



**UNIVERSITY** *of the*  
**WESTERN CAPE**

**AN EVALUATION OF ZIMBABWE'S NATIONAL PEACE AND RECONCILIATION COMMISSION**

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A research paper submitted in partial fulfilment of the requirements for the degree

**LEGUM MAGISTER (LLM)**

In

**TRANSNATIONAL CRIMINAL JUSTICE AND CRIME PREVENTION: AN INTERNATIONAL AND**

**AFRICAN PERSPECTIVE**

**UNIVERSITY** *of the*  
**WESTERN** **By** **CAPE**

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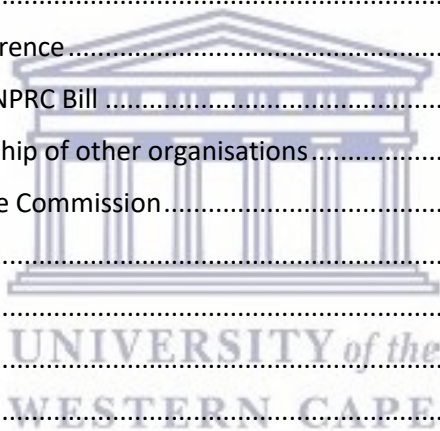
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**Declaration**

I, **Sheilla Kudzai Maribha**, declare that **An Evaluation of Zimbabwe’s National Peace and Reconciliation Commission Bill, 2017** is my own work, that it has not been submitted for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged by complete references.

**Student: Sheilla Kudzai Maribha**

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Signature: ..... Date: .....

## Dedication

This research paper is dedicated to my parents, the late Mr and Mrs Maribha. Your love for education has been my strength.



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## Acknowledgements

First and above all, I thank *Jehovah Ebenezer* who has taken me this far. His favour and unconditional love towards me leaves me in awe.

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## List of Abbreviations and Acronyms

CCJP	Catholic Commission for Justice and Peace
CEH	Guatemala's Commission for Historical Clarification
ICTY	International Criminal Tribunal for the Former Yugoslavia
GPA	Global Political Agreement
Joint Principles	United Nations Principles to Combat Impunity
LRFZ	Legal Resources Foundation of Zimbabwe
NPRC Bill	National Peace and Reconciliation Commission Bill
ONHRI	Organ on National Healing Reconciliation and Integration
TC	Truth Commission
TCs	Truth Commissions
TRC	Truth and Reconciliation Commission
UN	United Nations
WVCA	War Victim's Compensation Act
ZANU	Zimbabwe African National Union
ZAPU	Zimbabwe African People Union

## **Key Words**

Amnesty

Conflict

National healing

Human Rights Violations

National Peace and Reconciliation Bill

Non-recurrence

Peace

Political violence

Reconciliation

Repatriation

Torture

Transitional justice

Victim

Zimbabwe





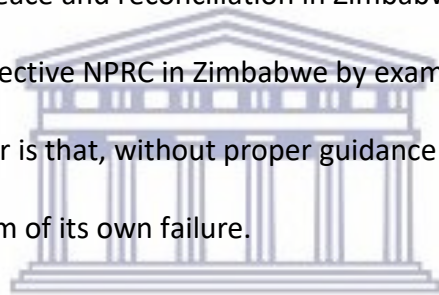
## Chapter One

### General Introduction and Overview of the Study

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#### 1.1 Introduction

This is a study of Zimbabwe's National Peace and Reconciliation Commission Bill (hereafter NPRC Bill).<sup>1</sup> The NPRC Bill seeks to bring the National Peace and Reconciliation Commission (hereafter NPRC) of Zimbabwe into operation.<sup>2</sup> The NPRC is a truth commission set to promote post-conflict justice, national peace and reconciliation in Zimbabwe.<sup>3</sup> The study discusses the prospects of establishing an effective NPRC in Zimbabwe by examining the provisions of the NPRC Bill. The view of the paper is that, without proper guidance from a comprehensive law, the NPRC is bound to be a victim of its own failure.



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Therefore, this paper will critically evaluate the scope of the NPRC Bill. Brahm suggests that an enabling law to a commission must contain comprehensive provisions.<sup>4</sup> This is meant to safeguard the effectiveness of the commission when carrying out its mandate. Drawing from Brahm's view, the study seeks to highlight whether the NPRC Bill contains comprehensive provisions which will ensure that the NPRC carries out its mandate effectively. Accordingly, the

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1 The National Peace and Reconciliation Commission Bill, H.B.2, 2017 (hereafter NPRC Bill).

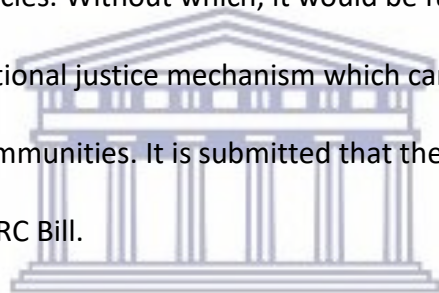
2 The Preamble to the NPRC Bill.

3 Sec 251 of the Constitution of Zimbabwe Amendment (No.20) of 2013.

4 Brahm E "Uncovering the truth: Examining truth commission success and impact" (2007) 8 *International Studies Perspectives* at 17.

study will illustrate whether the NPRC Bill is a genuine legislative attempt at peace and reconciliation or a mere charade in furtherance of impunity by evaluating its provisions. In assessing the true intention of the NPRC Bill, the study makes a comparative analysis of the truth commission experiences of Guatemala, Sierra Leone and South Africa. Here, general lessons are learnt that will help evaluate the NPRC Bill critically. The evaluation of the NPRC Bill is meant to show whether it meets the standards set under national and international law.

The study exposes numerous loopholes in the NPRC Bill. As a result, there is a need to address the NPRC Bill's present deficiencies. Without which, it would be futile to invest in an Act that will create an ineffective transitional justice mechanism which cannot facilitate dependable and sustainable unity within the communities. It is submitted that the success of the NPRC work is in tandem with an effective NPRC Bill.



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## 1.2 Background to the problem

The Zimbabwean history is filled with violence experiences.<sup>5</sup> From the pre-colonial times to the present day, gross human rights abuses are still being committed in Zimbabwe with impunity.<sup>6</sup>

The transition to a peaceful nation which upholds human rights remains a pipe dream.

Zimbabwe is a state party to international human rights instruments which requires her to

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5 Onslow S *Zimbabwe and Political Transition* (2011:4-14).

6 Gatsheni S N & Benyera E "Towards a framework for resolving the justice and reconciliation question in Zimbabwe" (2015) 15 *African Journal on Conflict Resolution* at 9.

uphold human rights.<sup>7</sup> In terms of these international instruments Zimbabwe has a duty to adopt and enact measures that protect and promote human rights. But, the government has neglected to honour its duties under these international instruments. Instead, a firm erosion of promoting human rights has occurred, thereby discouraging any prospects towards the realisation of fundamental human rights and freedoms. Violence has been commonplace during key political events such as elections.<sup>8</sup> Violence has been used to suppress ethnic groups<sup>9</sup> and further used in the past to colonise and maintain white minority rule.<sup>10</sup> Violence marked the pathway to independence, and since independence violence has continued to characterise the conduct of the state towards its citizens. However, those accountable for the use of violence have never been chastised.<sup>11</sup>



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- 7 International Covenant on Economic Social and Cultural Rights (acceded on the 13<sup>th</sup> of May 1991); International Covenant on Civil and Political Rights (acceded on the 13<sup>th</sup> of May 1991); International Convention on the Elimination of All Forms of Racial Discrimination (acceded on the 13<sup>th</sup> of May 1991) and the African Charter on Human and Peoples' Rights (ratified on the 30<sup>th</sup> of May 1986).
- 8 Tendi B M *Making History in Mugabe's Zimbabwe: Politics, Intellectuals and the Media* (2010:98); Veritas "Political Violence Report" *The Zimbabwean* 12 April 2008, available at <http://www.thezimbabwean.co/2008/04/political-violence-report-3/> (accessed 04 November 2017).
- 9 Ndlovu-Gatsheni S J "Nation Building in Zimbabwe and the Challenges of Ndebele Particularism" (2008) 3 *African Journal on Conflict Resolution* at 35; Thata N "Ethnicity or tribalism in Zimbabwe: let's dare it to speak about it and find solutions!" *Bulawayo24News* 9 April 2016, available at <http://bulawayo24.com/index-id-opinion-sc-columnist-byo-86017.html> (accessed 04 November 2017).
- 10 Raftopoulos B, Mungure S, Rousseau N & Masinjila M "Violence and Transition in Post Settler-Colonial states", available at <http://www.solidaritypeacetrust.org/1294/violence-and-transition-in-post-settler-colonial-states/> (accessed 20 October 2017).
- 11 "Coltart D "Why I cannot join Tsvangirai's faction" (2007) 462 *New African* at 81.

Instead, piecemeal efforts aimed at facilitating reconciliation and healing have been carried out in Zimbabwe.<sup>12</sup> These efforts included the 1979 Lancaster House Agreement,<sup>13</sup> the 1981 *Dumbutshena* commission of inquiry and 1983 *Chihambakwe* commissions of inquiry. However, the findings of the two commissions of inquiry were never publicised.<sup>14</sup> The subsequent cursory reconciliation efforts were the 1987 Unity Accord, the 2008 Global Political Agreement (GPA) and Organ for National Healing, Reconciliation and Integration (ONHRI) in 2009.<sup>15</sup>

However, these efforts have been fragmented, haphazard and with a distasteful political motive at most.<sup>16</sup> In most cases, the so-called post-conflict resolution and justice have been in the form of indemnities, amnesties and presidential pardons which served to protect the perpetrators of violence.<sup>17</sup> In the name of “unity”, amnesia has been preferred over other transitional justice tools that address the root causes of conflict and violence in Zimbabwe.<sup>18</sup>

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- 12 Murambadoro R & Wielenga C “Reconciliation in Zimbabwe: The Conflict between a state-centred and people-centred approach” (2005) 37 *Strategic Review for Southern Africa* at 32.
- 13 Lancaster House Agreement, 21 December 1979 available at [http://sas-space.sas.ac.uk/5847/5/1979\\_Lancaster\\_House\\_Agreement.pdf](http://sas-space.sas.ac.uk/5847/5/1979_Lancaster_House_Agreement.pdf) (accessed 04 December 2017).
- 14 Ndou P “Release the Chihambakwe and Dumbutshena reports” *Bulawayo24News* 16 May 2012, available at <http://bulawayo24.com/index-id-news-sc-local-byo-15284.html> (accessed 11 October 2017).
- 15 Murambadoro R & Wielenga C (2005:32).
- 16 “Bad publicity on Mphoko in bad taste” *NewsDay* 8 January 2016, available at <https://www.newsday.co.zw/2016/01/bad-publicity-on-mphoko-in-bad-taste/> (accessed 11 October 2017).
- 17 Gatsheni S N & Benyera E (2015:10).
- 18 Mashaya B & Mananavire B “Zanu PF MPs want Gukurahundi Buried” *DailyNews* 19 May 2017, available at <https://www.dailynews.co.zw/articles/2017/05/19/zanu-pf-mps-want-gukurahundi-buried> (accessed 20 September 2017).

For example, the former President Robert Mugabe who was in power from 1980 to 2017 referred to the physical violence in Matabeleland which led to the death of over 20 000 people as “a moment of madness.”<sup>19</sup> Therefore, the paper submits that there is a need to move “From Madness to Hope”.<sup>20</sup> This can be achieved by establishing a truth commission with sufficient powers to effectively investigate the past injustices and reconcile the perpetrators and the victims.

In principle, the gross injustices suffered by the Zimbabwean citizens have not been addressed at national level except in few instances where victims have demanded justice. In most instances, victims have been left more aggrieved due to the insensitivities of the justice system and the failure of the government to acknowledge the special circumstances in which most of the victims, especially women and children find themselves in. The rights of the victims have never been considered.<sup>21</sup> For instance, in 1985 a Commission of Inquiry was set up to investigate the despotism of “dissidents” in the Matabeleland and Midlands regions of Zimbabwe. The report by the Commission which was submitted to the former President Robert

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19 SAPA “Gukurahundi killings a 'conspiracy'” SABC News live, available at <http://www.sabc.co.za/news/a/71954a8047513a27b78cb7da2831d264/Ukurahundi-killings-a-conspiracy-20150215>; See visual video at <http://www.thezimbabwenewslive.com/main-news-9167-gukurahundi-robert-mugabes-moment-of-madness.html> (accessed 18 October 2017).

20 “From Madness to Hope” is the title of the report by the Truth Commission in El Salvador. Likewise, Zimbabwe need to a functional truth commission in order to move past the “moment of madness” stated by former president Robert Gabriel Mugabe.

21 “Zimbabwe: MP says still traumatised by Gukurahundi”, available at <http://allafrica.com/stories/201710090457.html> (accessed 18 October 2017).

Mugabe has never been made available to the public. The report is a sealed document, with the government claiming that publishing the report could spark ethnic violence.<sup>22</sup> The Zimbabwe Lawyers for Human Rights challenged the government's refusal to publish the report. However, the application was dismissed by the Supreme Court.<sup>23</sup> To counter the government's silence on the matter, two major Zimbabwean human rights organisations namely the Catholic Commission for Justice and Peace (CCJ) and the Legal Resources Foundation of Zimbabwe (LRFZ) published a report that extensively documented the despotism.<sup>24</sup> The report states that 20 000 people from Matabeleland and Midlands regions were killed during the repression period.

The last attempt to investigate the past human rights abuses was through the 2008 Global Political Agreement (GPA). The GPA set up the Organ on National Healing Reconciliation and Integration (hereafter ONHRI).<sup>25</sup> The ONHRI may be lauded for commencing the discussions on

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22 Hayner P B *Unspeakable Truths: Transitional Justice and the Challenges of Truth Commissions* 2 ed (2011:242).

23 *Zimbabwe Lawyers for Human Rights and Another v President of the Republic of Zimbabwe and Another* [2003] (311/99) ZWSC 12.

24 CCJP in Zimbabwe titled '*Breaking the Silence. Building True Peace. A report on the disturbances in Matabeleland and the Midlands 1980-1988*', available at [https://archive.org/stream/BreakingTheSilenceBuildingTruePeace/MatabelelandReport\\_djvu.txt](https://archive.org/stream/BreakingTheSilenceBuildingTruePeace/MatabelelandReport_djvu.txt) (accessed 7 April 2017).

25 The Global Political Agreement of 15 September 2008 signaled the end of the political conflict amongst the opposition political parties in Zimbabwe. The Agreement was made amongst the three main opposition parties that had won the 2008 elections. The Agreement represented a structure that officially recognised the extent of the politically-motivated violence and the need to promote and fulfil human rights

what methods are required to address past violations. However, despite the discussions, the record of the ONHRI was inadequate. In this respect, Ndlovu-Gatsheni correctly suggests that Zimbabwe's reconciliation efforts have proven to be minimalist and inadequate.<sup>26</sup> The failure of the reconciliation efforts and continuous episodes of violence shows that violence has become institutionalised and a culture of impunity entrenched in the upper reaches of government. Kaulem concurs with this view and states that violence has become part of the political culture of the country.<sup>27</sup> The resultant tension and division threaten the very core existence of any sense of nationhood.

From the failed reconciliation attempts, there have been calls made for national healing and peace in Zimbabwe.<sup>28</sup> The most significant calls for national healing and reconciliation were made after the *Gukurahundi* massacre of the 20 000 so-called "dissident" Ndebele people. These calls for national healing and reconciliation were made again after the 2008 political violence in which over 200 opposition party supporters were killed, while many others were maimed, tortured or raped.<sup>29</sup>

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26 Ndlovu-Gatsheni S J *Coloniality of Power in Postcolonial Africa Myths of Decolonization Council for the Development of Social Science Research in Africa* (2013:189).

27 Kaulem D *Ending Violence in Zimbabwe* (2011:78).

28 Misa "Call for Truth Commission" *The Zimbabwean* 29 May 2009, available at <https://www.thezimbabwean.co/2009/05/call-for-truth-commission/> (accessed 4 June 2017).

29 McGreal C "This is no election. This is war" *The Guardian* 22 June 2008, available at <https://www.theguardian.com/world/2008/jun/22/zimbabwe1> (accessed 20 June 2017).

