Truth and Reconciliation Processes – Lessons for Zimbabwe?

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Introduction

In this position paper various African and other truth commission processes are examined with the aim of mapping a strategy and offering a model in the event that Zimbabwe opts for a truth and reconciliation commission (TRC) as a mechanism to overcome its heritage of collective violence and serious human rights violations. There are two main ways to deal with systematic and large-scale human rights abuse in periods of transition: through criminal trials or through truth commissions.\(^1\) Truth commissions are processes that exist outside of (and increasingly in parallel with) the criminal justice system.\(^2\) Partly because of the limited reach of the courts,\(^3\) and partly because of the recognition that even successful prosecutions do not always achieve reconciliation or reduce tensions resulting from past conflict,\(^4\) transitional governments have increasingly turned to TRCs as a central strategy to respond to

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2 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; the body 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. (Priscilla Hayner, Unspeakable Truths: Facing the Challenge of Truth Commissions, (2002), 14 – hereinafter ‘Hayner, Unspeakable Truths’). Hayner’s study is one of the most comprehensive comparative studies of truth commissions and accordingly it has been extensively relied on in the preparation of this paper.

3 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 Audrey Chapman and Patrick Ball, ‘The Truth of Truth Commissions: Comparative Lessons from Haiti, South Africa, and Guatemala’, (2001) 23 Human Rights Quarterly, 1, 2-3.

4 Hayner, Unspeakable Truths, 12-14.
past atrocities.\(^5\) This paper confines itself to a discussion of the necessity and challenges of establishing a truth commission for Zimbabwe, and in doing so the value of truth commissions *per se* are assumed.\(^6\)

Since 1974 numerous truth commissions have been established either to support an ongoing peace process or to promote democratic reforms and reconciliation.\(^7\) 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 a truth commission be pursued.\(^8\)

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 one situation to another, particularly in view of the historical, cultural, political and other differences that confront various transitions.\(^9\) The eventual model adopted will, if it is to be successful, reflect Zimbabwe’s unique needs. Second, the nature of the transition in Zimbabwe will clearly play a major role in determining 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

\(^5\) And, of course, the establishment of a truth commission (with accordant 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 Nuremberg-style trials on the one hand and forgetting on the other’ (‘TRC preferable to trials’, Pretoria News 18 August 1997, cited in Avril McDonald, ‘A right to truth, justice and a remedy for African victims of serious violations of international humanitarian law’, (1999) 2 Law, Democracy and Development, 139, 139.


\(^7\) 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.

\(^8\) I have avoided a simple recounting of the most important truth commissions and their strengths and weaknesses, choosing instead to thematically map a strategy 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 Program on Negotiation at Harvard Law School, Search for Common Ground, and the European Centre for Common Ground. See also Hayner, *Unspeakable Truths*, Chapters 4 and 5, and Hayner, ‘Fifteen Truth Commissions – 1974 to 1994’, (1994) 16 Human Rights Quarterly, 597 (hereinafter ‘Hayner, Fifteen Truth Commissions’).

which one must necessarily make certain assumptions in order to prepare a paper of this nature. The central assumption in this paper is that some form of negotiated settlement towards a future democratic state in Zimbabwe may include a truth commission process as one of its features.  

**Why a TRC for Zimbabwe?**

The assumption that a truth commission is an important tool to be used by Zimbabweans 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 important ingredient for dealing with Zimbabwe’s recent political turmoil and its associated human rights violations.

Regarding the first premise, the calls for a TRC process have been sparked by consistent human rights abuse, beginning shortly before the June 2000 parliamentary elections, and linked both to the rising MDC popularity and the February 2000 failed constitutional reform via referendum. Spontaneous as well as state-sponsored invasions of white-owned commercial farms occurred throughout 2000. The government failed to take firm preventative action. Indeed, supporters of the government and of the government’s fast track  

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10 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 coordinator of the Guatemalan Clarification Commission points out, the ‘background of a truth commission is invariably … of stalemate in a political power play’ (Tomuschat, ‘Clarification Commission in Guatemala’, (2001) 23 *HRQ* 233 at 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 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. So too, it 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.

