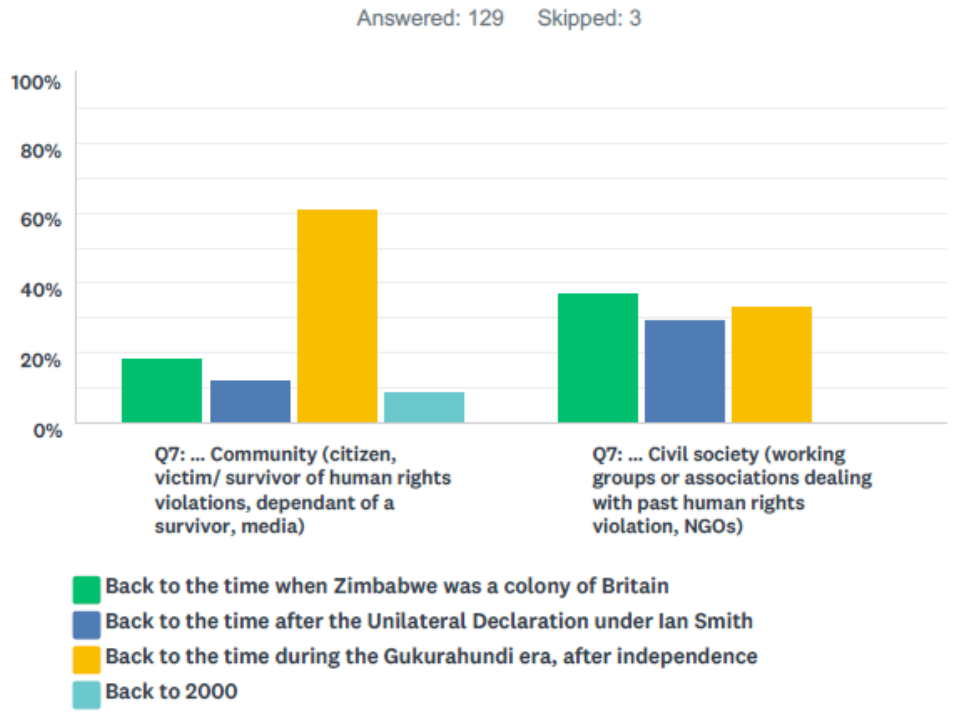


There is quite a significant difference between the opinion of the Community and that of the CSO: Where the former stresses institutional reform, truth and justice (all around 70%), the latter scores highest on truth (86%) and institutional reform (82%).



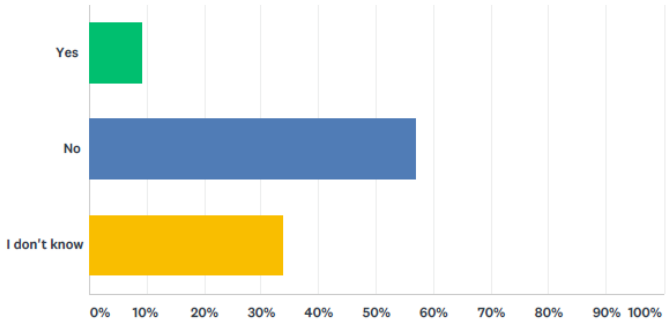
ANSWER CHOICES	RESPONSES	
Back to the time when Zimbabwe was a colony of Britain	22.82%	34
Back to the time after the Unilateral Declaration under Ian Smith	16.78%	25
Back to the time during the Gukurahundi era, after independence	53.02%	79
Back to 2000	7.38%	11
TOTAL		149

Most respondents would like to see the Dealing with Past process start after independence (53%), especially within the Community, as shown below, where that value goes up to 61%. Not a small number would like to go back even to colonial times (22%), especially within the CSO group (37%).



Q3 The NPRC has the mandate to bring healing, justice and reconciliation to the people of Zimbabwe regarding past human rights violations. Are you satisfied with the current activities of the NPRC?

