

HZT Policy Brief



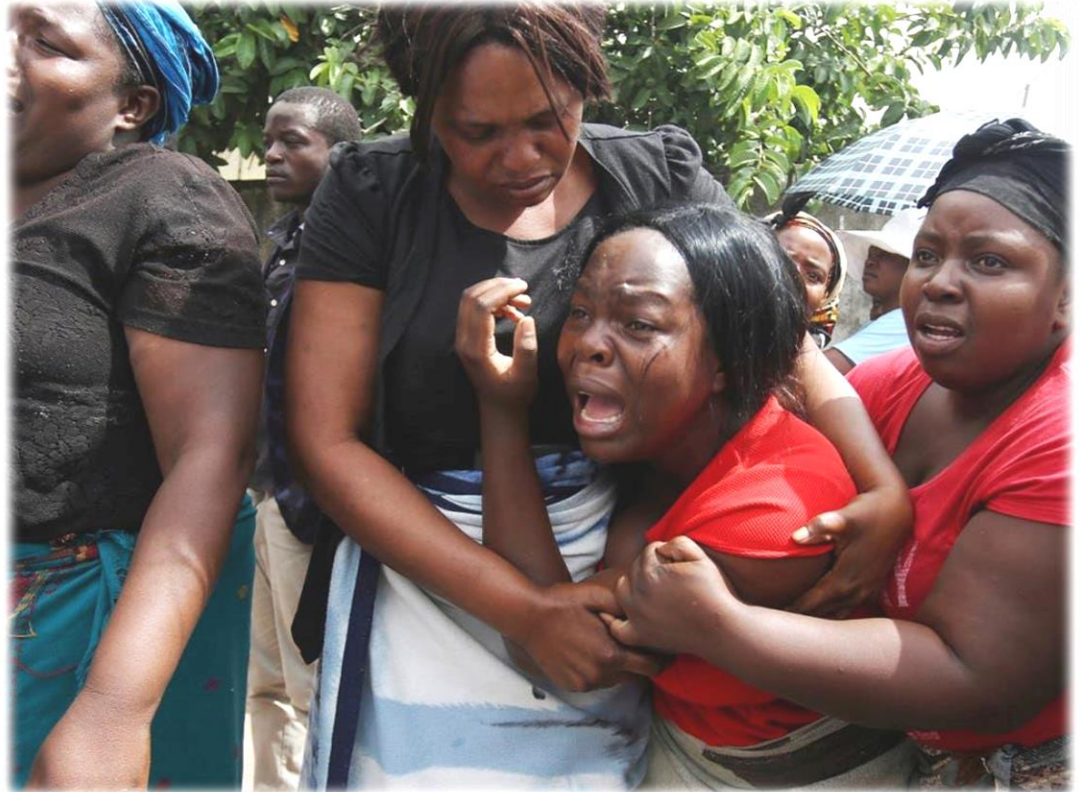
Heal Zimbabwe Trust
Peace, Healing &
Reconciliation Series

Victims and Witness Protection in Transitional Justice in Zimbabwe

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About

Heal Zimbabwe Trust (HZT) publishes the Peace, Healing and Reconciliation Series to stimulate critical thinking and enhance public interest research and policy engagement on peace building, national healing, and reconciliation in Zimbabwe. In our publications we interrogate policy problems and intervention practices that inform and build the capacity of peace architectures in Zimbabwe (including the National Peace and Reconciliation Commission, Churches and Civil Society institutions) that are working towards sustainable peace building.



Family members are mourning the death of young footballer Kelvin Tinashe Choto who was gunned down by security forces on 14 January 2019 in Chitungwiza, Harare

Overview

One of the fundamental guidelines of transitional justice is that a secure environment is critical for the process to take place. While full security may necessitate long-term institutional reform, it is critical that the safety of victims, witnesses and all those involved in the process is guaranteed both in law and in practice. A robust policy framework protecting victims and witnesses assuring all those seeking the truth about the past, holding the perpetrators of violence to account, reconciling divided groups and (re)establishing peace is vital for victims, affected communities, and for the future of both state and society. The aim of the victim and witness protection mechanism is to ensure their full and unfettered participation in the work of institutionalized mechanisms of transitional justice is not prejudiced as a result of real and imagined fear and intimidation to give evidence.

