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Truth and Reconciliation Processes: Lessons for Zimbabwe?

Max du Plessis

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Truth and Reconciliation Processes: Lessons for Zimbabwe?

Max du Plessis¹

Summary

This report considers African and other truth commissions and applies the lessons and experiences of other countries in order to map a strategy and offer a model for a Zimbabwean truth and reconciliation commission. Given Zimbabwe's history (especially over the three year period 2001-2004) of collective violence and serious human rights abuses, the report proposes that a truth commission in a post-transition Zimbabwe might be an important means of promoting reconciliation and reducing past tensions, thus achieving a variety of aims such as:

- establishing the truth about human rights violations and their causes;
- responding to the need of victims to recount their stories; and
- proposing reforms and recommendations that may contribute to the strengthening of democracy in the future.

The report focuses on the manner in which a future Zimbabwean truth and reconciliation commission might be established and suggests that it must have clear operational independence of

¹ MAX DU PLESSIS is a senior law lecturer at the University of KwaZulu-Natal and is the South African member of the International Law Association's International Criminal Court Committee.

government. For the commission to achieve the aims of reconciliation and establishing truth, full funding should be committed and available at the start of its work.

After considering the appointment of commissioners to truth and reconciliation commissions in Chile, Argentina, El Salvador, South Africa, and Sierra Leone, the report argues that the legitimacy of any Zimbabwean commission will depend on its being a well-balanced panel of highly respected people. That goal will be more easily achieved if Zimbabwe follows the recent international trend of appointing commissioners through processes that ensure transparency and public participation (such as in South Africa).

Regarding the nationality of commissioners, the report suggests that a mixed panel comprising both national and international commissioners might work well, and that in the Zimbabwean context, a feasible mix might include other African nationals — possibly drawn from the ranks of past truth commissioners in South African and Nigeria. As to the professional expertise of commissioners, it is suggested that — in addition to being highly respected as individuals — they should reflect a variety of disciplines such as the law, psychology, religion etc. In respect of the overall staff complement, experience has shown that well staffed and resourced commissions are the most successful in establishing the truth and contributing towards reconciliation. Also that commissioners require more than basic human rights experience and legal skills in order to deal with the breadth of work and the nature of the responsibilities that a truth commission has to undertake.

In considering the mandate of a Zimbabwean truth commission, the report draws on the El Salvadoran, Guatemalan and Nigerian experiences in arguing that the terms of reference of any proposed commission should be sufficiently broad to allow investigation into all forms of serious rights abuses in Zimbabwe and to leave the

commission to decide the most appropriate cases or practices to investigate.

As to issues relating to 'time', the quicker the commission begins its work after the transition, the better. This may be particularly important for Zimbabwe, where participatory civil society and democratic institutions are weak and where in the early stages of transition the window of support for the commission may be most open. As for the duration of the commission, a tenure of one to two and a half years is suggested, plus an additional period (of perhaps three to six months) for laying the administrative and logistical foundations. In respect of the period of history that a Zimbabwean commission would investigate, there might be practical reasons (such as concerns about economic resources) to limit its mandate (at least initially) to an investigation of the government's abuses of power since 2000. Calls for the commission to consider earlier periods, covering President Mugabe's accession to power and human rights abuses such as those in Matabeleland, should also be anticipated.

As to the manner in which a proposed commission will operate, the report looks specifically at whether it should conduct its hearings in public or in private, concluding that public hearings are preferable, especially so that the chances of a continuing denial of the truth by certain sectors of society can be reduced and public support and appreciation for the commission's work increased. Because of the public nature of the process, the report proposes the provision of counselling services to victims both before and after they testify. A further recommendation is that a Zimbabwean commission should — following the examples of the South African, Argentinian and Salvadoran commissions — undertake its own investigations into human rights abuses, in addition to holding public hearings.

Once the truth commission completes its work and issues its report, it is vital that the report be published immediately and be made

readily available to the public. As in Chile, El Salvador and South Africa, an important component of the report will be the commission's recommendations and suggested reforms. It is presumed that the commission will wish to recommend reforms to the Zimbabwean police and army services, the judiciary and the election process, among others.

The final section of the report is a brief synopsis of the topic of amnesty. Noting that so far only the South African and East Timorese TRCs have been accorded the power to grant amnesty, the report suggests there may be good reasons (related to the efficacy of establishing the truth) for a Zimbabwean commission to be given the power to grant amnesties, and that the reality in Zimbabwe might be that a truth commission with an amnesty power (as opposed to criminal prosecution of past offenders) will be the only realistic way in which the old regime will be persuaded to relinquish power. Assuming that the amnesty route is to be followed, the report draws on the writings of international experts in arguing that the blanket-type amnesty (seen in Chile) ought to be avoided, and that only amnesties such as those granted by a quasi-judicial amnesty committee functioning as part of a TRC process established by a democratically elected government (as in South Africa) will be internationally acceptable. Whatever form of amnesty is chosen in the Zimbabwean context, it should be limited in terms of the nature of the offence so that at the very least no amnesty is afforded for the international crimes of torture and genocide. The East Timorese truth commission's 'reconciliation model' might be suitably used by a Zimbabwean commission to facilitate the reintegration into the community of low-level perpetrators.

The report concludes by considering the implications, for the Zimbabwean leadership, of the recently created International Criminal Court. Notwithstanding the fact that Zimbabwean nationals have been committing serious crimes within Zimbabwe, because the country is not currently a State Party to the Rome

Statute of the International Criminal Court it is not open for another State Party to refer such a 'situation' to the Court for investigation. And despite the fact that Zimbabwean nationals are allegedly committing serious international crimes on Zimbabwean territory, because the country is not a State Party to the Statute, the ICC prosecutor has no power on his own accord to initiate investigations. However, there is a possibility that the Security Council of the UN may use its referral powers under the Rome Statute to request an ICC prosecution of Zimbabweans guilty of crimes against humanity, or that the domestic courts of other states (such as South Africa) will invoke their national legislation dealing with international criminal law to pursue a prosecution against Zimbabweans.

Finally, in considering the effect of amnesties upon the ICC, the report suggests that any national amnesties set in place by a truth commission in Zimbabwe would not prevent prosecution *per se* before the ICC. Where a criminal prosecution is instituted by a state under its domestic legislation, amnesty does not have an extraterritorial effect and thus the prosecuting state would not be required to recognise the amnesty granted by a Zimbabwean truth commission.

Introduction

This report examines various African and other truth commission processes with the aim of mapping a strategy and offering a model in the event that Zimbabwe should opt for a truth and reconciliation commission (TRC) as a means of overcoming its heritage of collective violence and serious human rights violations. It also considers briefly the creation of the International Criminal Court and its implications for individuals in Zimbabwe who are guilty of human rights abuses.

In any new political dispensation (post-war or post-dictatorship), there are, in the main, two ways of dealing with systematic and large-scale human rights abuses of the past: through criminal trials or truth commissions². Truth commissions are processes that exist outside of (and increasingly in parallel with) the criminal justice system³. Partly because of the limited reach of the courts⁴ and partly because of the recognition that even successful prosecutions do not achieve reconciliation or reduce tensions resulting from past conflict⁵, transitional governments have increasingly employed TRCs as a mechanism for responding to past atrocities⁶. This report

² See Dugard J, 'Possible conflicts of jurisdiction with Truth Commissions' in Cassese A, *et al*, *The Rome Statute of the International Criminal Court — A Commentary*, 1, 2002, p.693.

³ The international experience thus far indicates that there is a broad range of institutions which have come to be known as truth commissions. Following the leading scholar in the field (Priscilla Hayner), I use the term to denote a specific kind of enquiry by a body that displays the following characteristics: it focuses on the past; it investigates a pattern of abuses over a period of time, rather than a specific event; it is a temporary body with a limited mandate, and after completion of its work it delivers a report and; the commission is officially sanctioned, authorised, or empowered by the state. See Hayner P, *Unspeakable Truths: Facing the Challenge of Truth Commissions*, 2002, p.14. Hayner's study is the most recent and most comprehensive comparative study of truth commissions and accordingly has been extensively relied on in the preparation of this report.

⁴ Such limitations arise out of the fact that the scale of collective violence in certain countries (Rwanda is a good example) is so vast that it is simply not possible to prosecute all the alleged offenders. Moreover, few transitional countries have the strong legal institutions and resources required for successful prosecutions. See in this regard Chapman A & P Ball, 'The truth of truth commissions: Comparative lessons from Haiti, South Africa, and Guatemala', *Human Rights Quarterly*, 23, 1, 2001, p.23.

⁵ Hayner P, *op. cit.*, pp.12–14.

⁶ And, of course, the establishment of a truth commission (with powers to grant amnesties for serious violations of human rights), rather than the adoption of a punitive approach, is often the only way to ensure a peaceful transition from dictatorial to democratic regimes. As Judge Goldstone has remarked of the South African process, 'the TRC was a political decision. It wasn't taken for moral reasons or for reasons of justice. It was a political compromise between having

confines itself to a discussion of the necessity for and challenges of establishing a truth commission for Zimbabwe. In doing so, the value of truth commissions *per se* is assumed.⁷

Since 1974, numerous truth commissions have been established either to support an ongoing peace process or to promote democratic reforms and reconciliation in a post-conflict society.⁸ The best-known examples are the commissions established in Chile, Argentina, El Salvador, Guatemala, and South Africa. The methodology adopted in this study is to consider the example of these and other commissions and to extract lessons from them while working thematically through the various challenges that Zimbabwe will confront, should it attempt to create a truth commission.⁹ Various points must be stressed in this regard. The first is that no model of a TRC is ideal for all purposes, and no model can be transplanted from

Nuremberg-style trials on the one hand and forgetting on the other', 'TRC preferable to trials', *Pretoria News* 18 August 1997, cited in McDonald A, 'A right to truth, justice and a remedy for African victims of serious violations of international humanitarian law', *Law, Democracy and Development*, 2, 1, 1999, p.139.