11 As an example of such a call, see Max du Preez, ‘Zim must think about how to recover’, *The Star*, 10 April 2003.
land redistribution were vested with a considerable degree of impunity, made official by the Presidential political amnesty of October 2000. Of course, human rights abuses have occurred in earlier periods of Zimbabwe’s history too – most notably the Matabeleland massacres of 1983, and the war crimes and serious human rights abuses committed during the Rhodesian war. 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 important ingredient for dealing with these abuses – is born of various essential TRC aims. The most obvious objective is to establish the truth about human rights abuses in Zimbabwe; that through an official truth body an accurate record of the country’s past will be established, uncertain events clarified, and the silence and denial regarding human rights violations overcome. Lifting the lid on human rights abuses is particularly important in Zimbabwe, given Government denials of

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13 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, Unspeakable Truths, 55.

14 Hayner, Unspeakable Truths, 25.

15 Such denials of government abuses have been made, for example, by Jonathan Moyo, Zimbabwe’s previous Minister of Information. See Max Du Preez, ‘Zim must think about how to recover’, The Star, 10 April 2003.
contemporary and historical abuses. It may be that for many of the victims a TRC will not so much provide new truth, as much as formally recognise already known truths. Official acknowledgment of abuses will be a vital factor in any reconciliation and healing process.

Aside from establishing a record of truth, a TRC will respond to the needs and interests of Zimbabwean victims. A truth commission – unlike a criminal trial – spends much of its time and attention focused on victims. Through public hearings in which victims are integrally involved, commissions give victims a credible forum through which to articulate their suffering to the broader public, thereby reclaiming their human worth and dignity.

Another important TRC aim would be to describe institutional responsibility for abuses, and to outline weaknesses in the institutional structures or existing laws that should be changed to prevent future abuses. The government’s actions during the past years have expanded power for “war veterans” who, with no formal status as government officials (and regular rejection of police and court directives), have become increasingly involved in policing, land distribution, and training of youths in the national youth service. Clear lines of authority and jurisdiction have also been eroded by a gradual militarisation of normal policing activities. Food distribution, electoral management and other activities that would normally fall under Zimbabwe Republic Police mandate have increasingly been militarised, facilitating disorder and security sector abuses. Deterioration in the rule of law, along with government manipulation of the judiciary, have exacerbated these problems. A new government would need to commit itself to restoration of peace and order in Zimbabwe though reform of key democratic institutions incuding the army, the judiciary, and the police.

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16 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.


20 Ibid.
All of the aims mentioned above contribute to the achievement of the eventual goal that TRC processes have come to symbolise – the promotion of reconciliation and the reduction of tensions resulting from past violence.21

**Establishment of the commission**

Truth commissions have been established in various ways, the majority by presidential decree (Argentina, Chile, Haiti, Sri Lanka, Chad, Uganda), some by peace accord (El Salvador, Guatemala), and others by the national legislature (South Africa).22 However the commission is created, it appears as a minimum standard that a truth commission must have clear operational independence, and once established must be ‘free of direct influence or control by the government, including in the interpretation of its written mandate ..., in developing its operating methodology for research and public outreach, and in shaping its report and recommendations’;23

The question of funding for a truth 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. The experience shows that commissions that are financially under-resourced fail (the Ugandan, and Ecuadorian commissions are good examples24), or, like the Guatemalan Commission, waste a lot of energy on raising funds to keep the organisation running.25 To the extent possible, therefore, full funding for a commission should be committed and available at the start of its work. There are many examples of commissions receiving

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21 Hayner *Unspeakable Truths* 30.
22 For a full list of the way in which truth commissions have come to be established, see Appendix 1, Hayner, *Unspeakable Truths*.
24 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, *Unspeakable Truths*, 224).
25 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 *op cit* (note 10 above), 248.
external funding,\textsuperscript{26} and given the current state of the Zimbabwean economy, such outside financial assistance will be imperative.\textsuperscript{27}

**Appointment of commissioners and staff**

The persons who are chosen to manage a TRC often determine the success or failure of the commission. Aside from the fact that several commissions have run into serious problems rooted in weak management or personnel incompetence,\textsuperscript{28} the commission’s legitimacy – its acceptance by the population as a credible body capable of finding an ‘objective’ truth – generally depends on having a well-balanced commission of highly respected people.\textsuperscript{29}

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 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 to 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.\textsuperscript{30} In the same way, for example, that Chile’s President Aylwin appointed

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\textsuperscript{26} 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, *Unspeakable Truths*, 224).