Therefore, there is a need for a transitional justice tool to investigate the past human rights atrocities occurrences in Zimbabwe as Rohtz- Arriaza rightly suggests that “the past, unaccounted for, does not lie quiet.”<sup>30</sup> However, there are dilemmas attached to the search for truth and redress of past injustices such as: selecting the appropriate transitional justice method to be used in re-visiting the past.<sup>31</sup> This is because transitional justice manifest in different forms such as criminal prosecutions, amnesties, reparations, institutional reforms or truth commissions.

### 1.3 Statement of problem

As a solution to the above dilemma, the Constitution establishes a NPRC which has a lifespan of ten years.<sup>32</sup> The NPRC is a transitional justice tool in the form of a truth commission. Its main objective is to promote national healing, reconciliation and peace-building.<sup>33</sup> In response to this constitutional provision, the government gazetted the enabling law to the NPRC cited as the National Peace and Reconciliation Commission Bill on 18 December 2015.<sup>34</sup> The main purpose of the Bill was to bring the NPRC into operation. However, the Bill was withdrawn from

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30 Rohtz-Arriaza N “The New Landscape of Transitional Justice” in Rohtz-Arriaza N and Mariezcurrena J *Transitional Justice in the Twenty-First Century, Beyond Truth versus Justice* (2006:1).

31 Kritz N “The Dilemmas of Transitional Justice” in Kritz (ed) *Transitional Justice* (2005:1).

32 Sec 251 of the Constitution Amendment (No.20) Act of 2013.

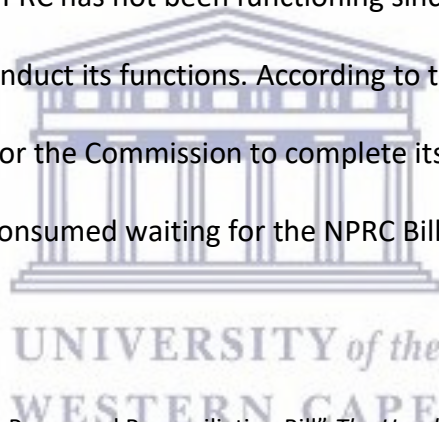
33 Sec 252 of the Constitution Amendment Act (No.20) Act of 2013.

34 Sec 251, 252 and 253 of the Constitution of Zimbabwe Amendment (No.20) Act of 2013.



Parliament due to several defects.<sup>35</sup> For example, the Bill contained several weak provisions that would have seriously undermined the credibility and independence of the Commission.<sup>36</sup> The provisions were ultra-vires the Constitution of Zimbabwe. Further, the Bill gave the Minister in charge of the Commission vast powers which whittled down the independence of the Commission.<sup>37</sup> A new National Peace and Reconciliation Commission Bill (hereafter the NPRC Bill) was then gazetted on 10 February 2017.<sup>38</sup> If passed into law, the NPRC Bill will provide the legal basis on which the NPRC may begin its work and implement its mandate.

Important to note is that, the NPRC has not been functioning since 2013 because it lacks an enabling law permitting it to conduct its functions. According to the NPRC ten-year life span,<sup>39</sup> there is less than six years left for the Commission to complete its work. This time calculation excludes the time that will be consumed waiting for the NPRC Bill to be passed as law by



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35 Kakore N “Ministry to review Peace and Reconciliation Bill” *The Herald* 12 May 2016, available at <http://www.herald.co.zw/ministry-to-review-peace-and-reconciliation-bill/> (accessed 16 March 2017).

36 Mudadigwa P “Zimbabwe won’t achieve transitional justice, warns former South African Truth and Reconciliation Commissioner” *VOAZimbabwe*, available at <https://www.voazimbabwe.com/a/zimbabwe-wont-achieve-transitional-justice-warns-south-african-truth-and-reconcillian-commissioner/3387942.html> (accessed 16 March 2017).

37 Mushava E “Parly condemns National Peace and Reconciliation Bill” *NewsDay* 6 April 2016, available at <https://www.newsday.co.zw/2016/04/parly-condemns-national-peace-reconciliation-bill/> (accessed 15 March 2017).

38 See, the National Peace and Reconciliation Bill, available at <http://www.veritaszim.net/node/1976> (accessed 15 March 2017).

39 Sec 251 of the Constitution Amendment (No.20) Act of 2013.

Parliament and more time is bound to be consumed in gearing up the commission for operation.

Nevertheless, the government has shown a positive attitude towards giving effect to the NPRC by drafting the NPRC Bill and swearing in of commissioners.<sup>40</sup> Also, the first budget allocation for the Commission was made by the Appropriation Act for 2016. The NPRC Bill ensures that a woman occupies the position of Chairperson or Deputy Chairperson and that half of the members of the Commission shall be women.<sup>41</sup> This guarantees the participation of women in national bodies in the country.

Although the gazetting of the NPRC Bill is according to the Constitution<sup>42</sup>, the NPRC Bill itself omits fundamental issues that relate to community healing, justice and reconciliation. The NPRC Bill contains fundamental omissions in its reference to the transitional justice accountability mechanisms such as the right to know, the right to justice, the right to reparations and guarantee of non-recurrence.<sup>43</sup> The paper will evaluate the NPRC Bill from a constitutional perspective, meaning that it will examine the constitutionality of its provisions.

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40 Bulawayo24News 'Mugabe swears in National Peace and Reconciliation Commission', available at <http://bulawayo24.com/index-id-news-sc-national-byo-83236.html> (accessed 15 March 2017).

41 Section 6(2) of the First Schedule to the NPRC Bill.

42 Sec 251 of the Constitution of Zimbabwe.

43 United Nations Human Rights Office of the High Commissioner, available at <http://www.ohchr.org/EN/Issues/TruthJusticeReparation/Pages/Mandate.aspx> (accessed 13 October 2017).

The assessment of the NPRC Bill will further include drawing lessons from truth commission practices elsewhere, mainly in South Africa, Guatemala and Sierra Leone. It bears noting that truth commissions differ in their make-up and workings, which means that there can be no talk of one size fits all.

One of the reasons for drawing lessons from South Africa's Truth and Reconciliation Commission (hereafter TRC) which existed between 1995 and 2000 is based on the Promotion of National Unity and Reconciliation Act.<sup>44</sup> Hayner asserts that South Africa's Promotion of National Unity and Reconciliation Act provides for the most sophisticated mandate compared to any other truth commission to date, for it has cautiously balanced powers and far-reaching investigatory powers.<sup>45</sup> For this reason, it is prudent to draw lessons from the South African TRC whose enabling Act provided the commission powers to award individualised amnesty, search premises and to seize evidence and run a state-of-the-art witness protection program - all features which are not explicitly stated in the Zimbabwean NPRC Bill.

Furthermore, using South Africa as a comparator is founded on the fact that South Africa and Zimbabwe have a similar legal system. They both share an English common law legal heritage.

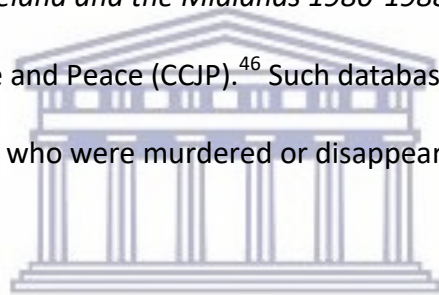
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44 The Promotion of National Unity and Reconciliation Act 34 of 1995 is the enabling law to the South Africa Truth and Reconciliation Commission.

45 Hayner P B *Unspeakable Truths: Transitional Justice and the Challenges of Truth Commissions* 2 ed (2011:27).

Also, in both countries democracy came about as a result of negotiations between the liberation movements and the predecessor ruling regime.

The Guatemalan Commission for Historical Clarification (CEH) which functioned from 1997 to 1999 considerably relied on the records of human rights violations compiled by non-governmental organisations (NGOs). These reports enabled the Commission to inquire into serious human rights abuses committed in the past. In Zimbabwe, similar reports were compiled by NGOs. One such report, titled '*Breaking the Silence. Building True Peace: A report on the disturbances in Matabeleland and the Midlands 1980-1988*' was drawn up by the Catholic Commission for Justice and Peace (CCJP).<sup>46</sup> Such databases can be used to help estimate the number of people who were murdered or disappeared and to uncover patterns of human rights abuses.



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The study will make reference to the Sierra Leonean Truth Commission from an ethnographic perspective, particularly how local communities responded to public hearings when the conflict was based more on ethnic roots than rational political ideologies, as is the case with Zimbabwe. Shaw suggested that the Sierra Leonean truth commission was a success because it had a local understanding of healing and reconciliation which was in line with existing grassroots

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46 See the report by the CCJP Zimbabwe titled '*Breaking the Silence. Building True Peace. A report on the disturbances in Matabeleland and the Midlands 1980-1988*', available at [https://archive.org/stream/BreakingTheSilenceBuildingTruePeace/MatabelelandReport\\_djvu.txt](https://archive.org/stream/BreakingTheSilenceBuildingTruePeace/MatabelelandReport_djvu.txt) (accessed 07 April 2017).

practices.<sup>47</sup> Without addressing the NPRC Bill's present deficiencies, it would be futile to invest so much effort in a law which, in the end, will create an ineffective commission that cannot facilitate dependable and sustainable social cohesion within communities.

#### 1.4 Research question

Taking into account Zimbabwe's violent history committed with impunity, this study seeks to answer the following question:

Is the National Peace and Reconciliation Commission Bill, 2017 a practical tool to deal with past human rights abuses and ensure national peace and reconciliation?

The following auxiliary questions flow from the main question:

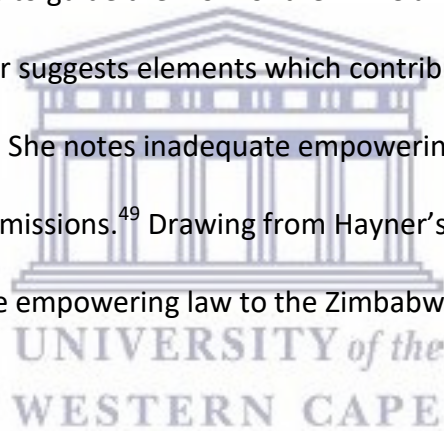
- Does the NPRC Bill provide for the implementation of all transitional justice accountability mechanisms?
- What are the NPRC Bill's weaknesses?
- What lessons can be learnt from truth commissions elsewhere?

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47 Shaw R "Rethinking Truth and Reconciliation Commissions: Lessons from Sierra Leone" (2005) 130 *United States Institute of Peace Special Report*.

## 1.5 Justification for the study

The NPRC will be the first constitutionally established independent commission aimed at reconciling a divided Zimbabwe. In principle, the NPRC will be a *de jure* institution vested with power to guide in a new era of transitional justice in Zimbabwe. The enabling law to the NPRC is an essential ingredient to the success or failure of the NPRC. Therefore, this paper argues that the truth commission's enabling law has to initiate a comprehensive process aimed at peace and reconciliation. This may be achieved by the NPRC Bill containing provisions which: (i) reflect the pursuit of justice; (ii) strives to guide the work of the NPRC and: (iii) act as a yardstick to judge its performance.<sup>48</sup> Hayner suggests elements which contribute to the failure of commissions such as the NPRC. She notes inadequate empowering laws to the commissions as one of the causes of failed commissions.<sup>49</sup> Drawing from Hayner's submission the study seeks to evaluate the adequacy of the empowering law to the Zimbabwean truth commission.



## 1.6 Objectives of the study

This paper has four cardinal objectives:

- To analyse the importance of a truth commission as a transitional justice tool in Zimbabwe;
- To outline and evaluate the NPRC Bill from a transitional justice perspective;

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48 Boraine A L "Transitional Justice: A holistic Interpretation" (2006) *Journal of International Affairs* at 18.

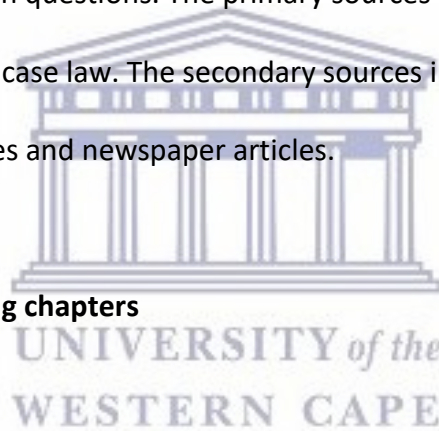
49 Hayner P B (2011:26); Gonzalez E (2013:3).

- To evaluate the constitutionality of the NPRC Bill; and
- To make recommendations on how Zimbabwe can establish an NPRC law that works effectively in tandem with the NPRC.

## **1.7 Research Methodology**

This research is a qualitative desktop research which draws data from relevant document analysis. This research focuses on a critique of both primary and secondary sources in order to develop answers to the research questions. The primary sources include international instruments, national laws and case law. The secondary sources include books, chapters in books, journals, internet sources and newspaper articles.

## **1.8 Outline of the remaining chapters**



### **Chapter Two: The Indispensability of a truth commission in Zimbabwe**

The chapter will examine the NPRC as an indispensable body for redress of past violence in Zimbabwe. This is meant to contextualise and validate the subsequent need of an effective empowering law to ensure the functionality of the commission. This chapter mainly discusses the need to give effect to the NPRC as the main response to post-conflict violence in Zimbabwe. In order not to drift away from the main subject of the paper- which is an evaluation of the NPRC Bill - the chapter briefly focuses on a general overview of transitional justice and truth

commissions, the NPRC and the missed opportunities which required a NPRC to investigate the gross injustices.

### **Chapter Three: An evaluation of Zimbabwe's National Peace and Reconciliation Bill, 2017**

This chapter analyses the crucial elements of an effective national peace and reconciliation system. It is here that the comparison will be drawn to truth commissions in the above-mentioned comparator countries. The discussion revolves around the NPRC Bill, examining its strengths and flaws.

### **Chapter Four: Conclusion and Recommendations**

This chapter draws conclusions and makes recommendations flowing from the discussion and findings.





## Chapter Two

### The Indispensability of a Truth Commission in Zimbabwe

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#### 2.1 Introduction

To give proper effect to the transition process in Zimbabwe, there is a need to establish not only a National Peace and Reconciliation Commission (NPRC) but a functioning one as well. Although provisions for the establishment of the NPRC are stipulated in section 251 of the Constitution,<sup>1</sup> the NPRC has not been functioning since 2013. What is required is an enabling law. This chapter seeks to validate the importance of the NPRC Bill by reflecting on the past conflicts and disputes which required an NPRC to investigate the gross human rights violations.

This chapter will not attempt to rewrite the vast history of all violent conflicts that have occurred in Zimbabwe. Such an account of events can be found in greater detail in other literature.<sup>2</sup> Instead, this chapter uses the main violent conflict occurrences in Zimbabwe to illuminate occasions and practices that have shaped the need for the NPRC and the subsequent enabling Act. Therefore, it covers the pertinent conflict periods, past attempts at uncovering

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1 The Constitution of Zimbabwe Amendment Act (No.20) of 2013.

2 Ndlovu- Gatsheni S J “Dynamics of the Zimbabwe Crisis in the 21st century” (2003) 1 *African Journal on Conflict Resolution* at 99-134; Doran S “Robert Mugabe – a history of violence” *Daily Maverick* 24 May 2017, available at <https://www.dailymaverick.co.za/article/2017-05-24-robert-mugabe-a-history-of-violence/#.Wf37kWiCzcs> (accessed 20 October 2017); Malaba B “The wounds are still fresh” *The Independent* 2 June 2017, available at <https://www.theindependent.co.zw/2017/06/02/wounds-still-fresh/> (accessed 20 October 2017).

the truth and past institutions established to find out the truth and foster reconciliation. The chapter deals, too, with present attempts to uncover the truth through the NPRC when it comes into effect.<sup>3</sup> To help understand these arguments, the chapter gives a general overview and background behind truth commissions, why they are the preferred transitional justice mechanism and the purpose they serve.