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“The Victim”



Background

When the President Emmerson Dambudzo Mnangagwa signed the National Peace and Reconciliation Commission Act (NPRC Act), Chapter 10:32 into law, he operationalized the work of the NPRC, one of the five Independent (Chapter 12) Commissions, established by the Constitution in 2013 tasked with enhancing the advancement of democracy in Zimbabwe. The gazetting of the enabling legislation marked a huge step in the country’s long and arduous path towards addressing the exigencies of the past in order to achieve national healing, reconciliation and social cohesion. The promulgation was also a momentous occasion for civil society organisations working in the realm of peace building, among them Heal Zimbabwe Trust (HZT) and the National Transitional Justice Working Group (NTJWG) to welcome the gazetting of the enabling legislation, despite noting that the Act had ‘monumental weaknesses and [...] fell short of an ideal law to address this important task’.

Perhaps one of its foremost contradictions is that the legislation that created the NPRC, fails to provide a clear and concise definition of what constitutes a ‘victim’. The net effect of such a misnomer is that even the definitions of witness, perpetrator become equally abstruse which potentially curtails the parameters within which the Commission operates. In the contemporary transitional justice initiative in Zimbabwe, the basic question that needs to be confronted is: who is the victim? Given the convoluted historical narrative of the conflicts that have befallen this country, the definition is obviously a highly contested one, since it evolves

Subjective choices as to who is or is not entitled to benefits based on their ‘victimhood.’ What is critical at the operational level of the NPRC programming, is that choices have to be made about who ‘fits’ the role of a victim and who has to be left out. The NPRC could draw lessons from most post-conflict contexts like Burundi, Rwanda, Sierra Leone and South Africa that grappled with the conception of victim and victimhood, albeit with serious challenges, in order to ensure a policy framework for the protection of victims and witnesses is constructed.

A woman with a wounded leg during clashes between protestors and police, is transported in a wheelbarrow, during protests over fuel hikes in Harare, Zimbabwe, Monday, Jan. 14, 2019



Reflections

About the Police Brief

This policy brief is meant to contribute to the debate on how best to establish victims and witness protection and witness assistance mechanisms to enhance the NPRC's capacity to confront the legacy of past human rights abuses in Zimbabwe. The recommendations suggested herein are geared towards supporting the full implementation of the provisions of Section 10 (13) of the Act; the development of a robust policy framework and the establishment of independent and effective victims and witness protection mechanisms that would facilitate the work of the Commission.

While Section 10 (13) of the NPRC Act enjoins the Commission to ensure the safety and protection of witnesses is guaranteed 'before, during and after the hearing of any matter before it and before other committees appointed by the Commission', there is no robust policy framework to give effect to this provision. Such a policy would address, in totality, victim and witness protection in the entire transitional justice process which will serve as a benchmark for them to come out in the open to narrate their experiences and seek remedy. In the absence of a policy framework that guarantees protection of victims and witnesses, there is danger that the country's past experience – wherein a pro-active stance exposes people to vulnerabilities to state persecution – becomes pervasive, effectively meaning that passivity becomes a self-reinforcing survival strategy. Yet witness protection and assistance policies, by their very nature are critical to the pursuit of truth, justice and reparations for past and ongoing violations.

Defining Transitional Justice

A definition for the term transitional justice according to the United Nations (UN) encompasses, 'a full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, to ensure accountability, serve justice and achieve reconciliation' (UNSG 2004: 4). In broad terms, it embodies a conceptual and analytical approach that seeks to address historical legacies occasioned by violent conflict and gross human rights violations (Gready 2011). It is largely driven by the desire to address the challenges that confront societies as they move from an authoritarian state to a form of democracy (Robins & Wilson 2015; Boraine 2000). In other words, it strives to 'promote a deeper, richer and broader vision of justice [...] and start a process of transformation toward a more just and humane society' (Murithi 2016: 10). It therefore refers to the ways in which countries emerging from periods of conflict and repression address large scale human rights violations so numerous and serious that the normal justice system is unable to provide an adequate response (Swart 2017). To achieve this, a broad range of 'judicial and non-judicial mechanisms' have been implemented across the globe to respond to the legacy of massive human rights abuses (Lundy & McGovern 2008: 267).

