TRANSITIONAL JUSTICE: A FUTURE TRUTH COMMISSION FOR ZIMBABWE?

MAX DU PLESSIS* AND JOLYON FORD**

Abstract An eventual sustained democratic transition process in Zimbabwe may include a 'truth and reconciliation' commission. The need for—and possible form of—any such institution is situated in a number of discussions: the balance of principle and pragmatism that peace deals sometimes require; comparative experiences in other societies and the promise and limits of institutional modelling; the dynamic between global expectations or prescriptions and ground-level exigencies; the interface of international criminal law and institutions with national-level justice processes; the content of the State's international legal duty to afford a remedy. In considering the extent of an international normative framework limiting the justice options of transitional States, a certain margin of appreciation may be appropriate or necessary to enable a society to reconcile with its violent past on its own terms.

I. INTRODUCTION

What lessons about formally accounting for past systematic and widespread human rights abuses can Zimbabweans learn from other societies that have undergone political transition? If there is a sociological and political case for a deliberative national process of remembering, dwelling, telling, uncovering, admitting, accusing, apologising, what international legal considerations attend these questions or affect the forms that such processes might conceivably take? In 2008, and expressly in an endeavour to avoid the internationalization of criminal justice issues in a future Zimbabwe, the main opposition party have said that their transitional justice policy, if in government, would meet 'international standards'.[1] As part of the September 2008 agreement intended to break the political deadlock that followed the March 2008 elections, the parties have agreed to 'give consideration to the setting up of a mechanism to properly advise on what measures might be necessary and practicable to achieve national healing, cohesion and unity in respect of victims of pre- and

* Max du Plessis is a Associate Professor at the Faculty of Law at the University of KwaZulu-Natal, Durban; Senior Research Associate, Institute for Security Studies, Pretoria; Advocate & Associate Member of the Durban Bar.

** Centre for International Governance & Justice, Australian National University.

[1] *MDC Policy 2008* (Movement for Democratic Change, Harare), discussed further at (n 18) below.

[*ICLQ* vol 58, January 2009 pp 73–117] doi:10.1017/S002058930800081X

https://doi.org/10.1017/S002058930800081X Published online by Cambridge University Press

post independence political conflicts.'[2] While its subject-matter relates to an evolving political context, this article is an attempt to stand back and consider the extent and content of international legal standards against which to assess any future victim-related truth, peace or justice mechanism that may be created as part of Zimbabwe's ongoing political settlement process.

One purpose of this article is to consider the extent to which an international legal framework not only forms a backdrop to national choices on justice and reconciliation, but may shape and even constrain the institutional and procedural options available. In the context of decades of violence and impunity in Zimbabwe, and in anticipation of an eventual democratization of political life there, we reflect on a variety of comparative transitional justice experiences such as those of Argentina, Cambodia, Chile, El Salvador, Guatemala, South Africa, Sierra Leone and Timor-Leste. Three main avenues are now used to formally address injustices relating to past violence: criminal trials (sometimes wholly or partly internationalized), truth-for-amnesty commissions, and a hybrid strategy entailing both conditional amnesties and selective prosecutions. A survey of the variety of mandates and procedures adopted and practices followed in various States reveals that notwithstanding the growth of a body of 'best practices' and guidelines, transitional justice choices remain eclectic. Within certain limits mandated by respect for universal norms, we argue that this is not only inevitable but may (with some caution) be preferable. There are limits to the appropriateness of foreign institutional formulae for pursuing locally legitimate and relevant justice and reconciliation. Provided the State's duty to afford an effective remedy is fulfilled, international peacebuilding institutions (and international law itself) currently does—and ought to—extend a margin of appreciation to transitional societies, where appropriate, to find their own ways to reconcile with the past as part of building a sustainable future peace. Comparative experience is thus simultaneously of significance and of limited utility in the design and conduct of any future institution in Zimbabwe. International legal principles certainly inform issues and available choices, but aside from the issue of purported national amnesty for international crimes, provide less by way of mandatory parameters than might be expected in relation to the content of the state's duty to afford a remedy for human rights abuse.

In the first part of this article (sections II to IV below) we consider debates on the utility, rationale and justification of establishing 'truth and reconciliation' bodies. While certain precautions are noted, these generic considerations and the particular context of Zimbabwe suggest, in our view, that such a body may be one viable or commendable component of any transitional justice strategy in that country. The second part of the article (sections V

[2] 'Agreement between ZANU-PF and the Two MDC Formations on Resolving the Challenges Facing Zimbabwe' (Harare, 15 September 2008) available at www.allafrica.com/stories/200809151361.html.

https://doi.org/10.1017/S002058930800081X Published online by Cambridge University Press

to VIII below) considers the legal framework possibly affecting national transitional justice strategies. Consideration is given to comparative experiences in terms of the mandate and procedures of truth commissions, and in particular the options available in terms of amnesties from prosecution. What will become clear is that the complexity and idiosyncrasy of these issues and the range of legitimate (but often incompatible) considerations, described in the first part, is a primary explanation for the lack of evolution of a detailed, prescriptive normative framework at the international level. Those interested in promoting international transitional justice solutions are prone to asserting the existence and certainty of international standards on the forms of transitional justice despite the variety of practices followed around the world, and despite the risk that global expectations might distort local exigencies for peace and reconciliation.

Before proceeding it ought to be emphasised that a range of difficult questions will undoubtedly arise for Zimbabweans as they grapple with transition away from the crisis and the 2008 horse-trading towards a new future. These reveal that social discourse on 'justice' involves, but is not always reducible to, legal or doctrinal issues.[3] In any interim phase, how will negotiations on 'transitional justice' persuade the powerful and prosecutable that it is safe to cooperate? How do we balance the need for restorative justice with solemn principles pointing to criminal trials and retributive justice? To what extent should society be looking back rather than concentrating its energies on the future? How far back does 'the past' really go? What is the status in law of pardons and amnesties given in the past? What would be required for future national amnesties to have international legal validity and afford immunity from prosecution? What is the place of international criminal justice mechanisms where a national process is in place? What is the relevance, utility or propriety of calls for international prosecutions? How would such a process deal—if at all—with any process on land claims between communities, or with wrongs that have a predominantly economic dimension: at least in relation to remedial measures? Can many of the intra-communal acts of violence be separated from an enquiry into questions of landholding and title? If there is 'no peace without justice', who can or should decide on justice? Is there a role for outsiders and, if not, who in Zimbabwe would have the moral authority to guide any process? With an economy in freefall, what priority of resources and national attention should a backward-looking process have, and what room to manoeuvre does international law allow a State in such situations?

The list of questions alone indicates the complexity of the debate. We modestly engage with these and other questions, placing our discussion of

[3] On the limits of a legalistic approach to understanding or ensuring justice, see Kieran McEvoy's excellent 'Beyond Legalism: Towards a Thicker Understanding of Transitional Justice' (2007) 34(4) Journal of Law and Society 411.

https://doi.org/10.1017/S002058930800081X Published online by Cambridge University Press

what might be drawn from comparative experiences within a wider approach which privileges seeking to solve problems according to local needs rather than becoming wedded to particular forms of institution. We consider whether local solutions nevertheless take place within the context of some degree of emerging consensus discernible on international minimum standards on truth commissions, amnesties and concurrent criminal prosecutions. It is important to comment at this stage that we do not necessarily subscribe, in reviewing options for approaches to dealing with the past, to the view that there is a need to choose starkly between 'peace' and 'justice'.[4] While there are certainly tensions between the two concepts, and often the price of peace is to accept that justice might need to be stayed against important stakeholders in the peace,[5] there is a recognized need now to move beyond a simplistic dichotomy that presents these two ideals as mutually inconsistent objectives where there has been conflict. Some aggrieved parties will not be able to contemplate peace without justice being seen to be done. These deep and real feelings cannot be denied simply on the basis that academic scholarship has moved beyond any simple dichotomy. Nevertheless, it is often an abdication of the duty to seek imaginative, tailored solutions to simply assert that justice and peace are incompatible objectives in most transitional settings: 'to place prosecutorial justice and the attainment of peace into opposed, abstract categories comes at the expense of an informed analysis of where tensions do, and do not, exist on the ground.'[6]

II. THE CONTEXT: POLITICAL VIOLENCE AND HUMAN RIGHTS ABUSE IN ZIMBABWE

The suggestion that a truth commission may be an important instrument for Zimbabweans in their transition from autocracy proceeds from two premises: first, that the human rights abuses that have occurred in Zimbabwe's modern history have been widespread, persistent, serious, systemic and systematic, and attended by a pattern of amnesty and lack of remedial action; secondly,

[4] N Biggar 'Making Peace or Doing Justice: Must we Choose?' in Biggar (ed) *Making Peace and Doing Justice after Civil Conflict* (Georgetown University Press, Washington DC, 2001) 6–13. See too V Nesiah, 'Truth vs. Justice' in Helsing and Mertus (eds.) *Human Rights and Conflict* (United States Institute of Peace, Washington DC, 2005), and generally Roht-Arrazia and Mariezcurrena *Transitional Justice in the 21st Century: Beyond Truth versus Justice* (Cambridge University Press, 2006).