## 2.2 Transitional Justice and Truth Commissions: An Overview

This sub-section is meant to show that the establishment of the NPRC in Zimbabwe is not a new phenomenon.<sup>4</sup> It is a practice that has occurred in many countries around the world as a transitional justice mechanism aimed at achieving social justice.<sup>5</sup> The earliest truth commission was established in 1974 by the then president Idi Amin in Uganda.<sup>6</sup> Since then many other truth commissions have been set up by other countries as an integral part of their respective break with human rights violations.<sup>7</sup> This may be the possible explanation behind the establishment of a truth commission in Zimbabwe. This sub-section explains the notion of transitional justice,

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3 Goredema D, Chigora P & Bhebe Q P "Reconciliation in Zimbabwe: Where, when and how" (2014) 3 *Journal of Global Peace and Conflict* at 207.

4 Hayner P B "Fifteen Truth Commissions—1974 to 1994: A Comparative Study" (1994) 16 *Human Rights Quarterly* at 603.

5 See, a list of truth commissions compiled by Moore J "Truth Commissions: Can countries heal after atrocities?", available at <http://library.cqpress.com/cqresearcher/document.php?id=cqrglobal2010010000> (accessed 11 October 2017).

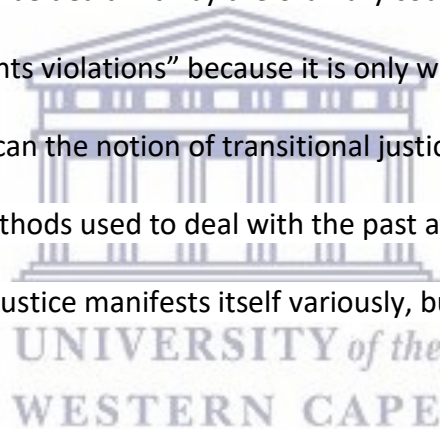
6 Hayner P B (2011:35); Brahm E (2009:2).

7 Pathak B "A Comparative Study of World's Truth Commissions-From Madness to Hope" (2017) 4 *World Journal of Social Science Research* at 192.

truth commissions (TCs), why TCs are favoured over other transitional justice mechanisms and the purpose they seek to serve.

### 2.2.1 Transitional Justice

Transitional justice is a method in which legal and non-legal mechanisms are applied in an emerging democracy.<sup>8</sup> It is founded on the need to address the past large-scale human rights abuses committed by a predecessor regime.<sup>9</sup> Such violations are deemed to be “gross” because they are too massive in scale to be dealt with by the ordinary courts.<sup>10</sup> Emphasis is to be placed on the words “gross human rights violations” because it is only when human rights violations are committed on a high scale can the notion of transitional justice be applied. Transitional justice is understood as the methods used to deal with the past atrocities perpetrated by the former regimes.<sup>11</sup> Transitional justice manifests itself variously, but in practice, it displays itself



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8 Pathak B (2017:194).

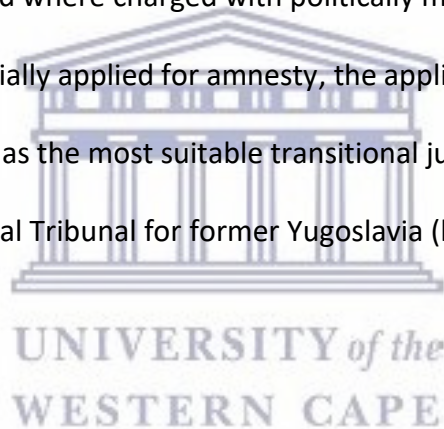
9 “What Is Transitional Justice?” *International Centre for Transitional Justice* (2017), available at <https://www.ictj.org/about/transitional-justice> (accessed 2 July 2017).

10 Tomuschat C “National Prosecutions, Truth Commissions and International Criminal Justice” in Werle G (ed) *Justice in Transition—Prosecution and Amnesty in Germany and South Africa* (2006:157-158). Collins C *Post-Transitional Justice: Human Rights Trials in Chile and El Salvador* (2010:7-8); Teitel R G *Globalising Transitional Justice: Contemporary Essays* (2014:3-8).

11 “What is transitional justice” ICTJ, available at <https://www.ictj.org/about/transitional-justice> (accessed 20 July 2017).

mainly in the form of criminal prosecutions, truth commissions, amnesties, reparations and purges.<sup>12</sup>

- i) Criminal prosecutions: This legal mechanism of transition began with the Nuremberg trials.<sup>13</sup> Trials are used as a transitional justice tool by transitioning states to ensure that perpetrators of human rights abuses are brought to justice. Trials may be conducted at national level, international level or as a hybrid.<sup>14</sup> An example of a local criminal prosecution is the case of Vakele Mkosana and Mzamile Gonya.<sup>15</sup> In this case the two accused were charged with politically motivated killings.<sup>16</sup> Although the accused had initially applied for amnesty, the application was refused.<sup>17</sup> Instead, a trial was favoured as the most suitable transitional justice method.<sup>18</sup> The International Criminal Tribunal for former Yugoslavia (hereinafter ICTY) is an



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12 Freeman M *Truth Commissions and Procedural Fairness* (2006:4-5); Teitel R G *Transitional Justice* (2000:214).

13 Oslen T D, Payne L A & Reiter A G *Transitional Justice in Balance: Comparing Processes, Weighing Efficacy* (2010:32).

14 Oslen T D, Payne L A & Reiter A G (2010:32).

15 *S v Mkosana and another* 2003 (2) SACR 63.

16 Bubenzer O *Post-TRC prosecutions in South Africa: Accountability for political crimes after the Truth and Reconciliation Commission's amnesty process* (2009:53).

17 TRC Amnesty Applications AM/4458/ and AM/7882/97.

18 TRC Amnesty Committee Decision number AC/2000/122.

example of international trial, while the Special Court of Sierra Leone is an example of a hybrid criminal trial.<sup>19</sup>

ii) Truth commission: This is a non-judicial *ad hoc* body established to generate an official record about the past injustices.<sup>20</sup> This is done through public or closed hearings. A TC investigates and reports on the principal causes and scope of violence. It further submits its findings to the government and makes recommendations on preventing future abuses.<sup>21</sup>

iii) Amnesty: This is alternative transitional justice tool used to exonerate a perpetrator of violence from punishment. Amnesties can be applied for both civil and criminal proceedings.<sup>22</sup> Amnesties can be used in two forms. First, it can be used as an act of justice. This involves the release of victims of the previous repressive regime from prison, annulling their sentence and clearing the charges against them.<sup>23</sup> Second, amnesties may be used as part of reconciliation.<sup>24</sup> Here the perpetrator of violence

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19 Stan L & Nedelsky N (eds) *Encyclopedia of Transitional Justice 1* (2013:10).

20 Stan L & Nedelsky N (2013:98).

21 Hayner P B (1994:604); Stan L & Nedelsky N (2013:99).

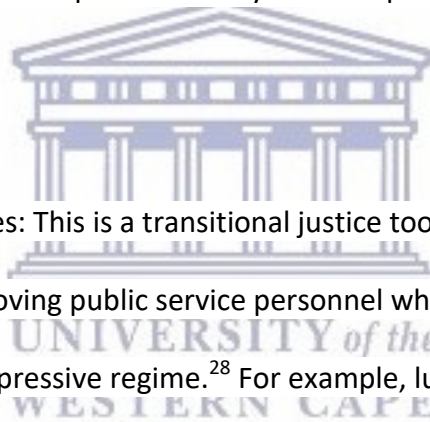
22 Stan L & Nedelsky N (2013:10).

23 Stan L & Nedelsky N (2013:10).

24 Snyder J & Vinjamuri L "Trials and Errors: Principle and Pragmatism in Strategies of International Justice" (2003) 28 *Quarterly Journal: International Security* at 18.

is offered immunity from any court proceedings in exchange of the truth concerning his participation in violence.

iv) Reparations: This is a method set up to repay victims of violence for their loss and suffering.<sup>25</sup> Reparations should be proportional to the harm suffered.<sup>26</sup> Reparations are said to be backward looking as they offer compensation for past violence suffered. Reparations can be in the form of individual or collective or symbolic reparations.<sup>27</sup> Individual or collective reparations include monetary payments or building of a school or hospital. Whilst symbolic reparations include public apologies and memorials.



v) Lustration and purges: This is a transitional justice tool used to cleanse the government by removing public service personnel who supported or sympathised with the previous repressive regime.<sup>28</sup> For example, lustrations conducted in Bulgaria resulted in the dismissal of 90 per cent of government workers for past socialist activity or support.<sup>29</sup> In Peru, military workers implicated in human rights

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25 De Greiff P (ed) *The Handbook of Reparations* (2006:98); Randalzhofer A and Tomuschat C (eds) *State Responsibility and the Individual: Reparation in Instances of Grave Violations of Human Rights* (1999:8)

26 See UN, "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law"

27 Oslen T D, Payne L A & Reiter A G (2010:37).

28 Stan L & Nedelsky N 1 (2013:61).

29 Bronkhurst D "Truth and Reconciliation: Obstacles and Opportunities for Human Rights" (1995) 8 *Amnesty International Dutch Section* at 9.

abuses were dismissed, reducing its military workers by half.<sup>30</sup> This is meant to build public trust and give legitimacy to public institutions.<sup>31</sup>

### 2.2.2 Definition of truth commissions (TCs)

TCs are *ad hoc*, official bodies set up to investigate large-scale human rights atrocities committed over a specific timeframe.<sup>32</sup> They document their findings and publish these in a report.<sup>33</sup> Buergenthal states the following regarding truth commissions:

“Truth commissions are fact-finding bodies set up for the specific purpose of investigating serious violations of human rights and humanitarian law committed in a country during a specific period of time, usually during internal armed conflict or a particular repressive regime.”<sup>34</sup>

From the above definition, TCs may be regarded as instruments *sui generis* since, their status differs from other investigatory bodies. TCs investigate past injustices which are frequently sponsored, if not planned and carried out by governments. Tutu, argues that TCs offer a justice

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30 Stan L & Nedelsky N (2013:374).

31 Mayer-Rieckh A & De Greiff P (eds) *Justice as Prevention: Vetting Public Employees in Transitional Societies* (2008:17).

32 Pathak B (2017:193).

33 Stan L & Nedelsky N (eds) 1 (2013:98).

34 Buergenthal T “Truth Commissions: Functions and Due Process” in in Dupuy et el (eds) *Festschrift fur Tomuschat* (2006:104-105).

balance between the international criminal courts or tribunals, blanket amnesty and state amnesia.<sup>35</sup>

Hayner describes TCs more broadly as follows: First, TCs examine historical human rights violations and not on-going injustices as a human rights ombudsman might. The latter is meant to investigate the nature and scope of one narrow occurrence. Second, TCs investigate a range of human rights violations over a given period and do not focus on a particular event. Third, TCs are *ad hoc* bodies. Finally, TCs are official bodies sanctioned or empowered by the government.<sup>36</sup>

Accordingly, TCs are methods of cathartic social action, based on the notion that communal recollection of the past will help prevent the repetition of human rights abuses in the future.<sup>37</sup> The definitions of TCs mentioned above are assumed to have played a pivotal role in the conception of a truth commission in Zimbabwe.<sup>38</sup> Thus the establishment of a transformative

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35 Tutu D *No Future Without Forgiveness* (1999:30).

36 Hayner P B *Unspeakable Truths: Transitional Justice and the Challenges of Truth Commissions* 2 ed (2011:11).

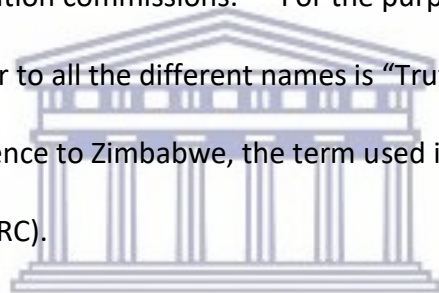
37 Hazan P "Transitional Justice After September 11: A New Rapport with Evil" in Shaw R, Waldorf L & Hazan P (eds) (2010:53-54).

38 Tshuma A "Reframing post-Mugabe justice: A critical need for a truth and reconciliation commission" (2015) 9 *African Journal of Political Science and International Relations* at 308.



mechanism, in the form of a truth commission, serves as a rational approach to redress the legacy of gross injustices in Zimbabwe.<sup>39</sup>

Truth Commissions have been established under various names, depending on the mandate they seek to achieve. For example, in Uganda and Argentina the investigatory bodies were called “commissions on the disappeared.” Elsewhere, namely, in Mauritius and Paraguay TCs were called “truth and justice commissions.” In Kenya and Togo the TC was established as a “truth, justice and reconciliation commission.” In Sierra Leone, South Africa and Peru the words used were “truth and reconciliation commissions.”<sup>40</sup> For the purposes of this research paper, the term generally used to refer to all the different names is “Truth Commissions” (TCs). However, with particular reference to Zimbabwe, the term used is National Peace and Reconciliation Commission (NPRC).



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### **2.2.3 Truth commissions compared to other accountability mechanisms**

Countries emerging from a dictatorship and transitioning to democracy have various accountability mechanisms at their disposal that may be used to redress past gross injustices. A country may either; punish the wrongdoers or institute a TC, offer reparations to victims,

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39 Du Plessis M “Truth and Reconciliation Processes: Lessons for Zimbabwe?” (2002) 8 *The South African Institute of International Affairs* at 1.

40 Hayner P B (2011:12).

initiate a restorative justice process or leave the egregious past to die a “silent death.”<sup>41</sup>

However, the question that arises more often is “what then commends truth commissions as an accountability mechanism compared to other transitional justice mechanisms?”<sup>42</sup> There are several reasons why a country would prefer establishing a truth commission as compared to other accountability mechanisms. These reasons are assumed to be applicable to the Zimbabwean context. The reasons are elaborated upon below.

In relation to trials several reasons may compel a state to establish a TC even though trials are possibly regarded as the earliest example of a transitional justice mechanism, as witnessed at the Nuremberg Trials.<sup>43</sup> Besides being costly, prolonged and frequently difficult to follow, criminal prosecutions usually focus on high-ranking military and political leaders.<sup>44</sup> As a result, there have been concerns that trials do not sufficiently mirror the range of offenders, the categories’ of offences committed or the type of targeted victim groups. For example, there had been concerns that the International Criminal Tribunal for the Former Yugoslavia (ICTY) trials did not impartially represent the Serb victims. During the trials Serbs were arraigned for crimes committed against Bosnian Muslims. Yet there were occasions in which the Serbs were victims to the perpetrators of Bosnian Muslims.<sup>45</sup>

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41 Hayner P B (2011:80).

42 Braham E “What is a truth commission and why does it matter” (2009) 3 *Peace and Conflict Review* at 1.

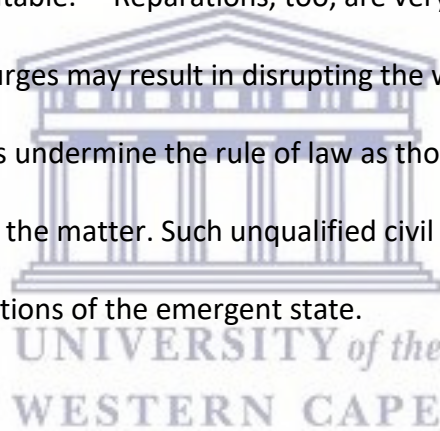
43 Oslen T D, Payne L A & Reiter A G (2010:32).

44 Teitel R.G (2000:41).

45 Stan L & Nedelsky N 1 (2013:10).

According to Hayner, transitional justice not only covers legal matters, it includes a wide range of political and even psychological matters.<sup>46</sup> Therefore criminal prosecutions alone are an inadequate transitional justice mechanism. Moreover, such trials have been criticised for being launched many years after the crimes have been perpetrated - justice delayed is justice denied, so the saying goes.<sup>47</sup> These judicial drawbacks make TCs the preferred option.

Compared to amnesties, TCs are preferable as amnesties can be manipulated to frustrate perpetrators being held accountable.<sup>48</sup> Reparations, too, are very expensive, especially where a state has scarce resources.<sup>49</sup> Purges may result in disrupting the workings of the civil service of the transitioning state.<sup>50</sup> Purges undermine the rule of law as those affected are not given an opportunity to put their side of the matter. Such unqualified civil service purges may thus weaken the democratic foundations of the emergent state.



However, one study is of the view that a successful transition is likely to be accomplished when a TC is combined with criminal prosecutions and amnesty, provided that such a merger strikes a

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46 Hayner P B *Unspeakable truth: transitional justice in historic perspective* (2002:12).

