TOWARDS TRANSITIONAL JUSTICE IN ZIMBABWE: THE ROLE OF THE NATIONAL PEACE AND RECONCILIATION COMMISSION AND THE ZIMBABWE HUMAN RIGHTS COMMISSION

BY

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SUBMITTED IN FULFILMENT OF THE REQUIREMENTS OF THE DEGREE PhD

IN THE FACULTY OF LAW, UNIVERSITY of PRETORIA

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2020

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Dedication

To my parents and Rajesh

Acknowledgement

The completion of this thesis has been more than an academic exercise, and thanks go to many people who have been helpful in many ways. In particular, I thank Professors Magnus Killander and Bonolo R Dinokopila who took me through this doctoral journey and gave insightful guidance. I immensely benefited from their contributions throughout. The importance of funding in the doctoral thesis is greatly appreciated. I thank Professor Killander for financial assistance and networking with postgraduate researchers who gave friendly critiques to my thesis. I am also very grateful for the financial and mental wellness support from Canon Collins Scholarship and Legal Assistance Trust. The Canon Collins Welcome Meeting at the University of Witwatersrand and the Canon Collins Scholarship Meeting in Cape Town allowed me to get feedback on many issues from postgraduate students. The Canon Collins virtual workshop on how scholars can be kind to themselves also helped me appreciate the importance of mental, physical, and social wellness on the part of scholars. The workshop also taught me to balance between being kind to myself as well as being kind to others, especially being mindful to the biting effects of black tax during periods of economic downturn and Covidien pandemic; acknowledging the need for gender mainstreaming efforts in crises and focusing on the concept of gender as instrumentalised in global transitional justice and governmental developments. I also thank the University of Pretoria and the Ministry of Foreign Affairs, Finland for a research opportunity at the Institute for Human Rights at Abo Akademi University. I benefited immensely from the advanced course on social and economic rights which provided me with deeper knowledge on the nexus between transitional justice, corporate social, and state responsibility in enhancing economic, social rights. This also enabled me to value the nexus between transformative justice, transitional justice, and soft laws on holistic transitional justice approaches. The list of staff to thank is long but specific mention goes to Katarina Frostell, project manager at Abo Akademi University and Raija Hanski for helping me to appreciate Finland from the aspects of snow; clocks turning back; accommodation; the Turku cultural city and teaching material. I also thank Viljam Engstrom and Lisa Grans for the comments on issues relating to time and task management of my research.

To Lisa, thank you lots for enabling me to get and compare material from Gjylbera Bella Murati from Kosovo and also for the guest lecture by Dr. S. Kuovo on the complexities of studying transitional justice in ongoing conflicts, including focusing on low-key transitional justice efforts under the auspices of civil society organisations. I thank also the staff at the

Centre for Human Rights, the University of Pretoria for enabling me to benefit from activities such as the Shurea and Afridoors Conference in Addis Ababa, Ethiopia. I am grateful to Professor Mizane for assisting me with health access in Ethiopia. I thank Afridoors and Shurea organisers and participants in Addis Abba and the Abo Akademi University for insightful and critical comments that enriched my research, especially on focusing on transitional justice outcomes during ongoing conflict situations or during situations where elite consensus on transitional justice efforts is lacking. I thank Dr. Christopher Mbazira for critical comments on my thesis: his insightful comments helped me to navigate the world of political transitions and the possibility of studying transitional justice in situations without definitive transitions from one regime to another. He also helped me to understand how conflict mapping exercise is difficult especially in translating the language of victims into the demands of national and international law. While victims remember when and how violence occurred, transitional justice practitioners, development agencies, civil society, and community-based organisations need to essentialise the linking of the language of international and national law to those who suffered, including understanding how victims talk about many places where the violent conflict occurred. The list of colleagues to thank is long: Professor Frans Viljoen and the staff at Centre for Human Rights who participated in the defence of my thesis and helped me shape this research to be outcome-based and not just merely evaluative. Colleagues who supported me through this journey: My friends Effort Jera, Shadreck Chirorwe, and Takunda Gumbo for encouragement; Ms. Abigail Mawonya for assistance with the typesetting; Drs A Murwira, T Zinyama, L Mhandara and S Muqayi for support; staff and students at the Political and Administrative Studies, University of Zimbabwe. I also want to thank Dr. H Zvoushe for a friendly critique of my ideas and assistance with intellectual resources on developments in transitional justice in Zimbabwe. My gratitude goes to Susan Feltoe for diligent editing and I do not hesitate to recommend her to scholars. Above all, I thank God, my family members, gogo Rose, my parents, and siblings in helping me focus on bigger successes such as this thesis. Indeed, well done is better than well-said!

Abstract

Transitional justice (TJ) in Zimbabwe can be gleaned as a maze of detached filaments mainly championed by civil society organisations. Though the origins of TJ as a discipline are polemic and debatable, going as far back as Athenian times, TJ was visibilised in the 1990s during the third wave of democratisation, when it developed globally as a self-consolidating field and transdisciplinary concept which focused on outcomes such as prosecution, truth-telling, guarantees for non-recurrence, vetting, and the payment of reparations for victims of conflicts. The traditional focus of TJ was largely template-based or some kind of one-size-fits-all concept which focused on truths and reconciliation concepts. Significantly for victims of violent conflicts, repressive rule and serious human rights abuses, the emerging approach to TJ at the United Nations (UN) and regional institutions such as the African Union (AU) and institutions such as African Commission on Human and Peoples' Rights (ACHPR) has been to focus on country-specific, localised, and holistic approaches that enhance transformative transitional justice in countries striving to find lasting solutions to deep problems caused by armed conflicts or serious human rights violations.

While there is a robust nexus between human rights, democracy, and TJ, the link is weaker for TJ as it remains an elusive concept in Zimbabwe. Besides, TJ efforts yield different considerations and impacts on racialised, ethnicised, politicised, and institutionalised challenges in Zimbabwe. In most cases, the elusive nature of TJ is felt by victims, their family members, community dwellers, community-based organisations, and faith-based organisations than alleged perpetrators. TJ is perceived in this thesis to be a critical concept that should be properly aligned with internationalised and localised responses. This thesis shows that international agencies now recognise and essentialise the important roles that national institutions (formal or informal), can play in preventing the occurrence and/or recurrence of conflicts and can also play in fostering sustainable cultures of human rights. Specifically, the thesis covers examination of how institutional complementarity between two independent institutions supporting democracy in Zimbabwe; the National Peace and Reconciliation Commission (NPRC) and the Zimbabwe Human Rights Commission (ZHRC) can be innovatively used to enable the Zimbabwean society to formalise transitional or post-conflict justice using the Constitution and international normative frameworks. The overarching research question in this thesis is: what are the main challenges/limitations and opportunities/openings for the ZHRC and the NPRC to advance TJ in Zimbabwe? The specific research questions are 1. *What does the international and national TJ normative*

framework entail and what is its theoretical force? 2. *What constitutes a genuinely contextualised and holistic transitional justice in Zimbabwe?* 3. *How innovative have the NPRC and ZHRC been in making TJ a reality in Zimbabwe?* 4. *How can the Zimbabwean TJ framework be improved constitutionally, statutorily, and in practice?* In this milieu, adherence to the normative principles of domestic constitutionalism, rule of law and human rights is essential to advance TJ and in identifying victims and most affected groups. The NPRC and ZHRC should thus be innovative in utilising international normative frameworks and aligning them with their constitutional mandates that speak to TJ. Sadly though, the NPRC and ZHRC are yet to align their mandates or work to international frameworks. The thesis concludes with an emphasis on the need for a coherent and transformative TJ policy that is informed by the root causes of societal problems in Zimbabwe: racial, ethnic, economic, political, doctrinal, pandemic-induced and so forth. Through constitutionally-established institutional independence, the NPRC, ZHRC and other Chapter 12 institutions supporting democracy in Zimbabwe must thrive on public legitimacy, confidence, and trust to promote dialogic democratisation and democratic consolidation which also recognise that the victim's voice in TJ initiatives must be prioritised. Lethargic governance, toxic politics and confidence deficits should be addressed from a human rights as well as transformative TJ perspective. Ultimately, the TJ outcomes expected in this thesis should help Zimbabweans fully reconcile, achieve total peace, and move towards permanent healing. A context-sensitive and coherent TJ should be seen as a precious fruit of the normative frameworks espoused by the Constitution and regionalised or globalised TJ frameworks.

Keywords

Independent institutions, reconciliation, healing, peace, human rights institutions, holistic approaches, context-sensitive transitional justice, transformative justice.

Acronyms and Abbreviations

ACHPR	African Commission on Human and Peoples' Rights
AIPPA	Access to Information and Protection of Privacy Act
AU	African Union
AU TJF	AU Transitional Justice Framework
AU TJP	AU Transitional Justice Policy
CCJP	Catholic Commission for Justice and Peace
CCSF	Church and Civil Society Forum
CSO	Civil Society Organisation
CSU	Counselling Services Unit
EISA	Electoral Institute for Sustainable Democracy in Africa
ESAP	Economic Structural Adjustment Program
FBO	Faith-based Organisation
FORUM	Zimbabwe Human Rights NGO Forum
GANHRI	Global Alliance of National Human Rights
GNU	Government of National Unity
GPA	Global Political Agreement
ICC	International Criminal Court
ICTR	International Criminal Court for Rwanda
ICTJ	International Centre for Transitional Justice
MDC	Movement for Democratic Alliance
MDC-T	Movement for Democratic Alliance - Tsvangirai
MDC-N	Movement for Democratic Alliance - Ncube
MOPA	Maintenance of Order and Peace Act
MOU	Memorandum of Understanding
NANGO	National Association of Non-Governmental Organisations
NGO	Non-Governmental Organization
NHRI	National Human Rights Institution
NPRC	National Peace and Reconciliation Commission
NTJWG	National Transitional Justice Working Group
OHCHR	Office of the High Commissioner for Human Rights
ONHRI	Organ on National Healing, Reconciliation and Integration
POLAD	Political Actors Dialogue
POSA	Public Order and Security Act
RENAMO	Mozambican National Resistance

SADC	Southern African Development Commission
SA TRC	Truth and Reconciliation Commission of South Africa
TJ	Transitional justice
TIZ	Transparency International Zimbabwe
TRC	Truth and Reconciliation Commission
UN	United Nations
UDHR	Universal Declaration of Human Rights
UDI	Unilateral Declaration of Independence
UNDP	United Nations Development Program
UNGA	United Nations General Assembly
UNITA	National Union for the Total Independence of Angola
UNOHCHR	United Nations Office of the Commissioner for Human Rights
UPR	Universal Periodic Review (OHCHR)
WVCF	War Victims Compensation Fund
ZANLA	Zimbabwe African National Liberation Army
ZANU	Zimbabwe African National Union
ZANU PF	Zimbabwe African National Union Patriotic Front
ZAPU	Zimbabwe African People's Union
ZDF	Zimbabwe Defence Forces
ZEC	Zimbabwe Electoral Commission
ZGC	Zimbabwe Gender Commission
ZHRC	Zimbabwe Human Rights Commission
ZIPRA	Zimbabwe People's Revolutionary Army
ZMC	Zimbabwe Media Commission
ZNA	Zimbabwe National Army
ZPP	Zimbabwe Peace Project
ZRP	Zimbabwe Republic Police
ZWLA	Zimbabwe Women Lawyers Association

CHAPTER 1

INTRODUCTION

1.1 Background

The significance of this thesis is that it contributes to the essentialisation and visibilisation of the innovative use of local transitional justice (TJ) mechanisms to help Zimbabwe's society pragmatically end serious conflicts and improve its commitment to human rights, peace, healing, and reconciliation. The thesis essentialises a one-size-does-not-fit-all approach which is substantiated by the emerging normative approaches to TJ that emboss the need for contextualisation and localisation of TJ mechanisms.

As shall be demonstrated below and in subsequent chapters in this thesis, Zimbabwe had both convivial and/or lobbied moments of informalised and spasmodic reconciliation that did not lessen agonising instances of violence, rule of force, rule by law, ideologised divisions, and tacit elite (and/or sub-elite and non-elite) consensus and coercion.[1] Neither did the moments referred to above bring lasting peace (carnal, negative, positive, or divine peace that passes all understanding) or healing (including salvific) between victims and alleged perpetrators. More regrettably, the anti-formal reconciliation tradition delayed the potential for healing and lasting peace for decades.

Believably so, the point of departure in this thesis is that challenges such as informalised reconciliations, blanket amnesties, the periodic use of key regime enablers (stockholders) such as the security personnel, the emergence of radicalised agents of social change and interest groups, and the sensationalisation of popular constitutionalism by the general populace during the transition from President Mugabe's to Mnangagwa's rule in November 2017, and so forth, all reflect hugely on how flawed or fledgling transitions emasculate the realisation of TJ by victims of conflicts, serious human rights violation, or repression in Zimbabwe.

[1] These terms are used to show how the ruling elites sometimes get the backing of party supporters and other citizens who may exacerbate conflicts in Zimbabwe.

At the heart of the thesis is the need to understand how societies ravaged by political repression and incessant conflicts, however their degree and tenor, can attempt to build political will and trust that invigorate, immortalise, naturalise, synergise, visibilise, and memorialise lasting peace, total healing, and formal reconciliation processes in a society. Linked to this is the need for victims to avoid overreliance on charted oralised narratives that are heavily dependent on immersed animosity. Similarly, concern on mythologisation of conflicts should also be seriously interrogated. In assessing how locally-grounded normativised TJ solutions can be embraced and embossed in Zimbabwe, the thesis examines the lessons that can be learned from countries such as South Africa where a Truth and Reconciliation Commission (SA TRC) was established soon after the end of apartheid/apart-hate. By looking at the challenges and benefits of the SA TRC and other localised TJ mechanisms across the Africa and the globe, this thesis explores the need to balance pragmatism, prudent normativism, and vertical, horizontal and diagonal accountability for atrocities of serious human rights violations in its TJ law and policy trajectories. This is considered important so that TJ practitioners and the state are not cartelised into '*them*' and '*us'* and so that they do not volatilise, sanitise, romanticise, politicise, or monopolise the TJ processes in a manner that serialises, or perenialise the problems that brutalise the Zimbabwean polity. Because it is not yet known as to how the TJ approach in Zimbabwe would be like if a TJ law and policy is adopted, the thesis examines whether it is not too late for Zimbabwe to embark on racial, ethnic, political, or other forms of peace, healing, and reconciliation.

Because every dark cloud has a silver lining, the celebration of the SA TRC for instance was resounding in ending racial apartness but the xenophobic attacks experienced today, demonstrate how TJ initiatives in a country may be received with mixed emotions. As such, this thesis also emphasises how transformative TJ solutions should be deepened and must come from and be designed by Zimbabweans, although such solutions may be informed by country-sensitive, regionalised and globalised norms and experiences.

Although societal disagreements abound on whether the modern face of conflicts in Zimbabwe started in the (un)known periods during the pre-colonial, colonial or post-independence periods, the past that divides Zimbabweans is seen here as a chapter of accumulated and historicised lessons Zimbabweans can use to revise, learn, unlearn, and relearn the challenges to the realisation of peace, healing, and reconciliation in Zimbabwe. Through contextualised, context-sensitivised, localised and normativised TJ initiatives, the

future that unites Zimbabweans should be seen as a hidden resource to be discovered beyond mere politicised, ideologised, and patronised arguments or approaches to healing, reconciliation and peace. With the diversity and mutual mistrust currently obtaining among variegated victims, perpetrators, and TJ practitioners, Zimbabweans should have a strong resolve to exalt the localisation and context-sensitivity of TJ mechanisms and do more on the side of addressing the unevenness and incompleteness of TJ processes.

At an intergenerational and intergovernmental level, TJ practitioners and TJ voices that emerge as vectors of institutional coherence under the current holistic and context-sensitive UN and AU normative frameworks should push conventional TJ practitioners to (re)think outside or even without the boxes of template-based TJ narratives. There is an urgent need for holistic and localised TJ mechanisms to inform Zimbabwe's TJ policy and law as contemplated by the Constitution's reference to post-conflict justice. In assessing the forms of accountability to be preferred, this thesis places emphasis for the powers that be and the generality of Zimbabwean citizens to faithfully commit to ending official impunity and non-official complicity. They should explore various approaches to reconciliation such as rehabilitation and reconstruction, exculpatory, reparation, restitution, apology, penitence, historical, joint reconstruction, theatrical, juridicial and so forth.

Linked to this are the legal challenges on how far back TJ processes should go. In considering this, pre-colonial and some of the colonial massacres of civilians using bacteriological warfare and chemical weapons or bombings at places such as *Chimoio* and *Nyadzonia* during the colonial period as well as events such as the Matabeleland and Midlands *Gukurahundi* in the early independent period, can be considered.

In pursuing TJ or any other emerging approaches to dealing with the past divisive acts in Zimbabwe's TJ discourse, and while victims have painfully traversed their way to total healing, concepts such as transformative transitional justice, affirmative, aversive, and formal acknowledgment of wrongs, community accountability, and so forth must be visibilised and essentialised so that victims can resolutely negotiate their ways to healing effectively. Even if reparations or other forms of material acknowledgment were to be paid, this thesis notes that springboard human rights-based conflicts such as the Entumbane and the Matabeleland and Midlands *Gukurahundi* have dragged for almost half a century and prove to be herculean of a task to manage. They are still highly sensitivised if not ethnicised, securitised, radicalised, particularised, exceptionalised, and politicised issues and seem to be closed to the unfurled banner of independent and impartial analysis. Quintessentially, taking Zimbabwe(ans)

towards the path of a sustainable culture of human rights, healing, peace, and reconciliation remains difficult.

This thesis examines how the National Peace and Reconciliation Commission (NPRC) and the Zimbabwe Human Rights Commission (ZHRC) can use their constitutional and legislative mandates to successfully electrify the TJ processes in Zimbabwe. For this reason, it seeks to widen every Zimbabwean's visual acuity and memory with regards to why TJ should not be seen as false support for human rights and constitutionalism in Zimbabwe on the one hand, or be conceptualised and dismissed as a mere extension of political rhetoric, patronage or regime change postures on the other.

Doing TJ in Zimbabwe shows that healing and reconciliation have both been volatilised and imagised as difficult to achieve. As such, there is need for TJ actors to authentically interrogate how the usage of narratives such as regime change, militarisation, or securitisation of politics on the part of ZANU PF should be done in light of counter-narratives such as sanctions renewal calls, and allegations of destructive violence on the part of the opposition Movement for Democratic Change stall TJ processes in Zimbabwe. Further there is need to faithfully interrogate issues such as Shona exceptionalism and Ndebele particularism as they relate to TJ discourse in Zimbabwe. In doing so, the dilemma of a happy slave who always preaches his master's vocalised sermon should be avoided and genuine efforts should be made to give a fair and vivid description of Zimbabwe's TJ problems without fear or favor.

There should be a paradigm shift by all Zimbabweans since TJ is on edge. There is a need for national consciousness and hybridisation of TJ initiatives which can enable perceived perpetrators to see light at the end of the tunnel and genuinely interact with victims, victims groups, and their families. Without a middle voice to unite victims and perpetrators, an authoritarian grip may be used by the governments of the day to stifle any TJ process that appear to be largely retributive, juridicial or punishment-oriented.

From the perspective of carnal, spiritualised, positive and negative peace and Zimbabwe's preparedness to establish formal TJ processes, the problematic relationship between the state and various racial, civil society, victims, and ethnic groups in Zimbabwe reflects deep distrust. Domestic and foreign challenges have made it impossible for ordinary Zimbabweans to live without coercion from the rulers of the day or superpowers. While rulers of the day have been accused of lacking political will to drive the TJ processes in Zimbabwe, superpowers affect the social security of Zimbabweans through economic embargoes and

financial conditionalities that exacerbate inequalities and poverty in Zimbabwe. Regrettably, in that milieu, it is noted in this thesis that various opportunities for permanent national peace, healing, and reconciliation have been missed. These include the informalised, ephemeral and seemingly transitory reconciliation between whites and blacks soon after independence; the analgesic efforts at '*conditional*' and blanket amnesties in the late 1980s that largely benefitted state functionaries and so-called dissidents at the expense of innocent civilians; and the Unity Accord in 1987. Other issues include the unpublished findings from commissions of inquiry in the 1980s; reportage to the effect that some crucial commission reports were lost; rushed compensation of war veterans that triggered economic nose-diving; and the politically-negotiated Government of National Unity (GNU) between 2009 and 2013 which reversed the gains of participatory and deliberative democracy.

From the perspective of posterity and stability of political transitions in Zimbabwe, this thesis argues that the 1987 Unity Accord and the GNU, for instance, should have been treated as landmark events to notch convivial solidarity in achieving real political transitions in Zimbabwe. This is because the two peace agreements under the 1987 Accord and the GNU largely led to the cessation of politically-driven hostilities and were opportune occasions for the warring political parties to oxygenate Zimbabwe on finding effective ways of achieving political unity for the benefit of the generality of Zimbabweans.

In motivating for the NPRC and ZHRC to be used as TJ institutions, the thesis looks at the global, regional, context-sensitive, and country-specific approaches that can be used to support victims to find ways to close the difficult past. Considered from the perspective of Zimbabwe's normatively-established national institutions that were established to support democracy, the NPRC and ZHRC, can be prioritised to make TJ realisable through continuous democratic engagements between and among Zimbabweans. Because Zimbabwe commits to the values of constitutional supremacy, constitutional democracy, rule of law, human rights and constitutionalism, the Constitution of Zimbabwe[2] is considered here as the normative starting point which provides tonic to the TJ-focused institutional arrangements

[2] Constitution of Zimbabwe Amendment (No 20) Act 2013 ('Constitution 2013 or Constitution'). This thesis however notes that the Constitution is not and should not be referred to as an amendment but a standalone and justiciable blueprint which replaced the cease-fire or transitional charter, the Lancaster House Constitution, 1979.

that can promote healing, peace, and reconciliation after conflicts or incidents of serious human rights violations.

Due to lack of consensus between the state and various TJ-oriented oversight bodies, practitioners or civil society organisations (CSOs) on how various individual and group victims can be assisted in their healing and reconciliation journeys, and on which reconciliation approach to prefer, this thesis focuses on the NPRC and ZHRC. The NPRC is considered because it has a direct constitutional mandate to ensure there is post-conflict justice in Zimbabwe. The ZHRC is preferred as the permanent commission that is mandated to protect human rights and also serves as the public protector in Zimbabwe. Operationalised before the NPRC, the ZHRC can utilise its broad constitutional mandate to remedy injustices related to human rights violations. Further, while there is talk about demerging the dual roles of the ZHRC by forming the office of the Public Protector, the ZHRC can still employ its role as a member of the National Human Rights Institutions (NHRIs) to promote TJ as contemplated by instruments such as the Kyiv Declaration and Paris Principles on national institutions. Together, the NPRC and ZHRC can complement their efforts in TJ processes.

It is important to state at the onset that Zimbabwe is yet to define the victims, beneficiaries, actors, practitioners, and perpetrators of conflicts where gross human rights violations were committed. It is also yet to concretise efforts to expand the span of the NPRC beyond 2023 so that the NPRC can operate for ten years as contemplated by the Constitution. There has not been consensus or consultation on extra-legal factors and other factors such as Zimbabweans' conceptions of TJ; timelines to compensate victims; or the likely approaches to dealing with official impunity (such as removing certain alleged perpetrators from power, using administrative procedures to deal with perpetrators, involving criminal justice avenues or vetting those who accede to power). There has not been formal consultation amongst Zimbabweans on the practicality of getting firsthand information on TJ from pre-colonial and colonial times even though it is clear that time-witnessing may be a problem. It is also not yet clear whether the NPRC, as a post-conflict institution, or the ZHRC, as a TJ institution under the rubric of national human rights institutions, will focus on the pre-colonial, colonial, and post-colonial periods in their TJ initiatives.

Further, beyond the NPRC's consultative meetings, public hearings and conflict-mapping exercises, victims and TJ practitioners in the CSO, academia, research and faith-based institutions have not yet been consulted on the practicality of finding realistic periods of focus, especially from the perspective of known time witnessing and real-time memory. They

have also not been consulted on how the ZHRC, as a permanent institution supporting democracy, will take the TJ processes forward in the event that the NPRC's span ends in 2023 or the ZHRC's roles are separated if the envisaged demerging of the ZHRC's roles is successful. Both institutions can thus contribute to the debate on how Zimbabweans can shun absurd timelines to compensate victims or enable victims and their families to best access reparative/restorative justice while the state is exploring other TJ options to be followed.

Structurally, this thesis utilises a bottom-up approach to analyse the relationship between constitutional and international norms on TJ. The analysis is outcome-based as it aims to create a healed and reconciled Zimbabweans with a strong sense of constitutional culture, and commitment to achieving lasting peace, all steeped in the realisation that TJ is not political, although it may frequently become politicised. As such, the thesis examines the Constitution and other national laws that speak to TJ together with international law. The use of domestic law as the basis of Zimbabwe's normative institutional framework that should be employed in TJ discourse is essentialised. Constitutionally-intoned accountability mechanisms are prioritised. For instance, while the President of Zimbabwe can be understood through the verticality concept or vertical application of the Constitution as the key authority involved in the appointment of commissioners of the NPRC and ZHRC, the horizontality principle can be maintained at the national level since the Constitution at least provides for restraints on how those constitutional appointments have to be made within the bounds of the Constitution. The Constitution also empowers Parliament to call the executive to account to it.[3]

Besides the normative framework at the national level, the use of the global framework under the United Nations (UN) and the regional framework under the African Union (AU) is meant to proffer lasting and sustainable solutions on how constitutionally-established institutions supporting democracy in Zimbabwe ought to be guided by international law to design platforms and methods for making TJ realizable as contemplated by national laws. Further, the reference to selected country-specific, context-sensitive, or localised TJ mechanisms in this thesis is done purposively to provide useful insights on how such countries used national policies and laws as well as international law in their TJ processes.

[3] Constitution, s 119.

This thesis examines whether there were transitions that can inform TJ processes that involve the San people, pre-colonial states such as 11th Century *Mapungubwe*, Great Zimbabwe, *Mutapa, Torwa, Rozvi* and *Ndebele* states as well as the colonial period under the United Kingdom and the Ian Smith regime until independence in 1980. Observably, this thesis notes that the major inter-ethnic violence in pre-colonial Zimbabwe existed between the *Rozvi* and the *Ndebele* transitions where violence and scorched earth policy were used by the Ndebele to subjugate the Rozvi.[4] The *Ndebele* conquered the *Rozvi* during the Mfecane or time of 'crushing' when Dingaan, Mpande, Mzilikazi and Tshaka dominated the Zulu people. Mzilikazi, the Great Bull Elephant and founder of the Ndebele kingdom, crossed the Limpopo from South Africa.

The vanquishment of the Rozvi created a sense of enervation for the Shona as the *Rozvi* king Chirisamhuru II, who according to oral tradition was brutally skinned alive under Nyamazana who thought the king had two hearts.[5] Ethnic rivalry during this period was exacerbated by the reference to the vanguished Shona as *amasvina*,[6] derogatory for 'dirty people,' and the victorious Ndebele as *madzviti*, derogatory for destroyers. The Ndebele state that was formed after the fall of the *Rozvi* state was divided into three groups, the *Zansi, Enhla* and *Hole*.[7] The *Zansi* were the original followers of Mzilikazi from Zululand. They were fewer in number, but they formed a powerful portion of the society. They were the upper class of the Ndebele society, the aristocrats.

The *Zansi* were divided amongst themselves into clans according to their totems and clan leaders formed the political elite of the Kingdom. Below the *Zansi* were the *Enhla*. These were people who had been conquered and incorporated into the Ndebele state before it came into Zimbabwe. They comprised mainly people of Sotho, Venda and Tswana origin and they were more numerous than the *Zansi*.[8] The *Hole* formed the lowest but largest class in the

[4] M Andreucci 'Emergence of the Ndebele state,' 22 February 2018, The Patriot.
[5] See K Chikuse, 'Effects of Ndebele raids on Shona power,' 22 July 2014, Nhaka YeVaShona; see also Andreucci (n 4) on other versions of fights between the Ndebele and Rozvi, including the failure by the Ndebele to defeat Tohwechipi Chibambamu, who got the surname Chibambamu after using *zvitunya* or gun traders at the Chikato battle to defeat the Ndebele. Although later subdued, he remained tributary until the coming of the white men in 1889.
[6] K Teya 'Who's Ndebele and who's Shona?' 28 March 2018 The Patriot.
[7] E Siamonga 'Class and social status in Ndebele state: part one,' The Patriot.
[8] ibid.

kingdom. They were a fusion of Nguni, Sotho, Tswana and Shona.[9] There were two types of *Hole*. The first group comprised chiefdoms that were moved or voluntarily migrated into Ndebele settlement. Examples of such people include the Kalanga, Rozvi, Nyubi, Venda fand other indigenous groups in the southwest Zimbabwe.[10]

In assessing the Rozvi-Ndebele ethnic clashes, this thesis notes that the color of class in the pre-colonial Zimbabwe was largely ethnicised. When Mzilikazi's son Lobengula was defeated by Cecil John Rhodes' Pioneer Column, Zimbabwe was formally colonised in the 1890s when Zimbabwe became a modern state after the signing of the Rudd Concession. The concessionary exercise under Charles Rudd was seen as a fraudulent act that led to racialised class struggles between blacks and whites;[11] cemented by cattle raiding, tax injustice, and disenfranchisement on the part of the Shona and Ndebele natives.

The details of the violent wars between the Shona, Ndebele and Rhodesians are numerous. In the colonial period, the Shona and Ndebele were condemned to tribal trust lands and reserves (*ruzevha*) where stones grew better than crops.[12] During the peak of the liberation struggle in the 1970s, various bacteriological and chemical weapons were unleashed on rural dwellers since they were seen as the masses which supported the liberation fighters (*vanamukoma*) during night rallies (*pungwes*).[13] The restrictees, detainees, the liberation fighters on the war front, and collaborators (*chimbwidos*/female collaborators and *mujibhas*/male collaborators) who are now recognised as veterans of the liberation struggle[14] have not been formally treated as victims of the liberation struggle.

Events in the post-independence period to consider for TJ include the ethno-defined two *Entumbane* uprisings in the early 1980s, and the Matabeleland and Midlands *Gukurahundi*; the racialised, historicised and patronised land seizures in the early 2000s; the internal displacements under *Murambatsvina/*remove the filth; electoral violence in June 2008 under operation *Makavhotera papi*/where did you vote for and operation *hakudzokwi*/you don't

[9] ibid.
[10] ibid.
[11] C Chakamwe 'The Rudd Concession: a big fraud' 24 April 2014, The Patriot.
[12] See for instance I Guvamombe 'The battle of Negomo tribal trust lands, 28 February 2013, The Herald, Zimbabwe.
[13] I Martinez 'Rhodesian Anthrax: the use of bacteriological and chemical agents during the liberation war of 1965-80,' 2003 Ind Int'l and Comp. L. Rev, 447.
[14] Constitution, s 84.

return. Other critical issues to consider include the securitised events such as the shooting and killing of protesters in 2018 and 2019; the abductions on those perceived to be anti-establishment, and the perceived weaponisation of the Covidien pandemic to stifle dissent.

Against the above background, TJ is discussed here from the perspectives of diagonal, vertical and horizontal accountability by the state functionaries and private citizens as espoused by the Constitution. The Constitution must be respected by state and non-state actors because it is the supreme or mother law of the land or national sovereign.[15] The need for an effective institutional approach to TJ stems from the realisation that Zimbabwe's path to TJ "remains at the crossroads with no viable mechanisms for transitional justice."[16] There is thus motivation to produce synthetic and outcome-based research on how the NPRC[17] and the ZHRC[18] can complement each other and innovate on ways to catalyse and crystallise TJ initiatives.

The NPRC is the constitutionally mandated institution to deal directly with post-conflict justice, healing, and reconciliation[19] and has the potential to tackle conflicts and serious human rights violations. The ZHRC is discussed constitutionally as a watchdog institution with dual roles to protect human rights and protect the public from the state. It is also discussed from the perspective of the AU's TJ framework which looks at a broad-based framework based on buy-ins and support from stakeholders.[20] Further, the ZHRC is discussed from the UN's framework which acknowledges the role of NHRIs in furthering the processes of TJ.[21] At a constitutional level, the ZHRC's specific mandates have a TJ dimension in that the ZHRC must empower victims to seek remedies or make recommendations relating to the

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[15] See the supremacy clause in the Constitution s 2. See also the duties on state, state institutions and agencies as well as natural and artificial persons to respect, protect, promote and fulfill constitutional rights. See also Linington (2012) Linington G "Reflections on the significance of constitutions: and constitutionalism in Zimbabwe' in Masunungure EV and Shumba JM Zimbabwe mired in transition (Weaver Press Harare Zimbabwe 2012) 63.

[16] Mandikwaza (2010) "Place for amnesty in Zimbabwe's transitional justice processes" 25, Accord.

[17] Constitution s 251.

[18] Constitution s 242.

[19] Constitution s 252 (a). Although there is no express reference to transitional justice in the section there is no doubt that TJ seeks to make post-conflict justice realisable and as such can be read into the constitutional provision.

[20] Panel of the Wise African Union (2012) "Transitional justice" 11. The regional framework is also discussed under literature review section in terms of the ACHPR http://www.achpr.org/files/news/2019/04/d373/achpr_transitional_justice_eng.pdf (accessed 7 July 2019). The report embosses the AU charter-based approach to TJ and basically examines how the ACHPR may be used in the TJ field.

[21] OHCHR (2008) Guidance Note on National Human Rights Institutions and Transitional Justice 3.

prosecution of perpetrators of human rights abuses.[22] The ZHRC can enable victims to access restorative justice while at the same time contribute to decisions on whether or not the state can pursue retributive justice through the prosecution of perpetrators. While the Constitution contemplates that the NPRC can deal with violations before 2009, the ZHRC should also strive to institutionalise and visibilise its broad constitutional and internationalised mandate to ensure that injustices from 2009 are properly remedied.[23] The ZHRC is also expected to take TJ initiatives in the event that the NPRC's mandate is not extended beyond the constitutional limit.

The NPRC does not assume the name of a TRC in the Constitution although it has some similar functions such as promoting reconciliation.[24] The significance of TJ institutions in a country is that they should enable societies that have been wracked by conflict or repressive rule to genuinely address serious human rights violations, albeit facing challenges including weak institutions, unavailability of resources, insecurity, and divided populations.[25] Holistic TJ mechanisms can reinforce each other since they are not mutually exclusive.[26] Even at the UN level, the hybridisation of institutions such as the ZHRC can be done simply to help states to design TJ initiatives "which fit into the unique country context that is linked to the rule of law in a country."[27]

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[22] Constitution s 243 (g). The specific mandate of the Zimbabwe Human Rights Commission (ZHRC) is also explained in terms of the legislative provisions in the Zimbabwe Human Rights Commission Act [*Chapter 10:30*] 2012(ZHRC Act) which is the law used to operationalise the ZHRC.

[23] Constitution s 233 (f).

[24]"Truth and Reconciliation Commission of South Africa Report (SA TRC) 48 shows that the SA TRC was a bridge-building process meant to be the torch bearer in uniting a nation sharply divided and hoping for a better future. Chiefly, the SA TRC is distinguished from the National Peace and Reconciliation Commission (NPRC) in that the former dealt with human rights issues while the latter focuses on post-conflict justice and national reconciliation without a specific mandate to deal with gross human rights violations. For Zimbabwe the ZHRC is specifically mandated to deal with human rights violations. Similarly, though, the NPRC and SA TRC are institutions mandated to deal with national unity and cohesion although the former does not expressly deal with the creation of a future without serious gross violations of human rights which the latter emphasises. The extent to which the NPRC can be involved in truth-telling remains to be tested since key conflicts such as the Matabeleland and Midlands Gukurahundi are yet to be dealt with in a manner that brings closure to victims or their families.

[25] UN Secretary-General's Report on the Rule of Law and Transitional Justice in Conflict and Post-conflict Societies (Report on the Rule of Law) (2004) 3.

[26] ibid 10.

[27] OHCHR Guidance Note (n 21) 15. See also Constitution s 3 (1) (b). The embedment of the rule of law as part of the founding values or essential features of the Constitution affirms the importance of other people-oriented provisions such as the main preamble in the Constitution (underlining the people's sovereignty through the '*We the People of Zimbabwe*' clause); the national objectives as the priority for Zimbabwe; the supremacy clause in s 2 of the Constitution which underlines the importance of constitutional sovereignty; and the Declaration or Bill

The benefit of the UN approach to institutions supporting democracy is that the role of national institutions in promoting the realisation of TJ becomes globally acknowledged.[28] The NPRC and ZHRC can perform their constitutional roles in line with the UN's conceptualisation of the rule of law[29] as the:

> "Principle of governance in which all persons, institutions and entities, public and private, including the state itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards."

Key conflicts in Zimbabwe

Of the many Bantu-speaking groups to occupy modern-day Zimbabwe, the *Khoisan* people are believed to be the first occupants of pre-colonial Zimbabwe. Other pre-colonial states such as *Mapungubwe*, Great Zimbabwe, *Mutapa*, *Rozvi*, and *Ndebele* also emerged.[30] Most parts of the *Shona* Empire which covered areas beyond the Kalahari Desert (now Botswana) and areas beyond Great Zimbabwe (1250-1450CE) such as *Mapungubwe* (now part of South Africa) and those beyond *Sofala* in Mozambique have been altered by colonial borders.[31] Broadly speaking though, Zimbabwe's conflicts have been divided into four discernible categories of analysis: the period before British colonisation; the colonial period before and during the Unilateral Declaration of Independence (UDI); the immediate post-independent period; and the post-2000 period. Key events in the pre-colonial period include the 1893 War of Dispossession in Matabeleland and the First and Second *Chimurenga*/*Umvukela*/wars of liberation.[32] During the colonial period, TJ initiatives were loosely considered through the promulgation of laws such as the Rhodesian Indemnity and Compensation Act (No. 45 of 1975) which sought to ameliorate the excesses caused by its forces in the line of duty.[33]

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of Rights which progressively makes justiciable various generations of human rights and in a unique way illustrates the importance of individual sovereignty for every private citizen in Zimbabwe.

[28] UN The Guidance Note (n 21).

[29] ibid.

[30] See generally Ndzimu-Unami (2012) "The rebirth of Bukalanga: a manifesto for the liberation of a great people with a proud history Part 1" 15. For a detailed analysis on the lives of the San in modern Zimbabwe see Hitchcock, Begbie-Clench and Murwira (2016) "Hitchcock RK, Begbie-Clench B and Murwira A "The San in Zimbabwe: livelihoods, land and human rights" (2016) IWGIA Report" 12-13 where the authors state that the San cannot be separated from the other ethnic groups in Zimbabwe although their population reaches about 2 500.

[31] See generally MacGonagle (2007) "Crafting identity in Zimbabwe and Mozambique"5.

[32] Raftopolous and Mlambo (eds) (2009) *Crisis* 213.

[33] FORUM (2010) "Taking transitional justice to the people: outreach report" 1. See Carver (1995) "Zimbabwe: : drawing a line through the past" in Roht-Arriaza N (ed) *Impunity and human rights in international law and*

After Zimbabwe attained independence in 1980, key conflicts include the two *Entumbane* uprisings in 1980 and 1981. In the first uprising between 9 and 10 November 1980, 55 civilians were killed and 550 were injured following ZANLA and ZIPRA armed confrontations.[34] The initiator of the conflict is not known but the evidence presented when Dabengwa and others were prosecuted in 1983 showed that ZANLA forces used heavy support weaponry against ZIPRA[35] which responded with firearms.[36] There were also murders and counter murders by both ZIPRA and ZANLA guerillas.[37] The second *Entumbane* conflict raged for six days from 7-13 February 1981 between ZANLA and Zimbabwe African People's Union (ZAPU) and, although several versions of its causes exist, it suffices to say that it led to bloodshed.[38] Because the national army had split into guerilla and political party alliances, ZIPRA men from Gwaai River and Essexvale camps marched towards *Entumbane* equipped with armoured personnel carriers, heavy ammunition trucks, and tanks.[39] The government reacted on the last day with helicopter gunships, mortars, and tanks used to contain the fighting.[40] The death toll after the intervention by the government stood at about 800 and 1800 injured; the majority of who were guerillas.[41]

This conflict was investigated under the Enoch Dumbutshena Panel of Inquiry with a mandate to determine the causes of the uprising and if possible, to identify the persons or organisations responsible for planning and inciting the disturbances.[42] The Dumbutshena Report was not published. It has been observed that given "the wartime history of political rivalry between the two guerilla-based parties, Zimbabwe African National Union Patriotic

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practice, 255-256 on how the Rhodesian security forces and other government servants had to first demonstrate that the action was done in good faith in defence of national security since December 1972. This law was retained after independence and Edgar Tekere invoked it when he faced charges of murdering a white farmer in 1980.

[34] Yap (2001) "Uprooting the weeds: power, ethnicity and violence in the Matabeleland conflict" 120. See also Carver (n 33) 258 on how civilians and prisoners were also killed and three children were killed when a helicopter gunship attacked a township.

[35] Yap (n 34) 120.

[36] ibid. See also Carver (n 33) 258 who argues that discontent started when the integrated Rhodesian army continued to stay in barracks drawing full army pay while the nationalist guerillas awaiting integration were housed in makeshift camps. This culminated in the latent rivalries between ZANLA and ZIPRA forces in 1980 and 1981. Disillusioned ZIPRA forces deserted *Entumbane* and assembly points and returned to the bush.

[37] Yap (n 34) 120.

[38] ibid 124.

[39] ibid .

[40] ibid.

[41] ibid 125.

[42] ibid 126.

Front (ZANU PF)'s focus on ZIPRA was not surprising."[43] Despite this, there has been an attempt to distinguish trained Super-ZAPU dissidents "recruited from Dukwe refugee camp in Botswana by South Africa to infiltrate ZIPRA-led units in Matabeleland South especially in 1983 and 1984."[44]

The Matabeleland and Midlands *Gukurahundi* massacres serve as one of the springboards for TJ as they occurred soon after independence when then Prime Minister Robert Mugabe dealt ruthlessly with an armed insurgency in the Matabeleland and Midlands Provinces.[45] In indigenous Shona language usage, *Gukurahundi* refers to the July or winter rain which may be accompanied by heavy downpours and washes away chaff after harvest.[46] A Commission of Inquiry chaired by lawyer Simplisius Chihambakwe was established but its findings were never published.[47] In 1988, an amnesty was granted to security personnel who had been accused of serious human rights violations.[48] Those amnestied included "Robert Masikini a CIO officer who only a week earlier had been found guilty of killing a political detainee."[49] Four Fifth Brigade officers were also released.[50]

From the perspective of politicised transitions in Zimbabwe, the 1988 amnesty which followed the Unity Accord in 1987 has also been compared to the 1980 amnesty where Rhodesian leaders including Ian Smith were pardoned and the decision was taken not to investigate or "undertake any accounting for past human rights violations."[51] The government politically justified the 1988 amnesty as a win-win outcome since "it had the same year pardoned '*dissidents*' in Matabeleland and brought peace to Matabeleland."[52] Exemplatively, the challenge for accountability for atrocities between independence and 1988 have thus been cited in arguments like "if dissidents could be let off scot-free, then those who acted in good

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[43] Kriger (2003) Guerilla Veterans in post-war Zimbabwe: symbolic and violent politics 1980-1987, 30.
[44] ibid.
[45] Killander and Nyathi (2015) "Accountability for the *Gukurahundi* atrocities in Zimbabwe thirty years on: prospects and challenges," *CILSA,* 463. The details of the massacres are also recorded in the Report by the Catholic Commission for Justice and Peace in Zimbabwe (CCJP) "*Gukurahundi* in Zimbabwe". It was believed, although it was not to be, in early 1980 that the conciliatory tone of Mugabe meant that political stability was to enable Zimbabwe to recover from the ravages of civil war. See Cornwell (1980) *African Insight* 150.
[46] Chipaike (2013) *Southern Peace Review Journal* 30. They occur like flash floods which usually cause untold suffering.
[47] Killander and Nyathi (n 45) 463.
[48] Carver (n 33).
[49] ibid.
[50] ibid.
[51] ibid.
[52] ibid.

faith to defend national security should also go unpunished."[53] Even from the perspective of critiquing welcome or politicised events such as the signing of the 1987 Unity Accord to end the Matabeleland and Midlands *Gukurahundi*, Gatsheni-Ndlovu also laments how the key figure in the 1987 peace agreement, the late Father Zimbabwe, Joshua Nkomo, then referred to as the "*Father of dissidents*", was also accused of destabilising Zimbabwe, also "dismantled PF-ZAPU after the electoral defeat in 1985, culminating in the Unity Accord of 1987 and official swallowing of PF ZAPU by ZANU-PF."[54] Thus welcome episodes of unity and peace can also be grimaced by targeting the figureheads in achieving peace and reconciliation.

In a sense, the amnesties and peace agreement above have to be understood from how personality politics under Mugabe monumentally shaped TJ discourses in the first four decades after independence in Zimbabwe. For instance, during the early independence period, Carver notes the importance of "personal acts of forgiveness by Mugabe to spare Ken Flower who wanted to kill him during the liberation struggle."[55] Although Zimbabwe was now largely led by black nationalists or former freedom fighters, Mugabe was not quick to purge or elbow out experienced Rhodesians. Organs and functionaries of state authority, consolidation of power and stability of the polity had to be retained based on the institutional intelligence of predecessor institutions. In a sense it was the hardest political appointments that however allowed the security institutions under the Mugabe regime to benefit from their predecessors. Mugabe however shrewdly minimised the key players in an act reflective of the application of the theatricised '*rules for rulers*' or behaviour of some benevolent dictator.

Carver quotes Mugabe as having said the following in retaining Flower as head of the intelligence amidst allegations that Flower had participated in the killing of over 1000 refugees at Nyadzonia, Mozambique in 1976:

[53] ibid.
[54] Ndlovu-Gatsheni (2007) "Fatherhood and nationhood: Joshua Nkomo and the re-imagination of the Zimbabwean nation" in Muchemwa K and Muponde R (eds) *Manning the nation: father figures in Zimbabwean literature and society*, 73.
[55] Carver (n 33) 255.

> "We were trying to kill each other; that's what the war was about. What I am concerned with now is that my public statements should be believed when I say that I have drawn a line through the past."[56]

Mugabe's remarks above largely reflect an aversive or lukewarm acknowledgment of war-related injustices on the part of both the Rhodesian forces and former liberation fighters. They help in showing that the modicum of discretion and ambience of political will in TJ initiatives is sometimes pragmatised by political leaders. This perhaps explains why Mugabe was knighted by the British before he was de-knighted following the land reform which was seen as illegal in some circles. Although largely misunderstood, Mugabe's fall out with the West was also dramatised by the Archbishop of York, John Tucker Mugabi Sentamu who swore never to wear his collar until Mugabe stepped down. Without greater knowledge and pragmatic decision-making in the early independence period, full revenge from Mugabe and thousands of unrehabilitated liberation fighters would have meant many white Rhodesians and black Zimbabweans who supported the Rhodesians would have been brutally killed.

The use of revengism would have threatened Zimbabwe's regime stability as a nation if tyranny had appeared imminent. To go beyond the rhetoric that operationalising the NPRC is akin to cosmetising a frog, Carver's averment on how Mnangagwa dealt with instances of his torture during the liberation struggle bear significantly on how TJ stakeholders and actors should also consider him a victim of atrocity who should be properly managed when seeking a TJ policy under his leadership. Carver notes that during an interview with Joseph Lelyveld in 1983, Mnangagwa indicated concerning his torture in the hands of the Rhodesians that:

> "The first thing he did after independence was to revisit a room in a police station where he had been tortured by white officers who hung him upside down by leg irons from the butcher's hooks that ran along a track in the ceiling. This enabled the interrogators to bat his suspended body back and forth on the track from one end of the room to the other as if he were the puck in an adaptation of hockey. The game continued until he lost consciousness. The day after the independence ceremonies, the butcher's hooks were still on the ceiling."[57]

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[56] ibid. See in detail Mihai (2016) *Negative Emotions and transitional justice*, 8 on how democratic emotional socialisation enables a society to discourse in earnest on what democratically appropriate resentment and indignation should look like in a state pursuing TJ. In essence Mugabe's sentiments confirm Mihai's assertion that a society striving for real TJ should give voice to all parties and acknowledge legitimate forms of resentment and indignation and point to the ways that they can be expressed in a democratic society.

[57] Carver (n 33) 255. This observation is also critical to understand how President Mugabe and President Mnangagwa transmuted themselves into victims from being labelled alleged perpetrators in allowing for debates around key incidents such as the Matabeleland and Midlands *Gukurahundi.* See also Mihai (n 56) 8 on how the

From the above considerations, TJ initiatives such as rehabilitation or building of memories should be designed in a way that gets a buy-in from those victims who allegedly became victimisers and occupied positions of power that hinder TJ processes.

From an institutional perspective and in dealing with early post-independence atrocities, it is important to note that some TJ institutions were established in the early 1980s. These include the 1983 commission of inquiry into the disturbances in Matabeleland and Midlands provinces; the national dialogue that resulted in the 1987 Unity Accord;[58] amnesties of 1988 on '*dissidents*' and '*collaborators with dissidents*' and the 1990 general amnesty on members and former members of the security forces.[59] Unfortunately, from the standpoint of diagonal and vertical accountability and equal benefit from or protection of the law contemplated by the Constitution, this legal framework did not allow the general population to embark on dialogic TJ interventions that could enable them to demand vertical and community accountability from the security forces, dissidents, or collaborators with dissidents.[60]

Another conflict that is critical and can be the focus of the NPRC's work relates to the fast track land invasions and land reform violence which was committed mainly against white commercial farmers since 2000.[61] The clamour for land reform began with the *Svosve* people's land invasions in the 1990s and was strategically elevated to a 'war' by the government, which even had a 'war cabinet'.[62] In 2001 the combatants tactically named their '*war*' the Third *Chimurenga* which was operationalised when thousands of commercial farms were seized illegally and their owners and workers were displaced.[63] Murder, arson, violence,

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normative integrity of a polity can be endangered if a society transits to democracy without opening a discussion about past legacies and without taking into consideration seriously the victims' emotional responses.

[58] Killander and Nyathi (n 45) 464.

[59] ibid 476-7.

[60] ibid. It may also be important to contrast Killander and Nyathi's views with the observations by Mihai (n 56) 13 on the need for a society to understand constraints on its democracy in light of the relationship between democracy and basic individual rights. According to Mihai such a relationship must be used to check unbridled majoritarianism and propose some form of institutional check on popular sovereignty.

[61] FORUM (n 33) 7. See also Magaisa "The land question and transitional justice in Zimbabwe: law force and history's multiple victims," 1.

[62] ibid. This view augurs well with that of Mihai (n 56) 30 that post-oppression justice is mostly a mask of political vendettas an opportunity for revanchism and scapegoatism. In essence Mihai (n 56) 31 notes that political empowerment must not come at the expense of victims' rights.

[63] FORUM (n 33). The Third *Chimurenga* got its name from the two *zvimurenga*s or wars of liberation. The First *Chimurenga* was waged in the late 1890s and the Shona people were defeated. The Second *Chimurenga* was waged largely from the 1960s to 1979 and resulted in the Lancaster House negotiations and the independence of Zimbabwe in 1980. This view is debatable since legal Acts of Parliament were passed to facilitate the radical land reform program.

theft, fear, and intimidation were the *modus operandi*.[64] The blame for the land crisis in Zimbabwe was laid mainly on Britain and other western nations through sanctions they imposed and on the USA for the compulsory instatement of the Zimbabwe Democracy and Economic Recovery Act in 2001.[65]

Land-related violence occurred during the same period of serious violations of human rights such as *Operation Murambatsvina/Restore Order* in 2005[66] where many households and families were rendered homeless, forced to leave urban areas, or arrested and fined.[67] The zenith of violence came in the 2008 Presidential runoff when opposition leaders were intimidated.[68] Systematic methods of violence included the use of blunt objects, heavy sticks, whips, use of *falanga* (assault under the feet), and so forth.[69] The GNU came about through the Global Political Agreement (GPA) between ZANU PF and the MDC in 2008.[70] In trying to deal with some pre-GNU challenges, the GPA proposed the establishment of the Organ for National Healing Reconciliation and Integration (ONHRI) for the creation of an environment in which the ideals of equality, national healing and unity could prevail.[71] But it was the

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[64] ibid.
52 Freeman (2017) "Clearing the smoke and mirrors around Zimbabwe: US-UK role in regime change". Freeman argues that the land reform may well be the foundation for a broad-based economic efficiency and new livelihoods in the fight against poverty. This view must, however, be connected to all citizens including those who Freeman feels must deal with the five '*myths*' that the land reform has been a total failure: that the beneficiaries are political cronies; there is no investment in the new resettlements; that agriculture is in complete ruins creating chronic food security and that the rural economy has collapsed. For this reason, it is important for Zimbabweans to be alive to views such as those from Mihai (n 56) 39 who emphasises the need to distinguish between victims and victimisers' claims of redress in terms of their compatibility with democratic norms of social interaction. Linked to this is Mihai's assertion that imaginative measures should be taken to nurture democratic attitudes within the public sphere of transitioning states.
[66] UN "Fact-finding mission."
[67] ActionAid (2005) "The impact of Operation *Murambatsvina*/Restore Order in Zimbabwe."
[68] FORUM (n 33) 8.
[69] Zimbabwe Peace Project (ZPP) as cited in FORUM ibid, 9. There was also violence after the July 2018 elections when six civilians were killed. A Commission of Inquiry was held and it made several recommendations relating to how the security forces such as the Zimbabwe Republic Police (ZRP) and Zimbabwe Defence Forces must behave themselves in the conduct of their activities. The Commission did not however resolve the question on who actually killed the civilians. On 14 July 2019 a national shutdown occurred and there were reports that several members of the public were raped and assaulted by members of the security services.
[70] Global Political Agreement (GPA) s 7 (c) created the Organ on National Healing Reconciliation and Integration (ONHRI) as a mechanism for national healing.
[71] Chipaike (2013) "The Zimbabwe Government of National Unity as a conflict transformation mechanism: a critical review," *Southern Peace Review Journal* 21. See also Mihai (n 56) 40 on how in the aftermath of dramatic normative political shifts TJ processes should clearly and directly contribute to the institutional satisfaction of citizens' expectations of reconciliation and vindication. See also in detail Aboueldahab (2017) *Transitional justice and the prosecution of political leaders in the Arab region: a comparative study of Egypt, Libya, Tunisia and Yemen* http://www.brookings.edu/research/transitional-justice-policy-in-authoritarian-contexts-the-case-of-egypt/ (accessed 22 November 2019) 10 on the challenges relating to ruptured and

ZHRC that was established as a key deliverable under the GNU which began to function, though weakly until it was fully operationalised in terms of the Constitution in 2014.[72] It is against the above background that 'holistic and contextualised transitional justice' should be the axiom of resolving conflicts and ending serious human rights violations in Zimbabwe.

1.2 Statement of the problem

Ideally, broken systems should be mended and incoherent TJ should be discarded in favour of inclusive, transformative, localised, and context-sensitive TJ. As such, contextualised, context-sensitive, holistic, and coherent TJ policies must replace template-based systems that do not work in specific contexts such as status quo regime changes. The emerging trajectory from the UN, AU and many countries to adopt holistic TJ, holistic and context-sensitive TJ should thus inform Zimbabwe's TJ processes under the auspices of the NPRC and the ZHRC. Realistically though, Zimbabwe does not yet have a formalised TJ policy or law despite the existence of a progressive Constitution which makes fundamental rights justiciable and recognises the need for post-conflict justice. Although the UN and AU frameworks, including the African Commission on Human and Peoples' Rights (ACHPR)[73] Study on Transitional Justice and Human Rights, can be used to design a national TJ policy in Zimbabwe, the NPRC and ZHRC have not yet aligned their work to these frameworks. Even though public consultations and conflict mapping exercises are important for TJ activities, the NPRC is procrastinanting on formalising its TJ process.

Further, both the NPRC and ZHRC have not used the Constitution's broad mandate that obligates all independent institutions that support democracy to ensure that injustices (including during conflicts or repressive times) are remedied. Resisting the impulse to cast aspersions on the NPRC and ZHRC alone, this thesis highlights the problems created by the Constitution in making TJ realisable. Specifically, the Constitution does not explicitly mention the phrase '*transitional justice*' although TJ can be read into the concept of post-

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negotiated transitions especially in instances where the military still retain cohesive force. Aboueldahab cites Max Weber who indicates that ambiguous transitional situations may require that political leaders be guided by ethics of responsibility (acting according to an ethical precept regardless of the outcome) rather than ethics of conviction (acting while considering the predictable consequences of one's actions).

[72] Danish Institute of Human Rights (2016) "ZHCR accredited Status A". Mihai (n 43) 30 notes that fragile democratic institutions are not in a position to hold still powerful actors accountable.

[73] African Commission on Human and Peoples' Rights (ACHPR): Study on Transitional Justice and Human and Peoples' Rights in Africa (2019) (ACHPR Study on Transitional Justice and Human Rights).

conflict redress. Further, the Constitution expressly gives the NPRC the mandate on post-conflict justice. To innovate on solutions to this, this thesis argues that the Constitution's broad mandate on independent institutions supporting democracy can be read to mean that the ZHRC can also serve as a TJ mechanism to ensure injustices, including those during conflicts, are remedied.

Effectively, the NPRC and ZHRC should innovate in their work and enable TJ practitioners and the state to dialogue on how to empower the NPRC and ZHRC to speed up TJ processes. The NPRC and ZHRC must also respond to the needs of victims using the UN, AU, and constitutional frameworks. To gain the upper hand and drive a sustainable culture of human rights, total healing, peace, and reconciliation initiatives, the NPRC and ZHRC need to come up with a roadmap on institutional complementarity. While the ZHRC can also effectively utilise its role as an NHRI,[74] and the NPRC can utilise its specific constitutional mandate as a reconciliation commission to deal with post-conflict justice,[75] the totality of TJ practitioners in Zimbabwe must earnestly commit to engaging with the state and national institutions with the potential or capacity to end past and present instances of serious human rights violations.

In this way, the NPRC and ZHRC must not serve as mere appendages of the state and should help Zimbabwe realise the important goal of ending scarring societal conflicts. For instance, victims who are alive and families of deceased victims are yet to assert their right to know what happened to their relatives during the deaths of between 300 and 800 people during the *Entumbane* Uprisings in 1980 and 1981[76] and the Matabeleland and Midlands *Gukurahundi* atrocities that killed between 10 000 and 20 000 Ndebele-speaking civilians (and not just generalisations that refer to 'Ndebele' in its ethnic usage) in the early 1980s.[77] The examination of the identity of the civilians affected by Matabeleland and Midlands *Gukurahundi* becomes critical for TJ initiatives. Uncertainty relating to the coronavirus pandemic also enjoins the NPRC and ZHRC to ensure that the pandemic is not weaponised in a manner that suspends democratic gains and TJ processes under the guise of containing or mitigating the effects of the unprecedented Covid_19.

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[74] OHCHR Guidance Note (n 8).
[75] A constitutional mandate means the authority to carry out particular work given by the Constitution: see National Transitional Justice Working Group (NTJWG) "Guide to understanding the NPRC" 8. The National Peace and Reconciliation Commission (NPRC) functions are set out in s 252 of the Constitution.
[76] Alao (2012) Mugabe and the politics of security in Zimbabwe; see also Yap (n 21).
[77] Killander and Nyathi (n 45) 463.

1.3 Research questions

The main research question in this research is: What are the challenges/limitations and opportunities/openings for the ZHRC and the NPRC to advance TJ in Zimbabwe?

The specific research questions:

1. What does the international and national TJ normative framework entail and what is its theoretical force?
2. What constitutes genuinely contextualised, localised and holistic TJ in Zimbabwe?
3. How can the NRPC and ZHRC innovate in making TJ a reality in Zimbabwe?
4. How can the Zimbabwean TJ framework be improved constitutionally, statutorily, and in practice through institutional complementarity?

1.4 Objectives of the study

This study covers the work of the NPRC and ZHRC as two institutions that can promote the voices of victims and perpetrators in coherent TJ discourses and engagements in Zimbabwe. The overall objective is to examine the challenges or limitations and opportunities or openings for the ZHRC and NPRC to advance TJ in Zimbabwe. The coverage of the study focuses on national and international soft law instruments that speak to the contextualisation of TJ initiatives as well as the need to adopt holistic and inclusive processes that benefit the victims and assist the whole of the polity to forget the past, heal wounds aesthetically and build an intergenerational future that cherishes peace and strives to build a clean slate of sustainable peace and human rights. The first objective examines what the international and national frameworks on TJ entail and the scope of their theoretical or conceptual force. The second objective considers what constitutes genuine, localised and contextualised, context-sensitive andinstitutionally-driven TJ for Zimbabwe. The third objective examines the extent to which the NPRC and ZHRC should, as non-judicial mechanisms, make TJ in Zimbabwe a reality, both from constitutional and international standardised perspectives. The fourth objective examines the extent to which the Zimbabwean TJ framework can be improved constitutionally, statutorily, and in actual practice. The practical implications for a context-specific approach are thus linked to the international normative frameworks that are used to guide national institutions.[78] Coronavirus hit the world surprisingly and this thesis considered

[78] OHCHR Principles relating to the Status of National Institutions for the Promotion and Protection of Human Rights were adopted by the United Nations Human Rights Commission in 1992, and by the UN General Assembly in Resolution 48/134 of 1993 (The Paris Principles). This calls for a comprehensive understanding of

how the pandemic can in a way, affect TJ processes due to nationally-imposed lockdowns to suppress, mitigate, or flatten the pandemic's curve.

1.5 Terminology

1.5.1 Transitional Justice

The concept refers to various judicial and non-judicial frameworks which address serious violations of human rights and abuses of international humanitarian law.[79] This liberal definition is used to analyse the work of the NPRC and the ZHRC. It also includes initiatives "assisting polities to address serious violations so that there is accountability, justice, and reconciliation".[80] The liberalised process normally leads to criminal prosecutions, payment of compensation, truth-seeking, institutional reform, vetting, or all of the above[81] and focuses on combating impunity and building public trust.[82] In analysing the conventional approach to TJ, and in proclaiming the need for a paradigm shift towards holistic and context-sensitive TJ, this thesis also considers the importance of contexts that shape TJ discourses. Contexts

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other international instruments such as those under the UN and the AU framework to which the NPRC and ZHRC (Chapter 2) can aspire when developing or encouraging Zimbabwe to amend and expand its' sphere of institutional competence.

[79] Roht-Arriaza and Mariezcurrena (eds) (2006) "The new landscape of transitional justice" in Roht-Arriaza N and Mariezcurrena J (eds) *Transitional justice in the twenty-first century: beyond truth versus justice.* An illiberal definition treats TJ measures as no different from ordinary justice and considers its measures as distractions from the work of consolidating new democracies. See also Aboueldahab (2017) *Prosecution of Political Leaders* 7 on how the absence of a return to liberal states in the Arab region did not stop TJ processes even in countries such as Yemen where an immunity law was passed.

[80] UN Report on the Rule of Law (n 25) 4. For more detail see also Mihai (n 56) 25-26 on two basic approaches to institutional engagements in post-conflict societies. These are *truth v justice* and *stability v justice*. The latter is sceptical and argues that democratisation cannot progress if a society does not bury the past. Mihai notes that digging into the past is seen by those who pursue *stability v justice* to be an avenue which can only antagonise society by providing enraged victims with a propitious occasion for political vendettas and scape-goatism.

[81] OHCHR Guidance Note (n 21). This view fits more into the *truth v justice* approach which Mihai *Negative Emotions* 28 argues can enable victims to air their views on alternative versions of the past claim victimhood and confront their oppressors. In contradistinction *stability v justice* approaches will, according to Mihai (n 56) 29, seem to be more recalcitrant pitting political adversaries against one another.

[82] UNDP http://www.undp.org/content/dam/undp/library/Democratic%20Governance/Access%20to%20Justice%20and%20Rule%20of%20Law/Discussion%20Paper%20%E2%80%93%20Complementarity%20and%20Transitional%20Justice%20%E2%80%93%202012%20_%20EN.pdf (accessed 20 November 2019). This view has to be contrasted however with the view from Mihai *Negative Emotions* 30 that those who do not want post-violence justice processes normally adopt an elitist approach which is based on the potential for instability associated with such processes.

should be considered important under the terminological aspects since they help show how societies attempt to address legacies of massive human rights violations.[83] The context can include on-going conflicts, post-authoritarian transitions, post-conflict transitions, and post-transitional periods.[84]

Contexts in which societies undertake TJ processes are supposed to be intermediary so that opportunities are created to address past injustice.[85] Although Zimbabwe operationalised the NPRC as a post-conflict institution, critics are concerned whether the Mnangagwa regime will bring liberal changes in a country whose past poses constraints for TJ.[86] The formalisation of TJ activities, laws or policies has been elusive under Mugabe's regime and it remains to be seen if the current regime will formalise TJ activities before the NPRC's span ends or before the ZHRC's dual role is re-allocated to the remodelled ZHRC and Public Protector. As such, the NPRC in its institutional context should be among institutions that focus on thorough investigations of the facts in the form of a truth commission established by the State.[87] The second context is political and can be used to bring changes or contestations over power dynamics, sometimes with significant implications for the form and feasibility of responses to massive violations of human rights.[88] This is crucial for Zimbabwe where

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[83] International Centre for Transitional Justice (ICTJ) (2017) "Justice mosaics: how context shapes transitional justice in fractured societies-report." Crucial to the ICTJ conceptualisation is the emphasis that transitions are not just geographical or temporal but are also institutional, political, social and economic and conflict or repression related. Importantly the ICTJ also shows that contexts affect how justice processes can foster trust and reconciliation among individuals, groups and state institutions.

[84]ibid. Scholars have also grappled with the question on whether or not Zimbabwe can be said to have been in transition even in periods when multiparty democracy seemed to have been flourishing such as the Government of National Unity (GNU) that existed between 2009 and 2013. See Benyera (2016) "On the question of the transition: was Zimbabwe a transitional state between 2008 and 2012?"*H Hum Ecol* 55 (3) 160. See also Aboueldahab (n 79) 6 on the importance of understanding factors in the pre-transition period in a country which serve as major triggers or turning points for the prosecution of those bearing the greatest responsibility. Countries such as Afghanistan have on-going conflicts but still pursue TJ activities.

[85] ICTJ (n 83). There is however need to consider views that transitions do not simply take place; see Teitel (2017) "Transitional justice and the power of persuasions: philosophical, historical and political perspectives" in Aboueldahab N *Transitional justice and the prosecution of political leaders in the Arab region: a comparative study of Egypt, Libya, Tunisia and Yemen* 7.

[86]ibid. This may be so if regard is made to some instances where human rights violations are more pronounced such as the shooting and killing of six protesters on 1 August 2018 and in January 2019.

[87] Killander and Nyathi (n 45) 472.

[88] ICTJ (n 83). Zimbabwe may also fit into a military-controlled transition judging from Operation *Restore legacy* https://www.zimbabwesituation.com/news/operation and the military-assisted transition that led to Mnangagwa's presidency. See also in detail Aboueldahab (n 79) 32 on how a military-controlled transition can shape the content and extent of TJ initiatives such as prosecutions as was the case in Egypt. For Egypt, Aboueldahab cites Mohamed El Shewy of the Egyptian Initiative for Personal Rights on how the military has been trying to control how much is prosecuted; what is prosecuted; how far back and how deep the prosecutions can go.

disagreements concerning the establishment of a Truth Commission (TC) have revolved around the lack of consensus on holistic healing and reconciliation TJ initiatives.[89] The NPRC was operationalised through the signing of the National Peace and Reconciliation Commission Act [*Chapter 10:32*] (NPRC Act) in 2018. Effectively, the political context is seen as crucial for encouraging the political will to end impunity and complicit in Zimbabwe. Political will, toxic politics, unbridled corruption, lethargic governance and poor commitment to multiparty tolerance must all be considered as critical aspects that affect the operation of the NPRC and ZHRC in driving the TJ process forward.

The third pillar of context is the nature of the armed conflict which focuses on the actors involved, their motivations, and the type and scale of violence and human rights violations committed.[90] This type of context is important in determining whether events such as the Entumbane and Midlands and Matabeleland *Gukurahundi* were internal or internationalised armed conflicts. The Entumbane armed conflict in the early 1980s between ZIPRA and ZANLA forces became a contributing factor to the Matabeleland and Midlands *Gukurahundi* massacres since both the government of the day led by ZANU and the ZAPU leadership led by the late Joshua Nkomo were accused of not exercising restraint and killing and injuring civilians in the process.[91] From the perspective of 20 000 targeted civilians which were allegedly killed by government forces, the nature of the armed conflict becomes important in determining the extent to which the law of war relating to genocide or other international crimes can be applied to the Matabeleland and Midlands *Gukurahundi*.

The fourth context relates to the underlying social and economic problems which can create gross inequalities, marginalisation, and discrimination which both facilitate massive human rights violations and creates obstacles for responding to them.[92] This context is largely

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[89] Ndlovu-Gatsheni (2008) "Nation building in Zimbabwe and the challenge for Ndebele particularism" *Afr J Confl Resolut* 16.

[90] ICTJ (n 83). Some conflicts in Zimbabwe such as the Matabeleland and Midlands *Gukurahundi* are still to be legally classified as either national armed conflict or internationally armed conflict because of the involvement of South African army.

[91] See Yap (n 34). For an understanding of accountability see in detail Gahima *Transitional Justice Transitional justice in Rwanda: accountability for atrocity* 6 where he shows that accountability involves identifying architects of past violence and to share, punish, diminish and exclude them on accountability of their offences.

[92] ICTJ (n 83). There is also an emergence of a nexus between socio-economic accountability and TJ; see in detail Aboueldahab (n 79)13. Zimbabwe has since the economic adjustment programs been on an economic nose-diving trend. The citizens have been largely on the receiving end due to economic policies that deny them access to economic justice. For instance, in 2008 citizens had their money rendered worthless due to runaway inflation that was blamed on government's mismanagement and lack of a clear bank regulatory framework to

explained by the economic and social problems that delayed the formalisation of TJ processes in Zimbabwe such as the imposition of the Economic Structural Adjustment Programme (ESAP) by Bretton woods institutions; the various scandals that stalled economic development such as the Willovale scandal; the riots, strikes, and retrenchments in the late 1990s, the erosion of US dollar savings and tumbling down in value of the dreaded Zimbabwean dollar before the GNU; and the sudden and impulsive ban on the multi-currency regime or the de-dollarisation in 2018 which again saw US dollar savings being reduced to bond notes and real-time gross settlement (RTGS) dollars. While economic challenges witnessed various protests including the US$15 billion allegedly lost from diamonds, TJ helps in showing how the current government should include citizens in policy and regulatory issues that affect their standards of living. The socio-economic contexts of TJ should be prioritised by the NPRC and ZHRC in engaging government on how policies such as '*austerity for prosperity*' and the auction system are affecting the generality of the population in terms of access to financial security. Zimbabwe's huge domestic and external debt which has short-circuited and electrocuted social service and public service delivery of goods and services should also be unpacked from the perspective of human rights and TJ. The odiousness of the Zimbabwean debt should thus be understood from the factors that affect state transitions such as war debts, imposed debts from domestic and external creditors, and debts incurred by the Mugabe, GNU, and Mnangagwa regimes.

1.5.2 Complementarity

A lexical definition of institutional complementarity is preferred in this article and describes a situation of interdependence among institutions.[93] The thesis uses institutional

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safeguard depositor's funds. The same practice was repeated in 2018 when the government arbitrarily banned the use of US dollars and deprived citizens who had made savings in US dollars access to their money. The use of statutory instruments and amendments to the Finance (No 2) Act 2019 demonstrated the extent to which concerns of a semi-authoritarian transition are made. Specifically, argument has also been made that the economic embargo on the government is a wrong target because the powers that be rarely feel the bite. Inevitably social justice is also elusive since citizens do not have access to social security under an environment of rapid economic meltdown.

[93] Landini and Pagano (2019) "Institutional complementarity" in Marciano A and Ramello GB (eds) *Encyclopedia of Law and Economics*. See also Richard (2005) "Complementarity and institutional change: How useful a concept?" 1 who notes that the core idea of institutional complementarity is that coexistence (within a given system) of two or more institutions mutually enhances the performance contribution of each individual institution and the whole is more than the sum of its parts. The merit identified by Richard is that, although intuitive and appealing, the utility of the concept can be used to explain patterns of change in a system as well as the binding force of complementarities. This thesis was mindful of the challenges of treating complementarity as similarity of the institutions under study; see Crouch *et al* (2005) *Socio-Econ Rev* 359. See also Mihai (n 43) on

complementarity to explore the potential for the NPRC and ZHRC to work together in terms of progress towards the normative goals and ideals that support democracy and the realisation of TJ in Zimbabwe. This thesis does not deal with complementarity as defined by the International Criminal Court (ICC) although the link between ICC and TJ may be referred to on a perfunctory basis.

1.6 Contribution of the thesis

This thesis contributes to the essentialisation of normative TJ frameworks that prioritise a one-size-does-not-fit-all emphasis investigated from a nuanced examination of the work of the NPRC and ZHRC. In particular, this thesis is ground-breaking in linking the UN and AU normative frameworks to catalyse and crystalise TJ processes in Zimbabwe under the auspices of the NPRC and ZHRC. Methodologically, this thesis also contributes to the literature on methodology of doing TJ. A larger part of literature contributed to use of political realism[94] and template based approach to TJ than utilising context-sensitivity.[95] While context-sensitivity in TJ has been emphasised by scholars,[96]it has not been studied on a nuanced basis from the perspective of peace and reconciliation commissions and national human rights institutions. While scholars in Zimbabwe have used a context-based approach to study transitional justice without transition;[97] the use of contexts to delay TJ;[98] and TJ in the context of land expropriation;[99] they have not interrogated through deep academic research the value of unpacking the sensitivities of each context from the perspective of

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how institutions can create citizens who are tolerant, open, responsive and accepting as opposed to intolerant, hateful, contemptuous and without propitious attitudes which threaten the survival of democracy.

[94] Benyera (n 84); Mandikwaza (n 16); Raftopolous and Mlambo (n 32); and Carver (n 33).
[95] Benyera (n 84); Forum (n 33); Killander and Nyati (n 45); and CCJP (n 45).
[96] M Salehi & T Williams 'Beyond peace v. justice: assessing transitional justice's impact on enduring peace using qualitative comparative analysis' 2016 Transitional Justice Review, Vol . 1, Issue 4, 98; G Kasapas 'An introduction to the concept of transitional justice: Western Balkans and EU conditionality, 2008 UNISCI Discussion papers, 59; J Cohen (2017) 'Studies in transitional justice in context: addressing corruption through justice-sensitive security sector reform, International Centre for Transitional Justice; EEAS (2012) 'Transitional justice in the context of mediation,' EEAS-Factsheet; L Fletcher, H Weinstein & J Rowan 'Context, timing, and the dynamics of transitional justice: a human rights perspective, 2009 Human Rights Quarterly 163 and others.
[97] P Bamu (2008) 'Zimbabwe: transitional justice without transition,' Oxford Transitional Justice Research Working Papers.
[98] I Muvingi (2009) 'Transitional justice will have to wait,' Oxford Transitional Justice Research Working Papers.
[99] T Magaisa (2010) 'The land question and transitional justice in Zimbabwe: law, force and history's multiple victims' Oxford Transitional Justice Research Working Papers.

national institutions that support democracy. As such, this thesis goes beyond contextualisation of TJ and deals in detail with the sensitivities that the NPRC and ZHRC should deal with as TJ institutions.

Further, while many researches have been written on Zimbabwe's TJ[100] and TJ in general,[101] they largely take a one-size-fits-all approach rather than a context-sensitive approach that localises TJ mechanisms and is emphasised in this thesis. Frequent issues under template-based retributive TJ include TRCs, prosecution, vetting and memorialisation.

While general TJ literature deals with template-based TJ, this presents a wide selection of globalised, regionalised, country-specific perspectives of a normative prudential approach.

The thesis also contributes to building literature on coherence approaches to doing TJ in Zimbabwe. Most literature simply contributes to the work of CSOs[102] and ignores the role of national institutions such as the NPRC and the ZHRC which have the potential to make TJ coherent through the promulgation of TJ laws.

From an innovative research standpoint, the thesis can be used as a seriatim on essentialisation of soft laws on TJ as well as localised, context-sensitive TJ mechanisms. While TJ work has been based largely on scholarly work[103] and studies on country-specific experiences, emphasis was not placed on how soft laws can be used to examine the work of independent institutions supporting democracy; international and regional normative frameworks tobuild country-sensitive TJ. Specifically, literature from the UN institutions which emphasises on template aspects like prosecution, vetting, reparations, and TRCs was criticized using emerging normative frameworks.[104] The normative emphasis from the AU and African Commission was also visibilised from the perspective of Zimbabwe's TJ challenges. The debates from scholars who focus on liberalised discourses on TJ were analysed critically from the perspective that illiberal regimes can still pursue TJ initiatives as long as they are context-sensitive.[105] The application of template-based approaches to TJ in

[100] Mandikwaza (n 16); Benyera (n 84); Raftopolous and Mlambo (n 32); Carver (n 33); Yap (n 34); Kriger (n 43) and others.
[101] Mihai (n 56); Benyera (n 84); and others.
[102] Forum (n 33); CCJP (n 45); Yap (n 34); Killander and Nyati (n 45) amongst others.
[103] Benyera (n 84); Raftopolous and Mlambo (n 32); Yap (n 34); Carver (n 33); Killander and Nyathi (n 45) and so forth.
[104] UNSG Report (n 25); ACHPRSTJ (n 73); OHCHR (n 21); Panel of the Wise (n 20) and so forth.
[105] Aboueldahab (n 79) and Gahima (n 91).

regions such as Europe and Latin America, was compared with context-sensitive approaches in countries such as Rwanda, Uganda, and Afghanistan to frame the debate on the need for the international community to start embossing holistic TJ methods.[106]

Essentially, by critically analysing recent international, regional and constitutional frameworks as they apply to Zimbabwe, this thesis has the potential to contribute immensely to literature on innovative and coherent TJ in Zimbabwe. Ultimately, the thesis demonstrates wide knowledge and assimilation of different bodies of literature on the UN's shift in focus from template-based TJ to holistic TJ; the AU's regionalised approach to holistic TJ by taking cognisance of regional challenges and responses; and country-selected experiences that brought healing and helped countries such as Rwanda and Uganda to move forward after a difficult past.

