



***Transitional Justice in
Pre-Transitional Times: Are there any
lessons for Zimbabwe?***

July 2016

Executive Summary

Zimbabwe is a country that has been the subject of sustained impunity for gross human rights violations, from the pre-colonial period to present. Acts of gross human rights violations that include extra-judicial killings, murders, torture displacements, enforced starvation, and detentions, amongst other human rights violations have been committed with impunity. This has raised demands for accountability through transitional justice processes and mechanisms. Generally, transitional justice usually occurs following some kind of political change, with a country moving from a situation characterised by gross human rights violations into a democratic dispensation. In principle, significant political change must occur first in order to allow a country to address the violations of the previous political dispensation. However, for many countries as demonstrated in this study such a political transition may be difficult or even impossible, and yet there may be demand for justice from the victims of gross human rights violations as is the case with Zimbabwe.

This study is based on the major premise that Zimbabwe has had only one major transition that is from colonial settler rule in 1980, although there have been some political accommodations such as the 1997 Unity Accord and the 2008 Global Political Agreement. The study seeks answers to the question; ***“What transitional justice processes and mechanisms are possible in a state where gross human rights violations continue to be perpetrated, with no genuine political transformation and where the state is predatory, authoritarian, and violent?”***

The main objective of this study is to establish the risks and opportunities of a civil society-driven transitional justice process using the examples of previous attempts by other countries. Quantitative evidence from international experiences with transitional justice revealed the following:

- more than half of the transitions were negotiated, with regime-led transitions being twice as common as opposition-led transitions;
- negotiated transitions, whether regime or opposition-led, seemed more possible where the form of government was either civilian or military-institutional;
- pre-transitional processes revolved almost totally around amnesties and domestic criminal prosecutions, but, these amnesties were mostly to do deal with political opposition to the regime, such as coups or mutinies or establishing impunity;
- negotiated transitions, whether regime or opposition-led, seemed more possible where the form of government was either civilian or military-institutional;
- and that all forms of transitional justice increase markedly in frequency once a transition takes place.

The study also compares Africa with the rest of the world and discovers that there were virtually no differences in transitional justice mechanisms between African and other countries, either pre or post-transition. However, African countries tend to have more likely emerged from an authoritarian regime based on a single individual, generally described as the ‘big man’ syndrome. Thus, transitional justice mechanisms as a whole are a necessary pre-condition in the movement from authoritarian to democratic governance.

In establishing a case for Zimbabwe, the study reveals that all the three regime typologies that are civilian-institutional, civilian-individual, or military-institutional co- exist in Zimbabwe.

The President wields extraordinary power, granted within a civilian-institutional framework, and there is considerable evidence that the state is strongly inter-penetrated by the military. Since 1980, Zimbabwe has initiated a number of transitional justice mechanisms that include amnesties, judicial prosecutions, vetting, reparations and customary justice. In Zimbabwe, as in other countries, amnesties have been used to end civil war and to obviate scrutiny of the state's involvement, whilst there has not been an official truth commission.

However, the truth has not been missing in Zimbabwe as civil society organisations have extensively documented the many gross human rights violations that have occurred in post independent Zimbabwe. Recourse to the judicial justice has also been undertaken in Zimbabwe, through civil prosecutions mostly. The Zimbabwe Human Rights NGO Forum has documented 7250 cases of human rights violations from 1998-2008, and, of these cases 588 cases are still active and at various stages of litigation in the courts. .

Efforts for criminal prosecutions have also been initiated by civil society organization. In 1999, a submission to the Human Rights Committee of the UN in respect of the Food Riots, and, since 2001 local human rights organisations have ensured that the situation in Zimbabwe has remained on the agenda of the African Commission on Human and People's Rights (ACHPR).

In spite of this, Zimbabwe has been unable to make use of many of the transitional justice mechanisms that can be used in the post-transition period, obviously because no substantial transition has taken place, although since 2015 it might be argued that a transition is in process.

The report concludes by stating that Zimbabwe is not in the kind of transition where official state sanctioned transitional justice processes and mechanisms have any realistic chances of being applied. However, there does not seem to be a single transitional justice mechanism that could have been possibly applied pre-transition that has not been applied. Thus, where a mechanism seemed to be impossible, Zimbabwean civil society has found another way to keep the demand and the momentum going, and, hence, the substantial groundwork to date has laid a firm foundation for a future transitional justice process.

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1. An Overview of Human Rights Violations in Zimbabwe

In the 126 years since the first occupation of the country that is now Zimbabwe the history is littered with examples of violations of human rights (Sachikonye. 2011). Whilst colonial conquest would not ordinarily be described as a period in which gross human rights violations are committed, it is evident that when seen through the lens of modern human rights law, the early settlement and especially the events that occurred in what was termed the “Shona rebellion”, or alternatively the “First Chimurenga” would today be called human rights violations. The coercive power of the settlers established a basis for political power that remained unchallenged until the 1960s, and the violent resistance to the now-illegal settler state, the “Second Chimurenga”, led finally to the formation of the new state of Zimbabwe.

From the early years of settler control until the late 1950s, there was slow opposition to white settler rule, with the country effectively divided into white citizens and black subjects (Mamdani. 1996), and resistance grew mainly from the 1920s onwards. This resistance was mostly peaceful and directed at demands for greater inclusion and participation, and mostly from the miniscule African middle class (Bratton. 2014). However, the demands became more strident and assertive, and the coercive power of the state was increasingly used against workers, protesters and the rapidly developing African political parties (Sachinkonye. 2011). This was exacerbated by the removal from political power of the liberals led by Garfield Todd, and the movement towards increasingly uncompromising white supremacy thereafter. The period was marked by the promulgation of repressive legislation, such as the Law and Order (Maintenance) Act in 1960, the banning of political parties, and the detention of key black political leaders. It was also marked by the growth of inter-political party violence as the black political groupings split into factions and new parties.

Violence escalated as a consequence of the ill-judged decision by the Ian Smith government with the Unilateral Declaration of Independence in November 1965, creating a pariah state subject to United Nations sanctions. Although this action was ambivalently dealt with by the Western nations in the context of the Cold War, as was the case for all the Southern African settler regimes (Southall. 2013), the nationalist movements were able to draw upon support from the rest of the now largely-independent Africa, and importantly the independent states surrounding Rhodesia, with the exception of South Africa and the Portuguese colonies. The ensuing war, which received a massive boost with the collapse of the Portuguese colonies of Mozambique and Angola, was bitter and brutal, and there is little doubt that gross human rights violations were committed on an extensive scale. War crimes - extrajudicial killings, torture, displacements and the like - were reported, with the major perpetrators being the Rhodesian forces in all their branches. The guerrilla movements too were reported as committing gross human rights violations. This was also the period in which the first statute of impunity was recorded, the infamous Indemnity and Compensation Act of 1975, made retrospectively applicable to 1972, the year in which it can be said that the Liberation War became a serious concern for the Rhodesian state. This allowed proactive immunity for gross human rights violations for all Rhodesian security forces and government employees, and put paid to the challenges being mounted to these violations by the Catholic Commission for Justice and Peace (CCJP.1975; CCJP.1976).

Following Independence in 1980, and the much-lauded reconciliation policy of the ZANU PF government, another extensive period of organised violence and torture took place in the

southern half of the country. Whilst it was evident that Zimbabwe was confronted by serious threats to its security from South Africa and also Renamo² bandits along its eastern border, the response to a “dissident” threat internally was excessive and brutal (CCJP & LRF. 1997). Human rights groups documented extra-judicial killings, murders, torture on an epidemic scale, displacements, enforced starvation, detentions, and many other violations. This came to an end in 1987 with the Unity Accord, and the amalgamation of the two main political parties, ZANU PF and PF ZAPU, and the country entered a period of relative peace and security, enhanced by the regional changes in Mozambique, Namibia and South Africa.

The peacefulness was marred only by the violence that seemed to accompany elections in Zimbabwe. Both the elections in 1990 and 1995 were marked by political violence and intimidation (Moyo. 1992; Makumbe & Compagnon. 2000).³ This trend has largely continued until the present.

The general atmosphere of peace prevailed for more than a decade, but the period also witnessed the growth of opposition to ZANU PF’s hegemonic government. This was particularly evident in the growing power of the Zimbabwe Congress of Trade Unions (ZCTU), strikes by civil servants, and finally the emergence of a strong movement for constitutional reform in the establishment of the National Constitutional Association (NCA). Whilst the state was not initially much threatened by the growing opposition, it became evident in 1998, with the nation-wide food riots in 1998, that there was fertile ground for political opposition amongst the citizens that were suffering increased hardship as a consequence of the Economic Structural Adjustment Programme (ESAP). The food riots saw the re-emergence of the blunt coercive power of the state: thousands were detained, thousands were brutally beaten, and a small number killed (Human Rights Forum. 1998; Human Rights Forum. 1999). It was also the first time that the army was deployed against the citizens of Zimbabwe.

The year 1998 thus marked the beginning of a period of sustained gross human rights violations that have been evident not only during elections but now have become a feature of everyday life. In 1999, Zimbabwe witnessed the near-public detention and torture of the two Zimbabwe Standard journalists, Mark Chavunduka and Ray Choto, and the following year, after the momentous defeat in the referendum of the ZANU PF-sponsored constitution, and the emergence of significant political opposition in the form of the Movement for Democratic Change (MDC), the land invasions, the beating of peaceful protestors in Harare, and the massive political violence that accompanied the 2000 General Elections (Human Rights Forum. 2000; Human Rights Forum. 2001). The violence that accompanied the so-called Fast Track Land Reform Programme (FTLRP) is well-documented by human rights groups, and the reports show abductions, extra-judicial killings, torture, rape, beatings, death threats and a plethora of other violations. The commercial farm workers bore the brunt of these violations (GAPWUZ. 2009).

Elections became the particular focus for political violence as ZANU PF now faced the serious threat to its power posed by the MDC. Here, elections in 2000, 2002 and 2008 were

² RENAMO, the Mozambican National Resistance (*Resistência Nacional Moçambicana*), was originally sponsored by the Smith regime prior to Zimbabwean independence in 1980, and thereafter by the South African government until 1992 and the signing of the Rome General Peace Accords.

³ The elections in 1985, and especially the post-election period after ZAPU had held onto all the seats acquired in 1980, were the most violent elections prior to the 2000s, but are better seen as one aspect of the Gukurahundi experience.

especially violent, with murders, extra-judicial killings, torture, rape, abductions and disappearances, death threats, and displacements being extremely common (Human Rights Forum. 2000; Human Rights Forum. 2001; Human Rights Forum. 2002; CSVR.2009). The elections in 2005 and 2013 were not marked by political violence to the same extent, but it was evident that intimidation was highly prevalent in both (Reeler & Chitsike. 2005). However, and despite ZANU PF regaining a two-thirds majority in parliament, 2005 saw forced displacement of a massive scale under the so-called *Operation Murambatsvina*, which several commentators (including a United Nations Special Envoy)⁴ feared could be a crime against humanity (Oxford Pro Bono Publico Group. 2005). An estimated 1.2 million people were rendered homeless, but the range of consequences far exceeded mere homelessness (ActionAid. 2005).

Following the excessively violent elections in 2008, and the Global Political Agreement (GPA), Zimbabwe has seen a diminution in gross human rights violations and political violence, but neither have been entirely absent as the monthly reports of the Zimbabwe Peace Project (ZPP) illustrate. By no stretch of the imagination can Zimbabwe be seen to be in any form of transition, and with the fracturing of political parties, the emergence of serious faction fights, any form of transition seems a long way off. It might even be that 2016 marks even greater instability, with the prospect of organised violence and torture being highly probable in the future (RAU. 2016(a)).

2. The History of Transitional Justice in Zimbabwe

With such a turbulent and violent history, it is remarkable that there has been such excellent documentation of gross human rights violations, and such courageous action by human rights groups over the past four decades. The beginnings can be traced to the Catholic Church in the 1970s and the work of the Catholic Commission for Justice and Peace (CCJP) (Auret. 1992). As reports of gross human rights violations began to trickle through from the Northeast of Zimbabwe in the early 1970s, the members of CCJP began to collect evidence and document the atrocities committed. This was at considerable personal risk, with some members even surviving grenade attacks on their homes. The intention in this work was to take cases of gross human rights violations to the courts, but this was stymied by the passing of the Indemnity and Compensation Act in 1975, and CCJP had to continue through advocacy and public exposure.

CCJP was quickly back in action in the 1980s documenting the well-planned and systematically executed mass killings being reported in southern Zimbabwe – the so-called “Gukurahundi”, which many commentators suggest was “genocide”.⁵ Documented evidence was collected and presented to the ZANU PF government, which resulted in the government establishing the Chihambakwe Commission. Tellingly, the findings of the Commission were not made public, and have never been made public. As pointed out above, the violations of the 1980s came to an end in 1987, but overt human rights work remained difficult with the country remaining under Emergency Powers, originally put in place by the Smith regime but continued by ZANU PF.

⁴ See “*Report of the Fact-Finding Mission to Zimbabwe to assess the Scope and Impact of Operation Murambatsvina by the UN Special Envoy on Human Settlements Issues in Zimbabwe*”.

⁵ Is a Shona language term which loosely translates to, “the early rain which washes away the chaff before the spring rains”.

However, with the removal of Emergency Powers, there was flowering in human rights activity, and, in 1992, the Zimbabwe Human Rights Association (ZimRights) was established, rapidly becoming a strong national voice for the promotion of human rights. This was followed in quick succession by the establishment of the Amani Trust, an organisation dealing explicitly with organised violence and torture, Zimbabwe Lawyers for Human Rights (ZLHR) and Transparency International Zimbabwe (TIZ) in 1996, and thereafter the rapid growth of a very large and diverse NGO community in which virtually all aspects of human rights were being addressed. It is pertinent here to point out that the legal domain in human rights had earlier on been addressed by the formation of the Legal Resources Foundation (LRF), which rapidly became highly influential in the realm of legal reform, legal education, and legal aid. It also partnered with CCJP in the ground breaking report on Gukurahundi – *Breaking the Silence* -- in 1997 (CCJP & LRF.1997). The Zimbabwe Human Rights Association (ZimRights) also produced a significant, albeit less well-known report, on the same event (ZimRights.1998).

