

# **A TRUTH AND RECONCILIATION PROCESS FOR ZIMBABWE? SOME PRELIMINARY OBSERVATIONS\***

Max du Plessis  
*Bluris LLB LLM*  
*Associate Professor*  
*University of KwaZulu-Natal, Durban*  
*Associate Member of the Natal Bar*  
*Research Associate, Matrix Chambers, London*

## **SUMMARY**

This paper 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 last three years) of collective violence and serious human rights abuses, the paper proposes that a truth commission in post-transition Zimbabwe might be an important means of promoting reconciliation and reducing past tensions. To this end the paper focuses on the manner in which a future Zimbabwean truth and reconciliation commission might be established. The paper also provides a brief synopsis of the topic of amnesty and considers how an amnesty process might be accommodated within a future Zimbabwean truth and reconciliation commission and how such amnesty process might be reconciled with the imperative of prosecuting offenders in light of the recently created International Criminal Court.

## **1 INTRODUCTION**

This paper examines various African and other truth and reconciliation commission (TRC) processes with the aim of considering the viability of a truth and reconciliation process for Zimbabwe as a means of overcoming its heritage of collective violence and serious human rights violations.

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 commissions.<sup>1</sup> Truth commissions are processes that exist outside of (and increasingly in parallel

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\* This article is a revised and updated version of a position paper commissioned by the South African Institute for International Affairs regarding the prospects of a Truth Commission for Zimbabwe.

<sup>1</sup> See Dugard "Possible Conflicts of Jurisdiction with Truth Commissions" in Cassese, Gaeta and Jones *The Rome Statute of the International Criminal Court – A Commentary Vol 1* (2002) 693.

with) the criminal justice system.<sup>2</sup> Partly because of the limited reach of the courts<sup>3</sup> and partly because of the recognition that even successful prosecutions do not achieve reconciliation or reduce tensions resulting from past conflict,<sup>4</sup> transitional governments have increasingly employed TRCs as a mechanism for responding to past atrocities.<sup>5</sup> This paper confines itself to a discussion of the necessity for and challenges of establishing a truth commission for Zimbabwe.<sup>6</sup> In doing so, the value of truth commissions *per se* is assumed.<sup>7</sup>

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.<sup>8</sup> The best-known examples are the commissions established in Chile, Argentina, El Salvador, Guatemala, and South Africa. In this article I consider the example of these and other commissions and attempt to extract lessons from them while working thematically through the various challenges that Zimbabwe will confront, should it attempt to create a truth commission.<sup>9</sup> Various points must be

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<sup>2</sup> 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 *Unspeakable Truths: Facing the Challenge of Truth Commissions* (2002) 14. Hayner's study is the most comprehensive comparative study of truth commissions and accordingly has been extensively relied on in the preparation of this paper.

<sup>3</sup> 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 and Ball "The Truth of Truth Commissions: Comparative Lessons from Haiti, South Africa and Guatemala" 2001 *Human Rights Quarterly* 23.

<sup>4</sup> Hayner 12-14.

<sup>5</sup> 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 Goldstone J 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 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 Right to Truth, Justice and a Remedy for African Victims of Serious Violations of International Humanitarian Law" 1999 *Law, Democracy and Development* 139.

<sup>6</sup> In respect of prosecutions for gross human rights abuses committed by Zimbabwean officials, see Du Plessis and Coutsooudis "Serious Human Rights Violations in Zimbabwe: Of International Crimes, Immunities, and the Possibility of Prosecutions" 2005 *SAJHR* 337.

<sup>7</sup> For critical reflections on the role and achievements of truth commissions, see *eg*, Hayner 1-9; and for a critical appraisal of the South African TRC see Wilson "The Myth of Restorative Justice: Truth, Reconciliation and the Ethics of Amnesty" 2001 *SAJHR* 531.

<sup>8</sup> Hayner, *eg*, identifies 21 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>.