47 Stan L & Nedelsky N 1 (2013:10).

48 Reeler T, Tarisayi E & Maguchu P (2017:27).

49 Koppe K "Reparations for Apartheid Victims" in Werle G (ed) *Justice in Transition— Prosecution and Amnesty in Germany and South Africa* (2006:217-225).

50 Collins C (2010:161); Olsen T D, Payne L A & Reiter A G (2010:38).

“justice balance.”<sup>51</sup> Accordingly, a justice balance is reached when: (i) the trial element is incorporated to emphasise intolerance of impunity for serious human rights abuses; (ii) amnesty is resorted to in order to enhance political stability, particularly in cases of negotiated transitions; and (iii) the truth-finding element is incorporated to uncover the truth about past systematic abuses for purpose of avoiding repetitions in the future.<sup>52</sup>

#### 2.2.4 Purposes of truth commissions

The discussion on the purposes of TCs is meant to contextualise the goals TCs seek to attain. The reasons discussed are assumed to be applicable to the case of Zimbabwe. This research paper refers to these goals as the purpose of truth commissions.<sup>53</sup> To begin with, a TC is established as an official body for the purpose of uncovering the truth.<sup>54</sup> A truth commission is established to provide a complete account of a state’s past marked with serious human rights abuses.<sup>55</sup> It is the state’s duty to provide its citizens with the truth of what took place during the violence periods.<sup>56</sup> Exposing the truth about the past is said to be a vital factor in a country’s

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51 Materu S F *The Post-Election Violence in Kenya: Domestic and Legal Responses* (2015:142).

52 Olsen T D, Payne L A & Reiter A G (2010:457).

53 Olsen T D, Payne L A & Reiter A G (2010:21).

54 Smyth M B *Truth Recovery and Justice after Conflict: Managing Violent Pasts* (2007: 12-13).

55 Smyth M B (2007:9).

56 Nerlich V “Lessons for the International Criminal Court: The Impact of Criminal Prosecutions on the South African Amnesty Process” in Werle G (ed) (2006:55-56).

process of reconciliation and healing.<sup>57</sup> This commends the purpose of establishing a truth commission in Zimbabwe.

Apart from exposing the truth, the purpose of a TC is meant to respond to the needs and interests of victims and survivors of past injustices. A TC, in contrast to a criminal trial is victim centred.<sup>58</sup> Through hearings, victims narrate their stories and thereby reclaim their human worth and dignity. This was central to the National Unity and Reconciliation Commission in Rwanda.<sup>59</sup> In like manner, a TC serves to submit recommendations to the government on suitable reparations methods to the victims and survivors of past injustices.<sup>60</sup>

Another purpose of a TC is to identify the causes of the past injustices subject to its mandate.<sup>61</sup> This is done by establishing the attributes and scope of the past injustices carefully and objectivity. For instance, the Peru TRC attributed socio-economic injustice as a cause of the conflict. Also, the Sierra Leone TRC established that there was a nexus between conflict and

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57 Du Plessis M (2002:11).

58 Rohtz-Arriaza N *Impunity and Human Rights in International Law and Practice* (1995:24-32, 39-49).

59 Sarkin C "The necessity and challenges of establishing a Truth and Reconciliation Commission for Rwanda" (1999) 21 *Human Rights Quarterly* at 799.

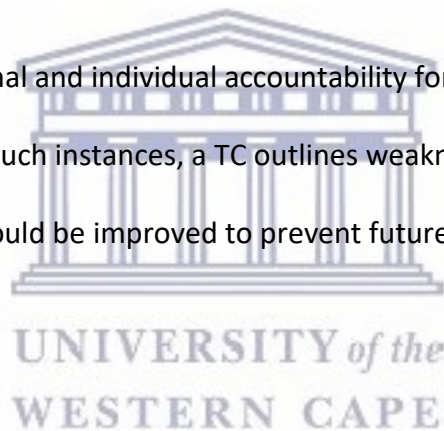
60 Wustenberg R K "On Truth, Dignity and Reconciliation in South Africa-A Theological Perspective" in Werle G (ed) (2006:131).

61 Hayner P B (2011:29).

socio-economic imbalances.<sup>62</sup> By establishing the causes of past injustices, a TC is able to make recommendations to the government on the prevention of future violence.<sup>63</sup>

A TC is established to show a country's break with the past regime which committed gross human rights violations.<sup>64</sup> When the new government establishes a TC, it indicates its pledge to promote the rule of law. This strengthens the public trust in the new government.<sup>65</sup> For example, in South Africa, a truth commission was established after the Apartheid era. Such a pledge reflects the break with the past.

A TC serves to assign institutional and individual accountability for gross human rights violations and recommend reforms.<sup>66</sup> In such instances, a TC outlines weaknesses in institutional organisations and laws that should be improved to prevent future re-occurrences of past injustices.<sup>67</sup>



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62 Schabas W A "The Sierra Leone Truth and Reconciliation Commission" in Roht-Arriaza N and Mariezcurrena J (eds) *Transitional Justice in the Twenty-First Century, Beyond Truth versus Justice* (2006:22).

63 Brahm E *Truth commissions and transitional societies: The impact on human rights and democracy* (2009:2).

64 Jowdy G "Truth Commissions in El Salvador and Guatemala: A Proposal for Truth in Guatemala" (1997) 17 *International Law and Human Rights Edition* at 287.

65 Fernandez L "Post-TRC Prosecutions in South Africa" in Werle G (ed) (2006:81).

66 Hayner P B (2011:29); Du Plessis M (2002:11).

67 Hazan P "Transitional Justice After September 11: A new Rapport with Evil" in Shaw R, Waldorf L and Hazan P (eds) (2010:53).

Another purpose of a TC is to provide a cathartic effect in the society. For example, the South Africa TRC ensured that both victims and perpetrators come together. Perpetrators apologised for the atrocities they committed while the victims narrated their painful experience. As a result, reconciliation was achieved between the parties.

### 2.3 Why establish a truth commission in Zimbabwe?

Based from the above discussion on the purpose of TCs, the establishment of a TC in Zimbabwe is set within an argument that a country cannot wholly reconcile as long as past human rights violations have not been addressed.<sup>68</sup> Academics argue that “silence and amnesia are the enemies of justice”.<sup>69</sup> Henceforth, a TC in Zimbabwe will serve the purpose of establishing the truth about past violence and providing reparations to the victims.<sup>70</sup> The fact of the matter is that, the government of Zimbabwe has vehemently denied the violent occurrences. Therefore, having an official body investigate the past injustices and expose the truth is important especially for the victims and survivors.<sup>71</sup> It follows that the undertaking of investigating the

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68 Tutu D (2000:260:261).

69 Bloomfield D, Barnes T & Huysse L (eds) *Reconciliation after violent conflict: A handbook* (2003:23).

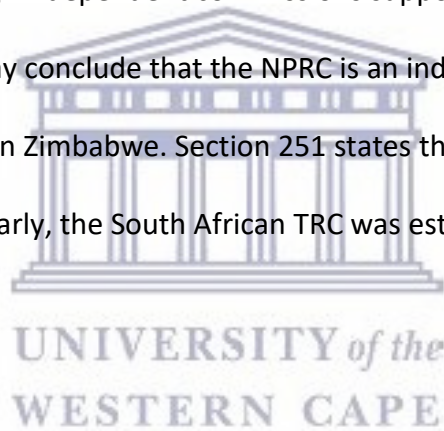
70 Du Plessis M (2002:9).

71 Du Plessis M (2002:10).

country's egregious past can be effectively accomplished through a TC.<sup>72</sup> The TC will reconcile and facilitate disputes resolution amongst communities.<sup>73</sup>

### 2.3.1 Establishment

The Constitution of Zimbabwe establishes a TC in Zimbabwe. The TC is called the National Peace and Reconciliation Commission (NPRC). Sections 252 and 253 provide for the NPRC's composition, mandate and reporting structure.<sup>74</sup> The NPRC is provided for in chapter 12 of the Constitution under the heading "independent commissions supporting democracy."<sup>75</sup> From the heading of the chapter, one may conclude that the NPRC is an independent investigative body meant to promote democracy in Zimbabwe. Section 251 states that the NPRC shall be in effect for a period of 10 years.<sup>76</sup> Similarly, the South African TRC was established through an Act of parliament.<sup>77</sup>



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72 Tshuma A (2015:308).

73 Sec 252 (i) of the Constitution of Zimbabwe Amendment (No.20) Act.

74 Secs 252 & 253 of the Constitution of Zimbabwe Amendment (No.20) Act.

75 Sec 233(a) of the Constitution of Zimbabwe Amendment (No.20) Act.

76 Sec 251 of the Constitution of Zimbabwe Amendment (No.20) Act.

77 The Promotion of National Unity and Reconciliation Act 34 of 1996.



Both commissioners and the secretariat have been appointed.<sup>78</sup> What the NPRC lacks is the ability to function, for it lacks an enabling law. The establishment of the NPRC is different to that in other countries. For instance, the Chilean TC was founded on a presidential decree, whilst the Guatemalan TC was founded on peace agreements.<sup>79</sup>

### 2.3.2 Composition and Independence

The commission is composed of nine members<sup>80</sup> similar to the Truth, Justice and Reconciliation Commission of Kenya. However unlike Kenya, the members are all Zimbabwean citizens. The NPRC members have already been sworn in by the then president Mugabe<sup>81</sup>. This was carried out after consultations with the Judicial Service Commission and the designated Portfolio Committee<sup>82</sup>. The NPRC members, chaired by an experienced lawyer are distinguished Zimbabweans of impeccable stature, and are experts in the field of post-conflict situations,



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78 Bulawayo24News “Mugabe swears in National Peace and Reconciliation Commission”, available at <http://bulawayo24.com/index-id-news-sc-national-byo-83236.html> (accessed 15 March 2017).

79 Hayner P B “Truth commission: a schematic overview” (2006) 88 *International review of the Red Cross* at 297.

80 Sec 251 of the Constitution of Zimbabwe Amendment (No.20) Act of 2013.

81 Bulawayo24News ‘Mugabe swears in National Peace and Reconciliation Commission’, available at <http://bulawayo24.com/index-id-news-sc-national-byo-83236.html> (accessed 24 June 2017).

82 Sec 251 (1) of the Constitution of Zimbabwe Amendment (No.20) Act of 2013.

national reconciliation and peacebuilding.<sup>83</sup> However, their competence to carry out their mandate will be tested only when the commission starts with its work.

The independence of the NPRC is guaranteed under section 235 of the Constitution and it is further reiterated in clause 4 of the NPRC Bill, which provides that the commission shall enjoy the independence stipulated in section 235 of the Constitution and “shall be subject to the direction of the law.”<sup>84</sup> The Constitution further provides that in performing their duties, the NPRC commissioners must exercise impartiality. Furthermore, they must be apolitical and not infringe the rights or freedoms of any individual.<sup>85</sup>

### 2.3.3 Mandate

The Commission’s mandate is very broad as it is suppose to be both forward and backward-looking. Section 252 outlines the specific ten functions which will guide the Commission in its mandate. According to the stated functions, the NPRC has to uncover the truth on any past conflict, facilitate the making of amends, dispensing justice, pre-empting future conflicts and recommending conflict prevention.<sup>86</sup> On paper, the constitutional provisions are progressive as they cover the four significant areas which a country has to address in order to deal with the

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83 Sec 251 (4) of the Constitution of Zimbabwe Amendment (No.20) Act of 2013.

84 Clause 4 of the NPRC Bill.

85 Sec 235 (1) (c); 235(3); 236 of the Constitution of Zimbabwe Amendment (No.20) Act of 2013.

86 Sec 252 of the Constitution of Zimbabwe Amendment (No.20) Act.

past effectively. “These are the right to know, the right to justice, the right to reparations and guarantees of non-recurrence.”<sup>87</sup> The overarching objective of the NPRC Bill is to coordinate and initiate investigations into post-conflict disputes occurring in Zimbabwe, subject to the constitutional provisions.<sup>88</sup> The NPRC once operational, shall deal with the past, although it is not specified what is meant by the word “past.”<sup>89</sup> However, the Commission can initiate and investigate past conflicts only after having received complaints from an interested party. The Commission also has the mandate to report to the Parliament through the Vice-President, who is the designated Minister.<sup>90</sup>

Aside from the ten specific functions, there are general objectives to be fulfilled by any independent commissions established in Zimbabwe.<sup>91</sup> These include promotion of constitutionalism, transparency and accountability in public institutions and ensuring that injustices are remedied. The NPRC mandate is very broad, which is to be welcomed. It does not restrict the scope of the conflicts or disputes to be investigated. This will allow the Commission to commence investigations on a wide range of disputes indispensable for the realisation of national peace and reconciliation. However, there is a drawback to a broad mandate. A case in

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87 United Nations Human Rights Office of the High Commissioner, available at <http://www.ohchr.org/EN/Issues/TruthJusticeReparation/Pages/Mandate.aspx> (accessed 13 October 2017).

88 Clause 3(2) of the NPRC Bill

89 Sec 252 (a) of the Constitution of Zimbabwe Amendment (No.20) Act.

90 Sec 253 of the Constitution of Zimbabwe Amendment (No.20) Act.

91 Sec 233 of the Constitution of Zimbabwe Amendment (No.20) Act.

point is the overly broad mandate of Guatemala's Commission for Historical Clarification (CEH). The CEH was tasked to investigate "all" human rights violations which had occurred over 35 years. This resulted in overburdening the Commission.<sup>92</sup> It is submitted that the NPRC should, accordingly, give priority to serious matters.

#### **2.4 Conflict and dispute episodes which make the NPRC a necessity in Zimbabwe**

There have been numerous human rights violations which required the use of an NPRC had it existed. This subsection makes reference to the human rights atrocities calling for the use of the NPRC as a remedy. Amongst the violations are extra-judicial killings, murders, torture, internal displacements, forced starvation and detention without trial.<sup>93</sup> The human rights atrocities covering decades, including the liberation war of 1965-1979, the *Gukurahundi* atrocities of 1980-1987 and the elections-related violence.<sup>94</sup> This subsection looks at some of the atrocities which the NPRC may conduct investigations, once it is operational.

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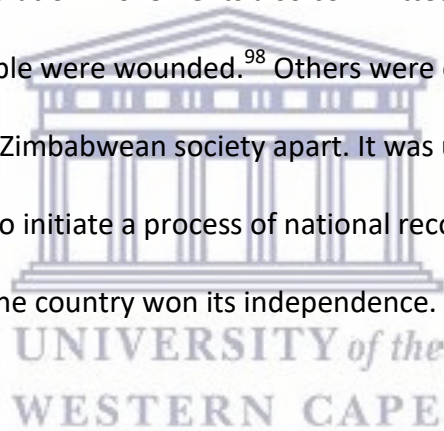
92 Tomuschat C "Clarification Commission in Guatemala" (2001) 23 *Human Rights Quarterly* at 239.

93 Reeler T, Tarisayi E & Maguchu P (2017:6).

94 Du Plessis and Ford 2009, Sachikonye 2011a) Themba Lesizwe *Civil Society and Justice in Zimbabwe* (2004) Proceedings of a symposium held in Johannesburg 11-13 August 2003.

### 2.4.1 Liberation war

Before 1980, the Zimbabwean population was subjected to inhuman treatment, torture and continuous violence by the then Rhodesian colonial regime.<sup>95</sup> The brutal liberation war between the colonial government and the two liberation movements, the Zimbabwe African People Union (ZAPU) and the Zimbabwe African National Union (ZANU) resulted in gross human rights violations, including the death of over 30 000 civilians.<sup>96</sup> The Rhodesian army used biological weapons as part of their war effort in contravention of the Biological Weapons Convention.<sup>97</sup> Similarly, the liberation movements also committed atrocities against the civilian population. Some 450 000 people were wounded.<sup>98</sup> Others were displaced or detained.<sup>99</sup> All these atrocities tore the entire Zimbabwean society apart. It was under these circumstances that it was deemed necessary to initiate a process of national reconciliation immediately after 1980, being the year in which the country won its independence.