[5] For a recent thorough survey of the issues, see N Grono and A O'Brien 'Justice in Conflict? The ICC and Peace Processes' in *Courting Conflict? Justice, Peace and the ICC in Africa* (Royal African Society, London, 2008). As the authors maintain, difficult choices will arise however nuanced the approach is, since it will simply be impossible to simultaneously pursue peace and justice objectives in complex cases. See also P Siels and M Weirda, 'The International Criminal Court and Conflict Mediation' (International Centre for Transitional Justice, New York, 2005).

[6] Justice Albie Sachs (Constitutional Court of South Africa) in *Courting Conflict?* (n 5), 'Foreword'. Polarised debates about the supposed incompatibilities between 'peace' and 'justice' have obscured efforts to consider these issues in a more integrated way and to recognise the potential for these goals to be compatible and mutually reinforcing: G Simpson, 'One among Many: the ICC as a Tool of Justice during Transition' also in *Courting Conflict*, Chapter 9.

https://doi.org/10.1017/S002058930800081X Published online by Cambridge University Press

that a truth commission would be a valuable and acceptable ingredient in addressing the violations and injustice and permitting a sustainable national peace. The second premise is the topic of the next section.

In relation to the first premise, human rights abuses perpetrated, encouraged or tolerated in particular by the State and its agents since at least February 2000, and which continued to worsen through 2008, have constituted constitutional, criminal and civil wrongs in Zimbabwean law and have in any event created pain, loss, grief, distrust, uncertainty, suspicion, grievance, anger and dislocation. The period has been marked by the consistency and level of State intimidation and brutality, involving widespread victimization; the partly covert nature of direct State abuses and indirect action at State instigation; the large number of low-level perpetrators especially among the youth militias; secrecy and denial on the part of the regime; a culture of impunity reinforced by pardons and general amnesties over many years; and the lack of remedial options. These factors all suggest the need for a formal national justice mechanism accompanying (and partly enabling) any future political transition to legitimate government. These abusive practices have been fairly well chronicled (although part of the point is that much is, of course, not known or presently knowable) and are only summarized here in order to properly situate our discussion. While formal denials, secrecy and the difficulty of cataloguing cases prevents a full assessment, a number of credible sources have reported that Zimbabwe's Government has been directly or indirectly responsible for murder, disappearances, rape, torture, beatings and other humiliating inhumane or degrading treatment, arbitrary detentions, denial of due process rights, group punishment including use of food as a political weapon, selective non-distribution of famine relief, mass displacement and forced removal, and other human rights abuses falling within well recognized 'categories' in international law.[7]

[7] See for example 'Justice in Zimbabwe' (Legal Resources Foundation, Harare, 2002); *Playing with Fire* (Zimbabwe Institute, Harare, 2004); 'Resolution on the Situation of Human Rights in Zimbabwe' African Commission on Human and People's Rights, Banjul, 5 December 2005; monthly and annual reports of the Zimbabwe Human Rights NGO Forum www.hrforumzim.com; shadow reports and other reports of the Human Rights Trust of Southern Africa www.sahrit.org; 'Policing the State' (November 2006, with Solidarity Peace Trust) and the 'Zimbabwe Monitor' both of the Institute for Justice and Reconciliation (Cape Town) www.ijr.org.za/transitionaljustice/zimbabwe-monitor; Human Rights Watch world reports and occasional reports on Zimbabwe www.hrw.org/africa/zimbabwe.php, including the then influential June 2003 HRW Report 'Under the Shadow: civil and political rights in Zimbabwe' and more recent reports, most recently in June 2008 (www.hrw.org/reports/zimbabwe/0608/); annual and occasional country reports of Amnesty International www.amnesty.org/en/region/africa/southern-africa/zimbabwe; US State Department, Country Reports (Human Rights), 2000—present www.state.gov/g/drl/rls/hrrpt/; United Kingdom Government (Foreign & Commonwealth Office), Human Rights Report (2002–2007). See also the evidence brought before the US Federal District Court for the Southern District of New York in the case of *Tachiona v Mugabe* (2001) 169 F.Supp.2d 259. See too B Raftopoulos & T Savage (eds) *Zimbabwe: Injustice and Political Reconciliation* (Weaver Press, Harare; African Books Collective, Oxford; 2005). We note that the ZANU PF and the MDC parties have in respect of the post-March 2008 election period recorded

https://doi.org/10.1017/S002058930800081X Published online by Cambridge University Press

From the available reports it is possible to identify three groupings of widespread violations since 2000. First, beginning shortly before the parliamentary elections of June 2000, and in response to both the rising popularity of the opposition Movement for Democratic Change (MDC) and to the ZANU-PF Government's defeat in the February 2000 constitutional referendum, Zimbabweans have witnessed nearly a decade of direct abuses on the part of the security services, as well sometimes less subtle abuses by ZANU-PF supporters and youths, with State facilitation, encouragement or instigation. Impunity has marked both sources of violence and intimidation, which have peaked in and around elections including the most recent (March and June) 2008 elections. The State and the party have been indistinguishable in Zimbabwean political life. Secondly, spontaneous as well as State-sponsored invasions of mainly white-owned commercial farms began in 2000: the Government perpetrated or incited (or at least failed to prevent, condemn or act against) the accompanying violence, property offences, mass displacement and lawlessness, the primary victims of which were thousands of farm workers. Impunity for criminal acts since 2000 was first formalized by a presidential decree of October 2000 granting amnesty, and followed by subsequent clemency orders including a substantial one in 2002. In those rare cases where a criminal conviction has been obtained against State agents, presidential pardons have been given to many actors responsible for political violence. Thirdly, there have been systematic forced displacements of urban dwellers pursuant to a deliberate political strategy: one official operation in the winter of 2005, condemned around the world, led to the forcible displacement of as many as 700,000 people.[8]

State human rights abuses have occurred in earlier periods of Zimbabwe's history too, and the extent to which these periods are to be addressed presents a difficult issue in the design of any future truth commission. Any truth commission today might not seek to address alleged war crimes and serious human rights abuses committed on all sides during the Rhodesian civil war leading to Zimbabwe's 1980 independence, for various reasons given later in this article. Of a different order is the question of whether and how to formally deal with allegations of grave crimes and human rights abuses arising from the Zimbabwean army's *gukurahundi* campaign in Matabeleland in the south of

themselves as being '[g]ravely concerned by the displacement of scores of people after the election of March 29, 2008 as a result of politically motivated violence' (see Article 18.2 of the Agreement of 15 September 2008 (n 2). The agreement is a political settlement and carefully avoids laying responsibility for the violence at the door of any one party.

[8] Launched in 2005, *Operation Murambatsvina* (this ChiShona language term has a 'clean up' connotation) involved razing of settlements in and around the capital, Harare, allegedly in an attempt to intimidate the urban civilian population and to force some to move to rural areas where a higher level of state control was thought possible; see *Order out of Chaos, or Chaos out of Order? A Preliminary Report on Operation Murambatsvina* (ZHR NGO Forum, June 2005); 'Report of the Fact-Finding Commission of the UN Special Envoy on Human Settlement Issues' (July 2005) www.un.org/News/dh/infocus/zimbabwe/zimbabwe_rpt.pdf.

https://doi.org/10.1017/S002058930800081X Published online by Cambridge University Press

the country in 1983–4.[9] The campaign coincided with a period in the new Zimbabwe during which the political and ethnic balance of power between the dominant ZANU-PF party and the ZAPU party was still crystallizing. The south of the country, ZAPU's support base, was subject to sporadic violent attacks by, amongst others, dissident ZAPU fighters. In response from January to April 1983 (and to a lesser extent throughout the rest of that year), the Matabeleland North area was subject to a state of emergency marked by waves of direct state violence against the civilian population: mass killings, disappearances, murder, group beatings, rape, destruction of property, intimidation, detentions, and torture. The overwhelming majority of abuses were committed by members of the uniformed services or the intelligence service. Between at least February and April 1984, the same units were deployed in Matabeleland South. It is thought that more than 10,000 people died as a direct result of the operations, while many more suffered serious human rights abuses.