<sup>9</sup> 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

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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 one situation to another, particularly in view of the historical, cultural, political and other differences that confront different regimes undergoing transition.<sup>10</sup> 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. It will be assumed, therefore, that any political transition in Zimbabwe will resemble something like 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.<sup>11</sup>

## 2 ZIMBABWE'S HUMAN RIGHTS CRISIS AND THE NEED FOR A TRC

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 serious human rights abuses have occurred in Zimbabwe, and second, that a truth

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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 Chapters 4 and 5, and Hayner "Fifteen Truth Commissions – 1974 to 1994" 1994 *Human Rights Quarterly* 597.

<sup>10</sup> See Sarkin "The Necessity and Challenges of Establishing a Truth and Reconciliation Commission for Rwanda" 1999 *Human Rights Quarterly* 767 802.

<sup>11</sup> 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 ("Clarification Commission in Guatemala" 2001 *Human Rights Quarterly* 233 235), 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". 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 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.

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, present-day calls for a TRC process<sup>12</sup> must be understood against Zimbabwe's turbulent past. The current political environment in the country has grown out of the aftermath of the colonial dispossession of Rhodesia and the subsequent violent civil war waged between the white minority government of Ian Smith and liberation forces, culminating in the signing of the Lancaster House accord and the creation of Zimbabwe in 1980.<sup>13</sup> Having taken power, the ZANU-PF government under the headship of Robert Mugabe, found itself implicated in human rights abuses as early as 1983, with reports of mass human rights violations committed at the hands of ZANU-PF forces in Matabeleland, the home constituency of Robert Mugabe's chief political rival, Joshua Nkomo. Nkomo had been expelled from the cabinet and the Zimbabwean government subsequently sent security forces into Matabeleland to suppress so-called "dissidents" loyal to Nkomo. Credible reports establish that the government forces committed widespread violence with general disregard for human rights.<sup>14</sup> According to Genocide Watch – based on an investigation undertaken by the Legal Resource Foundation of Zimbabwe – thousands of Ndebele were murdered in this period.<sup>15</sup> Mass rape and widespread torture was also reportedly perpetrated against this ethnic group in Matabeleland.<sup>16</sup>

This initial period of turmoil and human rights violations was followed by a period of relative calm and political stability, which lasted until the mid-1990s.

Attention has been refocused on Zimbabwe's human rights situation in approximately the last four to five years, with increasing reports of mass violations of human rights committed by the government or sanctioned and encouraged by the government. A consistent pattern of human rights abuses has been identified, beginning shortly before the parliamentary elections of June 2000, and linked both to the rising popularity of the government's chief political rival, the Movement for Democratic Change (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 began in earnest in 2000, and the government has failed to take firm action against the violence and lawlessness that have

<sup>12</sup> As an example of such a call, see Du Preez "Zim Must Think About How to Recover" 10 April 2003 *The Star*.

<sup>13</sup> Savage and Chimhini "Zimbabwe: A Hundred Year War" in Doxtader and Villa-Vicencio (eds) *Through Fire with Water* (2003) 187 and 203. See also Cornwell "Zimbabwe's Turmoil" September 2003 No 87 *Institute for Security Studies Monograph Series*.

<sup>14</sup> Savage and Chimhini 203. 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 is entitled *Breaking the Silence, Building True Peace*. See in this regard Hayner 55.

<sup>15</sup> Genocide Watch "Political Watch for Zimbabwe: February 20, 2002" at [www.genocidewatch.org/alerts/Zimbabwe200202](http://www.genocidewatch.org/alerts/Zimbabwe200202).

<sup>16</sup> *Ibid.*

accompanied these invasions. In 2001 and 2002, for instance, large-scale assaults, intimidation and, in some cases, killings were recorded as having been perpetrated against white farm-owners and workers on these farms by “war veterans” and ZANU-PF militia, with President Mugabe regularly singling out white Zimbabweans as the enemy of the state.<sup>17</sup> Indeed, supporters of the government and of the government’s fast track land redistribution programme have been vested with a considerable degree of impunity, an impunity that the Presidential political amnesty of October 2000 made official.<sup>18</sup>