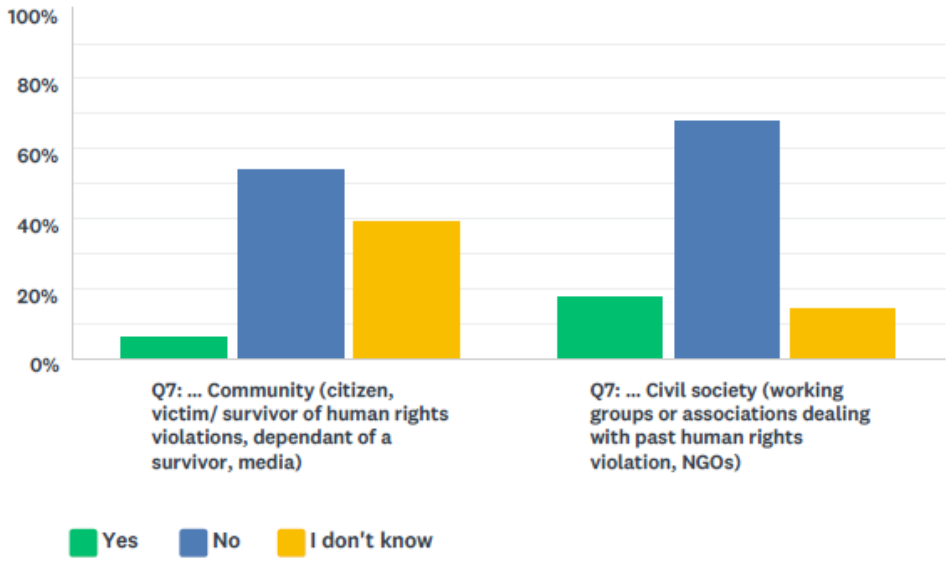
Answered: 151 Skipped: 2

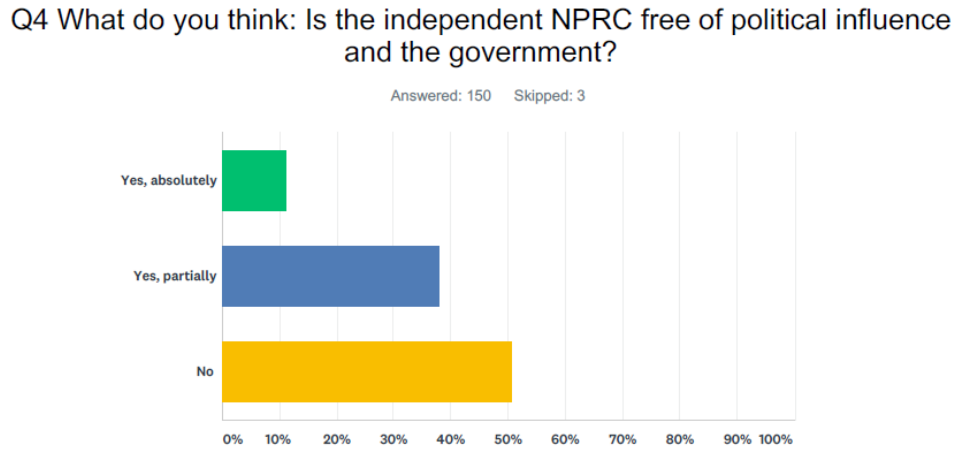


ANSWER CHOICES	RESPONSES	
Yes	9.27%	14
No	56.95%	86
I don't know	33.77%	51
TOTAL		151

The majority of respondents are not happy with the work of the NPRC (54%). This trend is more pronounced within the CSO group (68%). Quite a big group answer "I don't know" (34%); within the CSO group this value is much smaller (14%), presumably due to the better familiarity with the subject.