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- 95 Reeler T "Subliminal terror? Human rights violations and torture in Zimbabwe during 2008" (2009) 1 *Centre for the Study of Violence and Reconciliation* at 3.
- 96 Murambadoro R & Wielenga C "Reconciliation in Zimbabwe: The Conflict between a state-centred and people-centred approach" (2005) 1 *Strategic Review for Southern Africa* at 34.
- 97 Brickhill J "Zimbabwe's Poisoned Legacy: Secret War" (1992) *Southern Africa Covert Action Quarterly* at 43.
- 98 CCJP *Civil War in Rhodesia: Abduction, Torture and Death in the Counter-Insurgency Campaign* Salisbury: Catholic Commission for Justice and Peace in Rhodesia (1976); Amani Trust Report *Survivors of Torture and Organised Violence from the 1970 War of Liberation* (1988).
- 99 CCJP (1997:38).

## 2.4.2 *Gukurahundi* atrocities

Unfortunately, violence in Zimbabwe did not abate after independence. The two political parties, namely, the ZAPU headed by Joshua Nkomo and ZANU, headed by Robert Mugabe, which had fought side by side against the colonial Rhodesian regime of Ian Douglas Smith for two decades, began wrangling amongst themselves. This dissent between the two parties led to the infamous *Gukurahundi* massacre in which about 20 000 civilians believed to be “dissidents” were killed by the Fifth Brigade at the order of Mugabe.<sup>100</sup> This massacre necessitated the process of reconciliation amongst the civilian victims and the perpetrators.

## 2.4.3 Operation *Murambatsvina*

Operation *Murambatsvina*, meaning to “Restore Order” or “Get Rid of the Filth” was a government initiated program of forced evictions. The operation resulted in more than 700000 people losing their homes, their means of income or both.<sup>101</sup> Academics have equated

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100 This was an operation launched by the Zimbabwean government in the Matabeleland and Midlands provinces of Zimbabwe to flush out ‘dissidents’. *Gukurahundi* is a native Shona term given to a periodic phenomenon and is usually literally interpreted as “the rain which washes away the chaff before the spring rains.” It was the term given supposedly by former president Mugabe, who is of the Shona speaking majority people to entities which were largely responsible for the gross human rights violations against civilians’ in Matabeleland in 1983 to 1984. It was alleged that there needed to be a “cleansing of dissidents” from the minority Ndebele-speaking people.

101 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 (2005:7), available at [http://www.un.org/News/dh/infocus/zimbabwe/zimbabwe\\_rpt.pdf](http://www.un.org/News/dh/infocus/zimbabwe/zimbabwe_rpt.pdf) (accessed 21 July 2017).

Operation *Murambatsvina* to a crime against humanity.<sup>102</sup> The consequences of the operation were so dire that this hideous conduct attracted the attention of the United Nations (UN). In response the UN sent representatives to Zimbabwe to investigate the extent and consequences of operation *Murambatsvina*.<sup>103</sup> Operation *Murambatsvina* was in contravention of domestic laws and international instruments conflicted ratified by Zimbabwe.<sup>104</sup> The government denied any wrongdoing by conducting operation *Murambatsvina*. It further stated that the operation was a legal action to curtail unlawful economic activities, crime in slums and unlawful settlements in numerous cities and towns.<sup>105</sup> However, the government made no alternative housing or shelter for the victims of its policy.<sup>106</sup> These gross human rights violations called for the establishment of an NPRC.



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102 Nicolai J “Operation Murambatsvina: A Crime against Humanity under the Rome Statute?” (2005) 5 *American University International Law Review* at 814; See also, *Oxford Pro Bono Publico Group* “Are the activities conducted during Operation Murambatsvina crimes against humanity within the meaning of article 7 of the Rome Statute?” (2005) *International Law Opinion* at 83.

103 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”.

104 UN General Assembly *Universal Declaration of Human Rights* Adopted 10 December 1948, 217 A (III); *International Covenant on Economic, Social, and Cultural Rights* Adopted 16 December 1966; *International Covenant on Civil and Political Rights* Adopted 16 December 1966; *African Charter on Human and People's Rights* Adopted June 27 1981.

105 Sec 32 of the Regional, Town and Country Planning Act of 1976.

106 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” (2005:95).

#### 2.4.4 Violence during the elections

Violence which has generally been more prevalent during election years prompted the need for the creation of a NPRC. Reports of violence, intimidation, torture, murder, arbitrary detentions, disappearances and maiming have become a norm during elections.<sup>107</sup> Those who were deemed to have voted for a certain presidential candidate were physically assaulted, maimed and had their properties seized or destroyed.<sup>108</sup> Economic penalties were exacted as a form of political violence. For example, agricultural assets such as livestock and maize in rural areas have traditionally been confiscated as punishment for supporting the opposition.<sup>109</sup>

During the 2002 presidential elections, the Zimbabwe Human Rights NGO Forum recorded 1 096 incidents of violence, including 35 deaths.<sup>110</sup> Similarly, in 2005 a total of 1 221 incidents of gross human rights violations were recorded.<sup>111</sup> In June 2008 Human Rights Watch published a



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107 Zimbabwe Human Rights NGO Forum *Political Violence Report March 2008*, available at [http://www.hrforumzim.org/wp-content/uploads/2010/06/march\\_2008.pdf](http://www.hrforumzim.org/wp-content/uploads/2010/06/march_2008.pdf) (accessed 20 July 2017); Human Rights Watch Report 'Perpetual Fear: Impunity and Cycles of Violence in Zimbabwe', available at <https://www.hrw.org/report/2011/03/08/perpetual-fear/impunity-and-cycles-violence-zimbabwe> (accessed 20 July 2017).

108 Sachikonye L "Curse of political violence: Time to break the cycle of terror" *Open Society Initiative for Southern Africa*, available at [www.osisa.org/openspace/zimbabwe/curse-political-violence-time-break-cycle-terror](http://www.osisa.org/openspace/zimbabwe/curse-political-violence-time-break-cycle-terror) (accessed 20 July 2017).

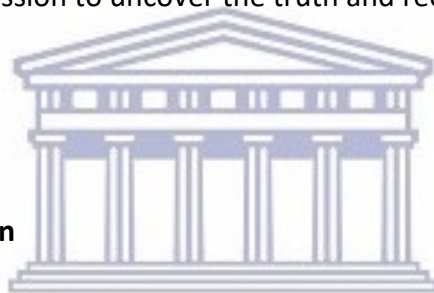
109 CCJP (2009:98).

110 Zimbabwe Human Rights NGO Forum *Political Violence Report March 2002*.

111 Zimbabwe Human Rights NGO Forum *Political Violence Report March 2005* Harare Zimbabwe.



report on the politically-motivated violence titled “Bullets for Each of You: State-Sponsored Violence since Zimbabwe’s March 29 Elections.” The report documented widespread and systematic human rights violations which resulted in the death of 200 people, with 5000 having been tortured and a further 36 000 people having been displaced.<sup>112</sup> Sadly, since the release of the report, the government has not made any genuine efforts to investigate or prosecute any of the perpetrators. Instead, former president Mugabe has issued presidential pardons and clemency after every election period.<sup>113</sup> These impunity measures have protected the perpetrators and failed the needs of the victims. It is these developments which call for the establishment of a truth commission to uncover the truth and reconcile the victims and the perpetrators.



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## 2.5 Attempts at reconciliation

The Zimbabwean citizens have been subjected to violence for decades. The government’s responses to the human rights violations have been minimal and fragmentary. It has failed to embark on effective transitional justice mechanisms. To this end, Ndlovu-Gatsheni suggests that transitional justice in Zimbabwe has so far been elusive.<sup>114</sup> There has been a lack of

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112 Human Rights Watch, available at <https://www.hrw.org/report/2008/06/09/bullets-each-you/state-sponsored-violence-zimbabwes-march-29-elections> (accessed 20 July 2017).

113 See, Clemency Order No. 1 of 1995 issued after the general elections in that year as well as Clemency Order No. 1 of 2008 under General Notice 85A/2008 issued after elections.

114 Ndlovu-Gatsheni S “Elections in Zimbabwe: A recipe for tension or a remedy for reconciliation?” (2012) *Institute for Justice and Reconciliation* at 9.

political will to address the past and implement transitional justice mechanisms, such as accountability, institutional reform, truth-telling, reparations and ensure that there is non-recurrence of gross violations. In the few cases where these methods have been applied, they have been partisan, forced, and not victim-centred.<sup>115</sup>

To start with, the gross injustices committed in the liberation war were covered and impunity emboldened by the Indemnity and Compensation Act of 1975, which was further made to apply retrospectively as of 1972. This allowed proactive immunity for gross human rights violations.<sup>116</sup>

It was premised on letting “bygones be bygones” robed up as forgiveness. Impunity was again encouraged in the violence during the elections. A case in point is the 2000 elections. After the 2000 elections, former president Mugabe granted “free pardon” to perpetrators of politically-motivated offences committed between 1 January 2000 and 31 July 2000.<sup>117</sup> A further Clemency Order, No. 1 of 2002, also exonerated perpetrators of acts of violence in the run-up to the presidential election of that year. Interestingly, issuing of pardons after an election period has become a custom in Zimbabwe.<sup>118</sup>

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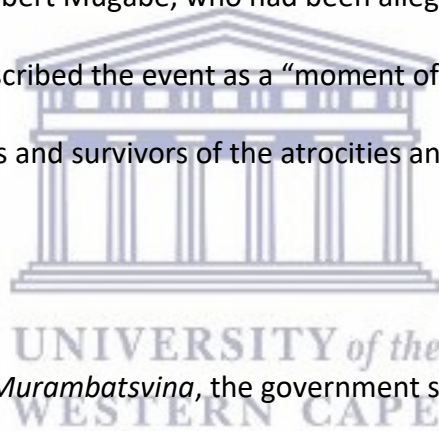
115 Chateta G “No one is going to be arrested for political violence – Mugabe” *ZimbabweSituation* August 9 2010, available at [http://www.zimbabwesituation.com/old/aug10\\_2010.html#Z3](http://www.zimbabwesituation.com/old/aug10_2010.html#Z3) (accessed 19 July 2017); See also ‘Outrage At Mugabe's Amnesty Call’ *ZimbabweSituation* 9/08/2010, available at [http://www.zimbabwesituation.com/old/aug10\\_2010.html#Z4](http://www.zimbabwesituation.com/old/aug10_2010.html#Z4) (accessed 20 July 2017).

116 Reeler T, Tarisayi E & Maguchu P (2017:11).

117 Clemency Order No. 1 of 2000.

118 See, Clemency Order No. 1 of 1995 issued after the general elections in that year as well as Clemency Order No. 1 of 2008 under General Notice 85A/2008 issued after elections.

In the case of the *Gukurahundi* atrocities in the southern provinces of Zimbabwe, little headway has been made to reconcile the communities. Although a pact, the Unity Accord, was established as a form of reconciliation, it was a failed attempt.<sup>119</sup> The Unity Accord is regarded as having failed in bringing about reconciliation and cohesion within the communities.<sup>120</sup> Also, the Chihambakwe Commission established by the state to examine the allegations of gross human rights abuses, did not avail its report to the public.<sup>121</sup> It is, therefore, unclear whether the commission's recommendations - still unknown to victims and ordinary Zimbabweans - were ever implemented. Mr Robert Mugabe, who had been allegedly implicated in the *Gukurahundi* atrocities, has described the event as a "moment of madness."<sup>122</sup> These sentiments have left the victims and survivors of the atrocities angry and reconciliation a pipe dream.



Following the 2005 Operation *Murambatsvina*, the government set up a new operation called "Operation *Garikai/Hlalani Kuhle*." This operation was meant to provide housing plots and new hawking places for people who lost their houses or businesses. The government completed

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119 The Unity Accord available at [http://www.pindula.co.zw/Unity\\_Accord](http://www.pindula.co.zw/Unity_Accord), (accessed 20 July 2017).

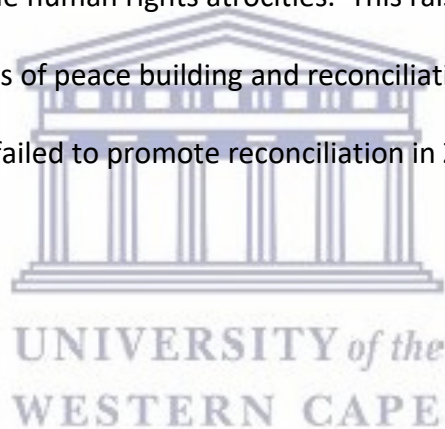
120 Mashingaidze T M "The 1987 Zimbabwe National Unity Accord and its Aftermath: A Case of Peace without Reconciliation?" *From National Liberation to Democratic Renaissance in Southern Africa*, available at [www.codesria.org/IMG/pdf/4-Mashingaidze.pdf](http://www.codesria.org/IMG/pdf/4-Mashingaidze.pdf) (accessed 20 July 2017).

121 Reeler T (2009:3).

122 "Zimbabwe: Gukurahundi - Tell Us Who Was Mad, Mugabe Challenged", available at <http://allafrica.com/stories/201407100386.html> (accessed 20 July 2017).

reconstruction of only 3 325 structures after destroying more than 92 000 dwellings. The new structures were distributed to the security forces personnel and civil servants and the remainder were allocated to people affiliated to the ruling party.<sup>123</sup>

After the 2008 political violence, the government established the Organ on National Healing, Reconciliation and Integration (ONHRI). The objective of the ONHRI was to reconcile the nation after the political violence that had resulted in numerous human rights violations.<sup>124</sup> However, the ONHRI consisted of members affiliated to political parties involved in the conflicts and alleged to be perpetrators of the human rights atrocities. This raises questions about the wisdom of assigning the process of peace building and reconciliation to politically tainted people. This is why the ONHRI failed to promote reconciliation in Zimbabwe.<sup>125</sup>



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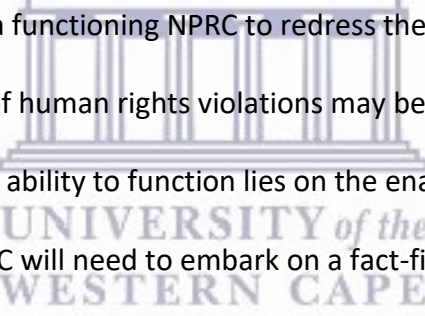
123 Mukaro A 'Operation Garikai a failure: Amnesty International' *The Standard* 22 July 2005 available at <https://www.thestandard.co.zw/2005/07/22/operation-garikai-a-failure-amnesty-international/> (accessed 20 July 2017).

124 Sachikonye L 'Curse of political violence: Time to break the cycle of terror' *Open Society Initiative for Southern Africa*, available at [www.osisa.org/openspace/zimbabwe/curse-political-violence-time-break-cycle-terror](http://www.osisa.org/openspace/zimbabwe/curse-political-violence-time-break-cycle-terror) (accessed 20 July 2017).

125 Human Rights Watch's June 2008 report on the violence, "Bullets for Each of You:" *State-Sponsored Violence since Zimbabwe's March 29 Elections*, available at [https://www.hrw.org/reports/2008/zimbabwe0608/5.htm#\\_Toc200507395](https://www.hrw.org/reports/2008/zimbabwe0608/5.htm#_Toc200507395) (accessed 20 July 2017).

## 2.6 Conclusion

Zimbabwe has not embarked on a comprehensive transitional process; very little headway has been made in addressing past injustices. Victims of the liberation struggle, the infamous *Gukurahundi*, and election periods are yet to tell their stories. The truth remains unknown or is told from the viewpoint of those who hold the power. The fact of the matter is that where the suffering of victims has not been acknowledged, the victims are not ready to put the past behind them or to start a process of reconciliation. There is no reconciliation without justice and truth-telling.

The logo of the University of the Western Cape is centered on the page. It features a classical building facade with a pediment and columns. Below the illustration, the text 'UNIVERSITY of the WESTERN CAPE' is written in a serif font, with 'UNIVERSITY' and 'WESTERN CAPE' in all caps and 'of the' in lowercase.