While the field of transitional justice has grown exponentially in the last four decades to be the dominant approach in post-conflict societies' attempts to address the past, its processes have been controversial and complex, 'zigzagging from extreme demands for severe punishment to similarly unacceptable calls for blanket unqualified forgiveness' (Popovski 2012:1). It has had to perform a balancing act: paying full respect to grievances — traumatic, deeply emotional and divisive — while also taking into consideration strategies for societal reconciliation and future stability. It has also struggled to content with victims, perpetrators, bystanders and upstanders' varied and dissimilar conceptions of justice. Without a shadow of doubt, transitional justice is an intricate field, not only because of the political, moral and legal dilemmas at the heart of the theoretical discourse, but also because of the realities on the ground that it seeks to address. These realities 'are often much messier than in theory, and involve contexts about which many experts do not have deeply rooted knowledge when it comes to designing transitional justice [processes] and mechanisms' (Saeed 2016: 169).

Reflections

Victim-Perpetrator dichotomy and its impact on contemporary transitional justice processes

One inherent complexity of transitional justice has been the blurred demarcation between victims and perpetrators. These conceptions are mired in multi-pronged interpretations of ever-changing socio-political contexts wherein victims and victimhood traverses victim-perpetrator identities. More so in post-conflicts contexts where more than half of the population identify themselves as victims of one kind or another, each with a peculiar conception of the harm inflicted and a particular notion of remedy, the classification of victims and victimhood becomes complex (Jacoby 2015). For instance, in the context of Zimbabwe, the colonial regime was replaced by liberation movement that, at one point, fought each other and a post-independent government that has allegedly been at the forefront of decades of violations – constructing the identities of victim and victimhood becomes problematic (Saeed 2016). Poignantly, in Zimbabwe there is no such clear distinction – almost everybody suffered at one point or the other.



Certainly, for Zimbabwe the ubiquity of victims presents a massive challenge in addressing the legacies of the past (Huysse 2011). In the country's long drawn out conflicts that spanned over a century beginning with colonialism, victim - perpetrator categories have become very fluid. According to Ndlovu-Gatsheni and Benyera (2015), the country's paradigm of war has inscribed conflicts and violence which created unending cycles for perpetrators and victims in which victims became perpetrators in one episode of violence and perpetrators became victims in the next. The famous seminal by Professor Mamdani, "When Victims Become Killers" as well as the compelling cases of child soldiers in Sierra Leone, Liberia, Uganda provide comparative lessons for emerging transitional justice processes (Mamdani 2001; Enns 2012). In the Zimbabwean context, former victims of colonial rule 'overpowered' their perpetrators, instead becoming perpetrators themselves against their fellow countrymen and women post-independence and assuming new roles in the new polity (Moffett 2016). For instance, in the case of Liberia, perpetrators became the political elites: a microcosm of the post war relationships between them where victims 'were treated with apparent callousness and disdain' (Weah 2012:331).

The unfortunate reality of the ongoing transitional justice process in Zimbabwe, undertaken by the National Peace and Reconciliation Commission (NPRC), is that victims of decades of violent conflict and repression have not been accorded a platform to 'tell their stories'. Not only is their identity a huge gap in the law, their safety and protection to appear before the truth-seeking platform of the NPRC is not ensured and guaranteed. An atmosphere characterised by pervasive fear, widespread intimidation, contrived free speech and a ruling party that maintains a tight grip on power provide conditions that are anything but conducive to the work of the NPRC. While the Commission is forging ahead with its work, providing space for victims to influence the process will offer a measure of the government's sincerity for having an independent and impartial process for dealing with the past. The difficult task of uncovering painful – and highly politicised – memories of the past demands that victims have an unfettered 'access', with guaranteed protection, to the truth-seeking platforms of the NPRC.

At the conclusion of a symposium on transitional justice organized by the Zimbabwean civil society in Johannesburg, South Africa 2003, the organizations concluded that victims of all past human-rights abuses were endowed with rights to redress and to be consulted about the nature of the mechanisms that were to be established to address their needs. The mechanisms that are established must be victim centred, and must be capable of addressing the needs of the victims in a meaningful way. Prior to the establishment of these mechanisms, there must be an extensive process of consultation with the victims' broader community about the mechanisms that should be implemented to address the legacies of the past. Clearly, civil society understood the primacy of victim-centric transitional justice process in Zimbabwe. A cursory study of this report would have assisted both the drafters of the NPRC Act and the Zimbabwe Independent Complaints Mechanism as well as the NPRC Commission to advocate for the specification of victims in the legislations.