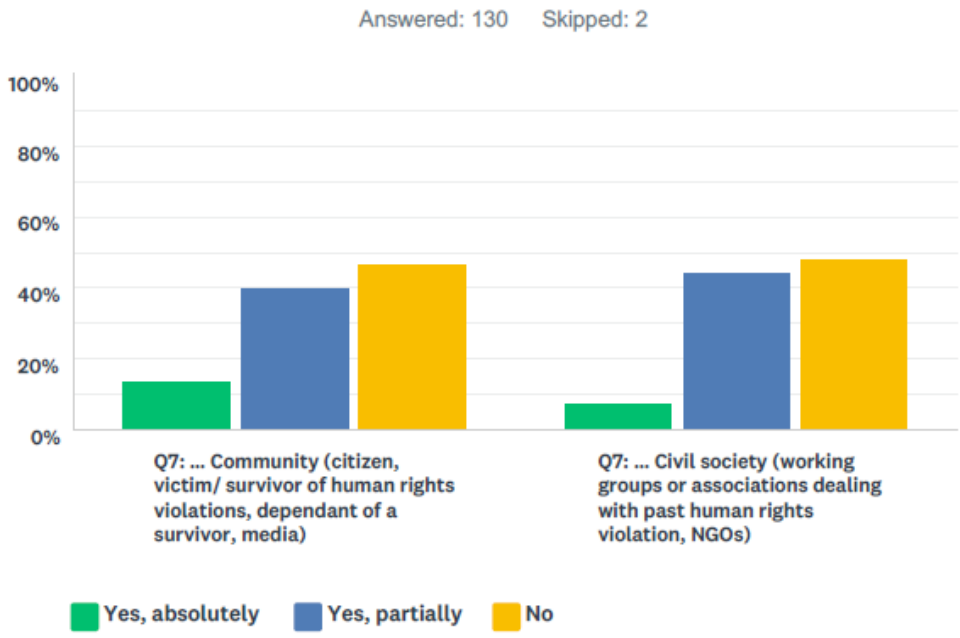
Answered: 132 Skipped: 0

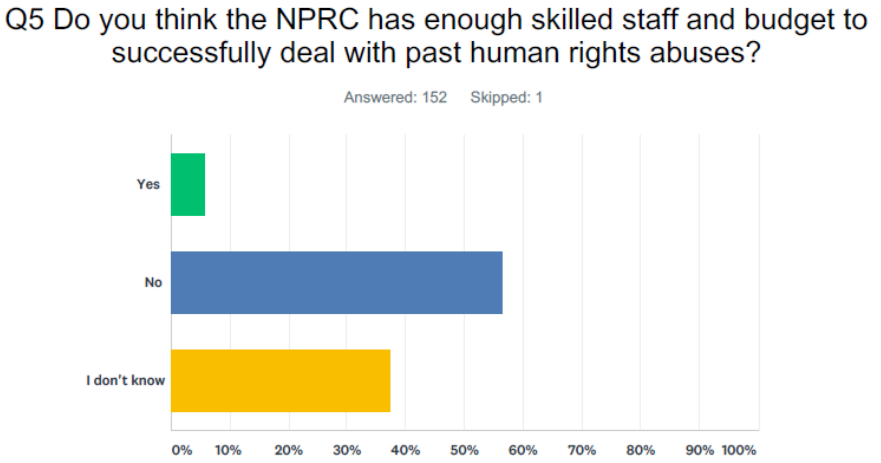




ANSWER CHOICES	RESPONSES	
Yes, absolutely	11.33%	17
Yes, partially	38.00%	57
No	50.67%	76
TOTAL		150

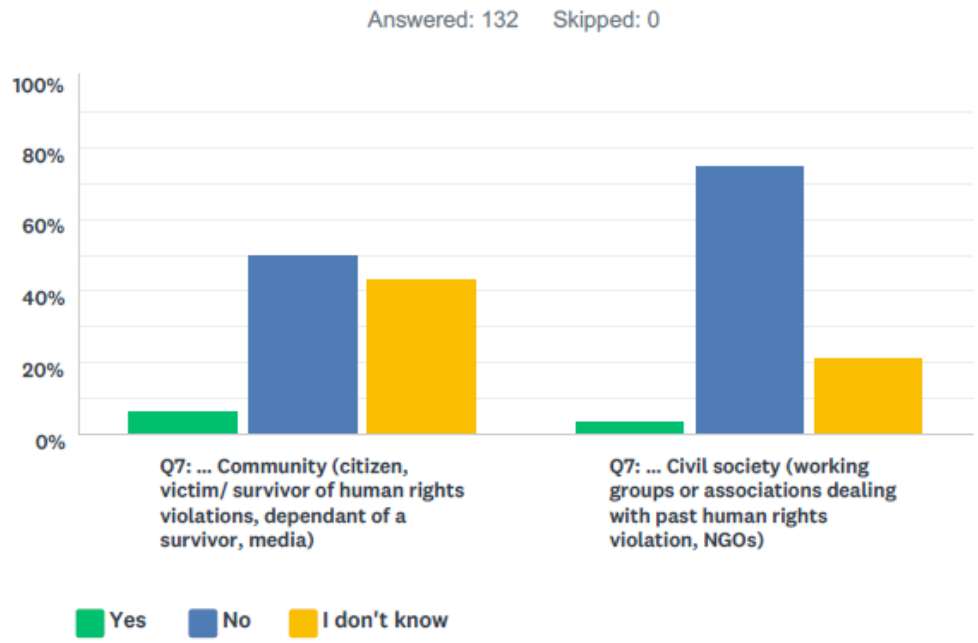
Most respondents think the NPRC is not (fully) independent from the government (89%). Within the Community the value of full independence is twice as high as within the CSO group (14% vs. 7%).