There has been no official or formal communal action in relation to this period. Findings of an official January 1984 inquiry into Matabeleland (the Chihambakwe Commission) were never published.[10] Until the independent 1997 Catholic Commission for Justice and Peace report, *Breaking the Silence, Building True Peace*,[11] the story of the 1983–4 period remained almost entirely unspoken and unheard in Zimbabwe. The report was based on detailed survey work sampling a few affected communities in Matabeleland. In just the two formally sampled districts, the report recorded 2000 confirmed dead, 3–4000 'almost certain' dead, 10,000 arbitrarily detained, and 7,000 beaten or tortured. A copy of the report was sent to President Mugabe and to members of the Cabinet. No official comment was ever received. As part of the Unity Accord signed on 22 December 1987, a general amnesty under Zimbabwean law was granted to dissidents on Independence Day on 18 April 1988. This was extended in June 1988 to members of the security services in relation to the *gukurahundi* operational area.

[9] *Gukurahundi* is a ChiShona word for a seasonal phenomenon and is usually translated as 'the rain which washes away the chaff before the spring rains.' It was the name given, reportedly by President Mugabe himself, to the new Zimbabwe army's 5th Brigade which, alongside police, intelligence and other entities was primarily responsible for the violence against civilians in Matabeleland in 1983–4. The insinuation was that there needed to be a 'cleansing' of the community which the government held responsible for harbouring a small number of dissident militant elements from the minority Ndebele-speaking group.

[10] It was announced in November 1985 that the findings of the report would not be released; in 2004 the Supreme Court dismissed an application for the State to be compelled to release the report: *Zimbabwe Lawyers for Human Rights v President of Zimbabwe & Anor*, S-12-03; Civ. App. 311/99.

[11] Catholic Commission for Justice and Peace; Legal Resources Centre (Harare, 1997); see also 'Choosing the Path to Peace and Development: Coming to Terms with Human Rights Violations of the 1982–1987 Conflict in Matabeleland and Midlands Provinces' (Zimbabwe Human Rights Association, Harare, 1999).

https://doi.org/10.1017/S002058930800081X Published online by Cambridge University Press

The *Breaking the Silence* report suggests that there remain serious matters to be unearthed and resolved in Zimbabwe, including possible international crimes. Apart from the obvious serious physical and psychological harms, loss of family members (many of whom are missing or in mass graves), property destruction, and so on, there is a general lack of knowledge about 'what happened', accompanied by the fact that the violence and impunity marking the period has not been forgotten by its victim communities. There remain a number of practical and legal difficulties for families who were unable to obtain a death certificate for missing persons or persons buried in mass graves. There has been no formal apology or explanation and no redress or reparation for victims. No compensation scheme has ever been implemented despite a 1996 undertaking by the Government.[12]

In this context, there have been a number of calls for any 'transition' in Zimbabwe to be marked by a truth and reconciliation commission as one component of a comprehensive approach to justice and peace.[13] The debate has been largely confined to a small group of local civil society activists and lawyers.[14] Nevertheless, since at least August 2003, when over 70 civil society organizations met in Johannesburg for a 'Symposium on Civil Society and Justice in Zimbabwe', the general preference has been for what that symposium called a 'Truth, Justice and Reconciliation Commission' as the main mechanism for redress, while expressly not discounting the possibility of

[12] The *Breaking the Silence* report had recommended that if individual compensation was not possible (as indeed it suggested it was not), a form of communal reparation should be pursued (by targeted development or communal reparation), and proposed a Reconciliation ('Uxolelwano') Trust for this purpose. One recommendation was to extend the benefits of the existing *War Victims Compensation Act* (relating to the Rhodesia-era conflict) to *gukurahundi* victims. The Act had a number of difficulties, and its related fund has been subject to plunder and abuse by high-level officials. The commonly held view in Zimbabwe is that the Act and perhaps the idea of such a scheme now has no 'moral credibility': W Buford and H van der Merwe 'Reparations in Southern Africa' (2004) *Cahiers d'Etudes Africaines* 44(1–2).

[13] Some observers are of the view that Zimbabweans are 'cynical' about reconciliation and the concept has been 'widely devalued, perhaps irrevocably' and 'remains polluted as a result of its expedient political manipulation and its failure to deliver meaningful results': *Exploring Transitional Justice Options in Contemporary Zimbabwe* (Zimbabwe Human Rights NGO Forum, Harare, 2006) 7, 21; also 'Zimbabwe: Why Reconciliation Failed' in *Reconciliation After Conflict: A Handbook* (International Institute for Democracy and Electoral Assistance, Stockholm, 2003) 34–39. We are not sure that this precludes such an institution. It rather depends on the form and practice of the institution and the prevailing political situation at the time of its establishment. The IDEA Handbook opines that the preference in 1980 for a 'shallow, cheap form of reconciliation without historic, restorative or economic justice' has devalued the notion of reconciliation in Zimbabwe. Other agree that by choosing 'reconciliation' over true 'reparation' in 1980, a dangerous culture of apathy and impunity was created: see Buford and van der Merwe (n 12) at fn 151; see also the record of an interview of July 2003 with former Archbishop Ncube in A Iliff 'Arresting Impunity: Towards a Transitional Justice Paradigm for Zimbabwe' (Honours Thesis, Harvard University, March 2004; unpublished).

[14] The preference apparent in the Zimbabwe Human Rights NGO Forum's 2006 consultant's study (above) was, if anything, for prosecutions. While the report's cover quotes the Nuremberg Tribunal, it acknowledges that the scale of violations, while widespread and systematic has not, since 1983–4, been of the gravest extent of international crimes.

https://doi.org/10.1017/S002058930800081X Published online by Cambridge University Press

criminal prosecutions.[15] The draft alternative Zimbabwean constitution of the unofficial National Constitutional Assembly has since 2001 provided for a 'Truth, Justice, Reconciliation and Conflict Prevention Commission' in its Chapter 9.[16] The opposition MDC party has in the past received generic advice on transitional justice options. It has consistently followed a fairly conciliatory line on future justice issues, though not without some ambiguities. For example, in its major 2003 Congress the MDC mentioned the intention to establish mechanisms in future for 'truth, justice, reconciliation and restitution'. At that time, one ambiguous position adopted was that 'general provisions of amnesty for prisoners will continue' although the party would nevertheless 'ensure that due legal process is applied to all human rights abuses.'[17]

In its latest (2008) policy statement the MDC does not mention a legal or policy position on past amnesties at all, and mentions future amnesties only obliquely.[18] The MDC policy says it will 'make a clean break with that past and establish a strong human rights culture' but that it 'will be necessary to deal with all past abuses'. It proposes a 'Truth and Justice Commission' to hear, in public formal recorded sessions, 'the stories of the victims and to identify those responsible for human rights abuses and any associated criminal acts', as well as mechanisms to prevent future abuses and 're-orientation programmes for all those affected'. Based on the four 'rights' expressed to underlie it,[19] the policy purports to deal with all episodes of political violence in Zimbabwe since 1980. It states that the MDC is committed to 'dealing with the needs of the victims' of all post-1980 abuses 'in a holistic and comprehensive way' by giving 'those affected by the abuse of their rights the satisfaction of knowing that the truth about what happened has been revealed and

[15] The Symposium condemned the pattern of amnesties and culture of impunity in Zimbabwean and Rhodesian history, and expressed the view that gross violations should never be subject of an amnesty; it noted that victims of all past human rights abuses have a right to redress and to be consulted about the nature of mechanisms what will be established to address their needs.

[16] The proposed institution would sit for five years, with options to renew it for a further five years. It would be responsible for investigations of past violations, provision of remedies to persons injured, the promotion of reconciliation, and conflict prevention. Further details were left to a future non-constitutional instrument. The government's March 2006 proposal to establish a constitutional 'Human Rights Commission' to 'counter the large scale orchestration of alleged violations' and the 'falsification, exaggeration, orchestration, and stage-managing of human rights violations by detractors' was widely treated with derision.

[17] 'From Crisis to Human-centred Development' (Movement for Democratic Change, Harare, December 2003).

[18] 'In the event that those identified as being responsible . . . do not themselves, on a voluntary basis, offer to come before the Commission to tell their side of the story, the Commission may, at its discretion, [direct the matter for investigation for possible prosecution]': *MDC Policy 2008* (Movement for Democratic Change, Harare) 37.