1.7 Methodology and materials

This thesis is methodologically qualitative, exploratory, outcome-based, and transdisciplinary. Since it explores the potential for victims to be empowered to find peace, healing, and reconciliation with perpetrators, the thesis uses affective analysis of the UN, AU, and domestic constitutional frameworks. Objectivity, though important, is cautiously considered since perpetrators may not understand the subjective needs of the victims. As such, some subjectivity and grounded approach to understanding victim-perpetrator relations is given in discussing TJ activities in Zimbabwe. For a more nuanced consideration of issues, it is noted that transdisciplinarity enables cooperation between researchers in different disciplines.[107] The researcher who has practiced law as a professional assistant, human rights lawyer, and has taught at the University of Zimbabwe in the department of Governance and Public Management essentialised transdisciplinarity. Specifically, teaching political science and public administration students as well as engaging with lecturers in the same department enabled the researcher to appreciate and analyse TJ work from various political scientists and other disciplines from the perspective of transdisciplinarity. Transdisciplinarity allows for distinction "between multilayered systems and normative epistemic, a methodology for case representation, assessment, strategy building and operate as a project management model."[108]

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[106] Gahima (n 91).
[107] Scholz *et al* (2006) "Transdisciplinary case studies as a means of sustainability learning: historical framework and theory" *Int J Sustain* 226.
[108] ibid.

Because transdisciplinarity allows researchers to manage transitions and identify ill-defined transitional problems,[109] researchers should also build on experiences from disciplines beyond the law. The major benefit of transdisciplinarity is the enthralling realisation that response from research respondents in TJ is now:

> "... Moving seamlessly between many disciplines (political science, sociology, and law) in their analysis of truth recovery. They do not erect false barriers in their examination because they are free of the burden to categorise or taxonomise their narratives (unless directed to do so by the researchers)." [110]

Transdisciplinary approaches clothe researchers with a sound overview of stakeholders who work with victims and perpetrators such as those in sociology, peacebuilding, law, conflict studies, moral psychology, and so forth. In essence, transdisciplinarity remains the "ideal of looking beyond the rims of one's discipline, 'discipline' being understood as any kind of research on a certain subject by using a methodology, with appropriate variations."[111] The method "provides the additional advantage of being used as part of applied research and is adapted to a variety of programmes responding to the need of the communities where the research is conducted."[112]

Transdisciplinarity also enabled this thesis to adopt a socio-legal research. The adoption of socio-legal approach permits for realisable TJ outcomes and thinking without the purely legal or doctrinal research box. It also permits the avoidance of a template or one-size-fits-all approach to TJ. Dialogic TJ was chosen so that citizens can be genuinely included in the formalization of the TJ activities under the auspices of the ZHRC and NPRC. This can be realised only if regard is accorded to different viewpoints from actors and stakeholders. Further, institutions such as the NPRC and ZHRC also benefit from non-lawyers who are involved in peace-building, conflict analysis, and theology. In this wake, essential aspects of perceptive research are included in some sections of this thesis to fundamentally avoid a gap-spotting or gap-filling examination. Gap-filling and gap-spotting research is largely avoided since this thesis is dealing with a virgin approach to TJ and also considers much of the

[109] ibid.
[110] Simpson (2009) Truth recovery in Ireland: critically interpreting the past, 4.
[111] Steinkellner (2007) "Introduction: transdisciplinary research in the western Himalayas" in Klimburg-Salter D, Tropper K and Jahoda C *Text, image and song in transdisciplinary dialogue* 1.
[112] Klimburg-Salter, Tropper and Jahoda (2007) Text, image and song in transdisciplinary dialogue viii.

literature on TJ in Zimbabwe to be focusing on the template-based approach which is now being abandoned by the UN, AU and African countries such as Uganda and Rwanda.

Information was collected from reviewed literature on TJ from the UN and AU, and primary legislation such as the Constitution of Zimbabwe 2013, NPRC Act, and Zimbabwe Human Rights Commission Act [*Chapter 10:30*] (ZHRC Act). The study was also based on observation of key developments relating to the NPRC and ZHRC; commissions of inquiry such as that established after 1 August 2018 shootings; the protests between January and February 2019; and various stakeholder concerns on how political players should engage with TJ practitioners.

A literary review approach was preferred because documentary information on holistic and contextualised approaches to TJ is now available on the internet and widely accessible in the published literature. A process-tracing approach to addressing challenges to literature and other problems related to analysis of evidence was adopted since it was possible to access institutional literature from TJ players such as the National Transitional Justice Working Group (NTJWG), FORUM, and Heal Zimbabwe Trust *inter alia* who publish policy briefs or reports on the web. An oasis of information was also provided by the University of Pretoria law library and Abo Akademi University libraries. The libraries are well-resourced and linked to various search engines that provided literature on TJ in Zimbabwe. This reseacher had rich institutional access to general TJ literature which was then compared with literature on Zimbabwe.

Initially, interviews were preferred for this thesis but were later discarded since the NPRC and the ZHRC have not done much to utilise the national and international frameworks on contextualisation of TJ mechanisms. As such, the researcher used his legal and transdisciplinary background to analyse documentary evidence on holistic and localized TJ and how the ZHRC and NPRC can drive that process. It was also easy to analyse constitutional and legal instruments that speak to the mandates of the ZHRC and NPRC as they were analysed from the NPRC and ZHRC's strategic plans and other information posted on their social media platforms and web pages. The interviews were also discarded as the researcher was invited to consult and had occasion to present to parliamentarians and NPRC commissioners in 2019. Generally, interviews are used to guard against intrinsic researcher

bias and weaknesses and problems that result from the use of a single method.[113] Thus the exhibition to parliamentarians and NPRC commissioners and officers in Bulawayo enabled the researcher to take note of the comments from their primary interventions on the presentation on the NPRC's legislative, constitutional, and anticipatory mandates. There were various presentations on the NPRC's conflict mapping exercise and the importance of the consultative stage; the extent of the map from Mapungubwe to Zimbabwe. The thesis thus embarked on a granular analysis of relevant evidence that was gleaned from the NPRC itself and interviews would have been used to reinstate the obvious. The opportunity to present to the NPRC and parliamentarians allowed for side comments from the NPRC and parliamentarians on how the NPRC's reports on its TJ work ought to be scutinised by the parliamentary committee on Justice, Legal, and Parliamentary Affairs and the two houses for the benefit of TJ.

In 2020, the researcher was also invited as a consultant to train the members of the Parliamentary committee on Justice, Legal and Parliamentary Affairs on the nexus between transitional justice and human rights in Zimbabwe. This thesis thus benefited from the interventions from the parliamentarians on how Parliamentary accountability in terms of section 119 of the Constitution will be used to ensure the NPRC, ZHRC and the Ministry of Justice speed up the formalisation of TJ in Zimbabwe. This methodology of relying on feedback from key actors who can endorse the work of the NPRC and ZHRC proved crucial in ensuring that the NPRC and ZHRC should be recognised by Parliament as important TJ institutions. In the same way parliamentarians and commissioners helped the researcher to understand the future of TJ under the NPRC; this thesis also relied on the interventions that were made by post-doctoral researchers when the researcher presented his thesis at in Addis Ababa, Ethiopia and in Finland. Discussants and TJ experts offered friendly but honest critique of the thesis and helped the researcher to address fundamental issues such as using the constitutional point as a starting point in analysing the roles of NPRC and ZHRC before glorifying international law or international best practices.

During my research stay in Finland, the thesis benefited from information my engagements with TJ practitioners in countries experiencing ongoing conflicts such as Afghanistan and

[113] Rahman and Yeasmin (2012) "Triangulation research methods as a tool for social science research) *BUP Journal* 154.

those who are researching on surrogate TJ. One TJ practitioner presented a paper and I solicited comments from the perspective of TJ in Zimbabwe. The other researcher on surrogate TJ shared notes that were insightful on how Zimbabwe's TJ processes have to be navigated.

In all this, experiential interaction with parliamentarians and NPRC staff, doctoral researchers and human rights experts together with the analysis of documentary evidence from the AU, UN, and the national actors reduced instances of researcher bias. Friendly interventions from doctoral researchers and doctoral supervisors in Addis Ababa and Finland as well as expert interventions by the panel of lecturers during the defence of my proposal for the doctoral thesis exposed the researcher to various ideas on NHRIs, parliaments and TJ and also importance of context-sensitive approaches to holistic TJ.

This thesis also tapped into the researcher's multidisciplinary, interdisciplinary, and transdisciplinary background in law, international relations, public administration, and political science to appreciate the need to avoid a purely legal analysis that ignores the politicisation, socialisation, publicisation, and internationalisation of legal processes that affect TJ activities. It also helped me analyse how actors and practitioners may be motivated by institutional or ideological bias, donor-based mandates, patronage, or the scoring of cheap political points to stall the TJ processes. I also exchanged notes with researchers from other countries experiencing TJ challenges such as Kosovo to understand how other researchers are looking at local institutions that can drive TJ processes. Regard was made to my substantial experience in strategic or public interest litigation in human rights and constitutional work. My academic background and language skills in Shona and to a more limited extent Ndebele enabled me to analyse the meaning and oxymoronic use of the indigenous words on various TJ-related issues from the pre-colonial period to date. In the end, this research was not human-centred, and there was no need to apply for an ethical clearance since the researcher did not interview personnel from the NPRC and ZHRC.

The information that was collected from documentary sources, interventions, or observations during my presentations at the NPRC, at the doctoral research meeting, and during my research stay in Finland or during side comments with institutional players were analysed thematically. To select themes, the content of the sources was summarised, synthesised and

interpreted qualitatively.[114] This method of analysis improved the reliability of the research as it was possible to check incorrect and spurious conclusions on natural, social, cultural, and political contexts.[115] The thematic analysis permitted an analysis of the extent to which the NPRC and ZHRC have shown an inclination to adopt holistic TJ and attention was also given to whether the NPRC and ZHRC are willing to utilise institutional complementarity to make TJ realizable as contemplated by the Constitution and international laws. Effectively, an analytical approach has been made possible through the categorisation of major aspects into themes on global, regional and national normative frameworks; NPRC's and ZHRC's challenges and opportunities to advance TJ in Zimbabwe; and the potential for complementary work between the ZHRC and NPRC.

The analysed themes were used to determine the normative frameworks, literature and institutional practices which the ZHRC and NPRC can utilize when designing their theories of change or establishing public trust and confidence banks. While the Covid_19 pandemic posed challenges in terms of mobility and physical interaction with supervisors, it was easy to mitigate the challenges. The supervisors were flexible and mediated well using online interaction, emailing, and Whatsapp communication. Further, the University of Pretoria was also very supportive through flexible adjustments to submission deadlines. The Centre for Human Rights where this researcher is based was also very supportive in exposing the researcher to the defence of the doctoral proposal, participate in research methodology, research stays, access to literature. Canon Collins Scholarship Trust also took this researcher and other beneficiaries through a '*being kind to myself*' well-being workshop and Canon Collins Connections Call conference. This played an important and therapeutic role in encouraging the researcher to overcome researcher's writing blocks through supportive postgraduate mental and health workshops.

While the research had the limitations associated with desk-review research, it mitigated the limitations by identifying current holistic and context-sensitive aspects of TJ; mapped the context-sensitive aspects to ascertain the extent they can be applied in Zimbabwe; and documented various normative frameworks and country-specific approaches to embarking on context-sensitive TJ. Actionable recommendations were made on how the identified

[114] Lacey and Luff (2007) "Qualitative research analysis" 7.
[115] Salkin (2003) *Exploring research*; Morse (2000) "Determining sample size" *Qualitative Health Research* 3.

normative frameworks and country-specific practices can be adopted and strengthened under the auspices of the NPRC and ZHRC and harmonised with the UN and AU frameworks. The examination of various general and specific literatures mitigated the challenges of desk review study assists in the designing of a robust context-sensitive, complementary, and holistic TJ model for Zimbabwe and a road map for realising the same.

Further, in view of the preferred methodologies above, the desk research was augmented by expert, experiential and informed interventions from a team of doctoral researchers, doctoral supervisors, parliamentarians, NPRC commissioners, and field researchers in ongoing conflicts like Afghanistan. . Effectively, this thesis immensely benefited from an unusual scholarship methodology where the researcher essentialised innovative and flexible research methodologies and also thoroughly interrogated empirical evidence.

1.8 Scanning the operating context of transitional justice actors

Transitional justice in Zimbabwe is the major theme of this thesis. The operating research context shows that Zimbabwe does not have formal local or contextual TJ mechanisms. This thesis thus examines why Zimbabwe, with a Constitution which expressly considers the need for post-conflict justice, has, in many instances, made healing, peace, and reconciliation elusive. At the same time, there have been instances of recurrent violations of human rights. While many actors such as CSOs and academics appreciate the problems of delayed TJ as well as the fundamentals of TJ, there does not seem to be a properly nuanced scan of the operating environment that considers institutions supporting democracy. A dialogised democratic consciousness based on the Constitution should see merit in the argument that such institutions should be utilised to localise TJ efforts and that a democratic institutional approach could lead to a coherent TJ policy.

The lack of coherent policy or law is in part explained by approaches that discredit NHRIs as mere state appendages. While important in ensuring the validity of state institutions, these concerns do not delegitimise the significant role played by institutions that support democracy. Stakeholders can and should raise flags on institutional challenges. Zimbabwe, with its complex history of ethnic and racial violence, is in a normative position to develop a homegrown-identity and a local TJ ethic. The logical corollary is that existing mechanisms must be properly examined from the perspective of international and national practices that proffer lessons for emulation. The Constitution established the NPRC to deal with post-conflict justice and formulated the ZHRC to redress serious human rights violations. The constitutional gains on the potential realisation of TJ by victims of various conflicts in

Zimbabwe are explained using Hans Kelsen's *Grundnorm* conceptualisation of "the legal medium, that is, the requirement of unity and internal normative hierarchy in the legal system."[116]

This in turn is important in the analysis of national and global constitutional moments because the linkage of the new norms of global public powers to public law "can foster and enhance human rights."[117] Fundamentally, international frameworks enable states to balance their rights and sovereignty in the international community with the obligation to uphold duties imposed upon them to protect, promote, respect, and fulfill the rights of citizens.[118] This view is contrasted with the Hobbesian argument that states are always in a state of anarchical, conflicting desires, and scarce consensus. The call for state responsibility is even important in affirming Thucydides' Melian dialogue where the Athenians tell the Melians that discussion of rights is valid only among equals or the Melians' insistence on rights and justice. The use of international norms is based on the rule of law concept that "only where officials faithfully observe the constraints laid down in laws and constitutions does the rule of law obtain."[119] This is contrasted with Max Weber's emphasis on ethics of conviction, ethics of ultimate ends, and ethics of responsibility or political action which always entail the use of evil means. Besides the lack of formal contextualisation of local TJ mechanisms, this thesis is also conducted in an operating context where there is no definable or consensually identified transition yet to focus on Zimbabwe's TJ. Generally, transitions in law pose challenges, ranging from "whether they are between regime types or from one government to another within a single regime.[120]

Zimbabwe has long been under the ZANU PF government's dominance and also fits into a transition within a single regime since the current Mnangagwa dispensation under the ZANU PF government replaced the ZANU PF government of late President Robert Mugabe in 2017.

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[116] Cohen & Lipscomb 'When more may be less: transitional justice in East Timor in Williams MS, Nagy R & Elater J (eds) *Transitional justice* 46.
[117] ibid.
[118] See Constitution s 44 which obligates the state and its various institutions and agencies to uphold the four duties. See Tella (2010) *A three-dimensional theory of law on the coactive purpose of law* 50 on the coactive purpose of law.
[119] Veitch, Christodoulidis and Farmer (2012) *Jurisprudence themes and concepts* 20.
[120] Sarat (2012) "What transitions mean to and for law: an introduction" in Sarat A Transitions: legal change, legal meanings 1. See also Kent (2012) The dynamics of transitional justice: international models and local realities in East Timor 25 on the importance of understanding the idea of ruptures between the past and the past as well political processes of dealing with the past using bottom-up approaches.

In transitional moments though, the law can "straddle the transitional period and serve as a catalyst for regime change or endpoint for a liberal revolution."[121] This was observed in 2013 when the GNU regime was ended following elections a liberal and transformative Constitution which ushered the ZANU PF government back into power. In 2017, the law was used to initiate impeachment proceedings which led to the resignation of President Mugabe leading to the Mnangagwa regime. This however allowed the ZANU PF government to renew itself using convivial solidarity from various sections of society. This saw the 2017 anti-Mugabe transition being described as a collective effort from Zimbabweans. During the last days of Mugabe's time in office, the domestic and international community did not refer much to the occurrence of a coup: guardian, soft, evolutionary, coup-lite, coup-not-so-coup, bedroom or palace, and even putsch. Emphasis was placed on the Constitution's nomenclature on the impeachment of a president.

After Mugabe, the Mnangagwa administration operationalised the NPRC when it promulgated the NPRC Act. The NPRC, CSOs, and development partners have been examining the potential of the NPRC to formally drive TJ processes. In the local milieu, this thesis proceeds from the standpoint that "law and its complementary institutions provide a normal structure that supports the diversification of groups and group affiliation in transitional societies."[122] To date, there is no agreement agreed on a specific transitional moment on which to focus. Zimbabweans however coalesce around various groups such as law-based organisations, membership-based NGOs, political party actors' forums such as POLAD, and social movements. Further, the thesis is carried out in a period where the doctrine of state responsibility has relativised the doctrine of state sovereignty, moving towards a utilitarian emphasis on human sociability as the basis for the existence of common norms and common interests. Predictably, the "traditional concept of sovereignty and equality of states […] that focused on national interests is replaced with equality with 'community-oriented' content."[123] Although utilitarians argue that international norms are weak and common interests fragile because of the absence of a command power, international norms have some grundnorm status respected by states.

[121] Sarat ibid 6.
[122] ibid 12.
[123] Cohen (n 125) 47.

The Kelsenian emphasis on the *Grundnorm* is thus emphasised in this thesis since it inspires "constitutionalists to presuppose the existence of a global legal community when dealing with recalcitrant states."[124] It also promotes the treatment of states as "subordinate 'only' to international law and not to one another; and as organs of the constitutional globalising international legal system."[125] The application of Kelsenian ideals to Zimbabwe is bulwarked by the monistic application of customary international law in Zimbabwe which automatically applies unless it is inconsistent with the Constitution or national laws.[126] The research appreciates how the post-Westphalian state order is also promoting "interdependence and cooperation towards international organizations and integration."[127] This explains why national TJ frameworks in Zimbabwe are examined from the perspective of the UN and AU frameworks. The AU frameworks have to be applied because they are part of the regional vision Zimbabwe should emboss while the UN frameworks should be applied because Zimbabwe is part of the global family of nations that contribute to such frameworks.

Further, the use of soft laws at AU and UN levels is increasing in the research context. This proceeds from the realisation that international law has "expanded horizontally because of internationalization and globalisation of human activity and relations."[128] Soft laws are also used to show how international law has gained vertically since "international relations are gaining in scope, speed and intensity"[129] as human rights instruments are promoting both state and individual accountability models.[130] The concept of accountability is linked to the rule of law which creates a level playing field through constraints on government.[131] This in turn obligates those in power to "accept the binding spirit of the law over their actions."[132]

The NPRC and ZHRC are considered as independent institutions supporting democracy in Zimbabwe. For them to promote TJ, it must be accepted by both the state and non-state actors that the pursuit of TJ is seen as:

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[124] ibid.
[125] ibid 48.
[126] Constitution s 326.
[127] Kreijen (2004) State Failure sovereignty and effectiveness: lessons from the decolonization of sub-Saharan Africa, 8.
[128] ibid 9.
[129] ibid.
[130] Sikkink (2012) "Models of accountability and the effectiveness of transitional justice" in Popovski V and Serrano M (eds) *After oppression: transitional justice in Latin America and Eastern Europe* 20-21.
[131] Domingo (2012) "Accountability, the rule of law and transitional justice in Latin America" in Popovski V and Serrano M (eds) *After oppression: transitional justice in Latin America and Eastern Europe* 43.
[132] ibid.

> "Not just a collection of tools or mechanisms, however; it is a discourse that assumes a relationship between the promotion of liberal values of individual rights and liberties, the rule of law and democracy, and the achievement of peace and stability in post-conflict societies."[133]

The NPRC and ZHRC should thus properly define who are the victims, perpetrators, beneficiaries, actors, and stakeholders from the perspective of TJ. In setting the pillars for argumentation, a victim is defined to include "a person who suffers from a harmful action and its consequences caused."[134] The UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (The Victim's Declaration)[135] is important internationally to define victims.[136]From the perspective of victims, other soft laws that can be used in helping victims of armed conflicts to access remedies include the Victim Guidelines;[137] the Declaration on the Elimination of Violence against Women;[138] the UN Convention on the Rights of the Child (1990) and all other UN documents.[139] Perpetrators may be defined from the perspective of direct perpetrators who participate in the crime; military and political elites who issue orders and cultural elites who sell ideological and normative claims supporting the criminal regime and its practices.[140] Bystanders may have nothing in terms of criminal or political responsibility but their "ethical stance, attitude, and goals correspond to those of the agents making their causal link to the crime more identifiable."[141] In delineating the TJ concepts in Zimbabwe, it is important to note that these processes generally depend on the nature of the political transition.[142]

1.9 Chapter synopsis

This thesis has seven chapters. Chapter 1 introduces the background of the research, the statement of the problem, research questions, research methodology, and terminology and situates the thesis within the existing literature. It sets the pace for issues that are considered in the other chapters.

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[133] ibid.
[134] Dimitrijevic (2011) Duty to respond: mass crime, denial and collective responsibility 173.
[135] UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985) (The Victim Declaration)
[136] Hall (2010) Victims and policymaking: a comparative perspective 62-3.
[137] UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Gross Violations of International Human Rights Law and International Humanitarian Law (2005) (The Victim Guidelines)
[138] UN Declaration on the Elimination of Violence against Women (1993).
[139] Hall (n 173) 66.
[140] Dimitrijevic (n 171) 175.
[141] ibid.
[142] Bamu (2008) "Zimbabwe: Transitional justice without transition?" 1.

Chapter 2 discusses the theories of TJ in detail as well as the AU and UN approach to localised and holistic TJ, and especially the aspects relating to the obligation to comply to broad-based approaches to TJ through regional and international standards as set down by the Paris Principles, the Kyiv Declaration and other international instruments. It also deals with the legal framework on TJ in Zimbabwe.

Chapter 3 examines the various types of non-judicial institutions and how they can independently or collaboratively work together in designing innovative strategies on TJ. This Chapter also details non-judicial institutions such as the NPRC and ZHRC as espoused by the Constitution, AU, and UN TJ frameworks.

Chapter 4 examines the potential of the NPRC to promote the realisation of TJ in Zimbabwe. The NPRC is considered first since it has the express constitutional mandate to deal with post-conflict justice. It examines the extent to which the public consultations address TJ concerns issues such as the Matabeleland and Midlands *Gukurahundi* and electoral violence. The chapter will show whether or not the political will exists to address past violations referred to in the background of the research study. This will set the tone on whether NPRC can assume the role of truth and reconciliation commissions or is markedly different both in name and mandate.

Chapter 5 deals in detail with the opportunities and challenges for the ZHRC in the realisation of TJ through an examination of how ZHRC has dealt with post-crisis justice as envisaged under the AU framework and with TJ issues under the purview of The Guidance Note of the UN. It looks at challenges that have been faced by the ZHRC and the reasons why it has not exploited opportunities from its partnership with other regional NHRIs. ZHRC's role is examined using documentary sources and non-participant observation.

Chapter 6 interrogates the extent to which the complementarity principle can be achieved in Zimbabwe through examining factors that isolate, enhance, or impede the complementary work of the NPRC and the ZHRC.

Chapter 7 in conclusion summarises the research findings, discusses their implications for future research, and provides practically achievable recommendations on how the NPRC and the ZHRC can draw lessons from the work of other national institutions or NHRIs in the promotion and realization of TJ for victims in Zimbabwe.

CHAPTER 2

CRITICAL NORMATIVE APPROACHES TO TRANSITIONAL JUSTICE

2.1 Introduction

This chapter emphasises the need for a deeper understanding of the normative frameworks which explain the relationship between the state and its citizens in post-conflict reconstruction. It examines international, country-sensitive and national frameworks that build a society's understanding of holistic and localised TJ mechanisms. Conversely and by parity of reasoning, it helps in setting out the pillars of argument on how TJ practitioners in Zimbabwe can abandon or demystify the TJ processes that have been practiced under the template-based TJ that mainly focused on prosecutions, truth-seeking, payment of reparations to victims and vetting of perpetrators in public offices. These frameworks that speak to holism and localisation of TJ mechanisms exist at the national level as embedded in the Constitution; at the regional level under the AU Transitional Justice Framework (AU TJF)[1] and ACHPR Report on transitional justice and human rights;[2] and through various UN and other agencies. Essentially it is shown here that political realism and political ideology usually fail to deal with the enormity of human rights violations that divide society if the elites, sub-elites and non-elites in a society shun the normative frameworks that speak to TJ.

The discussion seeks to show that the failure of the state and the whole of the Zimbabwean polity to address complex societal issues that bear on the realisation of TJ are explained by a systematic and seemingly steel-strong neglect and lack of ample knowledge of the constitutional and other institutional arrangements in this regard. Abusive constitutionalism prevents Zimbabweans from propelling TJ processes with one idea and will. For that reason, there is a need for a deeper analysis of the national contextualisation and sensitivities,

[1] The AU Transitional Justice Framework (AU TJF) and AU Transitional Justice Policy (AU TJP) provide guidelines for AU Member States to develop their own context-specific comprehensive policies as normative frameworks. See AU Transitional Justice Framework http://www.legal-tools.org/doc/bcdc97/pdf/ (accessed 5 September 2019) Part B2. It is obligatory that African states follow the AU TJF as institutional members although it is a soft law. See AU Transitional Justice Policy http://www.au.int/sites/default/files/documents/36541-doc-au_Transitional Justice_policy_eng_web.pdf (accessed 5 May 2019).

[2] ACHPR Report of the African Commission on Human Rights and Peoples' Rights on Transitional Justice and Human Rights in Africa http://www.achpr.org/files/news/2019/04/d373/achpr_transitional_justice_eng.pdf (accessed 7 July 2019) (Report on transitional justice and human rights).

regionalisation, and globalisation of TJ efforts that are aimed at dismantling cultures of official impunity, compliance, and complicity in violating human rights. While selected theories on TJ are discussed to situate the thesis within some extant theoretical discourses, the normative prudential theory is creatively used here to explain with alacrity the vision of the constitutional law and politics that must entrench a sustainable culture of human rights that make TJ realisable by victims in Zimbabwe.

What is important in the discussion of the AU and UN normative TJ frameworks is that both institutions have now focused on developing normative developments that give national institutions broad mandates to promote TJ and emboss internationally institutionalised normativism in TJ discourses. As such, the discussion in this chapter places emphasis on how institutionalised norms can dynamically help the NPRC and ZHRC together with other institutions supporting democracy in Zimbabwe, victims, perpetrators, and society generally, to strategically balance between *truth v justice* for victims and *stability v justice* approaches to dealing with a violent past. The former looks at the subjective and grounded considerations of the victims while the latter also considers the nation's good. The frameworks on contextual and holistic approaches to TJ at UN and AU levels are also discussed from the perspective of illustrations from regions outside Africa and from country-specific experiences that provide clarity on lessons that can be learned and implemented in Zimbabwe as informed by developments that healed and reconciled society elsewhere.

Because Zimbabwe has stood at the crossroads of serious human rights violations and repression for many years in the pre-colonial, colonial and post-colonial periods, attention is also given to political realist theories. Because the victims anxiously wait for the formalisation of TJ processes through clear laws and policies, a nuanced examination of theories associated with TJ as a research concept assists them to understand the practical problems that stall TJ processes, especially those ideologised and by party and ruling party officials. The prudential normative theory that is coined in this thesis has the potential to advance vigorously the road to formalisation of TJ processes since it proceeds from a normative political theory of reconciliation which keeps opening the need to be realistic about the "very significant practical obstacles such efforts take."[3] This approach allows the

[3] Verdeja (2009) Unchopping a tree: reconciliation in the aftermath of violence 4.

legal researcher to "identify moral claims and counter-claims that arise in transitional settings" and how they may work for or against each other.[4]

In practice, this thesis carries the earnest desire of the Zimbabwean people to acknowledge the commission of serious human rights violations at different periods of Zimbabwe's history and to design effective ways that promote social cohesion that deeply commits to the healing and reconciliation of victims and perpetrators. This also includes victims who became perpetrators and perpetrators who also became victims at some stage in the development of Zimbabwe's history. For this reason, this thesis is mindful that ethical realism or political morality is difficult to achieve in a polarised society and reposing faith in holistic TJ processes may encourage Zimbabweans to fully recognise their various problems that separate them. Thus, the use of the normative framework espoused by a national Constitution is important in helping TJ practitioners and the general populace to understand how international and national institutional laws and policies can assist states such as Zimbabwe to break away from the violent or repressive past, allow the sun to shine over the nation and empower the victims and perpetrators to move towards reconciliation. Normativism is also important in helping those worried a lot about getting or consolidating power to deal decisively with the ripple effects of incoherent TJ processes such as the perpetuation of the vicious cycles of poverty, the growth of a cult of disremembering, and lethargic social isolation and antagonism among other problems.

Predictably, the theoretical discussion is followed by a discussion of the UN, the AU frameworks, and the constitutional TJ structure and Zimbabwe's national institutional arrangements on TJ. The main purpose is simply to construct an argument for the modeling of TJ processes around the UN, AU and country-sensitive normativised ideas and also to visibilise the need to essentialise the utilisation of the global and regional frameworks. This in turn enables TJ practitioners to strengthen country-specific TJ mechanisms to discharge their constitutional, legislative, and innovative mandates more effectively in the light of the increasing influences of international organisations and international institutional law on local law and practice.[5] Further, the UN and AU frameworks offer wide options of choice as to the potential position adopted because of universality and interdependence between international

[4] ibid.
[5] Schermers & Blokker (2011) International institutional law: unity within diversity v.

organisations that deal with numerous similar common issues.[6] The need to use international institutional laws and standards is premised on the increasing interdependence of institutional intelligence in the international community.[7] This enables institutions such as the ZHRC and NPRC to collaborate with the AU and UN agencies and get first-hand advice on various normative aspects under the auspices of the UN and AU.

The beauty of essentialising the UN and AU frameworks in Zimbabwe stems from the fact that intergovernmental organisations including the UN and AU, can apply pressure on states to improve their level of constitutional adherence and good practice in conflict and post-conflict engagements and constitutions are an important tool to mitigate conflicts in divided societies.[8] At the UN, the Universal Periodic Review (UPR) process can also be used to encourage Zimbabwe to take TJ processes seriously while the peer review processes at the AU level can also yield the same results. Under the banner of the normativised TJ, national Constitutions become important in benchmarking the applicability of international norms since they promote a society's constitutional identity as captured in the idea that:

> "The need to better understand the relationship between constitutions and the identity of the people who author them has also been raised by recent attempts to write or rewrite democratic constitutions in the context of deep disagreements over the vision of the polity on both national and international levels."[9]

In turn, constitutional identity becomes crucial in catalysing the need for volitional solidarity amongst Zimbabweans to localise, contextualise and internalise holism in TJ processes. Constitutional identity becomes the banner of unity which binds Zimbabweans as a national force. To illustrate the importance of the nexus between constitutional identity and TJ in Zimbabwe, it is shown for instance that following the bloodbath in the 2008 presidential runoff elections that effectively became a run-over, Zimbabwe used the Global Political Agreement (GPA) to establish the politics of tolerance and redefine its democratic path, albeit through the facilitative role of political figures such as the former South African Presidents Thabo Mbeki and Jacob Zuma.

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[6] ibid.
[7] ibid 1.
[8] Jones (2018) "Constitutions and bills of rights: invigorating or placating democracy?" in Glover-Thomas N and Wardhaugh B (eds) *Capturing the broad range of interests across legal scholarship* 341.
[9] Lerner (2011) Making constitutions in deeply divided societies 1-2.

Under the idea of allowing the people to participate in the constitution-making process, the people of Zimbabwe united in making a homegrown Constitution, albeit initially driven by the political parties to the interparty dialogue that led to the establishment of ideologised and seemingly volitional unity under the Government of National Unity (GNU) between ZANU PF under the late and former President Robert Mugabe and MDC formations under the late Morgan Richard Tsvangirai, Arthur Mutambara and Welshman Ncube. The warring political parties ZANU PF and the Movement for Democratic Change (MDC) formations firmly and uncompromisingly created a culture of tolerance that largely led to political unity, economic stability and social cohesion. Further, the political parties and their wide support bases also rallied Zimbabweans to embark on consultative processes on the Constitution which was adopted in 2013. The 2013 Constitution established the normative framework on post-conflict justice and redress of human rights violations which can inform the operations of the ZHRC and NPRC.

In discussing how the ZHRC and NPRC can unhesitantly exploit the sweet benefits and bitters of the normative frameworks at the national and international levels, this thesis is alive to the fact that "the politics of transitional moments are mirrored in the complexity of the normative standards by which we judge them."[10] The ZHRC and NPRC can play a significant role in showing how the past history of repression and serious human rights violations can inform the future of TJ processes in Zimbabwe. Objectively and institutionally, their use of normative frameworks can greatly embed the holistic approach to TJ as contemplated by global, regional, and national instruments. Their creative use of such frameworks will enable the international community to grasp the TJ situation in the manner one grasps the situation of a house the moment they step over the threshold, *pachikumbaridzo*, in the Shona indigenous language system. While the quest for peace has been metamphoricised or historicised through usage of terms such as *Gukurahundi*, this thesis risks describing the usage of normativism in TJ processes as the thick foliage that can glisten under the mid-summer winter sun. This is especially so if victims, their families and alleged perpetrators are allowed to tell their lived realities as contemplated by normative frameworks at national and international levels.

[10] Williams, Nagy and Ester (eds) (2012) "Introduction" in Williams MS, Nagy R and Ester J (eds) *Transitional justice* 5.

How dearly the normative frameworks are treasured should proceed on the realisation that they fare better than Machiavellian realism since they unite a polity to move towards democratic nation-building which assists societies to address grievances and human rights abuses at the national level with the view to facilitating state accountability.[11] This enables the adoption of a human rights-based TJ which prioritises the rights and needs of victims and their families.[12] Put differently, normative frameworks are seen in this thesis as having the potential to repress and suppress factors that condemn Zimbabweans to various sectionalised identities. They enable the people of Zimbabwe to rid themselves of the incidents of structured and unstructured violence. The focus on normativism is important in exposing the root causes of conflicts and all human rights violations including economic, social, and cultural rights as well as civil and political rights.[13] The argument demonstrates that Zimbabwe's TJ is understood from the perspectives of armed conflicts such as the Entumbane, political repression, and other serious human rights conflicts.

Since the essential task of this thesis is to show the importance of transdisciplinarity in TJ research, this chapter first discusses selected theories to demonstrate how various approaches from transdisciplinary dimensions can assist to find a coherent approach to the design of a national TJ framework. Transdisciplinarity is considered here to possess the potential to avoid doctrinaire research. On the debris of various conflicts and serious human rights violations that separate Zimbabweans, there is need to carry out researches that pay attention to developments from various disciplines. Such an approach largely proffers effective solutions to the complicated problems that Zimbabwe's TJ discourse suffers that silo researches. Only when academicians and TJ practitioners disabuse themselves from academic pedantry and information bombism, and honestly interrogate the factors that stall TJ processes in Zimbabwe would they be able to shape and influence the TJ policies and facilitate the emergence of political will from the powers that be. The above is also steeped in the need for TJ practitioners to appreciate the fact that the NPRC and ZHRC are TJ mechanisms which are manned by people with diverse backgrounds.

[11] UNDP http://www.undp.org/content/undp/en/home/2030-agenda-for-sustainable-development/peace/rule-of-law--justice--security-and-human-rights/transitional-justice.html (accessed 5 November 2019).
[12] UN Rule of law tools (2009).
[13] ibid 1.

Equipping the functionaries at the NPRC and ZHRC with various approaches to peace, healing, reconciliation, and human rights protection requires the abandonment of institutional nihilism that claims certain TJ dimensions as '*all bad'* and others as '*all good*.' Dogmatism and tendencies to engender institutional nihilism can no longer be tolerated if TJ is to be genuinely realised in Zimbabwe. If the NPRC and ZHRC are to work with the state, state institutions and agencies effectively in a manner that does not smack of appendage engagement, TJ practitioners and the state apparatus that promote political will must decisively root out dogmatism and institutional nihilism and resolutely design TJ polices and laws that appreciate both the ideal and practical challenges to reconciliation, peace and healing in Zimbabwe. Various views from the selected theories are used here to offer a comprehensive elucidation of theory in the design of TJ policies and laws, and to build an important argument for the essentialisation of normative prudential TJ theory. The discussion starts with an overview of TJ as well as explaining the importance of theory in post-conflict societies.

2.2 The concept of transitional justice

2.2.1 Unpacking the concept of transitional justice

This section explains the general importance of TJ in addressing the causes of conflicts and serious human rights violations in a society. TJ determines the essence of normativism in the design of TJ mechanisms and processes. In that milieu, TJ processes should admirably be embraced by the members of the society that is dealing with a difficult past or are dealing with ongoing conflicts. Accordingly, this section shows that TJ is an important discipline that a society such as Zimbabwe can use to resolve its problems and if localised, contextualised and applied holistically to suit specific situations in a country, TJ frameworks can provide fundamental guidelines on how nations can heal, reconcile and achieve both carnal and spiritualised peace. Because TJ is a discipline that deals with war and atrocity situations, it is important to consider the historicity of war and atrocity to illuminate how the concept of TJ became legally prioritised and why "… war and atrocity have been the subject of public and scholarly interest from the ancient times to the present."[14] Dealing with the past ravaged by war can be described using an argument on the German understanding that:

[14] Aspel and Verdeja (eds) (2013) "Introduction" in Aspel J and Verdeja E (eds) *Genocide matters, ongoing issues and emerging perspectives* 1.

> "The law was designed with classical, not governmental criminality in mind and as such governmental criminality with its link to political and social dogmas of an entire government and legal system may be beyond the reach of criminal law."[15]

The problem experienced in Germany is largely experienced in many situations where official impunity is difficult to deal with. The example from Germany has been purposefully selected because the foundations of TJ were largely established through the Nuremberg trials conducted by Allied forces under international law following World War II to prosecute prominent political, military, judicial, and economic leaders of Nazi Germany who participated in the mass murder of European Jews in the Holocaust and other war crimes against citizens. The Nuremberg trials broadened "governmental criminality" to encompass vastly different, wrongful acts of state (or acts attributable to the state.)"[16]

In broadening state-actor criminality, state security in the Soviet-occupied zone of East Germany developed from internal security and police institutions and was legalised by the East German administration in 1950. Acts committed by 'Stasi' repression of critics and opponents are still under investigation as part of "gross violations of human rights."[17]

Similarly, at the level of describing the gravamen of international crimes it is observed that war crimes, once described simply as violations of justice, have been seen by Larry May as crimes

> "... Against humanness especially in a pluralistic world where there is a need to understand the rules of war as the collective responsibility of states that send their citizens into harm's way."[18]

Hugo de Grotius, 1583-1645, generally touted as the father of international law, provided the connection "between contemporary war crimes law and the just war theory"[19] which focuses on issues including "the decision to wage war morally justified (*jus ad bellum* to explain crimes against peace), and the tactics employed in war morally justified (*jus in bello* to

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[15] Walther (2013) "Problems in blaming and punishing individuals for human rights violations: the example of the Berlin Wall shootings" in Albreight HJ and Klip A *Crime, criminal law and criminal justice in Europe: a collection in honor of Prof. em. dr. h.c. Cyrille Fijnaut* 327.
[16] ibid 328. While the Nuremburg trials crystalised the foundations of TJ, this thesis will not deal with other periods in Athenian or other Roman times since the goal is not to philosophise on TJ but give concrete and context-sensitive solutions based on ideas that are generationally known to Zimbabweans on specific problems.
[17] ibid.
[18] May (2007) War Crimes and just war i.
[19] ibid 4.

describe war crimes).”[20] Crimes against peace are largely covered under general international law whereas war crimes fall under the law of war or international humanitarian law. In all this, the question is usually:

> “Why some war tactics are justified and others are not, based on the idea that rules of war can be justified but proscribe certain forms of treatment, regardless of whether soldiers fight with the just cause or not, and even if the intentional killing of soldiers is itself justified.”[21]

In an attempt to describe the Entumbane or Matabeleland and Midlands *Gukurahundi* conflicts as ethnicised wars or massacres, a discussion on genocide as an international crime may be useful. This will enable scholars and TJ practitioners to study potential causes of Shona and Ndebele rivalry in earnest by getting to know the ethnic dimensions of past conflicts. While the Entumbane conflicts are believed to have been a ZANLA-ZIPRA clash, there is concern that the Shona who stayed in Bulawayo ended up being targeted. Similarly, the Matabeleland and Midlands *Gukurahundi* claimed casualties from both the Shona and Ndebele since Ndebele-speaking communities that included the Shona were affected. The targeting of civilians from specific ethnic groupings during the Entumbane or Midlands and Matabeleland *Gukurahundi* determines the essence of an earnest assessment of genocidal attacks as contemplated by international law. A candid determination helps in disabusing Zimbabweans of the pernicious aftershocks of dogmatic treatment of the two conflicts. The best tool to unravel the ethnic dimension of the two conflicts is a context-sensitive TJ and the decisive factor in resolving the effects of the conflicts is the strong resolve of all Zimbabweans to avoid prioritising the resolution of one form of conflict at the expense of the other.

In an attempt to determine determine the heinous inclination by states or organised groups to eliminate other ethnic groupings, Raphael Lemkin is credited with introducing the term ‘genocide’ in 1944 in his founding theory outlining the Occupation policies resulting in “the domination and annihilation of peoples”[22] through “mass atrocities inflicted on civilian

[20] ibid 4.
[21] ibid 3.
[22] Aspel and Verdeja (eds) (n 14) 1.

populations" including the killing of some two-thirds of European Jews and the displacement of civilians and survivors following the World Wars.[23]

Following Lemkin's strong advocation for genocide to be recognised as a crime at the Nuremberg trials, he is credited with having genocide codified in international law through the promulgation of the UN Genocide Convention 1948[24] which ensured that genocide is separated as a standalone crime from crimes against humanity and extermination. Under the Genocide Convention, genocidal acts are aimed at destroying, in whole or in part, a national, ethnical, racial or religious group, through acts such as:

a) Killing members;
b) Causing serious bodily or mental harm;
c) Deliberately inflicting conditions of life calculated to bring about physical destruction in whole or in part;
d) Imposing measures intended to prevent births;
e) Forcibly transferring the children of the group.[25]

From the perspective of both the gravamen of the offence of genocide and accountability for genocidal acts, there is need for the NPRC to ensure that those who feel the Matabeleland and Midlands *Gukurahundi* was genocidal do so in terms of transposing the event to the essential elements of the offence of genocide as contemplated under international and national law. Specifically, the classification of the Matabeleland and Midlands *Gukurahundi* conflict as genocidal also enjoins the NPRC and TJ practitioners to give a fuller play to the country-specific experiences where genocide was also considered from the perspective of international law. As such, this thesis gives a cursory examination on examples from other countries that dealt with the problem of genocide.

As a result of the atrocities committed in Bosnia, Rwanda and Sierra Leone and other countries, the international community and national governments gave recognised the crime of genocide as part of TJ issues to be taken seriously. The challenges related to the pursuit of

[23] ibid 2.
[24] Hinton (2013) "Critical genocide studies" in Aspel J and Verdeja E (eds) *Genocide matters, ongoing issues and emerging perspectives* 45.
[25] Rosenberg and Silina (2013) "Genocide by attrition' in Aspel J and Verdeja E (eds) *Genocide matters, ongoing issues and emerging perspectives* 106.

war criminals in countries such as Bosnia, Rwanda, eastern Congo, and Sierra Leone[26] created the need to deal with "the enemy of all mankind through ending impunity at the highest levels of government and the military" for genocide and war crimes.[27] Scheffer describes war crimes and crimes against humanity under the rubric of atrocity crimes chiefly because they "coexist as heinous crimes in every atrocity zone".[28]

Hiebert's definition of genocide[29] includes ethnic cleansing of a particular segment of the population by a dictatorial government with state apparatus available to systematically eliminate sections of the population who threaten or oppose them. To employ Hiebert's definition, there is need for evidence gathering from both state and civilian populations to decide whether the Entumbane and Matabeleland and Midlands *Gukurahundi* were dominated by the eliminationist actions of the state that targeted civilians. There is also need to understand instances where there is genocide by attrition, which explains, "the slow process of annihilation… of mass murder of a protracted group."[30] This determination may be linked to the arguments on the historicised usage of the term *Gukurahundi* from the liberation struggle and how perhaps ZANLA forces and ZIPRA's Operation *Zero hour* could be used to explain the Entumbane and Matabeleland and Midlands *Gukurahundi* conflicts. With the commission reports on both conflicts still missing, scholars can only speculate on the tenor of the evidentiary sufficiency to justify genocidal tendency. In all this, sight should not be lost to the fact that the debate on transitions from authoritarianism and violent social conflicts in the twentieth century has prompted human rights movements to insist that significant violations of human rights must be dealt with systematically through TJ processes.[31]

While the Catholic Commission for Justice and Peace and Legal Resources Foundation report on the disturbances in Matabeleland and Midlands disturbances provides conservative figures of 20 000 civilians as having been killed, the report does not proffer explanations on the casualties of the two Entumbane wars. This leaves TJ practitioners without cogent information to decide whether the Entumbane attacks had a causal link to the Matabeleland

[26] Scheffer (2012) All the missing souls: a personal history of the war crimes tribunals xi.
[27] ibid xi-xii.
[28] ibid.
[29] Hiebert (2013) "Questioning boundaries: what's old and what's new in genocidal theory" in Aspel J and Verdeja E (eds) *Genocide matters, ongoing issues and emerging perspectives* 16.
[30] Rosenberg and Silina (n 25) 107.
[31] Aspel and Verdeja (eds) (n 14) 172.

and Midlands *Gukurahundi*. The presence of such information will help the NPRC or any other TJ mechanism like the ZHRC to model the two major conflicts on the idea of outright genocidal attacks or genocide by elimination. This in turn, Zimbabwenically speaking, will be fundamentally important in modeling the whole society on the idea of the spirit of unity that shuns ethnic supremacy and binds us all with chords that allow each tribe or ethnic grouping to flourish. The elements discussed above may thus be used by the NPRC to assess any genocidal culpability in various conflicts where political dimensions were observed. It is also important for TJ practitioners, in their discourse with victims and victim-groups, to also properly explain the position that the Entumbane conflicts and the *Gukurahundi* in Matabeleland and Midlands have not been legally described as genocidal by the NPRC despite that the conflicts and resultant killings are believed to have been carried out along ethnic lines.

2.2.2 Essentialising transitional justice

This section discusses the need for TJ practitioners, the NPRC and ZHRC to understand that addressing gruesome repressive acts or serious violations of human rights in Zimbabwe is inconceivable without an understanding of the concept of TJ. Every genuine victory to be achieved in the resolution of past conflicts and establishment of retributive or restorative justice is the fine fruit of a commitment to TJ. For this matter, there is need to understand that a seismic shift from state or official impunity to actor accountability has been seen in attempts through multilateral diplomacy "to develop an effective and just system of accountability for human rights violations." This process began with the International Criminal Tribunal for Rwanda (ICTR) and for Yugoslavia (ICTY), leading to the adoption of the Rome Statute that established the International Criminal Court (ICC).[32]

Some countries have essentialised the need to formalize TJ at policy and legislative levels. For instance, Uganda produced a policy in 2019 which focuses on the need for formal justice and made it mandatory for the government to protect witnesses; to guarantee victim participation in proceedings and, as far as possible, to remove barriers for access to justice by victims and those vulnerable.[33] The TJ policy in Uganda mixes traditional justice, nation-building, and reconciliation; reparation, and amnesty. Although Uganda's TJ has been

[32] Ahtisaari (2004) *Preface*: Justice and accountability, international or local?" in Thakur R and Malcontent P (eds) *From sovereign impunity to international accountability: the search for justice in a world of states* xii.
[33] Uganda Ministry of Internal Affairs "National Transitional Justice Policy" iii.

considered superficial due to human rights violations in instances of state impunity,[34] significant progress did result from the legislative framework[35] in the absence of blanket amnesty and an obligation imposed on those amnestied to participate in truth-seeking and TJ processes.[36] Besides Uganda, countries such as Afghanistan have however moved towards formalising reconciliation although efforts to end the conflict have been short-lived and there has been a little high-level appetite for dealing with legacies of human rights violations and war crimes.[37] While the Afghanistan example has courted controversy especially following the ICC's Prosecutor's move to investigate the situation in Afghanistan, Afghanistan provides justification that TJ should be pursued during ongoing conflicts. TJ practitioners and victim groups should gather evidence that can be used in the TJ process in the event that states decide to establish TJ mechanisms during and after the conflict.

As in the past, so also in the present and the future, it should be noted that transitional societies have largely faced challenges in dealing with accountability due to allegations of selectivity applied for retributive forms of punishment such as in Chile, Chad, and the Democratic Republic of Congo (DRC).[38] Further, in pursuing a retributive TJ which is usually resisted by those vested with political will, it should be noted that some retributive measures post-World War II have largely and believably been seen from the perspective of victor's rights such as that politicians including Winston Churchill and Henry Morgenthau suggested summary execution for leading Nazis on their capture.[39] The current TJ debate that focuses on post-conflict and ongoing conflicts includes crimes against peace, war crimes, and situations where the universality of human rights and the increasing use of human rights violations to cause conflicts or a recurrence of conflicts have increasing significance.[40] It can thus be said that TJ is not limited to wars, repressive acts or serious human rights violations that occurred in the past.

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[34] Oola (2010) "Advocating justice: civil society and transitional justice in Africa."
[35] Macdonald (2019) "Somehow this whole process became so artificial: exploring the transitional justice implementation gap in Uganda" *Int J Transit Justice* 225.
[36] Uganda Ministry of Internal Affairs "National Transitional Justice Policy" v.
[37] Kouvo (2019) "Reconciling peace with justice?" There have been concern that the Afghan government is also responding to the move by the ICC Prosecutor to investigate the situation in Afghanistan.
[38] Ahtisaari (n 32) xii.
[39] ibid 41.
[40] ibid5.

Because governments, the UN, regional organisations, TJ practitioners and victim groups are now taking transitional justice seriously, it is critical to flag out how TJ raises the important issue of either remembering or forgetting the past. Hayner begins her book *Unspeakable Truth* with the following:

> "Do you want to remember, or forget? I asked the Rwandan government official in late 1995, just over a year after the genocide in that country had left 500,000 dead. He had lost seventeen members of his immediate family during three and one-half months of slaughter."[41]

Hayner notes that "remembering is not easy, but forgetting may be impossible."[42] The assertion may be used to design the TJ that Zimbabweans want to associate or to determine how institutions of political will such as the current President prefer a '*let bygones be bygones' approach to TJ*.

On non-judicial TJ mechanisms such as the NPRC and ZHRC, and how they can work with judicial institutions, it is important to note that harmonised approaches to criminal justice have gradually evolved[43] as TJ is becoming increasingly important as a significant "transformative response to political violence, which aims to expose previously hidden abuses, challenge the denial, establish accountability, and advance political reform."[44] Additionally, the extension of TJ institutions and practices is widely commended as a tool for fair dealing and recollection against refutation and oblivion.[45]

In terms of its political development, transitional justice developed as a "regime's legal and symbolic response to past human rights violations."[46] Legal responses are either restorative or retributive while symbolic responses "entail a broader, less personal form of address … condemnations or apologies" against previous moral infringement.[47] States transitioning from a history of government repression develop ways through TJ to accord accountability for "mass murders, forced disappearances, mass rape, war crimes, ethnic cleansing, acts of genocide and other crimes against humanity."[48]

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[41] Hayner (2011) Unspeakable truths: transitional justice and the challenge of truth commissions 1.
[42] ibid 2.
[43] ibid 8.
[44] Leebaw (2011) Judging state-sponsored violence, imagining political change 2.
[45] ibid.
[46] Grodsky (2010) "Costs of justice: how new leaders respond to previous rights abuses" 4.
[47] ibid.
[48] Aiken (2013) Identity reconciliation and transitional justice: overcoming intractability in divided societies 1.

From the traditional focus on reconciliation than reconciliation, healing and peace that is emphasised under the NPRC, it is noted that the general advocation of the reconciliation concept is broadly promoted although few policymakers consider the important implications occasioned by reconciliation programs.[49] For instance, the legitimacy of TJ mechanisms may be discredited by blanket amnesties because they:

> "... require the state to refrain from pursuing justice against certain eligible classes of offenders. They do not typically place any affirmative obligation on the state to investigate, prosecute, or punish the ineligible classes of offenders."[50]

Further, Duthie emphasises that, "unexpected outcomes [may] emerge out of the frictions between global and local realities" from the application of TJ mechanisms. [51] For instance, Bosnia, recovering from the Srebrenica genocide, prioritises:

> "Both the right to know and the right to justice. The right to know refers to the right of surviving families to know whether their missing relatives are dead, where their remains are located, and to have those remains returned to them. The right to justice is less institutionalized.[52]

There is thus need to equip victims, victim groups, perpetrators and TJ practitioners with proper information on the outcomes of a TJ process designed in a country. For instance, the right to know in terms of ethnic configurations in Bosnia's Missing Persons Law refers to the right of all Bosnians to benefit from legislation to know the fate of their lost relatives.[53] There is thus a need for a "redemptive model of addressing the past and preventing the recurrence of violence, in the future."[54] In this wake, Shaw and Waldorf emphasise the need for acknowledgement and rectification of past injustice to develop "a future characterized by the non-recurrence of violence, the rule of law, and a culture of human rights"[55] whilst remaining aware that the means through which this is achieved may result in disbalances between

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[49] Daly and Sarkin (2007) Reconciliation in divided societies: finding common ground 4.
[50] Freeman (2009) "Necessary evils: amnesties and the search for justice"24.
[51] Duthie (2011) "Afterword: the consequences of transitional justice in particular contexts" in AL Hinton (ed.) *Transitional justice: global mechanisms and local realities after genocide and mass violence* 249.
[52] Wagner (2011) "Identifying Srebrenica's missing: the 'shaky balance' of universalism and particularism" in Hinton AL (ed) *Transitional justice: global mechanisms and local realities after genocide and mass violence* 27.
[53] ibid.
[54] Shaw and Waldorf (2011) "Introduction: localizing transitional justice" in Hinton AL (ed) Transitional justice: global mechanisms and local realities after genocide and mass violence 3.
[55] ibid.

"international norms and the affected people's expectation and attitude of justice."[56] It is thus important for the NPRC and ZHRC to extensively develop and encourage engagement and ensure that various facets of TJ are understood by the affected communities across Zimbabwe. This will ensure that the visibility of the two institutions across Zimbabwe will also immensely have confidence in the two institutions as TJ institutions.

2.3 Theory and theory-making in transitional justice

Having considered the evolution and importance of TJ, this section deals with the normative and realist theories. The theories to be discussed provide insights on how the NPRC and ZHRC can encourage state functionaries to show political will to formalise TJ in Zimbabwe. They also provide citizens with literacy on how theory helps them to understand practical problems that stall the TJ processes in Zimbabwe. Because the NPRC and ZHRC are considered under non-judicial institutions, the question and position of theory is also discussed using political realism which explains why institutions of political will such as the executive may read the political crystal ball to stall TJ processes that threaten their presence at the helm of state power. The theories are preferred so that the thesis examines the TJ roles of the NPRC and ZHRC from various relations of social, economic and political life in Zimbabwe. Theoretical models to explain the work of non-judicial TJ institutions should address the normative frameworks as well as policy and political realities in Zimbabwe. The term 'non-judicial model' is used here to refer to the work of institutions including CSOs whose work includes grounding social justice and strengthening civil society. Civil society opposes the repressive acts and legislation of a renewed authoritarian regime[57] and non-judicial models may be supported by judicial activism in such challenges.

The judicial model focuses on the establishment of a formal or informal court, tribunals, or forums after periods of serious conflict or serious human rights violations. The discussion of judicial models is often generalised[58] but this generalisation is usually insensitive to different country circumstances. Diversification of TJ processes across states is required.[59]

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[56] Weinstein et al (2011) "Stay the hand of justice: whose priorities take priority?" in Hinton AL (ed) Transitional justice: global mechanisms and local realities after genocide and mass violence 28.
[57] Aboueldahab (2017) *Transitional justice and the prosecution of political leaders in the Arab region: a comparative study of Egypt, Libya, Tunisia and Yemen* 2.
[58] Teitel (2003) *Transitional Justice* cited in Hansen 2011 *ORIL* 1.
[59] Hansen (2011) "Transitional justice: towards a differentiated theory" *ORIL* 1.

Many theorised models invoke the need for contextualized TJ studies. It may be argued that the liberal TJ processes applied in Latin American, Central, and Eastern Europe are unsuitable to analyse instances under non-liberal regimes and the use of liberal values may be insufficient for analysis of law and justice in non-liberal transitions.[60] This is because non-liberal contexts may not prioritise democracy and human rights but lean on realism aspects such as nation-building, security, and peace.[61] Effectively, TJ in non-liberal societies limits liberal values such as pluralistic democracy and particular freedoms and rights to benefit other goals.[62]

Theories are needed to enable researchers to understand various notions of justice on one hand and moments of transition on the other.[63] Theories enable researchers to go beyond assumptions and explicitly articulate TJ in theory and practice given the fact that language creates meaning.[64] Theoretical constructs may be built from philosophical arguments: Aristotle's view that argument is "a neutral instrument that can be put to both beneficial and harmful uses;"[65] or Plato's argument that plain truth may be replaced by mesmerising fictions.[66] Rubin urges legal scholars not to ignore theory-making when he noted that:

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[60] ibid.
[61] ibid.
[62] ibid.
[63] Buckley-Zistel *et al* (eds) (2013) *Transitional justice theories* 1-5.
[64] Lambourne and Carreon (2016) "Engendering transitional justice: a transformative approach to building peace and attaining human rights for women" *Human Rights Review* 71. Fish (2017) *Winning Arguments: what works and doesn't work in politics, the bedroom, the courtroom, and the classroom*. The indigenous language usage of terms such as *Gukurahundi* is normally used in TJ discourses to describe the Matabeleland and Midlands *Gukurahundi* and not the other versions of it across the ten provinces in Zimbabwe. As a term that is associated with the Shona indigenous language system and also associated with war situation unde ZANLA forces in the liberation struggle, charted narratives on the usage of Gukurahundi should be interrogated thoroughly from ethnical, military and scholarly orientations. Even the usage of war terms such as *Chimurenga* is given a war tone and excludes the various '*zvimurenga*' or instances of political violence or violent social unrest at various epochs to reflect the dilemma of scholarly orientation when describing certain terms.
[65] Fish (n 64) 45. This argument is prioritised because Zimbabwe's TJ is also punctuated by deeply racialised references to white superiority and black inferiority. Further the discourse is dominated by ethnic clashes, for instance, with Ndebele particularism compared to Shona exceptionalism and vice versa. In some instances, intra-ethnic clashes have morphed into the unconquerable *Zezuru* and invincible *Karanga*. In political transitional terms, Mugabe's rule was sometimes described as '*zezurufication*' of the state while Mnangagwa's government is described as '*karangisation*' of the state. Those descriptions are sometimes watered down by the fact that political leaders use recial, tribal or ethnic cards to consolidate their power. *Karangaised* or *zezurufied* narratives usually ignore distinctions between elite, sub-elite and non-elite sections of such ethnic groups.
[66] Fish (n 64). *Gukurahundi* in explanatory or metaphorical language usage means winter rain that wipes away the summer chaff. It is simply used to show how the first heavy or strong winter rains can help explain how one group can violently deal with the other group in instances of conflict. The term was mainly used in the Matebeleland and Midlands disturbances where about 20 000 civilians were killed by the Fifth Brigade;

> "Legal academics are constantly engaged in the process of evaluating legal scholarship, but we have no theory of evaluation. [...]. We conclude that a work of scholarship is good or bad, true or false, by intuition, trusting in some undefined quality of judgment. This leads to a wide range of conceptual and practical difficulties, difficulties that have festered to produce confusion and malaise throughout the field."[67]

The above assertion proves that theory dominates all academic disciplines. The legal scholarship should assimilate ideas from other professions and this thesis strives to set a new milestone adoption of a transdisciplinarian approach to discussing theoretical standpoints.

2.4 Selected theories of transitional justice

This section starts with the advocacy of the normative theory as the preferred theory in this research. It does not discuss theories on peacebuiding since it is mainly focused on unraveling the human rights dimensions of conflicts in Zimbabwe. The preferred normative theory is discussed using viewpoints from international relations and law and shows that even where political or legal realists adopt pragmatic strategies that may address *stability v justice* more than *truth v justice*, they need to commit to constitutionalism as guided by the state's democratic ethos. Zimbabwe's constitutional democracy (whether romanticised, borrowed/cross-border, identity-driven or homegrown) which treats the Constitution as sovereign in its own right explains why the normative framework must not be shunned at the expense of realism. Various aspects of constitutionalism adopted from South African, Kenyan, Canadian, and American Constitutions have been incorporated into Zimbabwe's Constitution.

Such borrowed or cross-border constitutionalism enjoins Zimbabwe to commit to norms on post-conflict justice and reconstruction. Other theories focusing on political power such as realism are simply discussed to show why state obligations must be understood in terms of the existing constitutional order at national, regional, and global levels. In all this, the argument motivated in this thesis is that political power as exercised by the instruments of political will such as the executive or monitored by institutions of state administration such as Parliament, the judiciary and other democratic institutions should arise from a normative framework that creates a sense of hope for consolidation of democracy in a society.

Chimurenga means violent conflict but is used to refer to violence in war. The pejorative usage of the terms registers a society's displeasure with attitude from a race, ethnic group or individuals.

[67] Rubin (1994) "On beyond truth; a theory for evaluating legal scholarship" *Calif L Rev* 903.

2.4.1 Normative provident theory

This section describes the importance of the normativisation of TJ in Zimbabwe to stimulate political will and coherent TJ activities. Essentially, the framing of a normative provident framework should address the over-reliance on ethical realism which prioritises political morality as this leads to the rule of law rather than rule by law.[68] To treat constitutional values as mere norms or tenets that can be trivialised for political gain poses a challenge to TJ, human rights, constitutional supremacy, and constitutional democracy. To avoid under-estimation of the importance of constitutional norms, this thesis demonstrates the advantage of prudential normative reasoning in discourses on good or good enough governance contemplated by the Constitution. This demonstrates that there is no need for Zimbabwe to wait for periods of total political harmony or healing alone to drive forward significant TJ processes. While Zimbabwe painfully tarried in formalising its pursuit for peace, healing, and reconciliation since 1980, the Constitution enjoins the Zimbabwean society to find lasting solutions to human rights violations and conflicts that tear apart the society's fabric. It does this by entrenching all the generations of human rights in the Bill of Rights and creating institutions that support democracy.

The beauty of providential normative reasoning is that it enables TJ actors and practitioners to guard against overly idealistic arguments on why they cannot trust the state or should not simply regard the authorities as insincere in their approach to TJ. Further, constitutional institutions will not be simply delegitimised or considered to be appendages of the state in the absence of cogent evidence to that fact. This is because the Constitution and its provisions reflect the will of the people as well as the political and governance road map they anticipate. The ZHRC's independence and its dual role as a human rights body and public protector have shown some success in protecting human rights and committing the state to account for atrocities. Such strong institutions advocating democracy and prompting healing, reconciliation, and human rights must be supported so that they gain institutional and public legitimacy.

While it is too early to judge the success of the ZHRC and NPRC in making TJ realisable, Zimbabwe must prioritise the constitutional and international frameworks in their support.

[68] Grenfell (2013) Promoting the rule of law in post-conflict states 14.

With the ZHRC's dual mandate likely to be disbanded with the formation of the public protector's office, the ZHRC can still use its permanent institutional status to electrify the realisation of TJ in Zimbabwe. If the NPRC's mandate is not extended beyond 2023, the ZHRC and TJ practitioners have to innovate on ensuring that the normative frameworks that exist are used to encourage the powers that be to show political will and that Parliament ensures that it uses its oversight role to ensure the ZHRC drive TJ in Zimbabwe. This also speaks to the need for the NPRC and ZHRC to submit reports that detail their TJ potential or roles from now onwards. For this reason, the approach taken here is to consider the Constitution and other country-specific approaches to TJ as multi-level normative frameworks that can immensely shape Zimbabwe's future. Even in instances where political realities such as toxicised political party cleavages, polarisation and patronage are considered, essentialisation of the normative theory on TJ stems from the argument that the normative theory is ubiquitous in all theory-making, and "even those who engage in positivist approaches such as political realism cannot avoid normative assumptions in the selection and interpretation of data."[69]

The multifacetedness of the normative theory stems from the fact that it is multinational, liberal, and permits individual choice.[70] It is significantly relevant where victims, alleged perpetrators, and practitioners of various descriptions are called upon to arrest their group differences for the public good in a society. In contradistinction, the communitarian considers the person as the product of his entire societal influences[71] which accords with the description

[69] Cochran (2004) Normative Theory in international relations: a pragmatic approach1.
[70] ibid 11.
[71] ibid. This is important for categorisation of concerns on issues such as pre-colonial raids by the Ndebele against the Shona or Matabeleland and Midlands *Gukurahundi* which is largely seen as instigated by the Shona against the Ndebele. Argument may be extended to interrogate the meaning of identity depending on community differences. For instance, the Ndebele can incorporate caste groupings under the *Zanzi* (original Khumalo) *enhla* (some Nguni groups such as Xhosa) or *holi* (including all Shona dialects who were sometimes referred to as *amasvina*, derogatory language used to show how the Shona people would be forced to take intestines of their raided and slaughtered cattle). During the last days of President Mugabe, narratives included *'Zezuru unconquerable'* to refer to the dominance of the Zezuru tribe in Zimbabwean politics. The narrative also led to the emergence of hate speech targeted at the Karanga through terms such as '*chekuMasvingo*/someone from Masvingo,' described in overtones of sarcasm. This narrative was countered by the '*Karanga invincible*' narrative which culminated in the popular support of Mnangagwa when he was fired as ZANU PF and national Vice President. The Shona embrace various groups whose main dialects include the *Karanga* (mainly from Masvingo, Mberengwa and Shurugwi*), Zezuru (*mainly from the Highveld area of Zimbabwe*), Korekore/Gorekore* (mainly from Hurungwe, Guruve, Mutoko and Mount Darwin*), Manyika (*mainly Mutare, Rusape, Chimanimani, Nyanga*)* and *Ndau* (mainly in Chipinge and parts of Bikita, section 6 of the Constitution however removes the Ndau from the Shona people. It remains to be seen if the Ndau will litigate against this position as it sounds exclusionary). Societies best comprehend their past processed through meaning relevant to

of TJ as a travelling norm with different meanings that change over space and time.[72] This raises pertinent questions such as: *what should a transition lead to*?[73] What kind of society is *expected after transitional justice?*[74] *How can or should the transition be accomplished?*[75] Since all theory in international relations is normative law, this thesis argues that states must be prepared to be bound to the higher norms which speak to the type of constitutionalism in their respective societies.

A further advantage of normative theory is that it allows for the operation of other theories in a manner that respects the constitutional values or laws in a country. This is especially so since it appreciates that a realistic approach to the "problems of coexistence (of states)" […] "as an approach to be valued for its virtues and its terms."[76] The application of constitutional, regional and UN normative approaches will thus indicate a commitment by Zimbabwe to the norms that bind the family of nations at regional or global levels. The need to canonize peace, reconcile and heal a nation at national or international levels is important where society is striving for a good image following periods of state repression and serious human rights violations. This good image can be created by applying institutional norms at regional and global levels when interpreting the functions of national institutions on democracy.

From an ethical perspective, the normative theory is useful to analyse a society's desired or standardised ends. While states may move for self-survival or national interests, the

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their specific situation, especially those described in local or indigenous language. The processing of meaning can be used to deal with incidents of particularism, ethnic superiority, hatred or anger in Zimbabwe.

[72] Dhawan (2012) "Transitions to justice" in Buckley-Zistel S and Stanley R (eds) *Gender in transitional justice*.

[73] ibid 5. This is important for Zimbabwe especially in relation to how indicators can determine whether the ruling periods of Mugabe, the GNU or Mnangagwa can be classified as authoritarian, liberal, semi-authoritarian, militarised or mixed transitions.

[74] ibid. In Zimbabwe, expectation was that the popular protests leading to the resignation of former and late President Mugabe in 2017 were supposed to unite all political actors, their supporters and the general populace to speed TJ processes including realisation of the delayed reconciliation in Zimbabwe. Sadly, the potential for popular constitutionalism was lost and cries for a national transitional authority also evaporated like morning dew. Fresh narratives punctuated by *'Mugabe is old/Mugabe must go now/ Mugabe is a dictator*' were used to wage anti-Mugabe protests without allowing the narratives to ferment. Songs such as *'Bhobho watengesa nyika kumaChina usazokanganwa tisu takakuisa tichakubvisa/ Robert yo sold the country to the Chinese, don't forget we installed you and we will remove you'* were sung in those seemingly moment of popular political action. Had brewed narratives been cultivated to reflect deeply on the kind of political transition that would genuinely unite Zimbabweans, Zimbabweans would not be talking today in anger about concepts such as '*kuitiswa'* or being used to allow ZANU PF to renew itself under the guise of removing Mugabe. Concepts such as '*chinhu chedu*/our thing,' *'chinhu chavo/chevaridzi/chine vene vacho*/their thing/it has its owners' are thus compared with current or after-the-fact narratives such as *chinhu chaora*/rotten thing' or *chinhu chonhuwa*/now smelling badly' to describe how the politicised transition after Mugabe reflects continuity with Mugabeism.

[75] Dhawan (n 72) 5.

[76] Brown (2010) in international political theory: selected essays 28.

normative theory is relevant to ensure that national interests are defined on a norm-based approach and not on the whims of state actors. An illustration is made from Ayn Rand's normative ethics. While states use real politics as a means to an end, usually taking power as the currency of politics in the same way money is the currency of economics, ethics and norm-based reasoning realises that, "there is an end that serves as the standard for defining moral values and virtues, and to this end, moral norms impose obligations."[77] Rand's view is used to explain why states or political players must not use politics 'as a means to an end' only. The state actors should appreciate that "the end for which morality is needed is also the ultimate end for a rational *qua* rational agent and the foundation of all such an agent's normative reasons for action."[78] The merit in this approach is that reasons are fundamentally teleological as they are "reasons to do or seek something as a means, constitutive or instrumental, to something else."[79]

The Constitution of Zimbabwe is the grund norm, the mother/supreme law and the starting normative point in the land. It should be used as a means to promote democratic participation of citizens and democratic governance through dialogic and inclusive politics. While realism as a political tradition is non-conformist and may be used by states to reject soft laws such as the AU TJF and UN framework[80] as non-binding (when compared to treaty-based obligations) the normative theory is conformist in nature since it explains why states, in maximising their self-interests, should conform to standards of national, regional and global constitutionalism which they usually participate in framing. The problem of how states refuse to incorporate normative ideas into their political games weighs heavily on communities that

[77] Wright (2011) "Reasoning about ends: life as a value in Ayn Rand's ethics" in Gotthelf A and Lennox JG (eds) *Metaethics, egoism, and virtue* 3. This is why some politicians such as Mnangagwa may occasionally commit to ethical realism and also respect the Constitution through operationalising certain institutions such as the NPRC; allowing certain institutions such as the courts to adjudicate upon societal disputes such as the electoral dispute between Mnangagwa and Nelson Chamisa of the MDC-A after the 2018 Presidential elections and also allowing the NPRC to engage with communities that were hurt in the past such as in Matabeleland, Midlands and other parts of Mashonaland. It remains to be seen whether ethical realism will be used to deal with issues of family displacements and culture erosion as well as rights of indigenous communities to protecting burial sites in Masvingo during the Tokwe-Mukosi dam and Manicaland during the Chiadzwa diamond mining-related displacements. Masvingo and Manicaland are the two swing political provinces in Zimbabwe especially in electoral governance.

[78] ibid.

[79] ibid. The operationalisation of the NPRC under President Mnangagwa's administration followed difficult years of calling for the same under former and late President Mugabe. Under Mugabe, institutions such as ZHRC and ZEC were operationalised but the NPRC which could have dealt with springboard TJ events such as Mtabeleland and Midlands *Gukurahundi* remained non-operationalised.

[80] This includes the UN Secretary's guidance notes and other institutional reports or studies under the auspices of the UN.

are already affected by brutal acts of states. While states seek to promote their national interests or survival strategies in a polarised world using realist '*means and ends*' as starting points, there exists no consensus on what amounts to '*national/state interests*.'

Historic experience also shows that political realists usually define the national interests usually from the perspective of power-based definitions. In the presence of a Constitution and other international normative frameworks, the whole of the polity, including the people who constitute a society of the rulers and the ruled, who are normally called the repositories of governmental power, should define the national interests, and the best way to achieve that is to consider the Constitution and other institutional norm-based frameworks beyond the state. Allowing inclusive approach to defining national interests plays a monumental role in creating a sense of national and constitutional identity in a society. The Constitution which protects constitutionalism or the concept of the limited government will be treated as a big living tree which cannot be broken, even when the branches of the whole bush clover may snap with ease.

The Constitution must always be the starting and highest normative point in TJ discussions. Zimbabwe's Constitution has a preamble affirming the people's sovereignty as the bearers of fundamental civil and political; socio-economic and cultural collective rights; and those related to information and technology. This is affirmed by the '*We the people of Zimbabwe*…' phrase. There is a bigger task for political and TJ players should TJ be formalised. The NPRC and ZHRC need to determine instances where the state and TJ practitioners fail to comply with the TJ policy. But the major point is that the Constitution would be used as the benchmark. The three branches of the government: executive, judiciary and legislature, must respect popular and constitutional sovereignty because the Constitution entrench the concepts and the functionaries in the three branches of government also derive their powers from the people. Even in instances where the President of the Republic feels to be '*more than equal'* under some Orwellian form of democracy which makes him the Head of State and Government and Commander in Chief of the Zimbabwe Defence Forces, the President is obligated to uphold and defend the Constitution. The Constitution further affirms that Zimbabwe is a sovereign, unitary and democratic Republic and, as such, state actors ought to respect all the democratic ideals contemplated by the Constitution.

The state's conduct (including disregarding normative ethos), laws, traditions (including realism), and customs must be consistent with the Constitution's supremacy clause. In dealing with national, regional, and international laws, the normative theory enables state and

non-state actors to balance between rationality and non-rationality, or even to normativise rationality or irrationality. This is because normative reasoning is value-based and obligates the rational and irrational actor to consider "reason, purpose (*teleos*), and self-esteem as a means to, and the realization of one's ultimate end."[81] If a state causes mass massacres, ethnic cleansing, enforced disappearances, and other threats to human life, the normative frameworks at national, regional, and global levels are used to demonstrate simply that the choice to live is fundamental. The normative system helps a society to deal with excess executive power, especially through concepts such as the rule of law, separation of powers, constitutional supremacy and human rights.

The Constitution which allows for incorporation of international law when interpreting the Bill of Rights condemns impunity in genocide and other crimes against humanity. This accords with Rand's view on the objectivity of morality and rejection of "… the popular thesis that morality is based on an irrational or a rational commitment."[82] The choice to live or choose to value which assesses the conduct of victims and perpetrators must be based on the determination of the ultimate normative value of the right to life. Rand sees this as that "end to which all lesser goals are the means and it sets the standards by which all lesser goals are evaluated."[83] The point is that the Constitution and other international normative instruments are a telling blow at the political realists' acts of impunity and complicity. They are important tools that can be used to evaluate the normative standards upheld for the common good of society, and should be used to shun what is evil from a cosmopolitan and communitarian perspective.

Further, these normative structures created under a Constitution such as constitutionally-established institutions on TJ help to establish why there should be ethically or morally justified political actions. In assessing justified political action, the foundations and superstructures, especially the Constitution, will be used as part of "the hierarchical structure of an individual's values where 'values' are understood as ontologically distinct from beliefs."[84] While politicians may use their political ideologies or ideologised state apparatus

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[81] Wright (n 77) 20.
[82] Gotthelf (2011) "The choice to value (1990)" in Gotthelf A and Lennox JG (eds) *Metaethics, egoism, and virtue* 34.
[83] ibid 37.
[84] Khawaja (2011) "The foundation of ethics: objectivism and analytic philosophy" in Gotthelf A and Lennox JG (eds) *Metaethics, egoism, and virtue* 54.

as part of their belief in patronised or consolidated power, normativism obligates them to respect non-negotiable tenets of democracy in the Constitution. In so doing, the politicians are enjoined to promote democratic values that give credence to the exercise of their political power.

While some politicians can argue and hide behind the misconceived perspective that '*morality is not law, and law is not morality*,' this thesis argues that law and morality are inextricably intertwined since morality does influence the content of the law and all laws are heavily moralised. Whether hard politicians may even dismiss concepts such as ethical realism which respect morality, normative instruments such as the Constitution obligate them to normativise and moralise their political engagements in the interests of the generality of the population. In making an argument for the need for states and state functionaries to respect, protect, promote and fulfill human rights, there is a requirement to use the supreme law to analyse the "normative relationship between morality and self-interest (national interest)."[85] Further, there is need to also take cognisance of the fact that constitutionalism is practiced beyond national boundaries, through regional and international frameworks. Zimbabwe has a legal or normative framework envisaged by the Constitution which must be interpreted together with international constitutionalism and the rule of law. Repression at the level of the state must not be tolerated because it violates the normative framework that is foundational to a state and its citizenry.

A normative theory best explains why TJ must be linked to human rights, constitutionalism, rule of law and democratic ideals at both state and international levels and the goal is to make a state democratic or move towards democratic consolidation or self-democratisation. It is now important to define and link the notion of the rule of law, human rights, and good governance. Because TJ is a form of constitutionally embedded justice, it is a legal notion.

The notion of the rule of law "belongs in multiple domains from law to political morality"[86] and is viewed as a credible limitation on state arbitrariness and as a safeguard of individuals and minorities only when:

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[85] Bloomfield (2011) "Egoism and eudaimonism: replies to Khawaja" in Gotthelf A and Lennox JG (eds) *Metaethics, egoism, and virtue* 74.
[86] Morlino and Palombella (2010) "The two 'rules of law' between transition to and quality of democracy" in Morlino L and Palombella G *Rule of law and democracy: inquiries into internal and external issues*.