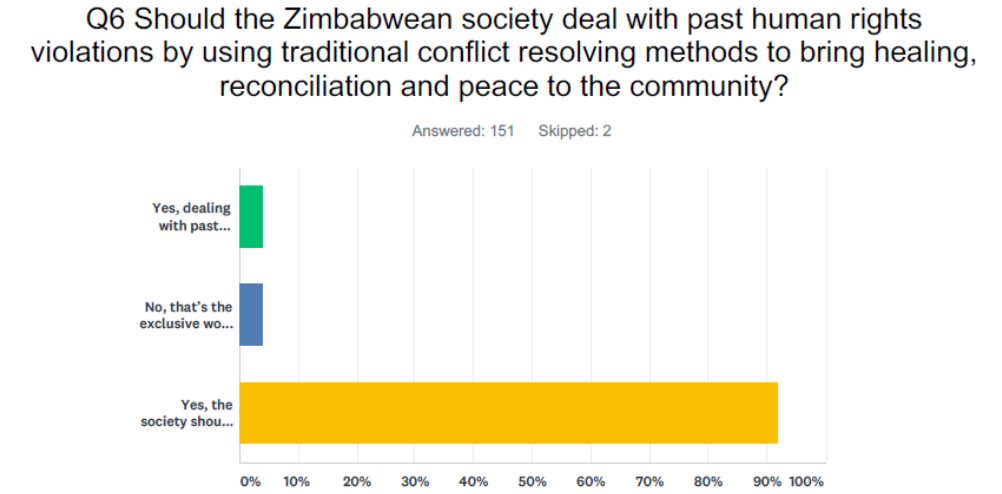




ANSWER CHOICES	RESPONSES	
Yes	5.92%	9
No	56.58%	86
I don't know	37.50%	57
TOTAL		152

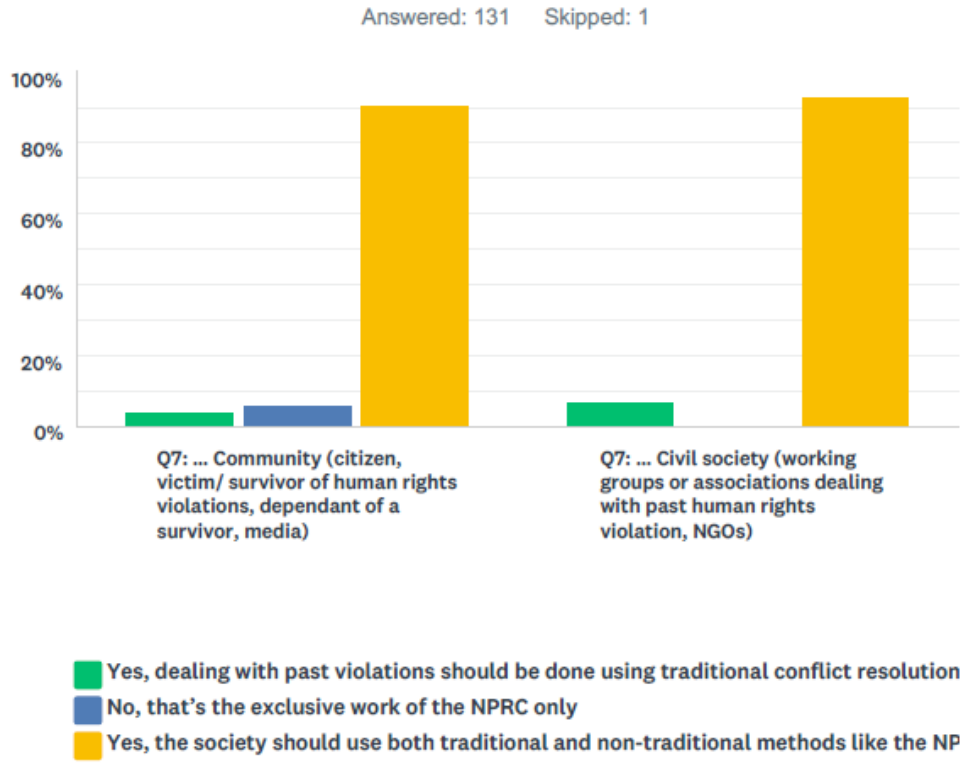
The NPRC is considered not fully prepared to deal with its tasks as 57% of respondents bemoan the Limited resources of the commission. Within the CSO group that deals “professionally” with the transitional justice issue this value is much higher (75%).