The most significant development in the human rights field in Zimbabwe came in the aftermath of the Food Riots in 1998 with the creation of the Zimbabwe Human Rights NGO Forum, the “*Human Rights Forum*”. Eight of the existing human rights organisations – Amani Trust, CCJP, TIZ, LRF, ZLHR, the University of Zimbabwe (Legal Advice Centre), Zimbabwe Women Lawyer’s Association (ZWLA), and ZimRights – came together to support the victims of the food riots. This coalesced into a formal body, now with 21 member organisations, and began the extensive documentation of gross human rights violations that has earned it an international reputation. A first step was in bringing civil suits for the victims of the food riots, initially through voluntary support, and later with the creation of the Legal Unit, staffed with full-time members. The first unit of the Human Rights Forum was the Human Rights Research Unit, and both these two units were housed by the Amani Trust.

In the aftermath of the 2000 General Elections, and the support for election petitions given by the LRF and the Amani Trust, a sub-project was set up for monitoring the court proceedings of the petitions. The interest here was in publicising the gross human rights violations that had taken place during the elections, but this initiative soon was expanded into monitoring the gross human rights violations ahead of the 2002 Presidential election. The Monthly Political Violence Reports began in July 2001 and, when these were ended in December 2008, the Human Rights Forum had published 84 monthly reports. These were supported by an enormous number of more detailed and analytical reports, over 40 reports by the end of 2009.

Given the propensity for governments to apply impunity for their actions, the Human Rights Forum and ZLHR continued the process that began in 1998 of mounting civil actions for gross human rights violations (Human Rights Forum. 2006). To date, the Human Rights Forum has received 7 250 requests for civil actions, whilst ZLHR has received a similar number. The rationale here was that, in the absence of any state action to investigate and prosecute gross human rights violations, human rights organisations in Zimbabwe would use the courts, albeit in this slow and expensive fashion, to demonstrate the veracity of claims about such violations and to indicate culpability. These suits, and the many reports of the Human Rights Forum and its members, and the reports of regional organisations such as the Solidarity Peace Trust, and international organisations, such as Amnesty International (Amnesty. 2000; Amnesty 2002), Human Rights Watch (HRW.2006), the International Rehabilitation Council for Torture Victims (IRCT.2001), Physicians for Human Rights (PHR.2002), and the Redress Trust (Redress.2005), amongst many others, all combined to fill out the picture of on-going human rights violations in Zimbabwe. All of this documentation

combined to contribute the abhorrence with which the international community began to regard Zimbabwe, and undoubtedly contributed to the actions taken by Western governments, the Commonwealth, and even to the actions of SADC in 2008.

The next critical development in the human rights field took place in 2003, with the holding of the Symposium on “*Civil Society and Justice in Zimbabwe*” (Themba LeSizwe. 2004). More than 70 civil society organisations from Zimbabwe attended, as well as a number of international organisations. A central feature of the recommendations was the reference to the so-called *Joinet Principles*, and the rights of truth, justice, reparations (restitution, compensation and rehabilitation) and non-recurrence.⁶

The recommendations of this Symposium set the stage for formal moves towards transitional justice in Zimbabwe. This has built steadily under the aegis of the Human Rights Forum and its members, with basic research on citizens’ views on transitional justice (RAU. 2009; Human Rights Forum. 2011). This has led directly to the establishment of a new, dedicated unit within the Human Rights Forum, the Transitional Justice Unit, and, spawned two international conferences (Human Rights Forum. 2012; Human Rights Forum. 2013), and then led to the establishment of the National Transitional Justice Working Group (NTJWG) in 2015, an initiative of 46 Zimbabwean civil society organisations. Staffed by eight elected “*experts*”, with the secretariat provided by the Human Rights Forum, the NTJWG has been developing principles and guidelines for a possible transitional justice process (NTJWG. 2015), holding public discussions, undertaking a wide range of advocacy, engaging parliamentarians, and preparing for engaging with the constitutionally sanctioned National Peace and Reconciliation Commission (NPRC).

The legal foundation for transitional justice has now been established in the 2013 Constitution through a National Peace and Reconciliation process. However, Zimbabwean civil society has clearly laid the foundations for the engagement. The question is whether it has been sufficient.

As can be seen from this exceedingly brief and selective history about human rights in Zimbabwe, much has been done in what can be described as a “*pre-transitional*” period, and in a country where impunity rather than accountability has been the norm. In many ways, the work already done by Zimbabwean civil society and the human rights community may be seen as exemplary, but we ask in this paper whether there more that can be done, and what other steps or processes might have been missed as we strive to move Zimbabwe into a genuine transitional justice process toward the kind of democracy that is envisaged by the Constitution.

Thus, this desk review addresses the following questions.

What transitional justice processes and mechanisms are possible in a state where gross human rights violations continue to be perpetrated, where no genuine political transformation has taken place, and where the state is predatory, authoritarian, and violent?

⁶ See UN [1997], *The Administration of Justice and the Human Rights of Detainees: Question of the impunity of perpetrators of humanrights violations (civil and political)*, Revised final report prepared by Mr. Joinet pursuant to Sub-Commission decision 1996/119, United Nations. Economic and Social Council. Commission on Human Rights. SubCommission on Prevention of Discrimination and Protection of Minorities. E/CN.4/Sub.2/1997/20/Rev.1

Moreover, this report seeks to answer empirical questions such as what can be learnt from the experiences of other countries? More importantly, this study interrogates whether transitional justice processes and mechanism, in pre or post-transition states, have any effect on the creation and deepening of democracy in those countries? This question is not trivial, for as Mahmood Mamdani, an eloquent commentator on human rights and transitional justice, pointed out recently in respect of South Africa, it might be the case that the complex set of negotiations known as the Convention for a Democratic South Africa (CODESA) negotiations had a far greater effect on the establishment of democracy in South Africa than the Truth and Reconciliation Commission.⁷

3. Objectives and Methodology of the Study

3.1 Objectives

The main objective is as follows:

To provide a comprehensive analysis of the risks and opportunities of a civil society-driven transitional justice process using the examples of previous attempts by other countries.

In order to achieve this primary objective, a series of secondary objectives were addressed as follows:

- To provide a comprehensive description of, as far as possible, all countries, governed by authoritarian regimes, that have attempted to institute transitional justice prior to any substantive political change;
- To provide a comprehensive analysis of the difficulties and successes of these attempts; and
- To provide a set of recommendations of the risks and opportunities for Zimbabwean civil society in pushing for a transitional justice process.

The intention here was to provide background material for the NTJWG initiative in its engagement with the NPRC and the mandate for transitional justice provided under Part Six, Sections 251, 252 and 253 of the Zimbabwean Constitution.

3.2 Methodology

In the first stage we determined the countries that would be included in the research, as this was crucial to determining the conduct of the study. As a first step, a search was made of potential sources of information on transitional justice, and two large databases were identified: the *Transitional Justice Data Base* of the **Transitional Justice Data Base Project (ITJDBP)**, which has 2,497 entries organised thematically, and the *International Internet Bibliography on Transitional Justice*, a bibliography of over 2,000 entries.⁸

Following a brief examination of the two sources, it was evident that the ITJDBP data was the most useful for the purposes of this study, especially as the project had a detailed, quantitative data base in addition to an extensive bibliography. Following a request for information, the ITJDBP group provided a comprehensive data base of 70 countries that

⁷ “*The Logic of Nuremburg*”, Mahmood Mamdani. *The London Review of Books*. 7th November 2013.

⁸ This latter is part of a joint project between the Law Faculties of the University of the Western Cape, Cape Town, and Humboldt University, Berlin.

shifted from authoritarian rule to democracy between 1970 and 2004 (Reiter & Fishman. 2016).

The data was then reduced to 58 countries by taking a cut-off date of only those countries that had made transitions since 1988. The rationale here was that 1988 marked the end of the Cold War, the beginning of serious revolts against Soviet rule, and the beginning of more serious-minded adherence to human rights treaties and conventions internationally, as well as the increasing insistence on human rights observance and rule of law in development assistance. The changes in Eastern Europe had a marked effect throughout the world, and removed the easy position for the Non-Aligned Movement countries of playing off the East against the West, with the persistence of many highly authoritarian regimes tolerated by either of these two major power blocs in return for political support. For countries had more than one transition, we took the most recent year of transition that fell within the selected time period, 1988 to 2004.

The ITJDBP data covers a number of fields dealing with the type of authoritarian regime, the type of transition, the transitional mechanisms applied pre-transition, and the transitional mechanisms applied post-transition. To these fields were added the overall scores and the sub-category scores from the Freedom House Democracy Index for the period 2006 to 2014. These were added in order to gain some indication of the democratic status for the selected countries since it is implicit in this study that some estimate can be made of the contribution of transitional justice mechanisms, both pre and post-transition, to the development of democracy. The final set of data fields were as follows:

PRE-TRANSITION		
Regime type	Transition type	Transitional justice mechanisms
<ul style="list-style-type: none"> • Authoritarian Regime Type <ul style="list-style-type: none"> → Civil war → Civilian-individual → Civilian-institutional → Military-individual → Military-institutional • Authoritarian Regime Length (no. of years) 	<ul style="list-style-type: none"> • State created • Collapse • Domestic overthrow • Emergence from civil war • Foreign overthrow • Negotiated- regime led • Negotiated- opposition led 	<ul style="list-style-type: none"> • Amnesty • Truth Commission • Domestic criminal prosecutions • Foreign criminal prosecutions • Civil trials • Reparations • Vetting
POST-TRANSITION		
Transitional justice mechanisms		Freedom House Democracy Index Score (2006 to 2014)
<ul style="list-style-type: none"> • Amnesty • Truth Commission • Domestic criminal prosecutions • Foreign criminal prosecutions • Civil trials • Reparations • Vetting • Customary justice 		<ul style="list-style-type: none"> • Free, Partly Free, Not Free • Political Rights • Civil Liberties • Electoral Process • Political Pluralism and Participation • Functioning of Government • Freedom of Expression and Belief • Associational and Organizational Rights • Rule of Law • Personal Autonomy and Individual Rights

The edited data set was then converted from text into fields in an Excel spread sheet. Binary scores for each of the above were then created in a separate spread sheet, thus giving frequency scores for each field, and allowing comparison of the selected countries. There

were thus two sets of data for every country in the data set: the actual number of transitional mechanisms that were applied for each country, bearing in mind that there was considerable variability, and a simple binary score – mechanism present or absent – also for each country. This allowed for simple quantitative analysis as well as more nuanced descriptions. Where possible, simple analyses of frequencies were undertaken, and tests of significance also.

The quantitative data base was then used as a guide for developing short qualitative descriptions of each of the transitional justice mechanisms. These are brief by choice, as the literature on each of these countries was extensive, and the intention here was to provide descriptions to underpin the quantitative analysis rather than serve as comprehensive qualitative analyses as a detailed analysis of 58 countries was beyond the scope of this study. However, it was our intent to provide a fair overview of the contribution of the various transitional justice mechanisms from countries moving from authoritarian regimes and governments.

4. International Experiences with Transitional Justice in pre-transition periods

4.1 Overall Quantitative Findings:⁹

Our first finding for the all countries that had transitioned from authoritarian rule is that there were no statistical differences between the large data set provided by ITJDBP and the cleaned set, so we can have confidence that the selection of the latter due to the different cut-off date was not producing a skewed sample. The only marked difference between the two groups was the greater frequency of civil war in the pre-1990 countries.

Table 1: Type of Authoritarian regime¹⁰

	%
Civil war	5
Civilian-Individual	15
Civilian-Institutional	31
Military-Individual	29
Military-Institutional	20

Regarding the cleaned set, it can be seen in the table that the pre-transition regimes had a variety of different forms of authoritarian regimes. There were few marked differences between the various types. The average length of these regimes was 22 years, but most European regimes had existed for lengthy periods.

⁹ Here note that nine countries had more than one transition - Albania, Bangladesh, Guinea-Bissau, Ghana, Haiti, Nigeria, Pakistan, Peru, and Sierra Leone. We chose the last transition for this analysis.

¹⁰ Whilst civil war needs no explanation, the other types do. The distinction between “individual” and “institutional” is simply that the former is as the term suggests rule by an individual who might be either a civilian or a military ruler. The latter is reserved to one-party state (civilian-institutional) arrangements or military juntas (military-institutional).

For example, the regime governing the USSR had lasted 72 years, and that of Mexico 70 years, but clearly post-colonial regimes had mostly only been in existence since the 1960s. Hence, regime length is not a useful variable for this analysis. There was a slightly greater frequency of *institutional* regimes than *individual* ones, 51% as opposed to 44%, but no great difference.

Table 3: Type of Transition

	%
State creation	7
Collapse	10
Domestic Overthrow	15
Emergence from Civil War	5
Foreign Overthrow	5
Negotiated regime-led	39
Negotiated-Opposition-Led	19

More than half of the transitions were negotiated, with regime-led transitions being twice as common as opposition-led transitions (Table 3 above). Given the period under consideration was 1990 onwards, and that the Cold War had ended, it may be assumed that authoritarian regimes were seeing the writing on the wall, and this was the part of the process that Huntington termed the “Third Wave” of democracy (Huntington. 1991).

Negotiated transitions, whether regime or opposition-led, seemed more possible where the form of government was either *civilian* or *military-institutional*. Examples of *civilian-institutional* forms are Hungary, Poland, Romania and Russia in Europe, and Kenya, Mozambique and Senegal in Africa. For military-institutional forms, South American countries – Argentina, Brazil, El Salvador, etc. - dominate here, but Africa is only represented by Algeria. Africa, in fact, according to Polity IV, is dominated by *military-individual* forms of authoritarian governments: of the 17 countries in which this form of authoritarianism prevailed, nearly 60% were African countries where the “Big Man” ruled. With the growing international interest in support for human rights that was accelerated by the end of the Cold War, it is interesting to see how much influence this had upon domestic moves for justice and accountability.