Henceforth, there is a need for a functioning NPRC to redress the past human rights abuses. Reconciliation as an aftermath of human rights violations may be achieved through a functioning NPRC. However, the ability to function lies on the enactment of an effective enabling law. A functioning NPRC will need to embark on a fact-finding mission, victim-tracing and suggest modes of redress provide a comprehensive analysis of underlying causes of the conflict and enable the development of conflict resolution programmes for the promotion of reconciliation, national healing and unity. What is clear is that reconciliation is a complete requirement in Zimbabwe. This is particularly true if we consent that effective reconciliation is the best guarantee non-recurrence of violation.

## Chapter Three

### An Evaluation of Zimbabwe's National Peace and Reconciliation Commission (NPRC) Bill

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#### 3.1 Introduction

One of the fundamental factors determining the success or failure of a truth commission is its enabling law.<sup>1</sup> Without a comprehensive law, the success of the commission is bound to be doomed. The government of Zimbabwe is applauded for drafting the enabling law –NPRC Bill. However, for all the attentiveness given to NPRC Bill, the basic question is “does the NPRC Bill reflect a comprehensive framework of a transitional justice tool aimed at redress of past injustices?” In other words, does the NPRC Bill meet its transitional justice obligations under both domestic and international law? Also questioned is the constitutionality of the NPRC provisions. These questions are meant to uncover the success or failure prospects of the NPRC once it begins to carry out its mandate.

To answer the above questions, the chapter evaluates the practicability and legitimacy of the NPRC Bill and the obligations it seeks to achieve. The assessment will be made from two points. First, the evaluation of the NPRC Bill will be from a transitional justice perspective. In this regard, the NPRC Bill shall be evaluated against internationally accepted transitional justice practices. The transitional justice approaches used to deal with the past are: the right to know,

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1 Gonzalez E “Drafting a Truth Commission Mandate: A Practical Tool” (2003) *International Centre For Transitional Justice* at 1; Du Plessis M “Truth and Reconciliation Processes: Lessons for Zimbabwe?” (2002) *The South African Institute of International Affairs* at 21.

the right to justice, the right to reparation and guarantees of non-recurrence. These approaches have been adopted as the United Nations Principles to Combat Impunity, also called the Joint Principles.<sup>2</sup> Here a comparison will be made to examine how the transitional justice approaches were applied by TCs in South Africa, Guatemala and Sierra Leone. The comparisons are based on the fact that truth commissions have numerous facets and the countries under examination employed different approaches in eliminating impunity and fostering reconciliation.<sup>3</sup> For example, in order to do away with impunity, the South African TRC named the perpetrators whereas in Guatemala, the naming of perpetrators was prohibited. Drawing from the comparison, the paper assesses which is the better option applicable to the Zimbabwean context.

Also, the selection of the respective TCs is based on the need to have a transnational viewpoint of TCs' experiences. This is based on the fact that, TCs differ in their formation and mandate such as the manner in which the different commissions dealt with human rights abuses, reconciliation, mediation and their respective legal frameworks. Notably, there can be no talk of "one size fits all."<sup>4</sup>

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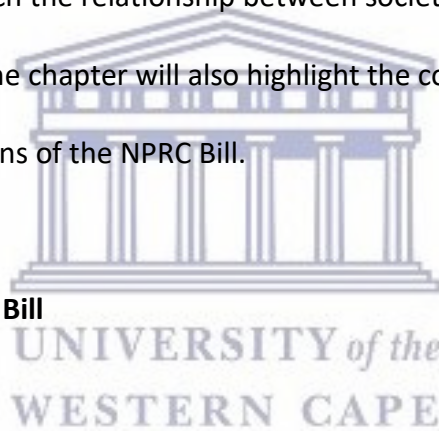
2 United Nations Human Rights Office of the High Commissioner, available at <http://www.ohchr.org/EN/Issues/TruthJusticeReparation/Pages/Mandate.aspx> (accessed 13 October 2017).

3 Moyo K "Forbidden Truth? -Background to Truth Recovery in Zimbabwe, Challenges, Opportunities and Threats" in Matyszak D (ed) *The Second International Conference on Transitional Justice in Zimbabwe. Truth Commissions: the Best Practices* 9 to 10 October 2013. Johannesburg, South Africa (2014:5).

4 Hayner P B (2011:12).

Second, the NPRC Bill will be evaluated based on the constitutionality of its provisions. The NPRC Bill should not only cover transitional justice mechanisms. Here the paper argues that the NPRC Bill must be in accordance with the Constitution of Zimbabwe as well. The discussion will also rely on a monograph by the International Centre for Transitional Justice (ICTJ) which provides useful points on key issues to be addressed in any legislation governing a truth commission. However, the monograph is only a guide and not a model that must be followed.<sup>5</sup>

The bulk of this chapter is generally supportive of Zimbabwe's stated intent of uniting and reconciling a population in which the relationship between society and politics have been driven by violence. However, the chapter will also highlight the concerns and some of the skeptics elicited by the provisions of the NPRC Bill.



### **3.2 Background to the NPRC Bill**

The road to national reconciliation in Zimbabwe has been filled with failed attempts. The failed attempts at reconciliation have been discussed in chapter two. The unsuccessful attempts at reconciliation gave rise to the first constitutionally endorsed establishment of the National Peace and Reconciliation Commission in 2013. Although the Constitution made provisions for the establishment of the NPRC in 2013,<sup>6</sup> the first enabling Bill was gazetted in 2015.<sup>7</sup> The Bill

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5 Gonzalez E (2003:1).

6 Sec 251 of the Constitution of Zimbabwe Amendment (No.20) Act.

7 The National Peace and Reconciliation Commission Bill HB 13, 2015.



was vehemently criticised for containing unconstitutional provisions and subsequently withdrawn.<sup>8</sup> A new draft NPRC Bill was published in the government gazette in February 2017.<sup>9</sup> Few amendments to the NPRC Bill were made in August 2017.<sup>10</sup> The new NPRC Bill and the amendments thereof meet many of the criticisms that were leveled against the earlier draft, but not all of them. This paper is of the view that there is still more work to be done on the NPRC Bill to ensure that the law meets the acceptable standards for the fulfillment of the NPRC mandate.

### 3.3 Aims and Objectives of the National Peace and Reconciliation Commission Bill

According to the NPRC Bill's long title, its aim is to vest the NPRC with working powers to carry out its mandate. The NPRC Bill further regulates other matters such as conditions of employment of personnel of the commission, qualifications, terms of office and conditions of service of commissioners – who are referred to as “members” in the NPRC Bill.<sup>11</sup> From a literal reading of the long title, one would conclude that the aim of the NPRC Bill is to give administrative powers to the Commission. The criticism of the long title is that it is silent on the

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8 Veritas “Bill Watch 7- 2016” available at <http://www.veritaszim.net/node/1622>; Veritas “Bill Watch 8- 2016” available at <http://www.veritaszim.net/node/1604> (accessed 28 July 2017).

9 “Govt re-gazettes Peace, reconciliation bill” *The Herald* 15 February 2017, available at <http://www.herald.co.zw/govt-re-gazettes-peace-reconciliation-bill/> (accessed 28 July 2017).

10 Veritas “Status of National Peace and Reconciliation Commission Bill” *The Zimbabwean*, available at <http://www.thezimbabwean.co/2017/09/status-national-peace-reconciliation-commission-bill/> (accessed 20 September 2017).

11 The Preamble to the NPRC Bill.

subject matter of the NPRC Bill. According to a monograph by the International Centre for Transitional Justice (ICTJ), the purpose of a long title of any given Bill is to give a short descriptive summary of the subject matter of the proposed law.<sup>12</sup> At the outset, no one reading the NPRC Bill will have any idea why we need an NPRC Bill as it is filled with administrative provisions. Therefore, the preamble to the NPRC Bill need to specify clearly the issue of addressing “post-conflict justice” as indicated in its mandate.<sup>13</sup>

### **3.4 Contents of the National Peace and Reconciliation Commission Bill**

The NPRC Bill has 19 clauses spread across six parts. Part I provides for the short title and the definition of words contained in the NPRC Bill. Part II provides for the functions and powers of the Commission which can be used as the benchmark to measure its success or failure upon completion of its work. It further reiterates the independence of the Commission, provides for the seal of the Commission, offices and operations of the Commission as well as the removal of members from office. Part III deals with investigative functions and hearing procedures for the Commission. Part IV deals with the administration of the Commission, including the Commission’s power to establish its staff, executive secretary and also the manner in which the Commission shall report to the Parliament. Part V deals with finances and Part VI contains miscellaneous provisions.

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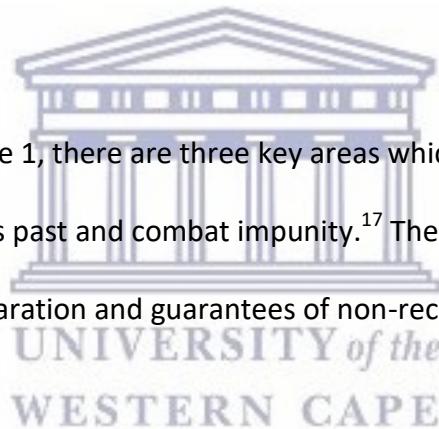
12 Gonzalez E (2003:5).

13 Sec 252 (a) of the Constitution of Zimbabwe Amendment (No.20) Act.

### 3.5 Evaluation of the NPRC Bill from a transitional justice perspective

To evaluate the NPRC Bill from a transitional justice perspective, the paper relies on the Jointet Principles drafted by Louis Joinet and adopted by the United Nations (UN) as the United Nations Principles to Combat Impunity (Joinet Principles).<sup>14</sup> These principles have since been updated.<sup>15</sup> The principles are used as guidelines to assist states develop effective measures in promoting human rights and combating impunity.<sup>16</sup> The 38 principles are spread across three headings namely, the right to know, the right to justice and the right to reparations or guarantees of non-recurrence.

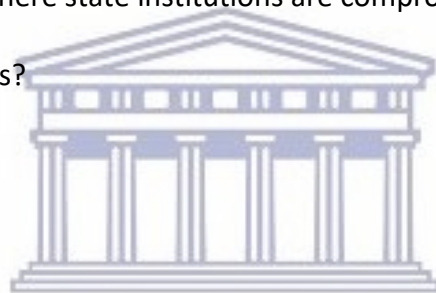
According to the Joinet Principle 1, there are three key areas which a government has to address in order to deal with its past and combat impunity.<sup>17</sup> These are the right to know, the right to justice, the right to reparation and guarantees of non-recurrence.<sup>18</sup> An effective NPRC



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- 14 The set of Principles for Protection and Promotion of Human Rights Intended to Strengthen Action to Combat Impunity UN Sub-Commission for Prevention of Discrimination and Protection of Minorities, 48th Sess., Annex II, Agenda Item 10 at 12, U.N Doc. E/CN.4/Sub.2/1996/18. 29 June 1996.
- 15 Updated Set of principles for the protection and promotion of human rights through action to combat Impunity, available at <http://www.derechos.org/nizkor/impu/principles.html> (accessed 13 October 2017).
- 16 Preamble to the updated set of principles for the protection and promotion of human rights through action to combat impunity.
- 17 See, Principle 1 of updated Set of principles for the protection and promotion of human rights through to combat impunity, available at <http://www.derechos.org/nizkor/impu/principles.html> (accessed 13 October 2017).
- 18 United Nations Human Rights Office of the High Commissioner, available at <http://www.ohchr.org/EN/Issues/TruthJusticeReparation/Pages/Mandate.aspx> (accessed 13 October 2017).

Bill must measure up to these requirements, which are not only internationally acceptable but are also in harmony with the expectations of the Zimbabwean population. This subsection seeks to establish whether the requisite key areas are contained in the provisions of the NPRC Bill. It is only when these key areas are provided for in a complementary manner and not exclude each other, are they likely to ensure the successful achievement of the commission's mandate. Questions to be answered include; Does the NPRC Bill cover the right to know and to what extent? Are these provisions feasible considering the current political situation, wherein the alleged perpetrators are still in power? Is there any parallel process to amnesties that can be implemented in instances where state institutions are compromised? What is the NPRC Bill's stand on justice and reparations?

### 3.5.1 The right to know



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According to Werle, South Africa TRC lesson to states in transition is that “there is no reconciliation without truth.”<sup>19</sup> Joint Principle 2 provides for the alienable right to truth.<sup>20</sup> A truth commission's mandate is to fulfill the right to know the truth.<sup>21</sup> International instruments

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19 Werle G “Without Truth, No Reconciliation: The South African Rechtstaat and The Apartheid Past” (1996) 58 *Verfassung und Recht in Übersee* at 72.

20 Joint Principle 2, available at <http://www.derechos.org/nizkor/impu/principles.html> (accessed 13 October 2017).

21 Hayner P B (2011:20).

require states to investigate human rights abuses.<sup>22</sup> Besides international laws, domestic courts have acknowledged the right to the truth.<sup>23</sup> A praised feature of the NPRC Bill is its provisions on the right to truth. The Commission's mandate will be to ensure national reconciliation by "encouraging the people to tell the truth about the past."<sup>24</sup> To ensure that the mandate to uncover the truth is achieved, the Commission will have broad investigative powers. It will have the power to subpoena witnesses and documents, similar to the South African TRC. Likewise, the Sierra Leone TRC had subpoena powers.<sup>25</sup> Experiences of the South African and Sierra Leonean TRCs reflect the importance of having broad investigative powers to ensure the attainment of the widest truth possible. The CEH had powers to compel witnesses to submit to any information that they possessed. However, non-cooperation was not an offence.<sup>26</sup>

The NPRC Bill is more comprehensive than the above truth commission models. Clause 6 obliges governmental institutions to assist the Commission when called upon to do so. If an institution fails to provide the necessary assistance the Commission may report it to Parliament.<sup>27</sup> The threat of being the subject of such a report will probably be sufficient to

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22 Rohtz-Arriaza N *Impunity and Human Rights in International Law and Practice* 4-5 (1995:24-32); Art 8 of the Universal Declaration of Human Rights; Art 2 of the International Covenant on Civil and Political Rights; Art 39 of the UN Convention on the Rights of the Child.

23 Gonzalez E and Varney H (2013:5).

24 Sec 252 (c) of the Constitution of Zimbabwe Amendment (No.20) Act.

25 Sec 8 (1) (e) and (g) of the Sierra Leone TRC Act 2000.

26 Art 1 of the Agreement on the Establishment of the Commission to Clarify Past Human Rights Violations and Acts of Violence that have Caused the Guatemalan Population to Suffer, 23 June 1994.

27 Clause 6 of the NPRC Bill.

induce government institutions to co-operate. This shows the government's commitment to uncovering the truth.

Establishing a TC aimed at truth-telling has played an integral part in any reconciliation process. For example, in South Africa, the Constitutional Court in the *McBride* case upheld the right to speak the truth about the past apartheid crimes.<sup>28</sup> The court further held that the change from apartheid to democracy was built on open truth-telling. A similar conclusion was reached in Peru, where the court held that the right to the truth is a key right protected by the constitution.<sup>29</sup> While in Guatemala the setting up of a TC was based on its peoples' right to the truth.<sup>30</sup> To further provide for the right to truth, Clause 10 will compel a person to appear before the Commission and further compel such person to tell the truth.<sup>31</sup> Failure, to tell the truth attracts the offence of perjury.<sup>32</sup> The criminalisation of willfully lying before the Commission encourages truth-telling. This paper supports this provision as one of the best strategies for achieving peacebuilding, national healing, and reconciliation.

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28 *The Citizen 1978 (Pty) Ltd and Others v McBride* (2011) ZACC 11.

29 *Barrios Altos v Peru* (2001) Inter-Am Ct. H.R. (Ser. C) 75.

30 Gonzalez E and Varney H (2013:5); Agreement on the Establishment of the Commission to Clarify Past Human Rights Violations and Acts of Violence that Have Caused the Guatemalan Population to Suffer, UN Doc. A/48/954-S/1994/751, June 23, 1994.

31 Clause 10 of the NPRC Bill.

32 Clause 10 (3) of the NPRC Bill.

Another praised feature of the NPRC Bill is the truth revealing process through NPRC hearings.<sup>33</sup> This will ensure that the right to truth is revealed through open hearings by both complaints and perpetrators as provided by international law. However, there is a downside to the provisions on hearings. The commission has the discretion to have either public or closed hearings.<sup>34</sup> The paper argues that victims of sexual violations should be allowed to decide whether they want to testify publicly. Also, the minister of national security has a hold over which information can be made public.<sup>35</sup> This distasteful provision has been based on the protection of national security. However, anyone aggrieved by the decision of the minister of national security decision to withhold information will be able to appeal against such decision to the Commission.<sup>36</sup> If the Commission upholds the minister's decision to withhold information, a further appeal may be instituted by the complainant at the Administrative Court.<sup>37</sup> This strikes a fair balance between the interests of state security on the one hand and transparency on the other.