ANSWER CHOICES	RESPONSES	
Yes, dealing with past violations should be done using traditional conflict resolution methods only	3.97%	6
No, that's the exclusive work of the NPRC only	3.97%	6
Yes, the society should use both traditional and non-traditional methods like the NPRC and judicial courts	92.05%	139
TOTAL		151

Almost all respondents, no matter from which stakeholder group, emphasize the importance of both, traditional and non-traditional methods of Dealing with the Past.



Socio-demographical questions

Q7: In which major capacity have you answered the above questions? I answered as a member of the…

ANSWER CHOICES	RESPONSES	
… Community (citizen, victim/ survivor of human rights violations, dependant of a survivor, media)	69.80%	104
… Civil society (working groups or associations dealing with past human rights violation, NGOs)	18.79%	28
…Political establishment (policy maker, member of a political party, member of a trade union, etc)	2.68%	4
… Church or other faith-based organisation	5.37%	8
… Donor community	3.36%	5
TOTAL		149

Q8: How old are you?

ANSWER CHOICES	RESPONSES	
16 – 35 years	40.40%	61
36 – 45 years	21.19%	32
46 – 55 years	13.91%	21
56 + years	24.50%	37
TOTAL		151

Q9: What's your gender?

ANSWER CHOICES	RESPONSES	
Female	60.26%	91
Male	38.41%	58
Other	1.32%	2
TOTAL		151

Q9: Q10 Which Province do you come from (where you call home)?

ANSWER CHOICES	RESPONSES	
Bulawayo	11.26%	17
Harare	49.67%	75
Masvingo	5.96%	9
Matebeleland North	1.99%	3
Matebeleland South	2.65%	4
Mashonaland Central	1.32%	2
Mashonaland West	6.62%	10
Mashonaland East	2.65%	4
Midlands	3.31%	5
Manicaland	13.91%	21
Diaspora	0.66%	1
TOTAL		151

Summary

The most interesting results of the snap survey are summarized below:

- Transitional justice Issues: Most important subjects are considered institutional reform, truth and justice. Interestingly, institutional reform scores the highest values, even in the Community.
- Time frame of Dealing with the Past: The Community prefers the time after Independence, whereas many respondents of the CSO group would like to go further back.
- NPRC: Most respondents are not happy with the work of the commission and criticise its lack of independence and resources.
- Transitional justice method: Both traditional and non-traditional methods should be applied.

8. A Possible TJ Framework for Zimbabwe – A Discussion Guideline

Drawing from other countries' experiences with Dealing with the Past, analysing international and regional norms and experiences in transitional justice, the research has established that for Zimbabwe to have a comprehensive, holistic, victim-centred justice, healing and reconciliation there is a need for a framework.

However, the political situation is not yet conducive to any reconciliatory measures:

- Impunity is still prevailing;
- there are suppressive laws, some of them from the colonial area, hindering citizens to exercise their rights;
- the political establishment, and the party which had committed – and is still committing - human rights violations, is still in power.