The International Bar Association has noted that there are large numbers of reports that indicate threats, beatings and torture which appear to be systematically directed at those groups who stand outside, or criticise, the ruling ZANU-PF party, whether that criticism is directed at the government’s land resettlement policy or at its strong-arm tactics against the MDC.<sup>19</sup> Reports compiled by the United States State Department for 2002<sup>20</sup> and 2003<sup>21</sup> indicate that there have been a number of extra-judicial killings by state security forces, as well as the wilful participation or assistance by police and army units in massive political violence. As an example, the 2002 report catalogues the following violations: the torturing of three MDC officials with the collaboration of a member of the Central Intelligence Organisation (CIO); the beating to death of the MDC campaign manager apparently instigated by the CIO; and no fewer than 35 politically motivated disappearances. The report also highlights the security forces’ involvement in beating and possibly torturing opposition voters across the country. Amnesty International, relying on reports compiled by the Zimbabwe Human Rights NGO Forum, indicated that over 1 046 cases of torture and more than 58 politically motivated deaths occurred in 2002 alone. The international NGO also indicated that among those responsible were the Zimbabwe Republic

<sup>17</sup> Manby (Human Rights Watch) “Zimbabwe, Fast Track Land Reform in Zimbabwe” March 2002 Vol 14.1 (A) 19 at [www.hrw.org](http://www.hrw.org).

<sup>18</sup> The severity of human rights abuses increased since that date, and the direct involvement of formal state institutions in such abuses marked a new and dangerous development in Zimbabwe’s ongoing political crisis. Previously, war 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 2003 established that violent human rights violations were being carried out by uniformed army and police personnel. Further, the government had 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 was particularly noticeable prior to election periods. However, as economic and political conditions deteriorated, the government seemed 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 at <http://hrw.org/backgrounders/africa/zimbabwe060603.htm>. See also Amnesty International’s 2002 Country Report on Zimbabwe at <http://web.amnesty.org/web/ar2002.nsf/afr/zimbabwe?Open>.

<sup>19</sup> International Bar Association, IBA Press Release 7 March 2003.

<sup>20</sup> Zimbabwe, Country Reports on Human Rights Practices – 2002, Released by the Bureau of Democracy, Human Rights, and Labor (US State Department) 31 March 2003.

<sup>21</sup> Zimbabwe, Country Reports on Human Rights Practices – 2003, Released by the Bureau of Democracy, Human Rights, and Labor (US State Department) 25 February 2004 at <http://www.state.gov/g/drl/rls/hrrpt/2003/27760.htm>.

Police, the CIO and the Zimbabwe National Army.<sup>22</sup> Amnesty International also noted the occurrence of state-sponsored violence, torture, arrests and intimidation of candidates for opposition parties during the September 2002 national local council elections.<sup>23</sup> Human Rights Watch indicated in its briefing paper for 2003 that in the first few months of 2003 hundreds of MDC activists were unjustifiably detained by official state security forces.<sup>24</sup> The NGO reports that this was often accompanied by violent attacks conducted in a “systematic and widespread” manner, and that “police and army personally burned victims with cigarettes, forced them to drink poison, urine or other toxic liquids, sexually assaulted them with blunt objects, and beat individuals on the soles of their feet”.<sup>25</sup> Genocide Watch, after conducting an investigation in 2001, has also noted that Zimbabwe is currently in what it calls stage six, the preparation stage for genocide, with early warnings of political mass killings and genocide (stage seven indicates full-blown genocide).<sup>26</sup> Genocide Watch indicates in their 2004 history that “genocidal episodes”, claiming the lives of thousands of civilians, occurred in Zimbabwe between 1982 and 1984 (directed against the ethnic minority in Matabeleland) and more recently from 1998 to the present (directed against political opposition).<sup>27</sup>

Most recently, President Mugabe’s government has come under heavy criticism for its implementation of a wide-scale eviction programme (under the label “Operation Restore Order”) during May and June 2005 which has, in the words of the UN Secretary General Kofi Annan, done “a catastrophic injustice to as many as 700 000 of Zimbabwe’s poorest citizens, through indiscriminate actions, carried out with disquieting indifference to human suffering”.<sup>28</sup> After a two-week fact-finding visit to the southern African country from 26 June to 8 July 2005, Anna Tibajuka, UN Special Envoy and Executive Director of UN-HABITAT, explained that the operation, “while purporting to target illegal dwellings and structures and to clamp down on alleged illicit activities” was carried out in an indiscriminate and unjustified

<sup>22</sup> Amnesty International “Zimbabwe: Rights Under Siege” at [www.amnesty.org](http://www.amnesty.org).