As seen in Table 4 (below), pre-transitional processes revolved almost totally around amnesties and domestic criminal prosecutions, but, as Reiter and Fishman point out, these amnesties are mostly to do with establishing impunity or dealing with political opposition to the regime, such as coups or mutinies (Reiter & Fishman. 2016). (Here see also sections 4.6.1 and 4.6.3 later for greater detail).

Table 4: Pre-transition justice mechanisms

	No.	%
Amnesties	51	86.4
Truth Commission	5	8.5
Domestic Criminal Prosecutions	43	72.9
Civil Trials	1	1.7
Foreign criminal prosecutions	4	6.8
Reparations	1	1.7
Vettings	4	6.8

Table 5: Post-transition justice mechanisms

	No.	%
Amnesties	44	74.6
Truth Commission	20	33.9
Domestic Criminal Prosecutions	53	89.8
Civil Trials	7	11.9
Foreign criminal prosecutions	11	18.6
Reparations	14	23.7
Vettings	20	33.9
Customary justice	6	10.2

It is immediately evident that *all forms of transitional justice increase markedly in frequency once a transition takes place*, as can be seen in Table 4. What is of interest is the significant decline in the frequency of amnesties, supporting the view that amnesty is the dominant mode of building the infrastructure for a transition, creating impunity for the excesses of authoritarian governments (Olsen, Payne & Reiter. 2010).

Table 6: Comparison of frequency of transitional justice mechanisms (Pre and Post-Transition)

	Pre-Transition	Post-Transition
Amnesties	86.4%	74.6%
Truth Commission	8.5%	33.9%**
Domestic Criminal Prosecutions	72.9%	89.8%*
Civil Trials	1.7%	11.9%*
Foreign criminal prosecutions	6.8%	18.6%*
Reparations	1.7%	23.7%**
Vettings	6.8%	33.9%**

There are significant increases in the frequency of most of the other transitional justice mechanisms. Thus, and unsurprisingly, the frequency of use of all transitional justice mechanisms, amnesties and foreign criminal prosecutions apart, are significantly more frequent in the post-transition period.

In particular, the overall frequency of all transitional justice mechanisms in the post-transition period was highly significant, statistically speaking, with these mechanisms doubling on average.¹¹ This is not a very surprising finding overall.

All of these countries were selected because they were formerly authoritarian regimes with histories of gross human rights violations, and hence it is of direct interest to see whether they have become democratic in the post-transition period. The question of whether the pre-transitional justice processes were influential here is left for a later section.

Overall, there is not much that is surprising in these results, and they have been well explained in previous research (Olsen, Payne & Reiter. 2010). It is unsurprising that there would be greater frequency in the use of transitional justice mechanisms once an authoritarian regime has been removed from power, but is also interesting in how these regimes do disappear. *In the post-1990 epoch, negotiations became the most frequent mode of change*, providing support for the Huntington thesis. The relationship between the type of authoritarian regime and the type of transition were largely negatively significant, apart from

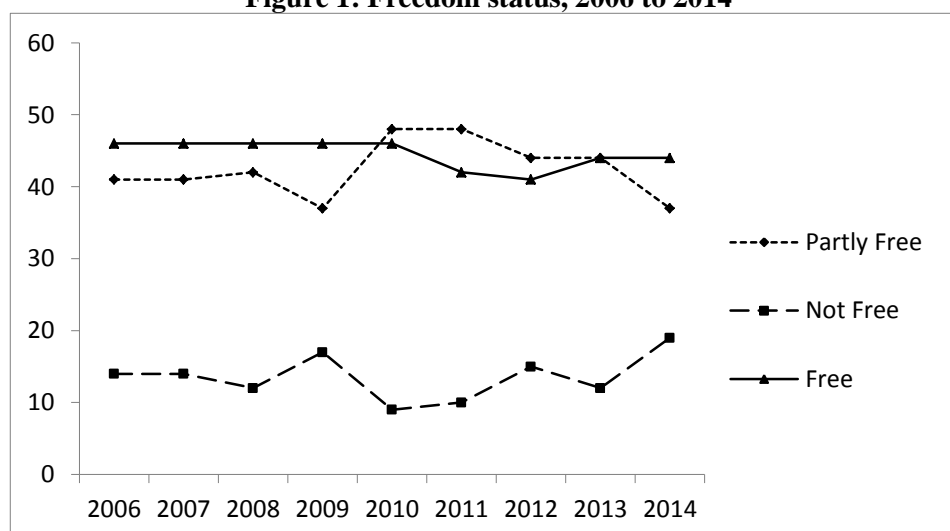
¹¹ ** Significant at 0.0001 level; * Significant at 0.01 level; * Significant at 0.05 level.

that between *civilian-institutional* regimes and *state-created* transitions, and *military-institutional regimes* and *negotiated (regime-led)* transitions (see Appendix 1).

It is evident, as seen in Figure 1(below), that change happens very slowly, and that, over the nine years since 2006, the Freedom House designation of a country changes very little. Whether *Free*, *Partly Free* or *Not Free*, this designation has changed little over the decade, and there is even a small trend for the *Partly Free* countries to be worsening, and a tiny trend for the *Not Free* to be improving.

As pointed out above, amnesty was more frequent in pre-transition than in post-transition, but not significantly so. This suggests that amnesties are used in different ways pre and post-transition: pre-transition they are a device to make transition happen, but post-transition they operate to protect the transition. There are no relations between amnesty, either pre or post-transition, and whether the country is *free*, *partly free*, or *not free*. Clearly the consolidation of democracy depends on much more than mere amnesty: amnesty probably facilitates transition, but does not guarantee it.

Figure 1: Freedom status, 2006 to 2014



Since African countries were reported to still rank mostly amongst the *Partly Free* or *Not Free* countries on the Freedom House Democracy Index (Table 6 below), a contrast was then made between African countries in the data base and the rest of the world. As can be seen in Table 8 (over), authoritarian regimes in African countries had a preponderance of individualised regimes, either civilian-institutional, such as Zimbabwe, or military-institutional, such as Ghana.

4.2 Comparing Africa with the rest of the world:

For this comparison, the sample was reduced from 59 countries to 47 by removing all countries that had not transitioned after 1988¹². One of the findings from the analysis above was that *African countries in this sample were rated not free more frequently than the countries from the rest of the world in the period 2006 to 2014*, according to Freedom House (Table 7).

¹² Argentina, Brazil, Ecuador, El Salvador, Greece, Guatemala, Honduras, Portugal, Spain, Turkey, Uganda, and Uruguay

Table 7: Distribution of freedom status, Africa compared to the World

		World (n=28)			Africa (n=19)	
	Partly Free	Not Free	Free	Partly Free	Not Free	Free
2006	25%	18%	57%	63%	16%	21%
2007	29%	14%	57%	58%	21%	21%
2008	32%	11%	57%	58%	21%	21%
2009	32%	11%	57%	58%	32%	11%
2010	36%	7%	57%	68%	16%	21%
2011	39%	7%	54%	63%	21%	16%
2012	39%	11%	50%	58%	26%	16%
2013	39%	7%	54%	53%	26%	21%
2014	36%	11%	54%	47%	37%	16%

As was also noted (section 4.1, African countries in this sample were most frequently transitioning from *military-individual* rule than any other form of authoritarian government (Table 8). The implication would seem to be that such countries, for whatever reasons, find it harder to transit to open democracy.

Table 8: Type of Authoritarian regime, Africa compared to the rest.

	World	Africa
Civil war	0	15.3%
Civilian-Individual	17.9%	15.8%
Civilian-Institutional	50%	21.1%
Military-Individual	21.4%	47.4%
Military-Institutional	7.1%	5.3%

Table 9: Type of Transition, Africa compared to the rest

	World	Africa
State creation	14.3%	0
Collapse	10.7%	5.3%
Domestic Overthrow	14.3%	21.1%
Emergence from Civil War	0	15.8%
Foreign Overthrow	7.1%	0
Negotiated regime-led	32.1%	31.6%
Negotiated-Opposition-Led	21.4%	26.3%

As can be seen from Table 9, there were differences between Africa and the rest of the world in the type of transition that took place. However, for both groups, *negotiated change was more frequent, over 50% for both groups, and civil war was more common for Africa*. However, it is instructive to remember the observation above, that most African countries (53%) transitioned from military rule of one kind or another, were still not regarded as *Free*, and hence a negotiated transition does not presage an easy path to democracy.

As regards pre-transition justice mechanisms, it can be seen in Table 10 that there were not many meaningful differences between Africa and the World, with both amnesties and domestic criminal prosecutions dominating.

Table 10: Pre-transition justice mechanisms, Africa compared to the rest

	World	Africa
Amnesty	89.3%	84.2%
Truth Commission	10.7%	5.3%
Domestic Criminal Prosecutions	71.4%	73.7%
Civil Trials	3.6%	0
Foreign criminal prosecutions	7.1%	10.5%
Reparations	0.0	0
Vettings	7.1%	5.3%

Here the point made earlier stands: that amnesties were aimed at securing the transition and domestic criminal prosecutions were dealing with threats to the state and not transitional justice issues.

Table 11: Post-transition justice mechanisms, Africa compared to the rest

	World	Africa
Amnesty	75%	78.9%
Truth Commission	28.6%	36.8%
Domestic Criminal Prosecutions	89.3%	89.5%
Civil Trials	3.6%	10.5%
Foreign criminal prosecutions	14.3%	21.1%
Reparations	14.3%	36.8%
Vettings	35.7%	36.8%
Customary justice	7.1%	5.3%

Again there were few meaningful differences between the two groups in respect of post-transitional justice mechanisms, apart from a greater frequency of both *reparations* and *foreign criminal prosecutions* for the countries in the African sample. Here the prosecutions of Charles Taylor, President Omar al-Bashir, and, most recently, Hissène Habre.

Thus, overall there are virtually no differences in transitional justice mechanisms between the two groups compared here. The differences are rather in the political domain. African countries in this sample were more likely to have emerged from an authoritarian regime based on a single individual, the “*big man*” of common political discourse on Africa, for this person to have negotiated a transition, and ensuring amnesty, but very few have reached the status of *Free* on Freedom House’s Democracy Index. This would suggest for African countries that factors other than transitional justice processes need to be addressed in order for full democracy to be attained after authoritarian rule. Here it may be speculated that the growing literature on the persistence of liberation movements may be helpful (Southall. 2013), as well as more careful attention to the nature of the political settlements that accompanied the transition (Bratton. 2014; Menocal. 2015). It seems probable that both these sets of factors are highly interactive, and that *liberation movements tend not to create the kinds of inclusive governance processes needed for a developmental and democratic state*.

Given these findings, it seems that examining states according to their freedom status might give a better understanding about the contribution of transitional justice mechanisms.

4.3 Comparisons on the basis of freedom

All the countries from the first analysis (n=58) were included for this comparison.

As can be seen in Table 12, over half the countries were still rated as *Not Free* according to Freedom House. There were interesting differences between the groups, and countries rated as *Free* were more likely to have been *military-individual*. Only two African countries – Benin and Ghana – were in this group.

Table 12: Type of regime	Free (n=17)	Partly Free (n=11)	Not Free (n=30)
Civil war	0	0	10%
Civilian-Individual	12%	9%	19%
Civilian-Institutional	24%	64%	23%
Military-Individual	35%	27%	26%
Military-Institutional	29%	0	23%

Of the *Partly Free* countries, *civilian-institutional* regimes were the most frequent forms of authoritarian rule, and only Mali and Uganda were in this group. There were 15 African countries in the *Not Free* group, and nearly half of these came from *military* governed regimes.

Table 13: Type of Transition	Free	Partly Free	Not Free
State creation	12%	9%	3%
Collapse	18%	0	10%
Domestic Overthrow	12%	18%	16%
Emergence from Civil War	0	0	10%
Foreign Overthrow	6%	9%	3%
Negotiated regime-led	35%	55%	36%
Negotiated-Opposition-Led	18%	9%	23%

As for the type of transition, the only stand-out differences were that *Partly Free* countries had largely emerged from *regime-led* negotiations. Furthermore, *Not Free* countries seemed unlikely to emerge from a *state created* process, and more likely to have emerged from a *collapse*, with previous civil war like Guinea-Bissau, Liberia and Sierra Leone.

There were a range of differences between the three groups in respect of pre-transitional justice mechanisms, with the most pronounced being the universal use of *Domestic Criminal Prosecutions* and *Truth Commissions* in *Partly Free* countries. Amnesties were common in all three groups.

Table 14: Pre-transition justice mechanisms	Free	Partly Free	Not Free
Amnesty	88%	91%	84%
Truth Commission	0	36%	3%
Domestic Criminal Prosecutions	65%	100%	68%
Civil Trials	0	9%	0
Foreign criminal prosecutions	0	9%	10%
Reparations	6%	0	0
Vettings	0	18%	7%

As for post-transitional justice mechanisms (Table 15), again there were few differences between the three groups, apart from *Truth Commissions* and *Foreign Criminal Prosecutions* being more frequent in countries rated as *Free*. But it is evident that, as with other comparisons, all justice mechanisms are more frequent in the post-transition period.

Table 15: Post transition justice mechanisms	Free	Partly Free	Not Free
Amnesty	77%	73%	74%
Truth Commission	47%	27%	29%
Domestic Criminal Prosecutions	88%	91%	90%
Civil Trials	12%	9%	13%
Foreign criminal prosecutions	29%	9%	16%
Reparations	24%	27%	23%
Vetings	35%	36%	32%
Customary justice	12%	0	9.5%

As seen in Table 16, there were a number of significant differences in the frequency of pre and post-transitional justice mechanisms. Countries that are *Free* and *Not Free* both show marked increases in the frequency of transitional justice mechanisms, but interestingly not for countries rated as *Partly Free*.¹³

Table 16: Comparison of pre and post-transition justice mechanisms

	Pre (mean; S.Dev)	Post (Mean; S.dev)
Free	1.59 (0.62)	3.24 (1.35)*
Partly Free	2.64 (0.95)	2.73 (3.04)
Not Free	1.71 (0.85)	2.84 (1.39)*

This seems contradictory on face value, but perhaps is due to the fact that most *Not Free* countries (48%) were former military regimes and amnesties were the dominant mechanism seen.