All in all, Zimbabwe cannot be considered a state in transition. So, it is not surprising that the victims in Zimbabwe who have suffered a lot go without any kind of acknowledgment by the state, let alone redress. They are traumatized and marginalized. In case they have survived the violations, they are not in the position to sustain their families, they have less access to education, health centres, physiological counselling etc. The survivors of the Gukuhundi atrocities, e.g., are waiting over 30 years for any kind of acknowledgment, they are losing hope, they are not even allowed to rebury their loved once who are thrown in mass graves. It's only the CSOs, supported by the international communities, that are providing counselling and representing them legally.

Victims and their dependants and relatives cannot wait for the recommendations of the NPRC, which had this year presented its 5-years' plan. Even if the NPRC makes recommendations there is no guarantee that they will be implemented by the state. The reason is that states tend to justify non-implementation with the state of the economy. A state which has enough resources for the security sector, the police and the army, should give victims priority.

Various academic researches, opinions, lessons learnt had and are been written concerning transitional justice. Now there is need for practicability for the sake of the victims and survivors including the guarantee of non-recurrence.

This discussion paper has shown the deficiencies of Zimbabwe's transitional justice process and, in particular, of the NPRC Act. The next step is to also show a "way forward", to show what should and could be done for the healing. Hence, the paper will, in the following, suggest measures, which can be taken by the state for the sake of the victims and the society as a whole, parallel to the activities of the NPRC, to accelerate the TJ process in Zimbabwe.

** Please note this is just a guide for discussions among all stakeholders to come up with an agreed transitional justice framework for Zimbabwe. Thus, it tries to submit ideas as a guide for the various consultations. Additionally, it seeks to create brainstorming as to which measures can only be implemented by the state and which measure need the support of the CSOs*.

This section follows (partly) the structure of the ATJF concept, gives comments on each area about the current situation and suggests concrete measures that are deemed actionable in Zimbabwe under the current (or later) circumstances.

8.1.Truth Seeking and Truth Commissions

The NPRC enabling Act

As mentioned above, the NPRC enabling Act suffers from various deficiencies regarding important definitions and topics.

Proposed remedial measures include the amendment of the NPRC Act:

1. Define specifically the types of human rights violations including the type of violations that that occurred during the time which has to be investigated.
2. State time period to be investigated (cut-off day) .
3. Give the NPRC the power of search and seizure.
4. Enable the NPRC access to archives of both state and non-state actors.

Witness protection

The NPRC Act gives the responsibility of witness protection to the NPRC (Part II NPRC (13) NPRC Act). The Act is very vague in citing that the Criminal Procedure and Evidence Act shall apply with necessary changes. It is the obligation of the state to adopt a standalone Witness Protection Act for the truth telling process as soon as possible.

A proposed measure is:

5. Adopt a standalone Witness Protection Act.

Archives

Archives are important measure to promote the right to the truth. The state should ensure the preservation of and access to archives concerning violations of human rights and humanitarian law.

The appropriate measure would be:

6. Adopt an *Access to Information Act* to enable transitional justice institutions, the media and victims representatives to access the archives of the various state institutions, especially the record of the military and the police) for the purposes of investigations, prosecutions and vetting procedures.

8.2.Justice and Prosecutions

Since the inception of the NPRC, it is now the responsibility of the commission to investigate cases and, where it sees deemed appropriate, refer the cases to the courts. In the case of Zimbabwe there are two challenges: In the light of the multitude of cases of human rights violations the domestic courts are, from a resources point of view, not capable to deal with. Second, there is no domestic legal frame for case under the transitional justice prosecution.

Measures

7. Adopt an Act which defines specifically human rights violation, as suggested for the amendment of the NPRC Act.
8. Establish a specialized court for these cases, where judges and prosecutors are well trained in transitional justice issues and have a victim-centred approach.

8.3.Amnesty

The Zimbabwean state government has given itself blanket amnesty for all violations it had committed. This is against the rule of law and strengthens the already prevailing impunity. These blanket amnesty laws are against international law. Blanket amnesty will allow the perpetrators who have designed and masterminded the gross human rights violations to go scot free. If this kind of blanket amnesty continues, there will be a vicious cycle of violations, disregarding the equal rights of the people without discrimination. Blanket amnesty also undermines the notion of accountability including reconciliation.