⁷ For critical reflections on the role and achievements of truth commissions, see, for example, Hayner P, *op. cit.*, pp.1–9; for a critical appraisal of the South African TRC see Wilson S, 'The myth of restorative justice: truth, reconciliation and the ethics of amnesty', *South African Journal on Human Rights*, 17, 4, 2001.

⁸ Hayner, for example, identifies twenty-one commissions in her study. Many more have been created or are currently in the process of being created since her work was published in 2002. Updated news on these latest commissions can be found at the website of the Centre for Transitional Justice, at <http://www.ictj.org>.

⁹ I have avoided a simple recounting of the most important truth commissions and their strengths and weaknesses, choosing instead to map a strategy thematically and provide a model for the establishment of a future Zimbabwean commission and in the process to draw on and describe the experience of other commissions. To access a good comparative overview and analysis of the different processes, see the website <http://www.TruthCommission.org>, a collaboration of the Programme on Negotiation at Harvard Law School, Search for Common Ground, and the European Centre for Common Ground. See also Hayner P, *op. cit.*, Chapters 4 and 5, and Hayner P, 'Fifteen Truth Commissions — 1974 to 1994', *Human Rights Quarterly*, 16, 4, 1994, p.597.

one situation to another, particularly in view of the historical, cultural, political and other differences that confront different regimes undergoing transition.¹⁰ The eventual model adopted will, if it is to be successful, need to be designed to respond to the critical factors in and unique needs of Zimbabwe. Secondly, the nature of the transition in Zimbabwe will determine how human rights violations of the past will be dealt with. The political context and transition leading to the establishment of any truth commission are factors about which one must necessarily make certain assumptions in order to prepare a report of this nature. It will be assumed, therefore, that any political transition in Zimbabwe will resemble something similar to the South African transition, namely that President Mugabe and authoritarian Zanu-PF members will step down or call for new elections after some form of negotiated settlement, which will include as one of its central features a truth commission process.¹¹

¹⁰ See Sarkin C, 'The necessity and challenges of establishing a Truth and Reconciliation Commission for Rwanda', *Human Rights Quarterly*, 21, 1999, pp.767, 802.

¹¹ On this point it is worthwhile noting that to date, truth commissions have always been the result of deliberate compromise. They have not simply been imposed by the winning party after the end of an internal conflict. As Tomuschat, the former co-ordinator of the Guatemalan Clarification Commission points out, the 'background of a truth commission is invariably ... of stalemate in a political power play' Tomuschat C, 'Clarification Commission in Guatemala', *Human Rights Quarterly*, 23, 2, 2001, pp.233-235. In South Africa the white minority had to abandon its political supremacy, but it still wielded important factual power, above all in the police and the army. In Chile and Argentina, the military leaders eventually had to step down, but they still held key positions in the army, making it initially unthinkable to commence criminal actions against the main culprits. In El Salvador and in Guatemala, the commissions were agreed on in peace agreements between the government and the guerrilla fighters, but neither side was truly defeated, and it was therefore clear that judicial proceedings would not be effectively utilised against only one of the warring parties while excluding the other. The contending parties have generally (from similarly balanced positions of negotiating power — roughly as weak or as strong as the other side) agreed to truth commissions as part of the negotiated settlement. In the Zimbabwe situation it seems likely that something of a stalemate would be the precursor to such a

Why a TRC for Zimbabwe?

The assumption that a truth and reconciliation commission is an important device to be made use of by Zimbabweans in their transition from dictatorship to genuine democracy proceeds from two premises: first, that there have been serious human rights abuses that have occurred in Zimbabwe, and second, that a truth commission will be an effective way of dealing with Zimbabwe's recent political turmoil and the human rights violations associated with that turmoil.

In relation to the first premise, the calls for a TRC process¹² have been sparked by the consistent pattern of human rights abuses over the past three years, beginning shortly before the parliamentary elections of June 2000, and linked both to the rising popularity of the MDC and the February 2000 defeat of the government's proposed new constitution in a referendum. Spontaneous as well as state-sponsored invasions of white-owned commercial farms occurred throughout 2000, and the government failed to take firm action against the violence and lawlessness that accompanied these invasions. Indeed, supporters of the government and of the government's fast-track land redistribution were afforded a considerable degree of impunity, an impunity that the Presidential political amnesty of October 2000 made official.¹³ Of course, human

commission. International and internal (especially internal economic) pressure may force the current government to abandon its position, but whatever power a new transitional regime may gain from such a sea-change will be significantly weakened by the fact that many of the police and military will still hold key positions. It also seems unlikely that the current government will give up power without a guarantee against prosecution. That conditionality may be achieved through the means of a TRC with amnesty powers.

¹² As an example of such a call, see du Preez M, 'Zim must think about how to recover', *The Star*, 10 April 2003.

¹³ The severity of human rights abuses has increased since that date, and the direct involvement of formal state institutions in such abuses marks a new and dangerous development in Zimbabwe's ongoing political crisis. Previously, war

rights abuses occurred in earlier periods of Zimbabwe's history too — most notably the war crimes and serious abuses committed during the Rhodesian war, and the Matabeleland massacres of 1983¹⁴ — and the extent to which these violations are to be considered by a future commission may have to be debated.

The second premise — that a TRC process will be an effective means of dealing with these abuses — is derived from the various aims that TRC processes strive to achieve. The most obvious objective is to establish the truth about abuses in Zimbabwe; that through an official truth body, an accurate record of the country's past will be established and uncertain events clarified; that the silence and denial of human rights violations will be dealt with and the truth exposed.¹⁵ Lifting the lid on human rights abuses is particularly important in Zimbabwe, given the extent to which the Government has denied, at

veterans, youth militia, and ruling party activists had been responsible for most of the violence and intimidation of opposition party supporters. Interviews by Human Rights Watch in March and April of this year established that violent human rights violations are being carried out by uniformed army and police personnel. Further, the government has taken no clear action to halt the rising incidence of torture and mistreatment of suspects while in the custody of police or intelligence services. As in the past, repression of political activity and expression of dissent have been particularly noticeable prior to election periods. However, as economic and political conditions deteriorate, the government seems increasingly willing to directly involve itself in human rights abuses. See the Human Rights Watch Briefing Paper, *Under a Shadow: Civil and Political Rights in Zimbabwe*, 6 June 2003, available at <http://hrw.org/background/africa/zimbabwe060603.htm>. See also Amnesty International's 2002 Country Report on Zimbabwe, available at <http://web.amnesty.org/web/ar2002.nsf/afr/zimbabwe?Open>

¹⁴ A commission of inquiry was set up in Zimbabwe in 1985 to investigate governmental repression of 'dissidents' in Matabeleland. In the end the commission's report was not made public, but to counter the government's silence on the matter, two major Zimbabwean human rights organisations produced a report in 1997 that thoroughly documented the repression of the 1980s. The report was entitled *Breaking the Silence, Building True Peace*. See in this regard Hayner P, *Unspeakable Truths*, op. cit., p.55.

¹⁵ Hayner P, *Ibid.*, p.25.

the highest level,¹⁶ that abuses have been or are being perpetrated against Zimbabweans.¹⁷ Of course, it may be that for many of the victims a TRC will not so much tell them new truth, as much as formally recognise a truth they may already have known. Nonetheless, the official acknowledgment of these abuses will be a vital factor in the country's process of reconciliation and healing.

Apart from establishing a record of truth, a TRC will respond to the needs and interests of Zimbabwean victims of human rights abuses. A truth and reconciliation commission — in contradistinction to a criminal trial — spends much of its time and attention focused on victims. Through public hearings in which victims are integrally involved, commissions effectively give these victims a credible forum through which to bring their suffering to the awareness of the broader public, and thereby to reclaim their human worth and dignity.¹⁸

Another important aim of a Zimbabwean TRC would be to ascribe institutional responsibility for human rights abuses, and to outline the weaknesses in the institutional structures or existing laws that should be changed to prevent future abuses.¹⁹ The government's actions during the last three years has led to an expansion of power for "war veterans" who, while having no formal status as government officials (and regularly ignoring police and court directives), have become increasingly involved in activities such as policing, land distribution, and training of youths in the national

¹⁶ Such denials of government abuses have been made, for example, by Jonathan Moyo, Zimbabwe's Minister of Information. See Du Preez M, *op. cit.*, 10 April 2003.

¹⁷ That denial has been important in Zimbabwe — as it has been in so many other countries — where the repressive government depends on the active or passive support of certain sectors of the public, to carry out its policies and maintain power.

¹⁸ Sarkin C, *Rwanda TRC, op. cit.*, p. 799.

¹⁹ Hayner P, *Unspeakable Truths, op. cit.*, p.29.

youth service.²⁰ Clear lines of authority and jurisdiction have also been eroded by a gradual militarisation of normal policing activities. The military has become increasingly involved in food distribution, electoral management and other activities that would normally fall under the mandate of the Zimbabwe Republic Police.²¹ The rising disorder in this sector has created a permissive environment for continued violations of personal security and basic rights. The situation has been exacerbated by a deterioration in the rule of law, and by the government's interference in and manipulation of the judiciary. Even if a new government were to commit itself to restoration of peace and order in Zimbabwe, it is clear that reforms will be needed in the army, the judiciary, and the police, to name but three services, in order to ensure the compliance of supporting structures.