[19] The communal 'right to know', the right to justice and a remedy, the right to reparations, and the 'right to non-recurrence': see discussion below.

https://doi.org/10.1017/S002058930800081X Published online by Cambridge University Press

that the culprits have been brought to justice in some way.' If anything, it is suggestive of a preference for criminal trials:

> '[A]ll victims will have an opportunity to assert their rights and receive fair and effective remedy, ensuring that the perpetrators stand trial and that the victims obtain reparations . . . [this reflects] an obligation on the State to investigate, prosecute and punish the guilty.'

The proposed mandate of the commission includes 'to determine who was responsible for the incidents being considered, and to decide whether or not to recommend further investigations by an appropriate authority and possible prosecution.'[20]

In any event, this policy is of course subject to whatever political realities prevail in future. By May 2008, the MDC had made overtures to reassure in particular the defence and intelligence elements of the Mugabe regime's leadership and to guarantee their 'security'.[21] It is not clear whether this pledge consists of an undertaking to engineer a formal amnesty from any prosecution, or something more political by way of a guarantee not to pursue legal actions. As a result of the 2008 election stalemate and violence, the leader of the main MDC faction, Morgan Tsvangirai said that while he had long espoused the notion that Mugabe himself ought to be allowed to retire with dignity rather than face prosecution, that issue might need to be revisited given the events following the elections in March 2008.[22] The September 2008 agreement does not provide for any formal transitional justice mechanisms, providing tentatively in a section dealing with the promotion of equality, national healing, cohesion and unity by a new government, that the parties 'shall give consideration to the setting up of a mechanism to properly advise on what measures might be necessary and practicable to achieve national healing, cohesion and unity in respect of victims of pre and post independence political conflicts.'[23] While the political impasse continued at the time of

[20] MDC 2008 (n 18) 1, 36–38. The MDC policy appears to attempt—perhaps wisely—to structurally distance justice measures from the vexed issue of property losses, land seizures and land reform. The policy does not, however, mention a role for the international community in any justice process.

[21] 'Negotiating Zimbabwe's Transition' Africa Briefing No. 1 (International Crisis Group, Pretoria/Brussels, 21 May 2008) 4.

[22] Interview, BBC News 'Hardtalk', 18 April 2008. By May 2008, however, Mr Tsvangirai was again repeatedly speaking in terms of the need for a 'graceful and dignified exit' for President Mugabe. This position by Mr Tsvangirai has been overtaken somewhat by the September 2008 agreement between ZANU PF and the two MDC factions.

[23] See Article 7.1(c) of the Agreement (n 2). The agreement has been read among civil society actors and others as denying amnesty or immunity for perpetrators of political violence, or at the very least not openly providing for it. The agreement stipulates that the Government will 'apply the laws of the country fully and impartially in bringing all perpetrators of politically motivated violence to book' (Article 18(5)(i)); that 'while having due regard to the Constitution of Zimbabwe and the principles of the rule of law,' the prosecuting authorities will expedite the determination as to whether or not there is sufficient evidence to warrant the prosecution or keeping on remand of all persons accused of politically related offences arising out of or

https://doi.org/10.1017/S002058930800081X Published online by Cambridge University Press

writing, we note that there have been a range of discussions that have taken place since 2001 which have included a truth commission idea and, particularly most recently, have aimed to express that idea by reference to international expectations and/or international legal standards. It is within that political context that we situate our discussion about the desirability of a truth and reconciliation commission as a new Zimbabwe begins to take shape.

III. THE TRUTH COMMISSION PHENOMENON

What in particular commends a 'truth commission' approach to dealing with past injustices? In addition to the variety of approaches adopted in practice (discussed below), consideration of the intrinsic merits of truth commissions and the issues at stake in resorting to them provides, we would argue, relevant context within which any enquiry into the normative framework and 'minimum standards' of transition justice must be made. While some of what follows reveals discernible trends, it also underlies the complexity of arriving at appropriate and effective remedies. This suggests a difficulty with (and a need to avoid) becoming too prescriptive about what a state must or must not do in transitional justice settings.

In reaching or embedding a new political dispensation after systematic and large-scale human rights abuse, then, there exists a range of ways—'transitional justice options'—to deliberatively and formally deal with past injustices. 'Transitional justice' itself is now considered to be a vital component of prescriptions for modern 'peacebuilding', alongside disarmament, security sector reform, elections, and so on.[24] At the extreme respective ends of the

connected with the March and June 2008 elections (Article 18(5)(j)); for further comment see 'Some Preliminary Comments on the Agreement Compiled for the Research and Advocacy Unit' the South African Institute for Democracy (IDASA), 16 October 2008, available at http://www.kubatana.net/docs/demgg/analysis_of_zim_agreement_081016.pdf.

[24] D Mendlehoff, 'Truth-seeking, Truth-telling and Post-Conflict Peacebuilding: Curb the Enthusiasm?' (2004) 6 *International Studies Review* 355. The literature continues to grow. Commendable texts include: N Kritz (ed.), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes* (US Institute of Peace, Washington DC, 1995 (3 volumes)) and Kritz's overview 'Where we are and How we got Here: an Overview of Developments in the Search for Justice and Reconciliation' in Henkin (ed) *The Legacy of Abuse: Confronting the Past, Facing the Future* (Aspen Institute, New York, 2002); J-P Lederach *Building Peace: Sustainable Reconciliation in Divided Societies* (US Institute of Peace, Washington DC, 1997); M Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (Beacon Press, Boston, 1998); G Robertson, *Crimes Against Humanity: the Search for Global Justice* (Allen Lane, London, 1999); J MacAdams (ed), *Transitional Justice and the Rule of Law in New Democracies* (Notre Dame, Indiana, 2001); R Teitel, *Transitional Justice* (Oxford University Press, 2000); Rotberg & Thompson (eds), *Truth v Justice: The Morality of Truth Commissions* (Princeton University Press, 2000); E Daly and J Sarkin *Reconciliation in Divided Societies: Finding Common Ground* (University of Pennsylvania Press, Philadelphia, 2006); T Borer (ed), *Telling the Truths: Truth Telling and Peacebuilding in Post-Conflict Societies* (University of Notre Dame Press, 2006); T Govier, *Taking Wrongs Seriously: Acknowledgment, Reconciliation and the Politics of Sustainable Peace* (Humanity Books, 2008). For a recent overview, see R Teitel, 'Editorial Note: Transitional Justice Globalised' (2008) 2 *International Journal of*

https://doi.org/10.1017/S002058930800081X Published online by Cambridge University Press

'transitional justice options' range are either all-out criminal prosecutions of varying quality, or blanket amnesty with few questions asked and little attempt to find or explain the truth.[25] Most responses to large-scale violations tend—mainly for reasons of internal political expediency, but also as a result of international pressure—to adopt a position somewhere between the two extremes.

Truth commissions are one response resorted to increasingly in recent years. The term encompasses a broad range of possible institutions with different features and purposes. We adopt Hayner's understanding of the term to connote a certain kind of inquisitorial non-judicial body that normally displays the following characteristics: it focuses on the past; it investigates or receives information on a pattern of abuses over a certain or determinate period of time (rather than being general or focussing on a specific event); it is victim-focused; it is an ad hoc temporary body with a limited mandate, normally producing a report upon completion of its work; it is normally a State-sponsored body or emanates from and is authorized by the state.[26] Since 1974 numerous truth commissions have been established by States—with or without the assistance, encouragement or imposition of other states, the United Nations and other actors—either to support an ongoing peace process

Transitional Justice 1. For excellent resources see www.csvr.org.za (Centre for the Study of Violence and Reconciliation, Wits University) and www.itcj.org (International Centre for Transitional Justice); see also www.restorativejustice.org and www.ijr.org.za/transitionaljustice (Institute for Justice and Reconciliation, Cape Town); for a most extensive bibliography see the University of Wisconsin's 'Transitional Justice database project' www.polisci.wisc.edu/tjdb/bib.htm. We do not find it useful here to pursue whether the 'field' is a coherent one, has a future and is just getting going, or is already discredited as a unifying concept: Zachary Kaufman has opined that 'transitional justice is a broad term that [wrongly] attempts to unify under a single topic a vast array of activities (including inaction) that pursue different objectives and employ varying procedures': 'The Future of Transitional Justice' (2005) 1 *STAIR* 58–81, 77. We are cautious of the teleological prescriptiveness that might be seen to accompany formulas for effective transitional justice, and conscious that 'transitions' come in many forms: see too T Carothers 'The End of the Transition Paradigm' (2002) 12(1) *Journal of Democracy* 6. See also the discussion in L Bosire, *Overpromised, Underdelivered: Transitional Justice in Sub-Saharan Africa* (International Centre for Transitional Justice, New York, 2006) 8–9.