In order to remedy that situation, the adequate measure would be:

9. Repeal all previous blanket amnesties

8.4.Conditional Amnesty

Conditional amnesties have various objectives depending on the past violations. It can sometimes persuade authoritarian rulers to hand over power. It can also provide an incentive to offenders to participate in truth recovery and thus contribute to reconciliation.

A measure could be:

10. Discuss with all stakeholders whether a conditional of amnesty is an option for Zimbabwe. And if yes, for which cases. Come-up with a catalogue.

8.5.Reparations

Reparations are a means to redress past gross and systematic human rights violations. These are measures taken by states to redress gross and systematic violations of international human rights law and/or international humanitarian law through the administration of some form of compensation or restitution to the victims. States are obliged to provide adequate, effective and comprehensive reparation to victims.

Reparations include restitution, compensation, rehabilitation or restitution: In criminal cases, one of the penalties imposed is requiring the return of stolen goods to the victim or payment to the victim for harm caused. For victims who have been internally displaced (IDP) the right to restitution of their property is of utmost importance. Where restitution is not feasible compensation in monetary form might be applied.

In the case of Zimbabwe, the state has done nothing towards reparation. Even if the state has not acknowledged the atrocities, it could have established some policies for vulnerable groups, which are women, ethnic minorities and the disabled. Victims cannot wait for the recommendations of the NPRC only. There should be a concentrated effort for the following measure to be put in place.

A set of measures may include:

- For the Gukurahundi survivors, their dependants and also for the dependants of the dead victims:

11. Develop an economic policy at least to develop the areas, where the atrocities took place Matebeleland, Midlands, Manicaland.
12. Adopt measures for free access to education, health and justice.

- For the victims of Murambatsvina, the 700,00 who had been displaced: Whereas the Gukurahundi massacres are being denied by the state, Murambatsvina (Operation Restore Order) had been officially endorse by the president and carried out by the ZRP. There is no need for root cause investigations in this matter. It is very clear who is responsible: the president of the country, Zanu-PF and the ZRP. Appropriate measures include:

13. Identify where the IDPs are now,
14. Asses their situations,
15. Encourage them to register,
16. Submit your findings to the state, the international community and the various treaty bodies
17. Restore their property or compensate them
18. Research what was achieved and what not with the counter programme from the state Operation Garikai (Rebuilding and Reconstruction).

- For the commercial farmers, whose farm has been illegally occupied and most of their rights grossly violated. Again here, investigation may be only towards identifying the once who have occupied the farms and threatened and in some cases tortured the farmers. The decision to occupy the farms was masterminded and endorsed by the state. Appropriate measures include:

19. Develop a policy for restitution or compensation.
20. Carry out a mapping exercise to identify the illegally occupied farms and the illegal owners.
21. Submit your findings to the state, the international community, and the various treaty bodies.

- For enforced disappeared people, for the once tortured, killed under unknown circumstances:

22. Create a database.

- Generally

23. Develop a special reparation funds.
24. Allocate sufficient amount to the fund during the yearly budget allocation.
25. Develop a policy for corporate identities to be involved in the funding by giving them incentives , like tax reduction.

8.6.The Definition of Victim

The NPRC Act does not define a "victim` of past human rights violations. International and regional norms have developed in such a way that it is a binding law that a victim of gross, systematic human rights violations is not only the directly concerned individual alone, but also persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term "victim" also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimisation.

The proposed measure is:

26. Amend the NPRC Act and any appropriate laws to include the above mentioned definition of victim.

8.7.Memorialization

Memorialisation is a commemoration, an acknowledgment of the truth, beyond any denial, preserving history, beyond any denial, an education tool and a guarantee for non-recurrence. There is a need to adopt a comprehensive approach for memorialisation. As such there is a need in Zimbabwe for memorialisation projects:

The proposed measures include:

27. Define a day of memorialisation for victims of human rights violation.
28. Design memorialisation spaces, halls, stadium etc. without the interference of the state.
29. Integrate memorialisation in the education curriculum.
30. Rename public spaces after the victims or the atrocities.
31. Revise history texts and educational curricula.
32. Include younger generations in all memorialisation activities; they are agents for change and for the non-recurrence of violence.