All the aims mentioned above contribute to the eventual achievement of the goal that TRC processes have come to symbolise — the promotion of reconciliation and the reduction of tensions resulting from past violence.²²

The Commission

Establishment of the Commission

Commissions have been established in a variety of ways, the majority by presidential decree (in Argentina, Chile, Haiti, Sri Lanka, Chad, Uganda), some by peace accord (in El Salvador, Guatemala),

²⁰ See the Human Rights Watch Briefing Paper, *Under a Shadow: Civil and Political Rights in Zimbabwe*, 6 June 2003, available at <http://hrw.org/background/africa/zimbabwe060603.htm>.

²¹ *Ibid.*

²² Hayner P, *Unspeakable Truths*, *op. cit.*, p.30.

and others by the national legislature (in South Africa).²³ However the commission is created, a minimum requirement is that it must have clear operational independence of the government, and once established, must be²⁴

free of direct influence or control by the government, including ... the interpretation of its written mandate ... in developing its operating methodology for research and public outreach, and in shaping its report and recommendations.

The question of funding for a commission is of particular importance. For the commission to achieve the aims outlined earlier, it must have sufficient resources to investigate, research, conduct hearings, run a data base, hire outside specialists and so on. Experience shows that financially under-resourced commissions fail (the Ugandan, and Ecuadorian commissions are good examples)²⁵, or, like the Guatemalan Commission, waste a lot of energy on raising funds to keep the organisation running.²⁶ To the extent possible, therefore, full funding for a commission should be committed and made available at the start of its work. There are many examples of

²³ For a full list of the way in which truth commissions have come to be established, see Appendix 1, Hayner P, *Ibid*.

²⁴ Hayner P, *Fifteen Truth Commissions*, *op. cit.*, p.179.

²⁵ The Ugandan commission repeatedly ran out funds and at one point had to cease operations altogether until it could raise further money. This lack of resources was one of the factors that contributed to the prolonging of the commission's work, and the consequent loss of the public's attention and interest. See Hayner P, *Unspeakable Truths*, *op. cit.*, p.224. Despite Ecuador's initial governmental support for the Ecuadorian commission, the commission ceased to function just five months after starting due to lack for resources. See Hayner P, *Unspeakable Truths*, *op. cit.*, p.69.

²⁶ Throughout its operation the Guatemalan commission was under the threat of financial collapse. The three commissioners on the Guatemalan commission, for example, started their official duties by directing their energy away from the work of the truth commission and towards attempts to raise money from the international community. See Tomuschat C, *op. cit.*, p.248.

commissions receiving external funding,²⁷ and given the current state of the Zimbabwean economy, such outside financial assistance will be imperative.²⁸

Appointment of Commissioners and Staff

The persons who are chosen to manage a TRC often determine the success or failure of the commission. Apart from the fact that several

²⁷ Salvador's commission, for instance, was fully funded (to the tune of \$2.5 million) through voluntary contributions of United Nations members. The trend in recent times appears to be that the national government provides a portion of the funds, and the international community the rest. The Guatemalan commission, in addition to the \$800,000 it received from the Guatemalan government, made up the rest of its \$9.5 million budget from contributions from thirteen countries and two foundations. The South African commission also received financial support from a wide range of international donors which supplemented the money provided by the South African government. See Hayner P, *Unspeakable Truths*, op. cit., p.224).

²⁸ It appears that such assistance will be forthcoming, along with logistical and other support. Colin Powell, for example, is on record as having pledged US 'assistance to the restoration of Zimbabwe's political and economic situations', and that other nations will follow suit. See Powell C, 'Freeing a nation from a tyrant's grip', *New York Times*, 4 July 2003; see too the United States' efforts at introducing the 'Zimbabwe Democracy and Economic Recovery Act of 2001'. One feature of the Act is to support programs to strengthen democracy and aggressively promote economic recovery in Zimbabwe. See Frist 'Pushing to restore Zimbabwean democracy', available at <http://frist.senate.gov/press-item.cfm/hurl/id=184578>. Baroness Amos has stated in the House of Lords that the British Government is aware of ongoing discussions about the possibility of a truth commission, and that while these are not discussions in which the UK government is currently involved, 'once we get through the current crisis', the British Government 'shall seriously consider the matter'. (Response in the House of Lords of Baroness Amos, Parliamentary Under-Secretary of State, Foreign and Commonwealth Office, on questions regarding Zimbabwe, 11 July 2002, Column 821, available at <http://www.parliament.the-stationery-office.co.uk/pa/ld199697/ldhansrd/pdvn/lds02/text/20711-02.htm>). One could also surmise that the African Union — following its ineffectual treatment of the Zimbabwe crisis — would go some way to restoring the damage to its image by providing financial assistance.

commissions have run into serious problems rooted in weak management or the inability or incompetence of staff,²⁹ the legitimacy of the commission — its ability to be accepted by the population as a credible body capable of finding an ‘objective’ truth — generally depends on its being a well-balanced panel of highly respected people.³⁰

Dealing with the achievement of legitimacy first, it is clear that much of the violence in Zimbabwe — as with so many African states — has an ethnic, or other group-identity element, with the deliberate manipulation of group or political identities (black against white, Zanu-PF against MDC) by the government for short term gain. At a minimum therefore, commissioners should be selected who represent a broad and fair range of perspectives, backgrounds (including race) or affiliations, so that no part of the population feels excluded from the process.³¹ In Chile, for example, President Aylwin appointed eight commissioners and carefully balanced both sides of the political divide, in the process achieving credibility for the commission.³² Zimbabwe’s TRC will also require a balanced set of commissioners who represent all sectors of Zimbabwean society.

How exactly those commissioners should be appointed will depend on the political context of transition. But assuming there will be a

²⁹ Hayner P, *Unspeakable Truths*, op. cit., p.215.

³⁰ Sarkin C, *Rwanda TRC*, op. cit., p.804.

³¹ Hayner P, *Fifteen Truth Commissions*, op. cit., p.654.

³² Sarkin C, *Rwanda TRC*, op. cit., p.806. Alwyn appointed eight people to serve on the commission, intentionally selecting four members who had supported Pinochet, including former officials of the Pinochet government, as well as four who had been in opposition, thus avoiding any perception of bias in the commission’s work. See Hayner P, *Unspeakable Truths*, 35). Given the polarised political situation in Zimbabwe it may be important to learn from Chile’s example and ensure that a Zimbabwean commission includes Zanu PF members or non-political members who supported Mugabe’s regime. Only in this way might the commission achieve objectivity.

negotiated settlement, with something of a stalemate in the political power-play, it will be vital to maintain a critical distance between the Government (old and new) and the commission. In recent years, instead of truth commission members being appointed through procedures that rely on the good judgment of some appointing authority (usually the state president), and with little public involvement, several commissions have been appointed through processes that have ensured transparency and public participation.³³ In South Africa, an Act of Parliament created the commission as an independent investigative body. A selection committee, which included representatives of human rights NGOs was formed, which then called for nominations from the public.³⁴ After receiving some three hundred nominations, forty-seven people were called for interviews, which took place in public session and were closely followed by the media, and from their ranks the selection committee narrowed the finalists to twenty-five.³⁵ From this list President Mandela eventually chose seventeen commissioners. The result was that a credible commission was created, comprising commissioners whose legitimacy the public could accept, and political horse-trading was prevented. Something similar might be needed if Zimbabwe is to create a legitimate truth commission, particularly if members of the old regime retain power within the transitional government. As a suggestion, the AU Secretary-General, the UN Secretary-General, the new President of the Zimbabwean Government, the Catholic Archbishop of Zimbabwe or the Head of the Zimbabwe Council of Churches and the General Secretary of the Zimbabwean Human Rights NGO Forum might each nominate one individual to sit on a

³³ Sarkin C, *Rwanda TRC*, *op. cit.*, p.806; Hayner P, *Unspeakable Truths*, *op. cit.*, p.216.

³⁴ The selection committee consisted of five politicians, one from each main political party, plus a bishop, the Secretary General of the South African Council of Churches, and a trade union official. See Sarkin C, *ibid.*, p.807).

³⁵ The criteria by which the twenty-five nominees were chosen were: impartiality, moral integrity, known commitment to human rights, reconciliation and disclosure of the truth, absence of a high party political profile, and lack of intention to apply for amnesty. *Ibid.*

selection panel.³⁶ Given that Zimbabwe is a highly polarised society with strong political divides, it would also be useful to involve international practitioners to bolster the legitimacy of the process. This involvement would be consistent with the trend for transitional governments to seek legitimation from the international community.³⁷ Either the panel itself or a representative chosen for the specific purpose of acting as selection co-ordinator³⁸ would choose the final candidates for appointment to the commission. While time constraints and the fractured political environment might make it difficult for the panel to involve the public directly in the choice of commissioners, the South African model illustrates that, at the very least, the appointment process should be made visible³⁹, perhaps by holding interviews in public.

³⁶ A similar process has been put forward by Sarkin in relation to the creation of a truth commission for Rwanda, *ibid*, p.807. A practical example of such a process is now provided by the recent events in Sierra Leone and the creation of its seven-member truth commission. There the UN secretary-general in Freetown was appointed as selection co-ordinator and was directed to call for nominations from the public. In the meantime a selection panel was formed (with representatives appointed by the two parties of the former armed opposition, the president, the governmental human rights commission, the non-governmental inter-religious council, and a coalition of human rights experts) which interviewed the nominees, ranked and commented on each, and submitted the evaluations to the selection co-ordinator, who would select the final four national candidates. The three international members of the commission were chosen by the UN high commissioner for human rights at the time, Mary Robinson. The lists of both national and international nominees was then submitted to the president of Sierra Leone for appointment. See Hayner P, *Unspeakable Truths*, *op. cit.*, pp.216–217. Information regarding the Sierra Leone commission can be found at www.sierra-leone.org/trc.html.