> "within legal structures and institutions, a dual-track is available or gradually developing in existing positive law... whose content and sources on a legal plane are neither under the purview of the ruling powers nor can they be changed at their whim."[87]

The Constitution protects human rights, imposes restraints on state functionaries, establishes institutions that support democracy, and ensures that individual rights holders are respected by the state. The rule of law thus enables a polity to achieve civil order through the existence of a legal government constrained through the rule of law, the application of "predictable and efficient justice", equality, and respect of all constitutional rights.[88]

In transitional periods where political arrangements may not take a state to full democracy, the rule of law is fundamental to the development of minimum democracy. This is described as a situation where political institutions are characterised at the same time by four aspects which are:

> "universal suffrage, both male and female; free, competitive, recurrent and fair elections; more than one party; different and alternative media sources… [to] provide real guarantees of civil and political rights that enable the actual implementation of those four aspects."[89]

In essence, minimum democracy upholds the need for norm-based governance which severs a transitional regime from an authoritarian regime. This is linked to the definition of authoritarianism that speaks to situations where democracy is believed but disregarded. Linz, as cited in Morlino, describes authoritarianism as applying to a state that can be described in the following manner:

> "A political system with limited, non-responsible political pluralism; without an elaborated and guiding ideology, but with distinctive mentalities; without either extensive or intense political mobilization... in which a leader, or, occasionally, a small group, exercise power from within formally ill-defined, but quite predictable limits."[90]

Normativism expressed in the Constitution becomes a guiding ideology that binds Zimbabweans. All other ideologies can be noxious if they do not measure up with the

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[87] ibid 40.
[88] ibid. See also Mihai (2016) *Negative Emotions and transitional justice* 50 on the call for rational persons to advance human interests; continue with the love of mankind; and manifest individual nature as free and equal beings with feelings of guilt and resentment aroused by injustices that offend a sense of justice. From this sense of conceptualising injustices Zimbabwean society calls all institutions supporting democracy under Chapter 12 of the Constitution to use their normative broad institutional mandate to remedy all injustices.
[89] ibid 41.
[90] ibid 42.

Constitution. Zimbabwe under Mugabe assumed many labels and was for instance seen in various periods as a '*socialist country'*, '*democratic deviant*,' '*less-democratic*,' or '*full-fledged dictatorship.*' This thesis alludes to the need for Zimbabwean leaders to lead the nation taking cognisance of the forms of democracy such as "consolidated democracy, semi-consolidated democracy, transitional government or hybrid regime, semi-consolidated authoritarianism, and consolidated authoritarian regime."[91] Zimbabwe under Mugabe was also described as a pariah state that was pursuing isolationist policies. For the current and any forthcoming government to distance themselves from such unpalatable labels, democratic participation and democratic mobilisation must be norm-based and should be used to shun semi-authoritarian or consolidated authoritarian regimes. The rule of law thus provides the tonic for Zimbabweans to deal with instances of rule by law/force where national laws are used as coercive instruments to entrench arbitrary governance or shirk human rights obligations.

The rule of law as a constitutional norm can be used to explain why thinkers like Thomas Hobbes, John Locke, and Immanuel Kant looked up to an arbitrator, judge or umpire who enables members of a polity to escape the state of nature through the law and to supervise the social contract that justifies the existence of a government. Zimbabwe's Constitution provides a social contract where the people of Zimbabwe agree to be bound by a Constitution that makes them the repositories of state power which they vest in specific functionaries in the executive, judiciary and legislature. Articulated in this way, the law becomes, "the definitive voice of public reason" necessary to resolve the problems "raised by a clash of private judgments" to vindicate the applied form of government expected by a society.[92] Using a jurisprudential analysis borrowed from Hans Kelsen, the Constitution as the *Grundnorm* which entrenches the rule of law, can be used to emphasise why thinkers like Ronald Dworkin distinguished between rights-based arguments that protect citizens and "policy arguments which are political decisions about what benefits a whole community."[93] TJ becomes normativised as a matter of right and it also acts as stimuli for politicians to design, formulate and implement policies that are aimed at ending atrocious behavior within a state.

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[91] Ciobanu (2010) "The end of the democratic transition? Analyzing the quality of democracy model in post-communism" in Morlino L and Palombella G *Rule of law and democracy: inquiries into internal and external issues* 95.
[92] Gaus (1996) An essay on epistemology and political theory: justificatory liberalism 195.
[93] ibid 208.

In demanding vertical, horizontal and diagonal accountability from public and private citizens in a democratic state, it should be noted that the notion of democratic constitutionalism promotes normative reasoning as it points to the idea that citizens as eligible voters must be allowed to contribute fully towards "important constitutional transformations through the most participatory methods possible"[94] to defend "against the inevitable tendency of political leaders to place power over the right."[95] Debates on constitutionalism come to the fore in situations where independent institutions are expected to conduct their affairs in a proscribed way by the state which would not be the case in fully democratic countries that abide by their constitutions.[96] Similarly, where independent judicial review and amendment of legislation is normally permitted, political conflicts that lead to constitutional issues may result in a diverse selection of outcomes from which the main political actors may choose.[97]

In connection with African constitutionalism, the malfunction or collapse of oppressive government may arise from their authoritarian actions in defiance of their "constitutions, laws, and the rights and expectations of citizens."[98] The normative prudential approach espoused in this thesis thus recognises that constitutionalism has gone global with countries applying constitutional tenets across all internal institutions as well as borrowing core principles of rule of law from regional and international examples.[99] In its quest to formalise TJ processes in Zimbabwe and to make TJ a reality and not just a myth, the Constitution, the AU and UN frameworks must be adopted and adhered to by state and non-state actors in TJ. It takes massive effort for the whole of the polity to respect the Constitution as a standalone sovereign and to adhere to ethos espoused under such a Constitution. If nothing is done in this regard, the Constitution and other normative instruments associated with it will become white elephants that will never unite the *Madzimbabwe* people.

2.4.2 Realist theory

The discussion of political realism stems from the fact that political behavior and political realities compromise the quality of constitutionalism in a polity and by extension the TJ

[94] Colon-Rios (2012) Weak constitutionalism: democratic legitimacy and the question of constituent power.
[95] Breslin (2009) From Words to Worlds*: exploring constitutional functionality* 20.
[96] Faundes (1993) "Constitutionalism: a timely revival" in Greenberg D *et al* (eds) *Constitutionalism and democracy: transitions in the contemporary world* 355.
[97] Ibid 355. See also Mihai (n 88) 50 on how John Rawls saw individuals as having two moral powers; the capacity for a conception of the good; and the capacity for a sense of justice and both are normatively grounded.
[98] Nolutshungu (1993) *Constitutionalism* 366.
[99] Halmai (2014) Perspectives on global constitutionalism: the use of foreign and international law 247.

processes that depend on the normative framework in a society. The previous discussion on normativism shows that Zimbabweans can return to basic politics where they can sit down and agree why certain problems occurred and how they can be resolved. There is need to agree that a lot of wrongs were created which were not put right. When that is agreed everyone will choose what role to play for the good of Zimbabwe. TJ will remain elusive if realist solutions which were made such as the Unity Accord are not immortalised as important starting points in uniting major ethnic groupings in Zimbabwe such as the Ndebele and Shona. The same obtains for events such as the land reform program which show that poverty does not get better by simply trashing the program as Zanunised. Realism enables Zimbabweans to grapple with realities on the ground, including allowing those who did not initially benefit to ask for land or engage constructively with the government so that they access land through organised land audits and redistribution programs. Realism enables the whole of the polity to accept the reality that talking human rights without utilizing the land to promote food security is mischievousness. Similarly, it helps Zimbabweans to deal with normativised issues in a manner that ends abject poverty, food shortages, and poor sanitation and restores dignity to the poorest of society.

Realism allows TJ practitioners and state functionaries to call to order those who ferret mice in the land when gold is being smuggled yonder and beyond Zimbabwe's borders. An honest resolution of real issues that divide Zimbabweans should bring the Zimbabwean people on the same table. The carrot and stick foreign policies that force Zimbabwe to resort to resource-based loans that are infested with stringent conditionalities will create a divided generation. Similarly, there will be no commitment to total healing or total reconciliation in the presence of sanctions that bite the commoner in Zimbabwe.

Essentially, realism as conceptualised by thinkers like Hans Morgenthau rests on assumptions of "state centrism, states as rational actors and power as the aim of states."[100] Morgenthau's arguments provide clarity on how states behave to preserve their national interests in a largely polarised world. States normally use sovereignty and non-interference in their internal affairs. John Vasquez as cited in Molloy notes that Morgenthau is the realist *par excellence* whose view on states is essentially three-pronged:

[100] Molloy (2006) The hidden history of realism: a genealogy of power politics 19.

> "... Nation-states or their decision-makers are the most important actors of international relations. [...T] here is a sharp distinction between domestic and international politics. International politics is a struggle for power and peace."[101]

This conceptualisation of state power by realists appreciates their understanding that the significant power held by particular individual states influences and controls international relations, enabling those states as global leaders.[102] Realism supports the cynicism held by states "towards international laws, institutions, and ideals that attempt to transcend nationalism."[103] Other aspects of realist theory worth considering are the inapplicability of "universal moral principles" to the actions of individual states which assumes that the quest for power by individuals and states is inevitable.[104] There are, however, strands of realism such as social, post-realism, ethical or moral realism, and critical realism where the theory largely ignores the arguments on national and international limited government concepts.

States are obligated to respect their national and international constitutions. At the international level, the UN Charter regulates the need for states to use force in instances of individual self- and collective defence. The corollary is that a state that acts contrary to the Charter as an international Constitution can receive a collective response from other states. States are increasingly called to respect the rights of their citizens under the 'responsibility to protect' concept. Collective rights such as environmental rights are protected from the perspective of principles such as common but differentiated responsibility or state's responsibility to build the environment. States which violate human rights or those which commit genocidal acts on their citizens may have their domestic affairs interfered with through humanitarian intervention.

Applied to transitional societies though, realist theory makes practical sense since it demonstrates that the period following a transition "is characterized by a prevalent political balance of power" which differs from the view of idealists who regard the "the law as a self-contained driving force for political change."[105] The theory is criticised for ignoring the

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[101] ibid 20.
[102] Donnelly (2000) Realism and international relations 2.
[103] ibid 8.
[104] ibid 7. This brings to mind the well-known adage that 'power corrupts; absolute power corrupts absolutely' as the universally recognised quotation of the 19th century British politician Lord Acton.
[105] Vanderbilt http://www.vanderbilt.edu/olli/class-materials/Spring2016TruthandReconciliationWeek1.pdf (accessed 22 November 2019).

requirement to balance "idealist views with political realism."[106] The balancing process is supposed to be practical and directed towards "enabling a symbolic rule of law that is capable of driving and constructing liberalizing change."[107]

The use of political realism to explain Zimbabwe's resort to politics to deal with TJ issues has been conducted by Benyera[108] who explains that transitional realism is used in situations dictated by political expediency.[109] Transitional justice has been explained from the perspective of critical realism by scholars including Hannah Arendt [110] who departed from realists who simply ignored concepts such as the Nazi holocaust which had systemised the use of state-organised terror to conduct mass murder (genocide). She emphasised, "the problems of power and justice as inseparable and interdependent, while realists like Kennan and Morgenthau concentrated on the role of power at the expense of the problem of justice."[111] Arendt's views permit the use of a reasoned normative framework because she opposed idealism that ignored the ruthless processes of contemporary power politics.[112] She supported the need for normative providential theory because, contrary to the realists, she did not consider that power politics were ubiquitous or an inevitable facet of human nature.[113]

Realism is playing out in Zimbabwe's national politics and TJ which has for long been separated between two paradigms. Doing Politics in Zimbabwe is either seen pro-West or pro-sanctions (anti-establishment) and anti-West, anti-sanctions (pro-establishment). No other political orientation is seen as representing anything else. The divisions that create fissures in ZANU PF or the MDC have been Zanunised or MDCised for long. The TJ actor, opposition politicians and state functionaries maybe accused of duplicity based on who eats from another's ideology. Realism helps Zimbabweans to accept the apogee of polarisation that TJ should also grapple to solve. It would therefore be asking too much to expect that TJ will work in a polarised environment.

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[106] ibid 2.
[107] ibid 4.
[108] Benyera (2015) "Presenting *ngozi* as an important consideration in pursuing transitional justice for victims: The case of Moses Chokuda" *Gender and Behavior* 6760.
[109] ibid.
[110] Klusmeyer (2005) "Hannah Arendt's critical realism: power, justice and responsibility" in Lang AF (Jnr) and Williams J (eds) *Hannah Arendt and international relations: readings across the lines* 116.
[111] ibid 116.
[112] ibid.
[113] ibid 117.

Zimbabwe's TJ journey has kept sensitive narratives such as Entumbane and Matabeleland and Midlands *Gukurahundi* for long. Such narratives have been used as reason to divide Zimbabweans into Shona and Ndebele, ZANU, ZAPU, MDC and so forth. Time should have healed our national, and improved party-based and ethnic politics because while killings may happen everywhere, healing becomes elusive when there is so much political hate in the country. The truth is that incoherent policies at the instance of the state functionaries and those outside power structures are causing more harm to TJ in Zimbabwe. The sincerity of supporting TJ processes is lacking from many sections of the Zimbabwean society and this is a fact that is making TJ a political fiasco. It is like living in the time of the Cold War when capitalism was playing against socialism. There will always be more questions than answers if those in the corridors of power are demonised and those outside power are venerated and sanitised while poverty divides Zimbabweans. Zimbabwe might see serious ethnicised violence before TJ finds effectiveness if politicians and their support bases place undue weight on their political muscles than real problems that separate Zimbabweans.

2.5 Conceptualising the institutional framework on transitional justice

2.5.1 Introduction

This section is important in showing how national and international institutions help a state to take TJ forward. States can choose to adhere to institutional standards that are in line with their national normative frameworks; as well as regional and global orders to which they subscribe. Some of the standards at regional and global levels are considered as part of soft sources of international law and states may still show commitment to be bound to them. This thesis closely consolidates on the need for Zimbabwe to adhere to the UN and AU frameworks on TJ since Zimbabwe is a member of the both the UN and AU. The evaluation of the link between the NPRC and ZHRC in terms of their TJ roles demands discussion on key aspects obtaining from other TJ institutions in Zimbabwe and other countries. The concept of an institutional normative framework from the global, regional, and country perspectives, as well as from the constitutional standpoint, can inform Zimbabwe's TJ process concerning the benefits of a prudential approach to situations of on-going violations or recurrent violations.

Crucially, the need for states and other stakeholders to respect national and international institutions that inform TJ processes cannot be underestimated. This is because institutions generally demonstrate that:

> "When actors create institutions, they are almost always engaged in the simultaneous construction of social identities, definition, and validation of individual and collective interests, deliberation on the good and just, and the strategic pursuit of instrumental objectives."[114]

Institutions are governed by certain rule-based arrangements that guide them on how to organise within a formal structure and constraints[115] and they function effectively due to simultaneous engagement "in purposive and instrumental logics (maximizing) and in the logic of obligation and justification (norm reasoning)."[116] When conflicts arise, actors in institutions can resolve disputes using norms. This is seen in three ways in that:

> "First, at the level of the single actor, a norm can prevent disputes from arising in the first place, by providing individuals with behavioral guidance, and by structuring choices concerning compliance. Second, once a dispute has erupted, norms may provide the contracting parties with the materials for settling the dispute on their own [...] to the extent that norms furnish the bases for evaluating both the disputed behavior and potential solutions to the conflict. Third, existing rule-systems help third party dispute resolvers do their jobs, by providing templates for determining the nature of the dispute and an appropriate solution."

With the support of TJ actors and practitioners, the NPRC and ZHRC will definitely play a huge role in driving Zimbabwe's TJ processes in a manner that can enable victims and perpetrators of various repressive acts and serious human rights violations to find each other.

2.5.2 UN transitional justice protocols and linkage to Zimbabwe TJ institutions

Out of desire to express the UN's emerging commitment to holistic and context-specific TJ, this section discusses the importance of selected TJ instruments that the NPRC and ZHRC can tap from. This will add to the template-based approaches that the UN once relied on: prosecution, TRCs, vetting of perpetrators and payment of reparations. The UN framework through soft law instruments is important in creating globally reaching TJ obligations. The importance of national institutions that promote TJ is explicitly prioritised under the UN framework on national institutions and the rule of law institutions in TJ. The discussion deals first with the international framework of the UN; The Paris Principles 1993; The Victim Guidelines 2005; Kyiv Declaration 2015 and Merida Declaration 2015.

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[114] Reus-Smit (ed) (2009) "The politics of international law" in Reus-Smit C (ed) *The politics of international law* 30.
[115] Sandholtz and Sweet (2004) "Law, politics and international government" in Reus-Smit C (ed) *The politics of international law* 239.
[116] ibid 245.

The Principles relating to the Status of National Institutions (the Paris Principles)[117] 1993 relating to the status and functioning of national institutions to protect and promote human rights[118] provide the international benchmarks against which national institutions such as the NPRC and NHRIs such as the ZHRC can be globally accredited. These principles emphasise the need for national institutions to have broad constitutional or legislative mandates specifying the sphere of competence.[119] The ZHRC and NPRC are doubtlessly national institutions that were established under the Constitution.

The UN system allows for national institutions to use reparations to compensate victims of atrocities. While reparations have a downside such as lack of a wide consultation process on what victims want; determining the appropriate reparation form in a country; absence of political will and bias towards certain forms; they have an element of completeness on the basis that victims who meet a preferred criterion are compensated.[120] The 'completeness' aspect emphasises the need to ensure that information on violations and victims is available; the participation of victims is guaranteed; the reparation process is publicised; the benefits of the process can be accessed by victims and the evidence threshold through which victims are designated is flexible.[121]

Although international human rights instruments were initially considered silent on reparations[122] since 2004 the increasing use of soft law has made the right to reparation a part of many international human rights protocols[123] increasingly used to protect vulnerable groups such as children.[124]

The UN Secretary-General's Report on the Rule of Law and Transitional Justice in Conflict and Post-conflict Societies[125] provides that "the success of transitional justice depends on the

[117] OHCHR Principles relating to the Status of National Institutions for the Promotion and Protection of Human Rights were adopted by the United Nations Human Rights Commission in 1992, and by the UN General Assembly in Resolution 48/134 of 1993 (The Paris Principles).
[118] The Paris Principles on NHRIs.
[119] TIMEP (2019) "Reparations as a transitional justice mechanism."
[120] ibid.
[121] ibid.
[122] Noriega (2011) "Reparation principles under international law and their possible application by the International Criminal Court: some reflections".
[123] ICTJ (nd) "Transitional justice in post-conflict and fragile settings: progress and challenges for reparations, truth-telling, and children".
[124] ibid.
[125] UN Report on the Rule of Law (2004) para 16..

quantity and quality of public and victim consultations." The Victim Guidelines of 2005[126] are an important soft source of international human rights law. Apart from reparations, the Victim Guidelines are instrumental in explaining the principles of due recognition of victimhood which include procedures of reparations as well as standard and burden of proof in reparations claims; the principle of effective victim participation with the need to inform victims of their role, scope, timing and progress of proceedings; the principle of taking due account of the victim's situation in any given case based on the UDHR Article 2 Principles of non-Discrimination regarding equality and non-discrimination principles on ten grounds.[127]

The totality of increasing TJ development under UN auspices evidences how the UN envisions a victim-centred TJ. The Report on the Rule of Law evidences an increased focus by the UN on questions of transitional justice and the rule of law in conflict and post-conflict societies and underscores critical issues of democratic inclusivity and the diversity of TJ actors.[128] The UN framework can be used to ensure that TJ programmes from the NPRC or NHRIs such as the ZHRC are revived or enhanced and well-coordinated which in turn can create effective peacebuilding frameworks.[129] The Report on the Rule of Law No 10[130] enables the NPRC and ZHRC to work with donors, aid agencies, non-governmental organisations (NGOs), and private foundations in TJ initiatives. Collectively, the NPRC and ZHRC can benefit from the UN framework which contemplates a TJ situation that addresses the root causes of conflict or repressive rule in a manner that ensures the protection of human rights.[131]

The UN concept of TJ recommends that states build consensus at an intergovernmental level on ways to end serious conflicts and repressive acts. The Zimbabwean government is

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[126] UN 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 General Assembly resolution 60/147 of 2005 (The Victim Guidelines).
[127] UDHR Universal Declaration of Human Rights Article 2 Principles of non-Discrimination (1948) prohibits discrimination on the following ten grounds: race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth and other status. See Noriega (n 122).
[128] UN Report on the Rule of Law (n 125).
[129] Guidance Note of the Secretary-General Part A7 https://www.un.org/ruleoflaw/files/TJ_Guidance_Note_March_2010FINAL.pdf (accessed 27 March 2020) 7 (Guidance Note).
[130] UN Report on the Rule of Law (n 125).
[131] UN The Guidance Note (n 129) Part A9.

committed to UN internationalism to prevent conflicts and serious human rights violations on consensus-driven and contextualised rewarding terms.[132]

The Guidance Note[133] explicitly prioritises the importance of national institutions and rule of law institutions. It defines TJ as "the full range of processes and mechanisms associated with a society's attempt to come to terms with a legacy of large-scale past abuses, to ensure accountability, serve justice and achieve reconciliation."

The Guidance Note[134] has principles which include but are not limited to:[135] support of international norms when designing transitional mechanisms; consideration of political context when implementing TJ; inclusion of rights for women; child-sensitivity; ensuring the certainty of justice for victims; consideration of broader rule law initiatives; encouragement of comprehensiveness and taking account of the root causes of conflict and engagement in effective partnerships.

The importance of the UN soft laws, apart from their creation of global recommendations, is an approach which accords leeway for states to choose those mechanisms relevant to their national circumstances. The emphasis on contextualised mechanisms allows focusing on the constitutional imperatives without satisfying all the standards of international law. The work of the NPRC and ZHRC can be aligned to the aspirations of the Guidance Note with a great deal of flexibility as it does not operate through top-down obligations.

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[132] I envision a situation of adoption of UN-driven initiatives and protocols which have a foundation based on the circumstances obtaining within individual member states or endemic in specific geopolitical regions. The task of the theory builder is to simplify the concerns identified under UN auspices for contextualisation of national circumstances.

[133] UN The Guidance Note of the Secretary-General United Nations Approach to Transitional Justice 2010 (The Guidance Note).

[134] UN Guidance Note 1. See also UN The Paris Principles; the UN Promotion and Protection of Human Rights: A Study on the Right to Truth; and UN Analytical Study on Human Rights and Transitional Justice. Annan noted that the judicial and non-judicial TJ mechanisms have different levels of international involvement (or none at all); see OHCHR Rule of Law: Transitional Justice http://www.ohchr.org/EN/Issues/RuleOfLaw/Pages/TransitionalJustice.aspx (accessed January 17 2019) para 8. Local perspectives studied as bottom-up processes focus on direct experiences and the urgent need for local action; see ICTJ Programme. Important TJ offices include the UN Peacekeeping operations; Office of the High Commissioner for Human Rights (OHCHR); UN General Assembly Joint Study of the Special Rapporteur on the Promotion of Truth, Justice Reparation and Guarantees of non-Recurrence; UN High Commissioner for Refugees; UNICEF Research-Innocenti on Children and Transitional Justice; and UN Women Towards an era of Transformative Justice. There are also UN conferences; UN International Day of Truth concerning Gross Human Rights Violations and the Dignity of Victims and extensive UN documentation on peacekeeping.

[135] UN Guidance Note (n 134) 1.

The Guidance Note allows national institutions to incorporate international law or international norms as the most widespread standard for states. It contemplates a situation where the Universal Declaration of Human Rights (UDHR), along with the four key pillars of the international legal system: international human rights law, international humanitarian law, international criminal law, and international refugee law promotes the rights and duties relative to the right to justice.[136] The UN's focus on restoration of the rule of law to a conflict-ravaged country is relevant as it allows Zimbabwe to commit to various branches of international law.

The second guideline emphasises that TJ mechanisms should be context-dependent on the political dynamics of the state concerned.[137] The contextualisation of national circumstances is important for Zimbabwe which has a Constitution that was adopted by an overwhelming majority.

The third guideline speaks to the need for certainty in dealing with victims who suffer injustice; urges states to consider the interests and inclusion of victims in transitional processes[138] and permits argument on victims' access to reparations. The other guidelines are also relevant for the NPRC which is directly seized with post-conflict justice issues and the ZHRC which can use its anticipated mandates as part of NHRIs.

The Kyiv Declaration on the Role of National Human Rights Institutions in Conflict and Post-Conflict Situations Declaration 2015[139] is part of soft sources of international law and includes affirmations on the role of NHRIs and the following main aspects relating to TJ:

- all human rights are universal, indivisible, interrelated, interdependent and mutually reinforcing and must be treated fairly and equally; and human rights, development, peace, and security are interrelated and mutually reinforcing;
- recognition of the Paris Principles as international standards guiding the work and status of NHRIs for the promotion and protection of human rights;

[136] ibid.
[137] ibid 8.
[138] ibid 18. This links to NPRC current dialogues aimed at gathering public views on key issues for consideration.
[139] The Kyiv Declaration on the Role of National Human Rights Institutions in Conflict and Post-Conflict Situations Declaration 2015 (The Kyiv Declaration) 2-3. International representatives of NHRIs convened in Kyiv in October 2015 on the Role of National Human Rights Institutions in Conflict and Post-Conflict Situations.

- recognition of the major role played by NHRIs in addressing human rights violations; disseminating information and providing education on human rights including for armed forces and law enforcement agencies, and monitoring compliance with standards of international human rights and humanitarian law;
- recognition of the collaboration between NHRIs and civil society to address issues related to conflict and its consequences;
- reiteration of the Merida Declaration on the role of NHRIs in implementing the 2030 Agenda for Sustainable Development; the promotion of peaceful and inclusive societies with access to justice for all and the establishment of effective, accountable and inclusive institutions at all levels;
- acknowledgement of the particular challenges encountered during conflict periods when political, judicial and other systems often fail to settle disputes;
- the requirement to show how normal human rights mandates are distinguished from operations in conflict and post-conflict situations;
- acknowledgement that NHRIs may be subject to criticism by state authorities for advising on the state's human rights actions and obligations in compliance with international and regional standards;
- the need to strengthen regional and international cooperation between NHRIs;
- the obligation of NHRIs to cooperate with civil society to:
    - identify early signs of possible conflict and take steps for prevention;
    - monitor and report the human rights situation under international, regional and national human rights standards through impartial objective documenting and impartial response to violations regardless of the political affiliation of the perpetrator;
    - take measures to prevent human rights violations, including against the most vulnerable, marginalised and minorities groups;
    - conduct systematic communications with authorities and promote dialogue between and with conflicting parties;
    - establish a close partnership with CSOs, engage with relevant state institutions and establish communication on behalf of the conflicting parties whilst ensuring that human rights are at the center of negotiations, including in peace agreements and monitor their implementation;

- advocate for the promotion, protection, and respect of the rights of refugees and internally displaced persons as a consequence of conflict,
- take measures to overcome the consequences of societal conflict; address past human rights violations that occurred in the context of conflict; combat impunity; promote TJ processes; facilitate access to justice including through effective investigations and reparations; promote peace, reconciliation and social cohesion;
- involve international organisations to ensure human rights protection in a conflict area; and
- Support the development of equality and human rights, including economic and social rights.

The ZHRC can align its anticipated mandates to the Kyiv Declaration so that its TJ role becomes one stimulated by its status as a NHRI. From the perspective of TJ and human rights, instruments such as the Merida Declaration also affirm the dignity, equality, and inalienable rights of all human beings and the universality, indivisibility, interdependence, and inter-relatedness of all human rights, as expressed in the UDHR.[140] This declaration may be added to the corpus of creative instruments that can be used to explain the nexus between human rights and TJ in Zimbabwe. It becomes very important therefore for the NPRC, ZHRC and TJ actors to align their work in terms of the UN framework on TJ. That will ensure that TJ practitioners who engage with the NPRC and ZHRC have a good idea of the expected roles of national TJ institutions into which they could offer assistance or ask for institutional feedbacks. At the end of the day, the efficiency of the NPRC and ZHRC will not rub onto the expected mandates that are not associated with national institutions supporting democracy.

2.6 UN approach to transitional justice v transformative justice

This section relates to the role of the UN as an intergovernmental organisation that seeks to end systemic and endemic structural injustices across the world. The UN's transformative approach to TJ allows critics and practitioners to take TJ seriously and stop treating it as a pastime. This allows practitioners to look beyond the obvious challenges posed by transitions and commit to enable states, state institutions, actors, victims and perpetrators to catch up with the various TJ processes that emancipate and empower them before, during and after

[140] The Merida Declaration 2015 1 A/RES/68/171 2 A/HRC/RES/27/18.

transitions. The UN assists societies affected by conflict or dealing with a repressive rule to re-commit to the rule of law and strives to address large-scale human rights violations.[141] The focus is on a comprehensive approach to addressing the root causes of conflicts and violations of all generations of rights.[142] The UN approach is transformative because it treats TJ holistically to include processes and mechanisms that enable a society to address large scale human rights abuses in ways that promote accountability, justice, and reconciliation.[143] This approach shows that whereas national or regional level can be preferred, they should be transformed into a continuation strategy.[144]

Briefly, the UN's approach envisages TJ that can transform societies using the four key pillars of the international legal system through criminal prosecutions, TCs, reparations, and institutional reform.[145] This approach is important to ensure that state and organisations benefit in their work with marginalised societies.[146] It has been suggested the UN focus more on community-level participation and not the manipulated and often flawed TRC processes to deliver social transformation.[147]

Although the UN instruments are foundational to this thesis, the discussion outlined here also emphasises that study should focus on a concept of justice that is more transformative than just transitional.[148] Broadly, transformative justice is descriptive of any transitional approach which leads to institutional transformation as well as the transformation of the person involved in conflicts. It focuses on changing the *status quo* on institutional or individual violence. Transformative justice could, therefore, have spatial and temporal application − including during political transition and instances where there is a need to create platforms for transformative change.[149] Transformative justice remains inadequately theorised or

[141] UN Rule of Law Unit (n 12) 1.
[142] ibid.
[143] UN Report on the Rule of Law (n 125).
[144]Pocar ""Address on the dialogue with member states on rule of law at the international level'" 4.
[145] The Victim Guidelines art 18-21.
[146] Lambourne (2014) "Transformative justice, reconciliation and peace-building" in Buckley-Zistel S *et al* (eds) *Transitional justice theories*.
[147] Lambourne (2014) "What are the pillars of transitional justice? The United Nations, civil society and the justice cascade in Burundi" *Macquarie Law Journal* 41.
[148] Gready and Robins (2014) "From transitional to transformative justice: a new agenda for practice" in Gready P *et al Transformative justice: a concept note Int J Transit Justice* 339.
[149] ibid.

properly linked to policy and practice.[150] The major motive of moving from transitional to transformative justice is the requirement to deal with structural and everyday violence.

Structural violence is endemic in social institutions where certain social groups are oppressed through abject poverty or marginalisation of communities creates severe inequalities between classes in society.[151] For instance, the UN Women strive to achieve justice which transforms individual experiences of women, including the underlying inequalities which make women and girls vulnerable during times of conflict and which create women's lived realities.[152]

Everyday violence describes more tangible and direct violence normally blamed on an individual.[153] Transformative justice's focus has been the promotion of social transformation. Gready and Robins detail five impediments to a structural transformation that may re-ignite conflict and spread insecurity over national borders such as poverty and inequality; resource exploitation and environmental degradation; political, social, and/or criminal violence; state and institutional fragility; and social marginalisation of women and children.[154]

Gready and Robins deal with two dimensions of transformative justice as globalisation and non-governmental actors. Globalisation influences how ideas travel.[155] Transformative justice has been studied using the 'boomerang pattern' and 'spiral model' on transnational advocacy which links the local and global to NGOs, supportive states, and international institutions that encourage states to stop human rights violations.[156] Civil society actors can prioritise collaboration and capacity building, and exploit legal and political opportunities in a new dispensation or monitor and lobby states.[157]

Fundamental to the UN approach is that the real TRJ challenges lie in the practical sphere of its implementation.[158] The challenges, including the address of massive human rights abuses committed during armed conflicts or by repressive regimes, deplete resources, create

[150] ibid.
[151] ibid.
[152] UN Women "Towards an era of Transformative Justice" (2015).
[153] Gready (n 150).
[154] ibid.
[155] ibid.
[156] ibid.
[157] ibid.
[158] Pillay (2009) "Address to the UN on dialogue with member states on the rule of law and the international level organized by the Rule of Law Unit".

complex demands, and cause an institutional breakdown.[159] Issues include the need to specifically target areas such as gender-transformation to include psychosocial, socioeconomic, and political power relations in a society.[160] Deliberate links between development and reparations to promote sustainable outcomes for female victims during conflicts[161] can be created.

The UN is transformative in its departure from the traditional TJ perspective which applied a one-size-fits-all solution to redress violations committed during conflicts or authoritarian regimes.[162] The traditional view has been criticised for a top-down approach to activities run by governments, international and national bodies that normally exclude victims.[163] The transformative agenda goes beyond truth, reparation, and prosecutions in its requirement that participants must be the subject and not object of their rights and must be engaged in the design and implementation of the chosen TJ process.[164] This approach is also transformative because it deals with long-term sustainable processes to deal with serious human rights violations.[165]

The UN Report on the Rule of Law[166] supports a human rights-based approach to the elimination of wars through the reconstitution of a society built on respect for the rule of law that takes the dignity of its citizens' security seriously.[167] This approach emphasises five forms of reparations which include restitution or restoration of a victim's rights, property or citizen status; rehabilitation through psychological and physical support; compensation; satisfaction through guilty admissions, apologies, burials or building memorials; and guarantees of non-repetition through reform of laws as well as reform of civil and political structures.[168] Reparations are transformative through the UN's emphasis on the need to ensure that they are material and symbolic; collective and individualised; immediate and ongoing;

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[159] ibid.
[160] Lambourne (n 149) 41.
[161] UNDP and UN Women https://www.un.org/ruleoflaw/files/Kampala%20workshop%202011-%20Reparations,%20Development%20and%20Gender.pdf (accessed 11 March 2020) 1.
[162] de Silva (2018) From transition to transformation: a new approach to post conflict justice .
[163] ibid.
[164] ibid.
[165] ibid.
[166] UN Report on the Rule of Law discussed under section 2.3.2.4; see UN Rule of Law Unit para 8.
[167] Pillay (n 160) 7.
[168] UNDP and UN Women http://www.un.org/ruleoflaw/files/Kampala%20workshop%202011-%20Reparations,%20Development%20and%20Gender.pdf (accessed 11 March 2020)1.

and involve pecuniary measures, as well as ensuring access to essential services.[169] The transformative agenda also focuses on the need to develop a 'conflict-sensitive' approach or what the UNDP calls 'crisis prevention and recovery' approach which focuses on livelihoods and economic recovery such as providing microloans or reintegrating victims; governance and the rule of law, and conflict prevention and recovery.[170]

2.7 AU Transitional Justice Framework and Policy

This section shows that beyond Africa's peer review system, it has also creatively regionalised a context-specific and holistic TJ from a normative standpoint. Essentially, the AU Transitional Justice Framework (AU TJF) was conceived within the wider perspective of the African Union Transitional Justice Policy (AU TJP) as continental guidelines for the AU Member States to develop their context-specific comprehensive policies as normative frameworks. Africa has institutions to handle resolution on issues attendant on clashes which have emerged from legacies of violence and conflict.[171] The AU TJF, adopted in 2019, embraces didactic experiences from various African forums in presenting a set of widespread concepts and principles to serve as reference points to reinforce peace pacts and TJ institutions.[172] Specific custom-made measures applicable to the particular issue include truth-seeking; justice and prosecutions; measures to prosecute international crimes; regional and hybrid courts and special chambers; amnesty, pardons, plea bargains and mitigation of punishment; reparation; definition of a "victim;" official acknowledgment and apology; memorialisation; guarantee of non-recurrence including institutional reform; vetting; gender justice and expansion of the mandate of transitional bodies to include a focus on socio-economic and cultural rights.[173]

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[169] ibid.
[170] Ibid 5.
[171] AU Transitional Justice Framework http://www.legal-tools.org/doc/bcdc97/pdf/(accessed 5 September 2019). See also the AU Transitional Justice Policy http://www.au.int/sites/default/files/documents/36541-doc-au_Transitional Justice_policy_eng_web.pdf (accessed 5 May 2019).
[172] NTJWG "Research and discussion paper" on the development of a TJ framework for Zimbabwe. It was adopted as a continental guideline aimed at achieving sustainable peace reconciliation and social cohesion. See AU adopts TJ policy http://www.au.int/en/pressreleases/20190212/african-union-adopts-transitional-justice-policy (accessed 29 June 2019). See also ACHPR Study on Transitional Justice and Human Rights 17.
[173] NTJWG "Research and discussion paper". See ACHPR Study on Transitional Justice and Human and Peoples' Rights in Africa (2019) 15. (Study on Transitional Justice and Human Rights)

The AU TJP was adopted in 2019. It is aimed at building an integrated, prosperous, and peaceful Africa. The AU TJP considers that TJ is crucial for the promotion of human rights and justice, peace and security, good governance, and development.[174] The AU Policy on Post-conflict and Development (AU PPD)[175] crowns Africa's efforts to address reconciliation in the aftermath of violence and mass atrocities. It recognises that African history is characterised by different political upheavals, struggles for liberation, and socio-economic transformations.[176] It appreciates that the different experiences brought different TJ initiatives such as national dialogue, national truth and reconciliation commissions (TRCs), and national reparations funds.[177] The AU TJP builds on regional research.[178]

Besides the AU TJF, the African Commission's (ACHPR) Study on Transitional Justice (ACHPR STJ) also appreciates the historical evolution of TJ in the 1990s as a core tenet of processes to deal with the consequences of conflict and authoritarian rule.[179] It is a concrete regional charter-based approach that explains how the African Charter guarantees the rights embossed in TJ processes.[180]

Essentially, the ACHPR STJ is four-pronged: First, it examines the nexus between the AU and UN approaches to TJ. Secondly, it identifies normative issues that serve as an antidote to African regional conflict. It does this by posting an argument to buttress the merits of regionally contextualised or localised TJ in curbing regional-specific conflicts or factors that cause conflicts. Third, it essentialises the need for a holistic regional TJ framework that draws from, and also shapes, global and country-specific approaches to TJ. This is considered important because TJ is a travelling norm and various Arabic, Lusophone, Anglophone, and Francophone countries can be motivated to uphold a common regional framework. Fourthly, the think-piece proffers a nuanced exploration of the institutional norms at the AU level as

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[174] Mahamat (2019) *Preface* AU TJP iv.
[175] The AU Policy on Post-conflict and Development 2006 (AU PPD).
[176] Samate-Cessouma (2019) *Preface* AUTJP vi.
[177] ibid.
[178] Panel of the Wise African Union "Transitional Justice Policy Framework: Expert's consultation report" (2012); Security Council's report on 'Non-impunity, truth, peace, justice, and reconciliation in Africa: opportunities and constraints' which was adopted by the Panel of the Wise African Union Ethiopia in 2011; and African Commission's Study on Transitional Justice (ACHPR STJ) 2018. From an institutional perspective, the African Commission monitors compliance by state parties with the ACHPR in terms of their Rules of Procedure and terms of Reporting Guidelines for State Reports. Heyns 2001 *The African regional human rights system: in need of reform? African Human Rights Journal* 155.
[179] Dersso (2019) *Preface* AUTJP iii.
[180] ibid.

part of a critical but less-explored area of AU's innovative strategies to curbing regional conflicts and threats to constitutional changes of government.

The 'antidote' status of both the AU TJP and the ACHPR STJ lies largely in the normative emphasis on TJ in Africa. This provides an attraction for TJ practitioners since it allows them to engage with state functionaries using normative guidelines. This may allow for states to also provide detailed feedbacks outside policy circles on how states are committing to the realisation of TJ within their countries. Given that the regionalised TJ framework affects Zimbabwe as an African country, the antidote status of the AU's TJ framework could be realised if the AU TJP is treated as a continental policy on TJ that aims to guide African member states emerging from conflicts or authoritarian rule in their quest to transition to peace and democratic order.[181] The framework also benefits from soft laws.[182] Further, Zimbabwe needs to accept the soft law status of the ACHPR STJ which analyses the role of the African human rights system in promoting comprehensive, context-specific, and transformative approaches to TJ which are informed by African experiences.[183] The ACHPR STJ can also inform TJ processes in Zimbabwe since it also benefits from a wide consultative process that involves external players, AU member states, and bodies through various methods such as state-reporting procedures, promotion missions, and on-site investigations as well as special mechanisms within the Commission such as special rapporteurs and working groups.[184] If an argument is raised that human rights violations in Africa constitute a problem of immense magnitude,[185] the TJ emphasis of the ACHPR STJ and AU TJP can be key in redressing the problems of serious human rights violations.

In terms of coherence and alignment with the UN framework, it is argued here that the AU TJP augurs well with the UN four key pillars through an emphasis on the retributive (prosecution) and restorative (reparations and truth-telling) TJ elements.[186] The diversity of African geopolitical factors is also emphasised and variations in political upheavals,

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[181] ACHPR STJ (2019) *Executive summary* (2019) vi.
[182] ibid: Resolution 235 which called for a study on TJ legislation in Africa and the African Commission's role in implementing the AU TJP and related work.
[183] ibid.
[184] ibid vi-vii.
[185] Heyns (2001) "The African regional human rights system: in need of reform?" *African Human Rights Law Journal* 156.
[186] AU Transitional Justice Framework http://www.legal-tools.org/doc/bcdc97/pdf/ (accessed 5 September 2019) Part B2 iv.

liberation wars, and different levels of socio-economic development are recognised.[187] The policy appreciates the importance of benefits of traditional institutions but also celebrates the need for other initiatives including national dialogue[188] which is relevant to Zimbabwe where the Constitution is the product of a referendum.

Other important principles included in the AU TJP include conflict resolution and violations as well as government deficits and development challenges that follow the regional Agenda 2063;[189] the need to prioritise peaceful resolution of disputes; the need for post-conflict resolution and development in areas such as Darfur and an ambitious goal to end wars before 2020.[190]

The framework demonstrates that African states are gradually coalescing to find regionalised ways to end impunity, compliance, and complicity in human rights abuses through designing collective TJ policies.

The major starting point to vitalise the AU TJF under the auspices of the NPRC and ZHRC, or other national institutions across Africa, would be to essentialise the unique conflicts that African countries experienced in the past; whether slight, moderate, or protracted. These range from coup d'états, commercialised warfare; proxy wars; ethnic conflicts; civil wars; interstate wars; genocides, use of pandemics to shirk human rights obligations, and terror attacks. A regional normative framework thus becomes crucial as it enjoins African countries and their people to commit to arresting regional instability, sub-regional differences, and country-specific conflicts that threaten the continental fabric through serious human rights violations.

The extent to which the gains of an Africanised TJ framework can be rejected or shunned by individual states appears small even when sub-regions are divided into Lusophone, Francophone, and Anglophone sub-regions which have variegated forms of conflict. This is because the Charter does not allow for derogations from human rights even in crises. The AU TJF offers African states the potential to learn from peer experiences. The AU singles out examples of transitional experiences in African countries that include South Africa, DRC,

[187] ibid Part B2 vi. See also ACHPR Study on Transitional Justice and Human Rights 29-31.
[188] AU Transitional Justice Framework ibid Part B2 vi.
[189] Agenda 2063 "The Africa We Want."
[190] AU Transitional Justice Policy (n 188).

Burundi, Rwanda, Kenya, Uganda, Sierra Leone, Liberia, Ghana, Ivory Coast, Togo, Tunisia, Libya, and Egypt.[191] The AU TJF focuses on the need to entrench the rule of law in TJ processes.[192] This is significant for Zimbabwe where the concern is that the independent commissions supporting democracy must be practically independent of state interference.

African states must follow the AU TJF as institutional members although it is soft law. The AU TJF is an important tool for use under the African Peer Review Mechanism[193] to encourage respect for human rights and to adopt mechanisms that enable victims to get reparations and deal with a difficult past. The AU TJF appreciates that no TJ model is easily transferable between countries[194] as each country has a particular situation that should be addressed locally albeit through regionalised standards. The AU TJF allows a flexible normative approach that seeks to promote local ownership and extensive public consultations between actors.[195] At a local level, the ZHRC and NPRC can utilise the AU TJF to expand their mandates to the effective protection of economic, social, and cultural rights.

The AU acknowledges the scourge of conflicts in Africa and is predicated on peace, security, human rights, good governance, and the need to promote regional development.[196] The emphasis on an inclusive future is forward-looking and in line with the UN approach.[197] While sharing African values, the AU TJF promotes the need for accountability, victim-focus, and reconciliation at all levels of society. Structural program development addresses inequality and encourages ties across group boundaries; human rights for all and promotion of truth recovery processes through TCs and public trials to satisfy appeals for justice; promotion of education programs which reinforce equality and dignity; establishment of social institutions and events that bring members of different groups together; offers of forgiveness and provision of mediation and trauma counselling.[198]

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[191] ibid.
[192] AU Transitional Justice Framework (n 188) Part B2.
[193] The African Peer Review Mechanism is a specialised Agency of the AU established in 2003.
[194] NTJWG (2019) "Research and discussion paper".
[195] AU Transitional Justice Framework (n 188). Zimbabwe signed the APR, Fabricius (2020), Zimbabwe, signs on to African Peer Review Mechanism, www.dailymaverick.co.za/article/2020-02-10-zimbabwe-signs-on-to-african-peer-review-mechanism/, accesed 16 November 2020.
[196] ibid Part B2.
[197] ibid.
[198] ibid 27.

The ZHRC and NPRC can benefit from internalising the AU TJF which complements the UN international protocols to appreciate that TJ is an extensive arena aimed at promoting an end to impunity for human rights violations and from the AU's reliance on the trade-off between institutions and extensive public consultations.[199] The TJ regionalisation is seen as crucial in that it gives victims of conflicts and serious violations of human rights the boldness to believe that African states will, through regional cooperation and integration, collectively commit to a charter-based approach to TJ. As such, this think-piece sees the AU Transitional Framework and the ACHPR Study on Transitional Justice as a clarion call for the African States to adopt the framework into their national TJ laws and policies. That will ensure that Zimbabwe and other African states can use the regionalised peer review mechanism to essentialise TJ. This is especially given the fact that the development of the AU and African Commission normative frameworks is not a product of perchance. They reflect a geopolitical response to dealing with past and ongoing conflicts. They also reflect an inevitable fact that the countries that were cited in the frameworks have made huge strides in their TJ journeys. The states and state functionaries who led to the development of a regionalised framework should support the frameworks by equipping institutions such as the NPRC and ZHRC to fully adhere to the regional TJ framework.

2.8 National framework on transitional justice

The national framework is guided by the Constitution which will be discussed before outlining the enabling Acts that operationalised the ZHRC and NPRC. There are TJ institutions that have also been established in terms of national laws and have been part of Zimbabwe's TJ journey who have stabilised the normative framework. Their work is thus discussed briefly as part of the normative gains on TJ in Zimbabwe, albeit the fact that the CSOs run a disjointed TJ vision that is also yet to be aligned with the UN and AU frameworks.

2.8.1 Zimbabwe Constitution 2013 and transitional justice

Whilst Zimbabwe currently does not have a coherent or nationally coordinated TJ policy there are constitutional provisions that speak to post-conflict justice. Discussion of the constitutional provisions is linked to the view that constitutional processes are intricately woven into the matrices of TJ which are influenced by evolving norms in international law,

[199] ibid.

even if they are yet to be implemented domestically.[200] In Zimbabwe, the Lancaster House Agreement 1979 did not expressly refer to post-conflict justice although it was a transitional document or ceasefire charter intended to end colonialism under the UK. The 2013 Constitution was a product of the transition from political violence to a negotiated peace process which started with the GNU in 2009 and ended in 2013. The Constitution is seen as the foundation for TJ since it is based on the power configuration that gave rise to it.[201]

The Constitution creates independent commissions to support human rights; protect the sovereignty and interests of the people; ensure transparency and accountability in public institutions; secure the observance of democratic values and principles by the state and all institutions and agencies of government and government-controlled entities; and ensure that injustices are remedied.[202] TJ mechanisms are seen as part of the major policy innovations to reduce human rights violations and strengthen democracy.[203] The reference to popular sovereignty in the work of the NPRC and ZHRC engenders active participation by society in working towards sustainable peace[204] through the constitutional guarantee to claim social and economic justice.

The need to achieve justice is linked to the need for victims to achieve the following:

> "Victims of atrocities, socio-economic grievances, and a range of human rights violations begin to seek and to expect some form of justice—whether it is accountability through criminal trials, compensation, and reparations, or truth commissions (in the case of Zimbabwe the NPRC and ZHRC can also investigate aspects that relate to truth-telling). The grand objectives of peace, justice, reconciliation, and institutional reform are often promoted as the ideal transitional justice package."[205]

A Constitution becomes the primary source of law that protects rights which are protected by CSOs or the active citizenry. CSOs and other institutions work as oversight bodies to approach courts of law and other human rights forums through initiatives such as civil society

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[200] Mendez (2012) "Constitutionalism and transitional justice" in Rosenfield M and Sajo A (eds) *Oxford Handbook of Comparative Law*.
[201] Bell (2009) "The new law of transitional justice" 10.

[202] Constitution s 233 (a)-(f).
[203] Olsen, Payne and Reiter (2010) "The justice balance: when transitional justice improves human rights and democracy" *Hum Rts Q* 980.
[204] Lundy and McGovern (2008) "Whose justice? Rethinking transitional justice from the bottom up" *J Law Soc* 265.
[205] Aboueldahab http://www.brookings.edu/research/transitional-justice-policy-in-authoritarian-contexts-the-case-of-egypt/ (accessed 22 November 2019).

reports to the Universal Periodic Review (UPR) mechanism or the ACHPR. For instance, in utilising national courts in Zimbabwe, Allison Charles, a relative of Gavin Dean Charles shot and killed during the 1 August 2018 events, approached the High Court together with the Counselling Services Unit (CSU) to challenge the legality of the commission of inquiry set up by President Mnangagwa and claiming that the NPRC and ZHRC were supposed to conduct the investigations.[206] The court challenge, although subsequently dismissed, raised important issues linking the NPRC and ZHRC as significant TJ mechanisms and the need for a commission of inquiry to assist victims to know their perpetrators and the course of action to be taken. The case dealt with critical issues such as:

> "Seeking the commission to inquire on who deployed the military on the streets and residential areas, what was the legal basis for deployment and the nature of assignment to be accomplished, who were the individual perpetrators and to what extent were their conduct in line with the laws of the country and United Nations guiding principles as well as identifying the chain of command among other issues."[207]

The deployment of soldiers raised the need for clarification as those on the lower chain of command may not be subject to criminal prosecution.[208] Sadly, the President of the Republic was not called to give evidence on who deployed the soldiers since he was the appointing authority. The court challenge also invoked the need for the many arms of the state to be accountable with citations against the President, security institutions of the Zimbabwe Republic Police (ZRP), Zimbabwe Defence Forces (ZDF); Ministries of Defence, Home Affairs and Justice; Commissioner General ZRP; Commander of the Defence Forces and the Attorney General. All these institutions are obligated to respect the Constitution.[209]

The High Court allowed victims or their relatives to participate in the activities of the commission of inquiry. Although the application was found wanting in meeting the urgent application requirements, the court allowed the withdrawal of the urgent application and proceeded to hear the matter.[210] The judgment gives agencies recourse to convince the courts why certain courses of TJ action must be followed. For instance, in finding that the

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[206] *Kubatana* "High court dismisses shooting victim's challenge of Mnangagwa's commission of inquiry" http://www.kubatana.net/2018/11/09/high-court-dismisses-shooting-victims-challenge-mnangagwas-commission-inquiry/ (accessed 22 November 2019).
[207] Kamhungira "ED's commission of inquiry faces fresh court challenge" 6 October 2018 *Daily News.*
[208] Erazo (ed) http://www.scielo.org.co/pdf/dere/n46/0121-8697-dere-46-00001.pdf (accessed 22 November 2019).
[209] See Constitution s 8 and s 44 on duties of the state and s 208 on duties of security institutions.
[210] "Full high court judgment on challenge to presidential appointment of commission of inquiry" http://www.allafrica.com/stories/2018/11/120554.html (accessed 22 November 2019): HC 8436/18.

composition of the commission of inquiry and the terms of reference of the commissioners were proper, the High Court also noted that:

> "The commission [of inquiry] is legally in place. The conduct of the authority which constituted it is above reproach. The commissioners whom the applicants seek to impugn cannot be impugned. [...] The applicants' case stands on nothing. It was a very good academic exercise that resulted from their legal practitioners' ineptitude. It is devoid of merit. It is, accordingly, dismissed with costs."[211]

Whether or not Mangota J was correct in his interpretation of the law may be subject to debate. However, the judge's bald remarks about the ineptitude of the applicants' lawyers may not have been warranted, as this case has significant bearing for TJ and access to post-conflict justice. There was nothing amiss in exercising judicial discretion to dismiss the case but there was also a need for the judge as the court and case manager to demonstrate that justice sector institutions such as courts of law must at all cost strive to provide the broadest and most equitable access to legal remedies.[212] In the absence of evidence to demonstrate the ineptitude of the lawyers, the judge's language may risk making access to justice a mirage in that his remarks fall foul of the need to use bottom-up approaches to support the claims of ordinary justice-seekers and marginalised communities.[213]

In approaching regional institutions, the ACHPR has been used to recommend that the Zimbabwe government respect freedom of expression and assembly and does not arbitrarily torture private citizens or shut down internet and that:

> "The government of Zimbabwe should urgently investigate actions of the perpetrators of individuals who have been subjected to acts of abductions, reprisals, threats or intimidation, and to ensure that such attacks no longer take place. We also urge the government to ratify the Convention against Torture and other Cruel, Inhuman and Degrading Treatment and the International Convention for the Protection of All Persons from Enforced Disappearance."[214]

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[211] ibid.
[212] Williams (2018) "Judges as peacebuilders: how justice sector reform can support prevention in transitional settings"".
[213] ibid.
[214] Southern African Litigation Centre http://www.southernafricalitigationcentre.org/2019/10/15/salc-shadow-report-zimbabwes-combined-11th-15th-periodic-report-65th-ordinary-session-oct-nov-2019/ (accessed 22 November 2019).

The instruments cited above allow the NPRC and ZHRC to focus on the TJ nexus through the emphasis on the need for a constitutional culture to prevail.[215] This is captured in the argument that:

> "When discussing the distinct constitutional and legal approaches of transitional justice, it is important to find out how much pre-existing constitutional culture the particular forms require, and whether certain approaches are better to help to develop this culture [as] more effective tools of reconciliation of formerly authoritarian societies and consolidation of constitutional democracy."[216]

In using the provisions on transparency and accountability in public institutions there is a need to link the founding values to constitutional principles of good governance.[217] This is fundamental in conflict societies and provokes an exploration of whether TJ spoils or promotes the establishment of the rule of law in society.[218] Rule of law and governance measures produce mixed records regarding their effects for short or long-term peace.[219] Good governance can reconcile areas including capacity and consultations; truth-telling; office of missing persons; reparations or victims compensation; accountability mechanisms and prevention and non-recurrence through independent institutions, decentralisation, and devolution. Rule of law involves women and youth in peacebuilding; constitutional, legislative, and public administration reforms; strengthening civil society and security sector reform.[220]

While the Constitution promotes both vertical (state to citizens) and horizontal (citizen to citizen or state institution to state institution) accountability, TJ actors can also prioritise the need to seriously take the victims' perceptions of accountability into the TJ discourse with the NPRC and ZHRC. In a study on Uganda, the finding by the Office of the High Commissioner for Human Rights (OHCHR) showed that accountability must focus on the victims who normally participate in conflict resolution and accountability programs. The OHCHR notes that:

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[215] Halmai (n 99).
[216] ibid.
[217] Constitution s 3 (2) (g) lists accountability, transparency, responsiveness and justice as part of the principles of good governance.
[218] European Consortium for Political Research http://www.ecpr.eu/Events/SectionDetails.aspx?SectionID=428&EventID=94 (accessed 22 November 2019).
[219] Sriram 2017 "Beyond transitional justice: peace, governance and the rule of law" *Int Stud Rev* 53.
[220] UN http://www.lk.one.un.org/wp-content/uploads/2017/01/PPP-16.12.16-1.pdf (accessed 22 November 2019).

> "Many discussions have become disconnected from the perspectives and needs of the people most affected by the conflict, who are also likely to be key actors in any future accountability and reconciliation processes – and whose acceptance of any peace agreement is central to the sustainability of peace. This study aims to amplify victims' voices and to interpret the social, cultural, and political significance of popular perceptions."[221]

In the context of Zimbabwe where citizens have sometimes been accused of destructive violence during mass protests; are seen acting as 'dissidents' leading to the targeting of civilians; or are accused of committing election-related violence such as during 1 August 2018, citizen accountability also becomes important in both the constitutional and lexical perspective and it becomes necessary to distinguish between accountability and responsibility. Relating to Uganda,[222] an OHCHR study noted how victims clearly distinguished between accountability and responsibility by showing that:

> "Most respondents emphasised that not all those responsible for causing harm should be brought to account [and] the notion of responsibility was not understood by respondents to mean liability in any legal sense. Rather, responsibility was attributed to those actors whom respondents felt [were] to blame for having caused the harms. [...] The majority of respondents identified both LRA and Government leaders as responsible for harms caused and accountable for their actions."[223]

Stakeholders must invest more in understanding what victims want so that CSO participation is not regarded as part of an imposed system that ignores the needs of the actual victims. The lexical considerations of accountability may even be extended to design ways to ensure that translations of the victims to the NPRC and ZHRC are protected.[224]

The pillar of transparency in public institutions hinges on the insight that transparency is a fundamental aspect of justice and a cornerstone of the rule of law which allows for public legitimation of the decisions and actions of both the judiciary and the authorities.[225] Transparency in public institutions is essential to ascertain that the cancerous worm of corruption is not used to perpetuate social and economic injustices because:

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[221] OHCHR (2007) Making Peace Our Own 1.
[222] With reference to Uganda's policy 2019.
[223] OHCHR (n 223) 21.
[224] Sixteen languages are recognised by the constitution s 6: including Chewa, Chibarwe, English, Kalanga, Koisan, Nambya, Ndau, Ndebele, Shangani, Shona, sign language, Sotho, Tonga, Tswana, Venda and Xhosa. The ZHRC and NHRC needs to ensure that all these major languages are used to drive the healing and reconciliation processes across various provinces in which the languages are spoken. This would also entrench the protection, promotion, respect and fulfilment of human rights as contemplated by Constitution, s 44.
[225] Brants and Karstedt (2017) *Transitional justice and the public sphere: engagement, legitimacy and contestation* 1.

> "The culture of corruption, greed, and self-aggrandizement must be eradicated in public institutions [for the realisation of] the hope of transition to a more democratic and prosperous nation. Any transitional process or mechanism that does not uphold the values of transparency, accountability, and integrity is bound to fail from the start. Corruption is the antithesis of development and therefore as Zimbabwe steps into an era of transition, TI-Z calls upon all stakeholders to step up the campaign for 'zero tolerance on corruption."[226]

The ZHRC has used its mandate to denounce corruption, dereliction of duty, and arrogance by staffers in the Registrar General's office[227] and has been encouraged to work against corruption in human rights.[228] The promotion of transparency and accountability endeavours to build a higher level of public trust and confidence.[229]

It is necessary to discuss the mandates of the ZHRC and NPRC from the perspective of the ordinary meaning of justice and post-conflict justice as TJ is:

> ".. a response to systematic or widespread violations of human rights. It seeks recognition for the victims and to promote possibilities for peace, reconciliation, and democracy. [TJ] is not a special kind of justice but justice adapted to societies transforming themselves after a period of pervasive human rights abuse. In some cases, these transformations happen suddenly; in others, they may take place over decades."[230]

As a term explicitly used in the Constitution, 'post-conflict justice' deals with the need for states and societies to engage with the past for transition from conflict to peace.[231] Agencies can decide when to implement post-conflict justice and measures to address past abuse.[232] The term post-conflict justice is also used specifically for armed conflicts to refer to "any process initiated within five years following an armed conflict that attempts to address wrongdoings" which occurred as part of that conflict.[233]

The term 'post-conflict' may be difficult to use locally where human rights violations continue and bearing in mind that during times of insecurity, truth, peace, and justice come

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[226] TI-Z "No impunity for corruption" https://www.transparency.org/en/press/20080911 (accessed 11 May 2020)
[227] Muonwa 2019 "RG's officials corrupt: ZHRC" *Newsday.*
[228] Maguchu (2019) *Transitional justice and socio-economic rights in Zimbabwe* 65.
[229] ZHRC http://www.info.undp.org/docs/pdc/Documents/ZWE/ZHRC%20Strategic%20Plan%202015.pdf (accessed 22 November 2019).

[230] ICTJ http://www.ictj.org/about/transitional-justice (accessed 22 November 2019).
[231] Kostovicova (2019) "Post-conflict justice and reconciliation in Europe and beyond".
[232] Binningsbo *et al* (2012) "Armed conflict and post-conflict justice, 1946-2001: a data set" *J Peace* 731.
[233] Kostovicova (n 233) 733.

into conflict.[234] Post-conflict justice involving trials may not be achieved in Zimbabwe soon because those accused of violations remain in power.[235]

Constitutional provisions can be utilised by the NPRC and ZHRC relating to the need for Zimbabwe to frame its foreign policy using international law in s12; to domesticate treaties to which it is a party in s 34; to automatically apply customary law which is consistent with the Constitution and national laws in s 326 and to either use parliamentary approval or dispense with it in some cases in s 327. The mixed approach allows for an *a la carte* use of constitutional provisions to adopt standards from transitional instruments at UN and AU levels which, although not treaty-based and therefore not binding, significantly benefit from the flexible constitutional nomenclature. Using international law argument to deal with commission of crimes which are explained by conventions such as the Convention against Torture to which Zimbabwe is not yet a party, Matwijkiw posits that Zimbabwe's Constitution demands that crimes such as torture and mass murder are understood under customary but compellable law or the peremptory principle of *jus cogens* irrespective of context, circumstances or legal characterisation in that:

> "If implemented as a holistic model that addresses [...] serious human rights violations, such as genocide, crimes against humanity, war crimes, torture, etc.[...] the model of post-conflict goals with corresponding accountability-securing measures, if implemented, will result in a democratic rule of law, with recognition and protection of so-called basic (human) rights, civil and political, as well as economic, social and cultural."[236]

Institutions may uphold the rule of law as a founding value or principle (Constitution s 3). Additionally, TJ processes which do not assure certain minimum standards of due process and rule of law are likely to be quickly discredited or politicised.[237]

Under a constitution that now protects various generations of human rights, the NPRC and ZHRC can design a TJ framework that protects the various generations of rights (Constitution

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[234] ibid.
[235] ibid 733-34.
[236] Matwijkiw (2007) "The reverse revenge norm in international law: The Chicago principles on post-conflict justice" *International Review of Penal Law* 565. See constitution of Zimbabwe s 50 (1) (c) which prohibits inhumane treatment and promote human dignity; s 51 on right to human dignity and s 53 on freedom from torture or cruel, inhuman or degrading treatment and punishment. The Constitution, s 86 (3) also contains non-derogable clauses on the right not to be tortured or subjected to cruel, inhuman or degrading treatment or punishment.
[237] Dowden http://www.odi.org/events/2043-peace-versus-justice-understanding-transitional-justice-fragile-states accessed (22 November 2019).

Chapter 4) and embosses the spirit of the Declaration or Bill of Rights. Zimbabwe's transitional discourse is now understood from the protected perspective of the generations of rights which includes the right to protest and political rights (s 59 and 67 respectively) as well as other economic and social rights.[238] Gendered or specific group dimensions to TJ can also be given using the Constitution. In all this, the attempt to achieve restorative justice, founded on constitutional principles, should be cognisant that retributive justice or prosecutions may never be conducted in Zimbabwe. Even those authorities who are no longer in power may not face prosecution after 30 years of state-sponsored violence and the deeply entrenched existing culture of impunity, attrition of human and political rights, and disregarded rule of law. Demonstrably, the initial euphoria brought about by Mugabe's forced retirement in 2017 has:

> "... been dampened by the agreement struck between the military and the outgoing president. The deal entails exempting Robert Mugabe from prosecution for crimes committed during his 37 years in office. The immunity deal reportedly covers numerous members of Mugabe's extended family [and] it may also include senior ruling party officials detained by the military as well as those who are currently overseas."[239]

Swart's argument captures the view that a window of opportunity proffered by Mugabe's replacement in 2017 has been lost.[240] The provision of amnesty or immunity may be used expediently to pursue stability versus justice in a society, giving the impression that immunity is elitist. President Mugabe, who enjoyed immunity in his time of office, escaped any form of state or individual liability after he leaves office. If his family were to benefit, thst would mean sub-elites and non-elites linked to Mugabe would also benefit.

Critically, Zimbabwe is still to deal meaningfully with past abuses as no institution, the NPRC or ZHRC, has moved actively to identify the transition period on which to focus; the victims and perpetrators to deal with or the surety of victims accessing TJ benefits. Even when a Commission was appointed to deal with electoral conflict in 2018, neither the the NPRC or ZHRC moved to voice its constitutional capability to deal with the crisis. The NPRC and ZHRC can however use recommendations in soft law sources of international law, international human rights treaties, and the Constitution in their attempts to ensure that serious human rights violations committed by the state, state institutions, agencies, and

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[238] Maguchu (n 230).
[239] Swart http://www.theconversation.com/why-signs-for-transitional-justice-in-zimbabwe-dont-look-promising-88171 (accessed 22 November 2019).
[240] Moyo (2019) Postcolonial transitional justice: Zimbabwe and beyond 6.

private individuals are pursued to achieve victim justice. The state and individuals have obligations to protect, promote, fulfill, and respect human rights (s 44). The Constitution also contains a non-derogable clause in s 86 on rights such as the right to life and human dignity.

2.8.2 Constitutional crisis and exogenously-influenced changes 2000-2009

This section is important in setting pillars on the discussion of the role of CSOs in the Zimbabwe's TJ journey. The land reform heightened the need for formal transitional mechanisms and the dominance of CSOs as voices of reason between political foes. The reaction by foreign governments and other international institutions played a huge role in the delays to the formalisation of TJ in Zimbabwe. The country has for long been engulfed in a constitutional crisis since "Zimbabwe's political and socio-economic policies have been subjects of intense national introspection and international debate over the years."[241] Zimbabwe inherited a huge external debt from Rhodesia and its odiousness has not been seriously considered as part of TJ: as war-related, capitalist-imposed or regime-incurred debts. Zimbabwe's socio-economic woes in the 1990s have been linked to the adoption of regulations imposed under the Bretton Woods system of monetary management measures and the Economic Structural Adjustment Program (ESAP) which both failed to promote improved financial systems. Consequently, Zimbabwe could not "stabilize accounts or reduce public spending as recommended by the International Monetary Fund (IMF) under the Enhanced Structural Adjustment Facility (ESAF) in 1995."[242] ESAP was followed by the Zimbabwe Programme for Economic Transformation which also failed: resulting in a

[241] Sachikonye (2011) *Zimbabwe's lost decade: politics, development and society* xiii. See also Chitando and Madongonda (eds) (2015) "Survival in a land of death: an exploration of selected stories" in Irene Staunton's 'Laughing Now' in Chitando A, Chikowero J and Madongonda AM *The art of survival: depictions Zimbabwe and Zimbabweans in crisis* 76. See also Chikowero (2015) "Dystopianism and survival" in Petina Gappah's 'Elegy for Easterly' in A Chitando, J Chikowero and AM Madongonda *The art of survival: depictions Zimbabwe and Zimbabweans in crisis* 16 where dystopia is used in image form to show how Zimbabweans suffer in an Orwellian-like society in a repressive and controlled state though often celebrated by the powerful elites and its supporters as ideal. Even social control systems such as *gutsaruzhinji* (socialism) are seen as a failure of egalitarianism in Zimbabwe.

[242] Mawere (2011) *Moral Degeneration in contemporary Zimbabwean business practices* 63-64. See also Muganiwa (2015) "Armed with hope: women and survival in Zimbabwe" in Chitando A, Chikowero J and Madongonda AM *The art of survival: depictions Zimbabwe and Zimbabweans in crisis* 32 on how ZANU PF abandoned socialism at the fall of the Soviet Union leading to the adoption of ESAP and rise in poverty. See also Mupondi "A critical analysis of the 'exit option'" in 'Selected stories hunting in foreign lands and other stories' in Chitando A, Chikowero J and Madongonda AM *The art of survival: depictions Zimbabwe and Zimbabweans in crisis* 51 on how Zimbabweans displaced by poverty consider emigration and economic refugee status or fulfil their dreams to end by hunting fruitlessly in foreign lands and tearing their families apart.

retrenchment and forcing indulgence in 'black or parallel market' business.[243] Linked to ESAP were "food riots, massive strikes" and war in the DRC in 1998.[244] The general strikes led to the emergence of CSOs "in the area of human rights and governance activism to deal with government authoritarianism".[245] Ideologically, Munyaradzi Gwisai describes the socio-economic challenges as reflective of the failure of the state to "improve and guarantee the living conditions of black workers."[246]

To promote a culture of constitutionalism in Zimbabwe, key CSOs that emerged to champion governance reform in Zimbabwe at the turn of the Millenium included Crisis Coalition, Transparency International Zimbabwe, the International Socialist Organization, and the National Constitutional Assembly.[247] While the CSOs attempted to force the government to commit to constitutionalism, government-led actions such as ESAP and retrenchments were seen as justifications by the Mugabe regime to embark on the land reform program as a political manoeuvre to distract attention from the plight of workers.[248] The land reform program is seen as a revelation that Mugabe's regime "was using Weberian dominance to entrench autocratic and neo-patrimonial traits such as corruption, contempt of rule of law and abuse of state power."[249] The contrary view, however, saw the program as important in creating land apportionment to the masses "while modifying semi-proletarianisation processes and conditions of labour exploitation."[250]

The apogee of the constitutional crisis came in early 2000, which was marked by key developments such as treason charges against Tsvangirai, the 2002 elections marred by extensive violence, and a split in the MDC formation in 2005.[251] *Operation*

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[243] Mawere ibid 65.
[244] Compagnon (2013) A predictable tragedy: Robert Mugabe and the collapse of Zimbabwe 4. See Grove Political Leadership in foreign policy: manipulating support across borders 72 on how ESAP was the major cause for political unrest based on class creations while the (white) business people and (black) members of the ruling class benefited from economic liberalisation.
[245] Murisa (ed) (2015) "Not yet Uhuru: Zimbabwe's halting attempts at democracy" in Murisa T and Chikweche T *Beyond the crises: Zimbabwe's prospects for transformation* 35.
[246] See Gwisai (2002) "Revolutionaries, resistance and crisis in Zimbabwe" in Zeilig L *Class struggle and resistance in Africa* 234.
[247] Murisa (n 245).
[248] Compagnon (n 244) 5.
[249] ibid. See also Kaarhus, Derman and Sjaastad (2013) "Reflections on national dynamics, responses and discourses in a regional contex"' in Derman B and Kaarhus R *In the shadow of a conflict: crisis in Zimbabwe and its effects in Mozambique, South Africa and Zambia* 31.
[250] Moyo and Chambati (eds) (2013) "Introduction" in Moyo S and Chambati W (eds) *Land and agrarian reform in Zimbabwe: beyond white-settler capitalism* 9.
[251] Zvobgo (2009) A history of Zimbabwe 1890-2000 and postscript, Zimbabwe 2001-2008 312.

Murambatsvina/remove the filth and *Operation Chikorokoza Chapera* besieged mines and farms assumed to be war veteran refuges in 2006.[252] The ZRP cracked down on opposition politicians including the arrest of MDC leaders and human rights lawyers representing the MDC.[253] The repressive policies of ZANU PF returned in force after their initial defeat in the March 2008 elections[254] (which decision they reversed) and those suspected of voting for the opposition MDC were arrested amid human rights violations.[255] Sachikonye's description of the early 2000s as a lost decade punctuated by the absence of participatory democracy and constitutionalism[256] augurs well with the argument by Masunungure and Ndapadzwa-Chingwete that a democratic government is one distinguished by democracy founded on state authority which has the support of the public opinion.[257] The extraterritorial effects of national democratic and constitutional crises compelled many Zimbabweans to seek refugee status in many countries including Mozambique which excluded them from active participation in life there.[258]

> "Zimbabwe has, since 2000, become known globally for its failed economy, the flight of more than one million of its citizens, widespread political violence, breakdown of the rule of law, and the nationalization of almost all white-owned farmland."[259]

Linked to authoritarian narratives Mugabe would, when seeking to appease opponents, use dual resource-centered buying-off strategies of intermestic policy-making and co-option of

[252] Sadomba (2013) "A decade of Zimbabwe's land revolution: the politics of the war veteran vanguard" in Moyo S and Chambati W (eds) *Land and agrarian reform in Zimbabwe: beyond white-settler capitalism* 101.
[253] Zvobgo (n 251) 315.
[254] ibid 339.
[255] ibid 339.
[256] Sachikonye (n 241) 65.
[257] Masunungureand Ndapadzwa-Chingwete (eds) (2012) "The public mood on Zimbabwe's political transition" in Masunungure EV and Shumba JM (eds) *Zimbabwe mired in transition* 2.
[258] Kaarhus (ed) (2013) "Poverty, shelter and opportunities: Zimbabweans' experiences in Mozambique" in Derman B and Kaarhus R (eds) *In the shadow of a conflict: crisis in Zimbabwe and its effects in Mozambique, South Africa and Zambia* 67.
[259] Hellum *et al* (2013) "Rights claiming and rights making in Zimbabwe" in Andreassen BA and Crawford G *Human rights, power and civic action: comparative analyses of struggles for rights in developing societies* 22. See also Maposa (2013) "Mugabe: Re-invention and political survival in Zimbabwe" in Mngomezulu BR *The president for life pandemic in Africa: Kenya, Zimbabwe, Nigeria, Zambia and Malawi* 76 on how Mugabe initially opposed the land occupation by threatening the *Svosve* people; then converted suddenly after the 1999 MDC launch. Maphosa notes that "Mugabe chose to run with the majority in the rural areas to sell the idea of land" with the mantra that 'Zimbabwe will never be a colony again' as part of efforts aimed against western powers and neocolonialism.

the democratic opposition.[260] Mugabe could appease "rural peasants and war veterans through land redistribution, economic policy, direct cash payments, and access to food."[261]

2.8.3 Changes marking some end to serious human rights violations in Zimbabwe

This section shows that Zimbabwe's political players have come to realize that constitutional crisis is a threat to national unity and social cohesion. While the human rights dashboard for Zimbabwe has not significantly improved, TJ practitioners cannot throw away the baby with the dirty bathing water. The discussion of certain landmark periods that brought national stability and allowed the generality of Zimbabweans to lead a normal life should be celebrated as important contributions in Zimbabwe's TJ journey. There are limited periods when Zimbabwe had some relief from violence or human rights violations. The first came in 1987 when Robert Mugabe, ZANU and the late Joshua Nkomo ZAPU signed a peace agreement to end the *Gukurahundi* atrocities committed in Matabeleland and Midlands Provinces. The Unity Accord is part of memory building as it is celebrated annually. The remembrance symbolises the need for transformative processes that ensure victims of the Matabeleland and Midlands *Gukurahundi* found closure through the acknowledgment that the event was wrong.[262] The GNU agreed between ZANU PF and the two MDCs afforded Zimbabwe a marked political transition that could have been used to design a formal TJ policy and promulgation of TJ law (as the GPA s 6 affirmed popular sovereignty). Further, the GNU afforded some socio-economic relief in resuscitating "the near-comatose economy", permitted the supply of food and subdued inflation.[263] This should have empowered the political authorities to utilise a stable economy to get a buy-in from the general populace and to trade on key gains for TJ through its formalisation.

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[260] Grove (n 244) 75-6. Contrast this with Maposa (n 261) who deals with Mugabe's use of his re-invention tools: as a guerilla statesman; adaptable character; post-colonial African pugilist and political survivor (though Maposa also dealt with the possibility of Mugabe's likely ouster). It is from this that this thesis argues that Mugabe managed transitional moments in ways that sapped the competitive opposition of its use of democratic discourse.

[261] Grove ibid 76. Stomach politics thus played a diversionary role which enabled Mugabe to consolidate his power at the helm of Zimbabwe's politics even in instances when the opposition was proving to be popular in some rural areas.

[262] This will be revisited on a discussion of conflicts that must be dealt with decisively in Zimbabwe.

[263] Masunungure (ed) and Ndapadzwa-Chingwete (n 257) 1.

Political violence diminished despite dissonance within the GNU[264] and Mugabe benefited from the lifting of sanctions against Zimbabwe at the instigation of the MDC.[265] Although it is held that "not even economic sanctions" were successful in dislodging Mugabe,[266] international pressure forced the GNU players to commit to informal TJ mechanisms through the establishment of the ZHRC and ONHRI. The GNU also spearheaded a constitution-making process that united Zimbabweans to adopt the Constitution 2013 which created specific mandates for the NPRC and other independent institutions supporting democracy. The transition in 2017 from Mugabe to Mnangagwa created a national constitutional moment that had the potential to emboss popular constitutionalism. However, the lack of inclusive management of political transitions created serious challenges that led to the shooting of protesters in 2018 and arrests of protesters in 2019. The formation of the Political Actors Dialogue and calls for other envisaged TJ initiatives such as the formation of a national transitional authority or another GNU demonstrate why dialogic TJ can emboss peace in Zimbabwe if actors faithfully commit to the peace processes. In all this, the Constitution is seen as a progressive justiciable charter that must be essentialised as it departs significantly from the previous Constitutional Commission Draft and the Kariba Constitutional Draft which were rejected by the people.

2.8.4 Rights-based approach to TJ and Zimbabwe's experience

This section shows that the problems faced in Zimbabwe's TJ journey are explained by the absence of a deliberate acknowledgement of the human rights dimension of conflicts in the country. As such, transitional justice should assist victims to deal with the aftermath of conflict or ongoing violations through institutionalised practices as a matter of human rights. Conflict varies in degree and may arise from armed conflict, serious human rights violations, or group differences based on tribal, ethnic, and racial divergence. In protecting the rights of victims, TJ looks at four rights including:

> "... right to reparations [as] financial or symbolic, individual or collective. The right to memory [including] investigation commissions, paying homages to victims, or [...] memorial sites. The right to the truth [including] accessing information about repressive organs or files located or produced by truth commissions. The right to justice [based

[264] Kamete (2010) "Zimbabwe" in Mehler A, Melber H and van Walraven K *Politics, economy and society south of the Sahara in 2009* 538.
[265] ibid.
[266] Maposa (n 259) 64.