[25] J Dugard, 'Possible Conflicts of Jurisdiction with Truth Commissions', in Cassesse et al, *The Rome Statute of the International Criminal Court—A Commentary*, vol 1 (Oxford University Press, 2002) 693.

[26] P Hayner, *Unspeakable Truths: Facing the Challenge of Truth Commissions* (Routledge, New York, 2002) 14. Hayner's remains a most comprehensive comparative examination of truth commissions, and, like ours, many subsequent studies draw upon it. Sara Parker considers a truth commission to be 'a formal investigatory method implemented following some type of transition . . . used to help societies come to terms with past abuses': S Parker, 'From Argentina to Zimbabwe: Chronicling the Emergence of an International Truth Commission Norm' Paper for the International Studies Association Annual Conference, 26–29 March 2008, San Francisco [copy with authors]. See also definitional issues discussed in M Freeman *Truth Commissions and Procedural Fairness* (Cambridge University Press, 2006), and 'The rule of law and transitional justice in conflict and post-conflict societies' Report of the Secretary-General (UN Doc. S/2004/616, August 2004), [50]: official, temporary, non-judicial fact-finding bodies investigating a pattern of human rights abuses; are victim-focussed and produce a report or recommendation.

https://doi.org/10.1017/S002058930800081X Published online by Cambridge University Press

or to promote democratic reforms and reconciliation in a post-conflict society.[27]

A number of broad factors commend the establishment of truth commissions as an element of a comprehensive approach to transitional justice: to help establish the truth, provide redress for victims, ensure accountability for perpetrators, identify and stimulate reforms and preventative effects, promote reconciliation, and create formal distance with the past.[28] The ordinary criminal courts in any country that has experienced civil conflict or oppressive rule are likely to be severely weakened if not entirely compromised.[29] Even if countries had strong legal institutions with sufficient resources, independence or credibility, sometimes the scale of collective violence in certain countries is so vast—there is such a degree of complicity by members of society generally—that it is impossible to conceive of attempting to prosecute all possible offenders. In any event, mere prosecutions, even if politically possible, do not necessarily achieve reconciliation or reduce tension.[30] A restorative justice approach may be more likely to.[31] (However, one ought to note that a restorative justice approach does not, properly speaking, discount the significance of criminal trials, which can as powerful a means of affirming the

[27] Hayner's 2002 study (*Unspeakable Truths*) identified 21 commissions. More have been created since: see the Centre for Transitional Justice at http://www.ictj.org. Parker's 2008 study (above) includes a table of over 30 commissions since 1982, and her research details evidence of demands for commissions in at least 10 other countries.

[28] E Daly, 'Truth Skepticism: An Inquiry into the Value of Truth in Times of Transition' (2008) 2 *International Journal of Transitional Justice* 23, 27.

[29] A Chapman and P Ball, 'The Truth of Truth Commissions: Comparative Lessons from Haiti, South Africa, and Guatemala' (2001) 23(1) *Human Rights Quarterly* 2. On the tensions between national courts and truth commissions, see generally W Schabas and S Darcy (eds), *Truth Commissions and Courts: the Tension Between Criminal Justice and the Search for Truth* (Springer, Berlin, 2005).

[30] Hayner, *Unspeakable Truths* (n 26) 12–14. By nature trials moreover 'paint an incomplete picture of the past': Bosire (n 24) 4; as Gerry Simpson has pointed out, war crimes trials in particular have long had a didactic, narrative, commemorative and educational and self-legitimating function (not always entirely consistent with their judicial purposes), but one which can readily distort history: 'Didactic and Dissident Histories in War Crimes Trials' (1997) 60 *Albany Law Review* 801, especially 824–6. A theme running through Govier's *Taking Wrongs Seriously* (n 24) is rejection of the notion that criminal trials, while important from a rule of law perspective, have utility in promoting reconciliation in a society: this perhaps both underestimates the significance of trials as a means of vindication for victims, and overestimates the significance of non-judicial communal relationship-building processes in building sustainable peace.

[31] For us, aspects of a restorative justice approach include responsiveness to community expectations, a recognition of the significance of locally-driven processes, and a need to focus on 'bottom-up' restorative processes, contrasted with attending primarily to processes involving only some elites (whether peacemakers, truth commissioners, prosecutors, or indicted persons). The overall focus is on the vindication of the victim, not the punishment of perpetrators. See van der Spuy, Parmentier and Dissel (eds), *Restorative Justice: Politics, Policies and Prospects* (Juta, Cape Town, 2007); J Braithwaite, *Restorative Justice and Responsive Regulation* (Oxford University Press, 2002); Biggar (n 4). We note this with a caution: the well-meaning promotion of some community-based rituals by external actors can amount to area-based exceptionalism: Tim Allen, 'Ritual (Ab)use? Problems with Traditional Justice in Northern Uganda' *Courting Conflict*, Chapter 6; see also in the same publication Nicholas Waddell and Phil Clark, 'Introduction', 10.

https://doi.org/10.1017/S002058930800081X Published online by Cambridge University Press

dignity of victims as the dialogic elements of reconciliation approaches. Trials are not merely backward-looking and may be essential to ensuring a sense of 'justice', avoiding self-help measures, and to deterring future abuses.)[32]

The most obvious commendation and objective of a truth commission is the attempt to establish 'the truth' about human rights abuses and to allow people in society to understand what has happened: that through an official truth body an accurate record of the country's past will be established and uncertain events will be clarified, and the silence and denial regarding human rights violations will be dealt with and the truth exposed.[33] In order to move toward the future, victims may need assurances about certain details about the past as well as recognition of their losses or pain.[34] Such processes can achieve a measure of symbolic closure through memory,[35] or a therapeutic and principled institutionalization of the memories of the abusive time,[36] to reach an

[32] H Jeong, *Peacebuilding in Postconflict Societies: Strategy and Process* (Lynne Reinner, Boulder, 2005) *Strategy and Process*, 165, 168–9.

[33] Hayner *Unspeakable Truths* (n 26) 25. Jeong has rightly pointed out that knowing 'the truth' of what actually took place is a necessary condition for forgiveness, but not a sufficient condition: *Strategy and Process*, 165; the same sceptical approach informs Daly's recent argument (n 28) that without accountability, truth on its own merely produces injustice (34), while surveys of attitudes have shown that establishing the truth about an event is no guarantee that beliefs and attitudes will change upon being presented with that truth, indeed it may serve to hinder not promote reconciliation (37). In the same way, Pablo de Greiff points out that a successful process of truth-telling, trials, forgiveness formalities, etc, would not automatically mean that elements of society are reconciled: 'The Role of Apologies in National Reconciliation Processes: On Making Trustworthy Institutions Trusted' in Gibney & Howard-Hassman (eds), *The Age of Apology: Facing Up to the Past* (University of Pennsylvania Press, Philadelphia, 2007). Simon Chesterman also notes the distinction between acknowledgement and accountability: *You, The People: The UN, Transitional Administration and State-Building* (Oxford University Press/International Peace Academy, 2004) ('Justice and Reconciliation: the Rule of Law in Post-Conflict Territories', Chapter 5) 157. More recently, (Daly n 28) has noted that 'the truth neither *is* nor *does* all that we expect of it'—it does not necessarily help victims, promote accountability or non-impunity, prevent future abuse, or ensure reconciliation.

[34] B Pouligny, 'Building Peace after Mass Crimes' (2002) 9(2) *International Peacekeeping* 202. This is not necessarily so that someone must be held to account: sometimes to know is enough. One argument for a more formal process after the conflict in Solomon Islands was that people were unable to concentrate on the future due to intense speculation, rumour and gossip on factual issues.

[35] B Hamber and R Wilson, 'Symbolic Closure through Memory: Reparation and Revenge in Post-Conflict Societies' (2002) 1(1) *Journal of Human Rights* 35. Rosalind Shaw has argued that the 'valorisation' of this kind of memory practice involving public recounts of violence is based on 'problematic assumptions about the purportedly universal benefits of verbally remembering violence': R Shaw 'Rethinking Truth & Reconciliation Commissions: Lessons from Sierra Leone' Special Report #135 (United States Institute of Peace, Washington DC, 2005) 7. Her view is that 'social forgetting' may be an equally valid strategy and in Sierra Leone was a cornerstone of established local processes of reintegration and healing and so held far more appeal than the truth commission approach. We note that Shaw in fact concedes that truth-telling may be effective in cases of covert, state-sponsored violence.