4.4 The effects of regime type on transition

There was another possible factor to consider in understanding the influence of transitional justice on later transition and possible movement into democracy from authoritarian rule, and this was the type of regime that preceded transition. Here two broad classifications seemed relevant: authoritarian regimes that were *institutional* as opposed to those that were *individual*, and also regimes that were *civilian* as opposed to those that were *military*. Both these comparisons were undertaken. The countries that emerged from civil war – Sierra Leone, Liberia and Guinea-Bissau – were excluded from this analysis, leaving a total of 56 countries.

4.4.1 Civilian versus Military Authoritarian regimes

Overall, there were few differences between the two types of regimes. Those that were governed by one or other *Civilian* regimes were significantly more likely to lead to a *state-created* transition,¹⁴ but otherwise both forms showed a near-equal spread of the other forms of transition.

¹³ Pre vs. Post-Transitional Mechanisms: *Free*; 1.59 vs. 3.24 ($p=0.0001$); *Not Free*; 1.71 vs. 2.84 ($p=0.01$)

¹⁴ Civilian vs. Military regimes: *State-creation*; χ^2 4.71 ($p=0.05$)

There were no differences in the frequency of pre-transitional justice mechanisms, with similar frequencies of the use of all mechanisms. There were two differences in the use of post-transitional justice mechanisms. One was significantly more frequent, the use of *Foreign Criminal Prosecutions* for *Military* regimes,¹⁵ whilst the other, *Vettings*, was approaching significance.¹⁶

Table 18: Comparison of Post-Transitional Justice Mechanisms (Civilian vs. Military Regimes)

	Civilian	Military
Amnesty	70%	82%
Truth Commission	26%	43%
Domestic Criminal Prosecutions	89%	93%
Civil Trials	7%	18%
Foreign criminal prosecutions	7%	32%
Reparations	30%	18%
Vettings	44%	21%
Customary justice	4%	11%

Finally there were no differences in the Freedom statuses between the two types of regime, with a near-equal distribution between those that were *Free*, *Partly Free*, and *Not Free*. Thus, the types of transition, and the use of transitional justice mechanisms did not seem related to the over democratic status of the two types of regime.

4.4.2 Institutional versus Individual Authoritarian regimes

The contrast between *Institutional* and *Individual* authoritarian regimes seemed to show more differences, presumably because the stakes in transition are likely to be considerably higher for an individual leader than for a collective leadership. However, it is interesting that *Individual* regimes were significantly more likely to be associated with *state-created* or *regime-led negotiated* transitions.¹⁷ As was the case with the *Civilian-Military* contrast, there were no differences in the frequencies of pre-transitional justice mechanisms, but a number of differences in the frequency of the use of transitional justice mechanisms in the post-transition period.

Table 19: Comparison of Post-Transitional Justice Mechanisms (Civilian vs. Military Regimes)

	Institutional	Individual
Amnesty	69%	89%
Truth Commission	31%	41%
Domestic Criminal Prosecutions	89%	100%
Civil Trials	0%	26%
Foreign criminal prosecutions	23%	19%
Reparations	23%	26%
Vettings	15%	52%
Customary justice	8%	7%

As can be seen in Table 19, there was a greater frequency of both *Civil Trials* and *Vettings* in the post-transition period for *Individual* authoritarian regimes.¹⁸ It is not immediately evident why these two mechanisms should be more frequent, but it is worth noting that the majority

¹⁵ Civilian vs. Military regimes: *Domestic Criminal Prosecutions*; χ^2 5.39 ($p=0.025$)

¹⁶ Civilian vs. Military regimes: *Vettings*; χ^2 3.38

¹⁷ Institutional vs. Individual: *State-creation*; χ^2 4.47 ($p=0.05$); *Negotiated regime-led*; χ^2 5.72 ($p=0.025$)

¹⁸ Institutional vs. Individual: *Civil Trials*; χ^2 7.96 ($p=0.001$); *Vettings*; χ^2 7.96 ($p=0.001$)

(65%) of these regimes were *Military-Individual* regimes. It is also evident that there were greater frequencies in the use of *Amnesties*, *Truth Commissions* and *Domestic Criminal Proceedings* in countries in transition from *Individual* authoritarian regimes.

As was found for the *Civilian-Military* contrast, the freedom status of these countries, 2006 to 2014, showed a similar distribution for both types of regime.

Finally, and for both sets of comparison, the use of transitional justice mechanisms, pre and post-transition, was examined.

Table 20: Transitional justice mechanisms compared; Pre and Post-transition

	Civilian	Military	Institutional	Individual
Pre-transition	1.9 (0.9)	1.8 (0.8)	2 (0.96)	1.7 (0.74)
Post-transition	2.8 (1.2)**	3.1 (1.4)***	2.6 (1.21)*	3.2 (1.5) ***

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As can be seen from Table 20, the increase in transitional justice mechanisms, from pre-transition to post-transition, was significant for all forms of regime, save that the effect was the least for regimes that were based in *civilian-institutional* forms. The largest difference, pre and post-transition, was for *military* and *individual* authoritarian regimes.

There was a very significant difference between *Civilian* and *Military* regimes in the longevity of the former, generally lasting more than twice as long as the latter²⁰, but this is simply explained by the presence of former communist regimes – classified as authoritarian by Polity IV, but the same trend was observed for the contrast between *Institutional* as opposed to *Individual* types of regimes, albeit not as strong a trend.²¹

4.5 Conclusions on quantitative findings

As Olsen, Payne and Reiter (2010) point out, quantitative analysis of transitional justice can lead to new insights that are rarely available from the study of individual mechanisms, and the ITJDBP data is a considerable help here. The question at issue here was an examination of transitional justice mechanisms in a pre-transitional setting, in countries making the transition from authoritarian rule to democracy. Obviously an *implicit question here is whether the use of such mechanisms made any difference to the transition, and, relatedly, whether the use of such mechanisms, post-transition, also made any difference.*

Perhaps the first conclusion is perhaps not very comforting. There does not seem to be much change in the status of the countries included in this analysis: as was seen (Figure 1), countries have maintained their status over time, and whether a country was *Free*, *Partly Free*, or *Not Free* according to the Freedom House Democracy Index, the status of these countries has remained largely the same over the period 2006 to 2014. As many commentators have pointed out, democracy is under assault (Carothers. 2002; Diamond. 2008; Fukayama et al. 2014), and one evident lesson is that transitions are highly complex and very individual: we have learned that one shoe does not fit all; and that each country must chart a course suitable to its own context.

¹⁹ * p=0.05; **p=0.01; *** p=0.001

²⁰ *Civilian* vs. *Military*; (Mean, 32 years vs. 14 years); p=0.0001.

²¹ *Institutional* vs. *Individual*; (Mean, 18 years vs. 27 years); p=0.06).

This is equally true for transitional justice. As was seen, and well-described by Olsen *et al* (Olsen, Payne & Reiter. 2010), there is widespread use of transitional justice mechanisms from 1970 onwards, and, for the sample under consideration here. Amnesties and domestic criminal prosecutions dominate, but, as seen here, there are differences, as there are for all transitional justice mechanisms. All mechanisms increase significantly once a transition has taken place (Table 5), with a diminution in the use of amnesties, post-transition, and significant increases in all other mechanisms post-transition. This seems easy enough to understand and it is obvious that authoritarian regimes will have little interest in accountability while in power, and, furthermore, that amnesties are the frequent mechanism to ensure that there is protection for the authoritarian elite in the aftermath of transition.

A second finding of relevance for Zimbabwe was that there were no real differences between African countries and other countries in the world in the application of transitional justice mechanisms either pre or post-transition. Given that half (53%) of the African countries in this sample are still rated as *Not Free*, one might quickly conclude that transitional justice has had little effect on the development of subsequent democracy. However, *foreign criminal prosecutions* and *reparations* were slightly more frequent for African countries. For the former, and here there have been some very high profile (and contentious) prosecutions, this suggests that true accountability of the authoritarian elites may be difficult domestically, and here the dominance of *military-individual* regimes, the “*big man*” syndrome, should be noted.

For the latter, *reparations*, it is worth pondering the importance of compensation in African traditional justice systems, which is well-described in the various studies on transitional justice that have been carried out in Zimbabwe (RAU. 2009; HRF. 2011).

Given the predominance of *military-individual* regimes, and taking note of the characterisation of Zimbabwe as a *securocracy* (Mandaza. 2016), the analysis of transitions according to regime type was interesting. The comparison of civilian as opposed to military regime types did not reveal any interesting differences, save the increase in *foreign criminal prosecutions*, post-transition, and there were only two in Africa, in Benin and the Republic of the Congo. This again is an artefact of the data set in which Rwanda, Sierra Leone, Liberia, Chad, etc., all countries where there have been well-publicised trials of former leaders or notorious perpetrators.

There were more interesting differences when a contrast was made between authoritarian regimes controlled by individuals as opposed to those controlled by collectives, whether civilian or military. Here it was found that there were greater frequencies of *amnesties*, *truth commissions*, *domestic criminal prosecutions* and *vettings* in countries transitioning from individual-dominated regimes.

However, overall there was little to distinguish countries on the basis of regime type: all showed a range of transitional justice mechanisms in the pre-transition period, and for all there is a significant increase in the use of all transitional justice mechanisms in the post-transition period. Hence, it cannot be said that transitional justice mechanisms, either pre or post-transition, seem to have any effect upon whether a country becomes *Free*, and, furthermore, countries do not seem to easily move towards becoming free. This is probably not surprising and whether a country becomes fully democratic after authoritarian rule will most likely depend on many factors in addition to whether a country confronts the excesses of such rule. For example, as Lucian Way (2011) has pointed out about the 1989 transitions, democratisation in the Eastern-bloc countries seemed to depend on long-term structural factors such as the level of economic development and, importantly, the strength of ties in

those countries, Russia excepted, to the West. Neither of these factors is seen in the African countries in this sample. Additionally, the persistence of the ideology behind armed liberation struggle seems to be a factor inhibiting the progress to democracy (Way. 2011).

Thus, it seems fair to conclude that transitional justice mechanisms as a whole are possibly a *necessary* but not *sufficient* condition in the movement from authoritarian to democratic governance.

4.6 Qualitative Findings

Using the findings from the quantitative analysis and the literature, brief descriptions of each transitional justice mechanism and their use are provided in the sections that follow.

4.6.1 Amnesties

As was noted in the above analysis, and was well-described by Olsen *et al* (Olsen, Payne & Reiter. (2010), amnesty is by far the most common form of the transitional justice mechanisms applied across the world.

Generally, in transitional justice amnesties play two unrelated roles. As Stan and Nedelsky noted:

“On the one hand, amnesty may be understood as a legal mechanism providing redress to victims of repressive regimes and human rights violations by releasing them from prison, cancelling the charges brought against them, and even annulling their court sentences”, and, “On the other hand amnesties are more commonly understood as an instrument for granting immunity and/or pardon to perpetrators of crimes under repressive regimes” (2013:109).

Hence, amnesties in pre-transitional states are different especially from other accountability mechanisms such as truth enquiries, documentation and prosecutions that can be applied where the end to conflict is nowhere in sight. Some amnesties are a *sine qua non* (condition) that triggers transition and that enables political transition to happen. As a result most pre-transition states are tempted to dice amnesties to enable other transitional justice processes.

By way of illustration, successful pre-transition amnesties includes the famous amnesty in South Africa, *“resulting from a gentleman’s agreement between Nelson Mandela and de Klerk, later confirmed in the postamble of the interim constitution, not to prosecute those responsible for the crime against humanity of apartheid.”*(Schabas. 2012:180) Another apt example is Sierra Leone, in August 2003, with Charles Taylor agreed to leave power on condition of an amnesty and seeking asylum ending the bloody war.

But a caveat is important at this stage. Amnesties can also be abused or used as a means to frustrate accountability. Although amnesty serves the important transitional justice goal of reconciliation, it may clash with other goals such as adjudicating on retributive justice or truth seeking. Hence, granting amnesties is a transitional justice approach that should be carefully balanced against other transitional justice goals and accompanied by a range of other methods (for instance, truth commissions) that may address the many shortcomings of amnesties.

However, as accountability mechanisms, amnesties can be problematic and are often challenged. There is no consensus among academics on the validity of amnesties in

international law. The International Covenant on Civil and Political Rights (ICCPR) under Article 6(4) states:

“Anyone sentenced to death shall have the right to seek pardon or commutation of the sentence. Amnesty, pardon or commutation of the sentence of death may be granted in all cases.”

Similarly, Protocol II to the Geneva Conventions Article 6(5) 5 states:

“At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.”

Do they play a big role in pre transition states and bringing justice? It has been argued that pre-transition states should balance the quest for peace with the attainment of justice. An example is Sierra Leone cited above, where the amnesty was later rescinded and Charles Taylor was indicted at the Special Court for Sierra Leone in the Hague. Critics argue this was an error as it would set a bad precedent that amnesties do not work as a transitional justice tool:

For example, one of the most intractable situations in contemporary Africa is posed by Mugabe’s Zimbabwe. A Taylor-like solution, whereby the country’s ageing despot might be convinced to leave power in return for a promise he would escape prosecution, is an attractive option and deserves consideration. But Mugabe is an observant man, and he has already noted publicly how the pledge to Taylor was ultimately rescinded. What was a useful option in 2003, when it was taken up by Taylor has become a trap that Mugabe will probably avoid at all costs (Schabas 2012:197)

What can be deduced from the above discussion and the database is that amnesties form the foundation of pre-transitional justice. As they allow the hardliners against change to step aside and pave way for other accountability mechanisms such as truth commissions, institutional reforms, reparations and even prosecutions for international crimes.

4.6.2 Truth Commissions

Truth Commissions were used in only 9% of countries, and less frequently in Africa than in other parts of the world.