In South Africa, all hearings and investigations were carried out in public with media coverage.<sup>38</sup> Based on Joint Principle 5 which provides for guarantees to give effect to the right to know,

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33 Clause 9(1) of NPRC Bill.

34 Clause 9(1) of NPRC Bill.

35 Clause 9(6) of the NPRC Bill.

36 Clause 9(7) of the NPRC Bill.

37 Clause 9(9) of the NPRC Bill.

38 Du Plessis M (2002:27).

this paper advocates for all hearings to be open to the public. By conducting open hearing, the public is guaranteed a transparent and impartial process. However, the NPRC Bill does not contain any provisions on how the mass media can have access to the Commission during its work. This weakness must be addressed. Clause 15(7) of the NPRC Bill will obligates the Commission to publish all its reports 30 days after they are laid before Parliament. This is a useful provision designed to keep the public informed about the Commission's activities. To ensure that reconciliation is attained, it is prudent that the findings of the Commission be published immediately after completion of its mandate.

The NPRC Bill has its own weaknesses. It contains provisions that do not reflect truth-telling as a primary objective. Unlike the South African TRC, the NPRC may not undertake its own investigations.<sup>39</sup> This is a drawback in ensuring the right to know.<sup>40</sup> Again, it goes against Joint Principle 1 which enjoins a state to investigate human rights abuses through action to combat impunity. Also, the NPRC Bill does miss the mark and omits fundamental provisions. The NPRC Bill lacks adequate details on the mediation procedure between the victims and offenders. The Bill is silent on the specific needs of the victims. There is a need for a comprehensive set of provision on victim-centredness such as provisions on taking adequate measures to provide support services to the victims. A lesson drawn from the South African TRC's inclusion of the specific needs of the victims is that where a TC's fundamental goal is reconciliation; the process

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39 Clause 8 of the NPRC Bill.

40 Du Plessis M (2002:29).



must prioritise the needs of the victims. Furthermore, the provisions do not mention which form of human rights violations the NPRC will investigate. There is a need to ensure that such provisions are provided for. This will ensure that the NPRC mandate to investigate human right abuses is not too wide.

### 3.5.2 The right to Justice

The right to justice as portrayed in the NPRC Bill may be understood to be restorative justice. Restorative justice is an approach which brings together the perpetrators, victims and community in an effort to reconcile the parties and bring about healing.<sup>41</sup> The Commission's mandate focuses on restorative justice as opposed to retributive justice approach taken by the Nuremberg Trials.<sup>42</sup> The title of the NPRC and NPRC Bill include the words "peace and reconciliation." These words reflect tangible proof that the NPRC is intended to have a preventive and restorative cause. The words indicate that the commission's mandate is mainly centred on reconciliation. In five of the functions of the commission, the mandate to reconcile is explicitly stated. The Commission is meant to ensure post-conflict healing and reconciliation; develop programmes aimed at unity and bringing about national reconciliation through truth-telling about the past. Further provisions on reconciliation are captured in the role played by the Commission in conciliating disputes among communities, organisations and individuals.<sup>43</sup>

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41 Hayner P B (2011:20).

42 Gonzalez E & Varney H (2013:12).

43 Sec 252 of the Constitution of 2013.

Whilst the South African TRC focused more on the reconciliation between survivors and perpetrators,<sup>44</sup> the NPRC's mandate is wider and includes reconciliation between communities and social groups.<sup>45</sup> These provisions are laudable. This is a step forward in the reconciliation of a divided nation.

Restorative justice is said to be "victim centred" justice.<sup>46</sup> It ensures that a victim's dignity is recognised and their voice is heard. It is therefore alarming to note that the NPRC Bill is silent on victims. First, the NPRC Bill does not define who is a victim. It fails to meet its international human rights obligations towards victims.<sup>47</sup> This goes against Joint Principle 4 which provides for the victims right to know. A lesson learnt from South Africa's TRC is that victims play a crucial role in restorative justice. As suggested by Kiss, "the essence of a commitment to restorative justice according to South Africa's TRC report is an effort to restore and affirm the human and civil dignity of victims."<sup>48</sup> It is submitted that there is a need to explicitly define who qualifies as a victim for the purpose of the NPRC.

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44 Van de Merwe H & Chapman A R *Truth and Reconciliation in South Africa: Did the TRC deliver?* (2008:277).

45 Sec 252 (i) of the Constitution of 2013.

46 Hayner P B (2011:20).

47 Article 8 of the Universal Declaration of Human Rights, Article 2 of the International Covenant on Civil and Political Rights, Article 6 of the International Convention on the Elimination of All Forms of Racial Discrimination, Article 39 of the Rights of the Child.

48 Kiss E "Moral Ambition Within and Beyond Political Constraints: Reflections on Restorative Justice" in Rotberg R I & Thompson D (eds) *Truth v Justice: The Morality of Truth Commissions* (2000:70).

The notion of restorative justice, unlike retributive justice, makes provisions for amnesty.

Hence, the NPRC Bill provides for pardon. Clause 19(1) (e) gives the Commission power to make rules that provide for the method and conditions for granting a pardon.<sup>49</sup> Pardon is defined as;

“[F]orgiveness, exclusion or acquittal from criminal and civil processes or any other form of punishment by the State for acts or omissions for which pardon is recommended in terms of the NPRC Act.”<sup>50</sup>

The inclusion of pardon provisions in the NPRC Bill raises skepticism towards the government’s hidden intention to further impunity. According to a study on amnesty laws and their role in the safeguard and advancement of human rights, pardon is meant to remit the penalty but does not expunge the conviction.<sup>51</sup> The approach taken by the NPRC Bill is broader and includes “exclusion” from any court proceedings or punishment.<sup>52</sup> One may conclude that “pardon” has been used synonymously with “amnesty.” The use of “pardon” is not a new phenomenon. States in transition have used terms such as pardon and clemency as synonyms to define laws which fall under the ambit of amnesty.<sup>53</sup> For example, The Lomé Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone contained a

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49 Clause 19(1)(e) of the NPRC Bill.

50 Clause 2 of the NPRC Bill.

51 Gonzalez E and Varney H (eds) Truth Seeking: Elements of Creating an effective Truth Commission (2013:21-25).

52 Clause 2 of the NPRC Bill.

53 *African Commission on Human and Peoples’ Rights, Zimbabwe Human Rights NGO Forum v. Zimbabwe*, communication No. 245/2002 (“A person may be pardoned before being formally accused or convicted.”).

provision to “grant absolute and free pardon” and ensure court proceedings are not instituted against the perpetrators.<sup>54</sup> In *Prosecutor v. Kondewa*, the Appeals Chamber of the Special Court for Sierra Leone described amnesties provided by the Lomé Accord as a form of “mass pardon.”<sup>55</sup> These examples highlight how pardon was used as a form of reconciliation in other states. Notably, pardon as defined in the NPRC Bill seems to promote impunity. In the past Zimbabwe has furthered impunity by granting amnesties. For example, in *Zimbabwe Human Rights NGO Forum v Zimbabwe*, the African Commission on Human and People’s Rights stated that amnesties rob victims of their right to remedy. Hence, Clemency Order 1 of 2000 which granted amnesties to perpetrators of violence was found to be in violation of the African Charter on Human and People’s Rights.<sup>56</sup>

Amnesty provisions are also controversial.<sup>57</sup> In South Africa, the inclusion and constitutionality of the amnesty provision was challenged in the case between *Azanian People’s Organisation (AZAPO) and others v The President of South Africa and others*.<sup>58</sup> In this case, *Azapo* argued that the amnesty provision was unconstitutional and violated the right to have a *prima facie* dispute settled by a court. The Constitutional Court held that the amnesty provision was constitutional

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54 Article IX of Lomé Peace Agreement of 7 July 1999.

55 *Prosecutor v. Kondewa*, case No. SCSL-2004-14-AR72(E).

56 *Zimbabwe Human Rights NGO Forum v Zimbabwe* No. 245/2002.

57 Orentlicher D “Settling accounts: The duty to prosecute human rights violations of a prior regime” (1991) *Yale Law Journal* at 2526; Roht-Arriaza N “State responsibility to investigate and prosecute grave human rights violations in international law” (1990) 78 *California Law Review* at 449.

58 *AZAPO and others v The President of South Africa and others* 1996 4 SA 671 (CC), 1996 8 BCLR 1015 (CC).

and acceptable based on the need to balance the realisation of justice and reconciliation. In the absence of amnesty as an incentive for the perpetrators, the macro truth will not be possible. It was therefore a compromise. Although this is a foreign case to the Zimbabwean context, it does carry a persuasive value. The notion of compromise perhaps explains the inclusion of amnesty under the term pardon in the NPRC Bill.

However, there are some differences between the South African and Zimbabwean amnesty methodologies. The South African TRC assured the prospect of amnesty to politically motivated perpetrators, whereas in Zimbabwe, the NPRC will have the discretion to make regulations on the “procedure and conditions for the granting of pardon subject to Parliament’s approval.”<sup>59</sup> The lack of a blueprint in the NPRC Bill on the precise method to be used in granting pardon does not speak much of the government’s commitment to deal with the past effectively. What is sorely lacking here is an explicit procedure and provisions on pardon. Pardon provisions are placed under the miscellaneous provisions.<sup>60</sup> This is a weakness which must be addressed. One may conclude that the NPRC Bill is trying to smuggle in the issue of amnesty, using the “pardon” synonym and without giving it the importance it deserves. For such a pertinent provision due procedure must be followed. One could argue that there is a need to redraft the amnesty provisions. This is a sensitive matter, especially for the victims who might view it as the furtherance of impunity.

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59 Clause 19 (1)(e) of the NPRC Bill.

60 First Schedule to the NPRC Bill.

Without disregarding the above-mentioned concerns, amnesty has its advantages. Amnesty may be used as a tool used to increase the quality and quantity of information obtainable compared to the information which might be obtained in a courtroom setting.<sup>61</sup> The paper is of the view that the amnesty provisions should be clearly stated. Clause 10 of the NPRC Bill states that witnesses who are compelled to give evidence which may be self-incriminating are exonerated from criminal liability. One may regard the above provision as blanket amnesty in criminal proceedings.<sup>62</sup> The concern that arises, therefore, is that the provision seems to promote impunity.

In summation, advocating for reconciliation without addressing problems within the NPRC Bill is likely to be an exercise in futility. It is well and good for a country to reconcile, but the NPRC Bill does omit fundamental provisions. For example, it does not define a victim or the range of violations it will investigate in order to achieve reconciliation. These are some of the weakness of the NPRC Bill which needs to be resolved.

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61 Rotberg R I "Truth Commissions and the Provisions of Truth Justice and Reconciliation" in Rotberg R I & Thompson D *Truth v Justice: The Morality of Truth Commissions* (2000:13); Boraine A "Truth and Reconciliation in South Africa: The Third Way" in Rotberg R I & Thompson D (2000:147).

62 Clause 10(3) of the NPRC Bill.

### 3.5.3 Reparations

According to Principle Joint Principle 31 any human rights violations gives the victim a right to reparation. The NPRC Bill makes provision for the right to reparation in line with the above-mentioned principle. In line with its mandate, Commission has a duty to develop programmes which will provide rehabilitative treatment and support to “people subjected to torture and other forms of abuse.”<sup>63</sup> The NPRC Bill seems to prioritise torture victims over victims of other human rights abuses. The discrepancy is clearly discriminatory in nature. One would gather that people subjected to torture have priority to receive reparations.

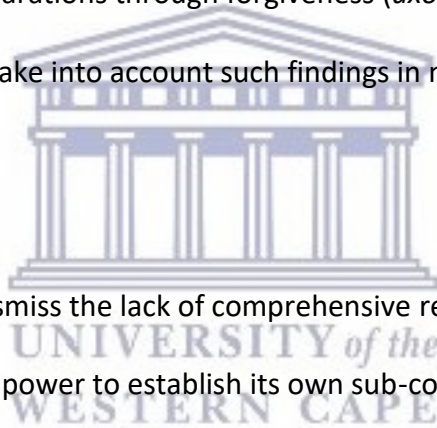
The reparation provision has been drafted in a manner that is meant to fail other victims. Based on the discussion in chapter two above, there is a need for reparations for violations of socio-economic and cultural rights. A case in point is Operation *Murambatsvina* which destroyed people’s homes and livelihood. In any transitional justice process, reparations are an important catalyst for peace and reconciliation. Therefore, there is a need to take all victims concerns into consideration so as to have a sustainable reconciliation.<sup>64</sup> The paper argues that there is a need to broaden the provisions on reparations.

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63 Sec 252 (e) of the Constitution Amendment (No.20) Act.

64 Gonzalez E and Varney H (eds) Truth Seeking: Elements of Creating an effective Truth Commission (2013:21-25).

Everyone has the right to effective remedies for human rights violations suffered.<sup>65</sup> The obligation to provide an effective remedy requires states to make reparations to individuals for harm suffered as a result of human rights violations.<sup>66</sup> For example, in South Africa, three forms of reparations were recommended, namely, symbolic reparations, personal or individual reparations, and community reparations. In South Africa urgent, provisional standard payments to victims or their families were made before the full reparations were finalised.<sup>67</sup> However, a survey carried out by the Catholic Commission for Justice and Peace in Zimbabwe showed that individual compensation was not well received by victims in Zimbabwe.<sup>68</sup> Instead, the survey found the use of communal reparations through forgiveness (*uxolelwano*) as the preferred form of reparations. The NPRC may take into account such findings in making reparations recommendations.



However, one cannot totally dismiss the lack of comprehensive reparations provisions as the NPRC Bill gives the commission power to establish its own sub-committees.<sup>69</sup> Therefore, one can only hope that there will be a reparations sub-committee once the NPRC becomes

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65 ICCPR art. 2(3); Universal Declaration of Human Rights Art. 8; European Convention on Human Rights art. 13; American Convention on Human Rights art. 25; African Charter on Human and Peoples' Rights art 7(1)(a).

66 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.

67 South African Truth and Reconciliation Commission 1996: Volume 1, chapters 2 and 6, and volume 6.

68 CCJP and LRF (1997:29)

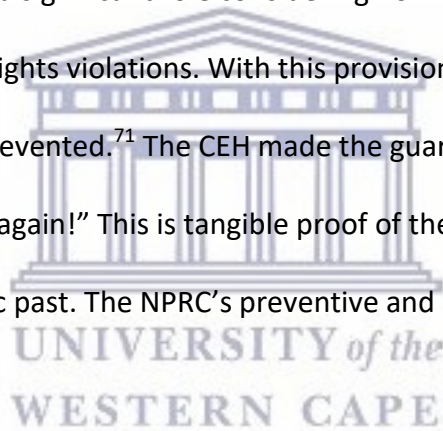
69 Sec 8 to the First Schedule of the NPRC Bill.



operational. The paper submits that the sub-committee should comprehensive cater for all victims without prioritisation.

### **3.5.4 Guarantees of non-recurrence**

Joint Principle 35 set guidelines on guarantees of non-recurrence. In line with the Joint Principle, the Commission's mandate is to pre-empt areas of potential conflict and take preventive measures.<sup>70</sup> This function aims to prevent the non-recurrence of human rights abuses. This provision will play a significant role considering how Zimbabwe has been experiencing constant human rights violations. With this provision it is hoped that repetition of violence in the future will be prevented.<sup>71</sup> The CEH made the guarantee of non-recurrence its slogan "Nunca Mas!" – "Never again!" This is tangible proof of the government's commitment to move forward from a horrific past. The NPRC's preventive and restorative function is applauded.



### **3.6 Constitutionality of the NPRC Bill**

This subsection discusses the constitutionality of the NPRC Bill. It is submitted that some of the NPRC Bill provisions will hamstring the commission in carrying out its work. According to the

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70 Sec 252(g) of the Constitution of Zimbabwe Amendment (No.20) Act.