\textsuperscript{27} It appears that such assistance will be forthcoming, along with logistical and other support. The pledges of support include, for instance, a statement by Colin Powell who promised US ‘assistance to the restoration of Zimbabwe’s political and economic situations’, and that other nations will follow suit (see Colin Powell, ‘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 \url{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 \url{http://www.parliament.the-stationery-office.co.uk/pa/ld199697/ldhansrd/pdvn/lds02/text/20711-02.htm}).

\textsuperscript{28} Hayner, *Unspeakable Truths*, 215.

\textsuperscript{29} Sarkin, *Rwanda TRC*, 804.

\textsuperscript{30} Hayner, *Fifteen Truth Commissions*, 654.
eight commissioners, carefully balancing both sides of the political divide and in the process achieving credibility for the commission,\(^{31}\) Zimbabwe’s TRC will require a balanced set of commissioners that represent all sectors of society. How exactly those commissioners should be appointed depends 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 ensure a critical distance between the Government (old and new) and the commission. 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, in recent years several commissions have been appointed through processes that have ensured transparency and public participation.\(^{32}\) In South Africa, an Act of Parliament created the commission as an independent investigative body. A selection committee was formed, including representatives of human rights NGOs, which then called for nominations from the public.\(^{33}\) 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 those the selection committee narrowed the finalists to twenty-five.\(^{34}\) From this list President Mandela chose the eventual seventeen commissioners. The result was that a credible commission was created with commissioners whose legitimacy the public could accept. In so doing political horse-trading was prevented. Something similar might be suited to any Zimbabwean attempts to create legitimacy, particularly if members of the old regime retain power within a transitional government. For example, 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 could each nominate one

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\(^{31}\) Sarkin, *Rwanda TRC*, 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, *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.


\(^{33}\) 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, *Rwanda TRC*, 807).

\(^{34}\) 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*).
individual to sit on a selection panel. At this stage at least (but see below regarding the nationality of the commissioners), given that Zimbabwe is a highly polarised society with strong political divides, it will be useful to involve international actors to bolster the legitimacy of the process. This involvement would be consistent with a trend for transitional governments to seek international legitimation. Either the panel itself, or a representative chosen specifically to act as selection co-ordinator, would choose the final candidates for appointment to the commission. While time constraints and the fractured nature of the political environment might make it difficult for the panel to involve the public directly, the South African model illustrates that at the very least the appointment process (perhaps through public interviews) should be visible.

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 with 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 commissioners are drawn from a full political and probably racial spectrum. A prerequisite for this route – and about

35 A similar process has been put forward by Sarkin in relation to the creation of a truth commission for Rwanda (Ibid, 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 coordinator, 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, Unspeakable Truths, 216-217). Information regarding the Sierra Leone commission can be found at www.sierra-leone.org/trc.html.

36 See Sarkin, Rwanda TRC, 808.

37 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).

38 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, ‘The Trials and Tribulations of the South African Truth and Reconciliation Commission’, (1996) 12 South African Journal on Human Rights, 617 at 621).
which there may be some debate – is whether the pool of qualified persons both internationally and domestically is sufficient for the needs of a credible commission.

At the other end of the spectrum, it is unlikely that only foreign commissioners would be acceptable to the parties involved in design, given the perceived need for national ownership of the process and the findings, and the strong anti-foreign sentiment regularly expressed by Zanu-PF and its leadership. In any event, there are good reasons for including nationals. The downside to the El Salvadoran Commission was that as foreigners, the commissioners and staff could not fully comprehend the local nuances, and because foreigners conducted the process, the national actors were not able to come together to write a common history, as did the commissions in Chile and Argentina.39

On balance the mixed model of both national and international staff works well. A mixture allows national familiarity and international expertise to complement each other, but there is some concern whether the current government would agree to any western nationals being commissioners in any future negotiated settlement. Perhaps then a feasible mixture would include other African nationals; one or two past commissioners from the South African TRC or the Nigerian truth commission,40 for example.

In terms of the professional background of commissioners, the experience of truth commissions varies. Because human rights violations have been largely understood as violations of the law, the composition of many commissions (e.g. Chile, El Salvador) favoured commissioners with legal training. South Africa’s commission had a more diverse background including religious leaders, psychologists, and human rights activists. In Argentina commissioners also had no predominate professional backgrounds. As the South African experience in particular makes clear, involving commissioners with different backgrounds can be a significant benefit for a commission. By going beyond a commission of lawyers and including religious leaders and psychologists, for example, it becomes easier for the commission to convey the primary focus of its work: an attempt to reach healing and

40 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, Unspeakable Truths, 69).
promote reconciliation. 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. This is vital as the commissioners are not only the public face of the TRC but their perceived credibility directly affects perceived TRC legitimacy. In this regard, as touched on earlier, the 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 particular, the diversity of South Africa’s commissioners added to the credibility and integrity of the process.