> on] investigations of facts and the enforcement of legal responsibility of those responsible for violating human rights."[267]

These rights are part of effective remedies for victims including access to the judicial system and compensation.[268] The UN Victims Guidelines recognise the institutionalisation of reparations for gross human rights violations to victims by way of "restitution, compensation, rehabilitation, satisfaction, and guarantees for non-recurrence."[269] The Victim Guidelines define restitution beyond monetary terms to include reinstatement of freedom, human rights, identity, family life and citizenship, return to residence, restoration of employment, and return of property.[270] Individuals can now claim reparations under customary international law, specifically in terms of the Victims Guidelines (principle 15).[271] Reparations are part of restorative justice and deal with stages of victimhood such as victims' emotions, self-image, world-image, and relations with others.[272] A comprehensive victim-oriented approach should start with systems of:

> "... emergency payments for expenses occurred and wages lost on the immediate aftermath; [...] practical, informational and emotional support [...] public compensation [...] as a backup for victims which cannot obtain adequate restitution from the person who committed the crime against them."[273]

The focus on the reparative rights of individuals or collective groups emanates from the fact that as a moral indication of outrage they are worthy of amelioration from the realisation that human rights violations are a serious injustice demanding punishment of the violator and compensation.[274] Reparative claims also ignore "abstract and impersonal principles of justice" in their focus on the specific individual or group narration and on what is due to them

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[267] Teles and Quinalha (2015) "Scopes and limits to the transitional justice discourse in Brazil" in Schneider N and Esparza M *Legacies of state violence and transitional justice in Latin America: a janus-faced paradigm* 20.
[268] Dwertmann (2010) *The reparations system of the International Criminal Court: its implementation, possibilities and limitations* 18. Dwertmann cites key articles on effective remedy including the UDHR art 8; International Covenant on Civil and Political Rights art 2(3); EU Convention on Human Rights and Fundamental Freedoms art 13; Victims Declaration art 18-21.
[269] Thesis section 2.3.2.5. Also see Torpy 'The political field of reparations' in Neuman K and J Thompson J (eds) *Historical justice and memory* 65. See also footnote 174 in chapter 1.
[270] Torpy ibid 65. See also Werle and Vormbaum (2012) "After the fall of the Berlin Wall: transitional justice in Germany" in Popovski V and Serrano M (eds) *After oppression: transitional justice in Latin America and Eastern Europe*300-302 on how Germany after the fall of the Berlin Wall introduced rehabilitation laws and allowed restoration of property. In effect Germany used all TJ mechanisms including those retributive and restorative.
[271] Dwertmann (n 268) 19.
[272] Johnstone (2002) Restorative justice: ideas, values, debates 65.
[273] ibid 81.
[274] Neuman and Thompson (ed) (2015) "Reparative claims and theories of justice" in Neuman K and J Thompson J (eds) *Historical justice and memory* 48.

or their descendants arising from the violations.[275] The contemporary "juridification of reparations" is cognisant of the need to transmute political reality through law and reparations consequent on violations are a sign of significant social evolution of human rights.[276] The long exposition of social, political and economic injustices inflicted on Zimbabwean society through serious human rights violation and conflict emanating from the deaths incurred in Entumbane and *Gukurahundi*; operations including land reform that displaced people or caused them the loss of their social and economic life and political injustice caused through electoral fraud and an absence of realistic democracy would indicate that restitution and reform locally are overdue. Individuals, communities, and the entire society have a long collective memory of these injustices.[277]

Spain's law of historical memory, the *Ley de memoria historica*, provides procedures for rectification for sufferers of the Spanish Civil War and Franco's dictatorship, covering "symbolic and political recognition to material reparation."[278] Zimbabwe's reparations should range to cover legal and quasi-legal mechanisms covering practical measures and symbolic aspects that would have an enduring positive cultural effect.[279]

The right to know and right to truth enable victims to understand the specific event, circumstances, and causes of violations and the perpetrators, whether individual or collective.[280] Walker describes the perpetrators as duty bearers and the victims, their families, and society as rights bearers and states that the requirement for the truth is the basis for and part of reparations.[281]

Reparation should be based on four factors enumerated by Walker which include the:

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[275] ibid.
[276] Torpy (n 269) 63.
[277] Blustein (2015) "How the past matters: on the foundations of an ethics of remembrance" in Neuman K and Thompson J (eds) *Historical justice and memory* 76.
[278] Violi (2015) "The Spanish law of history" in Neuman K and Thompson J (eds) *Historical justice and memory* 114. See also Smulovitz (2012) "The past is never dead: accountability and justice for past human rights violations in Argentina" in Popovski V and Serrano M (eds) *After oppression: transitional justice in Latin America and Eastern Europe* 77 relates how Argentina recollects Memory Day, remembrance monuments and transformation of detention camps.
[279] Violi ibid 115. See Hristov and Kashumov (2012) "Justice and accountability mechanisms in Bulgaria in the transition period 1989-2008" in Popovski V and Serrano M (eds) *After oppression: transitional justice in Latin America and Eastern Europe* 283 on how Bulgaria progressed in law making regarding restitution of nationalised land and property including for Bulgarian citizens of Turkish origin.
[280] Walker (2015) "How can truth-telling count as reparations?" in Neuman K and Thompson J (eds) *Historical justice and memory* 130.
[281] Ibid 134ff.

> "... the interactive process which represents an acknowledgment of a relationship and intention to repair it; [...] the reparation method to the victim which represents an acknowledgment of the victim's experience and suffering as well as the victim's agency [with respect given to] the proportionality principle to represent the nature, meaning, and magnitude of what is 'due' as a matter of justice to the individual or society. It must be effective by enabling the victim to access and use it as representative of the seriousness and sincerity to make amends." [282]

2.8.5 Constitutional democracy and transitional justice mechanisms

This section deals with the need for the constitutional democracy to which Zimbabwe subscribes to be respected as part of the normative frameworks that should guide all TJ mechanisms that exist in Zimbabwe. While the rights-based focus of constitutionalism in a polity affects the realisation of TJ, the supremacy clause of the Constitution invalidates any law, custom, conduct, or tradition that is inconsistent with the Constitution to the extent of that inconsistency.[283] The issue of the legitimacy of a regime is primary[284] and establishing a culture of human rights as entrenched in the rule of law following mass violence or violation is complicated and complex without respect for constitutional democracy.[285] Even with an inclination to constitutional democracy, the pursuit of retributive TJ mechanisms in Zimbabwe may not be practicable because it is difficult to prosecute those individuals with greatest responsibility in a transitional society, especially where the political actors accused of violations are still in power or control corporate state power.

Within political turmoil, there is need to also accept that actors may reject a return to democracy; revert to military rule through *coup d'état*; resume hostilities including the killing of civilians or political opponents, and inflict significant damage on the country's economy and infrastructure.[286] In the post-Mugabe era, serious human rights violations recurred in 2018 and 2019. A successor regime may simply show disinterest in prosecutions due to:

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[282] ibid 1.
[283] Constitution s 2. Mihai (n 88) 50 suggests that constitutional democracy enables countries which slide into authoritarianism, violence or civil war to mount a democratic comeback.
[284] Dimitrivejic (2003) "Constitutional democracy or how to prevent the rule of the people?" in Sajo A (ed) *Out and into authoritarian law* 79. Mihai (n 88) 41 states that normative consistency understood through action according to the principles of constitutional democracy requires that a society deals with betrayed yet legitimate expectations to acknowledge the appropriateness of reactive feelings to address past injustices. Mihai notes that it is only through this route that victims and victimisers' interests will not be sacrificed for the sake of stability.
[285] van Zyl (2003) "Justice without punishment: guaranteeing human rights in transitional societies" in Sajo A (ed) *Out and into authoritarian law* 73.
[286] ibid 54. See also Cavallaro and Delgado (2012) "The paradox of accountability in Brazil" in Popovski V and Serrano M (eds) *After oppression: transitional justice in Latin America and Eastern Europe* 89 on how the Brazilian transition has been described as slow because the military still dominate the executive and pliable

> "Excessive timidity; an interest in preserving power and perquisites associated with political office, desire to conceal its involvement in human rights abuses and a willingness to pander to the interests of political and economic elites."[287]

State and non-state actors must be restrained from violence[288] by committing to respect constitutional sovereignty based on the argument that a Constitution contains the pre-requisite democratic essentials and entrenchment of rights.[289]

In encouraging a commitment to constitutional democracy, there is need for TJ practitioners to take cognisance of the fact that the Constitution contains non-negotiable features and applies vertically to the state and horizontally on private citizens and both are obliged to uphold duties to respect, promote, protect, and fulfill human rights.[290] Some forms of constitutional democracy are not a panacea to all governance ills but demonstrate that valid democracy is based on political accountability and that political elites must show more respect to the collective inclination of its citizenry.[291] Responsiveness, accountability, transparency, and justice comprise the principles of good governance.[292]

Constitutional democracy may be embossed by way of reification which describes the positive process of conversion of state organisations into a unified system working cohesively.[293] Constitutionally-established institutions such as the NPRC and ZHRC can thus

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legislature. Mihai (n 88) 41 notes that institutional consistency in the affirmation of democratic values can act as a catalyst for the development of an emotional political culture within the citizenry.

[287] van Zyl ibid 54-55. See also Fuentes (2012) "The unlikely outcome: transitional justice in Chile 1990-2008" in Popovski V and Serrano M (eds) (2012) *After oppression: transitional justice in Latin America and Eastern Europe* 118 on how it was impossible to expect any significant change in Chile after the transition from Pinochet. Mihai (n 88) 41 notes that by responding to public emotional mobilisation in ways affirming concern and respect for constitutional democracy, institutions can live up to previously frustrated expectations, gain legitimacy and stimulate social support for necessary reform and their own stability. The view is important for the NPRC which is still struggling to attain institutional and public legitimacy.

[288] Mihai (n 88) 43 reminds constitutionally democratic states to appreciate that discontinuity with past abusive practices cannot be achieved if frustration and resentment are vented through measures outside the law

[289] Jones (n 8) 340-1

[290] Constitution s 44. See also Mihai (n 88) 47 on the need to connect the development of the sense of justice within the principles of constitutional democracy including respect for the legitimacy of negative reactions to previous crimes or repressive regimes. This is based on John Rawls' emphasis on justice and descriptive moral psychology.

[291] Habib South Africa's suspended revolution: hopes and prospects 40.

[292] Constitution s 3 (1) (g). Mihai (n 88) 61 explains why normalisation of impunity after a transition should not be allowed in a constitutional democracy and institutions need raise alarm signals on active negative emotions as well as stimulate the development of a vigilant citizenry who will react emotionally and politically when witnessing violations against their co-citizens.

[293] Moustafa (2009) *The struggle for constitutional power: law, politics and economic development in Egypt* 25. See also Mihai (n 88) on the need to make democracy the desired end result of a transition by ensuring that emotionally motivated actions are filtered through rules of democratic appropriateness. In this milieu, the NPRC and ZHRC must take the opportunities presented to address emotions and support Zimbabwe's democracy.

complement each other to disabuse citizens from treating them as mere state appendages. They will be assessed from indications that their competence and legitimacy flow from their institutional independence. The use of the NPRC and ZHRC proceeds from the realization that transitional justice is dependent on the universality and application in different conflict settings based on the:

> "... relationship between rights and politics; the dominance of the state and legalism; the linearity of both the transition and democratization; the selectivity of some human rights violations and exclusion of others."[294]

This view is important in delineating the role of the NPRC to deal with serious violations of human rights before 2009 and the ZHRC to deal with violations from 2009 to date as envisaged by the Constitution. There are some conflicts and violations that may be addressed by both institutions such as those that led to the shooting of civilians and the arrest of protesters. This is because conflict, which the NPRC must manage, can also be caused by human rights violations, which the ZHRC must address. This argument is also seen in the light of the Paris Principles regarding national institutions.[295] The creation of more progressive laws as the norm can limit authoritarian tendencies in a democracy through the legal system.[296] The polity needs to acknowledge that the role of law in historical transition has evidenced that judgments regarding oppressive pasts have generally moved in the same direction to liberalise.[297] This is because:

> "Narratives constructed in a transition, whether through trials, or administrative proceedings or historical commissions of inquiry make out a normative claim about the relation a state's past bears to its prospects for democracy."[298]

The constitutional content indicates appreciation that "transitional responses point to a fragmentary but shared vision of justice that is corrective."[299] Vital lessons can be drawn from the SA TRC as a non-judicial institution that emerged from that society's overwhelming need for the restoration of moral order endangered by the absence of the rule of law and gross

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[294] Teles and Quinalha (n 269) 20-21.
[295] The Paris Principles: see Principle 2 under competence and responsibility of national institutions.
[296] Sajo (ed) (2003) "Erosion and decline of the rule of law in post-communism: an introduction" in Sajo A (ed) *Out and into authoritarian law* X.
[297] Teitel (2003) "Transitional justice as liberal narrative" in Sajo A (ed) *Out and into authoritarian law* 5.
[298] ibid 7.
[299] ibid 12.

human rights violations.[300] The rule of law is crucial because the modern state is structured on "a monopoly of the law".[301]

The state should not be allowed to exercise rule by law or the rule of force. This transdisciplinary research affirms the globalised evolution of the rule of law in post-conflict states against a background of "colonialism, dispossession, decolonization, and development."[302] It is generally agreed that the rule of law is transversal as it requires at least that limits are applied to the state and authorities through international law "to provide common standards for states in international human rights law."[303] While methods of promotion from other regions may be opposed by the state through "sanctions [and] coercion,"[304] modifications of the rule of law at regional, national and international levels through "reception, adoption [and] adaption"[305] must be accepted in a democracy.

In Peru, the people challenged "authoritarianism, [...] constitutional crisis and human rights violations"[306] and required from the state "as never before, democracy, transparency, truthfulness, honesty, and respect for human rights" and the transitional government was compelled to make radical changes.[307] Essentially:

> "The Constitutional Tribunal was restored; the control and political manipulation of institutions ended; freedom of the press returned; and free elections were guaranteed. Peru returned to the jurisdiction of the Inter-American Court of Human Rights [through which] amicable settlements were reached. Hundreds of people were arrested and charges were filed against thousands of individuals involved in acts of corruption."[308]

The benefits of restoring commitment to democracy in Zimbabwe may occasion a return to the Commonwealth; possible resuscitation of the now-defunct SADC Tribunal or a reconstituted SADC administrative tribunal that allows individual citizens to enjoy legal

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[300] Boraine (2003) "Truth and reconciliation commission in South Africa: the third way" in Sajo A (ed) *Out and into authoritarian* 32.
[301] Grenfell (2013) *Promoting the rule of law in post-conflict states* 4. See Aust and Nolte (2012) *International law* 49 who argue that the establishment of the rule of law as a core principle for the organisation of state powers is a challenge to the traditional understanding of statehood and sovereignty
[302] Grenfell ibid 14.
[303] Zurn *et al* (eds) (2012) "Introduction"in Zurn M, Nollkaemper A and Peerenboom R (eds) *Rule of law dynamics in an era of international and transnational governance* 1.
[304] ibid 5.
[305] ibid.
[306] Iglesias (2012) "Transitional justice and democratic consolidation" Popovski V and Serrano M (eds) (2012) *After oppression: transitional justice in Latin America and Eastern Europe* 226.
[307] ibid.
[308] ibid.

standing; the allayment of fears of institutional-packing, including judicial packing in Zimbabwe; restoration of relations with regional institutions such as the European Union and prospects of ending punitive measures at bilateral levels.[309]This will also ensure that the Constitution is not mutilated by politicians on a willy-nilly basis as was done to the Lancaster House Constitution which was amended a record 19 times.

2.8.6. Literature review on democracy and transitional justice in Zimbabwe

A general overview of Zimbabwe's democratic challenges is important in demonstrating how TJ must be prioritised. To put the discussion on repressive political periods and TJ into the rule of law perspective, there is a need to illustrate Zimbabwe's move towards authoritarian tendencies. At independence, the ZANU PF government "committed itself to establish an order based on democracy, social justice, and equality."[310] Challenges, however, occurred following the *Entumbane* clashes which involved ZANLA and ZIPRA forces and the Matabeleland *Gukurahundi* conflict where the Fifth Brigade deployed an army. It has been argued that "the government, perhaps legitimately fearing that South Africa would arm the rebels as it had the Mozambique National Resistance (RENAMO) in Mozambique and National Union for the Total Independence of Angola (UNITA) in Angola, responded with overwhelming military force."[311] The state brutality on 'dissidents' in Matabeleland invoked the response of the church when "at Easter 1983, Catholic bishops issued a statement entitled 'Reconciliation is possible.'"[312] The bishops noted that "violent reaction against dissident activity has brought about the maiming and death of hundreds and hundreds of innocent people who are neither dissidents nor collaborators."[313]

Observably, though, Zimbabwe's human rights record continued to deteriorate. By the 1990s, "following the Commonwealth conference in 1991 and the transition in South Africa in 1994,

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[309] Mavhunga (2018) "Zimbabwe decries US renewal of sanctions" 12 August 2018 *Voice of America*.
[310] Muzondidya (2009) "From buoyancy to crisis 1980-1997" in Raftopoulos B and Mlambo A *Becoming Zimbabwe: a history from the pre-colonial period to 2008* 174. Mihai (n 88) 8 notes that one cannot proclaim equal concern for all citizens and at the same time silence some for the sake of stability. Mihai (n 88) 29 further notes that the *truth v justice* approach values complementarity of efforts to seek the truth and do justice.
[311] Phiri (2001) *Proclaiming political pluralism: churches and political transition in Africa* 89. The interrogation of the government's motive should also take cognisance of the *stability v justice* approach referred to by Mihai (n 88) 26 which focuses on ensuring that negative emotions are not indulged but are rather suppressed in order to stabilise the ground to kick-start the institutional reforms necessary to consolidate democracy.
[312] Phiri ibid 89.
[313] ibid.

attitudes in Zimbabwe towards human rights began to alter."[314] Human rights organisations, "along with civil society bodies concerned about the lack of transparency and corruption in government, joined forces to campaign for the reform of the Lancaster House Constitution."[315] This description augurs well with the observation that Zimbabwe's democracy was described as "unstable owing to the antagonistic relationship between ZANU and Zimbabwe African People's Union (ZAPU), and the conflict in Matabeleland."[316] Initially, Zimbabwe was seen as a "deviant of democracy but was classified as dropping into the category of semi-democracy by the end of the 1980s."[317] In the late 1990s, the Mugabe government was also seen "as autocratic and repressive with a poor human rights record."[318] The government moved to address some demands for effective transitional mechanisms. For instance, on 28 April 1999 after Zimbabwe had participated in the Democratic Republic of Congo war in 1998, Mugabe appointed "a 395-member commission"[319] with nine thematic committees with 43 commissioners each including transitional mechanisms chaired by Honour Mkushi. TJ was however not formally prioritised and healing, reconciliation and peace continued to be elusive for those involved.

The turn of the millennium witnessed instances of repression through exploitative laws. The Mugabe government-imposed oppressive regulation through the promulgation of restrictive laws such as the Access to Information and Protection of Privacy Act (AIPPA) of 2000 which government used for effective state control over the media and civil society. Human rights organisations documented many violations but Mugabe "repeatedly condoned police and military brutality against Zimbabwean citizens and in 2006 warned that the army would pull the trigger on protesters."[320] The Public Order and Security Act (POSA) of 2002 "… was used in the arrest of thousands of political opponents and in police action to break up public meetings and demonstrations."[321]

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[314] Bourne (2011) Catastrophe: what went wrong in Zimbabwe? 249.
[315] ibid 250.
[316] Laakso (ed) "Research debates in Zimbabwe: from analysis to practice" in Darnolf S and Laakso L *Twenty years of independence in Zimbabwe: from liberation to authoritarianism* 6.
[317] ibid.
[318] Ploch (2009) "Zimbabwe" in Cartage AJ *Focus on Zimbabwe* 1.
[319] *Government Gazette* (1999) Proclamation 6.
[320] Ploch (n 318) 18.
[321] ibid 11.

Zimbabwe has failed to respect property rights related to land issues. While the argument on whether the government was observing the rule of law or not remains contestable, the land reform exercise was seen as a political tool meant to elbow out political opponents since the political message or narrative of ZANU PF was appealing to the resource war in the early 2000s under the appellation "land is the economy and the economy is the land."[322] It has been noted on the one hand that:

> "Land fast-track-land reform programme was indeed fast, and it was about taking the land and giving it back to black farmers as the custodians of the land. Most rules, processes, administrative mechanisms, and issues of resource mobilization were put aside [as] a hindrance to achieving the objectives of the programme. Some constitutional and legal imperatives were also suspended and, if challenged by white farmers, were amended to meet this one objective… It also turned to be a major political issue as it entailed a deep-seated challenge to the property rights of a powerful propertied class."[323]

On the other hand, the land reform programme was also welcomed as "the final embodiment of empowerment of Zimbabweans following Zimbabwe's independence in 1980."[324] To explain the need for democratic political transitions in Zimbabwe, the land issue is instructive as it was a key aspect that allowed Mugabe to retain office. Land reform also forced many Zimbabweans to migrate to South Africa since the "farm invasions of 2002, but particularly as the economic consequences of having lost a national productive base began to be felt, from 2002 onwards, up to three million [Zimbabweans] decamped, with or without funds, to South Africa."[325]

Democratisation calls also relate to the social and economic policies that had political significance on good governance in Zimbabwe. In 2005 the government embarked on *Operation Murambatsvina*/clean up the filth. *Murambatsvina* has been described, by most accounts, as having been "carried out with the highest degree of insensitivity to the rights and needs of those affected and with such ferocious speed that local people began to speak of Zimbabwe's tsunami."[326] The operation has also been described as an "extension of the techniques of a party that has consistently failed to rule Zimbabwe through consent rather

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[322] Kanyenze et al (2011) Beyond the enclave: towards the pro-poor and inclusive development strategy for Zimbabwe 93.
[323] ibid.
[324] Matondi (2012) Zimbabwe's fast-track land reform 1.
[325] Chan (2011) Southern Africa: old treacheries and new deceits 173.
[326] Mlambo (2008) "Historical antecedents to Operation Murambatsvina" in Vambe M (ed) The hidden dimensions of Operation Murambatsvina 10.

than force or its possibility."[327] The usage of the 'dirt context' in colonial and post-colonial contexts shows that *Murambatsvina* is "symptomatic of various governmental anxieties about loss of control of the urban population, irrespective of political affiliation."[328] Its impact has been described as "unprecedented, including displacing 570 000 people or 133 534 households".[329] The social impact of *Murambatsvina* was most brutally felt by those urban dwellers with foreign origins from Malawi and Mozambique who had been imported as forced labour and had no local heritage.[330] The operation has been described as an act in which 'dirt' was "moralized and the moralization came to justify ZANU PF."[331] Effectively, the operation demonstrated how "democratic citizenship was undermined to serve the political needs of the elites and enclose accumulation processes to those related and interwoven with the ruling party structures."[332]

Whilst the zenith of authoritarianism or authoritarian rot in Zimbabwe came in the presidential runoff elections in June 2008, significant political changes came about through the power-sharing deal in 2009 on the political realisation of the need to establish formal institutions such as ONHRI to deal with a divided past. Sadly, the TJ mechanism of the ONHRI was criticised due to its ambiguous terms of reference and lack of clarity in mission and role which led to reduced credibility.[333] CSOs were however commended for working actively under the enabling GNU political environment since they used the opportunity afforded to carry out field consultations to investigate how the healing process should be undertaken.[334] A CSO-led TJ in Zimbabwe was emphasised by Sachikonye who argues that:

> "There will remain a major role for CSOs in shaping the discourse on transitional justice [TJ and its processes]. While obstacles from state institutions implicated in human rights violations will remain, CSOs need to continue to apply pressure to ensure transparency and accountability in the eventual TJ processes. The CSOs have the

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[327] Moore (2008) "Coercion, consent and context: *Operation Murambatsvina* and ZANU PF's illusory quest for hegemony" in Vambe M (ed) *The hidden dimensions of Operation Murambatsvina* 25.
[328] Harris (2008) "Discourses of dirt and disease in Operation Murambatsvina" in Vambe M (ed) The hidden dimensions of Operation Murambatsvina 40.
[329] Potts (2008) "Displacement and livelihoods: the longer-term impacts of *Operation Murambatsvina"* in Vambe M (ed) *The hidden dimensions of Operation Murambatsvina* 53.
[330] ibid 57.
[331] Harris (n 328) 40.
[332] Chimedza (2008) "Bulldozers always come: maggots, citizens and governance in contemporary Zimbabwe" in Vambe M (ed) *The hidden dimensions of Operation Murambatsvina* 90.
[333] Sachikonye (2011) When a state turns on its citizens: institutionalized violence and political culture 150.
[334] ibid 150-1.

> requisite data, skills, and institutionary memory to enable them to play a meaningful role in the process."[335]

CSOs can inform state institutions and rule-of-law-based institutions promoting TJ. It is emphasised in this thesis that an inclusive TJ framework that takes cognisance of the role of various players such as the church, political parties, and CSOs should be celebrated. Building an argument for an inclusive TJ framework proceeds on the fact that there is a need to observe situations after violence where TJ institutions play "a role in defining justice and the new socio-political order."[336] Zimbabwe has in various periods in TJ discourse been fittingly included in the description of African sites "affected by violence and armed conflicts where ideas about justice, reconciliation, retribution, and political participation are being instantiated and contested."[337]

Throughout the transitions, however, "CSOs, political opposition and labour movements, especially the Zimbabwe Congress of Trade Union have argued that TJ is needed."[338] Zimbabwe, together with South Africa and Uganda, has evidenced the significant impact of the pressure of trade unions in urging the state to promote democracy and adopt TJ mechanisms.[339] The work of faith-based organisations (FBOs) can also be emphasised considering the important role evidenced by the Catholic Commission for Justice and Peace (CCJP) report, the 'Zimbabwe we want' by various bishops in Zimbabwe and some churches which signed anti-sanctions petitions. Zimbabwe, together with Kenya, Uganda, Liberia, Burundi, and Egypt are countries where "the prominence of faith-based organisations, especially the Catholic, Anglican, Evangelical, Quaker, Muslim and interfaith groups are active in transitional justice."[340]

The need for a fully reconciled and healed Zimbabwean society is part of a societal continuum calling for respect for human rights and the promotion of regime stability. Private citizens and state institutions should strive to contribute to dialogic and participatory democratisation through demanding accountability for serious human rights violations. Lack

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[335] ibid 151.
[336] Anders and Zenker (eds) (2015) Transition and justice: negotiating the terms of new beginnings in Africa 1.
[337] ibid.
[338] Njeru (2018) "Taking transitional justice to the people: challenges for civil society in Zimbabwe" in Brankovic J and van der Merwe H *Advocating transitional justice in Africa: the role of civil society* 80.
[339] Brankovic (2018) "Introduction: civil society in African transitional justice: comparing theory and practice" in Brankovic J and van der Merwe H *Advocating transitional justice in Africa: the role of civil society* 10
[340] ibid.

of horizontal and vertical accountability on the part of private citizens and the state is a critical threat to TJ and also affects engagement between non-state actors and oversight institutions such as CSOs, political opposition, independent commissions, and the government. Destructive violence on the part of private citizens threatens the concept of horizontality and it makes it difficult for CSOs and FBOs to challenge the state to abandon security considerations and respect, protect, promote or fulfill citizens' rights.

In instances where the state is unjustifiably attacking innocent citizens, oversight bodies can boldly call the state to order. This was observed in the 1980s when the Catholic Church, from the perspective of vertical accountability, boldly addressed the killings of innocent civilians who had no connections to acts of banditry.[341] The same challenge arises where CSOs who speak on citizens who engage in destructive violence can be accused of harboring regime change agendas or are regarded as anti-establishment. In all this, sight should not be lost on the fact that scholars have long lamented the tenuous link between values and empirical facts in the TJ field[342] or other salient effects thereof.[343] From an oversight institutional perspective, the FORUM, a CSO organisation active in TJ, notes that "one of the greatest challenges in the aftermath of any violent conflict is the issue of accountability for serious human rights violations."[344]

The FORUM also provides important insights on the lack of clear breaks from violations in Zimbabwe and 2006 in noted that:

> "The situation in Zimbabwe presents a related, yet somewhat different, challenge. This is not a post-conflict dispensation and the country remained in the grip of a repressive nationalistic regime. Prospects for meaningful change in the short term remain doubtful… prevailing conditions circumscribe the extent to which many unattended issues of justice and accountability are, and can be freely aired and discussed. Repression and fear continue to pervade the realities and consciousness of the general population, as well as those who endeavor to further justice and accountability agenda."[345]

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[341] Phiri (n 311) 89.
[342] Skaar, Malca and Eide (2015) "Transitional justice alternatives, claims and counterclaims" in Skaar E, Malca CG and Eide T *After violence: transitional justice, peace and democracy* 1.
[343] See Kagoro (2012) "The paradox of alien knowledge, narrative and praxis; transitional justice and the politics of agenda setting in Africa' in Okello M *et al Where law meets reality: forging African transitional justice* 4 where he lists issues on judicial processes, institutional breakdowns and alternative specific focuses that could be preferred.
[344] FORUM (2006) "Exploring transitional justice options in contemporary Zimbabwe " 1.
[345] ibid.

The need for accountability on the part of citizens should thus be perceived as part of the legitimacy of TJ efforts in Zimbabwe. The discourse on accountability, dialogic democracy, and TJ has been studied globally and it is prudent to start this discussion with how Southern African states including Zimbabwe have been seen as part of the countries that focused on means to:

> "Strengthen Africa's pursuit of prosperity and human dignity. How best to maintain, fortify, and foster democratic tendencies in new, experienced states. How to curtail ethnic feuding and prevent the outbreak of intercommunal conflict, and then restore civil order when brutal intrastate wars ensued. How to dampen despotism and limit the likelihood of autocracy. How to maintain the momentum of decolonization, thus freeing the majority of Africans in the settler-influenced territories of East and Central Africa. How to dismantle apartheid in South Africa."[346]

When this appeared to have failed, political opposition and CSOs participated in the constitutional, economic and political reform processes. In the early 2000s, concern was that "instead of attempting to regain legitimacy and behaving in a statesman-like manner, Mugabe took no heed of the voices of nearly half his people."[347]

In other transitional societies such as Northern Ireland, it has been noted that "the search for a 'centre ground' has never been easy, least of all in terms of truth recovery and dealing with the past."[348] The proposal for finding lasting solutions in such instances "deliberately locates current problems of managing, dealing, and mastering the past within the most recent post-conflict 'endgame' debates about truth recovery."[349]

Zimbabwe has had many windows of TJ opportunity such as the 1987 Unity Accord, the 1980 and 1988 amnesties, the GNU, and impeachment period that led to the resignation of President Mugabe. What seems to be lacking in managing Zimbabwe's transitional moments is embossing posterity through what Eric Posner called 'transitional prudence' in transitional contexts.[350] He used the South African example where FW de Klerk who replaced PW Botha benefited from realising in the 1980s that international pressure and domestic unrest had become untenable to sustain apartheid for the white ruling class.[351] In 1990, de Klerk released

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[346] Rotberg (2002) Ending autocracy, enabling democracy 11.
[347] ibid 236.
[348] Simpson (2009) Truth Recovery in Ireland: critically interpreting the past 8.
[349] ibid 9.
[350] Posner (2012) "Transitional prudence: a commentary on David Dyzenhaus' Leviathan as a theory of transitional justice" in Williams MS, Nagy R and Elster J (eds) *Transitional justice* 218.
[351] ibid.

Nelson Mandela, gave legality to the ANC, and "entered into negotiations with the opposition parties over a new Constitution and repealed some apartheid-era laws."[352]Other moves towards a democratic South Africa included the establishment of the SA TRC in which Posner opines followed, De Klerk's realisation that that significant and substantial reform was necessary for ending apartheid.[353] De Klerk's move is explained by Posner's sensible emphasis on "the creation of (transitional justice) institutions as a reflection of a political commitment by policymakers."[354]

In other countries, prudential approaches focused on deconstructing narratives through processes such as denazification, de-communisation, and 'never-again' concepts. By summer 1947 the Germans implemented denazification law whilst cases of major culprits were handled by the British military government.[355] The inclusion of the German population was thus based on reading the prevailing context which included that, as did the Americans, "the British immediately understood how handy the files of the former Reich Ministry of Justice came."[356]

The trials of former Nazi officials are seen in this thesis to have been crucial in developing individual or command responsibility for serious international crimes. Researchers who translated his trial transcript into English disseminated how Major Karl Plagge, a *Wehrmacht* soldier, had demonstrated "an honourable mentality and strongly rejected the German policy of full extermination of the whole Jewish population in the occupied […] (eastern territories, Poland, the Baltics, Russia)."[357] Denazification helps the world appreciate how after the Jewish Holocaust, it has been said that most people know two things about Germany:

> "That Hitler's Germany, the most popular tyranny of the last century, initiated an unprecedented slaughter, the Holocaust, and that today's Federal Republic is a democratic polity, peaceful and responsible. But we know or less remember the process

[352] ibid. Various transitional periods from the Lancaster House Conference, the 1987 Unity Accord, the amnesties, the GNU, and the 2017 popular transition, have not prioritized prudential engagement beyond conviviality and lobbyism.
[353] ibid 225.
[354] Cohen and Lipscomb (2012) "When more may be less: transitional justice in East Timor" in Williams MS, Nagy R and Elster J (eds) *Transitional justice* 271.
[355] Raim (2015) Nazi crimes against Jews and Germany post-war justice 90.
[356] ibid.
[357] Good (2006) The search for Major Plagge: the Nazi who saved Jews 22.

> by which the country managed the transition from a state of horror to a state of constitutional order and stability."[358]

A note can also be made of the de-communisation linkages as part of a prudential approach to managing transitions. A study on de-communisation in Poland, the Czech Republic, Slovakia, Hungary, Romania, Bulgaria, and Albania notes that the international and political conditions in which new democracies are born "makes it difficult to isolate 'settling accounts with the past' variable and, to ascertain the links to democratization."[359] This is notwithstanding the realisation that the:

> "Scope of de-communization in Eastern Europe was narrower than that of denazification in post-war Germany or Germany de-communization after the unification. Judicial proceedings or public opinion 'trials' have been comparatively scarce. Hardly any former communist leaders are serving prison sentences, and many that were condemned were subsequently released for humanitarian reasons."[360]

While demands to prosecute communist authorities abounded on reworking the public discourse on the nature of the communist regimes, emphasis on the process rather than preconceived outcomes demonstrate that:

> "The nature and result of these demands, however, varied considerably from country to country. Only two, former Czechoslovakia and Albania, actually carried out purges that affected large numbers of people."[361]

For Czechoslovakia, Hungary, and Poland, the focus has been on how transitional personnel policies need to balance between "political effects such as seeking trust in government and social effects such as collective memory."[362] The need to manage the transitional moments also enjoins that the response reaction should focus on the primary objective, democratisation and establishment of a stable administration.[363] The example of a response that has not considered democratisation is gleaned from Iraq where:

> "Although it originally intended to establish a trustworthy government by ridding the state apparatus [of Iraq] of discredited Baathists, the policy augmented historical rifts in

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[358] Stern (2002) "Foreword" in Frei N *Adenauer's Germany and the Nazi past: the politics of amnesty and integration (*translated from the original German by J Golb) vii.
[359] Gonzalez-Enriquez (2001) "De-communization and political justice in Central and Eastern Europe" in de Brito AB, Gonzalez-Enriquez C and Aguilar P (eds) *The politics of memory: transitional justice in democratizing states* 218.
[360] ibid 219.
[361] ibid.
[362] David (2011) Lustration and transitional justice: personnel systems in the Czech Republic, Hungary and Poland ix.
[363] ibid.

> society as a whole. The negative social effects of de-Baathification may have undermined its primary political purpose."[364]

Transitional justice pursuit is thus seen here as both an enabler and an assessment tool, which makes the democratisation trajectory in a country unique. From David's assessment of the political and social effects of de-baathification, it has been observed that "transitional personnel policies send ideological messages that either reproduce or transform social relationships."[365] In essence, society must appreciate that "most policies of transitional justice generate profound social effects, redistribute guilt, and reassign responsibility for historical injustices."[366]

The flexible approaches to TJ in Central European countries have also enabled them to practice liberal nationalism. It is noted that except for Slovakia, which is still ensnared in its past and "characterized by illiberal regimes and an endless struggle for national survival,"[367] progress in Eastern European countries demonstrates that "liberal nationalism could also prove to be conducive to the project of European unification"[368] and transition from a communist system towards liberal democracy.[369] The progress has, however, been affected by the developments in Hungary where Prime Minister Viktor Orban is accused of manipulating the coronavirus pandemic to establish an elective dictatorship that allows him to rule by decree indefinitely.[370] Specifically, following the imposition of sanctions on Russia for its 2014 annexation of Crimea, Orban has moved to follow illiberal democracy which is influenced by political rule in Russia, China, and Turkey.[371] Coronavirus, has also allowed Hungary to move fast towards Islamophobia, xenophobia, anti-Semitism, populist authoritarianism, and rule by law.[372] In a sense, the Hungarian model is showing how unprecedented crises and non-traditional concepts to security such as global pandemics can threaten transformative TJ by enabling states to pursue illiberal policies that help them shirk their human rights responsibilities.

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[364] ibid.
[365] ibid 194.
[366] ibid 195.
[367] Auer (2004) Liberal nationalism in central Europe viii.
[368] ibid ix.
[369] ibid 171.
[370] Dettmer J (2020) "Hungary: The first dictatorship in the EU? 2020," *VOA News* 2020.
[371] ibid.
[372] Haltiwanger "The coronavirus just created a new dictator in Europe and has emboldened the toxic behaviour of authoritarians" worldwide http://: msn.com/en-au/news/other/coronavirus (accessed 22 May 2020).

2.9 Legal Framework

2.9.1 National Peace and Reconciliation Commission (NPRC)

This section deals with the laws that establish the NPRC and ZHRC. The NPRC, established by the NPRC Act[373] in 2018 is deemed a significant development in Zimbabwe's TJ. NPRC functions include:[374] ensuring justice after conflicts; programming peace initiatives; encouraging truth-telling; development of rehabilitative institutions for torture victims; detection of potential conflicts, mediation, and legal reform aimed at achieving peace and reconciliation. The NPRC is guided by five shared values of confidentiality, inclusivity, *ubuntu*, victim-centeredness, and transparency.[375] Although the concepts of *ubuntu* (Ndebele)/*unhu* (Shona) are conceived differently due to local ethnic disparities, there is an acknowledgement that human dignity is crucial.

The NPRC's life span is subject to contention as it was constitutionally established for ten years after the effective date,[376] Legal phrasing implies that the commission is a temporary mechanism with a lifespan of ten years but there is ambiguity concerning when the ten years begin. The contentious questions include: did the ten years start in 2013 when the Constitution was signed into law? Did the period start when the Commissioners were sworn in on 4 February 2016 or did it start on 5 January 2018 when the NPRC Act was gazetted?[377]

Thus, there is a problem in delimiting the Commission's period of operation since it seems to exist at the pleasure of the political elites. This affects the certainty of the reconciliation process in Zimbabwe, let alone the completion of the commission's mandate. Further, victims or victims' relatives affected by atrocities may be discouraged from testifying due to the lack of protection afforded them; despite that, the NPRC Act s 8 provides an avenue to speak out under its broad investigative functions. Victims may be deterred from revealing details of crimes perpetrated against them which would defeat the purpose of the commission. The funding of the Commission, through the courtesy of an Act of Parliament for budgetary allocations, s 18 of the Act, is also precarious.

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[373] National Peace and Reconciliation Act [*Chapter 10: 32*] 2018 (NPRC Act) as provided for by s 251 of Constitution 2013.

[374] NRPC functions as drawn from s 252 (a-j) of the Constitution 2013.
[375] NPRC 5 Year Strategic Plan 2018-2022: transitioning Zimbabwe from a conflictual past to a sustainable, harmonious and peaceful society through generations.
[376] Constitution 2013.
[377] Chanda http://www.sundaymail.co.zw/understanding-role-of-peace-commission (accessed 20 October 2019).

2.9.2 Zimbabwe Human Rights Commission (ZHRC)

The ZHRC is an independent human rights institution incorporating public protector functions.[378] Amendment to the Lancaster House Agreement[379] provided for the setup of a Human Rights Commission in 2009, after 29 years of 'democracy'.[380] The ZHRC became operational in March 2010 on the appointment of the Chairman and Commission members and became entirely operational in 2012 when the enabling legislation was passed.[381] The ZHRC is a constitutionally appointed human rights watch. Both Constitution and ZHRC Act require that the chairperson selected by the President in consultation with the Judicial Service Commission should have legal experience.[382] Functions of the ZHRC include the promotion of human rights awareness at all levels of society (in contrast to the Act which stated a function targeted at developing human rights) and the Constitution mentions protection and attainment as supporting elements attached to the development of human rights and freedoms.

Besides monitoring, the ZHRC is now constitutionally mandated to ensure the observance of human rights; receive complaints and act to investigate, and to monitor maladministration.[383] It can request the ZRP Commissioner to investigate human rights violations.[384] There are several flaws in the Act itself that impact the robustness of the institution and require alignment, reform, and attendant social, political, and economic modification. [385] Reif notes significantly that:

> National human rights institutions can be established by governments that are not democratic or by governments who want to give the appearance that they are taking steps to improve the human rights and administrative justice situation in their countries, while the reality is that there is little material change after the institution starts operations.[386]

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[378] NPRC "5 Year Strategic Plan" (n 378).
[379] Lancaster House Constitution s 100R.
[380] ZHRC http://www.swradioafrica.com/pages/billwatch120410.htm (accessed 12 October 2019).
[381] Zimbabwe Human Rights Commission Act [*Chapter 10:30*] 2012 (ZHRC Act)
[382] Constitution 2013 s 242
[383] Constitution 2013.
[384] ZHRC Act s 3 & s 4.
[385] Chiduza (2015) "The Zimbabwe Human Rights Commission; prospects and challenges for protection of human rights" *Journal of Law Democracy and Human Development* 148.
[386] Reif (2000) "Building democratic institutions: the role of national human rights institutions in good governance and human rights protection" *Harv Hum Rts J* 1.

The evidence of the ZHRC's work indicates that it does not serve the purpose or positive image projection of the successive authoritarian regime although political, social, and economic considerations are critical in the analysis of its effectiveness. The Paris Principles regarding national institutions underscore the need for adequate funding.[387] Criticism was raised on the "independence and impartiality of the commission" in the appointment of former ZHRC chairperson, Jacob Mudenda, who is regarded as having been selected on the basis that he was a ZANU PF loyalist.[388]

2.10 CSOs in promoting local pluralist transitional justice

CSOs operate in terms of the national laws and the Constitution of Zimbabwe 2013. Most CSOs operate as trust-based organisations and can assume the role of law-based organisations, NGOs, community-based organisations, and faith-based organisations. Some of CSOs are established as public voluntary organisations or registered trusts. There is no trust law in Zimbabwe *per se* currently and the regulation of trusts is conducted in terms of many laws, especially the Deeds Registries Act.[389] A discussion of the operation of CSOs under the legal framework proceeds simply from the constitutional obligation on juristic persons to uphold human rights.[390]

In their engagement with the ZHRC, NGOs have used non-binding memoranda of understanding (MOUs). The major organisations actively involved in local TJ initiatives include the Non-Governmental Organisations Association (NANGO), Zimbabwe Human Rights NGO Forum (FORUM), Church and Civil Society Forum (CCSF), and National Transitional Justice Working Group (NTJWG).

2.10.1 Zimbabwe Human Rights NGO Forum (FORUM)

FORUM has a Transitional Justice Unit which leads the organisation's activities aimed at rebuilding social trust, repair of a splintered justice system, and building an egalitarian system of governance dealing with past human rights infringements through both judicial and

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[387] The Paris Principles s B (1).
[388] Mushava http://www.newsday.co.zw/2013/02/20/mugabe-tsvangirai-misfire/ (accessed 20 January 2020). The MDC led by Welshman Ncube alleged that they were not consulted nor was the Committee on Standing Rules and Orders consulted in the appointment of the former Chairperson of the ZHRC which violated s 237 of the Constitution 2013.

[389] Deeds Registries Act [*Chapter20:05*]
[390] Constitution s 44.

non-judicial approaches.[391] FORUM initiated the first unique attempt locally to take the TJ agenda to the sufferers of past infringement and to ascertain society's comprehension of and dedication to TJ.[392] A major achievement has been their production of reports on TJ options and two published volumes on TJ through outreach programmes.[393]

2.10.2 National Association of Non-Governmental Organisations (NANGO)

This is an alliance formed by the majority of local NGOs, of which NANGO is a member and the convener, with the objective of effective TJ. It has pushed for recognition of human rights and the implementation of TJ mechanisms since 2008. It produced reports on traditional TJ mechanisms[394] and is one of the organisations, together with FORUM, calling for a truth-seeking inquiry to empower victims to access TJ in the post-Mugabe era.[395] NANGO endorsed the invariable minimum demands for victims which include:[396]

- Anti-impunity for crimes such as torture and rape;
- Need to shun prescription of crimes against perpetrators or the state;
- Awarding reparations to victims of human rights violations;
- Prohibiting those with a history of human rights violations and corruption from holding office;
- Achieving credibility in truth-telling initiatives;
- Establishing an independent complaint mechanism against the ZRP.

2.10.3 National Transitional Justice Working Group (NTJWG)

The NTJWG is a platform of 46 civil society organisations.[397] It was formed in 2014 to promote a collaborative space for stakeholders to share experiences and build synergies for

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[391] FORUM (2019) Transitional Justice Unit.
[392] ibid.
[393] ibid.
[394] NANGO "Traditional mechanisms in transitional justice" (2012).
[395] Chikuwa (2013) Zimbabwe: the end of the first republic 151.
[396] Kubatana http://www.archive.kubatana.net/html/archive/cact/080910nango.asp?sector=hr&year=2008&range_start=331 (accessed 12 January 2020). There is, however, no information online to demonstrate whether or not NANGO has been consistent with the independent monitoring mechanism. This initiative is important to ensure that the ZHRC and NPRC encourage security institutions to commit to respecting human rights the rule of law and democracy.
[397] NTJWG http://www.tjwg.org.zw/ (accessed 15 September 2019).

comprehensive, accountable, victim-centred and participatory TJ processes.[398] This institution may not per se be regarded as a CSO but has to demonstrate clearly how it ought to engage with the State, the NPRC and ZHRC in the interests of a coherent TJ that is based on clear positions of engagement.

2.11 Towards a collaborative national transitional justice process in Zimbabwe

This section demonstrates the need for the NPRC, ZHRC and CSOs to create a collaborative and coherent TJ policy. The TJ in Zimbabwe has generally proceeded in a manner organisations find desirable depending on their organisational mandates and visions. Consequently, most of their TJ policies have nothing to contribute to what TJ practitioners adopting a holistic and context-sensitive TJ need to know. The existence of many CSOs, and constitutional bodies in addition to the legal framework on the NPRC and ZHRC creates the potential for a coordinated national TJ framework. The long presence of CSOs in the TJ journey shows that their inclusion of CSOs in the formalisation of TJ process in Zimbabwe will promote the representativeness of diverse social groups with an interest in a peaceful society since CSOs save as citizens' oversight bodies. Civil society can proffer nuanced researches on the restorative and retributive aspects of TJ for inclusion in the national TJ process.

This includes acknowledgement of the downside that testifying victims can be re-traumatised since they usually face the offender with fear if there is no protection.[399] The transition from violent authoritarianism to liberal, democratic rule and the need to avoid renewed authoritarianism can be based on experiences such as where the removal of Hosni Mubarak in Egypt was followed by a non-liberal political context.[400] A collaborative framework will also focus on ways to reform weak institutions inherited from the Mugabe regime as emphasised by scholars who compare previous authoritarian and reforming societies.[401] With the NPRC and ZHRC working with various CSOs, countries like Uganda provide evidence on how consistent engagement between CSOs and Government can yield a formal TJ policy and law.

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[398] NTJWG http://www.peaceinsight.org/fr/conflicts/zimbabwe/peacebuilding-organisations/national-transitional-justice-working-group/?en=1 (accessed on 12 September 2019).
[399] Dandur and and Griffiths (2006) *Handbook on Restorative Justice Programmes: Criminal Justice Handbook Series*.
[400] Aboueldahab (n 57 1.
[401] ibid.

2.12 Conclusion

From the foregoing analysis on domestic constitutional frameworks, the AU and UN approaches to TJ, it is incontrovertible that states should find the best ways to deal with issues of forgiveness, reconciliation, peace, stability, and addressing human rights. The pursuit of TJ in Zimbabwe requires an earnest commitment to national and international frameworks. The Constitution must be treated as the blueprint which lays down a normative framework on which independent commissions supporting democracy can innovatively design their TJ foundations. Specifically, the constitutional provisions on norms and provisions on the rule of law, human rights, and other aspects can be augmented by the international frameworks that focus on contextualisation of TJ mechanisms. The beauty of the UN and AU frameworks is that they are not top-down directives that alleviate the fear that international framework can be used to supplant state sovereignty.

The importance of soft law instruments at the UN and AU levels has been emphasised as one which obligates the state to promote their standards. They set the pace for international treaties to reduce TJ obligations to writing. Whilst TJ remains elusive in Zimbabwe whilst victims are still to find closure in many regards, there is a need for the NPRC and the ZHRC to utilise the UN and AU framework to promote accountability on the part of state functionaries accused of violating human rights. The discussion has been based on the fact that the Constitution is the *grundnorm* through the supremacy clause in s 2 of the Constitution. Selected provisions on key constitutional features have been used to demonstrate the need for the state to respect popular sovereignty, constitutionalism, human rights, and the rule of law, transparency, and accountability in public institutions. The selected aspects from the normative frameworks are simplified in Diagram 2.12a below.

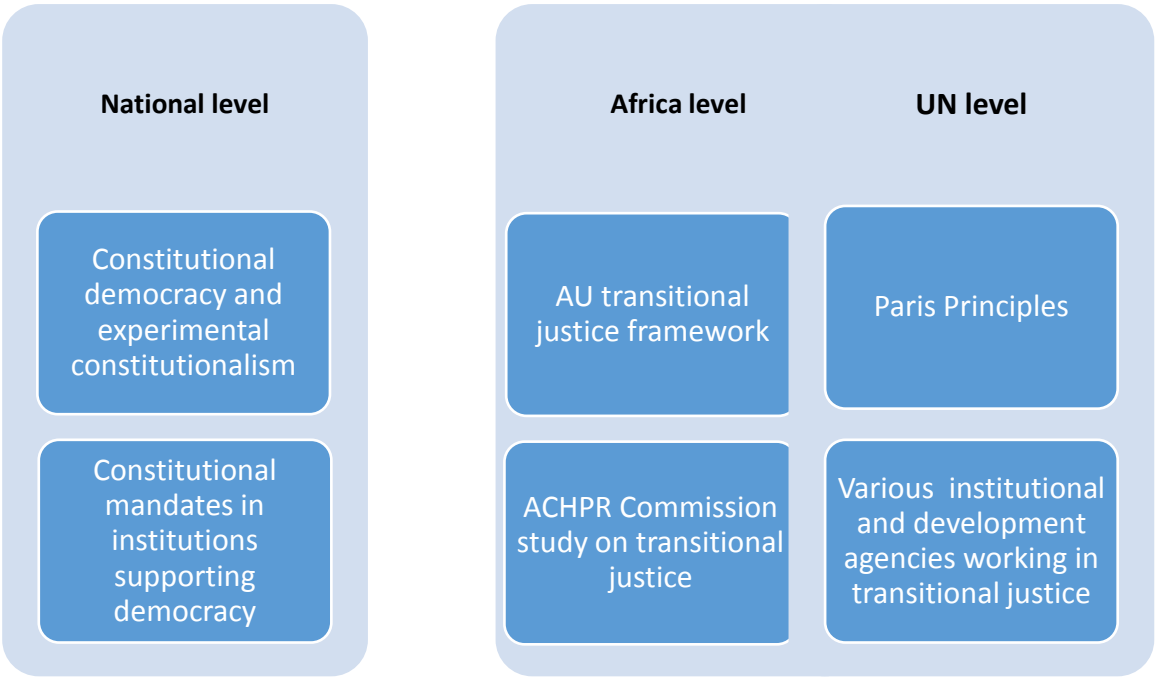

Diagram 2.12a: Selected aspects under the discussion on normative institutional frameworks

Using the above arrangement, this Chapter demonstrated the need to reconcile TJ and post-conflict justice. The link between TJ and accountability was analysed from the need to consider the victims' perceptions of accountability including how they distinguished accountability from responsibility. The Constitution illustrates how independent democratic commissions are bound by principles that are also linked to TJ.

It was shown that CSOs in Zimbabwe have largely pursued initiatives that do not wholly seek to engage with the government. The basis for holistic TJ is that civil society and government must not merely accuse one another of bad faith as the collaboration must aim at empowering victims to access real and meaningful justice. The role of civil society should not be circumspect, especially in the absence of state-led TJ and in a polarised environment. Civil society must meet with victims; share their experiences and learn from them exactly they want to be done.[402] In government engagement, there is also a need to include social movements in line with emerging narratives on the impact of such moments.[403] Civil society

[402] ICTJ (2016) "Conference explores efforts at redress, accountability and reform in African Great Lakes region.".
[403] See Gready and Simons (2017) "Rethinking civil society and transitional justice: lessons from social movements and 'new' civil society" *Int J Hum Right* 956.

has contact with victims since they work with many stakeholders.[404] CSOs are also well placed to work with development agencies, lawyers, medical associations, victim groups, and peacebuilding organisations.[405]

The role of CSOs in Zimbabwe has been important in mapping the way forward for TJ and there is hope that a common TJ framework can be realised through engagement with the NPRC and ZHRC. The gains of the social learning theory between countries can enable various institutions to find ways of empowering victims at each stage of serious human rights violations. The realist theory that focuses on political realities can also be modified in light of the Constitution and international norms to encourage a norm-based, close to ethical realism. Although it is difficult to prescribe ethics to political actors, it is possible to use the Constitution as the will of the people of Zimbabwe to commit to vertical accountability. Moreover, the elements of transformative theory that are emphasised at the UN and international level can buttress the normative theory as proposed here. The theory can aim for the transformation of institutional arrangements as well as perception shifts for actors, stakeholders, and civil society.

The normative aspects gleaned from various national and international sources can inform stakeholder debates in a largely tolerant manner. The prevailing current situation where civil society blames the state for procrastinating and the state blames civil society for harbouring regime change agenda must be resolved. Through consideration of the victims' plight, the NPRC, ZHRC, and the constitutional Chapter 12 Institutions can design locally owned TJ mechanisms inclusive of civil society input.

Organisations called upon by the NPRC to demonstrate their areas of research must co-operate urgently so that the NPRC has no reason to procrastinate concerning areas of focus. Organisations working in the peace zones must find ways to ensure the NPRC identifies the victims countrywide who need closure. Stakeholders must continue to engage donors in their areas of dispute or convergence to prevent instances of blame shift that obstruct work to the detriment of the actual victims. Observably, theory-building has significantly assisted to link the optimal situations, missing links, and expectations of a battered society.

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[404] Duthie (2011) "Building trust and capacity: civil society and transitional justice from a developmental capacity" 11.
[405] ibid.

Various theoretical underpinnings that build on national, regional, and global experiences may have national healing, reconciliatory and stabilising effect and can be an effective tool to dispel victim fears that the realisation of TJ will remain elusive. The normative and other constitutional values can end impunity and complicity in repressive acts or serious human rights violations through deliberation, discourse, and critique on Zimbabwe's experiences. This Chapter has emphasised the need for a normative theory that enables stakeholders and actors to design a holistic victim-oriented TJ structure for Zimbabwe.

CHAPTER 3

NON-JUDICIAL INSTITUTIONS AND SCENARIO MAPPING ON TRANSITIONAL JUSTICE

3.1 Introduction

The best way to help non-judicial TJ institutions do their work is simply to study how they have done such work elsewhere. However, some context-specific points might be made in relation to the actual institutions being studied so that the context in which they are established is fully appreciated. This Chapter aims to set the pillars for discussing why the ZHRC and NPRC must be used as constitutionally-established TJ mechanisms to achieve restorative justice in Zimbabwe and shape the discourse on how retributive justice can also be applied in Zimbabwe. The section examines the work of some institutions that do not function formally or explicitly as TJ mechanisms but can be used as TJ processes in Zimbabwe and other countries. Some of these institutions such as commissions of inquiry were legally established and can be regarded as quasi-judicial TJ organs.

For reasons of clarity, the use of the term 'non-legal institution' has been purposefully avoided as it may cloud the explanation on traditional institutions and other commissions that do not serve as judicial institutions but have legal frameworks that govern their operations. Further, the term is also avoided bearing in mind the existence of institutions that are found constitutionally within the hierarchy of courts but are largely governed by diverse customary law practices in a specific society. By way of structure, the legislative framework used in Zimbabwe or other countries to design institutions that serve as contextualised TJ mechanisms is not discussed in detail. What is emphasised is that the design and utilisation of non-judicial institutions in a country can serve as the apogee for the realisation of TJ since restorative justice is usually essentilised.

This section simply intends to demonstrate the need for a holistic, one-size-does-not-fit-all, contextualised, context-sensitive, and localised institutional set-up that is sufficient to ensure that Zimbabweans can deal effectively with a violent or repressive past and that victims of serious human rights violations, especially in the period post-independence, can access restorative justice or shape the tenor of retributive justice in Zimbabwe. In all this, transitional justice cannot afford the scenario where its genuine practitioners do not partner with state institutions that are constitutionally-established to drive the TJ process or those

with the potential to do so. This Chapter refers to judicial institutions as those where presiding officers are part of the court hierarchy normally established in a constitution. The discussion on non-judicial institutions is premised on the fact that most decisions affecting "a person's legal rights and duties are not made in courts and are made in other institutions and only the tiniest fraction of them are either in theory reviewable or reviewed by courts."[1]

Although the judicial institutions such as community courts may be subject to review by the magistrates' courts, they may be used innovately in this thesis as influencing non-judicial processes on TJ since traditional chiefs, headmen, or village heads normally use very informal rules of decision-making. Similarly, in most local courts, community members may participate in the resolution of matters by giving contributions or unnecessarily interjecting in the proceedings in a manner reflective of the conducting of public inquests or some informalised proceedings. Plainly, the community courts and the whole issue of how they do not function like formal courts are issues that should be on the agenda of TJ practitioners today. Be that as it may, this thesis acknowledges the need to use both judicial and non-judicial institutions to foster a sustainable culture of human rights based on the idea that human right protection is achievable through means of:

> "...non-judicial mechanisms to engaging action before a court. Domestic remedies are [more] rational and more effective than international ones because, primarily, the national authorities understand better the contextual situation of victims of human rights violations in their country. The redress [is] faster and requires fewer resources than a claim before an international body. The exhaustion of domestic remedies requires the use of available procedures to seek protection and prevention of future human rights violations (preventive dimension), as well as other models of satisfactory resolutions in case of the infringements, which would allow for the elimination of its consequences."[2]

From the above assertion, the beauty about non-judicial institutions on TJ is that they should be designed to help a society promptly deal with its grim past or difficult present. In following any model framework of the national justice system or the legal tradition on TJ, it

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[1] Wexler (1975) "Non-judicial decision-making" *Osgoode Hall LJ* 839. See also Quinn (2009) "What of reconciliation? Traditional mechanisms of acknowledgment in Uganda" in Quinn JR *Reconciliation(s): transitional justice in post-conflict societies* 4 on how TJ takes many forms such as memory collection; peacebuilding and transformation; forgiveness and reconciliation at personal and political levels. Individuals can be reconciled to one another or states may call for reconciliation.

[2] Rajska (2016) "Use of domestic remedies, judicial and non-judicial mechanisms by legal professionals" 9. See also Dinokopila (2013) "The role of the Pan-African Parliament in the promotion of human rights in Africa: the importance of collaboration" *AHRLJ* 302 where he examines how states should commit to democracy and human rights norms to curb human rights abuses.

is important for TJ practitioners and TJ institutions to recognise that institutional "independence, quality and efficiency are the essential parameters of an effective justice system and need to be ensured."[3] There is also need to shun rigid application of template-based approaches to TJ through the realisation that countries can use judicial or non-judicial activities to deal with non-retributive issues such as truth-seeking, prosecutions, reparations to victims, or institutional reform.[4]

In essence, non-judicial truth-seeking mechanisms such as peace and reconciliation commissions, TRCs, public-oriented national institutions including the Office of the Ombudsman and NHRIs may be preferred on a contextual basis.[5] These institutions can be designed from the perspective of institutional coherence and can include all members of the affected society, CSOs, and victim groups in the truth-seeking process as well as in empowering victims to access their rights to reparation and to restore their dignity.[6] In keeping with institutiuonal flexibility, the performance of TJ institutions must be based on the supply and demand position in a country's constitutional framework, together with how the constitutional nomenclature relates with international normative frameworks on TJ.

From a definitional perspective, the TJ definition appreciates that non-judicial institutions have a role in promoting prosecutions, reparation payments, and truth-seeking.[7] The logical corollary to this is that such institutions may have complementary aims such as establishing credible institutions or restoring confidence in them; making access to justice a reality for vulnerable groups including women, children and the disabled; respect for the rule of law; facilitating peace and ensuring durable resolution of conflicts and advancing the cause of reconciliation.[8] In this milieu, the complementarity between the NPRC and ZHRC will be

[3] European Commission "Quality of public administration: a tool box for practitioners" 3.
[4] OHCHR http://www.nepal.ohchr.org/en/resources/publications/Transitional Justice%20brochure_E.pdf accessed 23 November 2019 1.
[5] International Commission on Missing Persons http://www.icmp.int/press-releases/all-elements-of-transitional-justice-must-be-included/ (accessed 23 November 2019).
[6] International Commission on Missing Persons http://www.icmp.int/press-releases/all-elements-of-transitional-justice-must-be-included/ (accessed 23 November 2019).
[7] ICTJ http://www.ictj.org/about/transitional-justice (accessed 22 November 2019).
[8] ICTJ http://www.ictj.org/about/transitional-justice (accessed 22 November 2019. There is a direct link between the roles of NPRC and ZHRC and the complementary aims under the ITCJ. Notable aspects include the promotion of the rule of law and the advancement of reconciliation: these critical considerations are also linked to the roles of the two institutions such as those relating to investigation and referral of cases for prosecution. See also Quinn (n 1) 5 who observes that reconciliation is not yet settled in TJ but focuses on building relationships of trust and social cohesion. Quinn notes that the moral good of reconciliation is not disputed but not everyone considers reconciliation as possible in every circumstance.

embossed using the argument that, for instance, the NPRC suits the classification of a non-judicial institution with the potential to serve as an effective TJ mechanism on the one hand, and that the ZHRC has investigative powers and possesses TJ mandates as part of national human rights institutions. Both the NPRC and ZHRC are presented as non-judicial institutions because they have no power to prosecute or make decisions on perpetrators of injustices during conflict although they can recommend prosecution of identified perpetrators.

While the legal framework in Zimbabwe expressly uses the phrase '*post-conflict justice'*, the term seems to be used only to describe the mandate of the NPRC. The ZHRC and other institutions are thus at large to expressly use TJ in their strategic plans or to move for legislative reform and they can do this using the international frameworks in this regard. This thesis now turns to discuss some non-judicial institutions in TJ.

3.2 Non-judicial institutions in transitional justice

This section gives a general overview of institutions that are categorised as non-judicial to provide a montage of Zimbabwe in transition. The section examines information of value which shows how the selected institutions helped the countries which established them to fulfil their primary duties to protect human rights and to ensure closure for victims from the perspective of TJ. From the perspective that TJ may be incomplete and uneven, the section proceeds from the argument that even widely used institutions such as TRCs may err if a country is unprepared to come to terms with truth-telling in a proper manner.[9] While TRCs managed to establish their mark as an important TJ institutions in some countries, Patrick

[9] Argentina was forced to promulgate amnesty laws in 1986 and 1987 because the army junta which was prosecuted still retained much power. The work of the TRC in Argentina was thus rendered a white elephant. In Chile amnesty laws made it impossible for former dictator Pinochet to be punished. Pinochet even succeeded in retaining the 1980 Constitution retained. See Cuevas, Rojas and Baeza (2002) "Truth Commissions an uncertain path: comparative study of truth commissions in Argentina, Chile, El Salvador, Guatemala and South Africa from the perspectives of victims, their relatives, human rights organizations and experts" 5-6. See also Quinn (n 1) 5 on the idea that reconciliation is a process or a series of eugenic actions that eventually lead to a conclusion on how to repair relations. This also includes conjoining the symbolic and material considerations of TJ including genuine acknowledgment of official wrongdoing on events such as Matabeleland and Midlands *Gukurahundi*; land invasions; and the shooting of civilians. Some of these events have to be publicly memorialised or narrativised through reciprocal acknowledgments between state and non-state actors. For instance, end of apartheid was made possible when whites acknowledged war crimes and the new black leadership also acknowledged war crimes committed by members of the ANC. This may be the case for Zimbabwe where the Government may acknowledge the atrocities committed in Matabeleland and Midlands while the Matabeleland and Midlands communities also accept that the so-called dissidents operated in those areas and threatened national security.

Chinamasa, a former Minister of Justice in Zimbabwe, criticised a TJ discourse that goes back to the pre-independence era in Zimbabwe because:

> "We set up the organ on national healing and essentially it is far better to prevent conflict, to mediate and have early warning systems. Calls for a TRC are only good on paper, they have not done anything, look at South Africa, the victims are still there and the perpetrators are still moving free. It is very difficult to go back 500 years and get to the bottom of it (alleged crimes). Let us please expend our energies on the present and the future."[10]

The remarks may demonstrate why non-judicial mechanisms depend on the executive arm of the state as an institution of political will of the prevailing government. It is from the view above that argument can be made in this thesis that the ZANU-PF government as understood from Chinamasa's remarks preferred the ONHRI to deal with healing and integration of Zimbabweans to stimulating discourse on retributive TJ. ZANU-PF did not support the idea of a TRC during the GNU. While the opposition did not vehemently oppose ZANU PF's stance, the remarks by MDC-Tsvangirai (MDC-T) spokesperson, Mwonzora, during the GNU evidence why the ZHRC can be categorised as a TRC organ. He said:

> "It is possible that in the coming constitution we may have a TRC therefore we supported the ZHRC Bill. We must arrest injustice and we must make sure we arrest human rights abusers. Why we agreed to the cut-off date is that we are confident that there is another organ that is coming that will deal with past crimes."[11]

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[10] *Bulawayo24* http://www.Bulawayo24.com/index-id-news-sc-national-byo-17798-art.-Zanu-PF+rejects+Truth+and+Reconciliation+Commission+idea.html (accessed 23 November 2019) 2. Quinn (n 1) 5 remarks aptly that levels of reconciliation operate at the level of individual or collective commitment to actions regarding reconciliation. To employ Quinn's views (n 1) 12, Chinamasa's remarks point to the pursuit of reconciliation which allows mutual agreement to co-exist and agree to disagree. This may also be used to deal with various arguments on whether Zimbabweans do really exist: see Ndlovu-Gatsheni (2009) *Do 'Zimbabweans' exist? Trajectories of nationalism, national identity formation and crisis in a post-colonial state.* Put differently, there is need to imagine an exchange of identity considerations or specific group interests on one hand to achive nationally-agreed interests on the other.

[11] *Bulawayo24* (2012). See Quinn (n 1) 5 on how individuals can be called upon to contribute to political reconciliation. Quinn (ibid) 12 also shows how rapprochment can be used in reconciliation to establish cordial relations by bringing together estranged parties; in this case ZANU PF, MDC-T and human rights victims. Quinn shows that reconciliation can be understood through specific lenses as was done by the SA TRC on apartheid and the need to achieve social justice. The SA TRC allowed for a symbolic swap of responsibility between the white apartheid government and the black new leadership as each side accepted the legitimacy of the other side's narrative. For Zimbabwe, different narratives of victimisation and attendant suffering can be spread temporally and spatially across the ten provinces so that each group's concerns are properly captured. This will in turn lead to the construction of a national memory on TJ approaches to be taken in Zimbabwe. The remarks can also be used to understand how politicians like Douglas Mwonzora attached meanings of reconciliation to the need to end impunity in Zimbabwe during the GNU. Mwonzora's assertion on the need to arrest human rights abusers is situated in arguments such as those from Thomas "Forgiveness as righteousness" in Quinn (n 1) 18 who opines that with restorative wrongs the issue of forgiveness does not disappear although a person can refuse to forgive. Thomas (ibid) 19 notes that the distinguishing feature of forgiveness is that it looks

While the TRC was not subsequently included in the Constitution as per Mwonzora's, and by extension, MDC-T expectations, the Constitution established the NPRC to deal with post-conflict justice. The other MDC formation and party to the GNU was not very clear on its view about the establishment of a TRC as a TJ institution in Zimbabwe. Qhubani Moyo, spokesperson of the MDC-Ncube said that his party had agreed to "13th of February, 2009 ZHRC cut-off date" as a practical step to take under the GNU political dispensation.[12] The ZHRC cut-off date was seen as a "classic example of politically sponsored historical amnesia or a practical arrangement for a working human rights commission."[13]

Beyond assemblage of information on non-judicial TJ institutions, this thesis shows that the role of political will in designing non-judicial institutions is seen also in situations where politicians bring regime change or political transitions through TJ mechanisms such as a power-sharing deal. This was the case in Afghanistan where in 2008 the government passed a law on blanket amnesty for crimes committed between 1978 and 2001 and promised amnesty to perpetrators of the ongoing conflict.[14] Afghanistan's TJ mechanisms may be criticised based on the fact that they were meant to cosmetise the government's commitment to TJ in the wake of the ICC's move to investigate the situation in Afghanistan. The finding of the ICC Pre-Trial Chamber ended up indicating that although the crimes committed in Afghanistan satisfied the requirement for complementarity and gravity tests, it was not in the

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at the significant good that can be done by forgiving where the good does not pertain to the restoration of the person wronged. The religious andcultural dimensions of conflicts in Zimbabwe shows that there are issues that may be sacrilised or -desacrilised depending on what each cultural or religious group considers sancrosanct in TJ initiatives such as exhumations, monuments, public discourses and so forth. There is need thus need to consider both the oveoverlapping and cortemious considerations, including potential areas of irresolution and dissonance amonst various ections of the Zimbabwean society.

[12] Moyo http://www.bulawayo24.com/index-id-news-sc-national-byo-17798-article-Zanu-PF+rejects+Truth+and+Reconciliation+Commission+idea.html (accessed 23 November 2019). See also Frayling (2009) "Towards the healing of history: an exploration of the relationship between pardon and peace" in Quinn (n 1) 29 on how actors may not necessarily adopt a 'forgive and forget or remember and repent' but prefer remember and change or at least initiate change. There is thus need for compromises between perpetrators and victims which lead to harmonious closures of on the werongs committed in the past.

[13] See Frayling (n 12) 29 on how memory is retained; how people and communities select memories and how unhealed memories are the stuff of politics and community life. Frayling emphasises that repairing the past is key to preparing the future. For Zimbabwe, there is thus need to properly assess incidents when victims were also perpetrators in some sense, or accomplices to certain crimes, in pursuit of specific group interests. Efforts to pursue symbolic or material aims of TJ in Zimbabwe should de-escalate rivalries and should broaden the scope of relevant wrongdoing and compensable victimisation across the ten provinces.

[14] Afghan Analysts Network http://www.afghanistan-analysts.org/publication/aan-thematic-dossier/thematic-dossier-xvi-afghanistans-war-crimes-amnesty-and-the-international-criminal-court/ (accessed 7 November 2019).

interests of justice to investigate cases in an ongoing conflict.[15] Both the Afghan government and the ICC's Pre-trial Chamber prioritised peace and stability in Afghanistan over the need to investigate the needs of the victims.[16]

The implications of the ICC's Pre-trial Chamber's and the Afghanistan government's approach bear significantly on how delays in designing non-judicial mechanisms are based on the argument that conflict-mapping exercise is difficult, especially where information from the native language of victims must be translated to the demands and standards of international law.[17] Further, the other challenge to a rushed decision on the ICC's investigation in Afghanistan was that most victims are largely illiterate and those who suffered violence may have died or may not remember the actual dates of how and where the violence occurred and by whom, as required by lawyers in terms of evidentiary sufficiency.[18] There may even be problems on how oversight or victim organisations could deal with the outcome of the work of non-judicial institutions to be established in Afghanistan. For instance, the concern in Afghanistan was the need to balance peace and justice in situations of extended conflict.[19] This in a way speaks to the need to essentialise a nation's political stability than achieving justice of victims. Sadly, there has never been a real transition in Afghanistan due to the absence of a real opportunity for warring parties to sit at the negotiating table, giving the impression that even the 2001 transition that ended Taliban rule was flawed.[20] While the ICC subsequently allowed investigations in Afghanistan, the direction, the situation in Afghanistan serves as a leading example on how truth v justice and stability v security may be used to take a country's TJ discourse forward.

This thesis cautions against the sole focus or emphasis on non-judicial institutions such as TRCs[21] although, in many situations, TRCs have been the chief expression of non-judicial

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[15] ibid.
[16] Although the ICC granted the victims and the ICC prosecutor the right to appeal victims were given unrealistic timelines to produce evidence. The approach was not victim-centred. The judgment may take time and because the Afghan government came up with ways to demonstrate that it can prosecute perpetrators in Afghan courts the ICC's judgment may be obvious.
[17] Kouvo (2019) "Reconciling peace with justice? Transitional justice and the ICC in Afghanistan," public lecture delivered at the University of Turku, Finland.
[18] ibid.
[19] ibid.
[20] ibid.
[21] Generally, TRCs rose as an international norm and an essential element of national reconciliation democratisation and post-conflict development; see Hirsch, Mackenzie and Sesay (2012) "Measuring the impact

institutions that promoted TJ.[22] Despite their non-judicial quality, they can enhance the very conventional essence of TJ: criminal prosecutions, truth-telling, victim redress, and guarantees of non-recurrence, and no problems arise in resorting to variegated forms of TJ initiatives.[23] The treatment of TJ from the perspectives of institutions other than TRCs allows for a novel, contextualised, nationalised, and home-grown exercise of the concept.[24] The direction in which transitional and transformative justice is heading is definitive and expansive.[25]

This thesis notes the importance of the researcher's non-participant observations at the NPRC launch,[26] which revealed the important need to involve the people across Zimbabwe's provinces since some attendees were moving away from the *Gukurahundi* of Matabeleland and Midlands to the 2008 presidential runoff; doctrinal conflicts and specific issues that affect each province in Zimbabwe. The public engagement should enable the NPRC to realise

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of truth and reconciliation commissions: placing the global 'success' of TRCs in local perspectives" *Coop Confl*.386.

[22] TRCs were formerly regarded as a staple TJ mechanism and an 'imperative' for societies emerging from repressive regimes or intrastate conflicts see Hirsch (2013) "Ideational change and the emergence of the international norm of Truth and Reconciliation Commissions" *Eur J Int Relat* 810.

[23] It has been argued that some TRCs do not properly serve the interests of justice because non-criminal proceedings are inconsistent with the complementarity principle under the Rome Statute establishing the ICC. This argument arose in the case of the Kenyan cabinet's resolution to establish a Truth, Justice and Reconciliation Commission after post-election violence in Kenya in 2007. The concern was whether a non-prosecutorial mechanism could conduct a 'genuine' investigation to bring 'the person concerned to justice'. See Bosire (2009) "Misconceptions; the ICC and the truth justice and reconciliation commission (TRC)"

[24] Proponents of TRCs also have mixed reactions about their success or failures. Hirsch, Mackenzie and Sesay (n 21) 386 argue that it is difficult to measure the impact of TRCs since there are no specific methods or mechanisms to do so: and that early TRCS from the 1980s through the mid-1990s were largely variants of a regionally diffused temporary specific model associated with the political transitions in Latin America. They were deemed suitable only for a specific political setting (i.e. negotiated transition) and for specific types of human rights violations (i.e. torture and disappearances). This explains why they were then seen as 'poor alternatives' for justice: see Mendez (1997) "Accountability for past abuses" *Hum Rts Q* 255. Perhaps the SA TRC which shifted from a political compromise to a 'holistic' tool for social and political reconstruction and came to be associated with multiple democratising effects was more successful: see Hirsch, Mackenzie and Sesay (n 21). They note that the Sierra Leonean TRC was thought to have outlived its utility when the Special Court for Sierra Leone was established in 2002. In Guatemala (1994) Burundi (1995) Ecuador (1996) and Nigeria (1999) the TRCs did not have a reconciliation clause and did not even attempt to incorporate any of the other unique features of the SA TRC. While reconciliation has dominated in Zimbabwe from Mugabe's independence speech in 1980, the 1987 Unity Accord, the 2009-2013 GNU after *Gukurahundi*, the 2008 talks between ZANU PF and the MDC formations after the GNU and the current work of the NPRC, the establishment of a TRC was never taken aboard by ZANU PF. Essentially a TRC must be supported by government: see Chitsike (2012) "Transitional justice options for Zimbabwe: a guide to key concepts" 11. Enjoyment of government support has not been the case in Zimbabwe.

[25] The important consideration is that − whether through TCs, criminal prosecutions, institutional reforms or reparation schemes − efforts to achieve TJ must balance truth, justice and accountability against the need for reconciliation, political stability and transformation: see Harvard Law "Transitional Justice".