³⁷ See Sarkin C, *Rwanda TRC*, *op. cit.*, p.808.

³⁸ See the Sierra Leone example discussed in footnote 35 above (where the UN secretary general for Freetown, acting as selection co-ordinator, selected the final four candidates from a list provided by the selection committee).

³⁹ The openness of the South African process allowed NGOs, for example, to make submissions to the panel highlighting concerns about some candidates' human rights track records. See Sarkin C, 'The trials and tribulations of the South African

What about national versus international commissioners for appointment to the commission? A wide range of options is available. In Chile, Argentina, and South Africa, all the commissioners were nationals of their respective countries. However, El Salvador had all foreign commissioners (two Latin American and one American) and Guatemala had a mixture of two Guatemalans and one German commissioner. Much depends, of course, on the political climate and needs of the relevant country. In principle, it would be feasible to have only Zimbabwean nationals as commissioners, provided that they were drawn from a full political and probably racial spectrum. The question to be asked — and about which there may be some debate — is whether the pool of qualified persons from which to draw internationally recognised commissioners and staff within Zimbabwe is sufficiently large to establish a credible commission?

At the other end of the spectrum, the El Salvadoran option of having only foreign commissioners on a proposed Zimbabwean commission is unlikely to be acceptable to the parties involved, given the perceived need for national ownership of the process and its findings and the strong anti-foreign sentiments regularly expressed by Zanu-PF and its leadership. In any event, there are several good reasons for including one's own nationals. The downside to the El Salvadoran Commission was that, being foreigners, the commissioners and staff could not fully comprehend the local nuances. And because foreigners conducted the process, national participants were not able to come together to write a common history, as was done in Chile and Argentina.⁴⁰

Truth and Reconciliation Commission', *South African Journal on Human Rights*, 12, 1996, pp.617–621.

⁴⁰ See Design Factors — Composition of Commission, <http://www.truthcommission.org/factor.php?fid=3&lang=en>; see also Sarkin C, *Rwanda TRC*, op. cit., p.808.

On balance, the mixed model of national and international commissioners works well. A mix allows national familiarity and international expertise to complement each other; but in Zimbabwe it must be doubted whether the current government would agree to any western nationals serving on a TRC. A more feasible mixture would include other African nationals, one or two past commissioners from the South African TRC or the Nigerian truth commission,⁴¹ as well as Zimbabwean nationals.

As to the professional background of commissioners, the experience of truth commissions vary. Because human rights violations have been largely understood as infringements of the law, the composition of many commissions (e.g. Chile, El Salvador) has favoured commissioners with legal training. South Africa's commissioners were more diverse and included religious leaders, psychologists and human rights activists. In Argentina, commissioners also had no predominant professional background. As the South African experience in particular makes clear, having commissioners with diverse backgrounds can be of significant benefit. By going beyond a panel of lawyers to include religious leaders and psychologists, for example, the commission finds it easier to carry out the primary aim of its work: to heal wounds and promote reconciliation.⁴² Whatever the eventual composition of the commission, however, the key criterion in selecting commissioners is that they must — as a prerequisite — be respected nationally and preferably also enjoy international respect.⁴³ This is vital, as the

⁴¹ The Commission of Inquiry for the Investigation of Human Rights Violations was created by President Obasanjo in June 1999, and tasked with examining human rights violations in Nigeria over the period of 1984 (later extended back to 1966) and 1999. See Hayner P., *Unspeakable Truths*, *op. cit.*, p.69.

⁴² See Design Factors — Composition of Commission, *op. cit.*

⁴³ Consideration of the recent establishment of a TRC in Sierra Leone (see www.sierra-leone.org/trc.html) reveals that this consideration was taken into account in that country's Truth and Reconciliation Commission Act 2000. Article 2 (3) provides:

commissioners are not only the public face of the TRC, but their credibility directly affects the legitimacy of the commission. In this regard, as mentioned earlier, commissioners must be drawn from a broad diversity of political and possibly racial backgrounds in order to garner respect from the whole Zimbabwean nation. This was the situation in Chile and more recently in South Africa. In South Africa in particular, the diversity of commissioners added to the credibility and integrity of the process as well as to the national and international reputation of its TRC.

Aside from the commissioners themselves, the staff of any proposed commission will require more than basic human rights experience and legal skills in order to deal with the breadth of work and the nature of the responsibilities that a truth commission must undertake. Hayner points out that in addition to human rights lawyers and investigators, social workers or psychologists, computer and information-systems specialists, data coding and data entry

'(1) The Commission shall consist of seven members, four of whom shall be citizens of Sierra Leone and the rest shall be non-citizens, all of whom shall be appointed by the President after being selected and recommended in accordance with the procedure prescribed in the schedule.

(2) The members of the Commission shall be:

(a) persons of integrity and credibility who would be impartial in the performance of their functions under this Act and who would enjoy the confidence generally of the people of Sierra Leone; and

(b) persons with high standing or competence as lawyers, social scientists, religious leaders, psychologists and in other professions or disciplines relevant to the functions of the Commission.'

It is important to stress here that high standing in the context of transition and the creation of TRC processes does not include political high standing. As South Africa's Promotion of National Unity and Reconciliation Act 1995 provided, commissioners should be 'fit and proper persons who are impartial and *who do not have a high political profile*' (emphasis added).

staff, logistical co-ordinators, interpreters and security personnel are required.⁴⁴

In terms of staffing numbers, experiences again vary. Whereas Latin American commissions have enjoyed relatively large staff complements (Chile and Argentina had approximately sixty full time staff members each), the African commissions in Uganda, Rwanda, Chad and Zimbabwe have had to do with very few personnel.⁴⁵ The trend, however, is towards employing a large and professional staff,⁴⁶ and for good reason. As the complexity and difficulty of TRC processes have become clearer over time, the size and resources of the commissions have grown. Experience has shown that commissions that are well staffed and resourced have been most successful in achieving their objectives of establishing the truth and contributing towards reconciliation.⁴⁷

The Commission's Mandate

The most significant limitations of many truth commissions are bound up in the very instruments that create them. Written mandates for truth commissions often have restricted terms of reference that reflect the political compromises agreed upon in the transition negotiations. Good examples are the truth commissions of Argentina, Uruguay and Sri Lanka that were restricted by their mandate to consider only disappearances.⁴⁸ The Uruguayan

⁴⁴ Hayner P, *Unspeakable Truths*, op. cit., p.217. Many of these specialised services that are resource intensive and required on a short basis only (such as database expertise and information management) can best be obtained from outside consultants.

⁴⁵ Sarkin C, *Rwanda TRC*, op. cit., p.814.

⁴⁶ South Africa's TRC has had the highest staff complement to date, with around three hundred staff between 1996 and 1998. See Hayner P, *Unspeakable Truths*, op. cit., p.218.

⁴⁷ Sarkin C, *Rwanda TRC*, op. cit., p.815.

⁴⁸ Hayner P, *Unspeakable Truths*, op. cit., p.72.

commission, as a result, overlooked the majority of human rights violations (such as torture and illegal detention) that had taken place during the military regime.⁴⁹ Such curtailment of a commission's truth-finding scope should therefore be avoided if possible. It is important that the terms of reference for any proposed commission in Zimbabwe be sufficiently broad to allow investigation into all forms of serious rights abuses and to enable the commission to decide which would be the most appropriate cases or practices to investigate.⁵⁰ The El Salvador commission's terms of reference, for example, left the mandate relatively open, requiring only that the commission should report on 'serious acts of violence ... whose impact on society urgently demands that the public should know the truth'.⁵¹ A similarly flexible mandate would allow a fuller picture of the truth to emerge in Zimbabwe and would allow an investigation of a wider range of issues necessary for the achievement of reconciliation.⁵² It may be important, for example,

⁴⁹ *Ibid.*

⁵⁰ Hayner P, *Fifteen Truth Commissions*, *op. cit.*, p.636

⁵¹ Hayner P, *Unspeakable Truths*, *op. cit.*, p.73. See too the South African TRC's mandate which calls for investigation of 'gross violations of human rights, including the violations which were part of a systematic pattern of abuse'.

⁵² But note the criticisms directed at the *overly* broad mandate of the Guatemalan Clarification Commission which was required to investigate 'the' human rights violations — textually meaning 'all' relevant human rights violations committed during twenty years of different dictatorships, provided they were linked to the armed confrontation — resulting in an overburdening of the commission. In response to this difficulty the Clarification Commission eventually determined that priority had to be given to attacks on life and personal integrity, in particular extra-judicial executions, forced disappearances and sexual violations. See in this regard the article by the Clarification Commission's co-ordinator, Tomuschat C, *op. cit.*, pp.239–240. See too the problems experienced initially by Nigeria's commission. The commission interpreted its mandate to consider 'human rights violations or abuses' very broadly, including in its inquiry cases of dismissal from employment without due compensation. Because of this over-zealousness, in its first few weeks of work the commission received close to ten thousand written submissions complaining of violations, and estimates suggested that nine thousand of those pertained to labour disputes! The commission was forced to re-

that the commission use its wide mandate to consider in its inquiry the issue of land invasions. Because land invasions and the human rights abuses associated therewith have been central to the crisis in Zimbabwe over the last three years, the commission may have to deal with the issue so as to reflect fully the truth of this period, and also to ensure that many Zimbabweans (white and black) see their own personal experiences reflected in the commission's work.⁵³

Questions of Time

The first 'time' related question is when to start. In general, past experience shows that the quicker the commission is set up and begins its work, the better.⁵⁴ South Africa is an exception to this rule in that eighteen months were spent designing the Truth and Reconciliation Commission after the democratic elections of April 1994. Of course the appropriate preparatory period depends on the

evaluate, and focused thereafter on 'gross violations of human rights only'. See in this regard Hayner P, *Unspeakable Truths*, *op. cit.* p.69.