Aside from the commissioners themselves, the overall staff complement 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, a commission may need social workers or psychologists, computer and information-systems specialists, data coding and data entry staff, logistical coordinators, interpreters and security personnel.

In terms of staffing numbers, experiences again vary. Whereas Latin American commissions have enjoyed relatively large staff complements (Chile and Argentina had


[42] Consideration of the establishment of a TRC in Sierra Leone (see [www.sierra-leone.org/trc.html](http://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:

‘(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).

[43] Hayner, *Unspeakable Truths*, 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.
approximately sixty full time staff members each), the African commissions in Uganda, Rwanda, Chad and Zimbabwe have had to do with very few personnel.\textsuperscript{44} The trend, however, is towards employing a large and professional staff,\textsuperscript{45} and for good reason. As the complexity and difficulty of these 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 were most successful in achieving their objectives of establishing the truth and contributing to reconciliation.\textsuperscript{46}

**The Commission’s Mandate**

The most significant limitations of many truth commissions are bound up in the political economies that instruct their design. The written mandates for truth commissions often have restricted terms of reference that reflect the political compromises agreed upon in transition negotiations. Good examples are the truth commissions of Argentina, Uruguay and Sri Lanka that were restricted by their mandate to consider only disappearances.\textsuperscript{47} The Uruguayan commission as a result missed the majority of human rights violations (such as torture and illegal detention) that had taken place during the military regime.\textsuperscript{48} It is important that the terms of reference for a Zimbabwean commission allow investigation of all forms of serious rights abuses, preferably leaving it to the commission to decide the most appropriate cases or practices.\textsuperscript{49} 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’.\textsuperscript{50} 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.\textsuperscript{51} It may be important, for example, that the commission use

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\item \textsuperscript{44} Sarkin, *Rwanda TRC*, 814.
\item \textsuperscript{45} South Africa’s TRC has had the highest staff complement to date, with around three hundred staff between 1996 and 1998. See Hayner, *Unspeakable Truths*, 218.
\item \textsuperscript{46} Sarkin, *Rwanda TRC*, 815.
\item \textsuperscript{47} Hayner, *Unspeakable Truths*, 72.
\item \textsuperscript{48} *Ibid*.
\item \textsuperscript{49} Hayner, *Fifteen Truth Commissions*, 636.
\item \textsuperscript{50} Hayner, *Unspeakable Truths*, 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’.
\item \textsuperscript{51} 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
\end{itemize}
its wide mandate to consider in its inquiry the issue of land. Because land related issues, particularly land invasions and the human rights abuses associated therewith have been central to the crisis experienced in Zimbabwe over the last three years, the commission may have to deal with the issue so as to fully contextualise abuses and ensure Zimbabweans (white and black) see their own personal experience reflected in the commission’s work.  

Questions of Time

The first issue of time is when to start. In general, past experience shows that the quicker the commission is set up and begins its work, the better. South Africa is an exception to this rule in that eighteen months were spent designing the TRC after the democratic elections of April 1994. Of course the appropriate preparatory period depends on the political context of the country at hand. South Africa’s preparation was longer than others due to the development of complex empowering legislation, procuring support from all political parties (who held closely balanced positions of power in the transitional period), and responding to civil society input. However, while serious civil society engagement with a truth commission proposal is important and desirable, where participatory civil society and democratic

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 extrajudicial executions, forced disappearances and sexual violations (see in this regard the article by the Clarification Commission’s coordinator, Christian Tomuschat, (op cit (note 10 above) at 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-evaluate, and focused thereafter on ‘gross violations of human rights only’. See in this regard Hayner, Unspakable Truths, 69.

52 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.