In order to fully appreciate the timing of truth enquiries and their significance in pre transitional states, it is important to define the terms from the onset. The most common definition of truth commission was put forward by Hayner (2010), who described a truth commission as having the following characteristics:

(1) Truth Commission focus on the past; (2) they investigate a pattern of abuses over a period of time, rather than a specific event; (3) a Truth Commission is a temporary body, typically in operation for six months to two years, and completing its work with the submission of a report; (4) these Commissions are officially sanctioned, authorized, or empowered by the state. (Hayner. p14).

Whereas truth commissions are officially sanctioned by States, Unofficial Truth Projects (UTPs) are not, and they are defined as:

non-governmental initiatives geared toward revealing the truth about past crimes and serve as a component of a broader strategy of accountability and justice. To do so, they are self-consciously or coincidentally resemble official truth commissions. UTPs are rooted in civil society and hosted and driven by human rights organisations, victim groups, universities, and other societal organisations. When truth commissions are not feasible because of political constraints, are ineffective, or politically compromised, or human rights activists and their allies in government choose not to create them, UTPs may represent viable alternative strategies and can be seen as more legitimate interlocutors for the task of confronting the past. (Stan and Nedelsky, 2013:106)

UTPs can resemble official truth commissions, as, for instance, the Legal Resources Foundation (LRF) and the Catholic Commission for Peace and Justice (CCJP) report, *Breaking the Silence*, which is fully discussed in the next chapter. UTPs are normally conducive in those scenarios where ‘*there is insufficient political will or governmental capacity to establish an effective inquiry, civil society, local governments, and other institutions have stepped in to create innovative, truth commission-like inquiries*’ (Stan and Nedelsky. 2013:106). UTPs are instrumental in “*mobilizing victims and survivors, documenting abuse, and issuing formal findings, these inquiries have often generated public support and catalyzed official action, leading to stronger official inquiries and other measures*” (Gonzalez and Varney. 2013:10).

The only example in the ITJDBP database is the Algerian Ad Hoc Inquiry Commission in Charge of the Question of Disappearances, which was empowered to identify, investigate and determine the fate of people who were disappeared between 1992 and 1999, and also to draft a reparations plan for the families of the disappeared and assisted victims in attaining rehabilitation and compensation. In 1979, Zambia established a special international commission of inquiry chaired by Reuben Kamanga. However, it was only centered on one mission goal; to establish the death of a Zimbabwean freedom fighter who was exiled in Zambia, Herbert Chitepo, and hence the name, the ‘*Chitepo Commission*’. By way of contrast, the Uganda commission of 1974, *The Commission of Inquiry into the Disappearances of People in Uganda*, was to investigate and report on disappearances in the first years of the Amin government from January 25, 1971 until 1974. The four commissioners were targeted by the state in reprisal for their work.

By far, most truth commissions were created as post-transitional justice mechanisms and processes. This is attributed to the fact that, at the end of many conflicts, there is great pressure for accountability. Moreover, there is frequently pressure from the international community to adopt accountability mechanisms for a clean break with the past. This is the case in those countries like Algeria, whilst in others like Zambia and Uganda the truth commissions are pre and post-transition. In others, such as Central African Republic, Ghana, Kenya, Liberia, Nigeria, and Sierra Leone these were all post-transition commissions. The best known of these of course is the South African Truth and Reconciliation Commission (TRC), and the vast majority of the literature on truth commissions focuses upon South Africa, as can be seen in the *International Internet Bibliography on Transitional Justice*.

However, it should be pointed out that “*truth commissions are most effective when integrated in a comprehensive transitional justice strategy that includes reparation policies, criminal prosecutions, and institutional reforms*” (Gonzalez & Varney. 2013, 9). Thus in pre-transitional states, the focus of the present discussion, by delivering clear findings and

compelling recommendations, truth commissions could have assisted to enrich policy and create political and moral momentum for these initiatives.

That said, truth commissions are not necessarily indispensable. To be illustrative a number of countries of relatively peaceful transitions to democracy in which the past has not been systematically examined have been provided in the database. In places like Cote d'Ivoire, Ethiopia, Guinea-Bissau, Madagascar, Mozambique, Mali, Malawi and Senegal, where there appears to be a consensus that the past should be left alone, that sentiment should be respected.

Moreover, in spite of the growing prevalence of the truth commission phenomenon, there is still no understanding of its effectiveness, whether in pre or post-transitional settings. It is not clear whether truth commissions have effects or that there are other factors causing an impact. Evidence is often anecdotal. Many of the existing comparative studies focus on a few prominent cases, such as South Africa. Most of the lessons learned from truth commission experiences have thus been drawn from only a small number of cases. Having said that, truth commissions are intuitively appealing, and they have many supporters in global civil society. The emerging trend in international human rights law is increasingly recognized as containing an obligation to deal with past gross human rights abuses. As a result, the pressure to examine a legacy of human rights abuses is likely to remain strong.

While the UTCs are a major accomplishment, it does not necessary translate to change. The best way to allow the momentum of the UTCs into real transitional justice mechanisms, such as an official truth commission, is to raise the standards of data collection and to continue to research and compile evidence that can be used in future years when the country or its leaders are more open to accountability mechanisms.

Judicial Proceedings

Judicial proceedings can be initiated either by individuals, governments themselves or by human rights groups acting on behalf of victims. Court trials consist of foreign criminal prosecutions, civil trials and domestic criminal prosecutions.

“As a transitional method, the use of court trials for redress involves the legal adjudication of acts committed during the past conflicts or atrocities. Court trials seek to bring the perpetrators to account and provide redress to the victims by officially recognizing their harms, establishing the truth and, in some cases, providing reparations to them. This transitional justice method functions through the charging of an accused, the prosecution and defence team bringing evidence as to the role and actions of the accused in relation to the crimes charged against him or her, and a judge or panel of judges rendering judgment as to his or her guilt or innocence.” (Stan and Nedelsky. 2013:106)

As was seen in the quantitative analysis, each of these remedies was used in differing amounts in both the pre and post-transitional periods. However, the frequency of all three increased significantly, unsurprisingly, in the post-transitional period. It was also observed that the frequencies of each varied considerably from each other, with domestic criminal prosecutions being far and away the most commonly applied remedy, and foreign criminal prosecutions being more common than civil trials. The infrequency of these last, civil trials is of particular interest in the Zimbabwean situation.

4.6.3 Domestic Criminal Prosecutions

These are prosecutions that are conducted domestically within the country where the human rights violations were committed. A number of international human rights and humanitarian law treaties explicitly require States parties to ensure punishment of specific offences either by instituting criminal proceedings against suspected perpetrators in their own courts or by sending the suspects to another appropriate jurisdiction for prosecution. (NTJWG: 2015). The investigation and prosecution of major human rights abuses is a necessary component of States' obligations to guarantee and protect fundamental rights. This goes a long way in combating impunity and strengthening the rule of law. Domestic prosecutions involve efforts by the State to bring to justice those suspected of involvement in widespread human rights violations carried out in the context of armed conflict, civil unrest, or state sponsored politically-motivated violence.

From the ITJDBP it can be seen most African countries made use of domestic criminal prosecutions during their pre and post-transition periods for crimes ranging from extra-judicial killings, rape, kidnappings torture, among other human rights crimes. Kenya, for example, had the highest number of domestic trials (79) in its pre- transitional justice period, but only 14 during the post transition period. Ethiopia, on the other had the highest number of trials (30) in its post-transition period and only 13 during the pre- transition.

However, some of the prosecutions had nothing to do with transitional justice; for example, the trial of 27 security force members in Benin, 1994, for plotting to overthrow President Soglo in May 1992; the trial of 15 people for planning to overthrow the government of Ghana in 1986; the trial of more than 1000 Kenyan Air Force officers for attempting to overthrow the government of Kenya in 1982; the trial of five officers of former dictator Moussa Traore in 1993 for attempting to overthrow the Mali democratic regime in 1991; and other cases of authoritarian regimes prosecuting members of the military for an uprising/coup.

Moreover, very few criminal prosecutions were against civilian members, demonstrating that prosecutions were either merely a response to public pressure on a particularly egregious act that gained more widespread attention within the population, or an act of an authoritarian regime is policing itself internally (Reiter& Fishman 2016)

In spite of the important role of domestic criminal prosecutions in transitional justice, Zimbabwe just like any other country emerging from a violent conflict lacks the political will to investigate and prosecute human rights crimes. This is partly due to the fact that the judiciary is compromised, and also that most of the perpetrators of human rights violations are still in positions of authority.

4.6.4 Civil trials

A civil trial is a lawsuit made by a plaintiff for enforcement of civil remedies in the form of compensation or damages. In civil trials, individuals can claim damages either from the State or individuals. Although globally many countries avail civil redress for human rights abuses, these have not been widely used in most African countries that underwent periods of gross human rights violations, both before and after transition periods as shown in the Transitional Data Base Project (also Sections 4.1 to 4.4 above). This could be due to the fact that the process of civil litigation is cumbersome and protracted, especially when the lawsuit is against the State.

Although civil trials to address past human rights violations have not been very popular in Africa, in Zimbabwe, NGOs such as the Human Rights Forum, ZLHR, LRF, and ZWLA have assisted victims of human rights violations through civil litigation with varying degrees of success. Several judgments have however not been honoured, especially those against the State. In cases involving non-state actors, most of the defendants have been either too poor to pay the damages or are politically connected to an extent that the matters never reach the trial stages in court. In cases handled by the Human Rights Forum where execution has been granted to settle judgments, some of the defendants were not found in possession of valuable property to settle the judgment or compensate for the harm suffered.

Access to justice in Zimbabwe is a major challenge for ordinary Zimbabweans. The justice system in Zimbabwe is very complicated for an ordinary person without legal assistance. In seeking civil redress, victims face legal challenges with legislation such as the Prescription Act [Chapter 8: 11], which prescribes a period of three years within which a case against a private individual can be brought before the courts. This piece of legislation inhibits most victims from claiming damages and compensation for harm suffered during the different episodes of violence. Violence in Zimbabwe was mainly concentrated in rural areas where information and legal assistance was scarce. In addition limited mobility of victims and fear of further victimisation inhibited victims' access to legal assistance. By the time the violence subsided most cases had prescribed, nevertheless Zimbabwe has an exceptionally well-documented history of human rights violations, and this will be of material interest in the operations of the National Peace and Reconciliation Commission when finally established and operational.

The State Liabilities Act [Chapter 8: 14], which states that State property is not executable, makes it difficult to enforce judgements. Additionally the Police Act [Chapter 11: 10], which prescribes eight months as the time within which victims of police crimes should bring their claims, protects police officers, who were the major perpetrators as state agents. However, it is possible to bring civil actions against the perpetrator if he or she can be identified, and this has been a well-used strategy to date in Zimbabwe (see Section 4.7.4)

4.6.5 Foreign Criminal Prosecutions

Foreign criminal prosecutions refer to prosecutions that occur outside one's jurisdiction. Under universal jurisdiction, states that are party to the UN Charter and have domesticated²² this international legislation may prosecute and try the core international crimes: crimes against humanity, genocide, torture, slavery, piracy and war crimes. As was seen in Section 4, foreign criminal prosecutions were not common, but increased in the post-transition period, and were frequently used in respect of African countries and even more so in respect of countries that had military regimes.

Under the principle of Universal Jurisdiction, a foreign state can claim criminal jurisdiction over an accused person regardless of where the alleged crime was committed, and regardless of the accused's nationality, country of residence, or any other relation with the prosecuting

²² Amnesty International reports that, in total, 163 of the 193 UN Member States "can exercise universal jurisdiction over one or more crimes under international law, either as such crimes or as ordinary crimes under national law." See Amnesty International, [*Universal Jurisdiction: A Preliminary Survey of Legislation Around the World – 2012 Update*](#) (2012), p. 2

entity. In general, the prosecuting state should not have any territorial, personal, national interest, or link to the crime in question when it was committed. (Langer. 2011).

Advocates for universal jurisdiction argue that it is fundamental to achieving the following:

- bringing justice to victims;
- deterring state or quasi state officials from committing international crimes;
- sending a powerful signal to potential human rights abusers that they cannot commit crimes with impunity and then spend their remaining years living comfortably in another country ensuring that other countries do not become safe havens for war criminals;
- and, establishing a minimum rule of law by substantially closing the impunity gap for crimes against humanity (Human Rights Watch. 2014)

On the other hand, critics of universal jurisdiction assert that it is an unnecessary interference with internal solutions to mass atrocities and a disruption of international relations (Coombes. 2011). It is often inordinately expensive as well.

Some authoritarian leaders were tried for crimes against humanity in foreign countries. These criminal prosecutions were always carried out during the post-transition period and were meant to deal with gross human rights violations perpetrated during the pre-transition period so as to ensure deterrence of similar crimes in the future. The following are some cases that were prosecuted in other States.

- In 2011, two Algerian refugees residing in Switzerland brought a case against former Algerian Defence Minister Khaled Nezzar for war crimes committed during the Algerian internal armed conflict (1992 – 1999)²³. The former Defence Minister was accused of enforced disappearances, extrajudicial executions and acts of torture committed during the Algerian civil war. In a landmark ruling in 2012, the Swiss Federal Criminal Court ruled that the Minister Khaled Nezzar was not entitled to immunity before the Swiss courts after he had been arrested in Switzerland in 2011 (Giustiniani. 2013). Nezzar was arguing that he was entitled to jurisdictional immunity for crimes committed during the period he was in office (1992 – 1994) (Maroonian, 2015).
- In July 2004, Jean Francois Ndengue, the head of the Congolese Police in 1999, was indicted in France for torture, forced disappearances and for crimes against humanity, perpetrated against Congolese nationals in the case known as the “Disappeared of the Beach” (Refugee Rights News. 2009). According to the Transitional Data Base Project, in 2004, a case was brought before the Denmark courts of a Ugandan refugee living in Denmark for crimes committed in Uganda in 1995.