⁵³ It may be that the separate topic of compensation due to farmers and farm labourers for the loss of profits and loss of or damage to land will be best dealt with through some form of dedicated lands claim commission (akin to the South African Land Commission). However, the human rights abuses associated with the land invasions (torture, murder, rape, damage to property and so on) should be dealt with by the truth commission. In addition to the human rights abuses that occurred in pursuance of the land invasions, the truth commission should also attempt to highlight the truth about the government's policy of land invasions by exploring the legal, social and political underpinnings of that policy.

⁵⁴ See Hayner P, *Unspeakable Truths*, *op. cit.*, p.221. The example provided is that of the Philippines, which illustrates how the initial weeks or months of a new president's administration, when power is strong, may be the only chance to set up a truth commission, particularly where the new government is overseeing a largely unchanged military. In the Philippines there was no attempt to set up second truth commission after the first commission broke up. President Aquino had lost the popular support that had enabled her to establish the first commission notwithstanding military resistance. So too Aquino's own commitment to human rights had by this stage waned. See generally Hayner P, *Fifteen Truth Commissions*, *op. cit.*, p.640.

political circumstances in the country at hand. South Africa's period of preparation was longer than other truth commissions because of the time required to develop the TRC's complex empowering legislation, to gain the backing of all political parties (who held evenly balanced positions of power in the transitional period), and to respond to representations from many NGOs and other human rights groups regarding the legislation. However, while serious civil society engagement with a truth commission proposal is important and desirable, where participatory civil society and democratic institutions, such as those in Zimbabwe, are weak or have been rendered weak or nugatory by the government, it is probably better to plump for a quick start to the commission. It is at this early stage of transition, as a new government comes into power, that the window of political and public support for the commission and what it represents will be most open. Hayner points out that at this early stage a truth commission can also have the 'secondary effect of holding off pressure for immediate reforms and other measures of accountability, giving the government time to take stock, plan, and strengthen institutions as necessary to further its other transitional justice initiatives'.⁵⁵

The next 'time' related question refers to the duration of the commission's mandate. The majority of truth commissions studied for this report have had a limited period of time in which to complete their work, usually between six months and a year to complete all investigations and submit a report (sometimes with a possibility of extension).⁵⁶ More recent commissions such as the South African and Guatemalan commissions have worked for longer (almost five years in total for the South African commission and one and a half years for the Guatemalan commission). Hayner suggests

⁵⁵ Hayner P, *Unspeakable Truths*, op. cit., p.221.

⁵⁶ The Argentine, Chilean and Salvadoran Commissions had only nine months to generate an authoritative account of the human rights violations that occurred in those countries.

that one to two and one-half years is probably optimal.⁵⁷ That period does not include an additional three to six months for laying the administrative and logistical foundations of the commission, thereby avoiding the loss of precious operating time out of the commission's already limited life span.⁵⁸

There are good reasons to keep the tenure of a commission short, the most important being to make sure that the commission works efficaciously towards its deadline, to enable healing to begin swiftly and to ensure that a report (and its recommendations) is published while there is still buy-in to the reconciliation process.⁵⁹ The Ugandan commission demonstrates the danger of disregarding this consideration. Set up in 1986, the Commission of Inquiry in Uganda was given no time limit. It took over nine years before it ended and by then it had lost the support and interest of the public and failed to produce the cathartic effect expected of a commission.⁶⁰

Another 'time' related issue pertains to the period of history that a commission is expected to study. Certainly the historical period that a commission has to investigate will be one of the most hotly debated issues during the process of its creation.⁶¹ Not much more

⁵⁷ Hayner P, *op. cit.*, p.222.

⁵⁸ The Guatemalan Clarification Commission is a case in point. In terms of its mandate the commission was to start its work on the day of the conclusion of the peace agreement and would thereafter have a period of six months from that date to complete its work. The Commission was not able to comply with its mandate in time because on the date of the peace agreement — 29 December 1996 — the members of the future commission had not yet been chosen. The full complement of commissioners was only put in place some three months later at the end of February 1997, and actual work started only in mid-April 1997 since the members of the commission all had to adjust their lives to the requirements of their new functions. See Tomuschat C, *op. cit.*, pp.240–241.

⁵⁹ Hayner P, *Unspeakable Truths*, *op. cit.*, p.222.

⁶⁰ *Ibid.*

⁶¹ Sarkin C, *Rwanda TRC*, *op. cit.*, pp.811–812.

can be said here other than to point out that various periods of Zimbabwean history might fail to be investigated. There might, for instance, be practical reasons (such as concerns about resources in Zimbabwe's current state of economic crisis) to limit the commission's mandate to an investigation of the government's abuses of power since 2000. The most pressing human rights violations are perceived — it would appear both within the country as well as internationally — as being a direct consequence of the current political crisis in Zimbabwe, and the efforts to achieve reconciliation between opposing members of the MDC and Zanu-PF, as well as between whites and blacks in respect of the recent farm invasions, most obviously arise out of the events of this period. But even if the last three years are the primary focus of the commission, certain groups within Zimbabwe might insist that the commission consider the entire political period of President Mugabe's rule, and inquire into human rights abuses such as those in Matabeleland, abuses which to this day remained shrouded in secrecy.⁶² There may even be calls perhaps for the commission to go back as far as UDI in 1965, and to consider human rights abuses committed by parties prior to President Mugabe's assumption of power, especially during the Rhodesian war. Whichever periods are agreed upon, the outcome will in all probability be determined by the political realities of the negotiations over transition, and by a desire of the parties involved to ensure that at least a part of their version of what happened is placed on the table.

⁶² As explained earlier in this report (see footnote 13 and related text), a commission of inquiry was set up in Zimbabwe in 1985 to investigate governmental repression of 'dissidents' in Matabeleland. In the end the commission's report was not made public, and when two major Zimbabwean human rights organisations produced and delivered to the government a report in 1997 that thoroughly documented the repression of the 1980s, the government failed to give any response.

The Commission in Action

Every commission faces difficult questions of methodology regarding, for example, how it will gather evidence, what cases it will cover, due process rules and procedures, the level of proof it will use to make its conclusions and how it will relate to the press and public *etc.*

One of the most difficult questions to decide is how the commission will conduct its hearings. In Argentina, Chile, El Salvador and Guatemala, most TRC activities were held in closed-door hearings and interviews, whereas in South Africa all hearings and investigations were held in public (with high levels of media coverage on national television, radio, and in the press).

The general approach, particularly after the powerful example of South Africa's TRC, is that public hearings are preferable because they shift a truth commission's focus from *product* (its final report), to *process*.⁶³ Whereas the final report of the South African TRC was only delivered in 2004, it crystallised a three-year process that the whole of South Africa had been involved in during the hearing stages. The benefits of public hearings should therefore be carefully considered by any proposed Zimbabwean commission. Through the process of open hearings the public can be assured that there is no bias in the commission's work, and no cover-up of evidence. And by listening to statements from victims of abuses, statements of victims' family members, and other reports — itself an important means to achieve healing⁶⁴ — the commission may reduce the chance of a continuing

⁶³ Hayner P, *Unspeakable Truths*, *op. cit.*, p.225. Sarkin C, *Rwanda TRC*, *op. cit.*, p.817.

⁶⁴ There is a multitude of studies showing that repressing intense emotional pain leads to psychological trouble. Hayner, for example, draws on a variety of studies to conclude thus: '[One] of the cornerstones of modern-day psychology is the belief that expressing one's feelings, and especially talking out traumatic experiences, is necessary for recovery and for psychological health. It is often

denial of the truth by sectors of society, and increase public support and appreciation for its work.

Because of the public nature of the process and the victim-orientated approach involved, it will be imperative for a commission to make counselling services available to victims, both before and after they testify.⁶⁵ The South African TRC for example, had four mental-health professionals on its staff, provided basic training for statement-takers on how to respond to trauma, and employed 'briefers' to provide constant support to those giving testimony at the hearings.⁶⁶ To the extent that resource restrictions limit the provision of such professional support, community organisations, traditional healers, church structures, extended families and friends, and support groups⁶⁷ may be needed to fill the breach.

It is important that the commission does not rely solely on the testimonies of victims, government records and NGO submissions to complete its report, and that — following the example of the South African, Argentine and Salvadoran commissions — it undertakes its

asserted that following a period of massive political violence and enforced silence, simply giving victims and witnesses a chance to tell their stories to an official commission — especially one that is respectful, non-confrontational, and interested in their stories — can help them regain their dignity and begin to recover' See Hayner P, *Unspeakable Truths*, *op. cit.*, p.134.

⁶⁵ Sarkin C, *Rwanda TRC*, *op. cit.*, p.815.

⁶⁶ The Chilean and Argentine commissions also employed psychologists and social workers who attended interviews with victims, for example. However, apart from these, most commissions have operated with little recognition of the possible 'retraumatising' effect that their work might have. This is a mistake that any Zimbabwean commission would wisely seek to avoid.