At the community level:

33. Allow the communities to memorialize their grievances, depending on their culture, religion, and history, openly without harassment.
34. Give city councils the constitutional power, or per a decree, to decide which mass graves can be opened so that relatives can rebury there loved once. This will lead to healing and is also part of acknowledging the truth.

8.8.Official Acknowledgement and Apology

The official acknowledgment and apology from the state about atrocities its agencies have committed restores the dignity of the victim and supports reconciliation. Official acknowledgment

and apology should always be followed by justice, accountability, knowing the truth, memoraliaztion, reparation and measures to be taken for the guarantee of non-recurrence.

In Zimbabwe, there was no apology for any atrocities. Giving a statement about Gukurahundi, where over 20,000 people were killed, as a 'moment of madness' is not an acknowledgment per se but an insult to the victims and survivors. However, by establishing the NPRC, the state has in some way acknowledged its wrong doings, which need to be investigated and the necessary remedies applied.

Adequate measures include:

35. Publish to the public all findings of inquiry commissions.
36. Acknowledge and apologize to the victims and the nation.

8.9.Guarantee of Non-Recurrence including institutional reforms

The guarantee of non-recurrence is a pillar of transitional justice that strives to establish democratic structures following a period of massive human rights abuse. To prevent the recurrence of such abuses the state public structures and institutions including legislations should be reformed, especially the police, the army and the security sector.

The aim is to establish good governance, accountability, transparency and the separation of power. Generally, an accountable state structure, which adheres to the rule of law, respects, promotes and implements the individual rights and freedoms enshrined in the constitution and international and regional human rights treaties or customary law. The reformation of institution will hinder the repetition of past human rights violations.

An institutional reform may include:

37. Structural reform: restructuring institutions to promote integrity, legitimacy and accountability, building independence, ensuring representation, and increasing responsiveness. Transforming the legal framework to ensure protection and promotion of human rights. It also includes the creation of oversight bodies to ensure transparency and accountability.
38. Vetting: examining personnel backgrounds during restructuring or recruitment, to remove public office holders from their positions, if they have a past human rights abusive records.

The political willingness for institutional reform usually appears after a transition from authoritarian to a democratic regime. Nevertheless, even in such a setting an institutional reform is a long-term process. It is not possible to replace all institutions with new personnel, usually only the top positions are replaced with new once. Transitional justice, in particular institutional reform, is a very challenging exercise in an environment where it is disputed that there has been a transformation from a repressive state to a more democratic one or at least a new regime. Nevertheless, on a smaller scale, a gradual change within an institution to adhere to internationally agreed human rights and humanitarian law can be achieved through training, advocacy and lobbying.

In the case of Zimbabwe, there has been no transition, so what can be done, to guarantee non-recurrence at this stage?

Proposed measures would include:

39. Repeal all laws, which hinder citizens to exercise their rights.
40. Align all laws to the constitution.
41. Create a vetting committee at least to vet new top recruits of the police, army and the security sector.
42. Restructure the police, the army and the security sector – develop hereto a tool.
43. Establish an Independent Police Complaints and Misconduct Commission (IPCMC) also for the army and the security sector.
44. Integrate human rights and humanitarian rights modules in the training of the police, the military, the security sector and the judiciary.
45. Establish a rapid response committee with the aim to respond immediately and effectively when a human rights violation is reported. The Committee members should consist of the following representatives: CSOs, the police, the human rights commission, the gender commission, MPs and the judiciary. The committee will inform the appropriate agencies, monitor the progress and report to the public and the parliament.
46. Establish sustainable peace committees in the communities including the youth with at least 50 percent women including the youth.
47. Institutionalize traditional dispute resolution methods.
48. Develop policies for the youth. This will help to lessen the intrumentalization of them by political forces. An example could be the support of youth initiatives and incentivisation via micro-credits.

8.10. Gender Justice

All transitional justice processes, mechanisms and measures should have a gender-sensitive approach. The NPRC Act has emphasized this requirement by stipulating the need for a gender unit. This gender unit has the, among others, task to develop guidelines, rules and strategies to assess the needs of victims of gender-based violations and marginalization.

Suitable measures may be:

49. Establish a policy that helps to define gender-based violence categories in Zimbabwe.
50. Establish trauma centres for women country wide.
51. Educate women about their rights.