53 See Hayner, Unspakable Truths, 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, Fifteen Truth Commissions, 640.
institutions such as those in Zimbabwe are weak or have been rendered so by the government, it is probably better to plumb for a quick start. It is at this early stage of transition, as a new government comes into power, that the window period 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 to further other transitional justice initiatives’.54

The time issue relates to the duration of the commission’s mandate. The majority of truth commissions studied in this paper have had a limited period of time in which to complete their work, usually between six months and a year to complete all investigation and to submit a report (sometimes with a possibility of an extension).55 More recent commissions like the South African and Guatemalan commissions have worked for longer (almost five years in total for the South African commission and one and one-half years for the Guatemalan commission). Hayner suggests that one to two and one-half years is probably optimal excluding administrative and logistical establishment of a commission.56

There are good reasons to keep the tenure of a commission short, the most important being in order to ensure 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.57 The Ugandan commission demonstrates the dangers of disregarding this guidance. Set up in 1986, it had no time limit.

54 Hayner, *Unspeakable Truths*, 221.
55 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.
56 Hayner, *Unspeakable Truths*, 222. 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, *op cit* (note 10 above), 240-241.
57 Hayner, *Unspeakable Truths*, 222.
It took over nine years before it finished, and by then had lost the support and interest of the public, and failed to produce the cathartic effect expected.\textsuperscript{58}

Another problem of time relates to the period of history 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 in the creation process.\textsuperscript{59} Not much more can be done here than to point out that various periods of Zimbabwean history may not be investigated. For instance, there might be practical reasons (such as concerns about resources in Zimbabwe’s current state of economic crisis) to limit the commission’s mandate to abuses since 2000. In any event, the most pressing human rights violations are perceived – it would appear both within Zimbabwe as well as internationally – as being a direct consequence of the current crisis in Zimbabwe. The efforts needed to most obviously achieve reconciliation between MDC and Zanu-PF members, as well as between whites and blacks in respect of farm invasions, arise out of the events of this period. But even if the last decade is 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 to inquire into human rights abuses such as those in Matabeleland, abuses which to this day remained shrouded in secrecy.\textsuperscript{60} There may even be calls perhaps for the commission to go back as far as the unilateral declaration of independence in 1965, and to consider human rights abuses committed by parties prior to President Mugabe’s ascendency to power, especially during the Rhodesian war. Whatever period is agreed upon, the outcome will in all probability be determined by the political realities of transitional negotiation, and by parties desires that at least a part of their version of what happened is placed on the table.

\textbf{The Commission in Action}

Every commission must face various difficult questions of methodology regarding, for example, how it will gather evidence, what cases it will cover, due process rules and

\textsuperscript{58} \textit{Ibid.}
\textsuperscript{59} Sarkin, \textit{Rwanda TRC}, 811-812.
\textsuperscript{60} As explained earlier in this paper (see footnote 13 above 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.
procedures, the level of proof it will use to make its conclusions, how it will relate to the press and public, et cetera.

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

The general approach, particularly after South Africa’s powerful example, is that public hearings are preferable in that they shift a truth commission’s focus from product (its final report), to process.61 Whereas the final report of the South African TRC was only delivered many years later, the report crystallised the 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 public hearings the public can be assured that there is no bias in the commission’s work, and no cover-up of evidence. By listening to statements from victims of abuses, statements of victims’ family members, and other reports – itself an important means to achieve healing62 – the commission’s process may reduce the chance of continued denial of the truth by sectors of society, and increase the public support and appreciation for the commission’s work.

Because of the public nature of the process and the victim-orientated approach it involves, it is imperative that a commission make counselling services available to victims both before and after they testify.63 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

62 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: ‘[O]ne 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, nonconfrontational, and interested in their stories – can help them regain their dignity and begin to recover’ (Hayner, *Unspeakable Truths*, 134).
63 Sarkin, *Rwanda TRC*, 815.
hearings. To the extent that resource restrictions prevent the provision of such professional support, community organisations, traditional healers, church structures, extended families and friends, and support groups may need to fill the breach.

It is important that the commission does not rely solely on the testimonies of victims, government records and NGO input to complete its report, and that – following on the example of the South African, Argentine and Salvadoran commissions – it undertakes its own investigations into human rights abuses. In Chile the commission did not carry out its own investigations despite its broad mandate, a failure viewed as substantially limiting information relating to victims’ fates and the identities of the perpetrators. Of course much will depend on the number and quality of staff and the resources available. However, the commission should at least pursue in-depth analysis of a fair number of violations so that it can document violations that are paradigmatic of the period. With broad and flexible terms of reference in place (see the discussion above regarding the mandate of the commission), the commission will be well positioned to follow El Salvador’s example of in-depth investigation of selected cases, representative of typical victims, perpetrators, and types of abuse over the historical period of study.