[26] I attended at the invitation of Dr. Lawrence Mhandara, the NPRC's contact person in the Department of Political Studies and Administrative Studies.

the tenor of reconciliation preferred in each province. Of course, institutional visibility has a downside. Some attendees felt that the NPRC was shortchanging victims by launching its committees in a hotel; others felt there was a need for a disabled person in the NPRC; some felt that the NPRC was not doing enough to hold those in power accountable for atrocities committed during the Matabeleland and Midlands *Gukurahundi.*

While the NPRC may deal with the Matabeleland and Midlands *Gukurahundi*, the NPRC needs to take its tone and outlook from the etymology of the term 'Ndebele' which had war meaning and also caste usage. Its cause should not be selective in describing those who were affected. The very epitome of the Matabeleland and Midlands *Gukurahundi* is to separate Ndebele from Shona people. It has not interrogated faithfully who is Ndebele from the perspective of the disturbances and atrocities which were committed. The etymology of the Matabeleland and Midlands *Gukurahundi* has thus been increasingly and rapidly polarised. The Shona and other ethnic groupings that spoke Ndebele and could have also have been victims of the massacres have largely been forsaken in the discourse on who was affected. There are issues of enlarging the meaning of Ndebele to include the caste groups such as Zansi, Enhla and Hole/Holi groups given the fact that the Ndebele state was replaced by settler colonialism. Perhaps the major point for non-judicial TJ institutions in Zimbabwe to grasp about Matabeleland and Midlands *Gukurahundi* is that a complex mixture of assimilation and absorption of ethnic groupings, or even the absence of the original Khumalo people, has to be investigated faithfully to bring closure to the event. This means that in the final resolution of the atrocities linked to the Matabeleland and Midlands *Gukurahundi*, all the affected families or victims will, on average, contribute and participate in notching holistic, context-sensitive and localised solutions.

From the perspective of notching institutional visions on TJ, non-judicial institutions may deal with different TJ objectives.[27] From the position that citizens have to evaluate the

[27]The timing and sequencing of TJ mechanisms in any given situation depends on the context. A solid policy requires context sensitivity when choosing the mechanism to avoid a situation which does not speak to the needs of the intended beneficiaries, victims or remorseful perpetrators: see Moyo http://www.peacelab.blog/2018/12/any-one-size-fits-all-approach-to-transitional-justice-is-doomed-to-fail (accessed: 13 May 2019). I focus on the NPRC and ZHRC using the UN's emphasis on the preventative potential of TJ which seeks to depart from regarding TJ as a past-oriented policy: see UN General Assembly Joint Study of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of non-Recurrence. The focus on the two institutions is also necessary considering that the UN General Assembly places emphasises that "while transitional justice should not be conceived *primarily* as a 'peace-making'

performance of non-judicial institutions, identify their strengths and weaknesses, and then design practical ways to engage which such institutions, it is observed here that there is no agreed model on which non-judicial institution is preferable for Zimbabwe. What is important is that national and international developments have shown that the institutions commonly include reconciliation dimensions and they do not emphasise prosecutions or judicial remedy as their main goal. The current energy around the idea of contextualised and localised non-judicial institutions such as peace and reconciliation or human rights commissions, and the enormity of the need to establish institutions as directed by UN resolutions, The Guidance Note and other international protocols, are clear beacons of the distance that institutional hybridity in TJ has gone to address national problems.

Discussion from the perspective of non-judicial TJ serves a dual purpose: prioritisation of the needs of the people who must benefit from the purpose and the nature of the selected institution. Thus, the use of institutions other than TRCs is justifiably meant to provide alternative ways to achieve TJ.[28] Added to this is the UN's increasing emphasis on the link between the rule of law[29] and TJ.[30] This enjoins states with constitutions that establish institutions to promote the rule of law to use them as TJ mechanisms. This further suggests that the key to TJ is a combination of comprehensive and contextualised studies of related institutional linkages and approaches.[31] Under this rubric, and given the blue print status of a constitution as a political road map and reflection of the citizens' will, it becomes clear why the NPRC, ZHRC and other Chapter 12 institutions supporting democracy (which has the rule of law as one of its tentacles), must be empowered legislatively and institutionally to drive TJ processes in Zimbabwe and beyond. The permanent texture of the thinking in this text is that a ppositive conception of the relation of local TJ to an evolving international

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instrument it can contribute to sustainable peace and security by helping to break cycles of violence and atrocities delivering a sense of justice to victims and prompting examinations of deficiencies in state institutions that may have enabled if not promoted those cycles."

[28] See Harvard Law (nd) "Transitional justice".

[29] Constitution s 3. The ZHRC needs a unit which deals with research on international developments and these standards may be used as part of the constitutional mandates or the ZHRC's own anticipatory functions.

[30] OHCRC http://www.ohchr.org/EN/Issues/RuleOfLaw/Pages/TransitionalJustice.aspx (accessed January 17 2019); UNCHR http://www.unhcr.org/rule-law-transitional-justice.html (accessed 19 January 2019). Internationalisation of the roles played by national institutions has significant effects as the institutions are expected to comply with the international standards. While the UN's standards may not be quickly adopted by the ZHRC it is worth noting that researchers who engage with the ZHRC may innovatively sell their ideas on emerging aspects as contemplated by the OHCHR Guidance Note on NHRIs.

[31] When these aspects are aligned with the national constitution, other laws and international instruments TJ opens up to everyone: victims, vulnerable and marginalised groups included.

world is that constitutional democracy should be seen as having a tremendous influence on TJ.

Because this thesis is dealing with similar and emerging themes and impulses at the UN, AU, and country-specific levels, there is need for non-judicial institutions to consider both analogous and disparate themes. It is important to also note the perceptive shifts at the UN and AU levels and in-country developments. In this thesis' argument, three facts may be outlined as follows:

- The existence of non-judicial institutions and initiatives to achieve TJ;
- The conventional use of TRCs and four major focus of judicial institutions such as criminal prosecutions, truth-seeking/recovery, payment of victim reparations/redress, and guarantees of non-recurrence on a one-size-fits-all template basis.
- The emergence of other institutions and initiatives to achieve TJ, albeit dictated by country-specific or donor-driven concerns, steeped in a think without the template box or one-size-does-not-fit-all basis.

The considered opinion is that the continuous evolution of international norms and mechanisms to achieve peace after conflicts will guide nations on ways to achieve TJ.[32] Focus is now given to TJ mechanisms that are either non-judicial or offer flexibility in terms of non-judicialised contributions. The aim is to determine how the institutions under examination can take a leaf from them.

3.2.1 Truth and Reconciliation Commissions

This section is important since one of the institutions that are examined in this thesis have a reconciliation mandate. The NPRC largely works like a TRC especially in matters relating to truth-telling and reconciliation although the NPRC has an added dimension on peacebuilding that is constitutionally pitched in express terms. Arguments on the need for a TRC dominated

[32] I concur with arguments by Hirsch, Mackenzie and Sesay (n 21) 386 on ideational changes and the need to properly identify particular concepts of applicability of norms (logic of consequences); their morality (logic of appropriateness) and other applicable or alternative practices (specification). The necessity to identify ideas that work for a specific institution is the most effective way of identifying what works well or not for an institution and the constituency it serves. Understanding the effects, relevancy and specifications of certain aspects helps an institution to design its own theory of change or managing change. Thus, I believe the UN suggestions on national human rights institutions, for instance, give the ZHRC a clear starting point to apply the totality of the ideas or to apply its' own harvested ideas to suit a specific context or purpose. Ideas from other global non-judicial institutions may be used to determine what proves successful or disastrous in a polity.

Zimbabwe before the establishment of the NPRC.[33] Truth classification is critical in TJ realisation to assure victims that there will be no repetition of harm.[34] States, in deciding whether or not to establish a TRC, determine several endogenous and exogenous factors.[35] The configuration of domestic institutions to resolve internal strife or human rights violations usually determine the course of action whether through a TRC or an internationally-driven post-conflict path for political reasons.[36] When women-groups pushed for the establishment of a TRC in Zimbabwe after the worst violence during the presidential runoff which included sexual abuse against women,[37] the Justice Ministry left it to the co-Ministers in charge of reconciliation to decide on this feasibility although it indicated that the people's will would be satisfied.[38] The use of constitutional commissions is normatively affirmed, and by implication, other Chapter 12 Institutions and may explain why the establishment of a TRC in name has not been possible in Zimbabwe.[39]

3.2.2 Community Courts and other non-judicial community processes in transitional justice

While community courts are part of the hierarchy of courts in Zimbabwe, they contribute to informal and flexible ways of achieving justice. They are flexible judicial courts that allow

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[33] Chitsike (n 24) 11 sees TRCs as "temporary officially sanctioned non-judicial bodies" whose main purpose is investigation and report on significant periods of past abuse. Chitsike also notes that TRCs are complementary rather than alternative to prosecution. Generally, it is believed that it is difficult to measure the impact of TRCs or to lump them together due to mixed views on their evolutionary development. See du Plessis (2006) *Obiter* 75 on suggestions made for the establishment of a TRC in Zimbabwe. S252 (c) of the Constitution should thus be used to ensure that the NPRC also essentialises truth-telling so that the victims of various conflicts in Zimbabwe find total healing, peace and reconciliation.

[34] In some situations, TRCs do not deal with the truth. The Argentinian Commission, the first TRC to investigate disappearances, had neither the word 'truth' not 'reconciliation' in its name or title: see Trevino, Pinsky and Daieff "Whose truth? What kind of reconciliation? The importance of truth and reconciliation commissions for promoting democratic good governance" , Roper and Barria (2009) "Why do states commission the truth? Political considerations in the establishment of African Truth and Reconciliation Commissions" *Harv L Rev* 373 focused on the political reasons why states prior to the SA TRC established TRCs simply for use as political cover.

[35] See Roper and Barria (ibid) on how domestic and international influences can encourage states to establish TRCs.

[36] Generally, TJ and TRCs developed in response to the failure of the Nuremburg Trials to try all those who had committed crimes and been complicit in the atrocities: see Trevino, Pinsky and Daieff (n 34)

[37] Ncube http://www.allafrica.com/stories/200905150738.html (accessed 19 January 2019). This approach was motivated by the need for acknowledgment of wrongs. Govier (2009) "A dialect of acknowledgment" in Quinn (n 1) 37-38 provides more detail on forms of acknowledgment such as existential knowledge; aversive acknowledgment and affirmative acknowledgment.

[38] Ncube http://www.allafrica.com/stories/200905150738.html (accessed 19 January 2019) quoting then Ministry of Justice in the GNU, Patrick Chinamasa, who indicated the establishment of the Organ on National Healing, Reconciliation and Integration (ONHRI) and that three ministers were in charge of issues relating to justice, reconciliation and national healing. However, the GNU failed to establish the TRC.

[39] This will be dealt with in detail in Chapter 5 when the constitutional mandate of the NPRC will be evaluated.

for non-judicial interventions from affected communities. Members can make their contributions without following strict judicial rules and can freely ask the disputants questions they like without censure from the presiding chief. Unlike other courts that have clear rules of operation, the presiding officers normally rely on societal intelligence and individualised community rules than a set criteria of rules. Their flexibility is that those involved in the proceedings have unfettered discretion to identify, interpret and apply their local rules or customs without fear or favour. They take further comfort in the fact that community courts in Zimbabwe are part of customary law courts whose jurisdiction covers the application of customary law.[40] Those dissatisfied with the decisions of customary law courts can however approach the magistrate court to seek review or to appeal. From a constitutionally-intoned normative framework, he High Court, Supreme Court and Constitutional Court in Zimbabwe are now empowered to develop the customary law of Zimbabwe because these three superior courts have:

> "... inherent power to protect and regulate their process and to develop the common law or the customary law, taking into account the interests of justice and the provisions of this Constitution."[41]

Logically, non-judicial institutions can look up to the superior courts in Zimbabwe to find out how affected citizens use their active citizenry status to challenge laws, practices, traditions or conduct that bear on their work. Customary law is simply defined as the laws, practices, and customs of indigenous peoples and local communities.[42] The constituent elements may be broken down into:

> "... rules of conduct, obligatory on those within its scope, established by long usage. A valid custom must be of immemorial antiquity, certain and reasonable, obligatory, not repugnant to Statute Law, though it may derogate from the common law."[43]

Customary law is a dynamic living system that can enrich and inform other systems of law with which it interacts within a given legal system[44] and the constitutional definition includes unwritten rules of customary law in force in Zimbabwe.[45] The Customary Law and

[40] Constitution s 174 (b).
[41] Constitution s 176.
[42] WIPO (2013) "Customary law".
[43] *Osborne's Law Dictionary* cited in WIPO "Customary law" 2.
[44] Stewart (1997) "Why I can't teach customary law?" *ZLREV* 18.
[45] Constitution s 332.

Customary Courts Act[46] deals with the type of customary law to be applied between parties[47] or how courts of law can interpret customary law, including using court precedent, legal opinions, or calling witnesses who can give oral evidence to clarify certain aspects.[48] Using such courts as vehicles to achieve TJ, traditional systems are best placed to interpret known and unknown effects of certain steps such as the use of vengeance spirits (*ngozi*), traditional magical powers (*makona*), acts of sophistry from sangomas (*zvikiribidi zvana tsikamutanda*) and so forth to make TJ realisable. The local leaders are the vanguards of the Unhu/Ubuntu concept. They know their tangible customs (*tsika dzinobatika*) and intangible customs (*tsika dzisingabatiki* including belief in the supernatural and preternatural systems) that are used to resolve conflicts, including the such practices as feminising conflicts among the Shona by treating the elderly female child, the tete, as *tateguru*, *bambomukadzi* or *tete vakuru*. The Shona also traditional leaders also venerate the *hero bambo* concept where conflicts are resolved hierarchically.

Besides community courts and other traditional systems, some non-judicial institutions in Zimbabwe in the cast of CSOs promote the realisation of community justice and respect for customary laws in various communities. Heal Zimbabwe Trust for instance has enabled communities to deal with violations believed to have been committed by state agents and those who acquiesce with them.[49] Heal Zimbabwe Trust has also collaborated with Zimbabwe Civic Education Trust and the organisations have:

> "... utilized well-established traditional mechanisms to bring communities together, restore livelihoods, and establish peace and reconciliation.[50]

The two organisations, in common with many other local CSOs, envisaged a situation where TJ mechanisms could work in conjunction with the legal and reconciliation framework.

The emphasis by HZT is on how informal systems of justice have been utilised especially before the adoption of the Constitution given that:

> "Other community-level processes need to run in parallel to any formal commission, which is hampered as it needs to establish public trust and awareness in quite a short

[46] Customary Law and Customary Courts Act [*Chapter 7 05*].
[47] Customary Law and Local Courts Act [*Chapter 7:05*].
[48] Customary Law and Local Courts Act [*Chapter 7:05*] s 9.
[49] HZT and ZIMCET (2016) "Exploring indigenous transitional justice mechanisms."
[50] ibid 3.

> time, whereas local, women's and church groups have long been familiar to the community (and are likely to still be operating long after a TRC has wrapped up)."[51]

The approach by HZT augur well with the concerns of du Plessis and Ford who demonstrate the need to utilise traditional systems of justice including those that have been applied by different CSOs. CCSF, whose secretariat is at NANGO in Harare, carried out research on traditional TJ mechanisms in Zimbabwe[52] which shows various simple hierarchies that may enable locals to deal with problems of violence and other human rights violations. To demonstrate an understanding of how the traditional systems work in the indigenous community systems, the following hierarchies are worthy to reproduce:

> "At the bottom rung of the political ladder is the hut (*imba*) led by the family head (*samusha*), neighbourhood (*mana*) led by its head, village led by a village head or *samusha* (*sabhuku*). [...]Above this political division is the region or *dunhu* led by a headman (*sadunhu*), and chiefdom or *nyika* led by a chief (*ishe*). Above the chiefs is the King (*mambo*) who governs with the assistance of a council (King's Council/*Dare*). Members of the *Dare* include priests (medium spirits) and Kings' wives and close relatives (*vobhwo*). Traditional political leadership is sanctioned by religious authority [...] that gives legitimacy to lead. Institutionally there are community spirits (*masvikiro*) and national spirits (*mhondoro*). These religious functionaries play a role in the choice of traditional leaders as the[y] are believed to be the link between the living and the deceased of the land."[53]

While some rural areas have simple hierarchies such as family head, neighbourhood, the village head, and chief, and may treat the chief as the king, community action is usually vital for improving relations and finding alternative methods of dispute resolution. The decisions are more acceptable through being societal-based and led by community leaders. These can be utilised to resolve incidents of political violence that divided Zimbabweans in various provinces.

From a normative perspective, the Constitution recognises the traditional institutions, the status, and role of traditional leaders established under customary law.[54] The NPRC and ZHRC can work with traditional leaders who are obligated to act constitutionally; to observe customs on traditional leadership[55] and to treat all persons within their areas equally and

[51] du Plessis and Ford (2008) "Justice and peace in new Zimbabwe: transitional justice options."
[52] CCSF (2012) "Traditional mechanisms in transitional justice."
[53] ibid 10, with some additions on vernacular terms from the researcher.
[54] Constitution s 280 (1) and s 281 (1) (a).
[55] Constitution s 281 (1) (a).

fairly.[56] The Constitution envisages a situation where traditional leaders may not be members of any political party or in any way participate in partisan politics;[57] must not act in a partisan manner;[58] must not further the interests of any political party or cause;[59] and must not violate the fundamental human rights and freedoms of any person.[60]

From the perspective of institutional capability, traditional leaders are empowered to resolve disputes in their communities under customary law[61] including through invocation of the supernatural inherently practised in traditional or conservative societies. Traditional leaders are generally believed to be the figureheads of the Godhead (*Mwarindidzimu/Zisororenzou, Nyadenga/Dandiranyika/Samatenga/Zame*). Their intervention in resolving calamitous situations is normally not spited by their communities. For instance, families in Gokwe used the concept of *ngozi* or avenging spirit as a TJ mechanism following political violence.[62] The use of *ngozi* to force the family of a murderer to pay reparation, and by parity of reason, access restorative justice, is based on the fact that even if they evade the rule of law or other court procedures, perpetrators of gross abuse of human rights will not escape the paranormal retribution of the spirit of *ngozi*.[63] The use of or recourse to *ngozi* has the potential to influence both traditional leaders and courts of law to impartially dispense justice and find ways to punish the offender without fear or favour.

The case of Moses Chokuda, MDC organising secretary for Gokwe, who died as a result of political violence, provides an example.[64] When the family of the deceased had refused to cooperate in the burial of their relative, even ten police officers could not carry the coffin of the deceased from the mortuary to bury the deceased against the will of the family.[65] This demonstrates that in such heightened situations, Zimbabwe's criminal law that, for instance, deals with the violation of a corpse as a criminal offence, cannot be invoked by law enforcement agencies in instances where avenging spirits are used to deal with the past and to

[56] Constitution s 281 (1) (a).
[57] Constitution s 281 (2) (a).
[58] Constitution s 281 (2) (b).
[59] Constitution s 281 (2) (c).
[60] Constitution s 281 (2) (d).
[61] Constitution s 282 (1) (e).
[62] Benyera (2015) 'Idealist or realist transitional justice: which way for Zimbabwe?' *Eur J Soc Sci* 199.
[63] ibid.
[64] ibid. Zimbabweans have different interpretations of the retributive role played by vengeance spirits and tribal, familiar, territorial and alien spirits. All these spirits are believed to be capable of fighting battles against those who use unnatural or natural means to kill or commit hidden or known atrocities in the communit.y
[65] ibid.

control the nature of events that are aimed at forcing the perpetrator to shoulder responsibility beyond formalised rules of evidence.

The method used by the deceased's family to achieve TJ without state assistance may be acceptable from a human rights-based approach since the family and the traditional chief in the example above agreed to the payment of reasonable compensation to the deceased person's family. Benyera notes that:

> "The position of Moses' family was unambiguous. His father Tawengwa refused to bury Moses until his murderers apologised and explained the motive for the murder and compensated his family with cattle and money. In the interview, Tawengwa said he finally accepted the accused's restitution of 35 cattle and US$ 15 000 cash. [The amount of restitution] was moderated [...] by the local Chief who mediated between the two families."[66]

This form of compensation was in form of a fine achieved through non-judicial means. Aspersions may however be cast on some avenging spirits in Zimbabwe which demand ransom in the form of a virgin female relative from the extended or nuclear family of the killer. Such ransom seriously violates the rights of the woman who is used to appease the vengeance spirit when in most cases she would be innocent. Doubtlessly, resorting to avenging spirits may violate human rights norms although the practice is customarily accepted.

To draw from effects of experiential pain, when I was growing up in a rural village, the influence of *ngozi* was used to explain other challenges relating to the rights of women and the girl child. A local female relative was used to save an extended family from the wrath of the deceased which believably caused untold suffering and deaths of male relatives. Female relatives where mysteriously divorced or could not be married. The family had brutally murdered a relative based on chieftaincy claims. The girl child who was taken from the family that was identified by a sangoma was seen as the saviour of the family and she had to go and stay at the deceased's home. She later ran away when she came of age and nothing happened to her although the sangoma had sternly warned the family that calamity would heavily visit them if she dared escape. While the story of the young woman escapee may be an empowering recount of how a female victim asserts her rights when forced against her will

[66] ibid.

to appease the deceased's spirit, the mysteries surrounding the *ngozi* are still extant in conservative Zimbabwean societies.

While churches play a liberating role in treating vengeance spirits as part of spirits to be exorcised and from which individuals and families have to be delivered, it is sometimes accepted, even in religious circles, especially Apostolic (white and red garment) and Zionist churches, to encourage believers from the family of perpetrators to pay remedies to vengeance spirits (*kuripa ngozi*). The believers are encouraged to make peace with the families of the deceased before they can take solace in the Christian God. This is proverbially-captured in indigenous language coined statements such as *Mushonga wengozi kuiripa*/the antidote to appeasing avenging spirits is through the payment of compensation to the deceased's family. The payment is similar to the traditional concept of a retributive payment.

The major importance of the *ngozi* concept is that most communities in Zimbabwe believe that, once appeasement is paid, the deceased person's spirit is believed to have found rest and so has the community.[67] If it does not find rest, the perpetrator's family becomes a family of vagabonds (*madzungaidzwa, sweroenda mukwasha wezuva, madatawindi, matununu, or madzvatsvatsva*) until they own up.

From the perspective of ngozi literacy amongst indigenous people in Zimbabwe, many *ngozi* stories were orally presented to us by our grandparents on the effect of *ngozi* spirit and how it is sometimes invoked by the deceased's family through the assistance of traditional healers or witchdoctors (*kumutswa kwengozi*) as a way to resolve violent ritual murders and honor killings. As bearers of sage counsel, our elders are believed to possess nuggets about life (*mhangwa neshwiro dzeupenyu*). As such, when elders speak, the young speak less because of the belief that children will never be older than their parents. For instance, the story of a murdered girl called Mhuriya for community ritual purposes was resolved when the killer's family members died mysteriously uttering the words, '*Ndini Mhuriya/ I am Mhuriya*.' When compensation was paid, the deceased's spirit stopped the killings. Transposed to national

[67] Murambadoro and Matshaka (2019) *Aftermath of Gukurahundi* 136. Some families drive away the deceased's spirit to other families through the practice of *kusundira ngozi*. Others use traditional medicine to prevent the *ngozi* spirit from attacking their family through *kutsipika ngozi*. In all this, the family which drives away or protects itself using traditional medicine appreciates the need to compensate the deceased's family at a future stage in the event that their defensive mechanisms are exposed. Such acts may still lead to intergenerational curses in the future through the usage of terms such as *watorana nerushavashava* or *rushambwa* or *jambwa*.

conflicts, the balance between sacrilised, securalised and human rights debates have to be considered to find how traditional or religious beliefs can perhaps be linked to human rights through cultural relativism or particularism.

In contradistinction from the *Mhuriya* narrative above, further illustration can be drawn from another family in our rural neighbourhood where a younger sister wanted to lethally eliminate her older sister using poisoned nuts so that she could stay alone with their polygynous husband. This story demonstrates how individuals may also meaningfully contribute to traditional TJ mechanisms when they are finally called to account for isolated but heinous crimes. The younger sister gave her houseboy poisoned groundnuts to go and give her sister. The houseboy ate the poisoned nuts although he had been sternly warned not to. Upon reaching the homestead of the older sister, the houseboy collapsed and died. A *gata* ceremony (consultation of the traditional healers) exposed the younger sister. When the 'spiritually-identified' killer's family chose to pay compensation to the houseboy's family, arguing that their daughter had killed the boy, the boy's spirit is said to have become very agitated. Some traditional healers advised them to use *madziva (river-visit)/churu(cleansing on top of an ant-hill)/mharadzano(cross roads)* concept where ngozi is driven away (*kutanda ngozi*).

The spirit later emerged victorious (*kunyisa*) under the *chinokunda ndochinoguta* (the victors eat ravenously). It perennially manifested itself on relatives of the alleged killer and argued that it was blaming the polygamous husband who had married the two siblings for having planted the spirit of jealousy in the younger sister. It, therefore, vowed to destroy the sisters' family because they had rushed to pay compensation before it could ruthlessly deal with their in-law (*kudenha mangwiro*). Whenever the killer's family goes to consult traditional healers under the *gata/kubvunzira* concept, they are warned that the spirit is still angry at their unbecoming gesture to fight for it and, when appeased, will decide when to spare their loved ones and go to destroy their in-law's family. The above stories render the remedy of *ngozi* complex, especially in conservative or strongly superstitious families. It also creates astronomical challenges on how those who are spiritually-condemned can access and enjoy their right to personal security.

A comparison of how compensation of identified victims may be used to heal family wounds can be drawn from traditional practices in Uganda. In Uganda, traditional Acholi leaders have

strongly supported the use of traditional conflict resolution mechanisms for the reintegration of perpetrators in the post-conflict context.[68] The community leader holds a cleansing ceremony using the Opobo tree for those who spent some time away from the village.[69] Community members can participate in the drinking of bitter herb to restore relations between friendly clans after a wrongful killing or murder,[70] and spears are bent to mark the end of a conflict between clans and tribes.[71] The analysis of the symbolic TJ activities in Uganda can promote genuine reconciliation because the actors appreciate how their community prioritises community accountability through locally-developed mechanisms. From the interventions, I got from a Ugandan doctoral student during a research stay in Finland, that there is a lot of faith attached to the Acholi practices and the Opobo traditional methods of achieving reconciliation and justice. Those that disregard the need for apologies may die mysteriously, lose relatives, or experience mystic but excruciating pain amidst various calamities.

In an example where an Acholi male soldier committed an offence and escaped to a female relative's residence to seek fugitive status, the female relative refused to shelter the man. Because the deceased was innocent when he met his untimely death, and his family successfully invoked fate and curses to deal with the murderers, the soldier's family members were dying (*cen* narrative in Alcholi) and having serious misfortunes caused by his clan brother. They traditionally organised the *ber bedo* ceremony to achieve justice through the voluntary confession of the perpetrator's family. So long as there is genuine contrition on each side during shuttle diplomacy or public meetings, the cycle of retribution will end. The

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[68] Rose and Ssekandi (2007) The pursuit of transitional justice and African traditional values: a clash of civilizations: the case of Uganda" *Int J Hum Right* 101-125. The Maji also practice the *mato oput* methods of reconciliation.

[69] ibid 108. Opobo's barks can produce sticky material. Usually parties to minor use the Opobo tree ceremony to achieve reconciliation.

[70] ibid. The reddish material from the *mato oput* represents blood. The roots of the tree go underground and is entangled to the roots of another one. If one finds an opobo tree, they can track the roots to another *mato oput* tree. The entangled roots symbolically show that although the parties to the conflict are separated by conflict, they are united by their community ethos. The bigger thing is to taste the bitterness of the thing the warring parties are quarrelling over by mixing the reddish material in a calabash, kneel down facing each other and each party gives testimony admitting or emphasising his innocence. They now drink from the same calabash to symbolise total reconciliation.

[71] ibid. This is contrasted with the *mato oput* tree where, if one of the warring parties does not want to genuinely repent or reconcile during the *mato oput* vows, the retribution is very harsh on that person. This is because the process is based much on truth-telling and the parties invoke the ancestors to be witnesses of the process. The retribution comes from the ancestors.

mediator ritually bends a spear (*Gomo Tong*) usually after carrying out the *Mato Oput* Ceremony.

In Rwanda, traditional methods of acknowledgment were essentialised in the *Gacaca* courts. The *Gacaca* courts were established to deal with cases relating to the 1994 Rwandan genocide that left close to a million people dead.[72] The example of *Gacaca* courts can encourage traditional courts in Zimbabwe to adopt a communitarian way of achieving justice without focusing excessively on their hierarchical legal order in the judicial set up.

The obvious advantage of a communitarian approach under the *Gacaca* is that locals know both the victims and perpetrators usually based on relational affinities. The community allows the participants to demonstrate detached neutrality even when witnessing the atrocities of their kith and kin. They can indicate their familiarity with community experiences and expectations on traditional justice. They can provide a vivid illustration of events as they occurred on known crime scenes. Based solely on community relations, participants can construct vital and sufficient evidence that is in the public interests to be relied upon. Sufficient effort is thus expended by the community in searching for community healing, forgiveness and reconciliation. Communitarian testimonies tend to make members less aggressive in when repelling them since mental attitudes are built based on community guilty. Resultantly, forgiving wrongs through collectivised testimonies and confessions allows communities to give up resentment for the wrongs without exacting a penalty. Participants will also proceed cautiously on the notion that a community world may be both fragile and parochial and evidence has to be tested properly.

Those appearing before the *Gacaca* courts could trade leniency with truth-telling and could publicly show their remorse by asking for forgiveness. The *Gacaca* courts were empowered to ensure that victims realised TJ benefits through the trial of perpetrators accused of less heinous crimes and were practically designed to end the Tutsi-Hutu rivalry. The *Gacaca* community courts operated as an alternative dispute resolution mechanism[73] which enabled the Rwandan government to address issues that were stalling justice in formal courts relating to food provision, transport, prison accommodation, and other special considerations for prisoners. Rwanda could balance TJ and formal courts while the international community

[72] See Benyera (n 62) 160; Schabas (2005) "Genocide Trials and *Gacaca* Courts" *J Int Crim Justice* 879
[73] Schabas (ibid) 879.

focused on the ICTR. The ICTR did not bring the reconciliation the Rwandans desired but the *Gacaca* courts enabled Rwandans to pursue reconciliation alongside justice.[74] Information-gathering on perpetrators was flexible and witnesses could give credible testimonies.[75]

The initial *Gacaca* phase included an information-gathering session in each community affected by the genocide. These sessions documented those affected by the genocide, witness testimonies, and those accused of crimes. It is from this fundamental intervention that the NPRC's wide consultations on Matabeleland and Midlands *Gukurahundi* have to be celebrated since they are not cutting divagations on TJ roadmap in Zimbabwe. TJ practitioners and critics on the NPRC's must not fall victim to social hearsay, become ardent believers of holism and even question the practical benefits of template-based TJ that has long been followed. The NPRC must auspicate its work through the narrations by participants who use their retentive memory to describe how mass atrocities were committed with impunity.

Zimbabwe's community courts could adopt a similar system to deal with crimes of politically-motivated violence as documentation of atrocities committed in election times is gathered by CSOs, political parties, FBOs, CBOs, and the ZRP. In the end, TJ institutions scrupulously safeguard the gains of a coherent and context-specific TJ that can serve as an antidote to feverish propagandising on or wire-brushing of important TJ phases and processes such as consultations. Consultations help the NPRC and other TJ institutions to guard jealously against being caught in linguistic politics especially on usage of metaphorical language or historicised language such as Gukurahundi whose origin is with Shona idioms and also swiftness of ZANLA fighters. The same will also help the NPRC to interrogate faithfully why ZIPRA would use '*zero hour.'* Ethnologically, TJ can be done from the perspective of adroit usage of terms without patronising them to favour one ethnic group over another. Words that are the subject of scrutininy in Zimbabwe's healing, peace and healing sessions assume both ascriptive and acquisitive terminologies.

3.2.3 Office of the Ombudsman

[74] Haberstock (2014) "An analysis of the effectiveness of the *Gacaca* court system in post-genocide Rwanda" *Global Tides* 7.
[75] ibid.

In Zimbabwe, the ZHRC assumed the functions of the now-defunct Office of the Public Protector or Office of the Ombudsman, creating a hybrid institution with a dual mandate to promote, protect and enforce human rights and fundamental freedoms.[76] The ombudsman is a public officer appointed in terms of ordinary statutes or under a national constitution and may be treated as part of NHRIs[77] with the duty to protect human rights and normally empowered to summon state functionaries accused of committing serious violations.[78] If an amendment to the ZHRC Act is done and the ZHRC's dual mandate is delinked, the office of the public protector can again design its expected mandates from the perspective of TJ as contemplated by soft laws on NHRIs.

In Latin America,[79] the ombudsman was established as a transitional mechanism to address the arbitrary use of executive powers in countries emerging from dictatorships by equipping them with institutions to develop democracy.[80] Argentina, Brazil, Uruguay, and Chile, whilst transiting from military rule, could prioritise TJ process with the help of human rights defenders who also demanded accountability for victims of enforced disappearances.[81] The role of the ombudsman has been effective because it depends on the normative framework in domestic law and may enable countries to sign international humanitarian laws such as the

[76] NRPC 5-year Strategic Plan 8.
[77] GANHRI (2018) "Roles and types of NHRIs" (2018).
[78] Meyers, Oliveira and Rojas (2017) "The role of the Ombudsman in transitional justice processes: comparative studies of Brazil, Colombia, Ecuador, and Guatemala experiences" note that Brazil's Federal Prosecutor's Office for the Rights of the Citizen's (PFDC) fulfills the role of the Ombudsman and its mandate has a broad legal basis allowing it to act on all issues related to the protection of human rights including issues of TJ. The PFDC has a Working Group on the Right to Memory and Truth created in 2010 and consists of seven part-time federal prosecutors. The Cambodian Office of the Ombudsman depends on two laws: The Law of Justice and Peace 2005 regulating the demobilisation of paramilitary groups assigned several powers to the Colombian Ombudsman. Another law promulgated in 2011 provides for care, assistance and integral reparation to victims of internal armed conflict. The provisions of the Victims' and Land Restitution Law were established for the Ombudsman's Office aimed at guiding victims with respect to their rights. In Ecuador, the law for the Reparation of Victims established the responsibility of the Ombudsman's Office to manage non-material reparation measures and established five lines of work: measures of physical rehabilitation and psychosocial care; representation, advice and legal patronage for the prosecution of cases; implementation of symbolic and satisfaction measures; file maintenance of the documentary memory of human rights violations in the country and human rights education and dissemination of the final report. In Guatemala, although the Human Rights Protector (PDH) does not have a specific unit dedicated to TJ his office has several departments that carry out related actions. The PDH has procedural capacity which allows him to prosecute TJ cases and he has a wide margin of action in the area of criminal justice.
[79] ibid.
[80] ibid 20-21.
[81] ibid 21.

Geneva Convention.[82] In Colombia, the ombudsman has worked with development agencies in TJ and it has been noted for instance that in several parts of the country UNDP experts:

> "... assisted the government in exhuming remains, providing evidence in the investigation of more than 9,400 missing person cases. 27,400 living victims of the war have received justice from the UNDP-supported Ombudsman's Office and [through] advocacy from some CSOs that received UNDP human rights training and legal counsel. 75,000 people have now received some sort of compensation for the suffering they endured as a result of different crimes, landmine contamination of their land, or for the loss of family members."[83]

The above can be important for the NPRC which has been invited by CSOs in Matabeleland to witness exhumations. While the NPRC has not yet formalised its TJ work, such invitations broaden the NPRC's indefatigable voyage in robustly exploring effective TJ methods which started with wide consultations. Findings from the Office of the Ombudsman add credence to a state's commitment to fighting impunity of any form. Paucity in research determines that this thesis cannot confidently conclude that Zimbabwe's ombudsman was actively involved in TJ realisation although at least his office may have heard from victims of serious human rights violations.

The local ombudsman's office was changed to a public protector in 2007 but never investigated corruption cases.[84] The office depended on political appointment thus the appointee had vested interests, did not investigate party colleagues, and was barred from investigating key players such as the office of the president, attorney general, and cabinet[85] which limited their mandate. The hope is however not ephemeral since the ZHRC may have its dual mandate delinked and the Public Protector will use the delinking to ensure that its enabling Act will explicitly include legal mandates on TJ.

3.3 National Human Rights Institutions (NHRIs)

This discussion on NHRIs locates the ZHRC's TJ functions in emerging international soft law standards. Most importantly, it shows how the ZHRC may fit under NHRIs which promote TJ through democratic administration, participation and consolidation. If the ZHRC is to prove its mettle as a permanent human rights institution and withstand hyper competition

[82] ibid 24.
[83] UNDPC "Helping the Victims".
[84] Maguchu (2019) *Transitional justice and socio-economic rights in Zimbabwe* 62.
[85] ibid.

from the NPRC (unless the NPRC's mandate is not extended beyond 2023), it has no discretion save to ingratiate itself with TJ mandates. Without pre-empting a lot on NHRIs, more detail is provided in this regard in Chapter 5 when the role of the ZHRC is discussed. The role of NHRIs was also spelt out in Chapter 1 when their emergence under UN auspices was shown. NHRIs unquestionably come in many shapes and names which include human rights commissions, hybrid institutions, consultative and advisory bodies, institutes and centres and multiple institutions.[86] Effective NHRIs are an important link between government and civil society as they help bridge the 'protection gap' between the rights of individuals and the responsibilities of the state.[87] NHRIs must comply with international instruments including The Paris Principles which deal with the need for their independence. The UN Guidance Note provides detail on how NHRIs must operate in TJ situations.[88]

3.4 Commissions of inquiry

The discussion on commissions of inquiry is important since their enabling Acts may give them some quasi-judicial functions. This is important in analysing whether they should be allowed to resolve conflict in Zimbabwe or their roles should be given to the NPRC or ZHRC. It is this vein that the NPRC as a post-conflict institution or ZHRC as a human rights institution must have been actively involved in resolving the 1 August 2018 post-election disturbances that led to the deaths of six civilians. These institutions should have used the event as an opportunity to use their institutional resources in analysing the legal (enabling laws and the Constitution), social and political phenomena (enjoyment of freedom to demonstrate and petition government) that affects TJ processes in Zimbabwe.

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[86] GANHRI (n 77). Smith (2009) "The unique position of National Human Rights Institutions: a mixed blessing" notes that NHRIs "are able to do so by the unique position they occupy between government civil society" and NGOs: See Hofisi (2018) "The need for transitional justice in Zimbabwe" *Herald*.

[87] GANHRI (n 77) "Roles and types of NHRIs".

[88] See ENNHRI (2019) UN Special Rapporteur on Transitional Justice; OHCHR Guidance Note on NHRIs. The Guidance Note was prepared to assist NHRIs understand how they can best perform their institutional role of promoting and protecting human rights during the period of transition from conflict or totalitarian rule. NHRI engagement on TJ should support processes that ensure accountability and combat impunity, provide remedies to victims; promote respect for the rule of law and strengthen democracy and sustainable peace. See also Sajjad (2009) "These spaces in between: the Afghanistan independent human rights commission and its role in transitional justice" *Int J Transit Justice.* See also Brants, Breslin and Wurth http://www.ssoar-2017-breslin-et-al-National-Human-Rights-Institutions-in.pdf (accessed 28 October 2019). See also in detail University of Bristol https://www.bristol.ac.uk/media-library/sites/law/migrated/documents/northafrnhris.pdf (accessed 23 January 2020) 1.

Commissions of inquiry[89] have an important TJ role and fulfil the need for institutions that promote accountability without resort to criminal law.[90]The Commission of Inquiry 2018 established to look into post-electoral human rights violations and 1 August 2018 post-election killing of six civilians reflects a lack of confidence in the Zimbabwean TJ mechanisms. Section 2 (1) states that "[t]he President may, when he considers it advisable, by proclamation, appoint a commission of inquiry consisting of one or more commissioners."[91] In principle, however, the ZHRC which is mandated to deal with violations after 2009 or the NPRC which deals with conflicts in general are the correct bodies to handle post-election violence issues.[92]

The *Dumbutshena* and *Chihambakwe* Commissions were established through presidential powers but the unavailability of their reports casts aspersions on the state's commitment to making transitional and transformative justice realisable for the victims and families of victims and raises questions on the credibility of the legal frameworks available locally. While the publication of the reports may have been stalled for reasons of security and national stability, there should be a balance between merely making institutions available and adopting a positive victim-empowering approach. The Chihambakwe report contains the findings of the two commissions concerning the disturbances that culminated in the Matabeleland and Midlands *Gukurahundi* between 1981 and 1987.[93] The MAGGEMM[94] (a local CSO) had been petitioning the government for the release of the two reports. This critical issue tested the sincerity of Mugabe's government in 2012 and remains critical in the Mnangagwa dispensation.

The *Dumbutshena* report contains findings concerning the clashes between ZIPRA and ZANLA forces at Entumbane in Bulawayo, while the *Chihambakwe* report provides details

[89] Established in terms of the Commission of Inquiry Act [*Chapter 10:07*]
[90] Bell (2009) "The new law of transitional justice" Journal of Studies in Transitional Justice Peace and Development 105.
[91] However, the Constitution s 110 (6) states that "[i]n the exercise of his or her functions, the President must act on the advice of the Cabinet, except when he or she is acting in terms of subsection (2) above." The action of appointing the commission does not however come under subsection (2) which states that "appointing commissions of inquiry is not one of those functions"
[92]Constitution of Zimbabwe s 106 (1).
[93] Ndou http://www.*Bulawayo24*.com/index-id-news-sc-local-byo-15284-art.-release+the+chihambakwe+and+dumbutshena+reports.html (accessed 20 January 2020).
[94] The Zimbabwean 2008.

on the killing of civilians in Matabeleland and Midlands provinces. It is not clear whether the *Chihambakwe* Commission report was completed or whether the state failed to release the report for security reasons. According to the CCJP, the government's excuse for not releasing the report was and still is to avoid possible violence that could arise through making the information public on the basis that the act was genocidal.[95] The excuse is considered at variance with the modest request by the victims that they needed only to be afforded a chance to be heard and move towards peace and reconciliation.[96] The CCJP recalls the occurrence of many violations which include the destruction of property, people missing or presumed dead, physical torture including electric shock, detention, gunshot wounds, and rape.[97] In the same study, the CCJP made recommendations such as establishing a symbolic shrine, conducting exhumations, and seeking the will of the affected families.[98]

Lexically, if the argument is made that the fifth brigade targeted civilians, the Matebeleland and Midlands *Gukurahundi* may fit into acts of genocide that are committed with the target to obliterate either in whole or part a national ethnic, racial, or religious group.[99] Simplicius Chihambakwe, a renowned senior lawyer, led the state-commissioned investigation into the Matabeleland 1983 killings which sought to examine cases of human rights abuses that took place during the military operation by the Fifth Brigade. Mugabe's refusal to release this report shows the weaknesses of the legal framework of the Commissions of Inquiry Act. The quasi-judicial status of commissions of inquiries may discourage the executive as an institution of political will to engage faithfully with other institutions of state administration such as Parliament and the judiciary, especially in situations where the executive President fears that retributive responses may come from the general populace.

Mugabe's refusal also determines how the lack of political will continues to haunt the victims of protracted conflicts in Zimbabwe or elsewhere of context-specifity is not essentialised in TJ activities. The context where allegations of arms cache, dissidentry and insurgents were doing rounds should have been popularised in TJ studies. Further, the fears of a civil war and also the ripple effects of the two Entumbane uprisings should have been interrogated

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[95] CCJP (1997) "*Gukurahundi* in Zimbabwe: A report on the disturbances in Matabeleland and the Midlands 1980-1988"
[96] ibid.
[97] ibid.
[98] ibid.
[99] Mlambo (2008) A history of Zimbabwe.

faithfully to determine how the Mugabe regime perhaps vocalised national stability than truth and justice for so long. At a regionalised level, commissions of inquiry have been used in many African countries to determine the causes of atrocious crimes during violent conflicts or periods of repression. Zimbabwe had many commissions of inquiries whose findings were not published. For instance, it has been shown here that Zimbabwe's *Chihambakwe* and *Dumbutshena* commissions did not publish their findings. In comparison with the Algerian experience the Algerian commission, also unpublished, but did at least submit a confidential report to the president on 31 March 2005 on estimates of:

> "... about 7,000-12,000 disappearances and attributed about 6,146 disappearances on the file to the state."[100]

About 2 640 Algerian families received compensation since 2006, totalling about US$37 million.[101] The reason for the compensation of a few families is perhaps because those who received compensation had to produce death certificates which, not knowing the fate of their loved ones, many people were reluctant to do.[102] Further, victims considered compensation as a bribe to prevent them from asking for further information.[103] From a normative prudential approach, Zimbabwe should have informed the general populace on whether the commission findings had indeed been submitted and if so, why the confidential findings could not be urgently publicised for the benefit of the victims, their families, and the nation at large.

In an attempt to show the need for closure after episodes of mass killings, Zimbabwe's Matabeleland and Midlands *Gukurahundi* massacres depended largely on CCJP and Legal Resources Foundation's researches. The research uses conservative figures of 20 000 civilians being targeted and does not end the culture of uncertainty on the veracity of the victims. As such, the research again condemns the many victims' families to the pain of waiting to know what became of the victims. Using the Algerian approach, at least a statement from the *Chihambakwe* commission would have determined how many families were affected and in need of compensation.

It has been observed that despite compensation, which the NPRC may motivate on behalf of the Matabeleland and Midlands *Gukurahundi* or other victims, families still need to find

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[100] Fombad (2012) "Transitional justice in Africa: the experience with truth commissions."
[101] USIP http://www.usip.org/publications/2003/09/commission-inquiry-algeria(accessed 25 November 2019).
[102] ibid.
[103] ibid.

closure in terms of knowing the whereabouts of those lost. For instance, Robert Siedle, a sociologist lecturer at Makerere University and Nicholas Stroh, a freelance journalist, got killed by soldiers under Idi Amin's government in 1971.[104] Although a commission of inquiry had been appointed in 1972 and the Siedle and Stroh families were compensated US$80 000 each, thirty-three years later Ted Siedle still wants to see the remains of his father and he overwhelmingly said:

> "Finding the remains would give some closure to me and some insight into how they were killed. I think there is a lot that can be discovered still."[105]

And these remarks show how painful a circuitous route to healing is, especially where the victim's family is labouring under a disadvantage outside power structures. TJ practitioners should thus not display attitudes of decided disapprobation or disapproval of the NPRC and ZHRC without proffering alternative solutions that will take Zimbabwe's TJ forward. Besides, there is a need for the government to acknowledge the crime. This can only happen if critics avoid passing comments that not only disparage the approach of TJ institution, but also ridicule or deride them sharply.

Furthermore, at the level of Africanicity of the human being, improperly buried remains or the unidentified victims' remains may reflect evidence of physical and structural violence.[106] Arising from the Stroh example is that Zimbabwe may need to find ways to implement the right of victims and society to know the fate of their loved ones.[107] This may inform the NPRC and families of Matabeleland and Midlands *Gukurahundi* or missing persons such as pro-democracy activist Itai Dzamara to prioritise the International Day of the Disappeared, 30 August, as a symbolic gesture, realising for the latter that:

> "The impact of disappearances on the families is devastating and long-lasting, leaving them in a terrible limbo, unable to find closure. At the same time, it reaches beyond the immediate communities of the disappeared, affecting entire societies grappling with the legacy of unresolved crimes and the obligation to provide families with the truth about the fate of their loved ones."[108]

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[104] Burr http://www.pionline.com/art./20031208/PRINT/312080722/father-s-disappearance-still-haunts-consultant (accessed 25 November 2019).
[105] ibid.
[106] Kim and Hepner (2012) "Of justice and the grave: the role of the dead in post-conflict Uganda" *Int Crim Law Rev* 819.
[107] Baumgartner and Ott (2017) "Determining the fate of missing persons: the importance of archives for 'dealing with the past mechanisms" *IRRC* 663.
[108] ICTJ http://www.ictj.org/news/disappeared-right-justice-and-right-truth (accessed 25 November 2019).

While Itai Dzamara for instance was disappeared allegedly under state security agents, the family had to bear with the sad passing of Patson Dzamara who died of colon cancer. He had fought relentlessly to encourage the state to account for the whereabouts of his brother, including through setting up a trust in Itai Dzamara's cause. The need for closure thus suggests that families of victims suffer immensely from inadequate access to information or legal aid on the right to know what became of their relatives.

From the above assertions, the NPRC can work with government and TJ actors to determine effective inclusive methods for compensation through a victim-centred approach. This may require the inclusion of societies including the Law Society of Zimbabwe, the Ministry of Justice, the Zimbabwe Women Lawyers Association (ZWLA), and Zimbabwe Lawyers for Human Rights to find ways in which to ensure victims or their families are properly compensated. The Missing Persons Act[109] provides for the presumption of death of a person who is missing; for the care and administration of the estate of such a person and matters incidental or connected. Concerning the many families involved according to estimates, the Council for Estate Administrators and the Master of the High Court could also be involved.

The government has indicated that it wants to issue death certificates for the victims and birth certificates for the survivors.[110] The NPRC, ministry of justice, and traditional chiefs need lasting solutions to the Matabeleland and Midlands *Gukurahundi* disturbances through an inclusive consultative process as chiefs in Matabeleland were reported to be against tampering of evidence of the Matabeleland and Midlands *Gukurahundi* massacres.[111] The chiefs' concern is for public acknowledgement of the massacre and an apology may be fitting now that some families have started exhuming the bodies of their relatives.

In Burundi, the International Commission dealt with the ethnicisation of conflicts and implored government to ensure a fair administration of disputes that did not give the impression that the judges and prosecutors were favouring Tutsis.[112] In Chad, the Habre Commission of Inquiry into the crimes and misappropriations committed by ex-President Habré and his accomplices was established in 1990 to investigate the "illegal detentions,

[109] Missing Persons Act [*Chapter 5:4*]
[110] Ndlovu "Chiefs reject ED's *Gukurahundi* plan" 28 April 2018 *Standard*.
[111] ibid.
[112] USIP http://www.usip.org/sites/default/files/file/resources/collections/commissions/Burundi-Report.pdf (accessed 27 October 2019).

assassinations, disappearances, torture, mistreatment [and] all violations of human rights, illicit narcotics trafficking and embezzlement of state funds". The iinquiry included document archive memorialisation, securing objects and premises for truth-telling,[113] monument building, conversion of the subterranean prison into a museum, and a Day of Prayer and Remembrance for the victims.[114] To demonstrate Africa's resolve in ending a culture of impunity and complicity, the inquiry and the subsequent regional court to try Habre were used to frame the deliberations and consultations on the AU Transitional Justice Framework.[115]

In dealing with issues relating to land violence and post-election violence under the auspices of TJ, the Kriegler and Waki report from Kenya indicate how to deal with instances of personalisation of power around the presidency which may create legitimacy problems and foster post-election violence.[116] The resolution may help Zimbabweans understand why land-related elections such as the June presidential runoff in Zimbabwe revolved around the personalisation of the presidency as indicated in Operation *Makavhotera papi*/where did you put your cross? The 2008 presidential re-run elections[117] resulted in violence which prompted MDC-T to withdraw from the race.

The GNU was akin to a 'cabinet of rivals' and served as a transitional mechanism that allowed Zimbabweans to avoid intervention under the responsibility to protect doctrine and allowed Zimbabweans to find each other albeit through mediated-cum-facilitated roles of former South African Presidents Thabo Mbeki and Jacob Zuma. The Constitution of 2013 which was adopted after the GNU between ZANU PF and MDC formations and is a product of transitional compromises, now makes political rights justiciable. It provides for every Zimbabwean the right to support, campaign, and participate in the activities of a political party of their choice[118] through multiparty democracy.[119] From the perspective of TJ, the NPRC can learn from commissions from other countries to encourage political players to

[113] ibid 53.
[114] ibid 92-93.
[115] CSVR (2013) "Technical experts' consultation" 9.
[116] Kriegler and Waki Commission Part 2http://www.kas.de/c/document_library/get_file?uuid=d8aa1729-8a9e-7226-acee-8193fd67a21a&groupId=252038 (accessed 25 November 2019) 49-50.
[117] Chitukutuku (2013) "The search for political legitimacy: Zimbabwe" 34; Unpublished Masters' thesis University of Witwatersrand.
[118] Constitution s 67.
[119] Constitution s 3.

shun violence during elections. The NPRC can use its commendation for using peace caravans and working with other stakeholders such as the Multiparty Liaison Committee; most of the 23 presidential aspirants in the 2018 elections and all Chapter 12 Institutions to commit to a national peace pledge.[120]

Regarding issues relating to land or removal from ancestral lands, the NPRC could benefit from the reports of the Kenyan *Ndungu* Commission. A major finding in the *Ndungu* Commission included the discovery that government entities were grabbing land causing huge financial public loss and that professionals including lawyers, surveyors, and engineers were guilty of unprofessional conduct as were senior management who work in state entities or parastatals who allowed irregular allocations of land.[121] The *Ndungu* Commission report was very balanced and well-received and its language speaks to both elites and non-elites in measured terms:

> "Land remains a focal point in Kenya's history. It was the basis upon which the struggle for independence was waged [and] commands a pivotal position in social, economic, political, and legal relations. [Land] has since the colonial times to-date, been the subject of myriad state-managed policy and legal interventions [and] the subject of many Commissions of Inquiry. [T]he need to address systemic land-related grievances has forced successive regimes to make adjustments to the policy, institutional, and legal arrangements in the country's land relations."[122]

From a TJ perspective, land issues, especially relating to property rights and equal protection of the law, are a huge challenge in Zimbabwe where a land audit is likely to expose the extent of multi-farm ownership among elites, sub-elites and non-elites. This comes in the wake of the Land Commission's inerradicable work reveal the extent to which land barons are mushrooming, inclined to predatory mercantilism and profiteering through illegal land allocations in most urban and peri-urban areas.[123] Thus linked to the need to end violations on land ownership is the need for the NPRC to deal holistically with the forced removal of people from their 'illegally-acquired' settlements in the same way those forcibly removed from their ancestral lands through urban sprawl, irrigation projects, mining projects and

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[120] Commonwealth Observer Group (2018) "Zimbabwe harmonized elections" 39.

[121] Ndungu http://www.kenyalaw.org/kl/fileadmin/CommissionReports/A_Report_of_the_Land_Commission_of_Inquiry_into_the_Illegal_or_Irregular_Allocation_of_Land_2004.pdf (accessed 21 November 2019) 83-90.

[122] ibid xvii.

[123] Langa "Land commission targets barons" *Newsday* 13 December 2018.

natural disasters such as Cyclone Idai ought to be genuinely dealt with.

3.5 Strategic selection of non-judicial institutions in transitional justice

This section emphasises the need for agencies to pursue strategies that allow victims to get compensation or other forms of redress from the state. The use of variegated mechanisms that are strategically chosen must flow from the realisation that:

> "Each post-conflict situation is unique and requires different measures to address past wrongs. Comparative information about how other countries has approached similar post-conflict justice problems can, however, help to design and implement an effective transitional justice strategy."[124]

Indeed, innovating on the measures that electrify TJ is of fundamental importance. Zimbabwe should therefore be encouraged by the initiative at the UN, AU and other countries to localise TJ mechanisms because institutional innovation at national level will be even more important in states that are striving to fight democratic deconsolidation, polarisation and poor contributions to practical TJ processes from the human agency.

The determination of appropriate TJ mechanisms should also be based on the unique circumstances of a period of abuse; such as whether the crime was widespread or focused on a specific region or ethnic group; whether the crimes were acts of state or insurgents, whether the actors are still in power; whether the state can afford individual reparations and whether the court is credible.[125] Mechanism selection should also include wide consultations with broad sectors of society including victim groups; political commitment and institutional engagement by all parties involved in the conflict: responsiveness to a specific TJ context and a mix of mechanisms making full use of institutional links; participation of local communities and human right organisations and provision to operate independently of government and political parties.[126]

The strategic selection of TJ mechanisms may without doubt pose a daunting challenge in any country. The thesis notes the need for the NPRC and ZHRC to prioritise hybrid approaches or a collaborative exercise involving the state, national institutions, and CSOs. In

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[124] USIP (2008) "Transitional Justice: Information Handbook" 1.
[125] ibid 2.
[126] OHCHR http://www.nepal.ohchr.org/en/resources/publications/Transitional Justice%20brochure_E.pdf accessed (25 November 2019).

addition to these principles and considerations are the UN and AU normative frameworks.[127] Taken seriously and using victim-centred approaches, independent institutions as well as country-specific comparative studies can go far to explain the models. Building consensus, trust, and confidence across political and civic institutions can empower society to accelerate the TJ process.

3.6 Mapping scenarios for transitional justice framework

This section is important as it demonstrates how the NPRC and ZHRC can embark on institutional and staff mapping exercises that bear on TJ processes. The issues that will be scheduled for exploration are essentially based on the constitutional and international normative TJ frameworks. Organically, a great deal of thought needs to go into determining the constitutional, legislative and anticipated/administrative mandates of the two institutions. Scenario mapping is also important in helping the institutions to deal with perceptions and practicalities of a formalised TJ policy or law in Zimbabwe. The involvement of organisations that signed memorandum of understandings (MOUs) with the NPRC and ZHRC; and the partnership between the institutions and contact persons, peace zones, research institutions and CSOs would certainly be a useful addition to the institutional mandates of the ZHRC and NPRC. With the NPRC facing challenges in securing funding to employ its expected staff, staff mapping exercises is important in determining whether the NPRC for instance will speed up its work in consulting Zimbabwe's citizens across the ten provinces on the tenor of TJ they envisage. In the event of collaboration between the ZHRC and NPRC, advanced staff mapping exercises will be crucial to determine the pool of expertise to be recruited and used to drive areas of collaboration.

Scenarios in TJ country-wide must be prioritised by TJ institutions, actors and stakeholders in designing their theories of change or engagement models. This thesis examines scenarios that can enable sense to be made of institutional arrangements for adoption in a polity. Linked to task analysis, scenario-mapping enables actors in a specific area to complete tasks with an initial focus on what actors will do, and not necessarily how they will do it.[128] The analysis of TJ processes can help actors and stakeholders to address the formal steps taken by national

[127] http://www.un.org/ruleoflaw/files/Transitional Justice_Guidance_Note_March_2010FINAL.pdf (accessed 25 November 2019) 2.
[128] UXM http://www.uxforthemasses.com/scenario-mapping/(accessed 25 November 2019).

governments and international political institutions.[129] The focus may be on narrow or broad factors that may impede or promote such processes.[130] Scenario mapping can also highlight the efficiency of using deadlines such as timelines permitted for receipt and processing of land restitution applications.[131] Mapping scenarios can enable institutions to design the models of collaboration, the gendered dimensions of collaborations, and the need to determine responses that traditional TJ focus can produce as well as proffering an opportunity to determine the extent to which an institutionally-driven model of TJ may or may not be received.[132]

Some studies have focused on the assessment of initiatives at the state-level to prosecute, establish TRCs, or to declare amnesties.[133] The mapping scenarios are based on the need to end the culture of impunity and complicity in human rights violations. The UNDP developed strategic guidelines for TJ activities in the former Yugoslavia.[134] The OECD Conflict, Peace and Development Cooperation[135] drew from the UNDP[136] assessment survey which focused on the four key pillars of international and domestic war crime prosecutions: truth-seeking, documentation and archiving; multi-stakeholder dialogues; material and symbolic reparations; and institutional vetting or reform. Scenario mapping then enabled the UNDP to streamline its focus to areas under its strategic thrust such as security sector reform, good governance, and reconciliation as related to development.[137]

As Zimbabwe grapples with serious human rights crisis after crisis, the NPRC and ZHRC and other actors need to determine the hindrances to immediate cooperation in model-building amongst them and to distinguish between worst/likely/best (WLB) scenarios. This approach has obvious advantages: the first, to assist in decision-making priority between options.

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[129] Backer (2003) "Civil society and transitional justice: possibilities, patterns and prospects" *J Hum Rights* 297.
[130] ibid 297.
[131] Pabon (2019) "Beyond agreements, management tools to support peace agreements in the case of displaced populations in Colombia" in Canefe N (ed) *Transitional justice and forced migration: critical perspectives from the global south* 128.
[132] Muddell and Hawkins (2018) "Gender and Transitional Justice: a training module series."
[133] Skaar, Garcia-Godos and Collins (2016) *Transitional justice in Latin America: The uneven road from impunity towards accountability* 6-7.
[134] UNDP (2007) "Strategic Guidelines for Transitional Justice activities in the former Yugoslavia".
[135] OECD Development Assistance Committee Network on Conflict, Peace, and Development Cooperation of the Organization for Economic Cooperation and Development (Conflict, Peace and Development Cooperation))
[136] UNDP Rule of Law and Access to Justice Programme (assessment survey).
[137] UNDP (n 134).

Secondly, actors have an opportunity to brainstorm, reject, compromise, and agree to embrace particular options and whether to balance human rights-based approaches to TJ with other methods of dispute resolution. They can also assist in the design of models based on the need to focus move from transitional to transformative justice. The latter focuses on the personal and structural violence that can prevent community accountability for atrocious crimes. Practitioners can also weigh the benefits of using traditional, foreign, and country-specific TJ initiatives to resolve past and on-going conflicts or serious human rights violations. Scenario mapping tests the idea of whether it is fallacious to regard the lack of a clear TJ model as essentially the issue of a state's middle-level institutions or civil society's problem.

Further, the operating environment must be scanned, monitored, and properly assessed to enable evaluation of key interventions required. The nexus between climate change and conflict situations, for instance, demands a security scan of the operating environment.[138] The study of the operating context also enables researchers to rethink TJ's focus merely on paradigmatic transitions from authoritarian to liberal rule to the exploration of procedural democracies that are marred by on-going armed conflicts and authoritarianism.[139] In essence, any societal problem calling for an urgent need to build models for collaboration can be examined from a scan of the environment and the implementation of WLB scenarios.

3.7 Consideration of the models and frameworks for actors and stakeholder collaboration

This section is important in strengthening the institutional visibility of the NPRC and ZHRC. From a national perspective, this is so also because Zimbabwe does not have a coherent normativised TJ framework. The NPRC and ZHRC must promote mass involvement in TJ processes through building idealised and practicalised frameworks that are based on identified likely, worst and best case scenarios. This also includes taking TJ to the people through essentialising people-to-people grassroots contacts.

In all this, the temptation for optimism in TJ processes is usually high in instances where the focus is made on sentimentalising important concepts. The conventional wisdom on TJ is that it is incomplete, uneven and slow. The need, however, is to design a contextualised, context-

[138] Peters and Mayhew (2019) "Climate change conflict and security scan: analysis of current thinking."
[139] Layus (2010) The role of transitional justice in the midst of ongoing armed conflicts: the case of Colombia 12.

sensitive, and inclusive TJ model that yields positive changes in a divided society. To hypothesize the need for unity of purpose in designing methods of collaboration between the NPRC, ZHRC, and other actors, this thesis has sought to use the Python-Frog analogy drawn from teachings from my village elders on how communities need to unite and act collectively in resolving critical challenges. Of course consideration of animal rights is loudly made.

In the analogy, the elders narrate a story in the form of a problem scenario. Using a real threat or experienced scenario, a python intrudes on a village homestead causing pandemonium as children run away and leave a toddler behind. In the absence of an elder who can chase away the python, the toddler risks being attacked or swallowed by the python. An eponymous young man runs to an elderly man whom he knows and explains the plight of the toddler. The elderly man, who has wisdom on taming pythons, quickly captures a frog and ties it to a rope. He tells or advises the young man to run fast and place the frog in front of the reptile. The reptile is about to attack the child when, fortunately, it sees the frog dancing on a rope and goes for the jumping frog and the toddler's life is spared. When the elderly man finally arrives, he finds the toddler already rescued by the young man. The whole village celebrates, including the once frightened children. There is wild jubilation and the snake disappears into the thick forest nearby.

This analogy is simply meant to apprise listeners to various ways of dealing with a python-like problem. Through scenario-building, some may point to the need to kill the python but are faced with the reality that only young children are at the homestead. A single elderly man, representing the State, independent institutions or oversight CSO or CBO institutions, introduces a rescue strategy. This demonstrates how a state may commit to vertical accountability or vertical application of the normative TJ framework or how CSOs and citizens can commit to horizontal application of the normative framework espoused by the Constitution. In respecting the rights of animals, children, the youths and the elderly, a rights-based approach to TJ embossed in the Constitution and amplified by international law can also be visibilised from a micro-environment under the auspices of a TJ institution to the macro-environment that represents Zimbabwe. In designing a moment of jubilation, the need for community cooperation in resolving crises is appreciated through folktales and other illustrations from traditional teachings. The moment may be used to describe the constitutional moments in Zimbabwe such as the 2013 period where the Constitution was used to end the culture of uncertainty that had been created by the GNU.

If comprehensive TJ is a question of how various conditions obtaining in a country affect the activities,[140] the thesis argues that it makes sense for key actors to focus on innovative ways of using democratic essentials or non-negotiable tenets. The use of euphemisms and other traditional methods of teaching may demonstrate how national institutions such as parliament, courts, the police, and the prosecution service could be dysfunctional, politicised, or under-resourced.[141] The communitarian way of problem-solving alluded to above may be summarised diagrammatically as illustrated in Fig 3.5a below which is intended simply to demonstrate how society can identify solutions to problems, provide a setting for a problem, understand the levels of conflict, identify the best ways to address a problem and rationalise how they can use micro-level solutions to resolve societal problems at a macro-level.

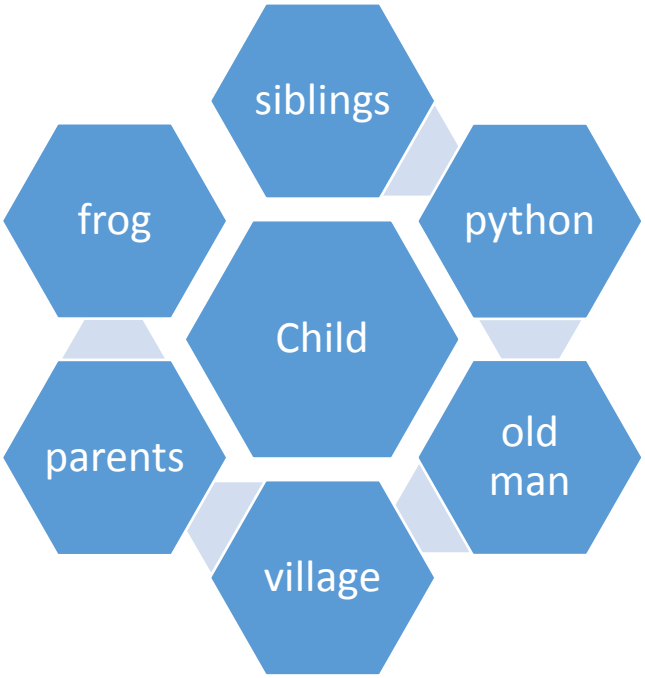

Fig.3.7a Resolving societal problems in a communitarian way

The child can symbolise the victim and the perpetrator while the other descriptions represent actors and beneficiaries in the TJ process. The advantage of using various ways of explaining real scenarios can yield merits as shown below. In another analogy, where TJ incoherence may be based on mutual mistrust between the state, national institutions and CSOs or citizen bodies, practical examples may be drawn from instances where the citizens themselves bully each other in ways that betray trust. Examples may be drawn from practices where herd boys

[140] See ICJT http://www.ictj.org/about/transitional-justice (accessed 7 November 2019).
[141] ICTJ http://www.ictj.org/about/transitional-justice (accessed 7 November 2019).

are paired and made to fight through fictitious creation of their mother's breasts (*Zamhu ramai vanhingi* game). Those doing the pairing will then encourage the herd boys to dare each other and destroy the breasts of their rival's mother. Immediately the herd boys will find themselves fighting over a parent who is present. This will encourage the state, state institutions and TJ practitioners to cooperate in creating the atmosphere for a TJ law and policy. Even in situations where a herd boy still refuses to fight after a fictitious destruction of their mother's breasts, the bully who destroys the breast can still resort to *marambakutya* concept where he beats up the peace lover to determine if indeed he is committed to peace. This may be used to describe instances where the citizens feel like the state is pushing them to the edge.

3.8 Benefits of using scenario models to transitional justice

From the previous section, it is shown in this section that role reversals, role plays, and building of scenarios at a micro-level bear significantly on what happens at macro-levels. Normally scenario-building is based on experienced or lived realities. The obvious justification is that TJ is seen as a human rights policy in that it is meant to provide the most meaningful justice under the political conditions at the time.[142] Comprehensive scenario mapping from multilateral perspectives can lead to a proper assessment of critical challenges based on real-time considerations. Effectively, mapping scenarios offers a better understanding of TJ models since a culture of commitment to ending impunity is entrenched at both government and other key institutional levels. The acceptability of the dynamism of actors depends on whether both the state and general actors believe that they may work together.[143]

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[142] ICTJ http://www.ictj.org/about/transitional-justice (accessed 7 November 2019. The UN has a system for preferred processes which conform to international legal standards and obligations; see UNCHR Rule of Law and Transitional Justice.

[143] The operating space which seemed promising in the early days of the post-Mugabe era shrunk to become dominated by distrust between civics dealing with human rights issues, and the state. For instance, while social movement activists and the Zimbabwe Congress of Trade Unions saw the "stay away" from 14 January 2019 in light of the economic meltdown, Government described it as an act from forces seeking to upend Zimbabwe's constitutional order with the assistance of foreign forces. The government described the stay away as neither civil nor peaceful and characterised by the worst violence witnessed in the recent past; see Nemukuyu (2019) "Government briefs diplomats on violent protests" *Herald.*

The changing nature of victimhood calls the design of theories and models applicable to context-specific situations.[144] In most cases, it is either the extremity or centrality of mainstream political and social differences which tears away the social fabric to the detriment of TJ because the constructive dialogue is hindered by sectarian animosity.[145] From a research perspective, academics have an opportunity to follow and reflect on problems that bedevil different segments of their societies.[146]

Scenario-mapping may also promote stakeholder coherence in TJ initiatives. Scenario-mapping may enable actors and stakeholders to allocate roles to those who can formulate, implement, and influence the national TJ policy. Transitional justice practitioners must be prepared to deal with specific or generally agreed ways of dispute resolution at the community, provincial and national levels through proactive engagement. Proactive and practical engagement requires the need for actors to test their assumptions and determine whether they hold in reality. The test of institutional assumptions following scenario mapping and dialogue, whether constructive or destructive, may enable actors to find ways to continue.

Actors can also engage consistently and innovatively with each other to avoid stereotyping and stigmatised narratives that delegitimise healing, reconciliation, and peace processes. They need continual and innovative engagement with the government and other stakeholders through focal persons. The NPRC, for instance, has a contact person in its peace zones and CSOs can have a contact person who connects them to CBOs. These connections will also spread to academia, researchers, and other practitioners in transitional and transformative justice circles.

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[144] There were some unpalatable reads when it became clear that teachers and pupils at an Epworth school were assaulted by militant protesters; Correspondent (2019) "MDC Violence: A Teacher's Tale" *Herald*. Three people were also reportedly killed including a police officer. The violent nature of the protests may justify the need for emphasis in the security and development dimensions of TJ.

[145] Almost any Zimbabwean who is, to avoid being too wordy, 'pro-political' party and is accused of political violence usually deals with his opponents in extreme fashion including use of lethal force. The majority of cases which hinder the progress of post-conflict peacebuilding security and development in Zimbabwe are also largely based or blamed on ethnical and other sectarian classifications such as elitism or the emergence of individual organisations including social movements who work under various #tags.

[146] The academic may stand as the voice of reason or conscience in a society. Depending on the views of mainstream political parties, the academic can scrutinise different sources to weigh the sentiments of the opposition political parties and the ruling party in light of the reportage in both state and private media. In 'politics it matters a lot who gets described as "mainstream" and who as "'extreme" and the media usually do the describing'; see Neuhaus (2001) *The best of the public square: selections from Richard John Neuhaus' celebrated first writings*.

A normative framework enables TJ practitioners to balance between the ideal and the realistic options through a category approach which legitimises the need for a theory of change between the state and other local TJ practitioners. Worst-case scenarios are equated to the pessimistic view and the best-case to an optimistic one.[147] The TJ approaches examined here have involved the comparison of a wide range of mechanisms with some form of linkage to the work of the NPRC and ZHRC. In dealing with what can be considered as bad or not ideal for TJ, this thesis examines various aspects that can be taken from the operational environment or the institutions under focus. The consideration of worst-case scenarios hopefully prompts actors and stakeholders to focus on innovative solutions. Actors may realise that they have been devoting energy to individual circumstances that do not speak to the victims' needs.

Best-case scenarios entail factors that enable actors to make TJ realisable for victims and perpetrators and expeditious implementation of the normative frameworks. The best method focuses on how the preferred approach to TJ embeds the gains of national TJ initiatives to enjoy institutional independence, competence, and legitimacy. The state functionaries will not trivialise their constitutional duties to protect, promote, respect, and fulfil duties on human rights. Independent institutions supporting democracy will not be seen as state appendages.

Holistically, the likely scenario includes what can perhaps happen unpredictably and unanticipatedly. This includes the good and bad events that can either promote or hamper TJ's progress. For instance, some actors may refuse to adopt a holistic approach or have irreconcilable differences on whether it follows that contextualised and holistic approaches would yield positive results as well as enabling the polity to deal with the past and stop impunity and complicity in current and future violations. The likelihood of actors agreeing to use either retributive or restorative mechanisms may be examined. Further, it is feasible to pursue TJ without worrying about terminology on transitions, specific institutional mandates, and ideological variance. The scenario includes the possibility that state functionaries will agree to be vertically accountable to ordinary citizens and may focus on whether state-civil relations can be mutually beneficial for TJ and victims.

[147] Dryfoos and Barkin (2006) Adolescence: growing up in America.

The three scenarios discussed above are addressed in Table 3.6a overleaf. The factors are based on issues discussed and on what actors and stakeholders may add. The factors listed in each category enable prioritisation of the need to build theories of institutional change that focus on nation-building and foster a sustainable culture of human rights. The non-negotiable traits of the political system followed can also be selected. The factors can serve as a checklist for strengths or weaknesses identified in the TJ pursuit to enable victims and perpetrators to find each other.

Table 3.8a Scenario mapping

Worst-case scenario	Likely scenarios	Best scenarios
• The NPRC's span is not extended beyond the current ten years. • Development partners refuse to work with NPRC. • The *Chihambakwe* and *Dumbutshena* commission reports are never found or government continues to say they were lost. • The NPRC and ZHRC fail to formalise their institutional complementarity. • A national TJ policy and law are not created. • Coronavirus is used to shirk the government's obligations on human rights and TJ. • The NPRC does not deal with victims of any conflict or human rights violations that occur after independence. • The executive continues to control the NPRC with no Reconciliation Minister appointed. • CSOs and NPRC continue to compete for funding with no formal TJ policy insight.	• The use of traditional justice mechanisms spreads from Gokwe to other provinces in the country. • A TJ policy is created in 2020. • CSOs and government work together in designing the TJ policy or law. • Development agencies such as UNDP and TJ actors such as ICTJ are invited to help design a development-oriented TJ roadmap for Zimbabwe from 2020-2030. • The AU or UN approach to TJ is fully embraced. • The ACHPR sstudy on transitional justice and human rights is fully adhered to. • A Minister of Healing is appointed. • Covid_19 is not used to shirk human rights obligations. • A National Transitional Government is established. • The Vice Presidents relinquish control of NPRC. • Victims of conflict are compensated just like White commercial farmers.	• The NPRC's mandate is formally extended to 2028. • The ZHRC and NPRC formalise their institutional complementarity in line with AU and UN frameworks on TJ. • The NPRC Act, ZHRC Act, and statutory instruments are amended to include clear TJ legislative mandates. • Victims, their family beneficiaries, and transitional episodes are properly identified. • POLAD and the executive fully commit to the UN, AU framework, and ACHPR sstudy on transitional justice and human rights. • CSOs and NPRC apply for joint funding to facilitate TJ initiatives. • ZHRC is allowed to deal with victims of incidents such as 1 August 2018 shootings. • Victors' peace is shunned and total healing and reconciliation promoted. NPRC secures funding for its staff to oil the formalised TJ processes.

3.9 Conclusion

From the foregoing, it is concluded in this Chapter that the importance of various non-judicial bodies used to promote TJ in various countries was examined. The variegated forms of institutions that have been preferred in Kenya, Algeria, Chad, and Uganda can be used to facilitate TJ processes in Zimbabwe. The actors are implored to work with each other in utilising the constitutional and international frameworks. Partners, actors, and the state must innovate on ways they can collaboratively engage to design initiatives that empower affected citizens and perpetrators to face the past and deal with it holistically. There are strengths and weaknesses in every mechanism and flexibility is essential to suit the national circumstances.

Within the focus on the four conventional pillars of transitional justice,[148] non-judicial bodies can be used as a way to achieve one or more of the pillars. Victims may utilise the communication by commissions to seek compensation and commissions play an important role in confirming to the general populace that violations were committed. The thesis argues that there is no such thing as a convenient time or perfect place for TJ implementation. Mapping scenarios may act as an institutional reminder on what needs to be prioritised, discarded, or modified for the benefit of the polity. These includes issues on staff mapping or advanced staff mapping in the event that the NPRC and ZHRC collaborate or choose to appoint or work with similar staff on critical issues. The major point gleaned from scenario mapping is that the NPRC and ZHRC can play a critical role in empowering citizens and TJ institutions to rethink, re-imagine and re-image the experiences they want to associate or dissociate with. At the moment, TJ is only in the minds of the informed who constitute the national institutions and TJ institutions. Scenario-mapping that is based on lived realities from communities allow the citizens to internalise TJ issues. With TJ focused scenarios, institutional differences or affiliations must not be used to derail the constitutional opportunity to use independent commissions supporting democracy as vital mechanisms for TJ.

[148] OHCHR (2008) Guidance Note on NHRIs.

CHAPTER 4

THE NATIONAL PEACE AND RECONCILIATION COMMISSION AND TRANSITIONAL JUSTICE

4.1 Introduction

This Chapter examines and presents the study findings on the National Peace and Reconciliation Commission (NPRC) work in TJ. The NPRC is considered as the Chapter 12 independent constitutional commission supporting democracy in Zimbabwe and endowed with the express mandate to find ways to stop violence, find real solutions to deal with root causes, and deal with post-conflict justice. Beyond the obvious horizons of post-conflict justice, the NPRC can encourage the executive as an institution of political will to demonstrate, with reasonable patronage and amenities in its power, that indeed the NPRC is a key TJ institution. It can meld the fragments of information that it gets from its conflict-mapping exercises to answer promptly the question on how far Zimbabwe's formalised TJ processes should go. In all this, it should guard against superfluous theorising on areas that remain unexplored.