As a Key Imperative

NPRC must provide a policy framework that clearly defines what a victim is. It can borrow from international law. The term victim can be delineated within the framework of the United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violation of International Human Rights Law and Serious Violations of Humanitarian Law. In that framework, victims are defined as those that have 'suffered physical or mental harm, economic loss or impairment of their fundamental rights; that there can be both direct and indirect victims, such as family members or dependents of direct victims; and that persons can suffer harm individually or collectively' (Saeed 2016:171).

Regardless of the widespread acknowledgement in theory those victims remain the primary focus of these processes, regrettably 'a sustained engagement with victims has not become part of the mainstream transitional justice practice' in Zimbabwe. Probably this is the greatest challenge faced by the NPRC in designing mechanisms that respond to needs and expectations of victims of past conflicts. Yet there is convergence within transitional justice scholarship that after mass violations have occurred, the concept of justice which mirrors specific political, social, historical and cultural contexts, needs to be restored underpinned by what Weinstein and Stover refer to as 'the desire to right wrongs of the past' (Weinstein and Stover 2004: 11; Hoogenboom 2011).

A discussion of victims and witnesses cannot take place without considering gender. Studies have shown that women's experiences of violence and repressions are completely different from those suffered by their male counterparts. In Zimbabwe's highly patriarchal society, women, irrespective of ethnic origin, have been extremely vulnerable to systemic social, economic and political marginalization. While the decades-long conflict brought about changes in some women's roles as they became heads of households, thousands more experienced different forms of political and sexual violence, loss of family members, involuntary displacement.

In carrying out its constitutional mandate, the NPRC is required by law to ensure that its programmes are gender responsive. Section 9 of the Act outlines the key provisions dealing with gender, mandating the Commission to ensure that women, girls and other vulnerable groups form part of the core of the country's reconciliation and peace building efforts (NPRC Act, No.11/2017). As the Commission begins the process of elaborating the nation's strategic framework for healing and reconciliation, there is an expectation that it will develop mechanisms, regulations and policies through which gender provisions will be met. The ultimate goal is ensuring effective participation by women (and other vulnerable populations) in these vital processes. While there is a global recognition of the role that women play in advocacy for peace and conflict resolution, their involvement in shaping and influencing peace processes— including in reconciliation efforts— remains limited. There are multiple factors that contribute towards this limited participation. They include the lack of female victims and survivors of conflict as key agents in peace processes.

Women who have experienced violence during the conflict fear the repercussions if they attempt to seek redress for, or sometimes even discuss, their experiences. Therefore, efforts by the NPRC to design victims and witness protection policy framework must address abuses primarily perpetrated against women, such as rape and other forms of sexually-motivated violence. The absence of a gendered consideration will most likely exacerbate impunity and could encourage further violence.



The Need for Victims and Witness Protection in Zimbabwe

It is widely accepted in transitional justice scholarship and practice that a country that endeavours to close its 'dark past' riddled with gross human rights violations and to build a society premised on peace, justice and reconciliation must be prepared to 'resonate with tough political choices under immensely difficult circumstances' (Powell 2010:4).

Lessons from the past political conflicts in Africa

Denote that when impunity prevails, victims and witnesses often come to fear the state apparatus, as officials increasingly become unwilling or unable to provide protection, or perpetrators and their associates control or exert significant influence over state mechanisms or authorities, directly or indirectly, rendering the justice and law enforcement systems ineffectual.

In the Zimbabwean context the inability of the victims and witnesses to participate in the truth-seeking process of the NPRC will result in their outright denial of their right to a procedural or substantive remedy for the rights violation. The right to an effective remedy, therefore, must include enough protection and support for victims and witnesses to ensure that they can safely seek redress for, or provide testimony about, human rights abuses. Without doubt, measures to ensure the physical security and psychological wellbeing of victims and witnesses are especially important in situations of systemic impunity, a situation that has prevailed in Zimbabwe for over four decades.

One of the tough choices is determining the extent to which the political class imperiously influences not only the design and implementation of transitional justice processes and mechanisms, but their intended outcomes as well. This problem is usually evident in countries like Zimbabwe and Uganda that attempt to address the past without undergoing political change – which raises the fundamental question whether there can be transitional justice without a meaningful transition of political power (Chengeta 2018).