The Report and Recommendations

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.

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, Unspeakable Truths, 147). For more information on the Khulumani group see their website at http://www.khulumani.net.

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 Carsten Stahn, ‘Accommodating Individual Criminal Responsibility and National Reconciliation: The UN Truth Commission for East Timor’, (2001) 95, American Journal of International Law, 955; see also Hayner, Unspeakable Truths, 107-108.

Sarkin, Rwanda TRC, 816.

Ibid, 817.

Hayner, Unspeakable Truths, 73.
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 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. 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 are mandatory. In more recent years truth commission reports have provided extensive recommendations for reforms across many sectors of government and public life. Several observers believe that the Salvadoran TRC’s most important long-term contribution was its recommendations on rule of law reform and institutional change. These recommendations may be based on diverse legal and political scholarly input, and in the past have suggested specific reforms in, for instance, the judiciary, the armed forces, the political structure and process, reparation for victims, measures to instil a human rights culture in society, et cetera. The importance of such recommendations for Zimbabwe are clear, and the country would be well served by a commission suggesting such reforms.

70 Hayner, Fifteen Truth Commissions, 652.
71 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, Unspeakable Truths, 167.
72 See Rama Mani, Beyond Retribution, Seeking Justice in the Shadows of War, (2002), 102.
73 Hayner, Unspeakable Truths, 167.
74 See for example, 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, and the independence of the judiciary, and about 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 Mark Ens alaco, ‘Truth Commissions for Chile and El Salvador: A Report and Assessment’, (1994) 16 Human Rights Quarterly, 656, at 666-670.
Reconciliation, Justice and Amnesty

Since time immemorial, successor regimes have sought to secure peace through the pardoning of deposed enemies 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 amnesty through an institutional process. A commission’s amnesty power, and the resultant immunity from criminal prosecution for serious human rights violations, sets up something of an opposition between the truth commission process – which aims to achieve what is called ‘restorative’ justice75 – and criminal trials, which focus on delivering ‘retributive’ justice’.76

So far, however, only the South African TRC and the recent truth commission in East Timor have been accorded powers to grant amnesty.77 Commissions generally investigate and report only, focusing on establishing historical truths about human rights abuses, the specific policies and practices that contributed to those violations, as well as describing individual cases only as indicative of general patterns 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


76 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, Unspeakable Truths, chapter seven.

they have committed. In any event, the political reality for many transitional governments is that, as opposed to criminal prosecution of past offenders, a truth commission with an amnesty power is the only realistic and peaceful way in which the existing regime will relinquish power. It is not inconceivable that the Mugabe-led government will insist on striking an amnesty deal, allowing many Zanu-PF officials, policemen and soldiers to choose the option of truth for amnesty.

Should the amnesty route be followed, it is important to point out that the particular form of amnesty granted by a commission must 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’. As such, the blanket amnesty in Chile passed by the regime and 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.

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78 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.

79 Dugard, Conflicts of Jurisdiction with Truth Commissions, 700.

Also of increasing importance is that the nature of certain offences precludes the grant of amnesty in respect of their perpetrators.\textsuperscript{81} 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.\textsuperscript{82} 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’. Of particular import is that the trend has itself come to be reflected in the mandate of East Timor’s recently created truth commission.\textsuperscript{83} 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, and the domestic crimes of murder and sexual offences, as defined by the Indonesian Criminal Code.\textsuperscript{84} 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


\textsuperscript{82} Dugard, \textit{ibid}, 699.

\textsuperscript{83} 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, \textit{op cit} (note 69 above) 952-953).

\textsuperscript{84} See Stahn, \textit{op cit} (note 69 above), at 957-958.
criticism for failing to comply with internationally recognised standards of criminal accountability.85

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.86 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 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.

Conclusion

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

86 Stahn, op cit (note 69 above), 963.
important part in the process. The real challenge for drafters of a future commission will be to adopt a sophisticated approach to addressing past human rights tragedies that draws the best from previous commissions, allows for a response to core international crimes which are of concern to the international community as a whole, but which meets the practical political and social realities of a transition process. This, of course, is no mean feat, but it is undoubtedly the case 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, if successful, will contribute towards achieving the peace and reconciliation that appears elusive for so many African states.