Institutionally, in order to ease the problem of identifying the practical areas to formally drive TJ processes in Zimbabwe, the NPRC's mandate enjoins it to innovate on TJ mechanisms and to deal with conflicts that erupt randomly or instantaneously whatever their enormity or degree of violence: slight, moderate, internecine, international, intractable, or protracted. Zimbabwe's Constitution uses the term 'post-conflict justice' explicitly but impliedly, the reference to post-conflict justice and TJ as similar concepts in this thesis is based on the fact that post-conflict justice has been used to focus on TJ efforts such as trials, urges, reparations and TCs.[1] Though the Chapter focuses on a reconciliation commission, it will not detail the many types of reconciliation such as individual, interpersonal, socio-political, institutional, thin, or thick but will use some of the descriptions to broaden the scope of analysis on the NPRC's potential to improve the understanding of post-conflict justice.[2]

[1] Gates, Lie and Binningsbo http://www.researchgate.net/publication/23550187_Post-Conflict_Justice_and_Sustainable_Peace (accessed 12 November 2019).
[2] See ICTJ http://www.ictj.org/news/rupture-relationships-transitional-justice-reconciliation (accessed 12 November 2019).

The concept of post-conflict justice is examined mainly from the perspective of restorative justice since the NPRC is a non-judicial institution with no quasi-judicial functions. The NPRC allows victims to access non-retributive measures such as reparation rather than through retributive aspects such as a trial.[3] From the need to link the NPRC's work on TJ and coronavirus, this thesis indicates that the success of the variety of activities undertaken by the NPRC before, during and post the coronavirus is difficult to benchmark. This is because there is no access to the calendar or diary of events by the NPRC to determine the progressive development of different activities and to convey a sense of actuality. It is also difficult since the NPRC's conflict map has not been posted on the internet for critics to assess the effectiveness of what the NPRC is doing. While the NPRC's work may be akin to the solitaire or patience game, the seemingly unformed nature of context-sensitive TJ and how it opens tremendous possibilities on making TJ realisable by victims of conflicts largely depend on some of its work and how it is taking from the work of the ONHRI.

From the perspective of an inchoate context-sensitive TJ, the goal of post-conflict justice should not be compromised for the sake of peace.[4] The precocious grasp of international and domestic normative TJ standards should both be viscerally and factually understood if the NPRC maximises the bottom-up approach to TJ. This is preferred in situations where post-conflict societies lack institutional and economic means to carry out fair and impartial justice without compromising other aspects of peacebuilding.[5] While the NPRC can be the tabula rasa for context-sensitive TJ in Zimbabwe, this may create doubts on the potential for TJ to achieve post-conflict peace and stability[6] although the emphasis is placed on 'what works' in a specific society rather than what is morally or legally appropriate.[7] The concepts of transitional and post-conflict justice are linked to social justice because formal international

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[3] Gates, Lie and Binningsbo (n 1). For detailed examination of restorative justice as an alternative to retribution see Cunneen *Restorative Justice Traditions*. See also in detail Robins 2011 *Int J Transit Justice* 75 for the use of restorative justice in preference to retribution.

[4] Gates, Lie and Binningsbo (n 1) 1. See also in detail SA TRC *Final report* (1998) para 36 on why restorative justice institutions pursue another kind of justice which is concerned not so much with punishment as with correcting imbalances, restoring broken relationships, healing, harmony and reconciliation.

[5] Gates, Lie and Binningsbo (n 1) 2. See also here in detail Hayner *Unspeakable Truths* on the importance and role of using institutions to promote truth-telling to bring restorative justice in situations where institutions lack capacity to prosecute or where there is lack of political will.

[6] Gates, Lie and Binningsbo ibid 2. In contrast for Zimbabwe however the commitment of the Mnangagwa government to operationalise the NPRC seems to augur well with the view that some form of accounting by perpetrators may ease tensions in early days of transitions; see C Campbell & C Turner (2008) 'Utopia and the doubters: truth, transition and the law' Legal Studies, Vol 28, Issue 3, 376.

[7] Gates, Lie and Binningsbo ibid.

social control approaches of the UN and AU are linked to their state-level forms in Zimbabwe. This has been the case with local mechanisms such as *Gacaca* courts in Rwanda and other responses such as TCs or amnesty.[8]

The NPRC is the preferred institution to achieve peace and reconciliation through non-retributive methods although, impliedly, its investigative actions may be used to recommend prosecution of perpetrators. The ultimate configuration of context-sensitive TJ in Zimbabwe should spur the NPRC to embark on consensus-seeking initiatives that tone down tensions between victims and alleged perpetrators. This enjoins the NPRC to also focus on language acculturation, cultural clashes between political and doctrinal factions, clique structures and core-periphery structures, as well as respect for taboos, religious rituals and rules that bear on TJ. In evaluating TJ progress, the NPRC as a stool-pigeon for TJ has engaged in public hearings around the country to determine the concerns of citizens on what they consider are critical issues. Its work also produced the National Peace Pledge and the Strategic Plan.[9] From the perspective that national institutions can serve as appendages of the state, concern exists over the sincerity of the NPRC to lead a TJ process and there is indecision as to the period of focus that the NPRC should include. This is reflected in the statement that:

> "... proposals were made recently at an Exchange Seminar of CSOs in Bulawayo to have the NPRC's mandate stretch from as far back as the 11th century. How to address all these issues holistically, given the limited time the Commission has before its official expiry, is something the Commission must be innovative about."[10]

With the NPRC grappling with shortages of the human resource to drive its activities, the proposal for the NPRC to extend back ten centuries may be noble simply to benchmark the history of conflicts in Zimbabwe and not for seeking real justice. The determination of pre-colonial conflicts may be important but risk being romanticised or mere pedantic. This is because the inclusion of the NPRC's conflict map for instance to the 11th century Mapungubwe may be problematic since the Mapungubwe area itself is now largely part of

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[8] Rothe and Mullins (2009) "Building justice after war: the use of multiple post-conflict justice mechanisms" *Journal of Social Justice* 35.

[9] NPRC 5 Year Strategic Plan 2018-2022.

[10] D Tshuma http://www.accord.org.za/conflict-trends/reconciliation-integration-and-healing-efforts-in-zimbabwe/ (accessed 12 November 2019). Although the NPRC has peace and reconciliation functions it is important to note that reconciliation is usually used synonymously with processes such as peace-building, mutual accommodation between former antagonists, reconfiguration of the individual and group identities, healing, restorative justice, social repair and community building. See Chapman (2009) "Truth-finding in the transitional justice process" in van der Merwe H, Baxter V and Chapman AR (eds) *Assessing the impact of transitional justice: challenges for empirical research* 145.

South Africa following the colonial alteration of territorial boundaries. There will be much time needed to think about how South Africa, which is grappling with its TJ challenges, will dedicate to going back 10 centuries ago to help Zimbabwe contextualise its TJ.

Further, while Zimbabwe may have a few generation of elders who were born in the early 1900s when the Ndebele exceptionalism under the *guramatanga* or period of the destruction of the livestock of the vanquished Shona, those individuals have not been interviewed from the perspective of social anthropology or TJ. The *guramatanga* raids under the *madzviti* are immortalised in Shangara songs such as:

'Zvimbudzi mee mee pakopo pamambo pasina (you have but the king has no goats)
Chenjera guramatanga (beware of cattle raids that destroy your kraals)
Hoyewoye guramatanga (Indeed they destroy kraals)'

Moreover, such conflicts are largely dependent on oralised tradition or secondary time witnessing which may risk being dismissed as sanitised, sugarcoated, redacted, sentimentalised, emotionalised, mythologised or anachronised. Moreover, its ethnic grouping has too many secrets, constructed mythologies, heightened animosities and so many blurred created identities. The narrated victories and challenges are usually clothed with tribalised identities that ignore intermarriages and focus on the damage done by the victors. Thus the mind of the listenership usually goes click so much that it becomes difficult for it not to believe the sinister things internalised in them. From experiential narration of the *guramatanga* concept, this thesis notes that the link between the hatred of the *madzviti* victors under the Ndebele and the *guramatanga* concept under the Shona for instance, creates animosity on how the Ndebele warriors would raid livestock, kidnap beautiful wives, kill or maim elderly women they considered useless among the Shona as a caste section of the *Holi*. All this is told through *mhangwa neshwiro dzeupenyu* (sage counsel from the elders).

Specifically, while the victim tellers ask their listeners to remember why the Ndebele sections that are not Khumalo may be half-Ndebele and half-Shona, together with the fact that msny who profess to be Ndebele cannot even connect themselves to the etymology of the term Ndebele demonstrate how the contemporary aspect of evidence to be gathered therefrom can only be gleaned from accounts of their remaining relatives' accounts. This thesis thus implores that it be essentialised by the NPRC that the kinds of time witnessing under the Shona, Ndebele or other pre-colonial groupings be cautiously given hype.

Similarly, while the need to focus on what is known by Zimbabweans may take us to the colonial period, based on the fact that some veterans of the liberation struggle are still alive and some can still recall the atrocities committed in many places, there is need to consider the psycho-social impacts of the armed struggle on both liberation fighters and former Rhodesian forces. Most of the informalised instances of reconciliation and blanket amnesties in the early and late 1980s were done under the watchful eye of the President who is now dead and who had not operationalised the NPRC during his time in office. Reasons why Mugabe's government had an indifferent attitude to bringing the ex-Rhodies to book, including Ian Smith who had presided over many atrocities should also be considered from the perspective of national security and stability. It may also be important to consider issues relating to the non-rehabilitation and recognition of various categories of veterans of the struggle now recognised by the Constitution such those on the war front under ZIPRA and ZANLA forces(labeled terrorists by the Smith regime), detainees, restrictees and war collaborators (the *chimbwido/female* and *mujibha*/male). Delay in NPRC's operationalisation calls realistically for post-independence reparations based on the roles played by the dominant political players and their supporters, lest it may be accused of complicity in making TJ less realisable or in precipitating a long-overdue debate on formalising TJ in Zimbabwe.

From the perspective of victims, finding the identities of the victims and perpetrators can also be done more easily by the NPRC if the focus period is post-independence. The need to restrict the period of focus is also based on the fact that restorative justice is aimed at the realisation that both the victim and perpetrator must be directly involved in the conflict resolution.[11] Linked to this is the fact that most victims of key conflicts such as the usage of the term *gukurahundi* and *zero hour* during the final stages of the liberation struggle, the two *Entumbane* conflicts, Matabeleland and Midlands *Gukurahundi*, other versions of *gukurahundi* or Operation *zero hour* across Zimbabwe, blanket amnesties, fast track land reform, Operation *Murambatsvina*, *hakudzokwi*, *chikorokoza chapera, chipo chiroorwa, chipo dzokera kumba* (gendered dimensions of TJ), 2008 election run-over, 1 August 2018 killings, and 14-16 August 2019 violence have not been compensated. The NPRC should,

[11] Tshuma ibid. The frequently practiced form of reconciliation in Zimbabwe has generally been national reconciliation which is based on political consensus and interaction rather than societal, personal and political reconciliation. See in detail Shriver "Truth commissions" for the explanation of the four forms of reconciliation and political reconciliation.

therefore, innovate on ways the Government may use to ensure these issues are holistically addressed to include their many meanings in the vernacular or indigenous language systems used in Zimbabwe. Such an exercise should also essentialising the usage of sign language which is also recognised as an official language in Zimbabwe.

The logical corollary to this is that the general absence of information on the actual identities of victims in various transitional moments enjoin the NPRC to identify times that are known to most Zimbabweans who supported the constitution-making process that brought the NPRC into effect.to deal with post-conflict justice. In operationalising the NPRC in 2018, and from the perspective of the executive as an institution of political will, the Zimbabwean government did not only demonstrate the political will to create the realisation of post-conflict justice work but also generated fervent hope that the popular transition in the post-Mugabe would allow victims to at least enjoy the benefits of TJ, especially those relating to material restorative justice such reparations or compensation or symbolic TJ such as exhibitions, decent burials, and so forth. To understand the importance of operationalising the NPRC, this is examined in light of some research perceptions. The general focus of the analysis is that emotional perceptions about the operationalisation constitute a legitimacy concern for the NPRC. If the Zimbabwean and developmental institutions give it a more positive review following collaborative activities, the reviews may encourage stakeholders that the NPRC is institutionally independent and fit to drive TJ processes.

In histrocising the delays in the operationalisation of the NPRC, it should be noted that thehe operatilisation delay was based on a lack of enthusiasm by Mugabe's government to operationalise the NPRC between 2013 and 2017 when Mugabe resigned. The delay was credited to the postponement of the NPRC following the GNU and the reasons included political polarisation; disagreement on whether to focus on the 2008 elections or the Matabeleland and Midlands *Gukurahundi* massacre and the need to sweep the past under the carpet or describe massacres as 'a moment of madness'.[12] The optimists saw the postponement of the NPRC's operationalisation as a dream-deferred and pessimists regarded

[12] Mwonzora http://www.transconflict.com/2013/11/framing-politics-reconciliation-new-constitutional-epoch-zimbabwe-211/ (accessed 12 November 2019).This calls for the NPRC to determine whether its reconciliation dimension is process-oriented to mend broken relationships in Zimbabwe or conditional to bring about harmonious relationships or coexistence. See in detail Amstuz (2006) "Restorative justice, political forgiveness, and the possibility of political reconciliation" in D Philpot (ed) *The politics of past evil: religion, reconciliation and the dilemmas of transitional justice*.

it as a façade.[13] This permits for an argument that elitist reconciliation explains both the operationalisation delay as well as the likely extension of the NPRC's mandate beyond 2023. Political will is used to describe the commitment of decision-makers for the use of a particular policy approach to solving a problem.[14] To employ this description, the GNU government and later the Mugabe government did not give priority to the operationalisation of the NPRC before and after the elections in 2013.

In political parlance, political will usually refer to the centre of power and political decision-makers as the key actors in governance.[15] The individual will of a senior politician such as the executive President in Zimbabwe is usually seen as sufficient to influence the response of other politicians to conform to his direction.[16] Political will can also be defined as a collective or aggregated effort considering that it is difficult to impose on an individual politician.[17] This will also bear significantly on why the ZANU PF government and the opposition or independent politicians in institutions of state administration such as Parliament must also be celebrated for embossing the work of a constitutionally-established NPRC through the promulgation of the NPRC Act. The concept of political will looks at the need for decision-makers to have a shared understanding of a particular problem on the common agenda which they are committed to supporting.[18] The point here is that lack of political will made the NPRC non-operational for a solid five years during which it could not fulfill its constitutional

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[13] Mwonzora ibid. The two camps alluded to by Mwonzora demonstrate why it is difficult for a polity to have a shared narrative and understanding of the past or goals of reconciliation; see Shriver "Truth commissions and judicial trials: complementary and antagonistic servants of public justice?" Mugabe's reconciliation style can be situated under thick reconciliation where elites regarded seen by the larger society as human rights abusers adopt maximalist or communitarian approaches to reconciliation; see in detail Wilson (2001) *The politics of truth and reconciliation in South Africa*.

[14] Roberts http://www.vox.com/2016/2/17/11030876/political-will-definition (accessed 12 November 2019). Operationalisation of the NPRC may have been encouraged by the need to separate the Mnangagwa regime from the Mugabe regime which had delayed fit. This explanation speaks to how political actors may seek legitimacy by not only upholding the rule of law but also by politically affirming or denying certain political pasts. See in detail Bell, Campbell and Aolain (2004) "Justice discourses in transition" *Sage Journal* 305.

[15] Illerheus (2015) "Foreword" in Abazovic D and Mujkiç A *Political will: a short introduction: case study of Bosnia and Herzegovina* 7.

[16] Untitled http://www.assets.publishing.service.gov.uk/media/57a08cbfed915d622c001551/R8236Appendix3.pdf (accessed 12 November 2019). While questions around Mnangagwa's legitimacy have been dominant especially from the MDC, Mnangagwa has worked with other political players under POLAD and the NPRC has also been part of POLAD events. Political reconciliation would have been possible had all the key players committed to POLAD and in a way would have legitimised the role of the NPRC in this regard.

[17] Illerheus (n 15) 14.

[18] ibid. This is what largely obtained during the GNU when ZANU PF and the MDC formations committed to establishing institutions such as ONHRI and ZHRC and the constitution-making process that culminated in the establishment of the NPRC and other institutions.

and legislative imperatives. This has further created uncertainty on whether the NPRC's life will be extended beyond 2023.

Under the Mnangagwa government, the NPRC has taken significant baby steps which sadly continue to create the impression that TJ realisation may remain elusive. The Strategic Plan notes that:

> "The NPRC is one of Chapter 12 independent commissions mandated to support and entrench human rights and democracy; to protect the sovereignty and interests of the people; to promote constitutionalism; transparency and accountability in public institutions; to secure the observance of democratic values and principles by the state and all institutions and agencies of government and government-controlled entities, and to ensure that injustices are remedied."[19]

The NPRC, now operationalised in the form of a TRC, can perform its functions as recognised by its Strategic Plan to:

> "Resolve the burdens of past violent conflicts and build national and sub-national capacities that guarantee a future of peace and reconciliation.... ensure post-conflict justice, healing and reconciliation by encouraging truth-telling, the making of amends, the provision of justice and rehabilitative treatment. [It will] also conciliate and mediate disputes ... and put in place institutional frameworks and mechanisms [to prevent] the recurrence of violent conflicts in the future."[20]

Both ZHRC and NPRC serve the same aims of peace, reconciliation, and truth-telling. Although the NPRC does not have prosecutorial power, it can contribute to the institutional framework on the resolution of disputes. Further, its use of alternative dispute resolution mechanisms such as conciliation and mediation resonate with the prioritisation of such methods in the legal fraternity. Fundamentally, the NPRC seems to follow the design of TRCs which prioritise restorative justice as was the aim of the TRC created in South Africa in the mid-1990s.[21] It has also been realised that TCs operate within a specific context for which national character cannot count.[22] The Mandela government, for instance, avoided the traditional adversarial royal commission-type of truth-telling enforced in apartheid South Africa and opted for a process where anybody who felt they had been a victim of violence

[19] NPRC 5 Year Strategic Plan 12.
[20] ibid. Whether or not the NPRC can as a post-conflict justice institution replenish Zimbabwe's healing and reconciliation capital is yet to be determined.
[21] FitzGerald (2019) "The truth commissions of Guatemala: plurality and particularity in the human rights paradigm."
[22] ibid.

could come forward to be heard. Perpetrators could also testify and request amnesty from prosecution.[23]

It may be important to interrogate the NPRC's emphasis on using conflict resolution to achieve post-conflict justice or prevent the recurrence of conflicts. Conflict resolution encompasses a wide range of diverse issues under the realisation that resolution of conflict supports social institutions that can manage conflict in an inclusive and non-violent way.[24] The NPRC's approach is understood as one that hinges on the nexus between conflict resolution and peacebuilding based on the need to address the structural roots of conflict.[25] The TJ dimensions of the NPRC also appreciates that peacebuilding interventions after violent conflict often address the same concerns as development interventions.[26] The development approach helps explain the functions of the UNDP and other critical actors[27] as acknowledged by the NPRC in its work.[28] This collaboration is fundamental since development organisations are sensitivised to conflict dynamics in their country and craft their support initiatives to promote informed programmes and policies on poverty that address underlying grievances.[29]

The NPRC uses shared aspirations to build reconciliation and healing.[30] This is based on the understanding that Zimbabwe's national aspirations for unity in diversity and a common desire for freedom, justice, respect for diversity, and gender equality must be cherished by the

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[23] Barnshttp://www.ab.net.au/news/2016-03-03/barns-what-we-need-is-truth-and reconciliation/7217018 (accessed 11 November 2019).
[24] Waldman (2009) "Conflict resolution, peacebuilding and youth" 4.
[25] ibid 5.
[26] ibid.
[27] Zimbabwe Agenda for Sustainable Socio-Economic Transformation (Zim Asset) October 2013 - December 2018 with the goal for sustainable development and social equity anchored on indigenisation, empowerment and employment creation. https://www.fbc.co.zw/stockbroking/sites/fbc.co.zw (accessed 4 May 2020).
[28] NPRC (n 19) 7.
[29] Waldman (n 24) 5.
[30] NPRC (n 19) 15. Whether the NPRC will wrought a miracle for permanent reconciliation is also to be seen considering the failures of racial and ethnic reconciliation which was attempted in the 1980s between whites and the Mugabe government and ZANU and ZAPU. See also du Toit (2009) "Tensions between human rights and the politics of reconciliation" in Quinn (2009) *Reconciliation(s): transitional justice in post-conflict societies* 232 on the assertion that accounts of justice and peace; of human rights and reconciliation of victim's rights; of perpetrator demands and legal processes and extrajudicial truth-seeking mechanisms have to be properly balanced.

current generations and preserved for future inheritance.[31] The NPRC's emphasis on intergenerational peace and reconciliation is broadly interpreted and people-focused.[32]

Potential for inclusive and broad-based reconciliation exists from NPRC's evidence-gathering initiatives since strategies for broad-based inclusion should focus on intergenerational and social reconciliation.[33] Information gathering depends on oral tradition and intergenerational memory-building. As such, intergenerational dialogue is needed to bring closure to the culture of blame shift between races, ethnic groups, and class in Zimbabwe.

Legacies of conflict include dehumanisation, deep trust, stereotypes, and divergent collective memories. These usually move from parents to children and often transmit trauma, uncertain identities, and victimisation.[34] Intergenerational dialogue is needed to promote the reconciliation of victor-survivors' memories.[35] In Rwanda, the '*Mvurankuvure* '*Heal me, I heal you'* intergenerational healing and community reconciliation assisted in a sustainable peace model. The intergenerational concept focuses on facilitating the psychosocial reintegration of (ex) prisoners and addressing genocide legacies perceived as risk factors

[31] NPRC 5 (n 19) 15. See Quinn (2009) What of reconciliation? Traditional mechanisms of acknowledgment in Uganda" in Quinn JR *Reconciliation(s): transitional justice in post-conflict societies* 178 on that reckoning with past injustice is an important step in the process of acknowledgment and forgiveness. It also leads to the building of viable democracy, restructured judicial system and strengthened network of civic engagement all of which ultimately increase levels of social trust.

[32] There are fears that the *Chihambakwe* and *Dumbutshena* reports were lost. Whether or not government can commit to finding the reports will greatly demonstrate its commitment to showing political will to ensure victims of conflicts such as Entumbane and Matebeleland and Midlands *Gukurahundi* achieve total healing.

[33] In Zimbabwe much happens in social circles including football politics where for instance Highlanders and Dynamos football clubs are seen as representing the battle for Zimbabwe which loosely points to Ndebele and Shona rivalry. This is reflective of the need for total healing and social healing for the Ndebele and Shona ethnic groups in Zimbabwe. The rivalry in soccer matches is pronounced such that Highlanders fans cannot risk sitting in the Vietnam end at Rufaro Stadium when playing Dynamos. Similalry, Dynamos fans cannot risk sitting in the Soweto end at Barbourfields. The club mottos can however be used to bring unity. For instance Highlanders has the motto '*Siyanqaba*-we are the fortress,' or '*Ibosso yitimu yelizwe lonke*/ Highlanders is a team for the whole nation,' which may be used to essentialise unity between the Shona and Ndebele. Dynamos' identity as *Chazunguza*, Glamour Boys, or 'the 7 million club' may also be used to shape the target for social healing across Zimbabwe.

[34] Khet (2012) "Intergenerational dialogue: connecting the past and present in Cambodia at youth for peace." See also El-Masri (2009) "Inter-ethnic reconciliation in Lebanon after the civil war" in Quinn *Reconciliation(s): transitional justice in post-conflict societies* 264 where there is emphasis on the need for a social transformation approach to reconciliation from a bottom-up level that manages conflicts and facilitates the growth of strong inter-ethnic civil society free from elite manipulation.

[35] Khet ibid. For Zimbabwe, time-witnesses embed intergenerational stories on how the Ndebele people brutally raided cattle, took away young girls and killed old women and young men in Shona villages. The victims of Matabeleland *Gukurahundi* retell the same stories to their descendants on how the event was ethnically pitched.

hampering long-term reconciliation.[36] The obvious advantage of this method is that it reinforces ownership among local leaders, teachers, and communities over the reconciliation process.[37]

The NPRC's Strategic Plan notes the continuum of violence which tends to peak during increased political tension such as elections.[38] It observes the existence of a culture of impunity concerning crimes of sexual and gender-based violence and that the psychosocial needs of survivors of political violence remain unaddressed and compound the injustice of vulnerable groups like women and girls.[39] The NPRC hopes to focus on sensitive programming in a human rights-based approach for gender equality and participation of women, youth, and people with disabilities in the nation-building process[40] which requires more attention to common crimes and contributes to the establishment of transparent, efficient and democratic police and criminal justice.[41] The NRPC stated:

> "Dealing with past wounds, or rather, opening past wounds, demands that the actors in this endeavor find wholesome ways of nursing those wounds. Any approach that ignores this may create a fertile ground for intractability and intransigent behavior. The social, economic, and political costs may be a burden too heavy to bear for our nation."[42]

Transitional justice should thus be defined by time considerations that are clear to identified victims and perpetrators.

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[36] Rwanda (2019) "Mvurankuvure approach for healing and reconciling the community for sustainable peace."
[37] ibid.
[38] NPRC (n 19) 16. See also El-Masri (n 34) 273 on how reconciliation after every internal crisis in Lebanon before 1975 was the prerogative of the elite. Priority was given to ethnic elite through the establishment of power-sharing agreements that specified only how power should be distributed between them. This then created inter-ethnic stereotypes and suspicions on whether the elite would champion the cause of the victims.
[39] NPRC 5 (n 19) 17. Hamber and Kelly (2009) "Beyond co-existence: towards a working definition of reconciliation" in Quinn *Reconciliation(s)*: *transitional justice in post-conflict societies* 291 express the need to develop a shared vision of an interdependent and fair society which involves the whole society at every level. The goal is to emboss a common vision of an integrated, just, equitable and diverse society.
[40] NPRC (n 19). NPRC needs to delink from the executive so that it avoids what El-Masri (n 34) 264 calls "consociational reconciliation" which is used to manage conflicts through elite power-sharing based on proportional representation and group autonomy. In Zimbabwe, conscociational reconciliation was seen in 1987 when a Unity Accord between ZANU and ZAPU was signed to form ZANU PF. Under such an arrangement the power-sharing deal stifled the voices of victims of Matabeleland *Gukurahundi* because some victims were given a taste of elite power.
[41] Cavallaro (2008) "Looking backward to address the future? Transitional justice, rising crime and nation building" *Me L Rev* 461. See also Perry and Saydee (2015) *African truth commissions and transitional justice* 12 on the need to respect due process in formulating reconciliation as well as transparency in citing the names of perpetrators.
[42] Hofisi (2018) "The need for transitional justice in Zimbabwe" *Herald*. See Gahima (2013) *Transitional justice in Rwanda: accountability for atrocity* 7 on the important assertion that justice is often the minimum condition that victims of atrocity seek as the price for peaceful co-existence with their victimisers.

The NPRC has demonstrated willingness to collaborate with CSOs working on various TJ issues and its Strategic Plan acknowledges the role of women's organisations, youth groups, and victim groups in devising a national peace pledge.[43]

Concern has been expressed on the role of the executive control of the NPRC through the office of the Vice President[44] as well as the lack of sufficient funding. Through its five thematic committees, the NPRC is beginning to design a roadmap based on its legal and constitutional mandate.The operationalisation delay of the NPRC reflects strongly on how the coercive nature of the state stifled the NPRC's work. Twenty-two years after the 1987 Unity Accord, victims of Matabeleland and Midlands *Gukurahundi* (and *Entumbane*) still grapple with physical and psycho-social problems relating to whether they may realise the fate of their lost relatives. The same happens for victims of political violence or enforced disappearance at any stage.

4.2 NPRC: mandate and transitional justice in Zimbabwe

The analysis in this section is guided by the research objectives laid out in Chapter 1. Focus is placed on the NPRC's constitutional and legislative mandate to enable conflict resolutions for victims. From their website, the intentions of the NPRC activities follow:

> "In accordance with s 3 (2) of the NPRC Act the Commission will fulfill its mandate to conduct investigations into any dispute or conflict within the [commission's mandate by Constitution s 252 and s 342]; and conduct research on (i) the nature, scope, extent, and causes of disputes and conflict: or (ii) the intervening strategies for disputes and conflict."[45]

The NPRC's dialogue in selected provinces has been aiming at findingthe best way to deal with disputes and conflict.[46] The observation in this thesis made during the researcher's presentation to parliamentarians in Bulawayo on the NPRC's mandate was that people do raise concerns that include the pre-colonial, colonial, and post-colonial conflicts.

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[43] NPRC (n 19) 13. See Gahima (n 42) 9 on the potential for a representational TJ process to aid victims to receive closure and facilitate co-existence and possibly reconciliation between previously antagonistic individuals, groups and communities.

[44] The involvement of VP Kembo Mohadi in NPRC activities may be reflective of what El-Masri (n 34) 264 refers to as a case of managing conflicts rather than eliminating ethnic divisions. Such divisions tend to be so long-lasting as to be practically permanent as is the role of elites in ethnic conflict.

[45] NPRC http://www.nprc.org.zw/how-will-nprc-fulfil-its-mandate (accessed 11 November 2019).

[46] *Zimeye* http://www.zimeye.net/2020/02/15/tell-us-the-truth-mr-president-are-you-sincere-on-*Gukurahundi*-mnangagwa-bashed-in-bulawayo/ (accessed 19 February 2020).

The NPRC presented its paper-based map on potential conflicts that goes as far back as 11th century Mapungubwe but this has not been published on the internet. Each period of conflict that divides Zimbabweans is considered important and the NPRC's epistemological approach in a way conforms well to CSOs and other actors. Through the use of an analytical and process-tracing methodology, reliance is also based on the reseacher's experience in public administration, political science, international relations, human rights, and the legal field to understand the model of peace that the NPRC may prioritise. The thesis thus concurs with the four models of peace by Junichiro Tanabe who focuses on a basic needs model where victims simply need justice or other amenities like health care; the structural or social model where the root of conflicts in a specific society has to be determined and used to redesign the society through the enhancement of political culture or common vision for society; an epistemic model which focuses on people's frame of mind, prejudices, points of reference and worldviews; and the spiritual model which focuses on what makes everyone human.[47] The latter may assist the NPRC to deal with doctrinal and other traditional forms of conflict in Zimbabwe.

Observably, justice seems to be the common aspect amongst the four models and data from conflict research demands that justice should be the common thread. The peace model removes 'fixation' on how TJ is practiced to focus on a larger societal vision for the benefit of the victims. The thesis now moves for an argumentation rooted in interposing politico-legal considerations.

4.2.1 NPRC: strategic importance of the 5-year plan to promote TJ

This section examines the NPRC's 5-year plan as a roadmap in its work and bears siginificantly on how the NPRC's also envisaged a situation where its life may not be extended beyond 2023. This planning model is thus based on prudential programming and should inform how institutions such as Parliament must engage the executive as the institution of political will to be clear on whether the NPRC's plan will be extended. Generally, the absence of a national law to give content to a constitutional provision entails that constitutionally established institutions will likely fail to discharge their mandates in a specific area. From the perspective of TJ, the NPRC Strategic Plan aims to deal with four areas: initiating inclusive healing; facilitating the enhancement of policy frameworks and

[47] Maboloc http://www.opinion.inquirer.net/109235/4-models-peace (accessed 11 November 2019).

capacities; strengthening peace architecture as a catalyst for conflict prevention; and transformation and enhancement of the national capacity for peace and reconciliation.[48] The Strategic Plan requires identification by Zimbabweans through stakeholder engagement processes and provincial consultations, and through the adoption of a bottom-up approach, to ensure that victims' voice and the population generally take precedence in the NPRC's discharge of its mandate.

It is always right when the institution that normatively deals with a crucial national issue makes a decision on how such an issue should be ventilated. That is the way of things and it may please every person in the society. To benchmark how the NPRC as an institution that support democracy can make TJ realisable, the major issue is that the link between TJ, rule of law and development has been emphasised by the UN Deputy Secretary-General as crucial to addressing the root causes that contribute to societal upheavals.[49] The link is premised on the fact that economic growth of a country alone is not an adequate measure: rule of law and human rights matter as well as justice, security, and development, and these aspects cannot be promoted in isolation or at the expense of the other.[50] As such, the NPRC's TJ work should be assessed using key tentacles entrenched and made justiciable in the Constitution such as the rule of law, human rights and constitutional supremacy.

In Chapter 3, this thesis indicated that the NPRC fits under non-judicial institutions that can innovate on designing TJ mechanisms that reflect constitutional and other legislative apparatus at a national or international level.[51] The Strategic Plan of the NPRC has created the impression that the NPRC will engage the state and civics and then come up with recommendations on the best TJ model for Zimbabwe. The problem with recommendations is that they may not be actioned by the institutions of political will such as the executive. This obligates institutions of state administration and accountability such as Parliament to ensure the NPRC's reports submitted to Parliament include deliberate and practical representations on the NPRC's TJ work. Though debatable, the Matabeleland and Midlands *Gukurahundi* remains a topical TJ issue which should be analysed holistically and not in piecemeal fashion

[48] NPRC (n 19).
[49] UN http://www.un.org/press/en/2013/dsgsm721.doc.htm (accessed 11 November 2019).
[50] UN http://www.un.org/press/en/2013/dsgsm721.doc.htm (accessed 11 November 2019).
[51] Ndlovu-Gatsheni and Benyera (2015) "Towards a framework for resolving the justice and reconciliation question in Zimbabwe" Afr J Confl Resolut 9.

to determine if it fits under the category of an internal armed conflict.[52] While concern is that 20 000 civilians were the target of state repression, there is also need to understand that from the perspective of national and international laws on genocide so that practical solutions are found in apportioning blame on alleged perpetrators.

In determining the historical link between liberation usage of terms such as *Gukurahundi* and Operation *zero hour* during the liberation struggle, Entumbane uprisings and the Matabeleland and Midlands *Gukurahundi*, the NPRC should also engage stakeholders on the factual basis to link the events. By way of evaluation, the NPRC's Strategic Plan is thus important as it helps in showing that operationalisation of an institution alone is not a panacea to resolving all TJ issues in Zimbabwe. The question of political will can now be analysed in terms of institutional independence and funding constraints. As in other conflict-ridden or repressive societies, the outward signs of imperfect disharmony and finger-pointing on conflict-related issues must prompt the NPRC to expedite the move away from road-mapping towards peaceful conflict resolution.[53] Specifically, those whose family members were killed or those victims who are still alive and traumatised should test the resolve of the NPRC to use platforms such as press statements or institutional comments to actively shun violence.

4.3 NPRC: ongoing conflicts and transitional justice in Zimbabwe

This section is important in showing whether institutions of political will are committed to making the NPRC a key TJ institution by allowing it to deal with conflicts that align with its mandate. As an institution with constitutional mandate to deal with post-conflict justice, the NPRC must also address ongoing conflicts as part of its evidence-gathering procedures. This is because although the ZHRC may be better placed to deal with ongoing conflicts, the NPRC has a broad mandate to also address such conflicts individually or in collaboration with other institutions. As such, it can ascertain the reasons why civilians during the 16-19 January 2019 protests were allegedly "assaulted using baton sticks, barbed wire and razor wire from the waist down to the feet for about 25 minutes."[54] Concerns have also increased regarding

[52] Killander and Nyathi (2015) "Accountability for the *Gukurahundi* atrocities in Zimbabwe thirty years on: prospects and challenges" *CILSA* 463. This largely so since concern is also that the event simply targeted civilians.
[53] Ncube (2019) Sixteen people arrested in January protests bring class action for 'brutality" *Sunday Times.*

[54] ibid.

enforced disappearances and kidnappings and the NPRC ought to have been actively involved in cases on alleged abductions, including opposition members, the MDC-Trio, who were subsequently arrested and released in June 2020. The active involvement of the NPRC would have assisted both the ruling ZANU PF and MDC-Alliance to negotiate faithfully without sacrificing the rights of the parliamentarians or victims on the altar of political expedience.

Further, the NPRC would have been at the forefront in ensuring that the government cannot be seen to be using non-traditional security threats such as coronavirus to stifle dissent from political rivals or shirk its human right obligations in areas such as peaceful protests. While the UN allowed governments to include restrictions to mitigate and suppress the spread of the coronavirus, and Zimbabwe responded by treating the coronavirus as a national disaster, imposed and extended lockdown indefinitely and also banned political protests, the NPRC should have visibilised its work by calling the major political parties in power and outside power structures to ensure coronavirus is not used to shirk human rights obligations. This is especially so given the fact that the nexus between TJ and ongoing conflicts must go beyond the cessation of conflict to the need for sustainable peace, the neutralisation of incentives to return to a conflict, and the realisation of a variety of accountability and rule of law strategies.[55] While coronavirus has given states an edge over their political opponents in terms of determining responses to curb the spread of the virus and in protecting citizens, there is a need for states including Zimbabwe to work with the general populace in appreciating that TJ is both mandatory and positive in orientation.[56] The NPRC should thus innovate on its social media platforms to show how the coronavirus is affecting its TJ-related activities.

Further, memory and evidence collection are important amid concerns that state functionaries in the Mugabe and post-Mugabe era played key roles in various conflicts: likewise, the need for proper documentation of conflicts that occurred after the NPRC's operationalisation is

[55] Engstrom http://www.papers.ssrn.com/sol3/papers.cfm?abstract_id=2004313 (accessed 12 November 2019). This view is also informed from my discussion with Sari Kuovo during her presentation on Afghanistan and the ICC at Abo Akademi University in November 2019.
[56] Villegas (2001) "Transitional justice in the ongoing conflict in Colombia."

essential.[57] The NPRC was commended for witnessing exhumations relating to Matabeleland and Midlands *Gukurahundi.* The concern by the Zimbabwe Peace Project was that:

> Exhumation of the remains of *Gukurahundi* victim Thembi Ngwenya [follows announcement] by President Mnangagwa that *Gukurahundi* victims will be assisted by the state [to obtain] identity documents and death certificates. The exhumation process [is] a contentious matter as some feel no framework and policy are informing the process. The most glaring vacuum ... is the missing *Chihambakwe* and *Dumbutshena* Commission of Inquiry reports which could have helped inform exhumation processes through [their] recommendations.... exhumation processes must be preceded by an extensive consultation process.... if these processes are to yield healing.[58]

From an explanatory usage of the term *gukurahundi*, institutions whose work bear on TJ should also torchlight on using the term Matabeleland and Midlands *Gukurahundi* or such other terms preferred under the Chihambakwe commission. In essentialising exhumations as symbolic TJ processes, the NPRC has explained why it is starting exhumations and reburial of victims with Matabeleland and Midlands areas. The NPRC's chairperson is quoted as having said that:

> "We decided to start with the *Gukurahundi* in our peace and reconciliation process because it's a burning issue that needs to be addressed immediately."[59]

Be that as it may, the participation by the NPRC resonates well with the African conceptualisation of justice beyond the grave as practiced in other countries such as Uganda. This is especially so if regard is had to practices in Northern Uganda, affected by a large massacre, the focus was to go beyond the prosecution of Lord's Resistance Army rebels to consideration of improperly buried human remains as evidence of physical and structural violence.[60] Eppel observed that the rights of the "living dead" need to be more widely addressed in TJ policies:

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[57] The preferred method of healing or reconciliation for Zimbabwe is yet to be seen since the NPRC has not yet started its work. Peru preferred a reconciliation restoring social agreement in a way that focused on full citizenship: see ICRC (2006) "Truth and Reconciliation Commissions: interview with Salomon Lerner" 230. Lerner "Making Constitutions" shows that the Peruvians preferred to enable everyone who was excluded from national life to feel that they belonged. Lerner shows that the ethics of conviction prevailed for Peru and a report was produced aimed at healing the society using a bottom up approach rather than a top-down approach which would please only the political players. The NPRC can contextually construct Zimbabwe's own version of the process of reconciliation.

[58] ZPP http://www.reliefweb.int/sites/reliefweb.int/files/resources/ZPP%20April%20MMR%20.pdf (accessed 12 November 2019) 7-8.

[59] Shumba (2019) "NPRC prepares for *Gukurahundi* victims' exhumations, reburials" *Chronicle*.

[60] Kim and Hepner (2012) "Of justice and the grave: the role of the dead in post-conflict Uganda" *Int Crim Law Rev* 819.

> "Exhumations in rural Zimbabwe in the 1990s [for] civilians killed in the 1980s *Gukurahundi* massacres are assessed here from the vantage point of 2014. The reburials [have] transformed family dynamics, healing rifts, and allowing for the reintegration of alleged sell-outs. Retrospectively, [...] most people did not know where their relatives were until the exhumations provided a context for previously silent neighbors, to tell the truth. Gravesites, once indicative of horrific murders, now signify the wrongs that were put right."[61]

Exhumations in Spain were recognised as literally digging up the past to realise that mass grave exhumations can reveal the truth about concealed crimes.[62]

Focus on ongoing human rights conflicts acknowledges the need to deal with the expectations or fears of private citizens, victim groups, civil society, and CBOs in dealing with memory collection. The NPRC, located amidst state and non-state actor engagement, is well placed to engage both spectrums. Its engagements must be informed by the ghost of past conflicts that still haunt society in the absence of real post-conflict reconciliation and effective peace building.[63] The state has used maximum force to deal with protesters on the reasoning that private citizens threaten national security by committing destructive violence or enjoying their human rights and freedoms irresponsibly.[64]

The NPRC must find ways to address legal and moral issues within its organisational vision.[65] Additionally, it should strive as an institution to build new identities about how the Zimbabwean society can heal.[66] The NPRC's consultations and outreach programs have been attended by civics and victim groups who mobilise and train communities on the constitutional and legal mandates of the NPRC. A representative of the executive noted during the launch of the NPRC that:

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[61] Eppel (2014) "Bones in the forest' in Matabeleland, Zimbabwe: exhumations as a tool for transformations" *Int J Transit Justice* 404.

[62] Colaert (2015) History from the grave: politics of memory in exhumations of mass graves from the Spanish civil war 3.

[63] Wang 2015) "The rocky road from normalization to reconciliation: China-Japan relations on the 70th anniversary of the end of World War II" in Arai T, Goto S and Wang Z *Contested memories and reconciliation challenges: Japan and the Asia-Pacific on the 70th anniversary of the end of World War II* 5.

[64] Constitution s 44 places duties to respect, protect, promote and fulfil human rights on both the state and citizens. The Constitution s 47 also embosses a presumption on the existence of other people's rights; s 59 creates a conditional right to protest which must be realised peacefully.

[65] Servaes and Birtisch (2008) "Engaging with victims and perpetrators in transitional justice and peace-building processes"2.

[66] This is based on arguments adopted from Servaes and Birtisch ibid.

> "The Commission's mandate to deal with a conflictual past, resolve current conflicts, and create a shared future for all generations in Zimbabwe must be supported by all Zimbabweans to achieve social cohesion, reconciliation, unity, development and people's well-being."[67]

Such involvement can lead to the best-case scenario where communities significantly improve their levels of institutional trust and their confidence in the NPRC strategies for reconciliation and collective national healing. By starting with the communities affected by *Gukurahundi*, the NPRC demonstrated its commitment to dealing with both the chronology and sequencing of transitional moments and the grassroots-cum-victim-centred approach to resolving conflicts.

4.3.1 NPRC: utilisation of the institutional structure created by the ONHRI

This section intends to provide insight into the preparatory infrastructure of the NPRC. Before dealing with the ONHRI's link to the NPRC work, it is important to demonstrate the challenges to peace, reconciliation and healing which Zimbabweans have been facing since independence. Historically, at independence, ZANU PF faced challenges including conversion to a peace economy, uniting a nation divided by almost two decades of civil war, and dismantling racial discrimination.[68] The mode of healing focused on interracial cohesion between whites and blacks but neglected intra-black impasses.[69] Fundamentally, Mugabe enunciated a national reconciliation policy where whites and blacks had to turn their swords into plowshares.[70] Reconciliation can be pursued with or without justice but one pursued without justice is bound to fail[71] and the national policy was seen as reconciliation without justice. Victor justice may focus on forgiving and forgetting the past[72] but it was not backed with reciprocity from the white population which felt that the Mugabe government wanted to

[67] The NPRC launched its strategic plan in the presence of state officials, UN representatives, traditional leaders, FBOs, women groups and political party representatives and maintained the ONHRI motto 'peace begins with me, peace begins with you and peace begins with all of us!' see Chikwati 2018 *Herald*.
[68] Bond and Manyanya (2003) Zimbabwe's plunge: exhausted nationalism, neoliberalism and the search for social justice.
[69] Mashingaidze (2010) "Zimbabwe's illusive national healing and reconciliation process: from independence to the inclusive government from 1980-2009" *Conflict Trends* 19.
[70] Hapanyengwi-Chemhuru (2013) "Reconciliation, conciliation, integration and national healing: possibilities and challenges in Zimbabwe" *Afr J Confl Resolut* 79.
[71] ibid.
[72] ibid.

retain them at all costs.[73] The policy had to die with the onset of the land reform under the Third *Chimurenga*.[74]

There is a need to deal first with the conceptualisation of peace from an institutional perspective. The ONHRI had a test pilot of the commitment of all Zimbabweans to peace[75] and its essence was that the value chain of peace building, reconciliation and national healing demands collaboration between different levels and players with complementary strengths.[76] That the perceptions of different sections differ from each other may not be a hindrance to TJ realisation.[77]

The NPRC created formal peace committees in the country's ten provinces between May and June 2019 and they are seen as a way to allow different communities to ride on community peace to enjoy national peace.[78] The NPRC is working with such CSOs[79] as Zimbabwe Civic Education Trust[80] and the Ecumenical Church Leaders' Forum.[81] While community peace zones cannot negotiate directly on high-level political conflict, they inform the NPRC on the best way to resolve such conflict.[82] They provide inclusivity of diversity; players can share interfaith experiences; there is partnership and networking and volunteerism between the community and national platforms.[83]

Although ONHRI was seen largely as an institution which made little progress in promoting reconciliation and national healing, its contributions included designing a concept paper mapping its functions; engaging political parties towards an end to politically motivated violence; consultations with churches, CSOs, and chiefs in the country's eight provinces and with people in the diaspora.[84] It conducted national dialogues for peace with traditional

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[73] ibid.
[74] ibid.
[75] Regarding the ONHRI motto see Govier (2009) "A dialect of acknowledgment" in Quinn *Reconciliation(s): transitional justice in post-conflict societies* 39 on the assertion that when people allude to the central importance of acknowledgment, they are generally referring to aversive acknowledgment.
[76] Dlembeu (2014) "Strengthening church capacity in negotiation skills, conflict prevention, management, resolution, and transformation in Zimbabwe"2.
[77] Chamisa (2019) 'Lessons from community-driven peace initiatives' *Sunday Mail.*
[78] ibid.
[79] ibid.
[80] Formed in 2000 after the election and land-related violence.
[81] Formed in 2008 following the violence that led to the GNU.
[82] Chamisa (n 77).
[83] Dlembeu (n 76).
[84] Mbire (2011) "Seeking reconciliation and national healing in Zimbabwe: Case of the Organ on National Healing Reconciliation and Integration."

leaders, FBOs and CSOs; consultative processes with key government departments; national dialogue with women's parliamentary caucus; conduct of a history of conflict in Zimbabwe Research Project; development of national policy frameworks for peace and reconciliation; development of draft principles for the NPRC Bill; development of a voluntary code of conduct for local political parties; development of a national early warning and early response framework; inclusion of the NPRC into the national Constitution 2013 as well as conflict prevention, management, resolution, and transformation.[85]

The gains of the ONHRI are important from the perspective of popular constitutionalism. While Mugabe's regime popularised the 'Peace begins with me, you and all of us' mantra which started with the ONHRI, Mugabe did not operationalise the NPRC. The quest for human rights and popular constitutionalism saw people registering their displeasure with the Mugabe regime, especially through the near unanimous impeachment of Mugabe in November 2017. In a manner seemingly reflective of aversive acknowledgment of responsibility, Mugabe brusquely resigned after the people resolved that enough repression was enough and dared to march to State House, the bastion of Mugabe's power. Mugabe had to resign before the NPRC was operationalised. Mugabe's resignation[86] significantly epitomised the need for total peace, reconciliation, and healing, and Zimbabweans from across the national divide joined hands in fighting for peace from 18-21 November 2017 when they gathered in the Zimbabwe Grounds to support war veterans fronting the '*Mugabe must go'* mantra. 18 November 2017 created a sense of oneness when various sections of the Zimbabwean society demonstrated their resolve in shaping a new politics of unity. Mugabe tendered his resignation letter on the terrific Tuesday on 21 November 2017 during on-going

[85] UNDP (2014) Strengthening the National Peace and Reconciliation infrastructure in Zimbabwe: key milestones of the Organ for National Healing, Reconciliation and Integration 2009-2014.

[86] The ruling ZANU P, opposition forces, war veterans and the generality of the populace had a collective resolve to affirm popular constitutionalism in 2017. The war-veterans meeting in the Zimbabwe Grounds in Highfields was akin to some Tennis Court Oath during the French Revolution. It was also a nemesis of the pro-Mugabe 1980 independence support. Using fresh narratives under 'Mugabe must go', they marched against Mugabe; even going to the bastion of his power, the State House, in a move akin to the storming of the Bastille. The politicised and popularised hype that led to Mugabe's resignation saw Zimbabweans from all walks of life, heads of state and some foreign diplomats also celebrating the inauguration of Mnangagwa at the National Sports Stadium on 24 November 2017. From a TJ perspective, the 2017 transition was convivially accepted as a landmark event and it was hoped that a national transitional authority would also prevail although this did not subsequently materialise. The popular constitutionalism turned into some romanticised constitutionalism since conviviality was replaced by references to the event as a product of '*kuitiswa*/being used, *chinhu chine vene vacho*/something owned by key enablers. The event was also quickly described as a coup, yet during landmark/convivial moments, the domestic and international community avoided the use of the term coup in major reportages.

impeachment proceedings against him to avoid humiliation and hope was created for a break from authoritarian repression. This however waned when an envisaged national transition authority was not created and Zimbabwe reverted to polarising and polarised politics under labels such as *chinhu chedu* (our thing), *chinhu chavo* (their thing) and *chinhu chanhuwa/chaora* (the thing is stench).

From the perspective of participatory TJ, strategic litigation played a role to ensure that the NPRC started its work from a properly and legally constituted manner. The NPRC's consultations, which were supposed to start on 9 February 2018 in areas such as Gwanda and Bindura, were halted after FORUM interdicted the NPRC from carrying out any work before the appointment of a substantive chairperson.[87] Critically, although the 'let bygones be bygones' approach by the Mnangagwa government was criticised,[88] the NPRC's compliance shows the need for constitutionally-established commissions to come up with effective change management strategies.

The NPRC's public consultations have created a self-selection procedure that is embossed by communities and is intended to cascade to village levels.[89] Through studies which focus on the importance of peace zones in countries such as Kenya's Wajir district, Sudan's South Kordofan, South Africa, and Uganda,[90] the NPRC can do a feasibility study on using peace committees with the realisation that peace created outside community traditions and social systems is not successful.[91]

From a historical analysis of the NPRC's criticisms, it should be noted that the ONHRI which informed the NPRC's work and popularised the moniker *peace begins* with *me, you and all of us* was criticised for failing to use its legal power under the GNU to address conflicts rooted in injustice.[92] The NPRC has also been criticised for failing to de-escalate political tensions resulting from election violence and to reduce instances of enforced disappearances such as the failure to find Itai Dzamara.[93] Moreover, on-going incidents of political repression

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[87] *Zimbabwe Situation* 'Civil society meets over NPRC' (2018).
[88] Correspondent 2018 *Zimbabwe Situation*.
[89] Chamisa (n 77).
[90] ibid.
[91] ibid.
[92] Murambadoro (2016) "One year after: has the National Peace and Reconciliation Commission Act failed Zimbabweans?".
[93] ibid. Dzamara, a pro-democracy activist and leader of a protest movement, Occupy Africa Unity Square which called for Mugabe's resignation, was allegedly abducted by suspected security agents at a barbershop in

continue to raise serious concerns on the state's role in instances of wanton disregard of the sanctity of human life.

Despite the criticisms, the ONHRI played a critical role in driving the peacebuilding and reconciliation initiatives through the combined input of government departments, CSOs, FBOs, academic institutes, traditional leaders and artists to ensure that these processes become nationally-owned; sustaining the momentum created by ONHRI on the conflict early warning/early response and the code of conduct for political parties; and continued publicity and awareness-raising.[94] The NPRC should thus take the limitations and openings of the ONHRI seriously to prevent critics from wire brushing it as a talk show institution.

4.3.2 NPRC: work on large-scale political violence in post-independence Zimbabwe

This section demonstrates the need for the NPRC's to deal decisively with instances of structural and personal violence in Zimbabwe. Zimbabwe's political history since the early years of independence has been characterised by violent conflicts. The NPRC's role in dealing with delicate issues requires the need for critics not to adopt a bystander stance but to draw from the NPRC's cautious approach in handling major conflicts. The view advocated here hinges on the fact that there is no assumption in TJ that conflict is in the past or that transitions move in one direction only towards legitimate or peaceful state-society relations.[95] Peace building must also handle cycles of conflict and repression and NPRC's work with victims must be commended from this perspective. These considerations include stabilisation programs aimed at balancing fragile peace and justice; the need to find ways to capitalise on opportunities to obtain justice; and the need to adopt development approaches that appreciate that TJ influences governance and development in the medium and long term.[96]

The NPRC called for an all-female victim conference at *Entumbane* Community Hall in Bulawayo where women wept uncontrollably describing how they suffered from pre-

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2015 for denouncing the late and former Zimbabwean President Mugabe. His brother, a human rights and political activist, Dr. Partson Dzamara also died in August 2020 due to colon cancer. A group identified as Team Pachedu had raised about US$ 14 000 of the required US$28 000 for the surgery. This enjoins TJ stakeholders and the state to prioritise the ratification of key human rights instruments on enforced disappearances and torture.

[94] UNDP (n 85) "Strengthening the National Peace and Reconciliation infrastructure in Zimbabwe: key milestones of the Organ for National Healing, Reconciliation and Integration 2009-2014."

[95] Domingo (2012) "Dealing with legacies of violence: transitional justice and governance transitions" 1.

[96] ibid.

independence violence that started during the 1981 *Entumbane* uprising.[97] The NPRC's meeting assisted female victims to identify the need for both rectification justice, which focuses on physical violence, and distributive justice which focuses on underlying causes of conflicts which may lead to political, social and economic injustice. This is captured thus:[98]

> "The meeting was very emotional. Some women told scary stories of how they were sexually violated during both *Gukurahundi* and the *Entumbane* battle. Some victims also told the Commission how they managed to walk long distances during the night fleeing the fighting forces," said a source who attended the meeting... [and] one woman narrated how her husband was tortured and killed by the soldiers."[99]

The NPRC is slowly building a memory collection from actual victims and this groundbreaking development affirms the existence of an excruciating past. The current NPRC's outreaches and meetings are institutionally-driven and this worthy exercise puts the future of TJ in the hands of victims. The memory collection will put the victim's voice in the future of any chosen way of finding TJ and also expose the need to deal with conflicts holistically. The move to memory collection is very important considering the gloom associated with the fear that the *Dumbutshena* and *Chihambakwe* commission reports were stolen although Nare was quoted as saying that, nonetheless, the government was still looking for their whereabouts in the following reportage:

> "Retired High Court judge Selo Nare, whose commission will shortly carry out public hearings into the 1980s massacres ... says they asked the government for the reports of the *Dumbutshena* Commission of Inquiry which investigated the events surrounding the *Entumbane* uprising between November 1980 and March 1981; [and] the *Chihambakwe* Commission of Inquiry which investigated the killing of civilians by the Fifth Brigade between 1983 and 1985. 'It's unfortunate though that the previous commissions' reports have been lost.'"[100]

This casts an ominous view on whether victims of *Entumbane* and Matabeleland and Midlands *Gukurahundi* will at least know what became of them if the reports were to be published. At the bottom of the hearts of victims is the fear that they may never know the whereabouts of their relatives.

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[97] *New Zimbabwe* http://www.allafrica.com/stories/2019/07/310/123.html (accessed 13 November 2019).
[98] See Gates, Lie and Binningsbo (n 1) 2.
[99] *New Zimbabwe* http://www.allafrica.com/stories/2019/07/310/123.html (accessed 13 November 2019).
[100] Mabuza http://www.zimlive.com/2019/04/19/dumbutshena-chihambakwe-reports-have-been-lost-nprc-chairman/ (accessed 13 November 2019).

On a comparison basis, memory collection has been used in countries including Afghanistan to enable victims to find closure close to twenty years after the commission of heinous crimes. This forced Afghanistan to commit to addressing local structural problems even during an ongoing conflict. Specifically, Afghanistan managed to find mass graves where some victims with single bullet holes at the back helped victims' families to know the causes of their death.[101]This is captured thus:

> "The powerful men accused of responsibility for these deaths and tens of thousands of others — some said to be directed at their orders, others carried out by men in their chain of command — are named in the pages of a monumental 800-page report on human rights abuses in Afghanistan from 1978 [to] the fall of the Taliban in 2001... The list of names is a sort of who's who of power players in Afghanistan: former and current warlords or officials, some now in very prominent positions in the national government, as well as in insurgent factions fighting it."[102]

The release of the Afghan report also led to international pressure with the ICC prosecutor moving to investigate the situation in Afghanistan and victims were allowed to make representations through organisations such as Afghanistan Democracy and Human Rights Organisation.[103]

In Afghanistan, those with questionable human rights records came back to power after the ouster of the Taliban government by the US in 2001.[104] As a result:

> "... many of the important post-conflict reconstruction processes—including disarmament efforts, elections, and security and rule-of-law reform—failed to uphold minimum levels of accountability. Indeed, they contributed to the culture of impunity."[105]

Disturbing events related to land also call for the NPRC's active role to achieve peace. The violence during land seizures in 2000 where Benyera and Ndlovu-Gatsheni speak of *zvimurenga*/wars (first, second and third *Chimurenga*)[106] with the third *Chimurenga* as land reform which is one area where the NPRC would have a daunting task. The NPRC must also

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[101] Nordland http://www.nytimes.com/2012/07/23/world/asia/key-afghans-tied-to-mass-killings-in-90s-civil-war.html (accessed 13 November 2019).
[102] ibid. The Afghan efforts were commended by the UN.
[103] Untitledhttp://www.icc-cpi.int/RelatedRecords/CR2019_03412.PDF accessed 13 November 2019.
[104] Kouvo "The case of Afghanistan" 1.
[105] ibid.
[106] Ndlovu-Gatsheni and Benyera (n 51) 9.

expose public concerns relating to the violent elections in June 2008. Hammar *et al*[107] raise fundamental considerations on how land reform; opposition to ZANU-PF's dominance; lack of a lasting solution to the land reform; recurrence of election-related violence and high unemployment rates in a failing economy[108] need real solutions. Married to these challenges are issues that threaten human rights such as 'militant responses by private citizens'[109] which may destroy zones of peace.

Failure by local politicians and the international community to classify some violent conflicts as 'armed conflicts' have made the work of the NPRC more difficult. In essence, the focus is simply given to political crisis in Zimbabwe with players differing on the use of violence either as a means to an end or wrong means to an end. The government normally uses the excuse that political crisis is dealt with in a way aimed at defending the nation's sovereignty and fighting "imperialist regime change ideas"[110] whilst the opposition parties situate political crisis as partly due to government's repressive acts. From the perspective of opposition parties, there is no inclusive politics and this creates an environment that nourishes public malfeasances such as corruption, bureaucratic harassment, political intolerance, and the politics of impunity.

4.3.3 NPRC: transitional, economic and social justice

This section proceeds from the link between TJ and human rights. Zimbabwe has a Constitution that makes justiciable social and economic rights in an *a la carte* version through the national objectives and Bill of Rights. At the top of the TJ agenda is the need to deal with the vice of corruption. The growing link between TJ and anti-corruption demands that the NPRC find ways to deal with serious violations in Zimbabwe and their impact on the social and economic lives of the general populace.[111] New TJ expectations include a need to focus on instances of grand corruption as based on the fact that:

> "A comprehensive and complementary strategy between transitional justice and anti-corruption fields is needed to address civil and political rights violations and socio-

[107] Hammar, Raftopoulos and Jensen (2003) Zimbabwe's unfinished business: rethinking land, state and nation in the context of crisis
[108] See Moyo (2001) "The land occupation movements and democratization in Zimbabwe" *Millenn J Int Stud* 311.
[109] Jenkins and Knight (2002) The economic decline of Zimbabwe: neither growth nor equity.
[110] Machakanja (2006) "Political crisis and memory in Zimbabwe: a case study of Manicaland Province: 1990–2005"
[111] Freedom House (2014) "Combating impunity: transitional justice and anti-corruption" 1.

> economic injustices to improve a transitional country's chances to achieve accountability, truth, repair, reconciliation, and non-repetition."[112]

The general Zimbabwean populace has been condemned to abject poverty due to grand corruption and economic policies that bleed the economy and work to the detriment of the general public whose income, saved in US dollars, was decimated by conversion into worthless bond notes. This is also exacerbated by instances of elite, sub-elite and non-elite capture and abuse of state institutions that seem to fertilise a culture of abusive constitutionalism at the level of the state and ordinary citizens. The need for vertical, diagonal and horizontal accountability in economic crimes flows from the need to expand the current narrow definition of TJ which excludes corruption to one where the impunity gap is reduced and human rights are protected.[113] Louise Arbour, UN High Commissioner for Human Rights, said that TJ has:

> "... Like mainstream justice, not yet dealt with economic, social, and cultural rights adequately or systematically. [TJ] should take up the challenges to which mainstream justice is reluctant to rise: acknowledging that there is no hierarchy of rights and providing protection for all human rights, including economic, social, and cultural rights. As with all other human rights, economic, social, and cultural rights call for constitutional protection, legislative promotion, and judicial enforcement. A comprehensive strategy for TJ would, therefore, address the gross violations of all human rights during the conflict as well as the gross violations that gave rise to or contributed to the conflict in the first place."[114]

Literature is emerging on the nexus between TJ, corruption, and economic and social rights in Zimbabwe.[115] Where transition occurred without a change in power, it is argued that those accused of corruption and who condemned Zimbabweans to economic refugees must also account.[116]

Critical developments in the early 1980s such as the informal reconciliation between whites and blacks, the 1987 Unity Accord, and the conditional or blanket amnesties on state functionaries and so-called dissidents may shed light on why Zimbabwe has generally not prioritised national reconciliation and healing. The 1990s offered multiple opportunities for

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[112] ibid.
[113] Carranza (2008) "Plunder and pain: should transitional justice engage with corruption and economic crimes?" *Int J Transit Justice* 310.
[114] OHCHR http://www.ohchr.org/Documents/Publications/FactSheet33en.pdf (accessed 14 November 2019).
[115] Maguchu (2019) *Transitional justice and socio-economic rights in Zimbabwe*.
[116] Chengeta http://www.justiceinfo.net/en/other/37708-the-possibility-of-transitional-justice-post-mugabe-in-zimbabwe.html (accessed 14 November 2019).

resolution following scandals that involved government officials. The following list is evidence for this:[117]

> "1987 Zisco Steel Blast Furnace Scandal; 1987 Air Zimbabwe Fokker Scandal; 1986 National Railways Housing Scandal; 1988 Willow gate Scandal; 1989 ZRP Santana Scandal; 1994 War Victims Compensation Scandal (where healthy Zanu (PF) chefs claimed up to 100 percent disability and received hundreds of thousands of good Zimbabwean dollars in compensation); 1995 GMB Grain Scandal; 1996 VIP Housing Scheme (public money was used to build VIPs' houses, including First Lady Grace's house); 1998 Boka Banking Scandal ($968 million fraud perpetrated on the Zimbabwean people with the RBZ and the office of the President accused of attempting to cover it up); 1998 ZESA YTL Soltran Scandal; 1998 Telecel Scandal; 1998 Harare City Council Refuse Tender Scandal; 1999 Housing Loan Scandal; 1999 Noczim Scandal (managers corruptly siphoned millions of dollars out of the oil firm, which was reeling under a deficit of about $5 billion); 1999 DRC Timber and Diamond scandals (UN reported military and other bosses were implicated); 1999 GMB Scandal and the 1999 Ministry of Water and Rural Development Chinese tender scandal."

Former President Mugabe set up commissions to investigate these corrupt activities.[118] Key figureheads in government were fingered in the Willowgate Scandal including Minister of Defence Enos Nkala, Commander of the Army Lt.-Gen. Solomon Mujuru, and Air Force Commander Air Marshal Josiah Tungamirai.[119] A commission led by the late Justice Sandura led to the "resignation of Minister Nkala, acquitted Mujuru through a technicality, and acquitted Tungamirai due to strong mitigating factors relating to his service to the state and his lack of knowledge of the price of the vehicle he had purchased."[120] Some officials like Frederick Shava, accused by the Commission of "behaving like a car dealer"[121] were convicted and sentenced to nine months in prison for perjury but were pardoned by President Mugabe.[122] Cosmetising the ills of comprador politics, Mugabe's argument was rhetorically pitched, "Who amongst us has not lied? Yesterday you were with your girlfriend and you told your wife you were with the president. Should you get nine months for that?"[123]

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[117] *Change Zimbabwe* http://www.changezimbabwe.com/index.php/news-mainmenu-2/1-latest/2973-scandals-that-rocked (accessed 20 August 2018). The discussion on these scandals is based on the shifting discussions on TJ and socio-economic rights; see also Maguchu (n 115) .

[118] Young (1998) "Politics in the military: transformations in the *Forcas Armadas de Mocambique* and the Zimbabwe National Army"172 relates how in 1989 under the Willowgate Scandal, senior military, government and ZANU PF party officials purchased Toyota Cressida cars at a government-controlled price of Z$27 000 and re-sold them on the black market for Z$110 000.

[119] Holland (2008) *Dinner with Mugabe: The untold story of a freedom fighter who became a tyrant* 24.

[120] ibid 127.

[121] Laiton (2014) "The birth of corruption in Zimbabwe" *Newsday*.

[122] Holland (n 119) 87.

[123] ibid.

Named and shamed Minister Nyagumbo committed suicide, ending the 'trials' and leading to the freedom of those accused.[124] The concern during this period was that some were sacrificed to assuage public anger while the ethnical resolution of national problems such as corruption may create a need for victim security.[125] The 1997 War Veterans' Gratuities corruption scandal is significant. The War Victims Compensation Fund (WVCF) was established to compensate war veterans for their participation in the liberation struggle. Although the war veterans demanded an initial payment of Z$50 000 and Z$2 000 monthly payments, Bond and Manyanya aptly note the peace dimension of the scandal: the deal was aimed at preventing protests from war veterans over the Mugabe regime's failure to meet even their basic welfare. [126] Nyarota asserted that the huge payments made were "a case of naked fraud of gargantuan proportions, where those with liberation war credentials, real or imaginary, plundered the country's resources."[127]

With the Constitution defining veterans of the liberation struggle broadly to include those on the war front, detainees, war collaborators, and restrictees,[128] the looting of the WVCF requires investigation.[129] Further, the rationale behind the appointment of commissions of inquiry to later ignore their recommendations or not publish their findings cast aspersions on the political commitment. The early 2000s have been described as a time where 3 500

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[124] Chung (2006) *Re-living the Second Chimurenga: memories from Zimbabwe's Liberation Struggle* 267.
[125] ibid.

[126] Bond and Manyanya (n 68). The money paid was unbudgeted for and caused the economic downturn Although Chenjerai Hunzvi, the leader of the war veterans was accused of embezzling the war victims' compensation funds, his trial kepton being postponed. Hunzvi received political amnesty from Mugabe. This view shows that TJ in Zimbabwe, just like any other countries, should focus on social and economic dimensions or transitions as affected by national, regional and global policies such as Brexit, Zimbabwe's austerity measures, the Eurozone crisis, and so forth. At the level of specific group rights protected in the Constitution, the various categories of war veterans which include detainees, restrictees, and collaborators should also be properly compensated just like those who led in the war front, see the broad definition of war veterans in section 84 of the Constitution.
[127] Nyarota (2006) *Against the grain: memoirs of a Zimbabwean newsman* 216. There is thus need to ensure that all those whose rights are constitutionally protected as war veterans benefit equally and equitably, including through symbolic TJ initiatives such as public appreciation of their role, in the war of liberation and monuments. While monuments or statues such as that of Mbuya Nehanda, a spirit medium in the First and Second Chimurenga are being built in Harare, there is also need to ensure that recognition of liberation fighters be decentralised to various provinces. The allocation of resources for erecting statues, compensating former white commercial farmers or driving the process of devolution should be done transparently and through wide consulation with the citizens to ensure government gets a buy-inby creating a grearer sense of security, confidence and belonging as Zimbabweans.
[128] Constitution s 84.
[129] Yamamoto http://www.newzimbabwe.com/news-15219-Mugabe%20fighting%20corruption?%20Forget%20it!/news.aspx (accessed on 21 August 2018).

Zimbabweans died every week due to HIV/AIDS, poverty, and malnutrition attributable to the corrupt political elite.[130]

4.3.4 NPRC: polarisation at interparty and other levels

Political polarisation is crystalising in Zimbabwe notwithstanding the growth of multiparty politics after the Constitution 2013. The GPA is regarded as having laid the basis for a formal recognition to end political tragedies that stalled state-building in Zimbabwe. The need for political unity was endorsed in the GPA which dealt with issues of Equality, National Healing, Cohesion, and Unity[131] and shows the need for clear provisions relating to issues such as national healing, cohesion, and unity.[132] The instability resulting from human rights abuse shows why such violations continue to invoke controversial negotiations among the principal political actors in Zimbabwe and this is not conducive to societal healing.[133]

Due to a lack of commitment to proper reconciliation, the GNU attempted to establish TJ through the ONHRI which failed to resolve political impasses, was disbanded in 2013, and replaced by the NPRC.[134] Criticism was levelled against the ONHRI that there was no wisdom in manning it with partisan individuals with unclean records.[135] Additionally, the organ did not define ways in which those whose limbs had been cut off in the 2008 presidential runoff could reconcile with their perpetrators.[136] Polarisation is also based on timelines still to be specified by the NPRC. Krigger, who interviewed an MP in Masvingo, found that compensating victims of violence from the pre-colonial period to the present period is not practical.[137] The major state concern is that the ZANU PF government cannot pay for crimes committed by the British South Africa Company and the Smith regime.[138]

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[130] Coltart *A decade of suffering in Zimbabwe: economic collapse and political repression under Robert Mugabe* 1.
[131] GPA art 7.
[132] Arthur (2009) "How 'transitions' reshaped human rights: a conceptual justice" *Hum Rts Q* 451
[133] Backer http://www.gateway.proquest.com/openurl?url_ver=Z39.88-2004andrft_val_fmt=info:ofi/fmt:kev:mtx:dissertationandres_dat=xri:pqmandrft_dat=xri:pqdiss:3150153 (accessed 12 November 2019) 165.
[134] Hofisi https://www.herald.co.zw/the-need-for-transformative-justice-in-zim (accessed 14 November 2019); also see Murambadoro (n 92) .
[135] Hapanyengwi-Chemhuru (n 70) 79.
[136] ibid.
[137] Kriger http://www.concernedafricascholars.org/bulletin (accessed on 23 February 2020).
[138] ibid.

Krigger sees the policy of reconciliation as practicable only if applied a few years after a conflict.[139]

For Zimbabwe, however, to employ the practicality argument raised above may be problematic since there is no consensus as to how far back time frames for healing must go. One of Krigger's informants, for instance, proposed 2008 as a starting period because it is still fresh in people's minds and there is hope that evidence and witnesses are still around.[140] This view augurs well with the view advanced by le Bas who points out that most people are ignorant of the legal process and are afraid of "taking the government on".[141] Besides, most victims do not have documentary proof to back up their claims and it is unlikely that many will come forward.[142] It may also be considered whether or not victims of these crimes have already overcome memories of violence and abuses they suffered because of the adage that states that 'time heals.'[143]

The preference by those in power to start on a new slate and sweep incidents of violence under the carpet is based on the concept that digging up memories will only re-open old wounds which could plunge the country into further acts of violence and conflict.[144] Mugadza, an informant in Moyo's work, asked the researchers if they thought President Mugabe was stupid when in 1980 he advised the whole nation, black and white, to draw a line through the past and forgive those who had persecuted the black majority.[145] Mugadza explained that Mugabe was well aware that digging into the past was counter-productive as it led only to accusations and counter-accusations and, at times, large scale falsification of alleged violations, exaggerations, and stage-managed human right violations.[146] Through informal interviews with war veterans Moyo found they preferred the way how, after a protracted civil war, Mozambique adopted a reconciliation policy based on forced amnesia,

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[139] ibid.
[140] ibid.
[141] leBas (2012) "Polarization as craft: party formation and state violence in Zimbabwe" Comp Political Stud 419.
[142] ibid.
[143] Mass Public Opinion Institute (2009) "Zimbabwe Focus Group Research Round 2".
[144] Moyo (n 108) 311.
[145] ibid.
[146] ibid.

that is, forgetting and forgiving the unexplained events of the past so that memories of violence and "the consequences of digging up unpleasant things are suppressed."[147]

This thesis moves strongly for prioritisation of reconciliation and peace processes by all political parties and other stakeholders in Zimbabwe. Public opinion on the NPRC varies from pessimistic arguments such as the impossibility that "Mnangagwa, a key individual in the Matabelelenand and Midlands *Gukurahundi* massacres, can bring justice:"[148] The first view may encourage complicit or continuous impunity if Mnangagwa decides to interfere with the NPRC's work. The Matabeleland and Midlands *Gukurahundi* was carried out to quell dissidents in Matabeleland who were loyal to the late Joshua Nkomo and were accused of wanting to topple Mugabe's government through a coup.[149]

4.3.5 NPRC: Implications of the research findings on total healing

For national healing and reconciliation to achieve the desired objective of uniting the fractured social and political groups in Zimbabwe, this thesis delineates certain factors that must have serious ramifications on the NPRC's activities. These factors balance between what is overly ambitious in research and what may be practically realisable in debate and discourse about the NPRC's work. The narrative on reconciliation in Zimbabwe is seen to be "reflective of African elites and nationalists."[150]

Total healing is seen as dependent first on the transformation of society. Researchers must prioritise "narratives that deal with the vision of a workable society" rather than narratives revealing the identities of the narrators.[151] Thabo Mbeki, for instance, defined reconciliation only "within the ambit of the political program of the ANC and for him, there can be neither talk nor understanding of reconciliation before the complete transformation of society."[152] Bhebhe argues that successful reconciliation depends on the admission of Zimbabweans that

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[147] Moyo (n 108) 311.
[148] *Chronicle* 31 January 2018 Comments section.
[149] Mhandara (2018) "The power of dialogue to promote peace" *Conflict Trends* 30; du Plessis (2006) "A truth and reconciliation process for Zimbabwe? Some preliminary observations" *Obiter* 75. After Mugabe's resignation NPRC has also been overshadowed by POLAD in as far as the need to find lasting solutions to Zimbabwe's political problems is concerned.
[150] Khan (2014) "Reconciliation without justice? An analysis of the film Reconciliation in Zimbabwe: the first ten years" Commonwealth Youth and Development 33.
[151] van Niekerk (2010) "Politico-philosophical perspectives on reconciliation" Dutch Reformed Theological Journal 274.
[152] ibid 247.

"I hate what you say, but will defend to the death your right to say it."[153] The establishment of the NPRC reveals the serious awareness of the Government "that criminal justice and trials alone (retributive justice) are not sufficient to bring about reconciliation, as opposed to restorative justice."[154]It is important to ensure that the NPRC adds its voice to national debates and dialogues on the need to reform laws that long been seen as exploitative or as vehicles to asphyxiate the rule of law.

4.3.6 NPRC: Impact on institutional visibility and legitimacy

The NPRC has promoted its visibility through press statements to private right holders to assert their rights peacefully and to security, institutions to observe the rule of law and has called for a consultative process. The NPRC was addressing the need for private citizens to respect horizontal accountability and the security personnel to respect vertical accountability and for all to exercise restraint in advising of the NPRC's concerns regarding:

> "...the deteriorating political and economic situation in the country. The NPRC is, therefore, initiating a multi-stakeholder consultative dialogue process. The Commission commits to doing everything in its power to fulfill its constitutional mandate to prevent any situation that arises in the country from deteriorating into a national conflict. The NPRC calls upon all people [...] to exercise their democratic rights peacefully and responsibly and desist from violence and violation of other citizens' rights. The Commission calls upon all law enforcement institutions to preserve life, protect property and maintain law and order responsibly and with restraint. The NPRC calls upon all key stakeholders [for] national dialogue to share views on how to address the situation in our country and foster sustainable peace and development." [155]

Thematic committees enable the NPRC to adopt a bottom-up approach to engage the general populace through soliciting the collaborative efforts of various organisations. This proceeds from the NPRC's realisation that citizens are part of the healing of the nation, especially so as the voice of the victim can never be replaced. At a political dialogue level, political parties propose to engage with the NPRC through four committees.

4.3.7 NPRC external thematic committees

The thematic committees will steer the work of the NPRC using electronic data. This is important for researchers who should ensure that they broaden models of peace, reconciliation and healing so that Zimbabweans can decide from an informed position on the

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[153] Bhebhe (2013) "Zimbabwe: integration, reconciliation and rehabilitation processes" *JETERAPS* 17.
[154] Tshuma http://www.accord.org.za/conflict-trends/reconciliation-integration-and-healing-efforts-in-zimbabwe/ (accessed 12 November 2019) 23.
[155] *Veritas* (2019) "National Peace and Reconciliation Commission Press Statement".

model to be preferred for the benefit of the Zimbabwean society. The idea of committees emerged from the NPRC's need to decentralise its services by working with members of the public and organisations. Currently the thematic committees are largely constituted by outsiders who have been involved in peace-building initiatives. There are four external committees as detailed below which act as multi-stakeholder platforms to provide advisory support under the Act and Regulations (www.nprc.org.zw).

Victim Support, Gender and Diversity Committee

This committee, established under NPRC Act s 9, deals with gendered dimensions of victimhood and intends to enable the NPRC to convey the victim's voice as it carries the nation towards healing.[156] It realises that any conflict affects men and women differently. For instance, a pregnant woman with five children will not run away when conflict starts. Even if pregnancy is considered alone, it is difficult for a heavily pregnant woman to run when attacked. This committee has two sub-clusters: one dealing with victim support, rehabilitation, legal, psychosocial and direct access, and the gender cluster which looks specifically at women's participation and issues such as rape and sexual violence during conflict.