While Zimbabwe's military-assisted transition of November 2017 terminated President Robert Mugabe's decades-long grip on power, it did not fundamentally alter the political power dynamics that had underpinned his rulership. Many of his erstwhile cronies that had served with him for the past four decades took over the mantle of political leadership which, in a way, did not demonstrate a clean break with the past. That failure to 'break with the past' has created a huge conundrum in the evolving transitional justice process in Zimbabwe. The contemporary process being undertaken by the NPRC is confronted with tough and complex choices on how to ensure justice and accountability for the victims of past violence and repression, in a country that has not experienced political change.

Essentially victims and witnesses of Gukurahundi, Operation Murambatsvina, Operation Makavhotera papi and other politically motivated, election-related violence, their families and the Zimbabwean society in general have the right to tell and know the truth about these violations of human rights. They have the right to an official account of what happened during these periods of political convulsion, including general information regarding the history of the conflict, systematic violations of rights that took place as part of the conflict, and specific information about the identities of those responsible for violations. In the absence of a specific policy on victims and witness safety, their participation in the transitional justice process may be inhibited as taking risks may not be in their best interests.

Without a clear policy on victims and witness protection, the pursuit of truth, justice and reparations for past violations becomes an exercise in futility for the NPRC. The lack of a policy is a negation of the state's responsibility to uphold human rights which includes the right to an effective remedy when violations of such rights occur. More so, the absence of a policy results in impunity wherein victims are not afforded access to effective remedies, when laws fail to criminalize serious human rights violations (de jure impunity), or when the laws that do criminalize human rights violations are not adequately enforced (de facto impunity).

The lack of an effective victim and witness protection mechanism geared towards addressing the exigencies of the past is likely going to reinforce fundamental weaknesses in the NPRC process. It will be difficult to identify victims and/or witnesses or obtain the necessary statements during truth seeking sessions. The likelihood is that victims and witnesses will have an enviable position to withdraw due to threats, intimidation or bribery. Once the option to withdraw becomes a safer option for victims and witnesses, fewer and fewer people will be prepared to come forward and contribute to the body of evidence that underpins NPRC's capacity to dealing with the past. That will be tantamount to continuing impunity which, regrettably emboldens perpetrators, and has the potential to lead to further witness harassment and intimidation. Inevitably, the reluctance of the victims and witnesses to provide testimonies for fear of reprisals will severely undermine the work of the Commission.

Principles for Establishing a Witness Protection Programme

Since the National Peace and Reconciliation Commission does not have a witness protection framework, this policy brief provides a glimpse of some of the guiding principles essential for establishing such a program. While not exhaustive, they provide a basic foundation for the development of a robust witness protection mechanism.

Independence

The fulcrum of any witness protection mechanism is its capacity to function freely without undue overbalance, control and influence by the state and alleged perpetrators. There must be a clear separation of roles as well as isolation of the investigative unit and the protection mechanisms to avoid compromising sensitive information or the use of protection as leverage in exchange for information. Decisions about entry, termination of service and scope of protection must be scrupulously protected from political manipulation

Neutrality

Witnesses must meet the requirements of defined criteria for admission into the program. Such admission must be free from political considerations. The witnesses' role, whether victim, innocent bystander, up stander or collaborator with the authorities should not be a decisive criterion.

Clarity

A clear legal, procedural, and institutional framework is needed to provide the certainty and predictability necessary to ensure that all parties are aware of the protection measures available before agreeing to testify or cooperate with a criminal investigation.

Principles for Establishing a Witness Protection Programme

Inclusivity: Clear mechanisms of support and protection must be in place for those facing real or imagined risk for their role in either the investigation or the provision of testimony. These mechanisms should extend not only to victims and witnesses but to NPRC staff and Commissioners and all those working with the Commission in various capacities. In addition, witness protection should be available from the moment that engagement with the Commission increases risk until that risk has been extinguished.

Holistic Approach: Witness protection measures do not exist in isolation but reflect the overall state of law enforcement or other truth-seeking structures. The work of one agency without the support of other actors involved in the process will be inefficient. Institutional reform as well as the vetting and training of personnel in judicial and investigative agencies are essential.

Informed Consent: Participation in criminal proceedings is not without an element of risk. However, witnesses should be informed in unambiguous terms of the risks, what measures may be taken, and their own responsibilities in mitigating the risks. Participants should then give free and informed consent to any measure applied

Victim/Witness-Focus: Protective measures should be proportionate to the assessed risk, least intrusive to the witness and taken with the best interest of witness in mind.