<sup>23</sup> Amnesty International “Zimbabwe: Local Elections Marred by State-sponsored Violence” at [www.amnesty.org](http://www.amnesty.org).

<sup>24</sup> Human Rights Watch, Briefing Paper: Under a Shadow: Civil and Political Rights in Zimbabwe 6 June 2003 at [www.hrw.org/africa/Zimbabwe.php](http://www.hrw.org/africa/Zimbabwe.php).

<sup>25</sup> *Ibid.*

<sup>26</sup> Genocide Watch (note 4 above); and see also Bay “Zimbabwe the Next Genocidal Killing Field” at <http://www.strategypage.com/onpoint/articles/20021030.asp>.

<sup>27</sup> See Genocide Watch, Genocides, Politicides, and Other Mass Murder Since 1945, With Stages in 2004 at <http://www.genocidewatch.org/genocidetable2003.htm> where the current table is provided for Zimbabwe:

| YEARS OF EPISODES SINCE 1945 | CUMULATIVE CIVILIAN DEATH TOLL | AFRICA                           |                   | STAGE in 2004   |
|------------------------------|--------------------------------|----------------------------------|-------------------|-----------------|
|                              |                                | MAJOR KILLERS                    | MAIN DIVISIONS    |                 |
| 1982-84, 1998-present        | 20 000 Matabele                | Gov’t army 5th Brigade, militias | Ethnic, political | 6 – Preparation |

<sup>28</sup> See the report and the press release accompanying the report at [http://www.unhcr.org/zimbabwe\\_report\\_2005.asp](http://www.unhcr.org/zimbabwe_report_2005.asp).

manner and the evictions have wrecked the informal sector and will be detrimental at a time when the economy as a whole is in serious difficulties.<sup>29</sup>

Without systematically detailing all the human rights abuses committed in Zimbabwe, the aforementioned instances provide a sufficient foundation from which to seriously consider the needs for a TRC process. That brings me then to the second premise of this paper – that a TRC process will be an effective means of dealing with these abuses. Such premise 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. Through an official truth body, an accurate record of the country's past will be established and uncertain events clarified; the silence and denial of human rights violations will be dealt with and the truth exposed.<sup>30</sup> Lifting the lid on human rights abuses is particularly important in Zimbabwe, given the extent to which the government has denied, at the highest level,<sup>31</sup> that abuses have been or are being perpetrated against Zimbabweans.<sup>32</sup> 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.<sup>33</sup>

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.<sup>34</sup> The government's actions during the last five years have 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 youth service.<sup>35</sup> Clear lines of authority and jurisdiction have also been

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<sup>29</sup> *Ibid.*

<sup>30</sup> Hayner 25.

<sup>31</sup> Such denials of government abuses have been made, for example, by Jonathan Moyo, Zimbabwe's erstwhile Minister of Information. See Du Preez 10 April 2003 *The Star*.

<sup>32</sup> 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.

<sup>33</sup> Sarkin 1999 *Human Rights Quarterly* 799.

<sup>34</sup> Hayner 29.

<sup>35</sup> See the Human Rights Watch Briefing Paper "Under a Shadow: Civil and Political Rights in Zimbabwe" 6 June 2003 at <http://hrw.org/backgrounder/africa/zimbabwe060603.htm>.

eroded by a gradual militarisation of normal policing activities. The military has become increasingly involved in food distribution, electoral management and other activities (such as, in recent times, the widespread eviction of people under Operation Restore Order)<sup>36</sup> that would normally fall under the mandate of the Zimbabwe Republic Police.<sup>37</sup> 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.<sup>38</sup>