The committee should speed up the healing, reconciliation and peace process by ensuring that victims of many conflicts: ethnic, political, doctrinal and so forth are properly identified. In an interview at Zimpapers TV Network on 8 June 2020, the Deputy Chairperson of the NPRC, Commissioner Lilian Chigwedere emphasized on how section 9 of the NPRC Act has informed the NPRC to include safe spaces for the marginalised and specific groups such as women, youths and persons with disabilities. These include the challenge of machete gangs in places such as Zhombe where people are being hacked to death and victims' families are dumping dead bodies at perpetrators' homes. The NPRC has made recommendations for tight

[156] Untitled http://www.twitter.com/NPRCZim/status/1045607616154603520 (accessed 14 November 2019). Because the NPRC is yet to identify state functionaries or non-state actors who were responsible for the atrocities in yet-to-be-identified conflicts it is also difficult to determine whether political will exists to meet the victims' need for reparations. While monetary payments may be important it has been noted that victims consider their needs to have been met where they have participated and where their expectations have not been tampered with in a transitional context; see Clamp (2015) *Restorative justice in transition* 79. Effectively, victims should be given a voice in a manner both satisfying and socially productive: see Braithwaite and Mugford (2004) "Conditions for successful reintegration ceremonies: dealing with juvenile offenders" in Roche D (ed) *Accountability in restorative justice* 3. Victim support should also include victim empowerment to discover that offenders are "less fearsome than they had imagined" see Roche cited in Braithwaite and Mugford ibid in footnote xii.

security and have been engaging with chiefs, police and Parliament. The NPRC has also been instrumental in ensuring that gender parity is promoted by making women, girls and other marginalised groups the centre of focus for the Commission. She noted that the NPRC has not yet made recommendations on how best to work with recommendations on legislative and policy issues to be made.

The NPRC Committee works with organisations such as Musasa Project, and Counselling Services Unit to also report issues of gender-based violence during the Covid-19 pandemic. In Matabeleland and Midlands, Commissioner Chigwedere highlighted how the NPRC is identifying people through the (Matabeleland and Midlands) *Gukurahundi* Committee to ensure the victims of *Gukurahundi* are assisted so that they access birth certificates and identity cards, reburials of their relatives and, relocation of graves. The *Gukurahundi* Committee will also work with the Central Registry, Victim Support, Gender and Diversity, Healing and Reconciliation Committee and Complaints and Handling Committee.

Conflict Prevention and non-recurrence Committee

The committee looks at contemporary and future conflict resolution and prevention in Zimbabwe. Non-recurrence is a critical concern and this dovetails with the NPRC's power to recommend legislation and work with peace committees at provincial levels.

Healing and Reconciliation Committee

The committee is mandated to deal with community-level dialogue with the potential to contribute to healing. While Zimbabwe has been carrying out the POLAD and other initiatives which are mainly top-down approaches to national engagement, the NPRC must focus on a down-up approach. POLAD has largely failed to unite all leading political players such as ZANU PF and MDC-Alliance. There have been threats of pullouts from actors such as MDC-T's Thokozani Khupe. All these political developments should help the NPRC to deepen its commitment to finding lasting solutions that promote individual, community, and national healing in Zimbabwe.

Research and Knowledge Management Committee

This committee intends to drive the NPRC's need to know what happened during various conflict epochs in Zimbabwe. It also works with institutions that have engaged in conflict research in Zimbabwe intending to streamline areas for urgent focus.

There are three internal committees as follows: Investigations and Complaints Handling; Resource Mobilisation and Partnerships; and Finance, Human Resources, and Administration Committee which support the Secretariat.[157]

The Investigations and Complaints Handling Committee seems to be the most important currently as the NPRC has not formalised its TJ work. This committee has two distinct components: the complaints handling system which deals with the issues of lodging complaints; and the investigations component.[158] This committee furthers the NPRC's responsibility to investigate complaints and initiate investigations from across the ten provinces. The committee can receive, handle, and conduct investigations on violations.[159] The committee's functions are guided by the Constitution s 252 (f); NPRC Act; SI 90/18 and the NPRC's Strategic Plan[160] but it remains to be seen how its recommendations will be processed.

The NPRC can lay out a clear investigative mandate to enable the determination of institutional complementarity with the ZHRC.[161] The NPRC urges the public to distinguish between investigations by the ZHRC in purely human rights violations and other investigations that can be made by the ZRP in criminal acts.[162] The NPRC's investigative

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[157] NPRC http://www.nprc.org.zw/how-nprc-structured (accessed 14 November 2019). In designing an urgent TJ roadmap, the NPRC must prioritise the need for victims, offenders and their communities to be involved at the earliest point and to the fullest extent possible: See van Ness (2004) "New wine and old wineskins: four challenges of restorative justice' in Roche D (ed) *Accountability in restorative justice* 145. The NPRC has at least started creating zones of peace and also gathering evidence, fulfilling the need to ensure a collaborative effort between civil government and victims, offenders and their communities and other parties responsible for restoring community peace and harmony. Ness points to the need for collaborators to also deal effectively with challenges relating to the abolishment of criminal laws which exclude victims from punishing offenders; challenge of ranking multiple goals; challenge to determine harm rationally; what types of victims to be reimbursed; quantifying the harm that should be repaired; and challenge to structure-community-government cooperation.

[158] NPRC (n 19).

[159] NPRC http://www.trendsmap.com/twitter/tweet/1189480774074019840 (accessed 26 November 2019). The NPRC website has no updated information on the functions of the committees. Investigation is important in restorative justice because there is need to determine three core issues: 1) crime as a violation of people and interpersonal relationships 2) violations as creating obligations and liabilities to victims 3) restorative justice as means to heal and put right the wrongs; see Zehr and Mika (2004) "Fundamental concepts of restorative justice" in Roche D (ed) *Accountability in restorative justice* 51-52.

[160] NPRC (n 19).

[161] Prescription Act [*Chapter 8:11*] s15 (d).

[162] NPRC http://www.trendsmap.com/twitter/tweet/1189480774074019840 (accessed 26 November 2019). This is important in determining the nature of conflicts which are "taken away, given away, melt away or are to be made invisible including the need to protect invisible victims" see in detail Christie "Conflicts as property" in Roche D (ed) *Accountability in restorative justice* 43. Christie notes that conflicts must represent a potential for activity or participation for victims as heavy losers in a conflict. This is because victims suffer, lose materially or become hurt physically or otherwise and the state will take some of their compensation or describe the losses

mandate has a clear timeline whereas the ZHRC cannot handle complaints of violations that occurred before 13 February 2009 or violations after three years have elapsed.[163] The ZHRC has a complaint handling and investigations unit which assumes the role of the public protector.[164]

The evidence from public hearings regarding the setting-up of zones of peace can be used to determine whether the NPRC needs to expand its sphere of influence to peace gardens and parks.

The NPRC may have to frame its investigative mandate in the manner the ZHRC has done. Significantly, the ZHRC's complaints handling and investigations unit enable it to make recommendations to redress a situation of human rights violations; forward the information to the Minister of Justice, and recommend compensation to the individual or their family.[165] Where appropriate, the ZHRC can recommend the release of a prisoner and can enable victims to seek recourse in a court of law or recommend the prosecution of offenders.[166] In the wake of Coronavirus and insurgence in neighbouring countries like Mozambique, this committee can also play a huge role in developing models that ensure the essentialisation of peace, healing, and reconciliation in the post-coronavirus period. The model also includes ensuring that the Zimbabwe Defence Forces will be deployed in a manner that upholds the Constitution and other national laws relating to ZDF operations. This will contribute to a transparent model of constitutionalism that will also allay the fears of Zimbabweans on the implications of coronavirus and jihadism in Zimbabwe on peace and stability in Zimbabwe and the SADC region.

4.4 Ethnicity and security sector reform

The first political crisis that hit post-colonial Zimbabwe concerned the "ethnicity and integration of military forces which began in the military ranks with an open exchange of fire: [167]

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but not the victim. This was seen in South Africa where the state suggested a once-off-payment for victims of around R30000.

[163] ZHRC http://www.zhrc.org.zw/complaints-handling-investigations/ (accessed 26 November 2019).

[164] ibid.

[165] ibid.

[166] ibid.

[167] Ndlovu-Gatsheni (2008) Nation building in Zimbabwe and the challenge for Ndebele particularism" *Afr J Confl Resolut* 44.

> "... between the triumphant and Shona-dominant ZANLA and the Ndebele-dominated ZIPRA in Connemara (Gweru) and *Entumbane* (Bulawayo), which ignited a reign of state terror in Matabeleland and the Midlands region in the period 1980-1987" [with the purpose to seek and eliminate some ex-ZIPRA combatants who] "had defected from the Zimbabwe National Army to embark on a life of dissidence."[168]

This period of turmoil became known as the *Gukurahundi* campaign and Gatsheni continues that the ethnic-ignited fighting between:

> "... ZIPRA and ZANLA in the Assembly Points, the running away of some ex-ZIPRA combatants back to the bush, the exploitation of the antagonistic situation by apartheid South Africa via Super ZAPU, and the 'discovery' of arms caches in PF-ZAPU owned farms around Bulawayo, gave the Shona-led government a pretext to use state power to crush PF-ZAPU once and for all, demonstrate to the Ndebele who was in power and widen ZANU-PF control into the south-western part of the country.'[169]

The process of recommending specific security services or persons associated with this crisis to deal with the extensive effects of trauma and grief requires critical reflection.[170] The quality and credibility of the work of the commission and the legitimacy of its outcomes will largely depend on how it calls security institutions, in particular, to order.

4.4.1 Other ancillary implications of the findings

Impact of political will on the executive arm of the state

From the findings above, it is important to discuss the related implications of each finding separately. For instance, the presence of political will help in showing how political leaders in the executive can commit to making TJ realizable under the auspices of the NPRC. President Mugabe for instance did not operationalise the NPRC but his successor, President Mnangagwa did so. While President Mugabe was reluctant to deal with post-independent challenges including *Gukurahundi*, *Murambatsvina*, land seizures (*jambanja*), and the election violence of June 2008, there is a need to "own the reconciliation process."[171] Mnangagwa has demonstrated some political will by signing the NPRC Act into law, the

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[168] ibid.

[169] ibid. The dominance of ZANU PF on the political scene is also discussed in ethnic terms. For instance, Jurgens and Hanauer (2019) "The elusive psychology of Africa's leaders" *Good Governance Africa* 15 argue that "ZANU PF is now largely regarded as a project of Shona domination with most of the party's senior officials belonging to that grouping. Even competition for power within the ruling party is a matter of affiliation to Shona clan affiliations".

[170] The Constitution s 207 lists security institutions that include the Zimbabwe Defence Forces, Police Service, Intelligence Service and the Prison and Correctional Service who are obligated to respect human rights and freedoms through s 208 (1) (d).

[171] Tshuma http://www.accord.org.za/conflict-trends/reconciliation-integration-and-healing-efforts-in-zimbabwe/(accessed 12 November 2019) 24.

appointment of the NPRC chairperson and commitment to compensation of victims of Matabeleland and Midlands *Gukurahundi* (including working with chiefs and CSOs under the Matabeleland Collective), and 1 August 2018 shootings. The crucial difference between Mugabe and Mnangagwa is not just the operationalisation of the NPRC, although that is important. The crucial difference is that Mugabe who did not operationalise the NPRC delayed the NPRC's commitment to fulfilling its constitutional and legislative mandates on post-conflict justice. Mnangagwa then allowed the NPRC to fulfill its mandate. This implies that the executive arm of government which delayed the operationalisation of the NPRC should also ensure that the NPRC's period is extended until 2028 to demonstrate that political will is indeed key to the realisation of peace and reconciliation under the NPRC-driven TJ.

Impact of constructive engagement between NPRC and civil society

It has been found above that the NPRC is engaged in constructive engagements. The finding implies that the NPRC is digging deep to build public trust and confidence in its operations and constructive dialogue is seen as an effort to nurture peace after violent conflicts.[172] Further, the finding implies that a successful national healing and reconciliation process requires meaningful engagement with various CSOs identified in Chapter 2 and the general public because a process aimed at responding to people's needs must necessarily involve those affected by the conflict, especially at the grassroots level. On the one hand, CSOs can play a vital role in monitoring the implementation of the reconciliation and healing processes and their work legitimises and reinforces the principle of a bottom-up approach. On the other hand, lack of citizen participation and consultation diminishes the crucial elements of transparency and ownership of reconciliation and healing. Where peace agreements are exclusively negotiated by political elites, human rights issues tend to be drafted in general terms, as evidenced by Zimbabwe's politically-led GPA and Constitution.

4.5 Consensus building in a polity

The finding on consensus-building implies that political parties and FBOs in Zimbabwe must play a leading role in building convivial peace and total healing society. The process must be devoid of partisanship stances and should exhibit political tolerance. Consensus and

[172] Mhandara (n 148) 30. See also, Mhandara (2020) "Community-based reconciliation in practice and lessons for the National Peace and Reconciliation Commission in Zimbabwe" 35 on the need for the NPRC to embrace localism and community reconciliation using practices from countries such as East Timor and the Fambul tok project in Sierra Leone.

legitimacy of the outcome of the national reconciliation exercise will be enhanced if the state and human rights organisations work together to develop the framework and key aspects. For instance, President Mnangagwa did not attend the healing conference that was attended by his nemesis, Nelson Chamisa, in the contested 2018 election. Chamisa responded by not attending or joining the POLAD. Other political actors such as Thokozani Khupe of MDC-T and Lovemore Madhuku of the National Constitutional Assembly have also been mulling pullout from POLAD although POLAD could be the TJ initiative that promotes national dialogue. If not politicised, it has the potential to unite political actors and enable them to engage meaningfully on key issues such as the practicality of a national transitional authority to deal with the issues of presidential legitimacy decisively. This implies that the political actors must ventilate their grievances about governance in Zimbabwe in a manner that makes their platforms of dialogue function as TJ mechanisms. For instance, while POLAD has been welcomed by other opposition party leaders to discuss governance issues with incumbent President Mnangagwa, the platform can still be used to determine if external facilitators such as former President Thabo Mbeki can mediate in ensuring that key opposition leaders like MDC-A's Chamisa can also be part of a reformed POLAD which will have a TJ dimension.

4.5.1 Truth-telling

The finding on truth-telling implies that real reconciliation demands that the truths about past wrongs be told openly. It has been shown that TCs vary in their mandate and methodology from narrow fact-finding inquiries analysing evidence and documentation to broader truth and reconciliation initiatives that incorporate victims and perpetrators through public hearings.[173] The implication is that the stories of the liberation struggle victims; *Gukurahundi* and the vicious 2008 election must be heard.[174] This is because truth-telling encourages the verification of past repressive actions and incidents by individuals and the state. Further, the process may also challenge stories that are inaccurately circulated in the public domain as a rumour. As the SA TRC revealed, the narration of their traumatic experiences to a supportive

[173] Rangelov and Theros (2009) "Transitional justice in Bosnia and Herzegovina: coherence and complementarity of EU institutions and civil society" in Ambos K, Large J and Wierda M (eds) *Building a future on peace and justice* 358.
[174] Hapanyengwi-Chemhuru (2013) "Reconciliation, conciliation, integration and national healing: possibilities and challenges in Zimbabwe" *Afr J Confl Resolut* 79.

audience provided a significant sense of healing to the survivors of apartheid.[175] The concern from Tshuma is that:

> "The creation of unity and national cohesion must first embrace and acknowledge the truth about what happened, rather than deny it. [The NPRC] must work with existing reality rather than trying to create a new reality of its own. [The independence of the NPRC activities must be acknowledged as opposed to their pursuit of] "An ulterior motive" [which would likely jeopardise the peace process as evidenced by activist disruption of two public meetings in Bulawayo and Lupane who considered that] "the Commission was trying to shield 'powerful' people from taking responsibility for the *Gukurahundi* atrocities." [176]

Lack of truth on massacres in the 1980s and the nature and extent of political torture since 2000 disturbs many Zimbabweans:[177]

> "The suppression of truth and constant denial and victim-blaming on the part of perpetrators represent a serious flaw by both the government and the NPRC to engage honestly and genuinely with the past."[178]

4.5.2 Education for national healing and reconciliation

The finding on education for national healing implies that neglect of historical veracity in healing, reconciliation, and integration is irresponsible. Rather, there should be:

> "Deliberate adoption of 'education for reconciliation'" [as] "an education for *hunhu/ubuntu* emphasizing human dignity, respect, equality, peace, justice, tolerance, and fairness" [to equip learners] "with conflict management skills."[179]

From the finding, it becomes clear that the guidelines in the Constitution, s 7, which relate to the role of organisations in promoting constitutional literacy in public education must be utilized by TJ practitioners so that the localisation and contextualisation of TJ mechanisms is known across Zimbabwe. This significantly implies that victims, perpetrators, and CBOs require counselling on issues relating to trauma-healing and reconciliation; and ways to encourage society to embrace the NPRC's community engagement must be publicised.

4.5.3 Special healing places and community intervention programmes

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[175] Hamber (1999) "Past imperfect: strategies for dealing with past political violence in Northern Ireland, South Africa and countries in transition."
[176] Tshuma http://www.accord.org.za/conflict-trends/reconciliation-integration-and-healing-efforts-in-zimbabwe/(accessed 12 November 2019) 25.
[177] Shale (2005) *JAE* 142.
[178] Tshuma http://www.accord.org.za/conflict-trends/reconciliation-integration-and-healing-efforts-in-zimbabwe/ (accessed 12 November 2019).
[179] Hapanyengwi-Chemhuru (n 174) 97.

The finding on the establishment of special healing and community intervention programmes implies that TJ practitioners must assist the NPRC to fulfill its mandate on post-conflict justice. In this case, there could be value in the development of special places of healing such as trauma healing centres and special nature parks to be visited as part of the relaxation and therapeutic process. These recreational healing places could be developed with supportive programmes where people undertake community-based skills-orientated training programmes relevant to community development. Such projects would strengthen sustainable peace by furthering social investment and the unification of the social fabric of society.

4.5.4 Memorialisation and ritualisation

The finding on memorialisation and ritualisation implies that well-orchestrated campaigns should focus earnestly on assisting victims to remember the incidents that harmed them. Through memory building or performance of specific rituals, the truth of what happened in an armed conflict or during violations by an authoritarian ruler and memory is interlinked.[180] The NPRC can utilise its outreach programs to contribute to memorialisation of violations. Memorialisation is defined as the process of preserving memories and accounts of suffering to honour the resilience and dignity of victims and serves to give victims and society:

> "... Closure and create space for dialogue about different experiences and legacies of violence, countering denial, and revisionism. Architectural memorials, museums, and commemorative activities help establish a collective record of events and prevent recurrence of atrocity." [181]

What is remembered, and how and why it is recollected impacts other tools of TJ.[182] Memory is part of:

> "... Social, political, anthropological, philosophical, cultural, psychological, urban, and archaeological elements, among others. Memory is expressed through [...] places, monuments, urban marks, testimonies, events, texts, and audio-visual media. [Recollection of violations to survivors, their relatives, and ancestors are events that may reoccur and permit the identification of] "Current problems such as police abuse, prison overcrowding, marginalization, exclusion, discrimination or an abusive exercising of power." [In this way] memory initiatives are an integral part of any strategies to promote and guarantee human rights and further democracy."[183]

[180] ICTJ http://www.ictj.org/gallery-items/memory (accessed 24 November 2019).
[181] ibid.
[182] Dulitzky (2014) "Memory, an essential element of transitional justice," *Peace in Progress*.
[183] ibid 2.

Open discussions of Matabeleland and Midlands *Gukurahundi* were long regarded as taboo but memorialisation enabled the media, for instance, to use documentaries to retell harrowing experiences of the victims.[184] Affected communities need to work with the NPRC in creating physical reminders to end victimhood. Examples may include monuments, museums, ritual ceremonies, and inclusive healing processes such as those relating to victim exhumation. Commemoration and cultural celebrations play a unique role in communal educational activities.

The NPRC may consider the literature on *Gukurahundi* which used participatory research methods to determine the extent to which memorialisation can be prioritised in Matabeleland and Midlands provinces. Dumisani Ngwenya's literature captures the notions from a victim on recalling the painful memory of family members or:

> "... maybe the entire family in some instances was wiped down, and you could be the few who are remaining. [If you were at home then] you would also have died [as] people were being killed at that time. [It really] opens up wounds and forgiveness can't be there because you would then begin to imagine that I would have died if I was there."[185]

Ngwenya also dealt with statements declaring the intention to kill the victims of *Gukurahundi*:

> "They wanted to wipe you out completely, isn't it? If you read *the year of the people storm* [Robert Mugabe 1979] he said they were going to remove all the barriers, the stumps, uproot even the roots and come and till anew the land, so that meant that they reap. *Gukurahundi* is the year of the people. We need to go back to the philosophy of *Gukurahundi* itself. [...] They wanted to obliterate, completely remove you from the face of the earth and how can you TO-LE-RA-TE that kind of thing?"[186]

What emerges from the horrific narratives through documentaries or participatory research is simply the need for victims to find closure. The above remarks reflect the sad emotions that have condemned the victims' families to conditions of appalling harm. Memories compel every actor to see, like the affected people, that for as long as communities are not dealing openly with past wounds, there can never be forgiveness between the warring parties.

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[184] Rwafa (2012) Representations of Matabeleland and Midlands disturbances through the documentary film *Gukurahundi*: A moment of madness 2007" *Journal of African Identities* 312. See also Kubatana http://www.archive.kubatana.net/html/archive/media/100901misaz.asp?sector=env&year=2011&range_start=1 accessed (24 November 2019).
[185] Ngwenya (2018) Healing the wounds of Gukurahundi in Zimbabwe: a participatory action research project 177.
[186] ibid.

Through the decades, the affected individual has witnessed the real experience of seeing relatives dying and wolves baring their fangs are traumatic.

4.5.5 Funding

The finding on how funding affects the NPRC in its peace and reconciliation initiatives implies that well-funded programs may have much effect on the drumbeat of TJ in conflict-affected areas. The absence of funding calls the belief in institutions supporting democracy into doubt, undermining the confidence of the general populace in the NPRC's institutional reliability and viability. Lack of funding hinders the progress and success of reconciliation and national healing projects. Reconciliation exercises are not only expensive but time-consuming emotional ventures that demand patience and resilience. Further, reconciliation must also have a human face. Words must be accompanied by actions such as restitution and compensation but failure in most national healing and reconciliation projects has been attributed to lack of resources. In the 2019 budget, the NPRC was allocated $1.7 million although it had requested $4.7 million and had also been sharing some allocations with other Chapter 12 Institutions which stalled the NPRC's work in the rural areas.[187] The NPRC also benefited from the US$3.15 million peace fund from the UN meant to advance national healing and reconciliation efforts through the implementation of the NPRC's Strategic Plan.[188] The participation of intergovernmental organisations and development agencies such as the UNDP and UN Women with the government is commendable.

The UN funding can augment national efforts to resource the NPRC to help it grow into a critical player in the healing and reconciliation exercises and a lack of funding will weaken the NRPC.

4.6 NPRC and restorative justice

In discussing the implications of the NPRC in promoting the realisation of TJ, emphasis is voiced about whether restorative justice is worthy of Zimbabwean approval or even of consideration. While there are crucial differences on whether to consider the pre-colonial, the

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[187] Ndlovu (2019) "Cracks emerge in the NPRC over funding" *Standard*. In an interview with Zimpapers TV Network in June 2020, NPRC Commissioner Chigwedere indicated that the NPRC has raised money to pay 32 staff members of the possible 102 workers. It has funding constraints as it also depends on the fiscal resources allocated to it. To deal with the challenges to funding of the NPRC staff, the NPRC has been working with outsiders to drive its work through thematic commitees.

[188] Gebrehiwot "UN allocates US$3.1m for peace building in Zimbabwe," available at http://www.reliefweb.int/report/zimbabwe/un-allocates-us31m-peace-building-zimbabwe (accessed 26 November 2019).

colonial or post-independence conflict and repressive events, restorative justice can be prioritised based on what is known about the government's reluctance to pursue retributive acts such as prosecuting violators of events such as Matabeleland and Midlands *Gukurahundi*. It is also constitutionally affirmed now that Zimbabwe has the NPRC as an institution that can enable victims of selected conflicts or incidents of serious human rights violations to be compensated or access reparations. It is now known how the plans for a TRC were shot down during the GNU; how amnesties were imposed and how informal reconciliations and convivial solidarity were used to negotiate political settlements that lessened chances of official accountability. The current public hearings and evidence-gathering initiatives of the NRPC bear significantly on the links to restorative justice which focus on ascertaining what society requires for healing.[189] Restorative justice enables the victims and the perpetrators to discuss accountability, how people were harmed, and ways to repair that hurt.[190] The NPRC must prioritise restorative justice through a process of reconciliation between all parties involved in the violence[191] and "accepting responsibility is part of therapeutic jurisprudence."[192] The NPRC must appreciate that "restorative justice is contrasted with courtroom justice and the moral frameworks associated with adversarial retribution."[193]

> "Restorative justice visions explicitly reject principles of justice [from] the desire to punish guilty offenders with 'an eye for an eye'" [by isolating the guilty] so that the state can exact its 'pound of flesh'. Instead, its version of justice is centred on specifically nuanced concepts of harm, obligation, need, restoration, healing, reconciliation, reintegration, participation and−when appropriate−forgiveness."[194]

The NPRC must ensure proper record keeping and public hearing reportage so that the actual needs of victims and perpetrators can be considered in restorative justice proceedings. Shaming by conscience through imagined gossip, actual gossip, and indirect confrontation

[189] van Wormer and Walker (eds) (2013) *Restorative justice today: practical applications* 4-5.
[190] ibid 5. To escape a conceptual cuckoo, it has been argued that reparations should induce recognition of social wrong done and culpability. See in detail Zedner *Reparation and Retribution.*
[191] Zehr (2004) "Restorative justice for victims without offender participation" in van Wormer KS and Walker L (eds) *Restorative justice today: practical applications* 35.
[192] Wexler (1975) "Restorative justice and therapeutic jurisprudence: all in the family" in van Wormer KS and Walker L (eds*) Restorative justice today: practical applications* 27.
[193] Pavlich (2005) *Governing paradoxes of restorative justice* 2.
[194] ibid.

may be practiced.[195] Effective shame management can produce positive effects of shame-guilt on crime which include reintegration, avoidance of stigma, and pursuit of procedural justice.[196] Shame-guilt analogy, if properly accepted by perpetrators, can increase empathy for victims and other affected persons[197] and may encourage perpetrators to proffer apologies as the most powerful and symbolically meaningful forms of shaming and acknowledgment.[198] Apologies can be followed by reparation and forgiveness sequences that accomplish synergistic access to restorative justice by the victim.[199] Table 4.5a below simplifies the effects of restorative justice pursued in a normative way.

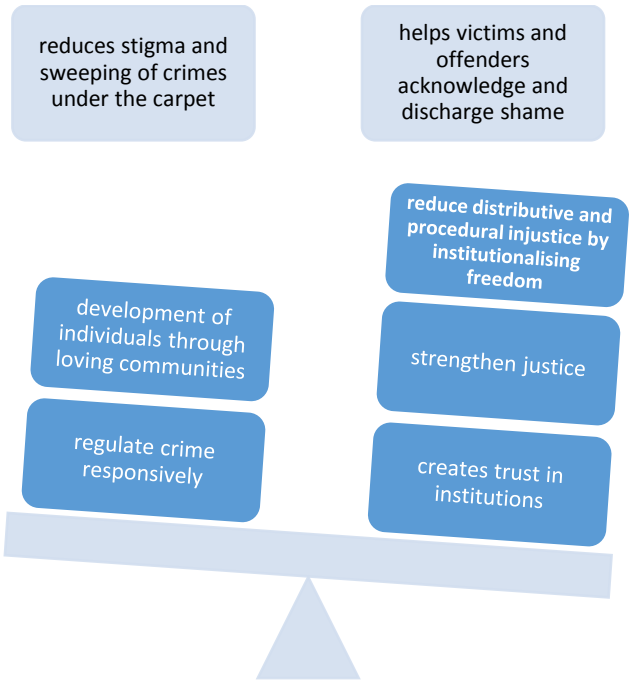

Table 4.5a Effects of normative restorative justice

Diagram developed from nine assumptions on explanatory-normative theoretical integrations by Ahmed *et al*.[200]

Considering that Zimbabwe's TJ discourse has been hampered by a culture of institutional blame, it may be important to avoid retributive measures dealing with offences where time

[195] For a more detailed expose on shame management see Ahmed *et al* (2017) *Shame management through reintegration* 30-31.
[196] ibid 52.
[197] ibid.
[198] ibid.
[199] ibid.
[200] ibid 54.

witnessing is no longer through firsthand witnesses.[201] The NPRC should treat complex conflicts, such as the *Gukurahundi* in Matabeleland and Midlands as well as other serious conflicts across Zimbabwe's ten provinces, committed mainly as a result of political violence, to look beyond state actors. In the Rwandan genocide, for instance, the roles of the "larger population" of men, women, and even children have also been examined to promote sustainable peace.[202] In expanding the roles of women and girls who aided or were complicit in the Rwandan genocide, various categories of women were examined such as:

> "women who led the killings by indoctrinating the people to kill the Tutsis; women who were coerced into the killing, women among the crowds of attackers; women accused of killing their husbands and children; intimate murders or women who turned on their neighbors; girls complicit in the murder of fellow pupils; those singing in praise of genocide by ululating the killers into action; those who betrayed the hunted, looted the dead and women who engaged their men to rape; ministers in the interim government; administrators of death such as local government actors; nuns who joined the killers; teachers and school inspectors; and healers who became killers including doctors, nurses and employees of medical institutions."[203]

The NPRC need not rush to formalise its restorative justice initiative but must focus on the effective investigation of what happened during the *Entumbane* and Matabeleland and Midlands *Gukurahundi* conflicts, for instance. This may include the need for DNA from bodies exhumed or those which will be exhumed in the future. The chronology of evidence can also be considered including the use of digital evidence to put victims on various scenes.[204] It should be borne in mind that conflict situations, especially between government and rebel or armed groups within a state, present the most serious challenges for human rights since horrendous violations are perpetrated by both sides. Linked to this is the issue of the

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[201] Contrast this however with Bennett (2008) *The apology ritual: a philosophical theory of punishment* 171 who supports retribution and rejects the notion that symbolic amend is the best way to express appropriate condemnation. Bennett argues that apologies offered in institutional cases may not be sincere when compared to standard cases where it is easy to assume that the apology usually accompanied with penance is sincere and meant to enable the offender to earn forgiveness.

[202] See in detail Leggat-Smith (1995) *Rwanda not so innocent: when women become killers* 1.

[203] For a detailed analysis of the names and roles of the various categories of women who played a role in the Rwandan genocide see Leggat-Smith ibid 1.

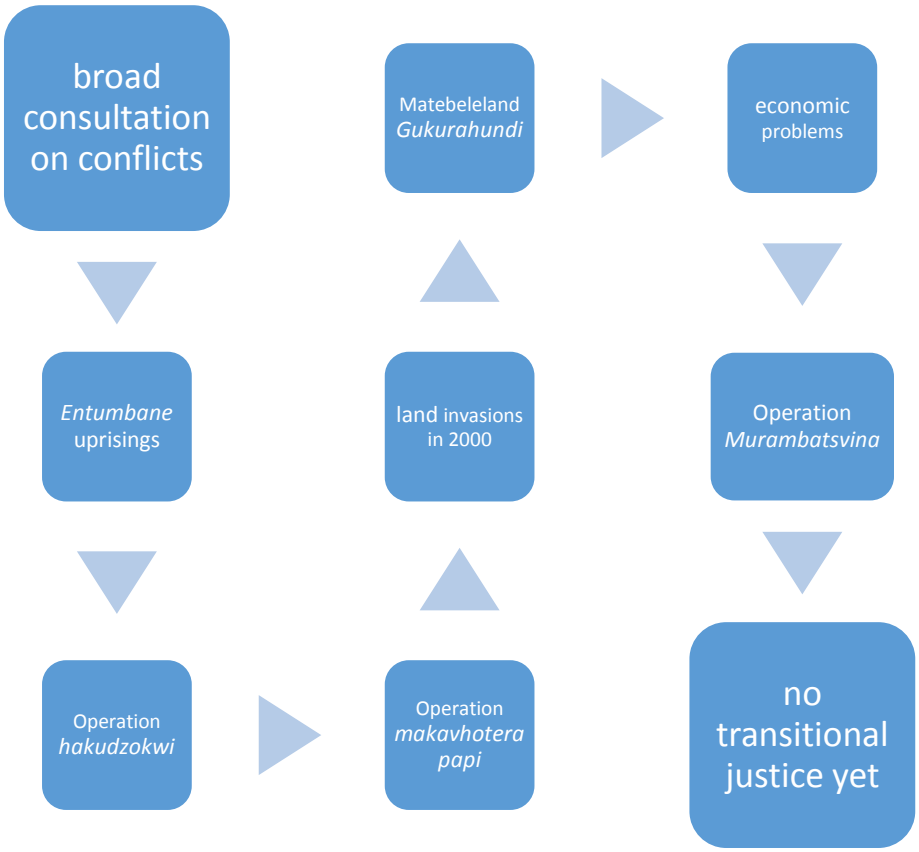
[204] While this thesis will not go into detail on effective investigation during conflicts see in detail Hofisi and Moyo (2019) "*The lex specialis* principle and transformative justice: analysis of the European Court of Human Rights decisions in Hassan and Jaloud" *Int J Political Sci* 2. See the Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016) on key issues such as crime scene management; recovery of bodies for autopsy or expert forensic evidence; sketches and diagrams; proper identification of victims and possible trace evidence to be used.

applicable law in conflict situations: whether to apply international humanitarian law or international human rights law for the *Entumbane* and *Gukurahundi* conflicts.

The emphasis on restorative justice in transitional contexts in Zimbabwe must be taken seriously by the NPRC and its stakeholders. Restorative justice has been seen as the approach or TJ framework as "more responsive to the needs and circumstances of victims and the broader community" because restorative justice theory argues that the needs of victims should be met while promoting accountability and the well-being of offenders.[205]

4.7 Conclusion

The NPRC must ensure that its units, especially those handling complaints and investigations, clearly lay out their mode of operations to enable victims to utilise the process. There is hope the government will implement the need for extension of the NPRC's operational timeline to 2028. A diagram below simplifies key issues to be dealt with by NPRC:



[205] Clamp (156) 4.

Fig 4.6a Key issues of the functions of NPRC

The NPRC must deal with the post-independent period crises as a priority. This will significantly empower their institutional competence; promote the NPRC's legitimacy and, hopefully, its visibility across the country. With the constitutional, legislative, and strategic instruments in force, the NPRC can build on the ONHRI infrastructure to expedite its work with past conflicts and facilitation for victims and perpetrators to find each other.

While the concern is raised that the NPRC is yet to formalise its TJ approach almost a year after operationalisation, the wide consultations are an important part of institutional mapping. The NPRC's broad-based consultations are foundational to an inclusive and comprehensive TJ approach in a nation polarised by ethnic, political, social, economic, and other chronic ideological differences. The current political will obtaining to enable victims and victim groups to work together and with the NPRC must be celebrated as an advance. The NPRC must, however, expeditiously adopt a transparent roadmap to gain institutional trust and public confidence. This roadmap must take cognisance of the differing viewpoints from those affected by various conflicts. The spread of the NPRC's institutional presence across Zimbabwe will provide ways to streamline areas of strategic focus.

CHAPTER 5

THE ZIMBABWE HUMAN RIGHTS COMMISSION AND TRANSITIONAL JUSTICE

5.1 Introduction

The Chapter is guided by the research question on how far the ZHRC has been innovative as the permanent institution with the potential to promote TJ in Zimbabwe using its dual mandate. With the NPRC's life beyond 2023 being unclear at the moment, and with the possibility that the ZHRC's dual mandate may be delinked, the ZHRC or its delinked institutions have the potential to take the TJ debate further under their status as part of NHRIs. The ZHRC's status as an NHRI is seen as a productive ground to achieve realisable TJ.[1] ZHRC's operational document, the 5 Year Strategic Plan (2015-2020) was prepared in compliance with the Paris Principles and other treaty bodies and performs the functions of an internationally accredited National Human Rights Institution (NHRI).[2] Accreditation is an affirmation that the institution is fully resourced, competent, and compliant.[3] The Strategic Plan shows that the ZHRC operates as a hybrid institution to protect human rights and functions and also as a public protector with the "developed appropriate strategies, policies, systems, and procedures."[4]

This chapter examines the extent to which the ZHRC as an NHRI assists to drive TJ processes in the empowerment of victims and perpetrators to deal effectively with the past to end impunity and complicity in human rights violations in the present and the future. The Chapter also examines the extent to which the ZHRC can ensure that TJ is linked to various generations of constitutional human rights which include civil and political rights, social and economic rights, and collective rights. Through its complaints handling and investigation unit, it is examined how the ZHRC can use its public protector role to guard the public

[1] Hofisi (2018) "Role of national institutions in promoting transitional justice" *Herald.*
[2] ZHRC 5 Year Strategic Plan 23. See also Dinokopila (2013) "The role of the Pan-African Parliament in the promotion of human rights in Africa: the importance of collaboration" *AHRLJ* 302 and Dinokopila "Beyond affiliate status: extrapolating the participation of national human rights institutions in the workings of the African Commission of Human and People's Rights" unpublished LLM thesis (2008) on the need for NHRIs to participate on regional platforms. The ZHRC can benefit immensely from utilising this platform especially in instances where individuals approach the ACHPR after exhausting internal remedies on protection of human rights.
[3] ZHRC (n 2).
[4] ibid.

against abuse of power and maladministration by the state, public institutions, and their officers.[5] The prediction for the TJ prospects of ZHRC is also examined in the perspective that all victims of human rights violations are equitably compensated, or otherwise remedied, where appropriate.[6]

The ZHRC is yet to formalise its TJ work. ZHRC can make state functionaries and ordinary citizens commit to TJ as implied from its Strategic Plan through which it undertakes to exhibit no prejudice or favour in the execution of its mandate and where its members have no affiliations to any political parties or groupings.[7] ZHRC will advance accountability for cases of corruption and administrative malfeasances through monitoring prosecutions of human rights violators and implementing deterrent measures to ensure that violations are investigated and enforced.[8] The hope is that the justice fraternity does not sacrifice the rights of those deserving of punishment or exoneration from criminal offences at the altar of corruption.[9]

The ZHRC mandate is to advance human rights to engender positive change and to arrest the effects of divisive political affiliations, race, or financial status.[10] The ZHRC should formalise its role as an NHRI which strengthens TJ mechanisms and must also develop a strategic partnership with the NPRC which deals directly with post-conflict justice.

This chapter presents and discusses the findings summarised in Table 5.a below. To put the work of the ZHRC into perspective, there is also discussion on NHRIs and whether or not the ZHRC fits into that category.

[5] ibid.
[6] ibid 25.
[7] ibid 25.
[8] ibid.
[9] ibid 26.
[10] ibid.

Table 5.a Influence of national and international frameworks on ZHRC

Summary of findings
ZHRC's institutional framework influences how TJ is conducted in Zimbabwe; • ZHRC's collaborative activities with civil society and other institutions accelerate TJ work; • ZHRC's work in human rights influences TJ; • ZHRC's work in condemning ongoing violations of human rights influences TJ; • ZHRC's reports to parliament in Zimbabwe influences TJ; • ZHRC has a middle course role to enable actors and stakeholders to share experiences and collaborate in TJ work; • Institutional diversity can improve victims' access to the benefits of TJ.

5.2 ZHRC and transitional justice

5.2.1 ZHRC: status as an NHRI and transitional justice

The ZHRC fits into the classification of NHRIs which are official, state-sponsored, and funded organisations with responsibility for promoting and protecting human rights at the national level.[11] NHRIs should address the negative impacts of violent conflicts or dictatorial regimes.[12] As mechanisms that are independent of the government, NHRIs can play a key role in preventing conflicts and ensuring respect for human rights and their protection in conflict and post-conflict situations.[13] They can handle complaints, serve as early warning systems, monitor and document violations of conflict-affected groups or victims, promote human rights education and training, and assist victims to access justice and reparations.[14] The ZHRC is accredited with status 'A' given to human rights institutions in full compliance with The Paris Principles which apply to all NHRIs.[15] The Paris Principles, essentially, direct NHRIs to have a broad mandate linked to the universality of human rights; autonomy from government; constitutionally guaranteed independence; pluralism promotion; adequate

[11] OHCHR (2008) Guidance Note on NHRIs 3.

[12] Breslin and Würth "National Human Rights Institutions in Post-conflict Situations" https://www.institut-fuer-menschenrechte.de/fileadmin/user_upload/Publikationen/ANALYSE/Analysis_National-Human-Rights-Institutions-in-Post-Conflict-Situations.pdf (accessed 27 March 2020).

[13] GANHRI "NHRIs in conflict and post-conflict" https://nhri.ohchr.org/EN/Themes/Conflict/Pages/default.aspx (accessed 27 March 2020).

[14] ibid.

[15] DIHR http://www.humanrights.dk/news/zimbabwe-human-rights-commission-accredited-status (accessed 9 November 2019). For a relationship between parliamentarians, parliaments and NHRIs see Dinokopila 2010 *AHRLJ* 26 on how the ACHPR granted observer status to NHRIs in 1998.

resources, and full powers of investigation.[16] As state-mandated bodies, NHRIs sit between the state and civil society.[17]

The potential for the ZHRC for promoting TJ is dependent on its capacity as a 'fourth space' institution that has different features from the state, NGOs, and international organisations.[18] NHRIs can cooperate with CSOs to provide an accurate overview of the human rights situation in the country with recommendations to government, parliament, and other state bodies.[19] ZHRC, for instance, presented its report to parliament in 2019 in terms of the ZHRC Act s 8.[20] Although the report shows compliance with the Act in terms of submitting annual reports and not overstepping its investigative mandate, it does show that the commission omitted to provide special reports to the Minister of Justice for presentation to the president and tabling before parliament as required by s 14 (4) of the ZHRC Act.[21]

The importance of the ZHRC's compliance with the Act lies in the protective role of NHRIs in receiving, investigating and resolving complaints; mediating conflicts, and monitoring the protection of the rights.[22] This enables ZHRC to fulfill the role of assisting the state to implement its human rights obligations, to monitor progress in fulfilling these obligations, and, in some circumstances, to ensure that remedies are available when violations occur.[23] For instance, ZHRC influenced parliament's thematic committee in human rights to look into various issues such as disregard of the ZHRC by ZRP;[24] poor reporting of human rights violations on women, and escalation of corruption in government. Parliament's stance

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[16] ibid.
[17] ENNHRI http://www.ennhri.org/about-nhris/ (accessed 9 November 2019).
[18] Wouters and Meuwissen (eds) (2013) *National Human Rights* 9.
[19] ENNHRI (n 17).
[20] TCHR http://www.veritaszim.net/sites/veritas_d/files/Report%20on%20the%20Zimbabwe%20Human%20Rights%20Commission%20Annual%20Report%20.pdf (accessed 9 November 2019).
[21] TCHR http://www.veritaszim.net/sites/veritas_d/files/Report%20on%20the%20Zimbabwe%20Human%20Rights%20Commission%20Annual%20Report%20.pdf (accessed 9 November 2019) 3.
[22] Bhandari (2014) "Role of National Human Rights Institutions in ending impunity for human rights during conflict: the case of Nepal."
[23] OHCHR (n 11) 3.
[24] This is important since ZRP is a security institution that is prohibited from violating individual rights in terms of the Constitution s 208. Zimbabweans celebrated the temporary removal of the police from the roads when the military transition culminated in the removal of former President Mugabe in 2017.

demonstrates how TJ in Zimbabwe has been examined from the perspective of social and economic problems in Zimbabwe.[25]

5.2.2 ZHRC: use of national frameworks to promote transitional justice

ZHRC's operationalisation under the ZHRC Act permits the argument that the ZHRC uses its legislative and constitutional mandates to promote TJ through demanding horizontal accountability from the judiciary, parliament, and the executive. The ZHRC's mandate is to bring awareness of and to promote, protect, and enforce human rights and freedom.[26] Its work finds further expression in sections 242-244 of the Constitution. Its legal mandate under the ZHRC Act depends on the definition of human rights violation to mean a violation of the constitutional Declaration of Rights or any international human rights instrument to which Zimbabwe is a party. This excludes it from dealing with international instruments to which Zimbabwe is not yet a party.[27] The mandate includes making recommendations to Government, parliament, and any other competent body in matters relating to the amendment of laws. It can be used to ensure the ZHRC Act is amended to allow for dealing with TJ issues.[28] It finds further expression in sections 242-244 of the Constitution. Other mandates which may be used to promote TJ include reporting without restriction,[29] promoting harmonisation of laws,[30] engaging with the UN, other organisations, regional systems, and NHRIs[31] and education and awareness-raising.[32]

The ZHRC must align its TJ work with gender, media, NPRC, Zimbabwe anti-corruption and land commissions[33] as common to all these commissions is the need to investigate and

[25]Maguchu (2019) *Transitional justice and socio-economic rights in Zimbabwe*.
[26] Mugwadi (2017) "The role of independent commissions with particular reference to the Zimbabwe Human Rights Commission" in Ruppel OC, Scherr K and Berndt AD (eds) *Assessing progress in the implementation of Zimbabwe's new Constitution: national, regional and global perspectives* 231.See ZHRC Act sections 9 and 15 and Constitution s 243 (1) a-k.
[27] NANHRI http://www.nanhri.org/wp-content/uploads/2016/04/ZIMBABWE.pdf (accessed 9 November 2019). See also section 34 of the Constitution on institutions which encourage the State to incorporate provisions of treaties to which Zimbabwe is a party.
[28] NANHRI ibid referring to s 243 (1) (i) of the Constitution.
[29] ibid referring to s 323 as read with s 244 (2) of the Constitution and s 6 of the ZHRC Act.
[30] ibid referring to s 243 (1) (b) of the Constitution.
[31] ibid referring to s 4 (e) of the ZHRC Act.
[32] ibid referring to s 243 (10 (a) of the Constitution.
[33] FORUM (2013) "Constitutionalizing transitional justice" 6.

uncover the truth regarding human rights violations, advising government and seeking redress.[34]

The return of state violence through incidents such as 1 August 2018; the death of some 17 people during the protests between 14 January 2019 and 5 February 2019; and the sexual abuse of women allegedly at the hands of soldiers necessitated the need for the ZHRC to be involved.[35] The ZHRC is regarded as an institution to which many victims are greatly indebted and it even received complaints of state violence against civilians ahead of the *Motlanthe* Commission.[36] The ZHRC has shown readiness to work within its constitutional mandate in s243 (1) to investigate any authority or person in armed and uniformed members of the ZNA and the ZRP for instigating systematic torture.[37] The statement of the ZHRC on public protests and conduct by the security forces was used in advancing the European Parliamentary Resolution on Zimbabwe to explain cases of breaches of human rights, democracy, and the rule of law.[38] The ZHRC can deal with the issue that even after the *Motlanthe* Commission, no one has been brought to justice for the killings of 1 August 2018 and that various abuses of human rights and political rights of the opposition were not denounced.[39]

The ZHRC's constitutional and legislative mandates allow it to address concerns on the worsening situations of human rights abuses in the Mnangagwa government.[40] Mnangagwa was appointed following 30 July 2018 elections which were seen as offering Zimbabwe the opportunity to break with the history of contentious elections marked by abuse of political and human rights and state-sponsored violations.[41] However, ZHRC's statement on 10 August 2018 on the 2018 harmonized elections and the post-election violent expressed deep concern about the brutality and violent conduct of the ZRP and called for national dialogue.[42] The ZHRC has not yet aligned its work with TJ instruments at international levels.

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[34] ibid.
[35] NTJWG (2019) "Not alone: the role of independent commissions in times of crisis".
[36] ibid.
[37] ibid.
[38] European Parliament Motion for a resolution on Zimbabwe, http://www.europarl.europa.eu/doceo/document/B-8-2019-0120_EN.html (accessed 9 November 2019).
[39] ibid.
[40] ibid.
[41] ibid.
[42] ibid.

5.2.3 ZHRC: compliance with international soft sources of law

ZHRC's role is examined here from the perspective of soft sources of international law such as The Guidance Note and the Kyiv Declaration. The ZHRC complies with the Paris Principles as was indicated above in 5.2.1. The ZHRC is yet to formally align its work with the ten principles listed in The Guidance Note[43] on TJ which include:

Designing, implement, and integrate TJ processes and mechanisms:

- supporting and actively encouraging compliance with international norms and standards;
- taking account of the political context; basing assistance for TJ on the unique country context and strengthening national capacity to carry out community-wide TJ processes;
- striving to ensure women's rights; supporting a child-sensitive approach; ensuring the centrality of victims;
- taking account of the root causes of conflict and repressive rule, addressing violations of all rights; and engaging in effective coordination and partnerships;
- Co-ordinating TJ programmes with the broader rule of law initiatives.

The ZHRC is still to formally adopt the three-pronged UN approach which focuses on the need to uproot the causes of conflict and repressive rule and related human rights violations; take human rights and TJ into account during peace times; and coordinate disarmament, demobilisation and reintegration initiatives with TJ activities in a positively reinforcing manner.[44]

The ZHRC has also not formally aligned its work the Kyiv Declaration which recognises the role of NHRIs in addressing human rights violations, disseminating information on such violations, and providing education in conflict and post-conflict situations.[45] The Kyiv

[43] UN Guidance Note of the Secretary General https://www.un.org/ruleoflaw/files/TJ_Guidance_Note_March_2010FINAL.pdf (accessed 27 March 2020) 2.(The Guidance Note).
[44] ibid. For this reason, this thesis will not go into detail in analysing the ZHRC's compliance with other aspects in The Guidance Note under review.
[45] International Conference on NHRIs http://ennhri.org/wp-content/uploads/2019/10/the_kyiv_declaration.pdf (accessed 27 May 2020) 1.

Declaration requires NHRIs to show how their normal human rights mandates are distinguished from their operations in conflict and post-conflict situations.[46]

The ZHRC has also not shown on its website that it has revised its strategic plan to incorporate the AU TJF or the findings of the ACHPR Report on transitional justice and human rights.

Whilst the ZHRC has not demonstrated alliance of its work with the soft sources cited above, it is hoped that it will do so considering its collaboration with the OHCHR which considers TJ from the perspective of human rights law.[47] ZHRC's collaborative work with the OHCHR is understood from the latter's focus on the four tenets of international human rights law which link to TJ and fighting impunity. These four tenets include ensuring that the state investigates and prosecutes alleged perpetrators of gross violations of human rights and serious violations of international humanitarian law; the right to know the truth about the past; the right to reparation for victims and the state's obligation to prevent, through different measures, the recurrence of such atrocities in the future.[48]

Other UN agencies produce reports or soft sources of international law with suggestions for incorporation into domestic legislation.[49] There is encouraging collaboration between ZHRC and OHCHR which provided technical support in the development of tools for monitoring human rights during elections.[50] The OHCHR conducted a working session with the ZHRC team to finalise tools used during the 2018 July elections; assisted to monitor the human rights situation and gathered the information for its outcome report.[51] Significantly, the OCHCR worked to ensure that ZHRC promoted the integration of human rights concepts and principles into the programming and planning of other UN agencies in Zimbabwe under the development pillar.[52]

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[46] ibid 2.
[47] OHCHR (2014) Transitional Justice and Economic, Social and Cultural Rights 5.
[48] ibid.
[49] Grover (2019) "Transitional justice, international law and the United Nations" *Nord J Int Law* 359.
[50] OHCHR (2018) UN Human Rights Report 224.
[51] ibid.
[52] ibid.

Elections campaigns and elections can be used to evaluate broadly the political discourse around TJ issues and particularly the role of the security apparatus and judiciary.[53] In states transiting from authoritarian rule, electoral justice diminishes the failure of elections through repression, electoral crimes, misconduct, or other irregularities which set back democratic development or occasion a return to conflict or non-democratic rule.[54]

The ZHRC can use the UNHCR study on gender-based and sexual violence concerning TJ[55] and the UNHCR study on human rights and transitional justice.[56] The ZHRC may also consider OHCHR's study on human rights training and TJ activities[57] for its work with other UN agencies in Zimbabwe including UNDP. The ZHRC can benefit from the experience of the OHCHR and UNDP working together with the ICTJ in strengthening national justice institutions and promoting coexistence and reconciliation.[58]

The ZHRC's cooperation with UN development agencies is critical since the pursuit of human development is understood on the need to deal effectively with repression by addressing past legacy through building a rule of law-based society which is at peace, just and inclusive.[59] Trust in state institutions cannot be fostered without justice, and justice cannot be achieved without the rule of law.[60] It may be argued that TJ, which aims at healing wounds and creating the foundations for the rule of law, is a precondition for sustainable development.[61]

5.2.4 ZHRC: engagement with the state

[53] El-Dabh 'Transitional justice and the politics of transition'. See also Greenstein and Harvey (2017) "Trials, lustration, and clean elections: the uneven effects of transitional justice mechanisms on electoral manipulation" http://dx.doi.org/10.1080/13510347.2017.1304380/ (date of access 15 March 2020) 1195 on how TJ focus can promote electoral integrity through democratisation efforts.
[54] IDEA (2016) "Prioritizing justice: electoral justice in conflict-affected countries and countries in political transition" 5.
[55] UNHCR Analytical study focusing on gender-based and sexual violence in relation to transitional justice https://www.refworld.org/docid/55c88ef04.html (accessed 28 March 2020)

[56] ibid.
[57] OHCHR (2006) Evaluating Human Rights Training Activities.
[58] Clark "A role for development in transitional justice: the Arab Spring and beyond 2011."
[59] ibid.
[60] Sancho "Using transitional justice to promote development" 2.
[61] ibid. See also the Merida Declaration http://www.nhri.ohchr.org/EN/ICC/InternationalConference/121C/Background Information/Merida Declaration FINAL.pdf (accessed 9 November 2019). See also UN General Assembly http://www.un.org/ga/search/view_doc.asp?symbol=A/70/684&lANG=E (accessed 9 November 2019).

The three arms of the state as the executive, the judiciary, and parliament must be involved with TJ issues at different levels. The Minister of Justice and the President can implement the ZHRC's recommendations from the perspective that NHRIs' findings can legitimise a government's commitment to fighting a poor human rights record.[62] NHRIs can also support the state to realise their commitments in this regard through their role of monitoring and follow-up.[63] For instance, the ZHRC found that there is still no clear policy on the fate of former farm workers after the farms on which they worked and lived were re-allocated[64] and hundreds of internally displaced people still need to be reunited with their families. Lack of compensation for victims of serious violations of socio-economic rights through arbitrary evictions such as Operation *Murambatsvina* must be considered. ZHRC's findings were affirmed by parliament's thematic committee on human rights which bemoaned how Zimbabwean courts still do not consider relevant factors that safeguard citizens against arbitrary evictions.[65]

Parliament overtly accepts the important role played by the ZHRC as envisaged by The Paris Principles which allow for a wide range of approaches and forms of coordination between NHRIs and mechanisms and processes of TJ.[66] Under the constitutional separation of powers principle, parliament can promote the ZHRC's TJ role by amending the ZHRC Act to empower victims through the award of compensation or reparation.

The ZHRC's TJ potential is premised on NHRIs support processes that ensure accountability and combat impunity, provide remedies to victims, promote respect for the rule of law, and strengthen democracy and sustainable peace.[67] Land issues are an important area where the ZHRC can engage with the government since the effects of the land reform are still affecting citizens in terms of access to better standards of living. The focus on land issues indicates the importance of historically understanding current land conflicts in Zimbabwe.[68] It has also

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[62] Goodman and Pegram (2012) *Human rights, state compliance and social change-assessing national human rights institutions* iii.
[63] ibid 2-3. See also Bhandari (n 22).
[64] TCHR http://www.veritaszim.net/sites/veritas_d/files/Report%20on%20the%20Zimbabwe%20Human%20Rights%20Commission%20Annual%20Report%20.pdf (accessed 9 November 2019) 3.
[65] ibid.
[66] ibid 10.
[67] OHCHR (n 50) 1.
[68] Magaisa (2010) "The land question and transitional justice in Zimbabwe: law force and history's multiple victims" *Big Saturday Read* 2.

been observed that a legal analysis of the rights and wrongs of the land reform in the 2000s is unlikely to resolve the land question.[69] The failure to compensate white farmers has been interpreted using the UK's refusal to accept responsibility for compensating white farmers and the Zimbabwean government's compulsory acquisition without compensation.[70]

President Mnangagwa's government pledged an interim payment of US$16 million or 12 million pounds to farmers in distress whilst work on total compensation continues.[71] The Commercial Farmers Union is concerned that the state's compensation package is insufficient since its members are owed US$9 billion in compensation.[72]

NHRIs have a unique position between government, civil society, and NGOs.[73] While may be difficult for the ZHRC to have direct involvement in the compensation of white commercial farmers since the ZHRC cannot handle complaints of violations that occurred before 13 February 2009 or violations in which a three year period has elapsed, the land issues have not been resolved and the ZHRC can prevent the commission of land-related problems that can cause resource conflicts in Zimbabwe. However, a half-hearted land reform effort will not solve Zimbabwe's current economic woes.[74]

Zimbabwe's land issues in early 2000 are seen as a struggle for access to resources between the indigenous population and the late 19th century white settlers and successors.[75] There has been a shift in the perspective of land allocation from black liberation narratives focusing on colonialism and the peasantry and neoliberal narrative which emerges from a political transition/ compromises between the elites and new forces of globalisation.[76] The state ordered 1 000 farmers to leave their land within three months[77] under a chaotic operation and instances of multiple farm ownership occurred.[78] A potential conflict exists between white

[69] ibid.
[70] ibid 13.
[71] *BBC* 16 May 2019. Dave Wakefield who lost a farm in 2001 believes the government will pay him US$20 000 from the interim payment plan yet he believes he is due US$2 million.
[72] ibid.
[73] Smith (2006) "The unique position of national human rights institutions: a mixed blessing?" *Hum Rts Q* (28).
[74] Mukeredzi (2019) "Zimbabwe's new land reforms don't go far enough" *FP*.
[75] Hansungule (2000) "Who owns land in Zimbabwe? In Africa?" *IJGR* 305.
[76] Alden and Aanseeuw (2011) "Land conflicts and Southern Africa's new narratives since Zimbabwe's fast-track land reform" 1.
[77] ibid 11.
[78] Samaita 2019 "Zimbabwe likely to return some land to white farmers" *Business Day*.

and black farmers or between currently resettled black farmers and other black farmers who may benefit from the land audit exercise. [79]

The need to link the causes of conflict and consequences of human rights abuses and human rights violations falls to the operations of NHRIs. [80] In the contentious land issue, its supporters hold that it was lawfully executed while their opponents maintain that the rule of law was not upheld.

> "It seems logical to assume that NHRIs functions can contribute to making transitional justice processes successful as the failure or lack of implementation of their recommendations may cause another conflict. The success of transitional justice processes may lead to ending impunity, ensuring respect for the rule of law and fostering and sustaining a culture of respect for human rights."[81]

5.2.5 ZHRC: role in promoting transitional justice through ending repressive acts

A society emerging from repression cannot ignore recent serious human rights violations[82] and only by the adoption of a practical solution suited to each particular situation, through "measures that are both feasible and most conducive to the reconstruction of a just order."[83] Since the end of World War II:

> "The cause of human rights has focused principally on the global adoption of international legal instruments and the development of governmental agencies and non-governmental organisations to monitor compliance of signatories to these agreements."[84]

Locally, reform of security institutions is required considering that the ZHRC and other CSOs have documented violations of human rights by security institutions, especially the ZRP and ZNA. To illustrate, the ZHRC condemned 1 August 2018 killings of six protesters by security forces and criticised the army for attacking civilians.[85] A seventh civilian died from injuries related to the protests.[86] The government did not overtly attempt to obstruct the ZHRC's

[79] Zenda 2019 "Compensation for white ex-farmers sparks intense debate across Zimbabwe" *TRT World*.
[80] Bhandari (n 22) 31.
[81] ibid.
[82] Goldstone (1999) Goldstone R 'Preface' in Hesse C and Post R (eds) *Human rights in political transitions: Gettysburg to Bosnia* 10.
[83] ibid 12.
[84] Hesse and Post (eds) (1999) 'Introduction' in Hesse C and Post R (eds) *Human Rights in political transitions: Gettysburg to Bosnia* 22.
[85] US State http://www.state.gov/wp-content/uploads/2019/03/Zimbabwe-2018-pdf (accessed 9 November 2019).
[86] ibid.

investigation or deliberately withhold resources based on the commission's criticism of security services' actions.[87]

Security sector reform is required in the military, police, and intelligence services, justice sectors, non-statutory security forces, management, and oversight bodies (such as ministries and parliament).[88] The goal is the promotion of a security sector that is accountable, legitimate, and transparent in the provision of internal security and rule of law.[89] The need for the security sector to value broad-based consultation with local populations and enhanced civil society mechanisms is based on the argument that security sector reform is highly political.[90] Reform of abusive institutions is an important TJ component and should be accompanied by and be coherent with other TJ approaches such as prosecutions, truth-seeking, and reparations for victims.[91]

No prosecution followed August 1 2018 and 14 January 2019 shootings. This permits the argument that the ZHRC's condemnation of this be interpreted through the aspect of justice-sensitive security sector reform which recognises that institutions and individuals bear responsibility for human rights violations.[92] The requirement exists for programs aimed at preventing recurrence and repetition of violations by transforming abusive institutions and instilling accountability for past abuses.[93] Preventing recurrence comes in the wake of police and military use of excessive force to arrest, assault or kill civilians during 14 January and 5 February 2019 protests.[94] Dialogue with ZRP personnel to reform their relationship with the general populace would assist to confer integrity, accountability, and legitimacy.[95]

5.2.6 ZHRC: engagement with CSOs and transitional justice

Chapter 2 of this dissertation referred to the role that civil society has played in promoting TJ. The logical corollary to this is to explore the ZHRC functions from its engagement with CSOs. Liaison and cooperation with CSOs are part of the OHCHR's emphasis on the:

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[87] ibid.
[88] Mobekk (2006) "Transitional justice and security sector reform: enabling sustainable peace" 3.
[89] ibid.
[90] Davis "Transitional justice and security sector reform" 4.
[91] ibid 7.
[92] ibid.
[93] ibid.
[94] ZHRC http://www.zhrc.org.zw/monitoring-report-in-the-aftermath-of-the-14-january-to-16-january-2019-stay-away-and-subsequent-disturbances/(accessed 9 November 2019).
[95] Davis (n 90) 7.

> "NHRIs engagement on transitional justice should seek to support processes that ensure accountability and combat impunity, provide remedies to victims, promote respect of the rule of law, and strengthen democracy and sustainable peace."[96]

Following the Constitution 2013, the ZHRC focused on various issues including the institutional requirement to promote awareness of constitutional provisions.[97] Through MOUs with CSOs, continued cooperation promotes the aim of vertical and horizontal accountability.[98] The MOUs formalised partnerships and collaboration mechanisms concerning case referrals and human rights promotion.[99] The ZHRC Chairperson, Commissioner Mugwadi, emphasised the need for NHRIs and CSOs to cooperate in compliance with The Paris Principles which promote pluralism and inclusiveness in national efforts to promote a culture of human rights.[100]

Both FORUM, which has a TJ unit, and LRF, who published a report on *Gukurahundi* together with the CCJP, continue to engage with the ZHRC in TJ. This comes in the wake of the ZHRC's requirement to tap into the technical expertise of CSOs in emerging human rights issues in areas where the ZHRC may not be present.[101] Further, ZHRC acknowledged during the MOU signing that it must act as a bridge between the state and civil society especially where there are disagreements, mistrust, or suspicion concerning human rights issues.[102] ZHRC's acknowledgement augurs well with the need to appreciate the role of non-state actors in driving TJ processes by focusing on the demand and supply factors that support or impede such processes.[103]

ZHRC can use MOUs to support national consultations incorporating the views of civil society, victims, women, and vulnerable groups.[104] This includes promoting peace and democracy in transitional periods by helping to establish and implement TJ initiatives while

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[96] OHCHR (n 50) 3.
[97] Constitution s 7.
[98] The ZHRC signed MOUs with four CSOs on 11 March 2016: the LRF, FORUM, Zimbabwe Human Rights Association and the Zimbabwe Association of Doctors for Human Rights. ZHRC http://www.zhrc.org.zw/wp-content/uploads/2017/07/Report_MOUs-Signing-Ceremony-with-Civil-Society-Orgs-14-03-26.pdf (accessed 11 November 2019).
[99] ZHRC http://www.zhrc.org.zw/wp-content/uploads/2017/07/Report_MOUs-Signing-Ceremony-with-Civil-Society-Orgs-14-03-26.pdf (accessed 11 November 2019).
[100] ibid.
[101] ibid 2.
[102] ibid.
[103] Backer (2003) "Civil society and transitional justice: possibilities, patterns and prospects" *J Hum Rights* 297
[104] OHCHR (n 50).

promoting accountability, remedies for victims, and other measures facilitating the non-recurrence of violations.[105]

In this way, CSOs with MOUs with the ZHRC can engage in finding ways to address past violations, raise public awareness, cultivate political will, mobilise support for a national dialogue on TJ issues, share notes on UN Treaty reporting processes and other international bodies as envisaged under UN auspices.[106] While the ZHRC emphasises institutional linkages and functions for investigations, reports, and recommendations considered useful to promote TJ through non-judicial means, there is a need for it to appreciate how NHRIs must collaborate with a wide spectrum of actors as envisaged by the Paris Principles.[107]

5.2.7 ZHRC: government and public support for transitional justice

ZHRC needs to secure government support through balanced reportage of human rights violations. Governmental cooperation is necessary at policy and political levels with ministers and parliamentarians to ensure that government engagement is most effective[108] and to strengthen the ZHRC in line with emphasis by UN agencies.[109] ZHRC's key findings in the aftermath of 14 January 2019 'stay away' and subsequent disturbances included the role of state institutions such as ZRP, ZNA, and the courts as well as communicating with CSOs and those people who stayed close to areas of road barricades.[110] The report was balanced since ZHRC recorded instances where citizens had barricaded roads, looted or damaged property in areas such as Mabvuku and Chitungwiza, Hopley, Machipisa in Harare and some areas including *Entumbane* Total Service Station, and Chicken Inn Corner, Tshabalala in Bulawayo.[111]

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[105] ibid.
[106] ibid 23-24.
[107] Dinokopila (n 1) 302.
[108] Maveneka (2015) "Terminal evaluation of the support for the strengthening of the promotion and protection of human rights and the rule of law through enhanced capacity of institutions" 9.
[109] UN General Assembly http://www.refworld.org/pdfid/57f64f4b4.pdf (accessed 9 November 2019).
[110] ZHRC http://www.swradioafrica.com/pages/billwatch120410.htm (accessed 12 October 2019).
[111] ibid.

ZHRC's report noted the deaths of civilians and a police officer including the death by gunshot wounds of one civilian.[112] The civilian was shot during a face-off between the protesters and law enforcement agents resulting from an attack on Makoni police station and the deaths of eight people were attributed to the use of live ammunition used by security forces.[113] ZHRC received complaints from the government blaming the opposition and CSOs for causing the protests but ZHRC verified instances where the government had abducted leaders of CSOs, opposition councilors, and an MDC Alliance parliamentarian. ZHRC found that there was excessive brutal use of force by the police and military. [114] The report revealed that the *modus operandi* of ZRP and military was similar in all communities assessed:

> "They would arrive at people's houses at night or in the early hours of the day and ask all men to go outside and lie on the ground. They would then beat [them up], including boys as young as 11 years, and then ask them to run or arrest them. [They] targeted those who live in shared residences where there would be [...] more than one male per house. They would also target men and boys who live in houses that are near areas where looting took place or where barricades were set up and just make dragnet arrests without investigating."[115]

In general populace engagement, the emphasis was given to the need for ZHRC to increase its visibility in rural areas to promote awareness of their services.[116] While the ZHRC website publicises Chapter 4 of the Bill of Rights and provides contact details,[117] internet accessibility in most rural areas is erratic or non-existent. The need for visibility in rural areas also follows the concern to deploy sufficient resources to the ZHRC and the need to ensure that schools, children, personnel, and school equipment are protected from political abuse and destruction.[118] The apparent failure of decentralisation of the ZHRC's activities to all provinces has been publicly rebuked through boycott against the seemingly elitist approach.[119] Public legitimacy remains critical and NHRIs should be seen to promote the rule of law through practical demonstration rather than foster an impression as a state appendage.

5.3 ZHRC: challenges in dealing with transitional justice

[112] ibid.
[113] ibid.
[114] ibid.
[115] ibid.
[116] Maveneka (n 108).
[117] ZHRC http://www.zhrc.org.zw/your-rights/ (accessed 9 November 2019).
[118] FORUM (2017) "State of human rights report: Zimbabwe" 63.
[119] Shereni 2019 "Zimbabwe: ZHRC Masvingo public hearings off to dismal start," *Voice of the People.*

The ZHRC faces mainly legislative and political challenges in aligning its TJ mandate at the international level. This also makes it difficult for ZHRC to deal with soft sources of international law which are not found in international treaties to which Zimbabwe is a party. The state may shy from committal to soft sources of law, especially in instances where it perceives that opposition parties and CSOs are to blame or can be blamed. While ZHRC criticised the ZRP for brutality in 2016,[120] 2018,[121] and 2019,[122] the Minister of Justice criticised the ZHRC's report in 2019 as unbalanced and offside on what transpired.[123] While in 2018 the government did not overtly criticize the ZHRC when it condemned violence during the killing of seven civilians on 1 August 2018,[124] the response by Minister Ziyambi showed rising tensions between ZHRC and the state.

> "The ZHRC is a constitutional commission put in place to strengthen our democracy. There is, therefore, an expectation that they would be impartial and speak without bias. Their report falls short of that standard, as it is based not on thorough investigation and only covers the period after the first two most anarchical days of the disturbances. The government expects our constitutional commissions not to be polarizing by making broad and unsubstantiated accusations without caveats or evidence. In the interest of fairness and justice, the government will engage with the ZHRC to map the way forward for the benefit of the people of Zimbabwe."[125]

There is nothing amiss for the government to expect the ZHRC to be impartial as this requirement embosses equal protection before the law[126] as well as the right to administrative justice and the right to be heard. However, the Minister's concern could be considered disingenuous in the absence of a thorough investigation. The ZHRC report categorises aspects where state institutions used excessive force as well as instances where citizens damaged and looted property and caused the death of a police officer.

Whilst criticism by MDC Legislator Phulu focused on what he referred to as flagrant violation of the Constitution, a total disrespect of its values and spirit, and illegality which should come with a political cost,[127] parliamentarians needed to take on Minister Ziyambi

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[120] Dzirutwe 2016 "Zimbabwe rights body criticizes 'violent' police crackdown" *Reuters*.
[121] US State http://www.state.gov/wp-content/uploads/2019/03/Zimbabwe-2018-pdf (accessed 9 November 2019).
[122] ZHRC http://www.zhrc.org.zw/monitoring-report-in-the-aftermath-of-the-14-january-to-16-january-2019-stay-away-and-subsequent-disturbances/ (accessed 9 November 2019).
[123] Nkala (2019) "MDC legislator slams Ziyambi over ZHRC rap" *Newsday*.
[124] US State (n 121).
[125] Nkala (n 123).
[126] Constitution s 56.
[127] Nkala (n 123).

regarding how the government sought to engage with ZHRC. It is incumbent upon Parliament to play an oversight role over the executive in terms of the separation of powers doctrine. Whilst ZHRC is subject to the supreme law, parliamentarians must play their role to promote representative democracy and, by extension, constitutional democracy through demanding horizontal accountability from other state institutions.

While the ZHRC can push for the amendment of the Act to provide express TJ dimensions, it may face hurdles in having its mandate extended to periods before that provided by the Constitution, that is, from 2009 onwards.

5.4 ZHRC: evaluation of prospects in promoting transitional justice

With increasing focus on innovative ways to promote TJ through NHRIs, the ZHRC remains a critical institution to ensure TJ formalisation in Zimbabwe. The ZHRC has followed its strategic plan from getting international accreditation to consistently producing reports on serious violations of human rights. This gives hope that the ZHRC's effective interventions can ensure that it find ways to collaborate with the NPRC on TJ. The ZHRC has used its constitutional mandate, the ZHR Act, and its strategic plan to fight impunity from both ordinary citizens and the state.

The ZHRC has, through its bold reportage on state violations and violations by the security sectors including ZDF and ZDF underlined its role as an effective watchdog on both human rights and public protection. As an NHRI, the ZHRC needs to broaden its scope of interactions with the more inclusive CSOs. Apart from the MOUs, other collaborative mechanisms between NHRIs and CSOs can be employed. Dinokopila states that NHRI-CSO collaborations can include consultations on thematic areas, partnership in projects and programs, dialogue with CSOs through periodic conferences, delegation, monitoring, and impact assessment as well as the establishment of a focal point within a commission.[128] The ZHRC must clarify in its periodic reports and on its website as to how it is complying with the Global Alliance of National Human Rights (GANHRI) guidelines on the roles of NHRIs in conflict and post-conflict situations, especially those relating to early warning, conflict

[128] Dinokopila (2009) "Strengthening civil society participation and advocacy on human rights protection: the role of National Human Rights Commissions" *AFLA Quarterly Journal* 35. See also Dinokopila (2013) *AHJRL* 302 on the need for NHRIs to collaborate with CSOs to engage institutions such as the Pan-African Parliament.

prevention and the re-establishment of peaceful societies and their contribution to just and inclusive societies.[129]

5.5 Conclusion

The ZHRC is using its dual mandate as human rights and public protection institutions to contribute to TJ realization in Zimbabwe, albeit in the absence of a formal legal framework. Specifically, the ZHRC has asserted its independence in calling on security institutions to end impunity in serious human rights violations especially relating to freedom to demonstrate against and petition government. It has also largely followed its strategic plan in asserting its independence to condemn incidents of serious human rights violations by security institutions from 2016 to 2019. The ZHRC has engaged with both state institutions and parliament in terms of reporting its work and with CSOs in formalising institutional collaborations. The collaboration with CSOs and accountability to parliament is seen as groundbreaking and an opportunity for the ZHRC to enhance its formal collaboration with institutions such as the NPRC.

The ZHRC has greatly enhanced the need for TJ aimed at curbing social ills and administrative or political malfeasances such as corruption which is crucial in the protection of social, cultural, and economic rights of citizens. The ZHRC must, however, improve its reportage as envisaged by international organisations including GANHRI to enable stakeholders and actors to gauge how it is benefiting from its status 'A' compliance. The ZHRC has been challenged to file special reports on human rights to the president and parliament. It is hoped that the ZHRC can emphasise the need for all independent institutions to stick to their constitutional mandates. While the ZHRC Act and Constitution do not provide for an explicit ZHRC role in TJ, this thesis argues strongly that the ZHRC has shown the need for independent institutions to align their work to TJ.

[129] See Brants, Breslin and Wurth http://www.ssoar-2017-breslin-et-al-National-Human-Rights-Institutions-in.pdf (accessed 23 January 2020) 5.

CHAPTER 6

INSTITUTIONAL COMPLEMENTARITY BETWEEN NPRC AND ZHRC

6.1 Introduction

The approaches of the UN, AU, and ACHPR Study on Transitional Justice and Human Rights have brought interesting opportunities for national institutions for their inter-reliance.[1] Of strategic importance is the need for collaboration which can significantly widen the scope of their mandates. In Zimbabwe, the use of various commissions influences the work of CSOs, FBOs, and national institutions. This chapter shows how the NPRC and ZHRC can cooperate through synthetic analysis to deal simultaneously with issues of transitional justice and human rights. The section expands on the importance of soft sources of international law with an emphasis that rule of law-based institutions should be founded, to the greatest extent, on constitutional and international norms. An institutional complementarity model is proposed to promote TJ cooperation in a holistic approach.

Focus is made at the nexus between the normative framework of both international and national law and institutional complementarity between the NPRC and ZHRC. This leads to the discussion of three broad themes on constitutionalism and institutional complementarity: institutional complementarity through TJ studies; and prospects and challenges for institutional complementarity between the NPRC and the ZHRC.

Selected aspects are discussed based on key TJ principles or linkages such as constitutionalism, rule of law and development. The use of complementarity is examined from the perspective of the Rome Statute and how the principle can be used to support national capacities to investigate and prosecute serious crimes of international concern.[2] Complementarity is examined in the constitutional and institutional operations of independent commissions since the study does not interrogate the role of the ICC. The focus is on the

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[1] Landini and Pagano (2019) "Institutional complementarity" in Marciano A and Ramello GB (eds) *Encyclopedia of Law and Economics.*

[2] UNDP http://www.undp.org/content/dam/undp/library/Democratic%20Governance/Access%20to%20Justice%20and%20Rule%20of%20Law/Discussion%20Paper%20%E2%80%93%20Complementarity%20and%20Transitional%20Justice%20%E2%80%93%202012%20_%20EN.pdf accessed on 19 November 2019; Dunnhttp://www.e-ir.info/2014/07/12/the-icc-and-africa-complementarity-transitional-justice-and-the-rule-of-law/ (accessed 19 November 2019); Seils (2016) *Complementarity*.

ability of commissions to utilise their broad constitutional mandate to supplement the rule of law from national and international perspectives.

6.1.1 Complementarity, constitutionalism, and democracy

This section examines the need for the NPRC and ZHRC to prioritise institutional complementarity in making TJ realisable in Zimbabwe. Constitutionalism explains the need to limit government through institutional arrangements. The Constitution promotes the transitional roles of the NPRC and ZHRC from the perspective of national institutions supporting democracy; and institutions that can promote constitutionalism, justice, and human rights cultures. The concept of institutional complementarity is consistent with the broad mandate of supporting democracy to remedy injustice. In the wake of a debate on whether there has been any meaningful transition in Zimbabwe in the movement from an authoritarian regime to a democracy, the approach by Huntington[3] is used to demonstrate why the focus on the choice of TJ systems should be on what is achievable rather than merely idealistic and pedantic. The concern is that TJ in Zimbabwe is not adopting a holistic approach or complementarity of means as prioritised under UN and AU frameworks.

Institutional complementarity is seen as an important tool to promote horizontal cooperation of all the independent Chapter 12 Institutions as well as stakeholders and actors in CSOs, FBOs, CBOs, academia, and other institutions. The absence of effective institutional complementarity is linked to the fact that the NPRC and ZHRC are allocated their specific financial budgets at the national level and work with development partners that may choose to work with either of them in a silo or compartmentalised approach. The lack of formal institutional complementarity could be the result of efforts to demonstrate institutional competence and legitimacy at the individual level through an active discharge of direct mandate rather than the broad interests of remedial justice. The argument raised here is that rule of law, human rights and constitutional supremacy protected in s 3 of the Constitution can substantiate the need for formalisation of institutional complementarity between Chapter 12 Institutions.