[36] See generally J Carroll & B Pasco, *Forgiving and Forgetting* (Life and Peace Institute, Uppsala, 2002). The emphasis is vividly captured in the name of the 'Recovery of Historical Memory' project in Guatemala: see Jeong, *Strategy and Process* (n 32) 185. See Naidu & Adonis 'History on their Own Terms: the Relevance of the Past' (Centre for the Study of Reconciliation and Violence (CSVR), Johannesburg, January 2007); see in general Southern African

https://doi.org/10.1017/S002058930800081X Published online by Cambridge University Press

institutionalized common memory, a national consensus on how the past is to be remembered and represented.[37] This is in contrast to denial and deliberate or non-deliberate forgetting (often perhaps a natural result of trauma and fatigue). The rationale behind formal public truth commissions is that deep wounds need to be cleaned and aired, not simply bound up and forgotten: out of sight is not out of collective mind.[38] One must 'bury the hatchet, not the past'.[39] Even if victims learn no new truth, the official acknowledgment of these abuses can be a vital factor in the processes of reconciliation and healing of individuals, groups, and the nation as a whole.[40] For many victims no new 'truth' will emerge, but formal acknowledgment of their truth can be vital in the shared healing process. This may also be what is meant by 'truth as acknowledgment' and 'recognition' as sufficient to sometimes comprise 'justice'.[41]

In addition to its truth-seeking and truth-recording function such a commission can be a platform for a range of processes intended to respond to the needs and interests of victims of human rights abuses, and to address perpetrators' responsibility. Peacebuilding and transitional justice have both structural and psycho-social dimensions. The psychological dimensions and needs

Reconciliation Project 'Memorialisation Bibliography' and 'Memorialisation and Reconciliation in Transitional Southern African Societies' (CSVR, Johannesburg, 2005); Naidu, 'The Ties that Bind: Strengthening the Links between Memorialisation and Transitional Justice' (2006) and 'Empowerment through Living Memory' (2004) (both CSVR, Johannesburg). On the troubled Indonesian province of Papua, where one proposed element of a new 'Special Autonomy' regime in 2001 was a truth and reconciliation commission, various indigenous Papuans have for some years asked for a process of 'pelurusan sejarah' (straightening of history): J Braithwaite et al, 'Peacebuilding Compared: Working Paper #1' (Australian National University, May 2008, draft; copy with authors) 31.

[37] Jeong, *Strategy and Process*, 158; also K Christie *The South African Truth Commission* (St Martin's Press, New York, 2000). One can concede that it is problematic to conceive of a commission's report being a single definitive impartial historical record or national memory expressing the experiences and truths of all actors, and optimistic to expect that such a single record might 'command agreement and heal social divisions': Shaw (n 35) 3. However, this view overlooks the relative significance of process over outcome; nor need a report purport to be definitive of 'the truth'—it can simply record various views and attempt some objectivity.

[38] This paragraph draws from the authors' joint newspaper opinion piece in *Business Day* (South Africa), 17 April 2008. Archbishop Desmond Tutu referred consistently to the imagery of opening, cleansing and balming of societal wounds throughout South Africa's Truth and Reconciliation (TRC) process.

[39] Terence McCaughey, 'Northern Ireland: Bury the Hatchet, not the Past' in Biggar (n 4): a new society cannot be built while mystery surrounds the fate of many people.

[40] Shaw has argued that 'nations do not have psyches that can be healed'—it is wrong to 'anthropomorphize' the nation as a suffering, feeling entity (see too T Borer, 'Reconciling South Africa or South Africans? Cautionary Notes from the TRC' (2004) 8 *African Studies Quarterly* 1) —and that 'ideas concerning the conciliatory and therapeutic efficacy of truth telling' are Western cultural products about memory and not necessarily applicable elsewhere: Shaw (n 35) 7. Truth-telling is not necessarily a complete therapy.

[41] A du Toit, 'The Moral Foundations of the South African Truth and Reconciliation Commission: Truth as Acknowledgment and Justice as Recognition' in Rotberg and Thompson (n 24).

https://doi.org/10.1017/S002058930800081X Published online by Cambridge University Press

are both individual and communal.[42] Such commissions can become the focal point for efforts going beyond the establishment of truth—efforts at *reparation*—by which is meant not merely financial or other economic or in-kind compensation, but broader notions of restitution, rehabilitation, satisfactions and guarantees of non-repetition.[43]

Truth commissions allow a forum for forgiveness to be given by the victim.[44] By not only learning facts and explanations but also telling their stories and receiving formal and communal recognition—including by the perpetrators—victims are afforded a chance to reclaim their dignity. At the same time, perpetrators are afforded a formal mechanism by which to renounce their violent deeds and to rejoin society in some fashion. In these ways it can be (part of) a joint national therapeutic or healing process, with a practical dividend for peace prospects. It can also help to focus on the wider patterns and causes of abuse and move away from attempting individual blame or guilt where this is unlikely to be constructive in the new society. Another important function that a truth commission can fulfil is to describe 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.[45] Ideally and relevantly, as Heinz Klug notes in relation to constitution-making, these processes and institutions provide a means (as they did in South Africa) to civilise political conflicts and channel the energies and tensions in a way that, done well, can reduce the potential for violence: debate about institutional design or practice structures the parameters of possible political action during the transition and its aftermath, and these institutions (constitutions, or here truth commissions) provide a site to receive the 'incompatible [justice or institutional] imaginations of local contestants'.[46]

[42] W Long & P Brecke, *War and Reconciliation: Reason and Emotion in Conflict Resolution* (MIT Press, Cambridge MA, 2003); R Fisher, 'Social-Psychological Processes in Interactive Conflict Analysis and Reconciliation' in H Jeong (ed), *Conflict Resolution: Dynamics, Process, Structure* (Ashgate, Aldershot, 2000); B Hamber, 'Does the Truth Heal? A Psychological Perspective on Political Strategies for Dealing with the Legacy of Political Violence' in Biggar (n 4) 131–150; see Jeong, *Strategy and Process*, 155, 159.

[43] Hayner's study (*Unspeakable Truths*) considers the variety of redress measures that might fall within the general term 'reparation'. For a comprehensive study of experiences in Southern Africa in developing official non-judicial reparation programmes for victims of human rights abuse, see Buford and van der Merwe, 'Reparations in Southern Africa' (n 12) and Hamber & Mofokeng, *From Rhetoric to Responsibility: Making Reparations to the Survivors of Past Political Violence* (CSVR, Johannesburg, 2000). See also 'Reparation' in *Reconciliation After Conflict: A Handbook* (n 13).

[44] There are perhaps conceptual problems with compelling victims to grant forgiveness, which ought to be a gift: J Braithwaite, *Restorative Justice and Responsive Regulation* (Oxford University Press, 2002) 15.

[45] Hayner *Unspeakable Truths*, 29.

[46] H Klug, *Constituting Democracy: Law, Globalism and South Africa's Political Reconstruction* (Cambridge University Press, 2000) 5–6. On the other hand, as discussed at n 51 below, as with Constitution-making, such commissions may foster division rather than cohesion, serving as a source of 'fragmentation and disintegration': W Murphy, 'Constitutions,

https://doi.org/10.1017/S002058930800081X Published online by Cambridge University Press

IV. SOME CAUTIONARY CONSIDERATIONS

The eventual goal of truth processes is normally the promotion of reconciliation and the reduction of tensions resulting from past violence. Our position is generally in favour of truth commissions as a phenomenon on the premise that history shows it is not usually sufficient or proper to simply leave past injustices unaddressed and unresolved (it neither 'works' for peace nor is it 'right' for justice): some concerted, formal national attempt must be made to account for past injustices and events, lest the alternative prevent members of a society from moving forward in some fashion together. Trials are often impossible or insufficient. Beneath the premise is an assumption that we think is made out by experience but which may need to be tested, including empirically: that truth commissions and other explicit attempts to deal with the past make an overall positive contribution to peacebuilding, or are an efficient, effective, just, useful or legitimate way of dealing with widespread victimization and perpetration. In this regard, before considering the comparative practice on various significant institutional design issues and international legal parameters shaping these, we make the following ten cautionary remarks about adopting a truth commission-type process at all. Apart from their intrinsic value, such considerations lend weight to our argument that given the complexity and multiplicity of issues and legitimate choices facing a transitional regime, it will remain difficult to seek to prescribe—as a matter of international law and practice—particular modes or features of a 'just' transitional order.