### **3 ESTABLISHMENT OF A ZIMBABWEAN TRUTH AND RECONCILIATION 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), and others by the national legislature (in South Africa).<sup>39</sup> However a Zimbabwean commission is created, a minimum requirement is that it must have clear operational independence of the government, and once established, must be “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”.<sup>40</sup>

The question of funding for a commission is of particular importance. For a Zimbabwean 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),<sup>41</sup> or, like the Guatemalan Commission,

<sup>36</sup> In relation to the forced evictions under Operation Restore Order, the UN Special Envoy Anna Tibajuka has pointed out that though the Government is collectively responsible for the disastrous results, evidence suggests that “there was no collective decision-making” about the conception and implementation, enforced by the police and military. See the report and the press release accompanying the report at [http://www.unchs.org/zimbabwe\\_report\\_2005.asp](http://www.unchs.org/zimbabwe_report_2005.asp).

<sup>37</sup> See the Human Rights Watch Briefing Paper 6 June 2003 at <http://hrw.org/backgrounders/africa/zimbabwe060603.htm>.

<sup>38</sup> Hayner 30.

<sup>39</sup> For a full list of the way in which truth commissions have come to be established, see Hayner, Appendix 1.

<sup>40</sup> Hayner 1999 *Human Rights Quarterly* 179.

<sup>41</sup> 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



waste a lot of energy on raising funds to keep the organisation running.<sup>42</sup> 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 commissions receiving external funding,<sup>43</sup> and given the current state of the Zimbabwean economy, such outside financial assistance will be imperative.<sup>44</sup>

#### 4 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 commissions have run into serious problems rooted in weak management or the inability or incompetence of staff,<sup>45</sup> 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.<sup>46</sup>

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factors that contributed to the prolonging of the commission’s work, and the consequent loss of the public’s attention and interest. See Hayner 224. Despite Ecuador’s initial governmental support for the Ecuadorian commission, the commission ceased to function just five months after starting due to lack of resources. See Hayner 69.

<sup>42</sup> 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 2001 *Human Rights Quarterly* 248.

<sup>43</sup> El 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 13 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 224.

<sup>44</sup> It appears that such assistance will be forthcoming, along with logistical and other support. The then Secretary of State, Colin Powell, *eg*, 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 “Freeing a Nation from a Tyrant’s Grip” 4 July 2003 *New York Times*; 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 programmes to strengthen democracy and aggressively promote economic recovery in Zimbabwe. See Frist “Pushing to Restore Zimbabwean Democracy” 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, <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. It is not unlikely that a key player in this regard will be South Africa.

<sup>45</sup> Hayner 215.

<sup>46</sup> Sarkin 1999 *Human Rights Quarterly* 804.

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 for a Zimbabwean TRC 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.<sup>47</sup> In Chile, for example, President Alwyn appointed eight commissioners and carefully balanced both sides of the political divide, in the process achieving credibility for the commission.<sup>48</sup> 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 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.<sup>49</sup> 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.<sup>50</sup> After receiving some 300 nominations, 47 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 25.<sup>51</sup> From this list President Nelson Mandela eventually chose 17 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

<sup>47</sup> Hayner 1994 *Human Rights Quarterly* 654.

<sup>48</sup> Sarkin 1999 *Human Rights Quarterly* 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 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.

<sup>49</sup> Sarkin 1999 *Human Rights Quarterly* 806; and Hayner 216.

<sup>50</sup> 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 1999 *Human Rights Quarterly* 807.

<sup>51</sup> *Ibid.* The criteria by which the 25 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.

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 selection panel.<sup>52</sup> 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.<sup>53</sup> Either the panel itself or a representative chosen for the specific purpose of acting as selection co-ordinator<sup>54</sup> 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 visible,<sup>55</sup> perhaps by holding interviews in public.

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?

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<sup>52</sup> A similar process has been put forward by Sarkin in relation to the creation of a truth commission for Rwanda, Sarkin 1999 *Human Rights Quarterly* 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 nongovernmental interreligious 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 216-217. Information regarding the Sierra Leone commission can be found at [www.sierra-leone.org/trc.html](http://www.sierra-leone.org/trc.html).

<sup>53</sup> See Sarkin 1999 *Human Rights Quarterly* 808.