Transparency and Accountability: The mechanism must be clearly accountable for both its performance and finances, through an oversight mechanism that does not compromise independence or confidentiality.

Conclusion

Zimbabwe's decades long history of conflict and violence demands that an independent, participatory and victim-centric truth-seeking platform be instituted to accord victims and witnesses an opportunity to tell their stories within a secure environment. Such an environment necessitates that the safety of victims and witnesses be guaranteed through a policy framework to ensure that the violent past is resolved and processed as a contribution to efforts towards national healing and reconciliation. The fact that the law provides, in broad terms, directs NPRC to ensure the safety and protection of witnesses is guaranteed is a big plus for the work of the Commission. What remains is a formulation of a policy framework that operationalizes this program. The policy must also qualify, in clear and unadulterated terms what a victim, witness and perpetrator is. It must take cognisance of the unique manner in which women experience violence and repression and conveniently makes bold step to consider such uniqueness. The policy brief provides an array of basic principles that should underpin the development of a robust victim and witness protection programme. Such a policy would address, in totality, victim and witness protection in the entire transitional justice process which will serve as a benchmark for them to come out in the open to narrate their experiences and seek remedy.

References

1. Bloomfield, D *et al* (2003) *Reconciliation After Violent Conflict: A Handbook*. Stockholm: Bulls Tryckeri AB Halmstad
2. Boraine, A. (2006) 'Transitional Justice: A Holistic Interpretation'. *Journal of Inter-national Affairs* 60 (1), 17-27
3. Chengeta, T. (2018) 'The Possibility of Transitional Justice Post-Mugabe in Zimbabwe' JusticeInfo.Net [Online] Available at < <https://www.justiceinfo.net/en/other/37708-the-possibility-of-transitional-justice-post-mugabe-in-zimbabwe.html>> [Accessed 10 January 2020]
4. Ndlovu-Gatsheni, S. and Benyera, E. (2015) 'Towards a framework for resolving the justice and reconciliation' *African Journal on Conflict Resolution* 9-33
5. Gready, P. (2010) *The Era of Transitional Justice: The Aftermath of the Truth and Reconciliation Commission in South Africa and Beyond* Abingdon: Routledge
6. Hoogenboom, D. (ed.) (2011) Annual Meeting of the Canadian Political Science Association. 'Examining the Visions of Transitional Justice' . held 16 May 2011 at Waterloo
7. Lundy, P. and McGovern, M. (2008) 'Whose Justice? Rethinking Transitional Justice from the Bottom Up'. *Journal of Law and Society* 35 (2), 265-292
8. Moffet, L. (2015) 'Reparations for 'Guilty Victims': Navigating Complex Identities of Victim-Perpetrators in Reparation Mechanisms'. *International Journal of Transitional Justice* 10 (1), 146-167
9. Murithi, T. (ed.) (2016) *the Politics of Transitional Justice in the Great Lakes Region of Africa*. Johannesburg: Fanele
10. Popovski, V (2012) 'Transitional Justice after Oppression: Complexity and Effectiveness' United Nations University. [Online] Available at < <https://unu.edu/publications/articles/transitional-justice-after-oppression-complexity-and-effectiveness.html>> [Accessed 9 January 2020]
11. Robins, S. and Wilson, E (2015) 'Participatory Methodologies with Victims: An Emancipatory Approach to Transitional Justice". *Canadian Journal of Law and Society* 30 (2), 219-236
12. Saeed, H. (2016) 'Victims and Victimhood: Individuals of Inaction or Active Agents of Change? Reflections on Fieldwork in Afghanistan'. *International Journal of Transitional Justice* 10 (1), 168-178
13. Swart, M. (2017) 'Why signs for transitional justice in Zimbabwe don't look promising?' *The Conversation* [Online] Available at < <https://theconversation.com/why-signs-for-transitional-justice-in-zimbabwe-dont-look-promising-88171>> [Accessed 9 January 2020]
14. Tsuma, W. (2018) 'A creative approach to increasing women's approach to participating in Zimbabwe's national healing and reconciliation process' UNDP Issue Brief 13/2008 [Online] Available at < <https://www.undp.org/content/dam/undp/library/Democratic%20Governance/OGC/William%20Tsuma.pdf>> [Accessed 13 January 2020]
15. Teitel, R. (2002) 'Transitional Justice Genealogy' *Harvard Human Rights Journal*. 16, 69-94