First of these cautions is that it is necessary (that is, it is both right and prudent) to centre peacebuilding efforts in the will of the people.[47] It is quite possible to conceive of a situation where the overwhelming view is that the past ought simply to be left alone.[48] A deliberate decision not to pursue any formalised process may also be one option. Some societies such as Spain after General Franco simply drew a 'thick line' between past and present and moved on, without any particular structural mechanisms for reconciling with the past.[49] Secondly, a truth commission could be used as a political tool to disproportionately allocate blame to one side, or a cosmetic exercise of mutual 'forgiveness' only by implicated or self-interested elites in pursuit of a political deal and mutual immunity. Thirdly, given the emotive and highly

Constitutionalism and Democracy' in Greenberg et al (eds), *Constitutionalism & Democracy: Transitions in a Contemporary World* (Oxford University Press, 1993).

[47] K Daglish and H Nasu, 'Towards a True Incarnation of the Rule of Law in War-torn Territories: Centring Peacebuilding in the Will of the People' (2007) 54 *Netherlands International Law Review* 81.

[48] Shaw's view is that despite pressure from NGOs and human rights activists for a truth commission in Sierra Leone, most ordinary people preferred a 'forgive and forget' approach (what she describes as deliberate social forgetting), out of fear of retaliation and reprisal and other reasons: (n 35).

[49] Jeong *Strategy and Process* (n 32) 163; also Chesterman (n 33) 154.

https://doi.org/10.1017/S002058930800081X Published online by Cambridge University Press

contested subject matter, there is the risk that the commission could itself become a focus or forum of renewed conflict (both in settling on its design, during its process, or the tone of its report),[50] or antagonize those with residual power: influential but implicated persons upon whose cooperation the new, perhaps fragile, national unity depends. Fourth, a truth commission could be hugely distracting, draining and expensive at a time when other priorities exist.

Fifthly, every country situation is unique, 'reconciliation' in particular is something that needs to be defined within a specific cultural context,[51] and so a number of more general cautions need to be expressed in approaching foreign models and comparative experience. South Africa's experience has been hugely influential,[52] and is likely to be seen as apposite for Zimbabwe (perhaps without sufficient consideration of the many differences between these two neighbouring countries). However, no model of truth commission is ideal for all purposes, and in view of the historical, cultural, political and other differences that confront different regimes undergoing transition, certainly no model can be simply transposed directly from one situation to another.[53] The eventual model adopted will, if it is to be successful, need to be designed to

[50] This is one of the reasons why Mendlehoff suggests that we 'curb the enthusiasm' for truth commissions: (n 24). The UN handbook *Rule of Law Tools for Post-Conflict Societies: Truth Commissions* (Office of the High Commissioner for Human Rights, Geneva, 2006; (n 86) below notes (albeit only in conclusion, 36) that a commission can be a risky endeavour in a fragile transition. In *Taking Wrongs Seriously* (n 24), Trudy Govier consistently notes that a superficial or dishonest or forced truth and reconciliation process may not only be unsuccessful but even itself dangerous and produce effects opposite to those intended. Daly has observed that it is increasingly characteristic of transitional governments to be 'infatuated with the truth' ascribing it 'all manner of curative powers' and reaching for truth commissions in a 'headlong' fashion without pausing to consider alternatives or negative consequences: Daly 'Truth Skepticism' (n 28) 23–4. The considerable force of these arguments undermines the search for the normative 'neatness' implicitly sought by some commentators in relation to transitional justice.

[51] Jeong *Strategy and Process* 184.

[52] The literature it has generated including in terms of 'comparative models' is large. See recently K Emmanuel, 'Between Principle and Pragmatism in Transitional Justice: South Africa's TRC and Peace Building' ISS Paper # 156 (Institute for Security Studies, Pretoria, 2007) and the extensive bibliography therein. See generally A Boraine, *A Country Unmasked: Inside South Africa's Truth and Reconciliation Commission* (Oxford University Press, New York, 2000); Posel and Simpson (eds) *Commissioning the Past: Understanding South Africa's Truth and Reconciliation Commission* (Witwatersrand University Press, Johannesburg, 2002); S Garkawe, 'The South African Truth and Reconciliation Commission: a suitable model to enhance the role and rights of victims of gross violations of human rights? (2003) 27(2) Melbourne University Law Review 334; J Quinn and M Freeman, 'Lessons Learned: Practical Lessons Gleaned from Inside the Truth Commissions of Guatemala and South Africa' (2003) 25(4) Human Rights Quarterly 1117. For a critical appraisal of the South African TRC see Stuart Wilson, 'The Myth of Restorative Justice: Truth, Reconciliation and the Ethics of Amnesty' (2001) 17 South African Journal on Human Rights 531. The Institute for Justice and Reconciliation's paper 'Truth and Reconciliation in South Africa: Ten Years On' provides a realistic assessment of what a TRC can reasonably accomplish and provides an audit of the response of government and other agencies to the unfinished business of the TRC: www.ijr.org.za/publications/publications-v2-1/truth-and-reconciliatin-in-south-africa-10-years-on/.

[53] J Sarkin, 'The Necessity and Challenges of Establishing a Truth and Reconciliation Commission for Rwanda' (1999) 21 *Human Rights Quarterly* 767, 802.

https://doi.org/10.1017/S002058930800081X Published online by Cambridge University Press

respond to the particular needs and dynamics in Zimbabwe. A foreign model of institution might be legitimate and work well in a receiving country, provided that it is translated into local terms by the agency of local actors representative of the wider public.[54]

World Bank studies note that institutional designs have been most effective, unsurprisingly, when they meet needs 'in ways compatible with country conditions'. Significantly, 'supplying' institutions is not enough: demand for these needs to be created, people must want to use them.[55] As Davis has pointed out in relation to entrenching constitutionalism, institutional indigenisation enables such phenomena to reach and be reached by the grassroots level.[56] Especially where external actors believe there to be certain model ways to build peace, we ought to bear in mind the warning given by Dezalay and Garth against the reproduction of global institutional 'prescriptions' of law or (in our case) quasi-legal institutions:

> Internationally-generated imports succeed only where the local situation allows them to be nationalised—made part of the indigenous structures and practices. Local histories determine what can be assimilated into local settings and how what is assimilated will affect long-standing local practices . . . while we tend to

[54] 'Modelling' as used in the social sciences describes the process by which one actor observes, interprets and copies the actions of another. It connotes more than mere imitation: rather it involves (or should involve) 'intelligent adaptation to ensure that the exotic plant can take root in native soil' B Opeskin, 'Australian Constitutional Law in a Global Era' in French, Lindell & Saunders (eds) *Reflections on the Australian Constitution* (Federation Press, Sydney, 2003) 176. We ought to be careful of the term 'exotic': while its courts and public institutions have been compromised, Zimbabwe is not to be conceived of as a 'noble savage' standing to benefit from the enlightenment of foreign institutional ideas; nor is it what Bhargava would call a 'symmetrically barbaric society' where there is no consensus on moral norms (R Bhargava, 'Restoring Decency to Barbaric Societies' in Rotberg & Thompson (n 24): agreed fundamental norms exist in Zimbabwean society and in its law (Chapter III of the *Constitution of Zimbabwe* 1979 (Bill of Rights), even if they have been breached and not practically enforceable for some time.

[55] The World Bank recommends that successful new institutions share these features: they complement what already exists; they innovate; they connect with 'users'; they are aware of competing institutions so that they remain oriented towards servicing needs: *World Development Report 2002* (Oxford University Press, New York, 2002).