<sup>54</sup> See the Sierra Leone example discussed 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).

<sup>55</sup> The openness of the South African process allowed NGOs, eg, to make submissions to the panel highlighting concerns about some candidates' human rights track records. See Sarkin "The Trials and Tribulations of the South African Truth and Reconciliation Commission" 1996 *SAJHR* 617-621.

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.<sup>56</sup>

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,<sup>57</sup> as well as Zimbabwean nationals.

As to the professional background of commissioners, the experience of truth commissions varies. Because human rights violations have been largely understood as infringements of the law, the composition of many commissions (eg 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.<sup>58</sup> 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.<sup>59</sup> This is vital, as the commissioners are not

<sup>56</sup> See "Design Factors – Composition of Commission" <http://www.truthcommission.org/factor.php?fid=3&lang=en>; and see also Sarkin 1999 *Human Rights Quarterly* 808.

<sup>57</sup> 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) to 1999. See Hayner 69.

<sup>58</sup> See "Design Factors – Composition of Commission" fn 56 above.

<sup>59</sup> Consideration of the recent establishment of a TRC in Sierra Leone. See [www.sierra-leone.org/trc.html](http://www.sierra-leone.org/trc.html): this consideration was taken into account in that country's Truth and Reconciliation Commission Act 2000. Article 2(3) provides:

"(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

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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 Zimbabwean commission would 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 would have to undertake in that country. 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 staff, logistical co-ordinators, interpreters and security personnel are ordinarily required.<sup>60</sup> This will certainly be true in respect of a Zimbabwean commission.

In terms of staffing numbers, experiences again vary. Whereas Latin American commissions have enjoyed relatively large staff complements (Chile and Argentina had approximately 60 full time staff members each), the African commissions in Uganda, Rwanda, and Chad have had to do with very few personnel.<sup>61</sup> The trend, however, is towards employing a large and professional staff,<sup>62</sup> 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 to reconciliation.<sup>63</sup> It is clear, given the scale of the Zimbabwean crisis, that a sizeable complement of staff will need to be employed by any proposed truth and reconciliation commission if the commission is to have a reasonable hope of achieving its aims.

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(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).

<sup>60</sup> Hayner 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.

<sup>61</sup> Sarkin 1999 *Human Rights Quarterly* 814.

<sup>62</sup> South Africa's TRC has had the highest staff complement to date, with around 300 staff between 1996 and 1998. See Hayner 218.

<sup>63</sup> Sarkin 1999 *Human Rights Quarterly* 815.

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## 5 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.<sup>64</sup> The Uruguayan commission, as a result, overlooked the majority of human rights violations (such as torture and illegal detention) that had taken place under the military regime.<sup>65</sup> 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.<sup>66</sup> 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".<sup>67</sup> 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.<sup>68</sup> It may be important, for example, 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 five 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

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<sup>64</sup> Hayner 72.

<sup>65</sup> *Ibid.*

<sup>66</sup> Hayner 636.

<sup>67</sup> Hayner 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".

<sup>68</sup> 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 20 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 2001 *Human Rights Quarterly* 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 10 000 written submissions complaining of violations, and estimates suggested that 9 000 of those pertained to labour disputes! The commission was forced to re-evaluate, and focused thereafter on "gross violations of human rights only". See in this regard Hayner 69.

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Zimbabweans (white and black) see their own personal experiences reflected in the commission's work.<sup>69</sup>

## 6 QUESTIONS OF TIME

The first "time" question is when a Zimbabwean commission should start its work. In general, past experience shows that the quicker the commission is set up and begins its work, the better.<sup>70</sup> South Africa is an exception to this rule in that 18 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 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".<sup>71</sup>

The next "time" question relates to the duration of the commission's mandate. The majority of truth commissions 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

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<sup>69</sup> 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 Claims 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.

<sup>70</sup> See Hayner 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 a 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 1994 *Human Rights Quarterly* 640.