²³ The Algerian civil war began in 1992 when the Algerian military orchestrated a coup d'état to prevent political party, the Islamic Salvation Front (FIS) from winning the country's first democratic elections. The official estimate is that 200,000 Algerians were killed and approximately 15,000 forcibly disappeared. <https://faculty.virginia.edu/j.sw/uploads/research/Schulhofer-Wohl%202007%20Algeria.pdf>

Under International criminal law, prosecutions can also be situated at the international level through the use of ad hoc tribunals, hybrid courts, and the International Criminal Court (the ICC). The ICC, because of the principle of complementarity, is a court of last resort for countries that are unable or unwilling to fulfill their obligation to investigate and address legacies of massive human rights violations within their jurisdiction. The Court has jurisdiction over individuals responsible for genocide, war crimes and crimes against humanity committed since July 1, 2002²⁴, and is one of the most powerful human rights courts created to deter perpetrators of human rights violations, particularly those who benefit from the laxity of or manipulate legal systems in their own countries, to avoid prosecution. Since inception the ICC has indicted individuals from Uganda, DRC, Central African Republic, Sudan and Kenya and is also investigating cases from Libya, Cote d'Ivoire and Mali (Reeler & Mue. 2004). Zimbabwe has signed but not ratified this statute.²⁵

There are three ways in which a situation can be referred to the ICC:

- A state party to the Rome Statute may refer its own situation to the ICC, as Uganda, the Democratic Republic of the Congo (DRC), and the Central African Republic (CAR) and Mali have done.
- The UN Security Council may refer a case to the ICC, as it did in the case of Darfur, Sudan and Libya. With Sudan for instance, the legality of the referral has been challenged, as Sudan is not party to the ICC's Rome Statute.
- The Office of the Prosecutor may open a case, as it did in Kenya, although the prosecutor is required to obtain authorization from the court's Pre-Trial Chamber before commencing investigations and must be able to show that he or she has sufficient grounds to pursue such investigations.

Currently all of the cases that the ICC is investigating and prosecuting concern crimes allegedly committed in African countries. This has raised questions as to whether this is an example of the selectivity of international criminal law (Report of the AU Panel of the Wise. 2013).

There are currently three cases relating to Côte d'Ivoire before the ICC, with two people in detention awaiting trial: former President Laurent Gbagbo and former Youth Minister Charles Blé-Goudé. They were both transferred to the Court by Côte d'Ivoire. On November 30, 2011, the former president, Gbagbo, was transferred to the ICC where he was charged with four crimes against humanity (murder, rape, other inhumane acts – attempted murder, and persecution) in connection with post-election violence in Côte d'Ivoire in 2010 and 2011. In 2012, another case was brought to the ICC against Simone Gbagbo wife of former President Laurent Gbagbo for alleged crimes against humanity committed in the context of post-electoral violence between 16 December 2010 and 12 April 2011.

²⁴ The ICC was established in 2002 by the Rome Statute

²⁵ Here it should be noted that the 2013 Constitution in Zimbabwe requires the domestication of all international treaties and covenants

Prior to the establishment of a permanent international criminal court, in November 1994, the UN created the International Criminal Tribunal for Rwanda (ICTR) whose mandate was to prosecute those responsible for the genocide and other serious violations of international humanitarian law. Since its inception, the ICTR has indicted ninety-two persons and managed to arrest seventy-eight of them. By May 2009, forty-four cases had been completed and twenty-four were ongoing (The African Union Series. 2013).

Zimbabwe is not a party to the Rome Statute of ICC, and therefore the chances of international prosecutions of perpetrators of gross human rights violations before the ICC are slim unless the United Nations Security Council makes referrals to the Court. This is also highly unlikely given the possibility of veto power by States in the Security Council such as Russia and China.

4.6.6 Vetting

Vetting refers to ‘*examining personnel backgrounds during restructuring or recruitment to eliminate from public service or otherwise sanction abusive and corrupt officials.*’ (ICTJ 2014). It belongs to the group of institutional reforms explained below:

“Institutional reform is the process of reviewing and restructuring state institutions so that they respect human rights, preserve the rule of law, and are accountable to their constituents. By incorporating a transitional justice element, reform efforts can both provide accountability for individual perpetrators and disable the structures that allowed abuses to occur.”
(ICTJ)

As was seen earlier (Section 4.1 to 4.4), vetting is more commonly applied, than some other mechanisms, and more frequently during post-transition. There is some variation between regime types, with vetting more common in countries transitioning from civilian rather than military regimes, but also, paradoxically, more common in individualized as opposed to collectively-governed authoritarian regimes. This paradox deserves more research.

Conventional wisdom argues vetting is antecedent to a political transition, such as a regime change, or a paradigm shift in political setup from civil strife to liberal democracy, or end of conflict under authoritarian rule, as the case maybe. However, as with other institutional reform mechanisms in post-transition periods, such as structural reforms, transformation of legal systems, creation of oversight bodies, demobilization, disarmament and reintegration and education programs, vetting is possible in pre-transitional states and early transitional stages.

It is difficult to describe the role of vetting in pre-transitional states. Mainstream literature and notes from practitioner’s analyses of the possible aims and justification for vetting are largely in isolation from other transitional justice measures, such as criminal prosecutions, truth telling, reparations for victims, and other forms of institutional reform. In trying to situate vetting in a transitional context, it is important to start with some caveats.

First, there have been plenty of transitions in which no formal vetting procedures, not even of rule of law institutions, have been established (for example, most of the countries studied in the previous chapter). Many countries have employed very modest and sector-specific vetting for example, in South Africa vetting was only limited to the security sector. Thus, it is important to note that ‘we should not overstate the importance of vetting in transitions.’ (De Greiff, 2008 527)

Second, the effectiveness of vetting heavily depends on other transitional justice measures, whether different measures are deliberately designed to relate to one another, and also on how they are sequenced. This in turn, poses challenges to measure with accuracy and certainty the success of vetting as it hinges on many factors that are irreducibly contingent and contextual. (De Greiff, 2008 527)

However, scholars and practitioners have conceded that “*vetting may also facilitate the broader sorts of institutional reform measures that are often called for in the after-math of conflict and in transitions to democracy*” (De Greiff, 2008 530). For instance, Mayer Rieckh states that in the early stages of transitional justice, vetting enhances the efficiency of transitional justice mechanisms such as prosecutions, truth enquiries among others. In his own words:

The point is that the contribution that vetting can make to a transition goes beyond removing obstacles that may lie in the way of putting transitional justice measures in place. Vetting can contribute positively to the operation of institutions that are rarely created de novo or totally and thoroughly transformed. (De Greiff and Mayer Rieckh (eds.) 2007:480)

Vetting may also contribute to the creation of a wholly new institutional and national culture.

4.6.7 Reparations

In transitional justice reparations often comes last, sometimes years after other mechanisms such as trials, truth commissions and institutional reforms,²⁶ and mainly because “*reparations usually come at the end after a long drawn out process of assigning blame and establishing lines of accountability*” (Mendez 2012: 1280). In South Africa, the reparations are not yet completed (still regarded as ‘unfinished business of the TRC), Germany only recently finished paying reparations for the Second World War that ended in 1945, and Japan has only admitted to pay reparations to the so-called *comfort* women.

As was seen in the quantitative analysis, reparations increased in the post-transition period and were markedly more common in Africa in comparison with the other countries in the sample. They were also more common in countries transitioning from civilian as opposed to military rule.

Reparations can be classified in four types. Firstly, reparations can take the form of concrete benefits, such as cash payments, social welfare entitlements, or guaranteed access to education and employment. Secondly, reparations can also be more ethereal, including apologies, memorials, and efforts to achieve social, cultural, and institutional reform. Thirdly, beyond form, reparations also can be categorized according to who benefits and who contributes. For example, reparations can be directed either toward specific individuals or a group. Finally, reparations can be classified according to contribute may be selected individuals, groups, or states.

It is not possible to generalize the effects of reparations in transitional states because only in exceptional cases reparations can be a feature of pre-transitional states. In the countries

²⁶ Despite the nature that reparations can be designed to be life long e.g compensation for victims with permanent disability , but their dispensation can also take longtime after recommendations by the TRC.

studied for the purposes of this research, with the exception of Senegal, all the countries carried reparations in post transition. Thus, the idea of reparations in pre-transitional states, which would bear the onus for human rights violations on the incumbent, is unthinkable.

On the contrary, there seems to be some anecdotal evidence which suggests that *“If a state will be called upon to pay reparations post-transition, then that serves as motivation to delay, stop, or constrain transitional movements and reforms”* (Gray, 2010.1065). An apt example is Foday Sankoh of Sierra Leone’s efforts to delay the signing of the Lomé Peace Accords to end the conflict. This was a bid to delay the transitional processes such as ending impunity, acknowledging wrongdoing and paying reparations (Gray, 2010. 1092).

The role of reparations in post-transitional situations is widely recognized in transitional justice literature. On the other hand, while these frameworks have been employed in places outside the African continent, a study of the African countries, as illustrated in the database results, confirms that *“reparations are only advisable in the transitional justice context after a sufficient period of repose during which time the legal and social changes attending transition have become well established”* (Gray, 2010. 1080).

4.6.8 Customary Justice Practices

Following decades of a violent past, many African countries have resorted to the use of customary mechanisms to seek redress for violence perpetrated, not only by state agents, but also by known civilians, from within communities (Benyera. 2013). Customary justice, also referred to as ‘traditional’, ‘informal’, ‘community based’, ‘grass roots’, ‘indigenous’ or ‘local’ justice is usually practiced without the involvement of the state (Allen & Macdonald 2013). Customary justice mechanisms complement formal processes such as court processes and the work of statutory institutions such as Truth Commissions. However, unlike formal processes that are perpetrator-oriented, customary justice give the victims the full attention they deserve in order to be healed of the harm they suffered. (Benyera.2013) Desmond Tutu²⁷ contends that the African view of justice is aimed at:

“The healing of breaches, the redressing of imbalances, the restoration of broken relationships. This kind of justice seeks to rehabilitate both the victim and the perpetrator, who should be given the opportunity to be reintegrated into the community he or she has injured by his or her offence” (Tutu.1999).

Most traditions have some form of restitution, but Ubuntu (and shalom) have the additional sense of putting things back into equilibrium that is needed for community health and resilience. However, as was seen in the database analysis, few seem to have been documented, and the ITJDBP data set only identifies six such processes overall, with one in Africa. This reflects not the actual number of customary justice practices in Africa, but is an artefact of taking a cut-off date of 1988, which excludes the processes in Uganda, as well as Rwanda and Burundi which were not included in the data set.

African countries have diverse and specific traditional mechanisms for justice, healing and

²⁷ Archbishop (ret) Desmond Tutu was the Chairperson of the South African Truth and Reconciliation Commission.

reconciliation. Most of these mechanisms are not documented as some occur at family and or community level on a day-to-day basis. Although these mechanisms differ from context to context, they exhibit common elements such as the practice of rituals and ceremonies as well as engagement structures where perpetrators and victims of human rights violations meet and dialogue.

Traditional justice methods take various forms such as the well-known *Gacaca* courts in Rwanda. This is a traditional community conflict resolution system that was used to investigate and resolve cases of individuals implicated in the genocide of 1994 (Mutisi. 2011). The Gacaca Courts came in as a response to the criticisms of the ICTR processes which were viewed as “too slow, too expensive and too far removed from Rwanda” (Clark. 2009), and, additionally, was very slow in getting off the ground.

In Northern Uganda, the Acholi people used a system known as *mato oput*, which includes clan and family. The practice was centered on reconciliation where the perpetrator acknowledges wrongdoing, and compensates the victim. Following the resolution of the dispute, parties to the dispute were to share the bitter *Oput* drink symbolizing the end of bitterness (Majakanja. 2010).

Other notable examples include the *Fambul Tok* (Family Talk) which was used in Sierra Leone to promote reconciliation by bringing together victims and perpetrators to speak about their experiences of the civil war. It draws on the age old traditions of confession, apology and forgiveness (Reeler & Mue.2004). In Mozambique, ordinary people conducted the *magamba* spirit where traditional healers conducted reintegration rituals for ex-soldiers (Igreja, & Dias-Lambranca. 2008). In Burundi, for example, the National Council of *Bashingantahe* was constitutionally created to mediate inter-ethnic massacres and violence that occurred since 1993.²⁸

Customary justice mechanisms if administered effectively can “*re-establish and produce trust, a value lacking in societies divided by violence*” (Bianca De Bortoli 2014). Furthermore, they are less expensive, more accessible, more in touch with community values and easier to understand than their counterpart formal systems due to their use of indigenous languages (Allen. 2013).

Traditional justice is intended to restore broken relationships in communities and prevent the recurrence of violence. As such it can be used to supplement the more formal transitional justice mechanisms. From the brief case studies above, African traditional justice mechanisms exhibit the following attributes:

- focus is on reconciliation;
- healing the wounds of victims and survivors and restoring social harmony;

²⁸http://www.idea.int/publications/traditional_justice/upload/Traditional_Justice_and_Reconciliation_after_Violent_Conflict.pdf

- emphasis on restorative penalties;
- viewing the problem as communal where collective values were violated as opposed to conflict between individuals;
- enforcement of decisions secured through social pressure;
- no recourse to professional legal representation;
- decisions are confirmed through rituals aimed at reintegration as opposed to written orders;
- the rules of evidence and procedure are flexible;
- rituals, rites and symbols are used aiming to consolidate peace and the restoration of order;
- traditional arbitrators are appointed from within the community on the basis of status or lineage;
- and, there is a high degree of public participation (Igreja et al. 2008).

4.7 Comparison with Zimbabwe

So how does Zimbabwe compare with the rest of the world and Africa in particular? In making any kind of comparison it is necessary to point out that Zimbabwe has had one major transition already; that from colonial settler rule in 1980, and this followed a very bitter and violent civil war. The regime in place in 1980 was *civilian-institutional* in a sense, but was also a renegade regime after 1965 and the Unilateral Declaration of Independence. Colonial rule had lasted nearly 100 years, but the illegal Smith regime only 25 years. The current regime has been in power since 1980, and materially in power, notwithstanding the short five years of the Inclusive Government under the Global Political Agreement (GPA) of 2008. It can be argued that the GPA represented yet another transition, but many would argue not, and see this more in the nature of a peace treaty to create a transition. It might also be argued that the Unity Accord of 1987 was also a transition, but again some would argue that this was merely a peace accord leading to a government of national unity of some kind.