⁶⁷ The Khulumani group in South Africa provides a good example of such a support group. The group was initially formed to represent victims' voices in lobbying around the creation of a truth commission, but it quickly took on the additional task of providing support to victims and survivors through support groups. See Hayner P, *Unspeakable Truths*, *op. cit.*, p.147. For more information on the Khulumani group see their website at <http://www/khulumani.net>.

own investigations into human rights abuses.⁶⁸ In Chile the commission did not carry out its own investigations despite its broad mandate, a serious shortcoming since it led to a substantial lack of information relating to victims' fates and the identities of the perpetrators.⁶⁹ Of course, much will depend on the number and quality of staff and the resources available, but the commission should at least aim to carry out an in-depth analysis of a fair number of violations so that it can document the type of violations that have occurred during the period.⁷⁰ With broad and flexible terms of reference in place (see the discussion above regarding its mandate), the commission will be well positioned to follow El Salvador's example and conduct in-depth investigation of selected cases, chosen for being typical of victims, perpetrators and kinds of abuse during the historical period of study.⁷¹

The Report and Recommendations

The work of a truth commission eventually culminates in a final report. The process of the commission is, in itself, an important means of promoting reconciliation, but the final report is a formal capturing of the truth — an overall acknowledgment of the abuses

⁶⁸ To this end, although commissions do not formally conduct criminal proceedings, they have increasingly taken on prosecutorial powers. For example, the South African TRC was authorised to subpoena witnesses, and more recently the Sierra Leonean TRC was vested with far-reaching subpoena and search and seizure powers. At the same time, basic rights of due process, such as the right of individuals to be informed of and respond to the allegations made against them, have gained in prominence, in particular because certain truth commissions (such as the South African and El Salvadoran TRCs) have made public findings about individual responsibility for human rights abuses. See Stahn C, 'Accommodating individual criminal responsibility and national reconciliation: The UN Truth Commission for East Timor', *American Journal of International Law*, 95, 2001, p.955; see also Hayner P, *Unspeakable Truths*, *op. cit.*, pp.107–108.

⁶⁹ Sarkin C, *Rwanda TRC*, *op. cit.*, p.816.

⁷⁰ *Ibid*, p.817.

⁷¹ Hayner P, *Unspeakable Truths*, *op. cit.*, p.73.

that occurred within the State. In order for the report to promote reconciliation, it is vital that it be published immediately after the commission has completed its work, and be readily available to the public.⁷² In Argentina, for instance, the commission produced a systematic account of the oppressive regime, detailing what happened to the nearly 9000 people who had disappeared. The report became a bestseller in Argentina.

The mere creation of a truth commission does not necessarily mean that the Government will be transformed. It is necessary, therefore, for the commission to be given the mandate to make recommendations and to suggest reforms. If possible, it should be agreed in advance that the commission's recommendations will be mandatory. In more recent years truth commission reports have provided extensive recommendations for reforms across many sectors of government and public life.⁷³ Several observers believe that the Salvadoran TRC's most important long-term contribution was its recommendations on rule of law reform and institutional change.⁷⁴ These recommendations may be based on the contributions of a wide variety of legal and political scholars, and in the past have included specific reforms in, for instance, the judiciary, the armed forces, the political structure and process, reparation for victims and measures to instil a human rights culture in society.⁷⁵ The importance of such recommendations for Zimbabwe is clear, and the country would be well served by a commission proposing such reforms.⁷⁶

⁷² Hayner P, *Fifteen Truth Commissions*, op. cit., p.652.

⁷³ The El Salvadoran TRC's recommendations ran to over fifteen pages, the South African TRC's recommendations forty-five pages, and Chile's over forty-five pages. See Hayner P, *Unspeakable Truths*, op. cit., p.167.

⁷⁴ See Rama Mani, *Beyond Retribution, Seeking Justice in the Shadows of War*, 2002, p.102.

⁷⁵ Hayner P, *Unspeakable Truths*, op. cit., p.167.

⁷⁶ See for example, the institutional reforms suggested by the truth commission reports for Chile and El Salvador. The commissions were singularly concerned

Reconciliation, Justice and Amnesty

For time immemorial, successor regimes have sought to secure peace through the pardoning of their enemies, and modern history is replete with examples where a regime has granted amnesty to officials of the previous regime who were guilty of torture and crimes against humanity, rather than prosecute them (e.g. Uruguay, Argentina and El Salvador). With the advent of truth commissions, however, it has become possible to channel the grant of amnesty through the commission. A commission's amnesty power, and the resulting immunity from criminal prosecution for an individual who has committed serious human rights violations, creates something of a conflict between the truth commission process — which aims to achieve what is called 'restorative' justice⁷⁷ — and criminal trials, which focus on delivering 'retributive' justice'.⁷⁸

about, amongst other things, the quality of the judges, the independence of the judiciary and the role of the armed forces. To enhance judicial independence both commissions suggested changes in the procedures for appointing judges and prosecutors. In relation to the armed forces, both viewed education and training in human rights as imperative goals for the new governments. See Ensalaco M, 'Truth commissions for Chile and El Salvador: A report and assessment', *Human Rights Quarterly*, 16, 4, 1994, p.656, at pp.666–670.

⁷⁷ See McGregor L, 'Individual accountability in South Africa: Cultural optimum or political façade?', *American Journal of International Law*, 95, 2001, p.32, at p.37; Wilson S, 'The myth of restorative justice: Truth reconciliation and the ethics of amnesty', *South African Journal on Human Rights*, 17, 2001, p.531 at pp.542–545.

⁷⁸ That is not to say that truth commissions *replace* national or international prosecution. It is precisely because of the recent move in international practice from blanket amnesties to the conditional and/or limited amnesties exemplified by the South African TRC that truth commissions have today come to be seen as *complementary* to prosecutions. For one, the subject matters of truth commissions and judicial action against perpetrators often overlap in that they both focus on past crimes. Furthermore, as the Argentine commission proved, a truth commission can most directly strengthen trials through its vast collection of information pertaining to crimes, which can be forwarded directly to prosecuting authorities as a source of evidence for future domestic and international trials. See in this regard Hayner P, *Unspeakable Truths*, *op. cit.*, chapter seven.

So far, however, only the South African TRC and the recent truth commission in East Timor have been accorded the power to grant amnesty.⁷⁹ Commissions generally investigate and report only, focusing on the truth about human rights abuses of a particular historical period and the specific policies and practices that contributed to those violations. Individual cases are described only if indicative of a general pattern or to highlight important events. That said, there might be good reason for the Zimbabwean commission to follow the South African example, particularly if the commission is seen as a more effective means of reaching the truth than through prosecution. As the South African experience demonstrates, the prospect of amnesty in exchange for truth is a good incentive to the guilty to provide detailed accounts of the acts they have committed.⁸⁰ In any event, the political reality for many transitional governments is that giving a truth commission the power of

⁷⁹ On the South African TRC's amnesty process, see McDonald A, 'A right to truth, justice and a remedy for African victims of serious violations of international humanitarian law', *Law, Democracy and Development*, 2, 1999, p.139, especially pp. 164-170; Hayner P, *Unspeakable Truths*, *op. cit.*, pp.98 *et seq.* On the amnesty process in East Timor, see Stahn C, *op. cit.*, p.952, especially pp.962-965.

⁸⁰ See the judgment of South Africa's former Chief Justice, Ismail Mohamed, who in *Azapo v President of the Republic of South Africa* 1996 (4) SA 671, at 681-685, stated: 'Most of the acts of brutality and torture which have taken place have occurred during an era in which neither the law which permitted the incarceration or persons or the investigation of crimes, nor the methods and the culture which informed such investigations were easily open to public investigation, verification and correction. Much of what transpired in this shameful period is shrouded in secrecy and not easily capable of objective demonstration and proof. ... That truth, which the victims of repression seek so desperately to know is, in the circumstances, much more likely to be forthcoming if those responsible for such monstrous misdeeds are encouraged to disclose the whole truth with the incentive that they will not receive the punishment which they undoubtedly deserve if they do. Without that incentive there is nothing to encourage such persons to make the disclosure and to reveal the truth ...'. The judge's observations are applicable to Zimbabwe insofar as what has recently occurred in that country (and during other periods) is also not easily capable of objective demonstration and proof, and has been denied by the government through various senior officials.

amnesty rather than criminally prosecuting past offenders is the only realistic and peaceful way in which an existing regime will be persuaded to relinquish power. It is not inconceivable that the Mugabe-led government will insist on striking an amnesty deal, allowing the many Zanu-PF officials, policemen and soldiers who have committed human rights abuses to choose the option of truth for amnesty as a means of avoiding prosecution.

Should the amnesty route be followed, it is important that the particular form of amnesty granted by a commission be circumscribed. No clear rules can be enunciated to distinguish between permissible and impermissible amnesties, but the leading expert in this field suggests that 'international recognition might be accorded where amnesty has been granted as part of a truth and reconciliation inquiry and each person granted amnesty has been obliged to make full disclosure of his or her criminal acts as a precondition of amnesty and the acts were politically motivated'.⁸¹ As such, the blanket amnesty in Chile passed by the regime prior to the establishment of the commission would not meet the required standard, while the South African amnesties granted by a quasi-judicial amnesty committee functioning as part of a TRC process established by a democratically elected government, may well do so.⁸²

It is also important to note that the nature of certain offences precludes the granting of amnesty to their perpetrators.⁸³ It is still

⁸¹ Dugard J, *Conflicts of Jurisdiction with Truth Commissions*, p.700.

⁸² *Ibid.* See too Rama Mani, *Beyond Retribution: Seeking Justice in the Shadows of War*, 2002, pp.112–113.