<sup>71</sup> Hayner 221.

possibility of extension).<sup>72</sup> 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 that one to two-and-a-half years is probably optimal.<sup>73</sup> 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.<sup>74</sup>

There are good reasons to keep the tenure of any proposed Zimbabwean 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.<sup>75</sup> 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.<sup>76</sup>

Another "time" issue relates to the period of history that a Zimbabwean commission might be 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.<sup>77</sup> Not much more can be said here other than to point out that various periods of Zimbabwean history might fall 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

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<sup>72</sup> The Argentine, Chilean and El Salvadoran Commissions had only nine months to generate an authoritative account of the human rights violations that occurred in those countries.

<sup>73</sup> Hayner 222.

<sup>74</sup> 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 2001 *Human Rights Quarterly* 240-241.

<sup>75</sup> Hayner 222.

<sup>76</sup> *Ibid.*

<sup>77</sup> Sarkin 1999 *Human Rights Quarterly* 811-812.



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.<sup>78</sup> There may even be calls perhaps for the commission to go back as far as the declaration of independence 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.

## 7 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, how it will relate to the media and public, and so on.

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*.<sup>79</sup> 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 healing<sup>80</sup> – the commission may reduce the chance of a continuing

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<sup>78</sup> 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.

<sup>79</sup> Hayner 225; and Sarkin 1999 *Human Rights Quarterly* 817.

<sup>80</sup> There is a multitude of studies showing that repressing intense emotional pain leads to psychological trouble. Hayner, *eg.*, 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 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 134.

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.<sup>81</sup> 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.<sup>82</sup> 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 groups<sup>83</sup> 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 El Salvadoran commissions – it undertakes its own investigations into human rights abuses.<sup>84</sup> 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.<sup>85</sup> 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.<sup>86</sup> 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,

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<sup>81</sup> Sarkin 1999 *Human Rights Quarterly* 815.

<sup>82</sup> 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.

<sup>83</sup> 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 147. For more information on the Khulumani group see their website at <http://www.khulumani.net>.

<sup>84</sup> To this end, although commissions do not formally conduct criminal proceedings, they have increasingly taken on prosecutorial powers. *Eg*, 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 “Accommodating Individual Criminal Responsibility and National Reconciliation: The UN Truth Commission for East Timor” 2001 *American Journal of International Law* 955; and see also Hayner 107-108.

<sup>85</sup> Sarkin 1999 *Human Rights Quarterly* 816.

<sup>86</sup> Sarkin 1999 *Human Rights Quarterly* 817.

chosen for being typical of victims, perpetrators and kinds of abuse during the historical period of study.<sup>87</sup>

## 8 THE REPORT AND RECOMMENDATIONS

The work of a Zimbabwean truth commission would eventually culminate 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 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.<sup>88</sup> In Argentina, for instance, the commission produced a systematic account of the oppressive regime, detailing what happened to the nearly 9 000 people who had disappeared. The report became a bestseller in Argentina.

The mere creation of a truth commission does not necessarily mean that the Zimbabwean 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.<sup>89</sup> Several observers believe that the El Salvadoran TRC's most important long-term contribution was its recommendations on rule of law reform and institutional change.<sup>90</sup> 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.<sup>91</sup> The importance of such recommendations for Zimbabwe is clear, and the country would be well served by a commission proposing such reforms.<sup>92</sup>

In addition, the commission may consider the question of reparations payments to victims of human rights abuses. Certainly, the question of reparations in Zimbabwe will be a vexed one. But the question of reparations cannot be ignored and stands as a challenge for any future government of

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<sup>87</sup> Hayner 73.

<sup>88</sup> Hayner 652.

<sup>89</sup> The El Salvadoran TRC's recommendations ran to over 15 pages, the South African TRC's recommendations 45 pages, and Chile's over 45 pages. See Hayner 167.

<sup>90</sup> See Mani *Beyond Retribution, Seeking Justice in the Shadows of War* (2002) 102.

<sup>91</sup> Hayner 167.

<sup>92</sup> See *eg*, the institutional reforms suggested by the truth commission reports for Chile and El Salvador. The commissions were singularly concerned 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 "Truth Commissions for Chile and El Salvador: A report and Assessment" 1994 16 *Human Rights Quarterly* 656 666-670.