The point here is to suggest that, whilst 1980 can be clearly argued to be a transition, the other points in time do not strongly support the notion of any transition as the ZANU PF party has remained the majority power in all these political accommodations, and remains in power today. Hence it seems fair to conclude that Zimbabwe is in a pre-transitional state currently.

Additionally, classifying the current regime according to the typology used in the analysis above is also tricky. Is the Zimbabwe regime *civilian-institutional*, *civilian-individual*, or *military-institutional*? It seems that all three forms co-exist, a state that has been characterized as a *securocracy* (Mandaza. 2016). Whilst all the forms of a *civilian-institutional* state exist, it is evident that the President wields extraordinary power, but power granted within a *civilian-institutional* framework, with the powers granted under a constitution. It is also evident that the military also wield enormous power and influence, but it is often unclear whether this at their initiative or as proxy for the Executive. However, this may matter little for considering human rights and transitional justice as there is little dispute that the state is authoritarian in all material ways.

So, in examining transitional justice in Zimbabwe, this section will deal with the period since 1980, and accept that there were a number of transitional justice initiatives in the period prior to this, as indicated in Section 1, but will not deal with these. There has been brief reference

to a number of transitional justice processes and mechanisms in the previous sections, but here we will deal with such processes and mechanisms in greater detail and their application within the Zimbabwean context in the period of time under present review.

4.7.1 Amnesties

Zimbabwe has a history of the use of amnesties. The transition from settler rule was marked by formal amnesty, granted firstly by the British government when it assumed power over the country in 1979,²⁹ and this was subsequently ratified through new amnesty by the independent Zimbabwe government.³⁰ These amnesties were celebrated as part of the reconciliation process initiated by Prime Minister, Robert Mugabe, and were widely lauded internally and externally. In truth there was a logic to these amnesties as all sides in the bitter civil war had committed serious gross human rights violations, and it was a *sine qua non* for peace that there would be no retribution.

However, the reconciliation process lasted a mere two years before there was extreme violence in the dealing with a dissident threat in the southern half of the country again an amnesty was passed to end the Gukurahundi episode.³¹ Again, this was touted as a process of reconciliation, but this was disingenuous this time as a mere handful of dissidents qualified for amnesty whilst extremely large number of security personnel, intelligence operative and political party members were implicated in gross human rights violations (CCJP & LRF. 1997). Thus, this amnesty is a formal disguise for impunity for what many commentators have described a crime against humanity and or genocide.

The 1997 process has set the trend for future episodes of gross human rights violations. Following the violent elections in 2000, the President, using Presidential Powers, passed an amnesty for all violations that took place during the elections, excluding only murder, rape and crimes involving fraud.³² This was repeated for the violent elections in 2008.³³ This gave immunity from prosecution to all that were convicted of torture and abductions, again excluding murder, rape and fraud. In addition to these, there have a number of Presidential Pardons that have excused serious human rights violations, but some have had the effect of releasing ordinary criminals or releasing prisoners with life threatening or terminal illnesses.

Overall, amnesty, apart from the necessity to end a civil war, has been used repeatedly as a device to excuse gross human rights violations, and, in particular, to obviate scrutiny of the state's involvement. It should also be pointed out that this has been complimented by the burying of crucial commissions of inquiry, such as the Chihambakwe Commission report on the violations during Gukurahundi. Thus, as Human Rights Watch and others have pointed out, Zimbabwe will remain bedeviled by repetitive cycles of violence and impunity until the problem of impunity is addressed (HRW. 2011; Reeler. 2000).

²⁹ Ordinance 3/79 (date of commencement, 21 December 1979), and Ordinance 12/80 (date of commencement, 21 March 1980).

³⁰ Amnesty Act (Chapter 9:02) and Amnesty (General Pardon) Act (Chapter 9:03) respectively.

³¹ Clemency Order No. 1 of April 18, 1988,

³² Clemency Order No. 1 of 2000.

³³ Clemency Order No. 1 of 2008, issued in June 2008.

4.7.2 Truth Commissions

There has been no truth commission process in Zimbabwe, but there have been a number of conferences and symposia on the issue of transitional justice. Allied to these has been some of the most extensive documentation of the gross human rights violations in the post-independent period. Thus, the first of the Joinet Principles, the *Right to Know*, has been extensively propagated by Zimbabwean civil society.

As illustrations of the extensiveness of this documentation, several examples can be given. In analysis of the violence in five selected southern African countries – Angola, Mozambique, Namibia, South Africa and Zimbabwe – Zimbabwe was shown to be the most violent of the five countries, especially during elections (RAU. 2016 (a)), but also that, in contrast to the other four countries, where most reporting emanated from the press, 75% of all available reports between 1997 and 2014 came from civil society organisations (RAU. 2016 (b)). Earlier, an analysis of human rights reporting on Zimbabwe by the Redress Trust in 2005 showed a four-fold increase in the number of reports since 2000, with reports from this period comprising 33% of all reports issued on Zimbabwe since 1975 (Redress. 2005). These are just two examples of the enormous outpouring of reports on human rights violations since the late 1990s, and hence it can be claimed that Zimbabwean civil society has more than adequately filled the gap that might have been occupied by a formal truth telling process.

This claim has been substantially enhanced through the many public meetings on the issue of transitional justice in the past decade or so. The large meetings on transitional justice were given impetus by the 2003 Symposium held in Johannesburg (Themba leSizwe. 2004), which provided an excellent overview of the gross human rights violations to that point in time and laid out the mandate that has guided subsequent meetings, as well as a considerable amount of research. In pursuit of that mandate, the Zimbabwe Human Rights NGO Forum has held two international conferences on transitional justice, carried out nation-wide surveys on ordinary citizens' views of transitional justice, and recently initiated the setting up of a National Transitional Justice Working Group (NTJWG). Composed of nine experts, and endorsed by 46 civil society organisations, the NTJWG is a timely initiative ahead of the establishment of the National Peace and Reconciliation Commission (NPRC). The NTJWG has already laid out guiding principles for any transitional justice process (NTJWG. 2015).

The NPRC is one of the independent commissions established under the Constitution amended in 2013, and whilst its terms of reference are yet to be legislated, its capacity to undertake transitional justice activities seem reasonably well-stated in Part 6, Section 252 of the Constitution. Given that the NPRC is time-limited, and that there has been unacceptable delay in establishing and empowering the Commission, there can be cause for concern about its final efficacy. However, there remains the possibility of a formal truth commission process taking place, but this possibility may even be in advance of an actual transition as things stand currently. Here the NTJWG is an important initiative that will provide pressure on the NPRC and may well continue beyond the life of the NPRC if this latter initiative proves inadequate.

It seems fair to conclude, therefore, that whilst an official truth commission has yet to operate, and may never satisfactorily operate, truth has not gone missing in Zimbabwe through the efforts of an energetic and courageous civil society.

4.7.3 Domestic Criminal Prosecutions

Domestic criminal prosecutions were seen to be a common feature of many transitional justice processes, both pre and post-transition, although in the pre-transitional period these were frequently prosecutions of the opponents of the authoritarian regime rather than human rights violators. This was obviously different post-transition, and the ITJDBP details enormous numbers of such prosecutions: for the 59 countries, there was total of 1,765 such prosecutions, with an average of 30 per country, as opposed to 467, and an average of 7 per country, in the pre-transitional period.

Zimbabwe has an enviable record for prosecuting ordinary criminals, even an over-zealous record of creating a very large number of dubious crimes requiring prosecution, it has not seen this translate into an assiduous policy of prosecuting human rights abuses. This is logical given the ease of using impunity to protect state employees. For example, it was noted that murder was excluded from both clemency orders in 2000 and 2008, but allegations of high numbers of murder during elections in 2000, 2002 and 2008 have not seen any urgency by the state to investigate or prosecute. There are even highly egregious murders for which the courts have ordered the police to investigate that have wholly ignored by the police, the most notorious of these involved a Central Intelligence Organisation operative, Joseph Mwale, who remains at large after incontrovertible proof of his involvement in the murder of Talent Mabika and Tichaona Chiminya (Human Rights Forum. 2001).

Understanding the reluctance of the state to investigate itself, the human rights community in Zimbabwe, as early as 1998, instituted a policy of seeking redress through the courts by means of civil litigation.

4.7.4 Civil trials

As was noted in the quantitative analysis, recourse to civil suits has not been a widely used transitional justice mechanism. Of the 59 countries in the data base, civil suits were documented only 29 times. Zimbabwe, by contrast, has instituted a very large number of civil suits.

Since its formation in 1998, and up to 2008, the Human Rights Forum through its Public Interest Unit received a total of 7,250 cases of human rights violations. Although current figures are not available, but 588 cases are still active and at various stages of litigation, and a previous report indicated a 90% success rate for civil suits (Human Rights Forum. 2006 (a)). The State is still to honour the awards to the victims. Zimbabwe Lawyers for Human Rights (ZLHR) and other human rights organisations, such as Zimbabwe Women Lawyers Association (ZWLA) have also instituted such civil actions.

The rationale behind this strategy was to provide pressure upon the state to honour its obligations to uphold the law, but also to counteract the denial by the government that human rights violations had taken place. Whilst civil litigation did not directly threaten the perpetrators, the judgements did, and do provide substantial evidence of guilt, as well as providing moral justification for the victims. An analysis of 291 cases seen by the Human Rights Forum between 1999 and 2006 demonstrated the value of this strategy (Human Rights Forum. 2006).

Of the cases that had been concluded, almost 90% had been concluded in favour of the plaintiff, strongly making the case that gross human rights violations had taken place and that

state agents were responsible. But it is also important to stress that this strategy has severe limitations: it is very expensive, very slow in its process, which can be very demoralizing for all but the most determined victims, and often results in the state delaying paying damages, and even refusing to do so. For this reason, 35% of the cases never reached any conclusion, as the clients died, never re-appeared, or agency had to be renounced for a variety of reasons.

Thus, whilst the strategy has had immense political and moral power, it is hardly practical when the scale of violations is as enormous as it has been in Zimbabwe over the decades. Perhaps the major advantage has been to provide a way of empirically, through the courts, supporting the claims made by the careful documentation of gross human rights violations. It may be easy for the government to dismiss the human rights reports as biased or deny the claims, but it is much less difficult to do so when the claims are verified in a court of law. Here Zimbabwean civil society has good reason to feel proud, and provides a powerful tool for telling the truth.

4.7.5 Foreign Criminal Prosecutions

In the pre-transitional period only 7% of countries reported foreign criminal prosecutions, but they did increase significantly in post-transitions (19%), and, of course, there has been the added impetus for such prosecutions in the aftermath of the end of the Cold War and the setting up of the International Criminal Court. Zimbabwe has perhaps benefitted from the wider interest in this mechanism, and has certainly attempted to use those available, given that Zimbabwe has not ratified the Rome Statute.

There have been a number of creative initiatives by Zimbabwean civil society. The first was a submission to the Human Rights Committee of the UN in respect of the Food Riots, which produced serious and adverse comment by the Committee (Human Rights Forum. 1999). The UN Committee made two specific recommendations in respect of the Food Riots:

16. The Committee expresses its concern over recent reports of excessive use of force by the police and the army during food riots in 1998. The Committee urges that all cases of alleged excessive use of force committed by members of the police or the army be investigated by an independent and impartial body, that action be taken against those officers found to have committed abuses and that compensation be paid to the victims; the State party should report to the Committee thereon. Intensive training and education programmes in the field of human rights for members of the army and law enforcement officials are recommended. The Committee urges that the list of situations in which the use of lethal force is allowed under domestic law be reduced.

30. The Committee requests the State party to ensure the wide dissemination in Zimbabwe of the Covenant, the State party report and the Committee's concluding observations.

Government took no action with respect to either recommendation.

Another strategy has been recourse to the African Commission on Human and Peoples Rights (ACHPR), which, although not a court in the strict sense, is in another way a court of public opinion. Here there have been several submissions to the Commission, most of which have

resulted in adverse findings against the Zimbabwe government. Beginning in 2001, local human rights organisations have ensured that the situation in Zimbabwe has remained on the agenda of the ACHPR for over a decade. At the 29th Ordinary Session in Libya, the ACHPR agreed to send a fact-finding mission to Zimbabwe, and the 2002 report of that mission was highly uncomplimentary, even contradicting the assertions of the Zimbabwe government about the centrality of land in the crisis that had engulfed Zimbabwe (Human Rights Forum. 2006). The ACHPR report was finally adopted by the African Union at its summit in January 2005, and this was shortly followed in December 2005, at the 38th Ordinary Session in the Gambia, by a stiff resolution on the mass forced displacements that took place under *Operation Murambatsvina*. These were also dismissed by the Zimbabwe government, with the Zimbabwe government going as far as to accuse the Commission of partiality.³⁴ Additionally, a number of individual cases were taken to the Commission, such as the torture of Gabriel Shumba, a lawyer with the Zimbabwe Human Rights NGO Forum.

The Zimbabwe Government could afford to dismiss the ACHPR, but not the SADC Tribunal, the court established by SADC, which did have legal powers under the SADC Treaty. Shortly after the establishment of the Tribunal, civil society made applications to the Tribunal in respect of human rights violations. Before the suspension of the SADC Tribunal in 2010, two Zimbabwean cases were heard by the Tribunal: namely, Mike Campbell (Pvt) Ltd and Others v. Zimbabwe, (Case No. SADC (T) 2/2007) and Barry L.T. Gondo and Others v. Zimbabwe, (Case No. SADC (T) 05/2008). Campbell argued that his rights were violated by the Government of Zimbabwe following the expropriation of his farm without any compensation. In the Gondo case, the applicants were victims of organized violence and torture who sued the Government of Zimbabwe for failure to comply with the domestic court's ruling to pay the applicants damages for the violence suffered.