⁸³ There is a vast body of literature on the debate as to whether there is an international legal obligation (whether founded in customary or conventional law) obliging states to punish past crimes. See for example Orentlicher D, 'Settling accounts: The duty to prosecute human rights violations of a prior regime', *Yale Law Journal*, 2537, 1991, p.100; Roht-Arriaza N, 'State responsibility to investigate and prosecute grave human rights violations in international law', *California Law*

open to States to grant amnesty for international crimes without violating a rule of international law, but international lawyers are largely in agreement that States are not permitted to grant amnesty for the crimes of genocide, torture, and 'grave breaches' under the Geneva Convention.⁸⁴ The Preamble of the Statute of the International Criminal Court, while binding only in respect of parties to it, confirms this trend when it declares that 'it is the duty of every State to exercise criminal jurisdiction over those responsible for international crimes'. It is noteworthy that this trend has been reflected in the mandate of East Timor's recently created truth commission.⁸⁵ While the mandate is clearly supportive of individualised amnesty in exchange for truth, the commission may grant 'no immunity' to persons who have committed a 'serious criminal offence', which includes the international crimes of genocide, crimes against humanity, war crimes, torture as well as the domestic crimes of murder and sexual offences, as defined by the

Review, 78, 2, 1990, p.449. See also Dugard J, 'Possible conflicts of jurisdiction with truth commissions', in Cassesse A, *et al*, *The Rome Statute of the International Criminal Court — A Commentary*, 1, 2002, p.697, and the authorities cited in Footnote 26. Hayner P, *Unspeakable Truths*, *op. cit.*, p.90 makes the important point, however, that 'even where international law clearly requires prosecution of those accused of rights crimes, serious prosecutorial action against perpetrators is still uncommon and many blanket amnesties remain in force', confirming the fact that much of the debate about the legality of amnesties such as those granted by TRCs is still — at least for now — somewhat academic.

⁸⁴ Dugard J, *ibid.*, p.699.

⁸⁵ In 1999 pro-Indonesian militia, supported by Indonesian security forces, used violence, threats and intimidation in an attempt to coerce the East Timorese population to support continued integration in Indonesia in the UN-organised 1999 referendum on independence of the island. In apparent revenge for the overwhelming vote in favour of independence, an estimated one thousand supporters of independence were killed and hundreds of thousands fled their homes or were forcibly expelled to Indonesia. After these events the United Nations took control of East Timor and through its United Nations Transitional Administration in East Timor established the Commission for Reception, Truth and Reconciliation in East Timor. See Stahn C C, *op. cit.*, pp.952–953.

Indonesian Criminal Code.⁸⁶ As a result, whatever form of amnesty is chosen in the Zimbabwean context, the amnesty should be limited in terms of the nature of the offence, so that at the very least no amnesty is afforded for the international crimes of torture and genocide (to the extent that there are persons who may be guilty of such crimes). In this way a Zimbabwean commission will, unlike the South African TRC, avoid criticism for failing to comply with internationally recognised standards of criminal accountability.⁸⁷

The East Timorese model is also of interest because of the example it offers to Zimbabwe through its 'reconciliation function', a novelty for truth commissions. Despite some parallels with the South African model — in that single persons are entitled to apply for amnesty by making full disclosure of their acts and by providing an association of their acts 'with the political conflicts of East Timor' — the East Timorese model makes the grant of immunities, already limited to less serious offences, dependent on the performance of a visible act of remorse serving the interests of the people affected by the original offence.⁸⁸ This act may involve community service, reparation, a public apology, and/or other acts of contrition. While the details would certainly need to be carefully worked out, this 'reconciliation function' may be suitably imported by a Zimbabwean commission in order to facilitate the reintegration into the community of low-level perpetrators. This reconciliation procedure could be used to good effect, for example, to deal with acts directed against property, which are likely to be the main group of offences pardonable in respect of the land invasions by 'war veterans' over the last three years.

⁸⁶ See Stahn C, *op. cit.*, pp.957–958.

⁸⁷ For a critical reflection on the South African TRC in this respect, see Dugard J, 'Retrospective justice: International law and the South African model', in McAdams J (ed), *Transitional Justice and the Rule of Law in New Democracies*, 1997, pp.269 *et seq.*

⁸⁸ Stahn C, *op. cit.*, p.963.

The Creation of the International Criminal Court and Implications for Zimbabwe's Leadership

The Statute of the International Criminal Court was adopted in 1998,⁸⁹ and the Court is already beginning to consider requests for prosecution with the aim of being fully operational by next year.

At the time of writing, the Rome Statute has been signed by 139 States and 91 States have ratified it.⁹⁰ Zimbabwe is not yet a party to the Statute.⁹¹ In order to appreciate the implications of the International Criminal Court (ICC) for Zimbabwe, it is necessary to understand how the Court intends to operate. Two areas of concern are focused on here: the possibility of prosecution by the ICC of senior officials in Zimbabwe (either before or after transition); and the effect, under the ICC system, of any proposed amnesty granted after transition by a Zimbabwean truth commission.

Dealing with possible prosecution first, the Rome Statute strictly defines the jurisdiction of the Court. The Court can take up only the most serious crimes of concern to the international community as a whole (genocide, crimes against humanity, and war crimes, all of which are defined in the Statute⁹², committed on or after 1 July 2002.

⁸⁹ The Statute was finalised at the Rome Conference, attended by 160 States from 15 June to 17 July 1998. For an account of the negotiating process at the Rome Conference see Kirsch P & J Holmes, 'The Rome conference on an international criminal court: The negotiating process', *American Journal of International Law*, 2, 1999, p.93.

⁹⁰ For signature and ratification status, see <http://www.un.org/law/icc/index.html>.

⁹¹ Although it signed the treaty on 17 July 1998, Zimbabwe has not taken the final step of ratifying.

⁹² It is assumed that the level and kinds of violence perpetrated by certain individuals in Zimbabwe, and acquiesced in and/or supported by Government officials, might trigger the International Criminal Court's jurisdiction in respect of crimes against humanity. Crimes against humanity are defined in the Rome Statute as acts, such as torture, murder, rape, imprisonment or other severe

The obvious consequence is that the Court's power to investigate abuses in Zimbabwe is limited to events on or after that date.

The Statute also defines the mechanisms for triggering the Court's jurisdiction. Any State Party may refer to the Court a situation in which one or more crimes within its jurisdiction appear to have been committed, *as long as the alleged perpetrators of the crimes are nationals of a State Party or the crimes are committed on the territory of a State Party*.⁹³ Because Zimbabwe is not currently a State Party to the Rome Statute of the ICC, the fact that Zimbabwean nationals are committing crimes within Zimbabwe means that it is not open to another State Party to refer such a 'situation' to the Court for investigation.⁹⁴

The ICC Prosecutor is also authorised by the Rome Statute to initiate independent investigations on the basis of information received from any reliable source. The granting to the Prosecutor of a *proprio motu* power to initiate investigations was one of the most debated issues during the negotiations of the Rome Statute. In the end, the drafters of the Statute determined that in order for the Prosecutor to exercise this power, *the alleged crimes must have been committed by*

deprivation of physical liberty in violation of fundamental rules of international law, persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender, or other grounds that are universally recognised as impermissible under international law, when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.

⁹³ See Press Release of the Prosecutor of the International Criminal Court, No.: pids.008.2003-EN, 15 July 2003, available at <http://www.icc.int>. See also Kirsch P (QC) & D Robinson, 'Trigger mechanisms', in Cassesse A, *et al*, *The Rome Statute of the International Criminal Court: A Commentary*, 1, 2002, pp.623–625.

⁹⁴ Additionally, any country, State Party or non-State Party may in terms of Article 12(3) of the Rome Statute make an *ad hoc* acceptance of the exercise of jurisdiction by the Court over its nationals or crimes committed on its territory. See Kaul H-P, 'Preconditions to the exercise of jurisdiction', in Cassesse A, *et al*, *ibid.*, p.611. This has not yet occurred, and it certainly does not appear that Zimbabwe, as a non-State Party, will under its present leadership make such an *ad hoc* acceptance.

*nationals of a State Party or have taken place in the territory of a State Party.*⁹⁵ Again, notwithstanding the fact that Zimbabwean nationals are allegedly committing serious international crimes in its territory, because the country is not a State Party to the Statute, the Prosecutor has no power, on his own accord, to initiate an investigation.

A further point must be made in relation to the two 'trigger mechanisms' just discussed. If, under the current Government or through the efforts of a new government, Zimbabwe were in future to become a party to the Rome Statute, the Statute provides that, for those States that become parties to the Statute after 1 July 2001, the ICC has jurisdiction only over crimes committed *after the entry into force of the Statute with respect to that State*. So if, for argument's sake, Zimbabwe were to become a party to the Statute in July 2004, the Court's jurisdiction over crimes committed in Zimbabwe or by its nationals would only be effective from that date. The obvious consequence for the current leadership is that any serious crimes committed in Zimbabwe from 1 July 2001 (when the Court's statute came into effect) would be effectively removed from the ICC's scope of inquiry.

The last jurisdictional trigger mechanism — the power of the UN Security Council to refer to the Court 'situations' in which crimes within the jurisdiction of the Court appear to have been committed — is more problematic for Zimbabwe's international criminals, since it allows the Court jurisdiction over an offender, regardless of where the offence took place and by whom it was committed, and regardless of whether the State concerned has ratified the Statute or accepted the Court's jurisdiction.⁹⁶ The Security Council has not yet made any referral to the Court, but its power to do so in relation to

⁹⁵ See Press Release of the Prosecutor of the International Criminal Court, No.: pids.008.2003-EN, 15 July 2003, available at <http://www.icc.int>. See also Kirsch P (QC) Y D Robinson, *op. cit.*, pp. 661–663.