Zimbabwe. Under international law reparations are due (also by successor governments) to victims of gross human rights abuses and a truth and reconciliation process is a principal means by which the issue of reparations can be confronted.<sup>93</sup> There are many gross human rights abuses that have been committed by the Zimbabwean regime and in respect of which the victims deserve reparations. As but one example, in relation to the recent land evictions by the Zimbabwean government (under Operation Restore Order) the UN Special Envoy Anna Tibaijuka when presenting her report to the Secretary General called on the government of Zimbabwe to stop the demolition of homes and markets and to pay reparations to those who have lost housing and livelihoods.<sup>94</sup> And under international law, land may not be unlawfully expropriated without adequate and prompt compensation being paid to the victim. This issue will be a particularly sensitive one in relation to the expropriation of farms without the payment of compensation. It may be that the 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 land claims commission (akin to the South African Land Claims Commission).<sup>95</sup>

## 9 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 (eg Uruguay, Argentina and El Salvador). With the advent of truth commissions, however, it has become possible to channel the granting 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” justice<sup>96</sup> – and criminal trials, which focus on delivering “retributive justice”.<sup>97</sup>

<sup>93</sup> For general discussion, but in a South African context, see Jenkins “After the Dry White Season: The Dilemmas of Reparation and Reconstruction in South Africa” 2000 *SAJHR* 415, especially 415-446.

<sup>94</sup> See the report and the press release accompanying the report at [http://www.unchs.org/zimbabwe\\_report\\_2005.asp](http://www.unchs.org/zimbabwe_report_2005.asp).

<sup>95</sup> For discussion of the South African Land Claims Commission in the context of reparations, see Jenkins 2000 *SAJHR* 449-459.

<sup>96</sup> See McGregor “Individual Accountability in South Africa: Cultural Optimum or Political Façade?” 2001 *American Journal of International Law* 32 37; and Wilson 2001 *SAJHR* 531 542-545.

<sup>97</sup> 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

So far, however, only the South African TRC and the recent truth commission in East Timor have been accorded the power to grant amnesty.<sup>98</sup> 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.<sup>99</sup> In any event, the political reality for many transitional governments is that giving a truth commission the power of 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, police 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".<sup>100</sup> 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

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of evidence for future domestic and international trials. See in this regard Hayner Chapter seven.

<sup>98</sup> On the South African TRC's amnesty process, see McDonald 1999 *Law, Democracy and Development* 164-170; and Hayner 98 *et seq.* On the amnesty process in East Timor, see Stahn 2001 *American Journal of International Law* 952, especially 962-965.

<sup>99</sup> 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 (CC) 683-684, 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 of 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.

<sup>100</sup> Dugard 700.

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.<sup>101</sup>

It is also important to note that the nature of certain offences precludes the granting of amnesty to their perpetrators.<sup>102</sup> It is still 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.<sup>103</sup> 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.<sup>104</sup> 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 and torture, as well as the domestic crimes of murder and sexual offences, as defined by the Indonesian Criminal Code.<sup>105</sup> 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.<sup>106</sup>

<sup>101</sup> *Ibid*; and see too Mani 112-113.

<sup>102</sup> 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 *eg*, Orentlicher “Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime” 1991 *Yale LJ* 100; and Roht-Arriaza “State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law” 1990 *California LR* 449. See also Dugard 697, and the authorities cited in fn 26. Hayner 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.

<sup>103</sup> Dugard 699.

<sup>104</sup> 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 1 000 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 2001 *American Journal of International Law* 952-953.

<sup>105</sup> See Stahn 2001 *American Journal of International Law* 957-958.

<sup>106</sup> For a critical reflection on the South African TRC in this respect, see Dugard “Retrospective Justice: International Law and the South African Model” in McAdams (ed) *Transitional Justice and the Rule of Law in New Democracies* (1997) 269 *et seq*.

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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 granting 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.<sup>107</sup> 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 five years.

## 10 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 Zimbabwean commission, will be to adopt a sophisticated 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 much effort 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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<sup>107</sup> Stahn 2001 *American Journal of International Law* 963.