The link between constitutionalism and TJ is based on the argument that constitutional processes and norms weave themselves intricately into international TJ norms which can be

[3] Huntington (1991) The third wave: democratization in the late 20th century.

implemented domestically.[4] Constitutionalism has the potential to promote full consolidation of democracy especially if the political will exists to tackle the necessary processes of dealing with the past.[5] Constitutionalism also enables the polity to move towards the democractisation of institutions. Huntington opines that democratisers dealing with an authoritarian regime must determine whether: (a) Following replacement of government, the leaders of an authoritarian regime can be prosecuted promptly within one year whilst clarifying that prosecution will not apply to middle-and lower-ranking officials. (b) If transformation occurred, it is not worth the effort to prosecute authoritarian officials for human rights violations as the political costs would outweigh any moral gains. (c) On the issue of "prosecute and punish vs. forgive and forget", grave problems accompany each alternative and "that the least unsatisfactory course may well be: do not prosecute, do not punish, do not forgive, and above all, do not forget."[6]

The need for democratising a society emerging from the repressive rule is important where, for instance, state officials of the Mugabe government were involved in various conflicts that occurred before Mugabe's resignation. Those officials still serving in President Mnangagwa's government may not be made accountable through option (a) because collective support from ZANU PF, MDC, CSOs, FBOs, and the civilian population ensured that President Mugabe received amnesty when he resigned. Accountability may also be difficult from the perspective of the time-lapse after periods of conflict. Zimbabwe is now thirty-nine years post-independence and many years after the Matabeleland and Midlands *Gukurahundi* massacre. Huntington's option (c) may allow the Zimbabwean polity to determine whether to 'let bygones be bygones' as supported by President Mnangagwa; or to adopt the 'forget theory' or the 'forgive, heal, reconcile and forget' theory.

By way of analysis, option (a) was feasible if applied in the early years of independence when witnesses had fresh recollections of events. The failure to move towards accountability for the Matabeleland and Midlands *Gukurahundi* violations depended largely on the classification of the conflict as an act of dissident activities. Using Huntington's model,[7] it is

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[4] Mendez (2012) "Constitutionalism and transitional justice" in Rosenfield M and Sajo A (eds) *Oxford Handbook of Comparative Law*)..

[5] Halmai http://www.eui.eu/Documents/DepartmentsCentres/Law/Professors/Halmai/Constitutions-and-Transitional Justice.pdf (accessed 19 November 2019) 7.

[6] Huntington (n 3) 231.

[7] ibid.

noted that the threats from sectors that wanted prosecution of Mugabe or to send him to the ICC probably explained why he stayed in power and did not prioritise the establishment of TJ mechanisms which could prosecute state functionaries for specific violations. Mugabe could even delay the operationalisation of the NPRC without consequences.

From the perspective of limited government or constitutionalism, the hindrances to the realisation of TJ in Zimbabwe demonstrate the need for actors to combine and design win-win models that unite state functionaries and TJ actors outside power structures. Essentially, there is a need for government and other actors to prevent managerism, hegemony, and hierarchy of interests between national actors and international stakeholders.[8]

The need for institutional complementarity between the NPRC and ZHRC is based also on the need to emboss the rule of law and human rights. Respect for the rule of law and human rights is considered as one of the best ways TJ actors can promote the flourishing of both vertical and horizontal accountability by state and non-state actors. Further, while the NPRC and ZHRC design their institutional funding proposals, complementarity is also based on the emerging reality that much of the resources supporting complementarity of national institutions lie with development agencies and rule of law implementers.[9] Complementarity will thus enable the NPRC and ZHRC to use their existing programs to collaborate in building their institutional capacity to design effective rule of law initiatives.[10]

6.1.2 Complementarity: Zimbabwe's past instances of violations

The NPRC and ZHRC can collaborate with civil society and state institutions to enable Zimbabweans to deal with their difficult past. The collaboration with CSOs can be made towards promoting the NPRC's visibility.[11] The goal of complementarity is to enable victims to make a clear break with past abuse and the recognition of historical injustice to deter future conflict and promote peace through reconciliation and restorative justice.[12] Effectively, the need to prioritise institutional complementarity between the NPRC and ZHRC stems from the

[8] Grover (2019) "Transitional justice, international law and the United Nations" *Nord J Int Law* 359.
[9] ICTJ (2012) "Supporting complementarity at the national level" 2.
[10] ibid.
[11] Rangelov and Theros (2009) "Transitional justice in Bosnia and Herzegovina: coherence and complementarity of EU institutions and civil society" in Ambos K, Large J and Wierda M (eds) *Building a future on peace and justice.*
[12] ibid 358.

need to ensure that the TJ actors in Zimbabwe faithfully commit to the use of holistic justice as an important tool in post-conflict policymaking.[13]

6.1.3 Complementarity: a one-size-fits-all approach to transitional justice

The evolution of a lexical form of institutional TJ complementarity is still not well developed. Complementarity is associated with the relationship between the ICC and national courts.[14] This provides latitude to deal with the concept of nurturing TJ development from various aspects. Institutional complementarity is seen as an effective way to address the conventional TJ approach which restricts states and actors to certain institutional responses which may derail processes in a polity. Although much capacity for building institutional complementarity is under soft law which differs from hard sources of law such as treaties, they are capable of describing the obligations of states and national institutions in some more elaborate way than treaties. If this claim holds for international law generally, it is equally applicable to TJ:

> "Soft-law international norms and their domestic progeny may simply generate another dimension to facilitate 'forum shopping' for states in respect of their legal obligations. [Whilst] lack of holistic transitional justice and the proliferation of legal norms remain uncharted, we might surmise that discrete and ill-defined legal boundaries and legal norms with limited formal traction generally do not work in the best interests of the powerless, the dispossessed and the oppressed."[15]

The benefits of complementarity are that the UN now recognises a holistic justice that acknowledges that no mechanism is likely to be effective in isolation and that plurality of approach appreciates that retribution and restoration may serve different but equally valuable TJ functions.[16] The TJ field is gradually becoming institutionalised into the mainstream UN agenda.[17] Institutional complementarity promotes the functional legitimacy of institutions, enabling stakeholders to choose between underlying values such as truth and accountability rather than a hierarchy of values that may derail the TJ process.[18] The NPRC and ZHRC can progress to ensure that policy decisions at the state level are embedded in democracy whilst

[13] Friedman and Jillions "The pitfalls and politics of holistic justice," https://doi.org/10.1111/1758-5899.12193 (accessed 22 February 2020) 142.
[14] See ICTJ (n 9).
[15] Aolain International law, gender regimes and fragmentation: 1325 and beyond (2012) Cambridge University Press.
[16] See Friedman and Jillions (n 13) 142.
[17] ibid 143.
[18] ibid.

acknowledging that "competing policy choices represented by alternative mechanisms" offer wider alternatives for "the configuration of the holistic justice agenda." The UN and ICTJ "should do more to engage with the long term and unintended consequences" of failed TJ as the assumption of "complementarity of means has fostered misplaced complacency about the need to develop effective strategies for achieving holistic justice."[19]

This is seen as both a move away from the conventional emphasis on one-size-fits-all justice and also a move empowering society to shun ineffective collaboration between TJ institutions. Through complementary means, the NPRC and ZHRC can play an important role in integrating key aspects including those relating to human rights and unique violations at provincial levels. The collaboration can also enable the NPRC and ZHRC to plan and share resources in joint projects.

Friedman and Jillions emphasise that "outreach to victims and affected communities play a crucial role in communicating the terms of the relationship between different mechanisms" to develop "the social and political legitimacy" of TJ; that "complementarity of means does not emerge organically; effective cooperation requires greater strategic coordination." Thus, stakeholders should elaborate on a transitional agreement specifying the basic terms of cooperation which "provides a forum for resolving operational disputes."[20]

It is also important to enable situations where the NPRC and ZHRC collaborate in public hearings and streamline evidentiary issues that address each institution's direct constitutional and legislative mandate as well as those speaking to indirect constitutional mandates.

6.1.4 Complementarity and developmental approaches to transitional justice

The need to adopt a development-oriented complementarity stems from the realisation that peace, justice, and development are interdependent but no master plan exists to demonstrate how to help conflict-damaged societies find their path; to link together peace and security, justice, reliable institution-building and the re-establishment of trust within a society.[21] To achieve this, conflict recovery also needs to cope with developmental pathologies such as weak economic governance, inequality, exclusion, and unemployment which hinder

[19] ibid 141.
[20] ibid.
[21] Steinmeier (2007) "The Federal Foreign Minister of Germany" cited in Reiff S, Servaes S and Zupan N *Development and legitimacy in transitional justice* 5.

sustainable peace and recovery at the structural level.[22] The UNDP has moved to deepen foundations for peace, dialogue, and social cohesion in Zimbabwe by working with the NPRC in the adoption of a theory of change to establish safe spaces for high-level dialogue through institutional capacities at national and community levels.[23] The strategy that facilitates collaboration between the NPRC and ZHRC includes national dialogue and tailored institutional development and capacity building of state and non-state actors.[24]

The developmental approach can also fit into ZHRC's function in Constitution s 233 which includes support and entrenchment of human rights and promotion of constitutionalism, transparency, and accountability in public institutions. The UNDP has emphasised the need for the NPRC partnership to be guided by principles including the promotion of constitutionalism and the need to support the partner institut**i**ons through human rights and gender-sensitive programming.[25] Linked to this is the aim to maximise strategic partnerships and linkages to promote universal good practice in the delivery of peacebuilding programmes whilst building on the gains of previous programmes.[26] The NPRC needs to mitigate risks by encouraging synergies and partnership building with independent commissions as the intended beneficiaries of the NPRC's upstream support.[27]

6.1.5 Complementarity and the realisation of justice

Three dimensions of justice have been identified to explain the nexus between peace and justice. Rectificatory justice deals with the direct consequences of war such as past human rights abuse and war crimes.[28] The other forms of justice important for complementarity include legal justice to re-establish the rule of law and provide access to justice for previously marginalised groups; and redistributive justice to address socio-economic injustice arising from "structural injustices and distributional inequalities that are often causes of conflict."[29]

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[22] Ohiorhenuan (2007) cited in "Development and legitimacy in transitional justice: report from workshops co-organised by the Working Group on Development and Peace at the conference 'Building a Future on Peace and Justice" *Development* 5.
[23] UNDP (2016) "Deepening the Foundations for Peace Dialogue and Social Cohesion in Zimbabwe " 4.
[24] See UNDP ibid 5 on the strategies suggested for NPRC adoption.
[25] ibid 7.
[26] ibid.
[27] ibid 13.
[28] Reiff, Servaes and Zupan (2009) "Development and legitimacy in transitional justice: report from workshops co-organised by the Working Group on Development and Peace at the conference 'Building a Future on Peace and Justice" 5.
[29] ibid.

The ZHRC and NPRC can collaborate on ways to deal with the consequences of the *Entumbane* conflict and Matabeleland and Midlands *Gukurahundi* as to the requirement for classification as war crimes. This will also enable the NPRC to determine the extent to which rectificatory justice can be achieved by determining the responsibility of identified perpetrators under Zimbabwe's Genocide Act[30] which can be applied to specific individuals.

For the development of legal justice, the NPRC and ZHRC must ensure their broad constitutional commitment to support democracy. To promote redistributive justice, the NPRC and ZHRC must also target relevant areas relating to structural injustices and distributional inequalities in Zimbabwe's ten provinces. They may work with other institutions such as the Land Commission to determine ways of ensuring equitable land access by all Zimbabweans. The general populace can be apprised of the outcome of land audits and appropriation by land barons. The Land Commission in Kenya made huge progress to ensure equitable land distribution and access of private citizens to land ownership structures.

NPRC, ZHRC and the other independent commissions must have, between them, a working plan or strategic partnership with a wide range of approaches to deal with past and recurring injustices covering the fields of human rights, peace and reconciliation, media, elections, and gender. These broad roles deserve investigation and understanding not only in terms of specific constitutional mandates but across all spheres of justice. World-wide political transitions are contemporary and in this minefield of emerging institutional contributions to justice, the ZHRC cannot be left out. Quintessentially, it is argued that NHRIs prevent the disintegration of normative standards in global communities as well as the consequent break-up of the national social fabric.

Justification is also given in terms of the ordinary legislative framework relating to the establishment of the ZHRC. Since 2012, the ZHRC has emerged as an important institution and middle course between government, as the primary duty holder in respecting, protecting, promoting and fulfilling human rights, and civil society. Against this background, a general scope of political considerations is examined using a normative and realist theoretical framework.

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[30] Genocide Act [*Chapter 9:20*] 2000.

6.1.6 Complementarity and institutional competence and legitimacy

This section is cognisant of the different mandates of the NPRC and ZHRC and that they are at different stages in their institutional competence and legitimacy. The concept of trans-regime legitimation explains how political legitimacy has an important role in understanding the formal and public legitimacy of the two institutions. Political legitimacy is used to examine whether the operationalisation of the NPRC and ZHRC will lead to state accountability for mass violations of human rights. Political legitimacy is described as a concept that examines the reasons for the justification of the exercise of political authority. In essence:

> "A state has legitimacy when it is permissible for it to issue and enforce laws and regulations" and legitimacy relates to the reasons that citizens have for accepting political authority. There is a historical element to political legitimacy through the normative assessment. Every new leader makes promises to protect the Republic. However, "when that claim is first made it is a prediction, not a description, and legitimacy cannot be adequately pledged."[31]

Transparency is needed on the allocation of resources to demonstrate that real political legitimacy has been accorded to ZHRC and NPRC. The NPRC, for instance, started a national dialogue process to create social, economic, and political transformation. However, the government mooted its dialogue at an interparty meeting.[32] The meeting at the president's residence was criticised due to the inappropriateness of the venue and disputed elections but the NPRC's initiative was seen as a semi-broad-based consultative process aimed at establishing a framework for national dialogue.[33] It remains to the NPRC and ZHRC to design a collaborative method and provide anticipatory mandates that can win buy-ins from the ruling government, opposition political parties, and their diverse support bases.

There is also a need to consider the importance of legal legitimacy as contemplated by constitutional and international norms relevant to TJ. However, the starting point on legal legitimacy is considered here to flow from the need to contextualise TJ locally because:

> "There are limits to the appropriateness of foreign institutional formulae for pursuing locally legitimate and relevant justice and reconciliation. Provided the State's duty to afford an effective remedy is fulfilled, international peacebuilding institutions (and

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[31] Winter (2013) "Towards a unified theory of transitional justice" Int J Transit Justice 197.
[32] Interparty meeting on 6 February 2019 held at the president's residence but not attended by the President's chief rival, Nelson Chamisa. See, Mandikwaza (2019) "Constructive national dialogue in Zimbabwe: design and challenges" *Conflict Trends.*
[33] Mandikwaza (ibid).

> international law itself) currently [extends] a margin of appreciation to transitional societies to develop their "own ways to reconcile with the past" ... "whilst building sustainable future peace." [34]

It is important to emphasise the intent to promote the legitimacy of the NPRC and ZHRC as the institutions developing TJ strategies in Zimbabwe. Both formal and informal procedures are implemented by institutions of accepted legitimacy when transitioning out of an oppressive or violent social order to deliver justice to the perpetrators and their collaborators as well as to victims.[35] Legal legitimacy is based on The Paris Principles which emphasise the need for NHRIs to be established constitutionally or through a law that sets out roles and powers as well as broad mandates.[36] Chapter 2 explained the legal legitimacy of the NPRC and ZHRC in terms of their constitutional mandates and enabling Acts.

Linked to legal legitimacy is the need for the NPRC and ZHRC to promote public or popular legitimacy.[37] Public legitimacy is regarded as how NHRIs are perceived to stand up for the rights of the powerless against powerful interests and act fairly in treating issues within their purview.[38] The existence of a public sphere is also a constituent of legitimate justice.[39] NHRIs are encouraged to engage in joint planning to ensure that activities are coordinated to the greatest effect and to devise simple access procedures for public concerns.[40]

Brants and Karstedt note that the public sphere of TJ is made up of spaces created by "different actors: courts, tribunals, other truth-finding bodies, and those leading the procedures: media and journalists, perpetrators, victims, and civil society and cosmopolitan actors." Institutional legitimacy requires that courts, tribunals, and commissions are recognised as "principled, independent and impartial institutions, indispensable to truth-finding, history-telling, retribution, and reconciliation." In the arena of emotive, politicised and divided public and international spheres" that difficult task requires that they negotiate their way through networks and actors with "different narratives and understandings of truth

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[34] du Plessis and Ford (2009) "Transitional justice: a future truth commission for Zimbabwe" *Int'l & Comp LQ* 74.
[35] Kaminski, Nalepa and O'Neill (2006) "Normative and strategic aspects of transitional justice" *JCR* 295.
[36] OHCHR (2005) Assessing the Effectiveness 6.
[37] ibid 7.
[38] ibid.
[39] Brants and Karstedt http://www.iisj.net/sites/default/files/Transitional Justice and the Public Sphere-Introduction_0.pdf (accessed 21 November 2019).
[40] Carver (2004) *Performance and legitimacy: national human rights institutions* 116.

and justice" to connect with the public and "open up new spaces for victims and families of victims of mass atrocity crimes and gross human rights violations"."[41]

A public-oriented approach enables determination of the boundary of cooperation and to ensure the appreciation of the general populace. How institutions choose public interaction should be based on the consideration that people are the repositories of legitimacy. The OHCHR affirms the need for NHRIs to support the processes of complementary institutions. The Guidance Note lays out formulations to assist NHRIs in their engagement towards the promotion and protection of human rights during the period of transition from conflict or authoritarian rule. NHRIs engagement on TJ should support processes that ensure "accountability and combat impunity, provide remedies to victims, promote respect of the rule of law, and strengthen democracy and sustainable peace".[42] The role of NHRIs regarding "judicial and non-judicial mechanisms of transitional justice" and their aim for adoption of a holistic approach inclusive of "prosecutions, truth-seeking, reparations, vetting, and institutional reform[43] is encouraged by the Guidance Note.

Thus, the NPRC and ZHRC must strive for international and domestic legitimacy through collaboration and adherence to the recommendations of the Guidance Note. At the domestic level, both institutions should formalise their commitment to institutional complementarity; and ensure that their operations reflect the broad constitutional mandate on Chapter 12 constitutional commissions that support democracy.

6.1.7 Complementarity and democratic institution building

It has been noted that:

> "A level at which transitional justice can reasonably be expected to have an impact is democratic institution-building. This refers to the strengthening of foundational democratic institutions and principles –such as an independent judiciary, democratic security forces, and participation–as well as the improvement of the performance of these institutions."[44]

The NPRC and ZHRC belong to empowering institutions that assist TJ agencies to demand human rights and democratic behaviour from the state by supporting actors and opening a

[41] Brants and Karstedt (n 39).
[42] OHCHR (2008) Guidance Note on NHRIs 3.
[43] ibid.
[44] Arnould and Sriram (2014) "Pathways of impact: how transitional justice affects democratic institution-building"3.

space where mobilisation can happen.[45] Democratic institution-building should use public legitimation and participation in TJ processes since this normally improves the performance of the institutions.[46]

Institution-building can also act as a way of balancing political and public legitimacy. The secrecy regarding official information and concealed agendas has been noticed of "many governments purporting to be democratic". ... "The press and private individuals experience great difficulty in wrestling information out of government departments." This is attributable to the tendency of the state to conceal their reprehensible acts and importance is given to "establishing institutional devices to ensure that governmental wrongdoing is detected and that those responsible for it are held accountable.[47]

As middle-course institutions between government and citizens, the NPRC and ZHRC are obligated to use their mandates to request the state to provide information on peacebuilding and human rights violations. All Chapter 12 Institutions need cautious monitoring to promote their true independence and enhance their performance.[48]

It is noted that the government was supposed simply supposed to support the ZHRC with resources when the ZHRC denounced the use of maximum force by the state to assault protesters in January 2019[49] in the same way the state had supported the *Motlanthe* Commission following post-election violence in August 2018.[50] Concern exists that through its chairperson, Justice Nare, the NPRC has associated itself with the government-led national dialogue which is seen at variance with NPRC's mandate to act independently.[51]

Institutional complementarity can alleviate the fear that TJ would be rendered inconsequential if it becomes entirely a political process. Predictably, the party in power is easily capable of wielding political clout to make compromises to the detriment of popular democracy. The role of national institutions is crucial in shaping democratic institution-building tenets such as human rights. This point was aptly captured by Killander who states that:

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[45] ibid 7.
[46] Mihr (2017) "An introduction to transitional justice" in Simic O *An Introduction to transitional justice* 21.
[47] Feltoe (1999) 'Concealing Bad Behaviour' (1999) 26.
[48] FORUM (2019) "The new deception: what has changed?" 34.
[49] ibid 32.
[50] ibid.
[51] ibid 31.

> "National courts, human rights commissions, regional and global treaty bodies, and courts refer to each other in reports and judgments in the continuous development of the law of human rights."[52]

If the NPRC and ZHRC are prioritised as non-judicial TJ institutions, there would be a genuine holistic commitment between and amongst TJ practitioners to put the welfare of victims first. The NPRC and ZHRC can also contribute to democratic institution-building by committing to compliance with the AU TJF and UN framework[53] on TJ. Many civil societies, the TJ working group, CBOs, and, recently, independent NHRIs are largely pursuing silo approaches to harness solutions for a national coherent approach. Ultimately, the complementary efforts of the NPRC and ZHRC must aim at creating a fertile atmosphere for multi-stakeholder cooperation.

6.2 Challenges for institutional complementarity between NPRC and ZHRC

The biggest challenge on institutional complementarity between the NPRC and ZHRC is the absence of a joint strategic plan on collaboration. A joint strategic plan would enable the NPRC to learn from the work of the ZHRC which was operationalised earlier. The NPRC has been weak generally in achieving real TJ partly due to its operationalisation only some five years after the adoption of the Constitution 2013. A combined strategic plan could have a significant role in ensuring that the NPRC and ZHRC map the way forward in terms of their TJ collaboration. Another challenge to complementarity emanates from the fact that both the NPRC and ZHRC are yet to spell out clearly how they can utilise their broad constitutional mandate to remedy injustice. Specifically, they are yet to link their broad constitutional mandate to TJ initiatives.

Another considerable challenge relates to a failure by the NPRC and ZHRC to utilise the UN and AU approaches to TJ. The UN approach enjoins national institutions to look beyond compliance with the Paris Principles on institutional independence. NHRIs should demonstrate how their roles can be used in conflict and post-conflict societies. This has not been done by the NPRC and ZHRC. Further, complementarity must be based on the fact that the NPRC and ZHRC are Chapter 12 commissions obligated to support democracy in Zimbabwe. The NPRC and ZHRC have not yet prioritised or formalised their roles in TJ

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[52] Killander (2010) "African human rights law in theory and practice" in Joseph S and McBeth A (eds) *Research handbook on international human rights law* 1.
[53] The Guidance Note (n 42).

towards embossing constitutional democracy. The more that independent national institutions can embed collaborative benefits, the more TJ can contribute to the growth of constitutionalism.

Moreover, the NPRC and ZHRC have not moved to show how the national 'normative' constitutional framework can be operationalised institutionally through insights from the UN and AU transitional justice frameworks.

As the supreme law, the Constitution contributes uniquely to TJ discourses. Democratic institutions are obliged to ensure their operations comply with the constitution. The NPRC and ZHRC can draw from other Chapter 12 Institutions working with civil society to craft specific objectives through mutual participation.[54]

Apart from challenges that relate to the failure to align their work with the UN, AU, and constitution, Chapter 12 institutions have not been seen to be innovative in using their administrative mandates to further TJ interests in Zimbabwe. While the two institutions can be guided by UN, AU, constitutional or legislative mandates, they have not designed administrative infrastructures that ay out their expectations on how best they can serve as TJ mechanisms. The expected mandates can be laid out in operational documents and publicised with oversight institutions or citizen bodies. Further, there has been no effort to publicise TJ approaches from which the NPRC and ZHRC can draw vital lessons from other countries.

The absence of a roadmap on conflicts that can be handled by the NPRC or the ZHRC will lead to inevitable institutional friction between the two institutions. For instance, there is no clarity on which events after 2009 which the ZHRC could use to design a TJ framework. Collaboration in strategy between the ZHRC and NPRC would at least streamline their areas of focus. The above challenges effectively hamper progress on how Zimbabwe can even attempt to probe serious conflicts such as the Matabeleland and Midlands *Gukurahundi* which essentially falls under the purview of the NPRC.[55]

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[54] The Electoral Institute for Sustainable Democracy in Africa (EISA) worked with ZEC, NPRC, ZHRC and other national institutions to develop an election dispute resolution strategy in Zimbabwe. EISA http://www.eisa.org.za/zimconflict.php (accessed 2 March 2019. A commitment to election management is important especially for TJ initiatives relating to election disputes concerning serious violations of human rights.
[55] The NPRC has no constitutional or legal limit on the timelines which it can investigate when dealing with conflicts in Zimbabwe.

The prospects exist for the NPRC and ZHRC to align their work with the UN, AU, and the constitution. There is a need for both institutions to work closely with development partners and CSOs to craft strategies that can enable the ZHRC to fulfill its mandate to deal with instances of human rights violations after 2009 and for the NPRC to deal with violations before 2009.

6.3 Prioritising a holistic approach to transitional justice

The need for a holistic approach to TJ stems from the awareness that the NPRC and ZHRC can now look at criticism levelled against institutions such as the SA TRC to design (resources permitting) TJ models inclusive of multi-generational human rights. It has been noted concerning the SA TRC that the design of TJ mechanisms "starts from a civil and political rights understanding, ignoring the social and economic dimensions of violent conflicts." The SA TRC provides an example that fell short of addressing the "social and economic injustices of the apartheid system." The commission "did not reveal underlying patterns that would have to be changed to bring about sustainable peace and justice."[56]

Prioritisation of a holistic approach may be based on regional and global frameworks such as the AU and UN although it has been said that "holistic" should be interpreted geographically:

> "Conflicts have regional dimensions, so [it may be] worth considering a "more regionally-oriented" approach in designing a TJ strategy. A "regional focus would then enable regional patterns of a conflict to be addressed."

The NPRC was not yet operationalised at the time of the military-assisted transition. The NPRC and ZHRC accord with the AU's emphasis on promotion of local and national ownership; inclusive participation in TJ processes; focus on assignment of roles and responsibilities to national actors, as well as the need to promote accountability and sequencing of various TJ initiatives.[57]

6.4 Conclusion and evaluation of institutional complementarity

Institutional complementarity must be based on the current work of the NPRC and ZHRC and also on increasing emphasis on collaborative approaches to TJ at UN and AU levels.

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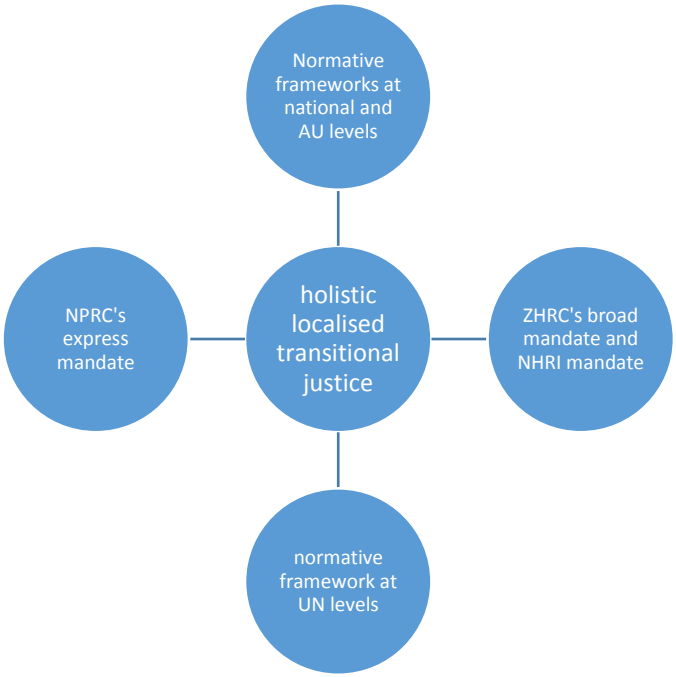
[56] Reiff, Servaes and Zupan (n 28) "Development and legitimacy in transitional justice" 6.
[57] Wachira (2019) **"**The African Union Transitional Justice Framework and how it fits into the African global governance framework**:** promise and prospects for the African Court of Justice and Human Rights" in Jalloh C *et al* (eds) *Court of Justice and Human and Peoples' Rights in Context*: *Development and Challenges* 147. .

Figure 6.4a Proposed complementarity between the NPRC and ZHRC



Complementarity between the NPRC and ZHRC can usefully augment holistic and localised TJ. The NPRC can utilise its express constitutional mandate to deal with post-conflict justice in partnering with the ZHRC which can use both its comprehensive constitutional mandate and broad mandate from The Paris Principles and Kyiv Declaration.

The NPRC is doing good work to promote a wide consultative basis. Similarly, the ZHRC's role as a human rights institution can be examined from the perspective of NHRIs which are globally expected to play a significant TJ role. The NPRC and ZHRC should be empowered to formalise their collaborative TJ roles to include other state institutions such as ZRP and ZEC, the latter coming into the fray because it now has investigative powers.

The constitution is the *Grundnorm* of a polity and its broad mandate can be utilised legally by TJ institutions.[58] The thesis argues that complementarity has merits including increased institutional visibility and accessibility; improved democratic discourse, democratisation, and entrenchment of democratic tenets such as TJ; nuanced discourse on constitutional sovereignty; improved jurisprudence on the role of independent commissions; a broader approach to constitutional literacy; embedment of middle course approaches to resolving

[58] Alternatively, the two institutions have different Acts of Parliament applicable to their administrative or institutional functions. These Acts operationalised the institutions and do not rank the Constitution in as far as shared and proactive functions are concerned.

conflicts in a polity; promotion of normative growth of national identity in achieving TJ; coordinated efforts on reforming legal development and potential for the internationalisation of constitutional TJ approaches.

There is, however, a need for both the national and international community to properly define institutional complementarity from the perspective of TJ mechanisms other than the ICC. The UN and AU do not spell out the complementarity between NHRIs although reference is made to collaborative efforts. The AU TJF,[59] for instance, looks at the principle of complementarity in TJP to imply that national states have:

> "The primary responsibility to investigate, prosecute, and bring to judgment, perpetrators of serious crimes such as genocide, crimes against humanity, and war crimes. A TJP should seek to strengthen regional and domestic prosecutions of the most serious crimes" and "envisages a system in which continental, regional and national jurisdictions" ... "lead in the investigation and prosecution of international crimes"[60]

It was shown in Chapter 4 that the NPRC must explain how its complaints handling and investigations unit is different from that of ZHRC and ZRP in the need to avoid duplication in investigating threats. Further, institutional complementarity can be extended to the complementarity between independent commissions supporting democracy and other TJ institutions such as CSOs, CBOs, FBOs, and academia.

[59] AUTJF (2019). .
[60] AU http://www.legal-tools.org/doc/bcdc97/pdf/ (accessed 5 September 2019).

CHAPTER 7

CONCLUSION

7.1 Introduction

This concluding chapter reflects the need for a more nuanced examination of the role of UN, AU, and constitutional frameworks in enabling national institutions in Zimbabwe to innovate on ways to realise TJ which is accessible to victims, perpetrators, and the whole of the Zimbabwean society at large. The thesis has questioned the use of conventional template-based or one-size-fits-all approach to TJ and has shown the need for a holistic, localised, and contextualised approach to TJ. It also dealt with the potential of the NPRC and ZHRC to utilise the Constitution and national laws that operationalised the two institutions, as well as regional, and international normative frameworks in embossing the TJ discourse in Zimbabwe. It also shows how in 2019, regional normative priorities under the auspices of the AU and African Commission, have focused on embossing localised and contextualised approaches to TJ with support from international actors. The regional efforts can stimulate the formalisation of the TJ processes in Zimbabwe if adopted by the NPRC and ZHRC. While regional efforts are commendable, they do not address unprecedented and potential non-traditional causes of securitised conflict such as the unprecedented coronavirus which has been seen in this thesis either as a non-traditional form of security challenges and as an instrument that states can weaponise to consolidate their power or challenge liberalised forms of TJ.

From the above, the thesis shows how the coronavirus has led some states to pursue illiberal policies that are causing democracy and liberal forms of TJ to be in a state of decline. TJ and the crisis of democracy are thus supposed to be studied from the realisation that models of demanding state accountability have been affected by coronavirus responses such as the imposition of curfews and indefinite national lockdowns in Zimbabwe. The need to suppress and mitigate the effects of the virus which has ravaged the global community has also changed the way in which the UN and nations assess states' commitment to the rule of law, the need to foster sustainable cultures of human rights and consideration of key human rights issues such as social and economic rights, corporate accountability for climate injustices, climate change and so forth. The coronavirus is reversing the movement of transitions to democracy. Conditions of authoritarian legalism have been created in many countries since states can use the coronavirus responses to shirk human rights obligations, including civil and political rights such as the freedom to petition and demonstrate against the government.

Conversely, pertinent issues that have affected the TJ discourse include populism, abusive constitutionalism where citizens also disregard measures to mitigate the spread of coronavirus. Together, a situation of constitutional backsliding seems to be greatly affecting the manner in which TJ initiatives would be led by institutions such as the NPRC, whose work is affected by lack of financial resources.

Similarly, there is also a need for the NPRC and ZHRC to determine how non-traditional threats to peace and security such as coronavirus should be properly managed so that they do not morph kaleidoscopically into protracted conflicts. This is so since the concern in the wake of the Covidien crisis has been that states can embark on authoritarian use of power under the guise of Covid-19 to shirk their human rights obligations. This is especially so since the state and citizens have engaged in abrasive twitter wars and threats of demonstration. While government is not run on twitter, the coronavirus pandemic has changed the shape of truth-telling, creating an impression that states are currently in a 'post-truth age.' There is thus need to expand the scope of TJ to include unprecedented pandemics, economic decision-making that affect global economics such as Brexit, Eurozone Crisis, climate change protests, social protection protests and so forth. Practical insights should be drawn from important discourses on climate justice and economic and social rights, artificial intelligence and rights in a digital world so that all generations of human rights are protected under the TJ field.

Further, from the perspective of TJ scholars who are wary of democratic decline, abusive constitutionalism, populism and authoritarian legalism currently obtaining in many parts of the world, the diverse views from TJ stakeholders as to which period to focus on for Zimbabwe's TJ has should bring to the fore the need for the state and TJ stakeholders to ascertain whether there has ever been a clear transition to talk about in Zimbabwe's conflicts. This includes incidents where Zimbabwe experienced reverse transitions into pseudo-democracy or episodes of authoritarian regimes. In this sense, the pre-colonial, colonial and post-colonial conflicts to consider under the rubric of democratic decline or other aspects alluded to above include the bacteriological and chemical warfare during the colonial period; the Entumbane, and Matabeleland and Midlands *Gukurahundi* in the early 1980s, the fast track land reform violations in the early 2000s, *Operation Murambatsvina*/remove the filth, the bloody 2008 June presidential run-off that seemingly became a run-over, and its associated operations of *hakudzokwi*/You won't return and *makavhotera papi*/where did you put your cross? Other events include the 1 August 2018 shootings, 14 January to 5 February

2019 clampdown on protesters, the assault on protesters on 20 November 2019, and cases on alleged abductions of opposition parliamentarians during the Covidien crisis.

In essence, the current disjointed TJ discourse seems to be suggestive of the existence of loosely landmark and politicised lobbied transitions, flawed transitions, single-party competitive regimes, and popular/military-assisted transitions in Zimbabwe; whether political or socio-economic. While the NPRC is working with various organisations through its thematic committees, it is sad to note that the NPRC's work is heavily covided since the NPRC cannot directly meet community members with the view to identifying victims and their concerns. While victims such as those experiencing gender-based violence can network with organisations such as Musasa Project during the coronavirus-induced lockdown, the work towards national peace, reconciliation and healing has been heavily covided. Further, the post-Mugabe political environment seems to reverse the gains of popular and guarded constitutionalism in Zimbabwe. While the expectations of an effectively-managed political transition under the auspices of a National Transitional Authority after the 2017 popular or military-assisted transition have not materialised, concerns from citizens still abounds whether ZANU PF will have another GNU with either the MDC under Thokozani Khupe or the MDC-Alliance under Nelson Chamisa. These concerns emanate from the need to deal effectively with the effects of austerity measures, de-dollarisation and other economic measures that have largely prevented ordinary citizens from enjoying life above the poverty datum line. With Covid_19 serving as a supervening impossibility or some *vis major* which places people-oriented processes such as employment and TJ in exile, substantial political and TJ resources should be invested in the NPRC and ZHRC to enable them to virtually address the many conflicts that continue to divide Zimbabweans along ethnic, ideological, partisan, patronised, securitised, political, economic, racial, and tribal lines. Fears of data mining, job losses, loss of assurance policies have added to the burden of black tax and lack of access to basic commodities.

Violent or polarised politics and serious human rights violations in Zimbabwe are interpreted in this thesis as reflective of the poor commitment by the state and the generality of its citizens to both vertical and horizontal accountability. State-driven violence and human rights abuses call for verticality and outweigh individual abuses, and the state should always play its role as the primary protector of human rights. Similarly, to prevent abusive constitutionalism, individuals should also commit to horizontality and shun destructive violence or violent protests as was seen in the post-election violence in August 2018. The failure by citizens to

commit to horizontal accountability can be used by the state to stifle human rights under the pretext that destructive violence threatens the security and stability of the state and non-protesing citizens. Commitment to the horizontal and vertical application of the Constitution, and by extension, international norms discussed in Chapter 2, was seen in this study as the cornerstone of Zimbabwe's homegrown constitutionalism and by extension, fertile ground to drive TJ processes in Zimbabwe using cross-border TJ experiences.

Beyond the national normative framework on TJ, it was stressed in this thesis that the UN and AU institutions have created critical normative linkages between national institutions and various principles of democracy such as constitutionalism, the rule of law, human rights, and good governance. Further regionalised and globalised linkages dealing with peacebuilding and conflict transformation influence the holistic approach to TJ. A common agenda is emerging to make TJ part of transformational justice and politics but this faces many challenges, including the existence of endemic structured violence in most states. Further, the emergence of unprecedented crises such as coronavirus has threatened the effectiveness of dialogic TJ due to lockdown restrictions on social distancing, gatherings, isolations, and strategies such as night curfews aimed at mitigating and suppressing the coronavirus pandemic. The trajectory of TJ in the post-coronavirus period demands that practitioners map their theories of change now.

This thesis suggests against the above backdrop that there is a huge need for Zimbabwe to avoid purely legal or doctrinal approaches when dealing with TJ to avoid mere pedantry. A multi-dimensional theory of institutional change is needed from the state and TJ practitioners and the normative frameworks on TJ at both national and international levels should be based on the practical conflict and human rights exigencies in Zimbabwe. In all of Zimbabwe's suggested transitions, some measure of state-citizen collaboration is an exigency if TJ practitioners are planning on making TJ realisable and beneficial to professed victims. Although non-state actors may shun open engagement with the state in repressive or tense contexts for fear of state surveillance, collaborative TJ is an exigency that must be strategically considered for Zimbabwe's healing, reconciliation, and peace. This is important in balancing competing realpolitik considerations such as regime stability, swing ethnicity, tribalised politics, state sovereignty, and security on the one hand, with normativised factors such as human rights, individual sovereignty, and rule of law, democratic consolidation, and justice on the other.

Even the use of international law or international institutional standards from the AU or UN needs to be carried out in a pragmatic or prudential way that prevents a top-down approach where internationalism is imposed or used to trump national constitutionalism. In countries like Zimbabwe where status-quo transitions have dominated the political scene, national constitutionalism and internationalism must be used to develop, supplement, and complement national institutions but never to supplant them.

In considering the nature of transitions the NPRC and ZHRC should essentialise and focus on in shaping a formalised and normative-driven TJ discourse, it should be noted that Zimbabwe has largely failed to manage both convivial solidarity and politically-lobbied transitions such as the 1987 Unity Accord and the 2009 GNU. Effectively, TJ practitioners should find more ways that promote social, economic, and political stability. As such, the institutionalisation, localisation or contextualisation of holistic TJ mechanisms should serve as a clarion call for a radical shift in both national and international forums to blur the distinction between hard and soft sources of law that speak to TJ. The detailed obligations that are laid out in soft sources of international law demand that template-based TJ be practically replaced with holistic, nation-specific, and contextualised approaches. The logical corollary to this is that the hard and soft sources on TJ should be blended in the same manner the conventional template-based practices should be blended with contemporary practices. While international law provides useful insights on TJ, it should not be used to supplant constitutional and other national laws that speak to TJ if states are to be encouraged to embrace it.

In an endeavor to find how both the NPRC and ZHRC can complement each other and practically utilise the regionalised and globalised holistic and contextualised approach to TJ emphasised under international soft law; the broad constitutional mandate of independent institutions to ensure that injustices are remedied as well as the Paris Principles emphasis on broad mandates for national institutions should be visibilised. Having laid down the importance of the holistic and contextualised approaches to TJ and the other challenges that are associated with it, the thesis also looked at the terminological problems involved.

It was shown that Zimbabwe is yet to define various victims and perpetrators to be considered. In this wake, victims of civil turmoil and political suppression understood from the perspective of human rights such as the right to demonstrate and to petition government must benefit from TJ in the same way victims of socio-economic violations caused by exploitative economic policies and other social ills such as corruption should also benefit. For this reason, TJ was also discussed from the perspective of socio-economic rights. In its

conventional sense, TJ did not emphasise socio-economic such as healthcare, water, and so forth and other generations of rights such as collective rights to a safe and clean environment. The development of soft sources of international law and global calls for climate justice and the need to deepen national fights against corruption have made TJ the vital legal tool to unite societies fighting a difficult past or dealing with an ongoing present crisis in human rights violations using broad ranges of rights.

Further, from the perspective of remedies under TJ, the transition from an emphasis on retributive justice to various categories of justice such as rectificatory/restorative, legal, and distributive justice in TJ has rendered it the receptive ground for discourse on victim compensation and their access to effective legal justice institutions and resources. The UN agencies such as the OHCHR, the General Assembly, UN Women, the UN Secretary-General, and other offices have emphasised holistic and transformative approaches to TJ in statements, policies, and instruments. The holistic approach to TJ as articulated by UN institutions and UN instruments is now visibilised and publicised on the internet. This study looked at how various UN institutions can work with the NPRC and ZHRC. Put simply, the NPRC deals with post-conflict justice and the ZHRC can be used as an NHRI although NHRIs and the NPRC have not yet formalised their cooperation in TJ initiatives.

The UN's suggested mechanisms can be used together with the suggestions in the AU TJF[61] to drive Zimbabwe's TJ processes under the NPRC and ZHRC. The state needs to work with special watchdog institutions such as the National Transitional Justice Working Group (NTJWG) which work with many CSOs in TJ work. The NTJWG has volunteered to work with the NPRC in implementing the AU's TJF and with local working groups. TJ can thus benefit from the NTJWG since it is one institution that has the backing of several CSOs. By streamlining engagement between the AU, the state, and independent institutions, the implementation of the regional framework can be reduced to an operational strategic plan.

At the level of hard sources of international law, this study notes that although holistic TJ is not yet formally included in an international treaty, various countries are regionalising TJ approaches through the use of the '*never again*' concept or commissions of inquiry. Nations such as Uganda have moved to formalise TJ policies and laws. Countries like Rwanda have

[61] AU Transitional Justice Framework http://www.legal-tools.org/doc/bcdc97/pdf/ (accessed 5 September 2019) Part B2.

moved to localise TJ using communitarian approaches such as the Gacaca courts. By way of caveat in this study, there is a need to also take cognisance of the fact that TJ processes have not been uniformly accepted across the globe. To countermand the caveat, it is noted that the AU TJF is a specific and unique regional framework that Zimbabwe can and must use to ensure that the independent institutions create hope for a future where the state and its citizens can interact genuinely without fear that the state will treat CSOs and victim groups as enemies of the state; or the CSOs and victim groups will see the state as a repressive regime that intrudes and shuns engagement with oversight institutions.

Besides the AU framework, the globalised UN normative framework is also crucial since it is variegated with protocols such as the Kyiv Declaration on NHRIs; declarations on reparations; the Guidance Note on the approach to TJ; guidance notes on the link between TJ and rule of law processes; and reports of the OHCHR and the UNDP. The framework is important and can be applied in Zimbabwe where one party has dominated the political scene since independence in 1980. This is because the UN has moved away from a one-size-fits-all approach that focuses on TRCs or prosecutions and now prioritises the contextualisation and localisation of TJ initiatives. This gives the ZANU PF government or any other governmental arrangement that can work with it to identify flexible TJ mechanisms that can be wholly-owned, albeit adhering to international practices. In this, the UN institutions that are working with individual countries and institutions such as the NPRC and ZHRC should motivate the NPRC and ZHRC to effectively respond to different issues that stall TJ development. The global, regional, and country-specific approaches can contribute to a freshly focused start for states like Zimbabwe which have not formalised TJ policies.

Through studies on ongoing conflicts in countries such as Afghanistan where the state has been using TJ initiatives in an ongoing conflict, this thesis examined how both the NPRC and ZHRC can utilise institutional complementarity to monitor potential causes of conflicts or human rights violations so that they adopt preventive measures against the occurrence of further conflict in Zimbabwe. In this, ZHRC must use its public protector's role to create a language of common interests between the state and victims or victim-groups. Both institutions should frequently produce reports on various conflicts or repressive acts that are occurring in Zimbabwe so that they design effective ways to engage the state and non-state actors and also to prevent serious conflicts in the future.

It cannot be claimed though, that contextualisation or holistic approach is the perfect antidote to making TJ realisable in Zimbabwe. In instances where there is no recourse to TRCs or

where similar institutions such as the NPRC have tarried in identifying victims; retributive and other accountable mechanisms from traditional justice may be preferred. This has been shown in situations where some families use vengeance spirits (*ngozi*) or traditional vows in Uganda to promote genuine reconciliation and healing. This is so since Zimbabwe has not moved to an overthrow regime model where a new political party will defeat a party that was in government and seek to purge its political rivals. An overthrow model of peace, healing, and reconciliation may allow for the new party to start on a clean slate and devise vindictive approaches to dealing with the past, the present, and the future. To avoid victor's peace or sham reconciliation even under the overthrow model, thinking must proceed beyond traditional templates in TJ to using a broad checklist that balances between narrow template-based focus and holistic focus on localised and contextualised TJ mechanisms.

Moreover, contextualised models have shown likely challenges posed by a status quo model of the political context where a government in power such as ZANU-PF simply replaced Mugabe as a leader with his longtime lieutenant, Mnangagwa. ZANU PF maintained its grip as a political party in government. The majority of TJ steps it takes will thus be aimed at consolidating ZANU PF's regime status. This is because, in a *status quo* political context, the political party in government manages to transition through elite consensus and sometimes elite coercion. Both the rulers and the key enablers of the transition work closely with the political leaders. For Zimbabwe terms such as stockholders and stakeholders have been used to explain the relationship between the powers that be and security institutions. In typical Marxian philosophy, the *status quo* model can create leaders who utilise the approach known as the 'ruling class with ruling ideas' where a leader like Mugabe would tap from both organic and inorganic intellectual labor to be known as an astute leader and in the process divert attention to alleged human rights abuses.

From the perspective of how personality traits of incumbent leaders can delay TJ processes, it is noted that Mugabe's personality dictated the tone of TJ in Zimbabwe. Whether Mugabe could tarry in operationalising institutions such as the NPRC, he could choose to operationalise other institutions such as ZHRC and other Chapter 12 institutions in the Constitution. In the Machiavellian conceptualisation of the Prince, Mugabe was able to manage political transitions because he was a leader who was largely misunderstood both domestically and internationally. He could notch power-sharing agreements with opponents, could use land resources to manage a potential anti-Mugabe vote, could deal with urban population through operations such as *Murambatsvina,* and could be the chief foreign policy

strategist. Under the foreign policy, Mugabe could shift attention from the West to the East and use sanctions rhetoric to divert attention on critical challenges facing Zimbabweans. He could even afford to pull out of organisations such as the Commonwealth of Nations or threaten to pull out of the UN. Mugabe could play the pan-Africanist or father-Africa role at the UN conferences. At the domestic policy level, he could benefit from security institutions that served as the stockholders for his rule and saw the presidency as a straight-jacket even in instances where Mugabe later admitted to having been defeated by political opponents during elections.

Unfortunately, from the perspective of managing illiberal transitions, Mugabe did not consider Machiavelli's Discourses which emphasise the need for a leader to strive to leave a well-embraced legacy. Under the *status quo model*, the use of international law instruments can be done to promote regime stability, legitimacy, and even to drum up convivial national solidarity. This occurred in Zimbabwe's GNU and 2017 transitions. While prospects for a landmark transition existed when the whole nation seemed to have anti-Mugabe sentiments, ZANU PF ended up maintaining its grip at the helm of politics. Institutions such as the NPRC were operationalised after Mugabe but concerns exist that they are still 'talk show' institutions in the absence of a formal TJ policy. The concern even exists on whether the reports on key events such as *Entumbane* conflict and Matabeleland and Midlands *Gukurahundi* were lost and thus makes TJ processes sound pedantic for the victims of such conflicts.

Concern also exists, for instance, on whether the current Mnangagwa dispensation has made a clean break from Mugabe's period. While Mugabe's period was described under 'pariah state', fragile democracy, and dictatorship, the Mnangagwa regime has also been described as repressive. This is especially concerning post-election violence in August 2018, response to violent protests, allegations on abductions, and economic woes that erode social security.

A contextualised model of TJ will permit institutions operationalised under the Mnangagwa dispensation such as the NPRC to reimage the Mnangagwa transition as one that is moving towards progressive democracy. The NPRC can contribute to this by genuinely engaging victims and creating peace zones in the whole of Zimbabwe's ten provinces. From the perspective of what can be practically achieved, the NPRC should engage those affected by the colonial and post-colonial human rights violations and hope that the peacebuilding efforts will trickle down to the many districts and thousands of rural villages. Zimbabwe has

liberation fighters who were never rehabilitated and still suffer from war trauma in the same way victims of armed conflicts, political and economic-social violence need rehabilitation.

Without a balance between narrowly-construed template-based TJ and holistic, localised approaches to TJ, other actors that engage in TJ-related activities may find it difficult to deal with the endemic problem of lack of political will in making TJ realisable in Zimbabwe. For instance, the work of the commission of inquiry into the 1 August 2018 killings should have been done by the NPRC. This could have been better utilised as an opportunity to allow the NPRC to promote responsibility in the security sector on issues relating to the deployment of soldiers in situations where the members of the police are empowered. The establishment of the commission of inquiry meant that the President of the Republic could not be called as a witness since he was the appointing authority. Had the NPRC been given the power to investigate the events that led to the killing of six or seven protesters in 2018, the President could have explained to it as commander in chief of the ZDF on what could have transpired and how the members of the ZDF were deployed. The majority of issues canvassed by the 1 August 2019 commission directly fell under the ambit of the NPRC's activities and there was a need for a huge emphasis on command responsibility and prevention of future conflicts.

Further, the active involvement of victims or their families could have been facilitated by the NPRC because the High Court had interpreted that the terms of reference of the commissioners who sat on the 1 August 2018 shootings allowed for their participation. In this way, the commissions of inquiry could have been utilised as one of the very important platforms that can contribute to security-sector reform and create a culture of participation for the downtrodden and marginalised. Vital lessons could have been drawn from the Kriegler Commission on post-election violence in Kenya recommended the involvement of the ICC; the Ndugu Commission dealt with corruption and the commission on the Goldenberg Scandal implicated government officials involved in gold trading.

Additionally, development agencies must continue to support the NPRC and ZHRC with financial resources. Development partners such as the UNDP posted partnership projects with the ONHRI and have publicised their work with both the NPRC and ZHRC on the web. A partnership is possible between the NPRC, ZHRC, and other CSOs, academics, and government. Donor agents can also play a significant role in encouraging partnerships that promote localised TJ mechanisms in Zimbabwe. Further, despite having different institutional donors, thrusts, clusters, and visions, the NPRC and ZHRC as well as TJ practitioners must work from a common national position to TJ realisation derived from their different angles of

operation. TJ should not be used to get donor funds by using victims as bait for such funds. Institutional disagreements between NPRC, ZHRC, and TJ practitioners should go beyond skepticism and focus on the victims' lived realities and needs.

At the level of institutional complementarity, the prospects of collaboration between the ZHRC and NPRC have been shown from the reading of the strategic plans of the two institutions. The desire for an inclusive TJ implementation strategy has also been shown by the NTJWG. Given the richness of the current UN, AU, and other country-specific TJ approaches from African, the EU and Latin American countries, formalising institutional complementarity and aligning the NPRC and ZHRC mandates to TJ can become a reality. Recently, the publication of NPRC projects has shown that the Office of the President has been working with UN development institutions in monitoring the partnership project between NPRC and UNDP. Together with the state's adoption of the AU TJF, state efforts at making the NPRC effective after its operationalisation must unite TJ practitioners to find ways to collaborate with state institutions such as the Ministry of Justice and the NPRC to formalise a TJ policy. In this, the executive's steps that show political will to give the green light for the NPRC to deal with delicate issues such as the Matabeleland and Midlands *Gukurahundi* conflict should be considered critical points of engagement. The need to hasten ways to bring closure to victims is important and innovative approaches used successfully in countries such as Algeria,[62] illustrating how institutions commissions of inquiry must find ways to present reports to the executive or the public.

The NPRC and ZHRC can lead in the need to present a fair account of the position of state stability and human rights protection in a balanced approach between national stability, national security, human security, and human rights protection. From a transdisciplinary approach, it is clear that TJ, or post-conflict justice, depends on various disciplines including peace building, security studies, conflict transformation, political science, law, and public administration. These disciplines demonstrate that rapid consensus on which model to use through the institutional guidance of the NPRC and ZHRC is unlikely.

[62] The Algerian commission submitted a confidential report to the government whilst demonstrating the extent to which state institutions were responsible for violations: and some compensation to victims ensued. USIP http://www.usip.org/publications/2003/09/commission-inquiry-algeria (accessed 25 November 2019). .

The compartmentalised approach adopted by CSOs and the state is another TJ challenge. CSOs seem to belong to different clusters that fit their institutional tastes and their style of engaging with the state is incoherent. In the absence of a common engagement goal; perhaps through representative CSO institutions such as NANGO and FORUM, the pursuit of inclusive TJ may be seen as a highway leading nowhere. With their role gaining recognition at the AU and UN levels, the CSOs must add their voice to ensure that collaboration with the state materialises.

Zimbabwe's negotiated constitutionalism, from the Lancaster House Agreement 1979 to the Constitution 2013, demonstrates that TJ can be workable if norm-based compromises are made. Individual agencies do not have to abandon their institutional focus as particular human rights violations may need CSOs or the ZHRC and NPRC to act independently. There is no need to wait for a clear transition to present itself: there can be TJ without complete transition. Focus can be on political, socio-economic, democratic, or semi-authoritarian changes. The actual practice of TJ which empowers a country effectively to deal with a divided past or violent present or threatened future must be prioritised. The fragmentation of the discourse into proper transitions and effective institutions is important but may lead to the abandonment of the normative framework and practical realities. The necessity not to procrastinate on TJ has been seen in Afghanistan where, despite ongoing conflict and the imposition of a blanket amnesty, an 800-page document on serious violations was published;[63] and families which had for long required psychosocial, psychological and other forms of therapy found closure when they got to know that their relatives had been killed.

The psychiatric, psychological, and psycho-social effects of the various conflicts in Zimbabwe must be prioritised whether through legal or transdisciplinary means. Evidence is before us today of how the liberation fighters needed compensation for war trauma and how delays in rehabilitating and compensating them led to the economic downturn that Zimbabwe still feels today. With the effects of impulsive compensation of the liberation fighters, the management of post-independence conflicts and human rights violations should not again put Zimbabwe in another political or economic crisis. For instance, armed conflicts and serious violations and how families of both *Entumbane* conflict and the Matabeleland and Midlands

[63] Nordland http://www.nytimes.com/2012/07/23/world/asia/key-afghans-tied-to-mass-killings-in-90s-civil-war.html (accessed 13 November 2019).

Gukurahundi atrocities; former white commercial farmers; internally-displaced people from *Murambatsvina* and *Tokwe-Mukosi* conflicts; the diamond areas of *Chiadzwa* and *Marange*; victims of election violence and protest assaults demonstrate the need for many victims to get emotional, physical and material assistance. The multitude of obligations from the Constitution and international instruments must be genuinely used to guarantee the protection of the victims and empower them to hope for a better future. Zimbabweans must be allowed to start afresh and to end tribal, ethnic, and political differences.

Ongoing atrocities must be documented by the NPRC and ZHRC and the need is to go actively beyond calling for political-actors' dialogue to ensuring that unremedied violations are determined by courts of law or the government is encouraged through concrete recommendations to fulfill its constitutional obligations to protect, respect, promote and fulfill human rights. Although this thesis has focused mainly on non-judicial mechanisms under the NPRC and ZHRC and their potential role in individually or collaboratively promoting TJ, there is much to be achieved in bridging the gap between hard and soft sources of international law. While hard sources are binding on states which ratify them, soft sources benefit from the inputs of the various institutions that work practically in the TJ field.

The detailed obligations and mass of evidence for flexible TJ mechanisms at the international level can empower states to innovate on ways to effectively deal with the grim past whilst building a future that enjoys sustainable and intergenerational peace. Many issues are still at the level relating to suspicious collaborations, donor-funding constraints, conservative institutional visions, and the absence or flawed presence of political will to formalise TJ processes. The need to address the root cause of the conflicts in Zimbabwe and the root causes of an incoherent approach to TJ remains. Mere contextualisation or move towards holistic TJ cannot substitute for a culture of impunity or complicity in human rights violations. The respect of human rights, the rule of law, constitutionalism, sustainable peace, and other non-negotiable principles of democracy must be prioritised at the level of the state and private citizen.

7.2 Reinstatement of the objectives and thesis content

This thesis was built upon four objectives that examined the benefit of a coherent national TJ framework emboldened by regionalised and globalised frameworks. The nub of these objectives was to motivate TJ practitioners to contextualise or localise their activities in their engagement with the NPRC and the ZHRC. The need to test the practicability of institutional complementarity between the NPRC and ZHRC was also prioritised. Although the

coronavirus pandemic reduced the potential for engagement between the NPRC, ZHRC, and the general populace following restrictive lockdown conditions, the study affirmed the research objectives.

Effectively, the research objectives provided me with flexibility in analysing the reviewed literature and other sources of law. While the need for comparative analysis was necessary, I found most institutions that can inform the NPRC and ZHRC had different mandates and environmental factors that may essentially benefit the NPRC and ZHRC if innovatively adopted.

7.3 Overview of key findings of the study

7.3.1 Relevance of national, regional and global frameworks

In emphasising the need to crystalise the TJ commitment of the NPRC and ZHRC, the focus was given to the national, regional, and global frameworks. At the national level, the NPRC and ZHRC were operationalised and the Constitution and primary laws such as NPRC Act and ZHRC Act were critical to reveal the mandates of the NPRC and ZHRC. The ZHRC is the institution mandated to deal with human rights violations after 2009. The NPRC is mandated to deal directly with post-conflict justice, healing, and reconciliation although its time-frame has not yet been determined. At the international level, the AU[64] and UN frameworks[65] are important. While the Paris Principles oblige the ZHRC to assert its institutional independence as a NHRI, there is no coherent instrument that explains the ZHRC's TJ roles with those of the NPRC. Both belong under the UN's broad category of non-judicial institutions that can make TJ a reality.[66] The AU Transitional Justice Policy and Framework (AU TJP and AU TJF) outline the need to promote the rule of law, democracy, and TJ among AU member states.

In motivating the argument on holistic and localised TJ, emerging UN emphasis on the role of NHRIs in TJ has been emphasised.[67] The challenge from this standpoint is that the

[64] The AU TJF http://www.legal-tools.org/doc/bcdc97/pdf/ (accessed 5 September 2019) Part B2. The (AU TJP) AU Transitional Justice Policy http://www.au.int/sites/default/files/documents/36541-doc-au_Transitional Justice_policy_eng_web.pdf (accessed 5 May 2019).
[65] UDHR The Guidance Note.
[66] See UN documentation in Thesis s 2.4.2.
[67] Principles relating to the Status of National Institutions (The Paris Principles).

OHCHR[68] affirms the position that the role of NHRIs is not contained in a treaty. However, as Zimbabwe is part of the UN system, the ZHRC must find ways to align its work to the spirit of The Guidance Note. The UN framework also enables the international community to use the systems such as the Universal Periodic Review (UPR) to make recommendations on Zimbabwe's need to align its TJ dimensions to the UN framework. The relevance of AU and UN frameworks to the study of NPRC and ZHRC lies in the need for a contextualised or country-specific approach to TJ that depends on constitutional and international standards. The constitutional mandates for the two institutions are further elaborated under the NPRC and ZHRC Acts and the AU TJF and UN framework[69] provide other normative expectations that enable regional bodies and intergovernmental institutions to oversee national TJ initiatives. The AU framework was discussed from a regional outlook as Zimbabwe benefits from regional initiatives and its progress in incorporating regional initiatives can be discussed under the Africa Peer Review Mechanism.

7.3.2 Nexus between theory and practice of transitional justice

This study finds that a theoretical gap exists on how best NHRIs such as the ZHRC can design practical ways to enable victims of serious human rights violations or political repression to realise TJ benefits. While the NPRC and ZHRC are now operationalised, their ability to bridge the great divide between approaches by CSOs, CBOs, and research-based organisations and the state is felt remotely. Institutional conservatism, rigidity, and isolationism still hamper the reality of institutional TJ reform. There have not been deliberate efforts from researchers and CSOs to explore the potential of the ZHRC to complement the efforts of the NPRC in TJ activities.

Albeit without specifically emphasising TJ, the ZHRC signed MOUs with CSOs working in the human rights fraternity. What has been lacking is the collaboration of key institutions through ways contemplated by the Constitution and international frameworks to dismantle systematic injustices that prevent victims from realising the benefits of TJ. After realising that various organisations had been working with victims of moribund conflicts such as the Matabeleland and Midlands *Gukurahundi,* the NPRC has rolled on with thematic and peace

[68] Guidance Note on NHRIs. See also UNDP Strengthening the National Peace and Reconciliation infrastructure in Zimbabwe: see also Thesis 4.3.1.
[69] UDHR The Guidance Note.

committees to enable engagement to ensure that victims, not just individual organisations, benefit from their work.

What practitioners seem not to emphasise in their different TJ initiatives is that disjointed efforts inevitably prejudice the victim. Organisations that work with victims focus on institutional ways of doing TJ that may tempt them to pay lip service to the actual needs of victims. Because of a lack of pragmatic normative theorisation, most of the TJ challenges faced in Zimbabwe reflect a horrible institutional dysfunctionality. Institutions deliberately disengage from working with perceived rivals and the state and engage with those seen as all-weather friends. This may be caused by the need to design strategies that are donor-driven for CSOs or mandate-driven for the NPRC and ZHRC. I argue that a workable way to encourage institutional collaboration at all levels of engagement is to design a model that addresses victim-oriented worst/likely/best scenarios that can arise if the NPRC and ZHRC work with other TJ organisations.

Using a constitutionally and internationally framed value-based approach, common positions that address the best/worst/likely fears of each organisation must use victims as the starting points and this could enable different agencies to choose to move to low, middle, and higher negotiated grounds where necessary. The MOUs between ZHRC and organisations like ZWLA and Zimbabwe Lawyers Association should enable the factional interests of ZHRC as an independent institution and those of women's rights or interest groups to be handled in the national interest. Similarly, the NPRC and ZHRC can design an agreement on institutional complementarity by using the norm-based mandates of independent institutions: the main one of which is to ensure that injustices are remedied. Importantly, a reference to constitutional norms will ensure that TJ will not be sacrificed in the struggles for institutional visibility among different agencies.

The WLB model does not, of course, seek to suffocate institutional independence or the pursuit of institutional TJ goals. It simply impresses the need to contribute to national processes using the constitution, regional framework, and global initiatives that emphasise on normativised TJ. While victim organisations raise genuine concerns on fears of being captured or infiltrated in protecting separation between state and citizen activities, there is a need for citizen groups to make the state commit to vertical accountability. Normative frameworks categorised as worst/likely/best (or unlikely in some instances) can be blended to enable institutions to focus beyond their institutional mandates and forge strategic relationships that connect victims to TJ benefits.

7.3.3 Embedding institutional complementarity between NPRC and ZHRC

The comprehension of normative frameworks at national, regional, and global levels broadened my appreciation of TJ developments that bear on the work of the NPRC and ZHRC. Where the AU and UN frameworks were cited, the emphasis was placed on how these frameworks enable the NPRC and ZHRC to work cohesively. Emphasis was linked to the Constitution as the *Grundnorm* by which a critical analysis of the pros and cons of institutional complementarity can be made.

This concluding chapter emphasises the practicability of institutional complementarity between the NPRC and ZHRC using the Constitution as the major starting point. Institutional complementarity is seen as part of a rationalised decision-making process as cohesive organisations can convince the state to shun impunity or complicity in human rights violations. The NPRC and ZHRC must use their mandatory functions as well as shared and proactive functions to work together. However, whilst mandatory, shared, and proactive functions of NPRC and ZHRC must be prioritised; there is a critical need for other TJ actors to collaborate in ways that assist victims and perpetrators to find each other. The constitutional context and the victim's needs must be used to encourage actors to build national spaces to integrate, collaborate, synergise, and unite for the common realisation of TJ for victims in Zimbabwe.

7.4 Overall conclusion

The overall conclusion in this thesis is that coherent context-sensitive and localised TJ is urgently needed in Zimbabwe. The institutions that deal with TJ should utilise normative frameworks at UN, AU and country-specific levels to visibilise a one-size-does-not-fit-all TJ that is steeped in contextualised aspects. This thesis began with the need to build internal logic on the possibility for individual and institutional complementarity between the NPRC and the ZHRC. The major focus was to examine the practice of TJ from the perspective of institutional complementarity of the two independent national institutions with special focus on their constitutional and legislative mandates. The thesis viewed the NPRC and ZHRC as independent institutions supporting democracy and can unite the state and private citizens who look to the state to protect, promote, respect, and fulfill their human rights. It is hoped that development or human rights institutions that have worked with the NPRC and ZHRC such as the UNDP and OHCHR can also emphasise support for their TJ initiatives and projects.

Institutional complementarity speaks to the constitutional, regional, and global frameworks that nourish operating standards. Effectively, the NPRC and ZHRC need to be proactive in developing practical models involving TJ practitioners, government, and independent institutions to end the recurrent conflict in Zimbabwe and to deal promptly with pressing issues that can cause serious conflicts.

Institutional complementarity between the NPRC and ZHRC and, by implication, all five Chapter 12 Institutions, can enable innovative strategies aimed at achieving peace and reconciliation and in fostering a sustainable culture of human rights in Zimbabwe. Various spaces (state, media, civil society, and independent institutions) can serve to catalyse a change of attitudes and perceptions that stall collaboration between the nation-state as first space duty bearer and the other spaces as custodians of limited government.

Institutional polarisation can occur if strategic partners and TJ practitioners embark wantonly with institutional bias or zeal not backed by real collaborative checklists. While the private citizen feels that NPRC and ZHRC must not behave as state appendages, the contemporary government functionary wants not to be seen as an extension of anti-government forces. Specifically, the NPRC and ZHRC must be committed to independent and innovative democratic support by adopting the middle course approach contemplated by the Constitution and international institutions including the AU, The Paris Principles, and other normative frameworks at the UN level. And now with these concluding remarks out of the way, the thesis proffers recommendations to the NPRC, ZHRC and future researchers in appendix form overleaf.

Appendix

Recommendations for the NPRC and ZHRC

What the NPRC should do to facilitate transitional justice

- NPRC must be assertive in its independence to avoid executive interference. Specifically, the NPRC should not be seen as an extension of the state. The government must ensure the NPRC works with a minister from the Ministry of Justice and is not supervised by the Presidency. Alternatively, the government can establish a Ministry of Healing, Reconciliation, and Peace.
- NPRC should call for joint-funded projects with CSOs to test the latter's resolve in committing to actual realization of TJ by victims and other targeted communities they represent.
- NPRC must formalise its own TJ activities and go beyond outreach programs. The NPRC was operationalized in 2018 but it is yet to make significant decisions on which conflicts it will focus on or which victims it will move to compensate. Specifically, the NPRC has not been innovative enough in finding practical ways to reach out to the families of victims across Zimbabwe's ten provinces.
- NPRC should lead the way in promoting collaborations with the ZHRC, CSOs, and other actors in TJ operations. The collaboration with the ZHRC must be based on the role that is played by NHRIs in conflict and post-conflict situations. The collaboration with CSOs for instance should be based on the fact that CSOs such as the Matabeleland Collective[70] have been visible in ensuring that Matabeleland and Midlands victims of *Gukurahundi* find closure for the atrocities committed in the 1980s. Such partnerships would increase the institutional visibility of the NRPC.
- NPRC must fast-track its TJ initiatives in all the ten provinces of Zimbabwe. Procrastination has been the biggest letdown for the NPRC which became visible in public consultations only in 2019. It also rolled out its five-year thematic plan in mid-2019 giving the impression that healing, reconciliation, and peace remain elusive for victims and their families.

[70] Seventeen CSOs in Bulawayo have broken away from the Matabeleland Collective, a network of the clergy and civic society groups in the region, to form a new platform known as Matabeleland Forum after some of the members felt uneasy with being viewed as aligned to the Zanu PF-led government.

- NPRC must faithfully engage the public and CSOs concerning the donors who fund its TJ efforts. Multiple questions linger in many minds on whether the NPRC and CSOs are indeed committed to making TJ realisable in Zimbabwe.
- Further, the NPRC, as a post-conflict mechanism, must provide clarity to the general population as to whether it has developed healing, reconciliation, and peace TJ tool since most of its work seems to focus on peace between or among Zimbabweans.
- Institutional capacitation must be prioritised including highly resourced funding; and improvement of human resource capacity. Currently, the NRPC is understaffed with a few members of the Secretariat, managers, an executive secretary, and one assistant for each thematic committee. Decentralised structures and access to NPRC services are virtually non-existent currently.
- Lack of innovativeness also means that the NRPC cannot identify peace and reconciliation issues that affect different provinces. *Gukurahundi* in Matabeleland and Midlands is one conflict that supersedes all the other post-independent conflicts in terms of the death toll and targeting of civilians. Mashonaland East has its version of conflicts related to election violence. Manicaland has diamond wars and serious cases of internal displacement of families due to diamond mining. Mashonaland Central has political violence as a critical problem. The liberation struggle and versions of revolutionary wars after independence such as the Third *Chimurenga* in the early 2000s are other sources of conflict that affect all provinces. Masvingo has biting internal family displacement especially related to the *Tokwe-Mukosi* dam construction and perennial droughts.
- The NRPC should examine how supervening crises and non-traditional security threats, such as Covid_19, are changing the way TJ and human rights discourses are framed. This will ensure that the state does not use such crises to shirk its human rights obligations.
- The NPRC should also engage effectively with the Government so that the public is made aware as to whether the ten-year life span of the NPRC will be extended to 2028.
- There is also a need to focus on the coronavirus and post-coronavirus challenges to regime stability and peace as well as the need to monitor how jihadism in Mozambique can challenge peace and reconciliation initiatives in Zimbabwe.

- The NPRC's collaboration with outsider organisations and other committees on various conflicts such as the Matabeleland and Midlands *Gukurahundi* should be quickly formalised in the coronavirus period to create a sense of security and confidence for victims and their communities.
- The NPRC should also play a huge role in debates on funding of compensatory initiatives such as the compensation of white commercial farmers and the supervision of funds for devolution. This would ensure that other victims of state actions such as Matabeleland and Midlands *Gukurahundi* are effectively compensated, symbolically or materially.
- There is need to critically interrogate war-related ideologies such as *gukurahundi* and operation *zero hour* to determine how they also contribute to the ethnicisation of conflicts in Zimbabwe.
- The NPRC should also manage victims effectively and should balance between aggregative and disaggregative methods of obtaining information. This waters down concerns that appointments to the NPRC may be done to enable victims of some conflicts to manage other victims.
- The NPRC should interrogate the *guramatanga* concept of cattle raids under the Ndebele caste system and how it has created alternate instances of exceptionalism and particularism between the Shona and Ndebele. Such guramatanga also includes how ethnic groupings such as the Tonga were also affected with cosmic name changes which led many to lose their identities.
- The use of the Ndebele identity in issues such as Matabeleland and Midlands Gukurahundi demand that more be done to determine whether Ndebele means Zanzi, Ehla or Hole. The issues relating to how Ndebele-speaking victims were also affected should proceed from the question: who is not Ndebele in Zimbabwe? This question especially makes sense since the Ndebele state was the last pre-colonial state arranged under a caste society which was not formally displaced by the Rhodesians and the independent government. This debate can be informed by scholarly works such as 'Do Zimbabweans exist?

Recommendations for ZHRC

- The ZHRC should align its work with the roles of NHRIs in conflict and post-conflict situations. Specifically, the ZHRC should align its work to The Guidance Note of the UN and the Kyiv Declaration.

- The ZHRC should implement the UN Report on the Rule of Law, and the details of the Kyiv Declaration, to widen its TJ remit under the Constitution and ZHRC Act.
- The ZHRC should show how it is implementing the AU TJF as well as the findings of the ACHPR Study on Transitional Justice and Human Rights on how NHRIs can promote TJ in their countries.
- The ZHRC should use its anticipatory functions to innovate on ways for active TJ participation by victims and their families. Specifically, the ZHRC should use its constitutional mandate to ensure that victims of violations that occurred after 2009, including the killing of protesters in 2018 and 2019 as well as the displacements that occurred in areas such as Mazowe and Masvingo are compensated.
- The ZHRC should find ways to design a collaborative TJ framework with the NPRC to avoid duplicity of action. Specifically, there should be clarity of purpose on how the NPRC can work with the ZHRC through the adoption of a joint strategic plan to spell out the areas of collaboration. The collaboration can be projected to 2023 when the ten-year life span of the ZHRC is expected to end. Alternatively, through an amendment to the Constitution, the ZHRC's collaboration with the NPRC can be projected to 2028 if the NPRC's ten-year life span is interpreted from its date of operationalisation in 2018.
- The ZHRC must lead in TJ dialogues on the implementation of findings by other institutions that bear on the TJ roadmap in Zimbabwe. For instance, regarding the 14-16 January 2019 disturbances, the ZHRC must independently roll out effective national dialogue initiatives that unite the state and CSO organisations in designing a TJ policy or law for Zimbabwe.
- It should also increase its virtual visibility on issues such as property rights and the compensation of white commercial farmers; the management of devolution funds as well as the opening of democratic spaces of engagement in Zimbabwe.
- In the event that the dual mandate of the ZHRC is delinked, the remodeled ZHRC and the Public Protector should ensure that their enabling Acts contain TJ mandates as contemplated by international law.
- The ZHRC should engage parliament through section 119 of the Constitution to ensure that its reports tabled before Parliament or relevant Portfolio Committees speak to the ZHRC's efforts in the realisation of TJ in Zimbabwe. The instruments of political will such as the Ministry of Justice should also be engaged and their

preparedness to make TJ realisable can be tested through the reports submitted to Parliament.

Both the NPRC and ZHRC should ensure that human rights obligations by the state and citizens are not shirked in the coronavirus and post-coronavirus periods. This is especially so from the developments in Hungary where coronavirus has been used to promote authoritarian consolidation of power which suspended elections. The developments in Hungary may pose challenges to TJ across the world. Effectively, both the NPRC and ZHRC must assist in the design of transitional justice law and policy. This would ensure that Zimbabwe identifies conflicts, victims, or alleged perpetrators on which to focus.

Recommendation for future researchers

Future researchers must also focus on the NPRC's and ZHRC's TJ work from the perspective of context-sensitivity. Some of the key interventions they should make include:

- Embarking on researches that essentialise the one-size-does-not-fit-all approach that visibilises the legislative, constitutional and administrative mandates of the NPRC and ZHRC.
- Funded lunch-bag and formal meetings, symposia, call for articles or book chapter projects on the nexus between TJ and coronavirus and the post-coronavirus under the auspices of the NPRC and ZHRC must be prioritized by TJ practitioners and development partners. This is especially so since the coronavirus has affected TJ activities in Zimbabwe and the institutions under review have to be capacitated to deal with the challenges posed by the virus.
- Engage the Ministry of Higher and Tertiary education and public institutions on how based NPRC and ZHRC can embark on advanced staff-mapping exercises through Education 5.0 which speaks to teaching, community service, research, innovation and industrialisation. The teaching component can include curriculum development that is biased at encouraging students to build model frameworks for TJ which can be incorporated by the government and CSOs. The other component may aim at ensuring that universities become centres of excellence that produce students who are TJ practitioners and know how the ZHRC and NPRC mandates should produce a healed Zimbabwean society.

- A situational analysis of the future of ZHRC as a permanent institution should be conducted to determine how the delinking of the ZHRC's dual mandate can serve as a platform for TJ realization even in if the NPRC's span is not extended beyond 2023.
- Institutional visits to countries that used context-sensitivity coupled with feedback meetings with TJ practitioners and institutions should be emphasised to stimulate experiential researches and practical model building on TJ.
- Researchers should vigorously engage Parliament through the chairpersons of the relevant Portfolio Committees that deal with human rights to have TJ issues tabled before Parliament.
- They should also engage the Counsel to Parliament to ensure they participate in TJ-related activities.
- Institutions linked to Parliament such as the SADC Parliament and Africa Parliamentary Network against Corruption (APNAC) should be utilised to ensure the nexus between socio-economic rights and TJ is explored practically through the APNAC-Zimbabwe and partners in the national anti-corruption strategy.
- Model TJ bills should be designed by TJ lawyers and test projects should be conducted through film and television and other social media platforms. Specifically, the use of satire and other mediums of communication at the moment should be analysed as a clarion call to formalise TJ in Zimbabwe.
- TJ practitioners and researchers should also conduct social anthropological and other participatory forms of research to determine how current activities that bear on TJ realization such as memorabilia by liberation fighters; exhumations and reburials in Matabeleland and NPRC consultations are eclectically analysed.
- Transdisciplinary utilisation of the national heritages, national archives and history clubs should also be embossed to ensure mythologies, legends, and archived material is critically unpacked.
- Current claims to pre-colonial states such as Great Zimbabwe should also help researchers to unpack the totemic and family traditions that bear on TJ realisation through written history and corrections to misconceptions or charted myths on certain histories.

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