⁹⁶ See Kirsch P (QC) & D Robinson, *ibid.* p.634.

the events in Zimbabwe is clear, at least in respect of events that took place after 1 July 2001 and the entering into force of the Rome Statute. The Statute provides that the Council may only make such a referral by acting under Chapter VII of the United Nations Charter, which is to say it must regard the events in Zimbabwe as a threat to the peace, a breach of the peace, or an act of aggression. There is a possibility that this could happen (particularly if reports on Zimbabwe confirm that human rights abuses continue to increase), since the Security Council, — in determining whether a ‘threat to the peace’, exists — will be guided by the gravity of the crimes committed, the impunity enjoyed by the crimes’ perpetrators and the effectiveness or otherwise of the national jurisdiction in the prosecution of such crimes.⁹⁷ The International Bar Association, for example, has urged that the first act of the ICC’s Prosecutor should be directed at the alleged atrocities committed by Zimbabwe’s President and his regime.⁹⁸ This call exemplifies the growing

⁹⁷ The Preamble of the Rome Statute proclaims that the crimes within the Court’s jurisdiction ‘threaten the peace, security and well-being of the world’ (para. 13). Furthermore, the practice of the Security Council reflects a willingness to regard these crimes as a threat to the peace. See for example the application of Chapter VII by the Security Council in case of grave international crimes that remain unpunished in expressing its support for the establishment of the International Criminal Tribunals for Yugoslavia and Rwanda. For instance, in Security Council Resolution 808, 1993, after having expressed ‘its grave alarm at continuing reports of widespread violations of international humanitarian law occurring within the territory of the former Yugoslavia’, the Security Council declares ‘that this situation constitutes a threat to international peace and security’ and its determination ‘to put an end to such crimes and to take effective measures to bring to justice the perpetrators who are responsible for them’. See in general on this point, Kirsch P (QC) & D Robinson, *op. cit.*, pp.630–631.

⁹⁸ See Ellis M, *International Bar Association*, 7 March 2003 (IBA Press Release). The IBA addressed its call to all state parties to the International Criminal Court (ICC), on the assumption that each of those states has the authority to request that prosecution be initiated. While that is true, the IBA has failed to appreciate that the Court can only take up that request where the alleged perpetrators of the crimes are nationals of a State Party or the crimes are committed on the territory of a State Party — jurisdictional factors which prevent the court from being able to consider the events in Zimbabwe, which is not a party to the Statute (see

demand for a response to the events in Zimbabwe through the mechanism of international criminal law. A Security Council referral to the ICC is an example of how that might be done.

International criminal law developments in national legal systems⁹⁹ may also have consequences for persons responsible for serious crimes in Zimbabwe. South Africa, as an example, has recently incorporated the Rome Statute into its domestic law by means of national legislation,¹⁰⁰ and there has already been one known attempt to invoke the Act against President Mugabe. Under the Act, a structure is created for national prosecution of crimes in the Rome Statute. In terms of the Act, the jurisdiction of a South African court will be triggered when a person commits an ICC crime within South Africa, and also when a person commits a core crime outside the territory of the Republic where that person, after the commission of the crime, is present in the territory of the Republic; or that person has committed the said crime against a South African citizen or against a person who is ordinarily resident in the Republic.¹⁰¹ When

footnote 73 above and related text). Nonetheless, the IBA's call is evidence of the growing international concern about the human rights violations occurring in Zimbabwe, a concern which the Security Council has the power to act upon and to refer the matter to the ICC for investigation.

⁹⁹ For an overview of such developments see Charney J, 'International criminal law and the role of domestic courts', *American Journal of International Law*, 95, 1, 2001, p.120. Belgium's courts are perhaps the best example of national judges exercising universal jurisdiction to prosecute international criminals.

¹⁰⁰ The Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002.

¹⁰¹ The first scenario is grounded in the idea of universal jurisdiction; that is, that a State may exercise jurisdiction over a person who enters its territory who has committed crimes elsewhere, but which, because of their egregious nature, are of concern to the international community as a whole. The second scenario flows from the passive personality principle in international law. In terms of that principle a State has the competency to exercise jurisdiction over an individual who causes harm to one of its nationals abroad. See further Du Plessis M, 'Bringing the International Criminal Court home: The implementation of the

a person commits a core crime outside the territory of the Republic in these circumstances, the Act deems that crime to have been committed in the territory of the Republic.¹⁰² Relying on this ground of jurisdiction, the Act was invoked against President Mugabe by a South African citizen (who has significant property interests in Zimbabwe) in September 2002 while Mugabe was attending the World Conference on Sustainable Development in Johannesburg.¹⁰³ However, President Mugabe had left South Africa by the time the call for his arrest was made, and no action could therefore be taken against him.

The second area of concern —the effect of amnesties and the ICC — could become relevant if, for example, the ICC were to initiate an investigation into the ‘situation’ in Zimbabwe following a Security Council referral (see above),¹⁰⁴ or if Zimbabwe in future become a party to the Rome Statute, and accepted the Court’s jurisdiction over specific crimes for the period that it was not a party to the Statute.¹⁰⁵

Rome Statute of the International Criminal Court Act 2002’, *South African Journal of Criminal Justice*, Part 1, 2003 (forthcoming).

¹⁰² Section 4(3) of the Implementation of the Rome Statute of the International Criminal Court Act 2002.

¹⁰³ Quintal A, ‘Farmer’s case against Mugabe under spotlight’, *Independent Online*, 4 September 2002, available at <http://www.iol.co.za/index.php>.

¹⁰⁴ Once again, it must be reiterated that any such investigation would be limited to the events in Zimbabwe after 1 July 2001 when the Rome Statute became operative.

¹⁰⁵ As explained above, the Rome Statute provides that in the case of States that become parties to the Statute after its entry into force on 1 July 2001, the Court only has jurisdiction over crimes committed *after* the entry into force of the Statute with respect to that State. However, it is possible for a State to make an *ad hoc* declaration recognising the Court’s jurisdiction over specific crimes, and to allow the Court to exercise jurisdiction over those crimes for the period *before* that State became a party to the Statute (see Article 11(2) read with Article 12(3) of the Rome Statute of the International Criminal Court). In this way it would be possible for a future Zimbabwean government to become a member of the Court and to allow the Court to exercise jurisdiction over the events that occurred from

If during its transition Zimbabwe had created a truth commission, and that truth commission had granted amnesties to individuals who were guilty of committing serious human rights abuses (such as crimes against humanity), then the question might arise whether such national amnesties would constitute a bar to prosecution before the International Criminal Court.

The Rome Statute is silent on amnesty, and commentators argue that this is because the Rome Statute was never drafted with the intention of allowing amnesty to be raised as a defence.¹⁰⁶ Assuming therefore that the relevant jurisdictional requirements are met, such national amnesties in Zimbabwe would not *per se* prevent prosecution before the ICC.¹⁰⁷ And where a criminal prosecution is instituted by a State under its domestic legislation (such as South Africa's Implementation of the Rome Statute of the International Criminal Court Act of 2002), amnesty does not have an extraterritorial effect and the prosecuting State is not required to recognise the amnesty granted by another State.¹⁰⁸ While in practice certain types of amnesty have been recognised abroad, this acceptance is discretionary and in no way mandatory. Naturally, the exercise of that discretion will be affected by the type of amnesty process that the State had followed. No prosecutions have been attempted of South African citizens granted amnesty, even though apartheid and many of the acts committed in pursuance thereof

1 July 2001, the date on which the Court's jurisdiction over genocide, crimes against humanity and war crimes came into effect.

¹⁰⁶ Dugard J, *Conflicts of Jurisdiction with Truth Commissions*, pp.700–701.

¹⁰⁷ Although there may be a variety of mechanisms built into the Rome Statute which would allow a 'genuine' amnesty (see the discussion above at page 21 et seq) to be recognised in appropriate circumstances. For example, Article 53(2)(c) of the Rome Statute allows the Prosecutor to refuse prosecution at the instance of the State or the Security Council where, after investigation, he concludes that 'a prosecution is not in the interests of justice, taking into account all the circumstances'. See Dugard J, *ibid*, p.702.

¹⁰⁸ Dugard J, *ibid*, p. 699.

were serious crimes. However, the type of blanket amnesty given in Chile has been less well recognised. In the *Pinochet* case¹⁰⁹ before the House of Lords, for example, it was not even argued by Pinochet's lawyers that his amnesty in Chile could constitute a bar to his extradition from Britain to Spain.¹¹⁰ This takes us back to the point about amnesties discussed in the previous section and underlines the importance — should a Zimbabwean commission choose to provide amnesties — of crafting internationally acceptable amnesties granted as part of a truth and reconciliation inquiry, in which amnesty recipients have been obliged to make full disclosure of their criminal acts as a precondition of amnesty and to prove that their acts were politically motivated.

Conclusion

The literature on truth commissions is vast (and growing). The general consensus is that commissions are less adversarial and inimical to reconciliation than court trials; that they provide more comprehensive accounts of past facts, patterns, causes and consequences of human rights abuses than trials; that they more readily promote healing and victim-centred processes, and that through their proposals for reforms they can make valuable contributions to the future of democracy in their countries. At the same time, the features of a Zimbabwean commission will necessarily reflect the political compromises and stresses that accompany a transition from autocracy to democracy. These political pressures and their influence on the drafters of the commission cannot be predicted with any accuracy, but they will undoubtedly play an important part in the process. The real challenge then, for the drafters of a future commission, will be to adopt a sophisticated

¹⁰⁹ *R v Bow Street Metropolitan Stipendiary Magistrate, ex Parte Pinochet Ugarte* (No. 3) (1999) 2 All ER 97 (HL).

¹¹⁰ See Dugard J, *Conflicts of Jurisdiction with Truth Commissions*, *op. cit.*, p.699.

approach to addressing past human rights tragedies that draws the best from previous commissions in Africa and elsewhere, that allows for a response to the core international crimes of concern to the international community as a whole, but that meets the practical political and social realities of a transition process. This will take some doing, of course, but it is most likely that as the drafters contribute to the 'expanding universe of official truth-seeking', their efforts will attract the support of a range of institutions from within and without Zimbabwe and, in so doing, will contribute towards achieving the peace and reconciliation that eludes so many other African states.



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