Deeply embarrassed by the judgments against it, the Zimbabwe government made strenuous efforts to have the Tribunal removed, and this was done by SADC in 2011.³⁵ However, it was evident to the international community at large that, once again, the Zimbabwe government would avoid any move to be held accountable. Nonetheless, the human rights violations and the discriminatory practices of the Zimbabwe government had been exposed by civil society.

A further creative use of foreign juridical bodies came with several initiatives using the jurisdiction of the South African courts. These again resulted in wide exposure of the human rights record of the Zimbabwe government. The most serious of these involved the invoking of South Africa's domestication of the Rome Statute in an application for the indictment of those responsible for the torture of MDC-T and civil society leaders in 2007. Lead by the Southern African Litigation Centre (SALC), and supported by a number of *amicus* briefs, including a dossier on politically motivated rape by the Tides Foundation, this has finally led to the Constitutional Court ruling that there was an obligation by the South African state to

³⁴ "What do you expect from them (ACHPR)? They are looking for money and what better way to make money than to vilify Zimbabwe....." Their resolutions are a fallacy, just as was the case with the (ACHPR) 2002 report which was full of fiction. We are not going to accept the report." This was the comment of Tichaona Jokonya, government spokesperson, to the ACHPR resolution. (*"Harare dismisses human rights abuse report as fiction"*. *ZimOnline*. 6 January 2006).

³⁵ For more detail, see Matyszak, D (2011), *The Dissolution of the SADC Tribunal*. August 2011. Harare: Research & Advocacy Unit.

investigate the allegations.³⁶ This investigation is still ongoing, but with little evidence of any progress.

In another action, various groups, such as the Southern African Litigation Centre (SALC), the Zimbabwe Exiles Forum and the South African History Archive, made applications to the South African courts for the South African government to make public the reports of two investigatory missions on the conduct of elections in 2002 and 2008. The former, the report of Justices Mosenke and Khampepe, was finally successful, and the report was made public in 2014,³⁷ but, despite strenuous efforts, the latter has never been released. However, the use of the courts did again provide strong corroboration of the allegations of gross human rights violations outlined in the plethora of human rights reports by Zimbabwean organisations.

Similarly, victims and families of victims of human rights abuses in Zimbabwe have also approached US courts using the American Alien Claims Statute.³⁸ The victims and survivors have instituted prosecutions against President Mugabe and other senior ZANU PF officials for serious international crimes committed in Zimbabwe.

Thus, whilst there have been several uses of foreign courts with great success, there has also been the use of other bodies, such as the ACHPR and the UN Human Rights Committee, to expose the human rights record of the Zimbabwe government, and together these initiatives have resulted in widespread condemnation of the government. Together with the numerous reports, both from Zimbabwean and international human rights organisations, all of this exposure has been a contributory factor in the pressure applied on the Zimbabwe government by the Commonwealth, the European Union and the US. This bears testimony to the sterling work done by Zimbabwean organisations, and, after 2008, is probably also a reason for the improved human rights climate and the diminished violence.

4.7.6 Vetting

It seems obvious that *vetting* was more common in the post-transition period of the countries sampled than it was in the pre-transition period. *Vetting* in the pre-transition period, only took place in four countries, Algeria, Honduras, Hungary and Peru, but, post-transition, took place in 20 countries. It would thus be expected that this would be the case for Zimbabwe, and is in fact so.

Immediately after Independence in 1980, there was a slow re-structuring of the state agencies, but this did not involve vetting of personnel because of their involvement in gross human rights violations, apart perhaps from the disbanding of the Selous Scouts. The Scouts were likely exempted for political reasons because of their iconic identification with the former regime rather than their involvement in gross human rights violations, because, as pointed out before, most military units in all sides of the civil war were complicit in these violations.

³⁶ *National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre and Another* [2014] ZACC 30. [<http://www.southernafricalitigationcentre.org/1/wp-content/uploads/2012/11/Judgment.pdf>]

³⁷ Report on the 2002 Presidential Elections of Zimbabwe. [<http://cdn.mg.co.za/content/documents/2014/11/14/reportonthe2002presidentialelectionsofzimbabwe.pdf>]

³⁸ *Chiminya Tachiona v. Mugabe*, 216 F. Supp. 2d 262 (S.D.N.Y. 2002) U.S. District Court for the Southern District of New York - 216 F. Supp. 2d 262 (S.D.N.Y. 2002) August 7, 2002

The post-transition period will pose enormous problems for any notion of vetting. Although the NTJWG has published in its *Guiding Principles for Transitional Justice Policy and Practice in Zimbabwe* a set of guidelines for vetting (NTJWG. 2015):

- a. *Public employees who are personally responsible for gross human rights violations or serious crimes under international law must be excluded from public service to re-establish public trust and re-legitimise public institutions;*
- b. *Vetting must not be solely on the basis of group or party affiliation as this tends to cast the net too wide and to remove public employees of integrity who bear no individual responsibility for past abuses;*
- c. *In vetting, there is need for a strategic approach targeting critical areas.*

These are useful guidelines, but, given the scale of the violations since 1980 and the numbers of public employees involved, this will obviously be a very complex process, with the potential of wholly de-stabilising the state. Vetting will, therefore, require very careful thought.

4.7.7 Reparations

Reparations are a thorny matter as a transitional justice mechanism, especially in countries where there have been mass human rights violations. They are rarely a mechanism seen in the pre-transitional period, but they did increase post-transition. Reparations were significantly more frequent in African countries, but this is explicable perhaps because of the importance of compensation in traditional justice systems. Certainly this is the case for Zimbabwe, and the surveys of Zimbabwean citizens show the high priority given to compensation (RAU. 2009; Human Rights Forum. 2011). Interestingly, in both studies there seemed to be the understanding that individual perpetrators might find it difficult to be made responsible for compensation, and that the state should then be responsible. It is also interesting that the other aspects of *reparation*, best described under the Joinet Principles – restitution, rehabilitation AND compensation – are rarely mentioned by citizens.

The issue of *reparation* has had a chequered history in Zimbabwe. Building on the colonial support to victims under the Indemnity and Compensation Act, the Zimbabwe government promulgated the War Victims Compensation Act, which was aimed at giving victims that had suffered physical injury during the Liberation War access to a disability pension (Reeler. 1998). The criteria were based on those in the Workmen's Compensation Act, and make no mention of disability due to psychological damage, nor to the right to rehabilitation. The whole process of awarding compensation was undermined by the revelations in 1997 that the Act had been corruptly used to benefit select individuals. There was considerable discussion in the judicial commission set up to investigate the corruption about the likely costs of full compensation to all the victims, including those with psychological disability, and it evident that any adherence to international principles, such as those developed by the Governing Council of the United Nations Compensation Commission, would bankrupt the country. Additionally, there was the very difficult matter of making the current government liable for the violations committed under a previous government.³⁹

³⁹ Such discussions about compensation will undoubtedly be coloured by the previous history of the payouts to the war veterans in 1997, which led to the collapse of the Zimbabwe dollar, as well as uncovering the massive corruption in the awards under the War Victims Compensation Act.

This problem is now greatly exacerbated by the periods of gross human rights violations since 1980. The number of likely victims since 1980 is in the order of hundreds of thousands. To take one example, if *Operation Murambatsvina* was to be deemed a gross human rights violation, and those that suffered as a consequence were entitled to reparation, this would mean a likely figure of 1.2 million Zimbabweans (RAU. 2016(d)). This would have enormous economic consequences on its own, but add to this number the tens of thousands of victims from the Gukuranhundi period and all those from the post-2000 period. The state could not possibly expect to be able to provide reparations on the template of individual acknowledgement.

Thus, whilst *reparations* seem straightforward at face value, the reality is that it will be exceedingly complex. Of the three components in reparation under the Joinet Principles, *rehabilitation* seems to fit easily within the ability of the state to address this, especially as the vast majority of the potential victims will be suffering from psychological disability. There has already been much thought about the issue of rehabilitation (Parsons et al. 2011), and there are already useful, locally-appropriate approaches to healing (Mpande et al. 2013).

As for the thornier matters of *restitution* and *compensation*, these will need very careful consideration in order to avoid unrealistic expectations, or, worse, to add further hurt to the burdens already carried by the thousands of survivors.

4.7.8 Customary Justice Practices

Following the different episodes of violence that have occurred in Zimbabwe, and the absence of formal state-initiated transitional justice mechanisms, communities have resorted to the use of traditional mechanisms for transitional justice purposes. Zimbabwe's traditional justice system is made up of traditional courts at the following levels: the family court, presided over by the family head; the village court, presided over by village headmen; and the chief's court, presided over by the chief. Remedies in traditional court settlements range from apologies to the payment of fines, which can be in the form of money, cattle, goats, sheep and any other acceptable forms of payment (Heal Zimbabwe Trust & Zimbabwe Civic Education Trust. 2016). In addition to the traditional courts, there are also justice mechanisms in the form of traditional rituals meant to deal with crimes committed within communities (Heal Zimbabwe Trust & Zimbabwe Civic Education Trust. 2016) (*see box*). Traditional ceremonies such as *nhimbe/ilima*, (community working groups) are used as platforms where victims and the perpetrators come face to face in the presence of the community are performed. There are also variants of traditional practices, such as the Tree of Life, that complement these (Reeler et al. 2009). These community-working groups serve as platforms for truth telling thus bringing closure and finality to cases, some of which would not have been heard in the formal judicial processes.

The case of Moses Chokuda who was murdered by ZANU PF supporters was dealt with through ritual methods of assisting the deceased's spirit to seek vengeance against his murderers. Dismissed by some as a myth, spirit vengeance under the traditional concept of *ngozi* manifested when for more than three years the body of Moses practically 'refused to be buried' and his murderers suffered mysterious ailments and deaths. His family insisted they would only bury him after his murderers had apologized, explained the motive for the murder and compensated his family with cattle and money despite the state's intimidation and attempts to bury Moses and refuse to acknowledge the murder. His body was only buried after the arbitration efforts of a local chief and the family's acceptance of restitution in the form of 35 cattle and US\$ 15 000 cash. Similar processes have been recorded for previous periods of violence (Mupinda.1997).

To complement these community-based initiatives, Civil Society Organisations (CSOs) have embarked on peace building exercises and outreach programmes in the various communities in Zimbabwe. In these outreach programmes CSOs provide platforms for victims to speak out, in small groups, on their experiences of political violence (Church and Civil Society Forum. 2012). A CSO, Heal Zimbabwe, for instance conducted 144 memorial services for victims of the 2008 political violence in districts of Zimbabwe between 2010 and 2011.⁴⁰ The former Minister of the now defunct Organ on National Healing Reconciliation and Integration⁴¹, Sekai Holland advocated for a cultural model known as “*Kusvutisana fodya*”(sharing snuff/cigarettes) under which perpetrators and victims would discuss and amicably resolve their grievances before sharing tobacco as a sign of reconciliation (Church and Civil Society Forum CCSF. 2012).

5. Overall Conclusions

It is evident that Zimbabwe, in common with most other authoritarian countries, has been unable to make use of many of the transitional justice mechanisms that can be used in the post-transition period. This is not surprising since in an authoritarian state such as Zimbabwe, few have a vested interest in accountability when such accountability will directly affect the interests of the ruling elite. And Zimbabwe, despite the views of many commentators that the country is in a transitional state, is not in the kind of transition where transitional justice has any realistic chance of being applied. Here one only has to point to the timorous manner in which the constitutional requirement for the setting up of the NPRC is being approached and the highly contentious gazetting of the NPRC bill. Notwithstanding, the years of hard work by civil society resulted in a significant victory in the 2013 Constitution that requires the establishment of the NPRC. Zimbabwean civil society has faced all the hurdles in a very innovative fashion, not the least of which is the setting up of the NTJWG, bolstered by the huge number of reliable and authoritative reports on gross human rights violations since 1980. Furthermore, the creative use of other jurisdictions and bodies has bolstered all the claims made in these reports, and there can be no doubt that all Zimbabweans and the international community accept that gross human rights violations are now common knowledge. It may even be, certainly since 2008, that all of this action has had a restraining influence on the government’s propensity to use violence as an instrument of political persuasion.

The question here is whether there are still lessons that Zimbabwe should learn from the experiences of other countries dealing with authoritarian regimes. It does not appear so. There does not seem to be a single transitional justice mechanism that could be possibly applied pre-transition, that have not already been realistically applied. And where a mechanism seemed to be impossible, Zimbabwean civil society has found another way to keep the demand and the momentum going. It has also used novel strategies such as the use of civil litigation, and, above all, has successfully drawn in the support of regional and

international bodies, and even governments. Thus, all that could be done in the pre-transition has been done, and already there are the preparations for the post-transition. All that remains is to continue to prepare for the inevitable transition to try and get a meaningful transitional justice effort with expanded state participation.

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Appendix 1

Correlations between types of authoritarian regime and types of transition

	Civilian- Individual ^a	Civilian- Institutional ^a	Military- Individual ^a	Military- Institutional ^a	State creation ^a	Collapse ^a	Domestic Overthrow ^a	Emergence from Civil War ^a	Foreign Overthrow ^a	Negotiated regime-led ^a	Negotiated- Opposition- Led ^a
Civil war											
Civilian-Individual	1	-.281*	-.270*	-.214	-.114	.169	.082	-.098	-.098	-.146	.160
Civilian-Institutional		1	-.340**	-.335**	.407**	.021	-.076	-.153	-.153	.074	-.128
Military-Individual			1	-.321*	-.172	-.090	.146	-.147	.193	-.125	.176
Military-Institutional				1	-.136	.109	-.214	-.117	.075	.287*	-.134
State creation					1	-.091	-.114	-.062	-.062	-.216	-.129
Collapse						1	-.143	-.078	-.078	-.269*	-.161
Domestic Overthrow							1	-.098	-.098	-.339**	-.203
Emergence from Civil War								1	-.054	-.185	-.111
Foreign Overthrow									1	-.185	-.111
Negotiated regime-led										1	-.383**

** significant at 0.01 level (two-tailed); * significant at 0.05 level (two-tailed)