71 Hazan P "Transitional Justice After September 11: A New Rapport with Evil" in Shaw R, Waldorf L & Hazan P (eds) (2010:53-54).

Constitution, independent Commissions “must act in accordance with the Constitution.”<sup>72</sup> The content of the subsection seeks to examine the NPRC Bill provisions which are not in accordance with the Constitution. The paper will not examine the NPRC Bill as a whole due to the word limit. Instead, the paper will evaluate only the provisions which it argues to be unconstitutional and therefore should be amended or omitted.

### **3.6.1 Termination of membership of other organisations**

The NPRC Bill provides that an individual appointed as a commissioner must terminate his or her membership in “any organisation” within seven days. If the commissioner fails to terminate such membership, he or she ceases to be a commissioner.<sup>73</sup> The words “any organisation” may be taken to cover all organisations. For example, Commissioners who belong to religious “organisations” will have to terminate their membership on appointment. This means that a Commissioner must not be a church member. This provision is far too wide. A lesson drawn from the South African TRC experience is that having commissioners with different credentials can be advantageous. The commissioners’ panel included religious leaders and this made it easier for the commission to carry out its mandate.<sup>74</sup> For example, the chairperson of the South African TRC was a church leader. Religion played a critical role in ensuring that forgiveness and

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72 Sec 235(1)(b) of the Constitution of Zimbabwe Amendment (No.20) Act.

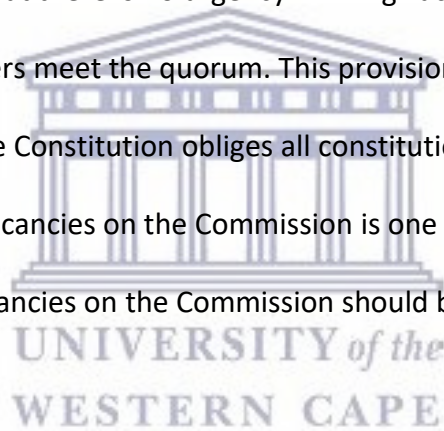
73 Paragraph 3 of the First Schedule to the NPRC Bill.

74 “Strategic Choices in the Design of Truth Commissions”, available at <http://truthcommission.org/composition.htm> (accessed 19 October 2017).

reconciliation are achieved. Most religious organisations preach forgiveness and reconciliation. In summation, there is a need to amend the provision to exclude religious organisations.

### 3.6.2 Filling of vacancies on the Commission

The NPRC Bill provides that the President must fill vacancies that occur on the Commission.<sup>75</sup> It further states that if the Commission's membership falls below a quorum (five members) the President must fill the vacancies "as soon as practicably possible."<sup>76</sup> The words "as soon as practicably possible" suggest that there is no urgency in filling vacancies on the Commission when the existing commissioners meet the quorum. This provision is not in accordance with the Constitution. Section 324 of the Constitution obliges all constitutional duties to be performed as a matter of urgency.<sup>77</sup> Filling vacancies on the Commission is one such duty. The paper argues that the provision on filling vacancies on the Commission should be amended to make this clear.



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75 Clause 5 of the First Schedule to the NPRC Bill.

76 Paragraph 5 of the First Schedule to the NPRC Bill.

77 Sec 324 of the Constitution of Zimbabwe Amendment (No.20) Act of 2013.

### 3.6.3 Perjury as an Offence

Clause 10 (3) states that witnesses who lies or misleads the Commission may be charged with the crime of perjury in terms of Section 83 of the Criminal Law Act.<sup>78</sup> This is unconstitutional as perjury can only be charged for giving false evidence before a court of law.

### 3.6.4 Ministerial interference

Clause 9(6) of the NPRC Bill provides that the Minister responsible for National State Security may at any stage during an investigation issue a certificate to the non-disclosure of evidence. The non-disclosure of evidence should be based on public interest. This provision seems to restrain the right to truth recognised in section 252(c) of the Constitution.<sup>79</sup> Also, the provision violates the constitutional right of access to information held by the State or any institution or agency of government.<sup>80</sup> Clause 161(c) states that the NPRC will only accept donations, grants or bequests “after consulting the Minister.”<sup>81</sup> This provision highlights the fact that the Commission will lack administrative and financial autonomy. This is a violation of Section 235 which provides for the independence of the NPRC.<sup>82</sup>

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78 Clause 10(3) of the NPRC Bill.

79 Sec 252(c) of the Constitution of Zimbabwe Amendment (No.20) Act of 2013.

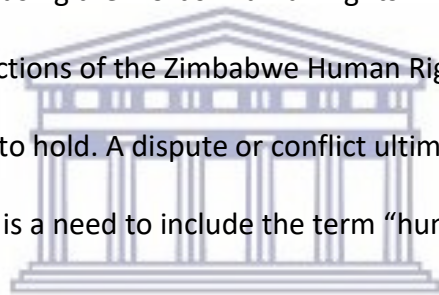
80 Sec 62 of the Constitution of Zimbabwe Amendment (No.20) Act of 2013.

81 Clause 16(c) of the NPRC Bill.

82 Sec 235 of the Constitution of Zimbabwe Amendment (No.20) Act of 2013.

### 3.7 General Appraisal

The NPRC Bill contains clauses which are open to vague interpretation. Of interest is the choice of words used to describe the Commission's mandate. There is absolute no mention of the words "human rights violations." Instead, the Commission's mandate is to investigate "any conflict or dispute." A conflict or dispute is defined as "any dispute or conflict of a kind falling within the scope of the Commission's mandate."<sup>83</sup> There have been intense debates concerning the meaning behind disputes or conflicts. During the parliamentary reading of the NPRC Bill, it was submitted that defining or using the words "human rights" in the NPRC Bill is likely to be viewed as infringing on the functions of the Zimbabwe Human Rights Commission. However, this submission does not seem to hold. A dispute or conflict ultimately led to the violations of human rights. Therefore, there is a need to include the term "human rights."



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The NPRC Bill does not provide a definition of a victim. As a result, this leaves room for abuse and misuse of the vague provisions. A practical example is the War Victim's Compensation Act (WVCA). The WVCA was set up in Zimbabwe to provide compensation to the victims of the liberation war. However, failure to interpret the Act and lack of cut-off points for compensation resulted in ex-freedom fighters making claims and benefitting at the expense of the victims.<sup>84</sup>

This example aims to reflect the importance of having clearly defined provisions in order to

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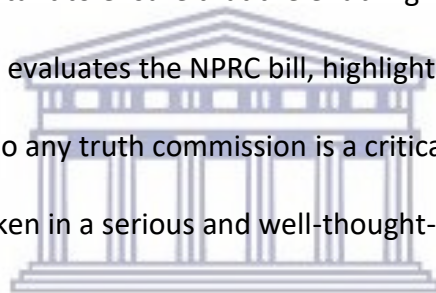
83 Clause 2 of the NPRC Bill.

84 "Zimbabwe war fund inquiry starts" *Mail & Guardian* 18 August 1997, available at <https://mq.co.za/article/1997-08-18-zimbabwe-war-fund-inquiry-starts> (accessed 19 October 2017).

avoid discrepancies in the application of the law. The NPRC Bill also contains some errors. The provision on the renewal of commissioner’s appointment is dealt with twice.<sup>85</sup> The paper suggests that the repetition is deleted.

### **3.8 Conclusion**

The government’s initiative in drafting the enabling law is welcomed, but it must be put in effect, for, as the saying goes, the “proof of the pudding is in the tasting.” However, before the law is put into effect, it is important to ensure that the enabling law is well-crafted. It is against this background that this paper evaluates the NPRC bill, highlighting its strengths and weaknesses. The enabling law to any truth commission is a critical step in the truth-seeking process and should be undertaken in a serious and well-thought-out manner.



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Having discussed the flaws and strengths of the NPRC Bill, its effectiveness is yet to be seen.

The fact of the matter is that Zimbabwean victims of conflict and disputes have a right to the truth so that reconciliation and healing may be fostered. While the Bill is not entirely defective, certain amendments are needed urgently. Since 1974, there are over thirty commissions which have been established, Zimbabwe may draw meaningful lessons from these commissions. The Joint Principles also provide helpful tools which may be used as guidelines to draft a comprehensive legal framework. With guidance from the past TCs experience and the UN tools,

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85 Paragraphs 2(1) and (4) of the First Schedule to the NPRC Bill.

Zimbabwe can put in place an excellent enabling law which will set the pace for a transformative national reconciliation process.



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## Chapter Four

### Conclusion and Recommendations

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#### 4.1 Conclusion

Zimbabwe's history is marred with violence. Although it is a state party to several human rights instruments, it has failed to promote and protect human rights. Its attempts to promote human rights have been structured along political motives, fragmented and without genuine political will. The 2013 Constitution of Zimbabwe makes provisions for the establishment of a truth commission to investigate the past violence occurrences. This truth commission will be called the National Peace and Reconciliation Commission (NPRC).

Given Zimbabwe's history of violence, the study supports the government's intent of having a truth commission as a means of investigating the past violence and subsequently promoting post-conflict justice, healing and reconciliation. Once in operation, the NPRC will be a *de jure* institution with powers to initiate a new era of transitional justice in Zimbabwe. However, since 2013 the NPRC has not been operational. What it lacks is an enabling law. In 2015, the first draft of the enabling law was gazetted. The draft Bill was later withdrawn from Parliament because it contained numerous unconstitutional provisions. In 2017, a new draft Bill was gazetted. This Bill once approved will bring the NPRC into effect. However, the study questions the government's true intention of establishing a truth commission by critically evaluating the enabling law to the truth commission. The study suggests that the mere enactment of an



enabling law to the NPRC is not enough. The enabling law must contain provisions which will give the Commission extensive powers to carry out its mandate effectively and impartially. Therefore, the object of the study was to show whether the NPRC Bill is a genuine legislative attempt aimed at reconciling a divided nation. As already established in the research paper, a truth commission endowed with extensive legal powers is more likely to fulfil the objectives stated in the mandate.<sup>1</sup> Henceforth, the intervention of the study was to reveal whether the enabling law to the NPRC provided comprehensive powers which reflect the pursuit of justice and not a charade legislative piece in furtherance of impunity.

To set the groundwork for the study, chapter two focused on the indispensability of a truth commission in Zimbabwe. This was meant to contextualise and validate the subsequent need of an effective empowering law to ensure the functionality of the truth commission. The chapter gave a general overview of transitional justice, truth commissions and the purpose served by truth commissions. This displayed the fact that, the practice of establishing a truth commission is not a new phenomenon. It is a fundamental part of any country's transition to democracy. Hence, Zimbabwe also establishes a truth commission as part of its break with its violent past and ensure the non-recurrence of future injustices. Chapter two pointed out several crisis points at which issues of transitional justice can be located in Zimbabwe's violent past. These include the liberation war, the *Gukurahundi* atrocities, Operation *Murambatsvina* and election periods.

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1      Gonzalez E (2013:3).

The paper then proceeded to evaluate the NPRC Bill's strengths and flaws in Chapter Three. The assessment was made from two points. First, the evaluation was from a transitional justice point. The NPRC Bill does cover the four pillars of dealing with the past as provided for by the United Nations Principles to Combat Impunity (Joinet Principles). These are: the right to know, the right to justice, the right to reparation and guarantees of non-recurrence. From the discussion, it was also revealed that the NPRC Bill provisions on the four pillars need some considerable improvement in order to be truly effective. For instance, the process of reconciliation and the needs of the victims, in particular, are too vague to be meaningful and may not bring about the desired impact.

Second, the assessment was made from a constitutional perspective. Here the paper evaluated the NPRC Bill's consistency with the Constitution of Zimbabwe. The paper explored provisions which may hamstring the NPRC in effectively carrying out its mandate. These provisions included ministerial interference and inconsistency with the Constitution of Zimbabwe.

Hayner suggests inadequate empowering laws for the commissions as one of the causes of failed commissions.<sup>2</sup> Considering the fact that the NPRC Bill is still in the development stage, the paper is of the view that a better law is feasible for a better commission. Zimbabwe still has a window of opportunity to put in place an exceptional piece of legislation which will set the

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2 Hayner P B (2011:26); Gonzalez E (2013:3).

tone for a transformative national healing process. This may be achieved by amending some of the provisions. Hence, the study summarises a set of recommendations based the evaluation of the NPRC Bill.

## **4.2 Recommendations: Towards a more effective legal framework**

There is a need to amend the provisions of the NPRC Bill to ensure that they cover all four pillars of dealing with the past extensively. Also, the provisions of the NPRC Bill which are not consistent with the Constitution must be amended or eliminated.

### **4.2.1 Amnesty Provisions**

Clause 19 (1) offers the Commission power to make rules that provide for the method and conditions for granting pardon.<sup>3</sup> Clause 10 makes use of amnesty as a method of compelling witnesses to give evidence which may be self-incriminating.<sup>4</sup> The paper recommends that all clauses that make reference to amnesty must be stated clearly without ambiguity and be qualified. The wording of the amnesty provisions must prioritise the needs of the victims and not be used to promote impunity. Since the NPRC Bill gives the NPRC power to make regulations pertaining to granting pardon, the paper recommends that the Commission set up an Amnesty Committee which will develop robust rules and principles upon which amnesty may

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3 Clause 19(1) of the NPRC Bill.

4 Clause 10(3) of the NPRC Bill.

be granted. The rules and principles must not provide for blanket amnesties or grant amnesties against the core crimes under international law. In crafting the rules and principles relating to granting amnesty, the Commission may employ Joint Principle 24 for guidance. Joint Principle 24 provides restrictions and other measures relating to amnesty. Amnesties must be granted on a case by case basis. All perpetrators of human rights abuses must be named. This includes persons who are granted amnesty. Perpetrators who are not granted amnesty must be handed to the prosecuting authorities for trial, if sufficient evidence is available.

#### **4.2.2 Victim-centredness**

Victims should be the focus of the NPRC Bill. However, as the NPRC Bill currently stands, it is silent on victims. It does not define who is a victim in line with the Commission's mandate. Clause 9(12) stipulates that the Commission shall provide safety and protection for the witnesses.<sup>5</sup> It makes no reference to victims and survivors. The paper recommends that adequate protection mechanisms be put in place for the victims and survivors. The NPRC Bill must adopt a victim-centred method and prioritise the needs of the victims.

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5 Clause 9(12) of the NPRC Bill.

### **4.2.3 Reparations fund**

Besides recommending reparation programs, the government should also establish a reparations fund to which perpetrators and beneficiaries of the repressive regime may contribute.

### **4.2.4 Ministerial Interference**

All provisions in the NPRC Bill that hamper the functionality of the Commission need to be revised in line with the Constitution of Zimbabwe and the United Nations standards which clearly provide for the independence of Commission. The Commission must be empowered to make independent administrative and financial decisions without the interference of the designated Minister or Minister of State Security. This means that provisions which require the Commission to consult and seek ministerial approval before making administrative or financial decisions must be amended. The Commission may only give prior notice of its intentions in cases where executive support is needed.

### **4.2.5 Access to information**

The NPRC Bill is silent on how the media and the public can access the information from the Commission during its work. The NPRC Bill should, therefore, make provisions for access to

information in line with Section 62 of the Constitution.<sup>6</sup> Section 62 provides for the right to information held by the government or any establishment of the government based on public accountability. Also, the provision which allows the Minister of State Security to issue a certificate against the disclosure of the Commission's work must be revised.<sup>7</sup> This provision is a hindrance to the Commission's mandate which is meant to encourage truth-telling.<sup>8</sup> The paper argues that the provision is an impediment to the right to access to information and therefore should be struck off the NPRC Bill.

#### **4.2.6 Enactment of the NPRC Bill into an Act**

The paper recommends the need to fast-track the enactment of the NPRC Bill into law. The Constitution of 2013 makes provisions for the establishment of the NPRC. However, the lack of an enabling law has rendered the NPRC non-functional. Consequently, over four years of the NPRC timeframe has been lost. Time is running out for the government to show its commitment towards peace building and reconciliation in Zimbabwe.

Words: 18 319.

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6 Sec 62 of the Constitution of Zimbabwe Amendment (No.20) Act of 2013.

7 Clause 9(6) of the NPRC Bill.

8 Sec 252(c) of the Constitution of Zimbabwe Amendment (No.20) Act of 2013.

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