[56] M Davis, 'East Asia after the Crisis: Human Rights, Constitutionalism and State Reform' (2004) 26(1) *Human Rights Quarterly* 126, 128; 145. In relation to interpreting the South African Bill of Rights, Currie and de Waal, *The New Constitutional and Administrative Law* Vol 1 (Juta, Cape Town, 2003) fn 24:

> While in South Africa we may look to the jurisprudence of . . . [other] constitutional democracies as a vast historical text from which to draw . . . , the principles of constitutionalism adopted by our courts will achieve acceptance only if they address local problems. It is the shaping of these principles in the context of applying them to local issues—in effect their hybridization—which will give them a unique South African character and life. *Our new experiment with constitutionalism will only bear fruit to the extent that these principles become ingrained into the hopes, dreams and practices of our society*. From there, they will become part of the global text from which others may [in turn] draw examples and arguments while simultaneously shaping them to meet their own circumstances.' [Emphasis added].

https://doi.org/10.1017/S002058930800081X Published online by Cambridge University Press

> think of the rule of law as an international concept, law must be produced at the national level to make national sense.[57]

There is a related danger that in designing institutions such as truth commissions, too much emphasis is given to lawyers and experts, including foreign experts. In the constitution-making context, but in a relevant way to our topic, Shaw has asked whether we risk 'dangerously privileging law over politics, diverting constructive polity-building energies into blind alleys of discussion among technicians and experts about constitutional authority, sovereignty and legal rights which fail to illuminate . . . fundamental questions of political acceptance and legitimacy'.[58]

A sixth caution is that we need to be conscious of the chronologies, prescriptions and formulae that international law and an international renewalist project may, even unconsciously, seek to impose on post-conflict societies: if actors in the international community suggest or require certain features based on international legal standards, what ideological preferences or structural dynamics does 'international law' contain for a particular society?[59] Seventhly, we ought to be aware of the danger of legitimizing the previous regime by effectively enabling its representational portrayal and perhaps redemption in an ordered, formal institutional process.[60] Eighthly, we see a risk, in particular in international expectations or responses to these, of a degree of ritualistic 'going through the motions',[61] or a situation whereby institutionalization becomes, paradoxically, a way of distancing society from the process and from its responsibilities, rather than a forum for engaging in these.[62]

[57] Y Dezalay & B Garth (eds), *Global Prescriptions: The Production, Exportation, and Importation of a New Legal Orthodoxy* (University of Michigan Press, 2002) 326. See also H Klug, 'Hybrid(ity) Rules: Creating Local Law in a Globalised World' in Dezalay & Garth, 276ff.

[58] 'Process, Responsibility and Inclusion in EU Constitutionalism: A Contribution to the Debate on a Constitutional Architecture' Constitutional Web Papers, No. 4, 2001 ([http://les1.man.ac.uk/conweb/]).

[59] S Marks 'Guarding the gate with two faces: international law and political reconstruction' (Symposium: The Rule of Law in the Era of Globalization) (1999) 6(2) *Indiana Journal of Global Legal Studies* 457.

[60] cf. R Wilson *The Politics of Truth and Reconciliation in South Africa: Legitimising the Apartheid State* (Cambridge University Press, 2001).

[61] Ritualism in this context is the application of institutionalised means for securing objectives in such an unreflective and automatic way that focus is lost on actually achieving those outcomes: Merton, *Social Theory and Social Structure* (Free Press, New York, 1968). In the context of truth commissions and for on another aspect of 'ritualism', see T Kelsall, 'Truth, Lies, Ritual: Preliminary Reflections on the Truth and Reconciliation Commission in Sierra Leone' (2005) 27(2) *Human Rights Quarterly* 361.

[62] Of course, many of these institutions are intended to be highly ritualistic and symbolic rather than attempting substantial individualised justice for perpetrators and individuals. It is conceivable that a traumatised society would prefer a ritualised, symbolic process at a distance than a very involved—but painful—process; for more discussion see M Humphrey 'From Victim to Victimhood: Truth Commissions and Trials as Rituals of Political Transition and Individual Healing' (2003) 14(2) Australian Journal of Anthropology 171.

https://doi.org/10.1017/S002058930800081X Published online by Cambridge University Press

Ninthly, and related to the danger of abuse by local elites, there is a risk that such institutions are cosmetic only, or are embarked upon for the wrong reasons as a primarily externally-driven or led agenda.[63] As Rudi Teitel has recently observed, compliance with the demands of international criminal tribunals and prescriptions for transitional justice has come to be seen as a path to political legitimacy for transitional states:[64] this might lead to taking decisions that are not in the best interests of resolving the actual problems facing that society, so jeopardising sustainable peace. 'Transitional justice options' ought not to be selected (or advised or imposed by donors or agencies) and embarked upon for reasons that have more to do with outsiders' expectations than what is needed—and wanted—on the ground. Before a truth commission is initiated in a particular setting, it ideally ought to be established whether such an exercise has popular support among ordinary persons (not just local or international NGOs or government elites).[65] For our argument the particular significance of this point is that as a result of the many complex decisions they face, it will prove difficult to discern normative content on transitional justice decisions by states.

Tenth and finally, what is possible by way of institutionalised response—how robust and intrusive and prosecutorial it might be, for example—is of course heavily dependent on what is politically feasible or wise according to the balance of political power at the time of the transition. This will vary from case to case,[66] and it is not only local issues that affect the justice options: foreign political pressure can be determinative.[67] A truth commission may represent a local political compromise, as criminal prosecutions would be too provocative or untenable given the residual power in elements of the previous incumbent regime (who may be part of a unity transitional government). Justice Goldstone has remarked that the South African process '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

[63] Parker (n 26) also notes (37) that some truth commissions might be manifestations more of an attempt to appease the international community than a considered, popular decision or response to domestic demand. Bosire (n 24) 3 has cautioned that unmet expectations of transitional justice efforts are partly due to a default resort to a legally and institutionally demanding understanding of transitional justice divorced from the reality of weak capacities. While critical of the 'infatuation' with truth commissions, Daly ought to acknowledge that the 'transition planners' to whom her related caution is directed are usually not just 'transitional governments' but international NGOs, donors, the UN and others: E Daly 'Truth Skepticism' (n 28) 23; 40–1.

[64] R Teitel, 'Transitional Justice Globalised' (n 24) 3.

[65] Shaw (n 35) 12. Notwithstanding the (sincere) keenness of some international civil society organisations, a truth commission is not something to be imposed upon a society according to some transitional justice formula, automatically as part of a conflict resolution 'first aid kit'. More recently Teitel used the term 'tool box' to make substantially the same point: (n 25) 4.

[66] See D Shea, *The South African Truth Commission: The Politics of Reconciliation* (United States Institute of Peace, Washington DC, 2000); on prosecution models, see G Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton University Press, 2000).

[67] Parker (n 26) 3–5.

https://doi.org/10.1017/S002058930800081X Published online by Cambridge University Press

and forgetting on the other.'[68] By contrast, in Solomon Islands, and partly as a result of the relatively high level of political control and security influence that the intervening regional assistance mission could bring, the preference was to strengthen courts and pursue prosecutions, leaving reconciliation mechanisms to informal, church-based and community processes. The idea of a formal truth commission with the suggestion of amnesties was thought to send mixed messages about future responsibility for ethnic violence.[69] How and whether past injustices will be dealt with will largely be determined by the actual nature of any political transition in Zimbabwe. We are conscious that emphasising political realities can be something deployed by those acting in bad faith whose aim is to justify illegitimate transitional justice 'whitewash' strategies that fail to address victims' rights and needs. It nevertheless reinforces the difficulty in prescribing certain forms of transitional justice, that is, the difficulty of arriving at those standards in the first place.

Where there is a high level of awareness about the problem (accompanied by fatigue, political power imbalances, widespread communal implication, and the need to avoid creating a new venue of disputation), it is as least arguable, then, that Zimbabweans may feel that the best way to proceed is to 'leave the past alone'.[70] Most experience, as we argue, points the other way, especially where there are concerns about *who gets to decide how to proceed*. The often intense political pressure and the peace-seeking basis for 'justice compromises' again illustrates the difficulty of defining with any precision whether and how international law constrains a state's options in determining how to fulfil its general duty to act somehow to remedy human rights abuses within its jurisdiction.

[68] 'TRC preferable to trials' *Pretoria News* (18 August 1997), cited in A 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. Truth commissions are often—but not necessarily—the deliberate result of political compromise, rather than imposed by the dominant new regime. As Tomuschat points out, the 'background of a truth commission is invariably . . . of stalemate in a political power play': C Tomuschat, 'Clarification Commission in Guatemala' (2001) 23 Human Rights Quarterly 233, 235. In the transition to democracy in South Africa, the white minority still wielded serious negotiating power, including through control of the police and military. In Chile and Argentina, the enduring influence and power of the military leadership meant that at least initially it was unthinkable to commence criminal actions against the main culprits. In El Salvador and in Guatemala, the commissions were components of the ceasefire and peace agreements where neither government nor rebels had suffered military defeat.

[69] Ho-Won Jeong observes that '[o]verall strategies of reconciliation are affected by political constraints and evolving intergroup relations in a postconflict society.' Imposing justice can have a disruptive potential and, for example, lead to military coups, so that it may be crucial 'not to provoke still-powerful elements in the armed forces that retain political veto power during a fragile democratic transition' so that for any process of truth-seeking 'the alignment of forces at the time of transition shapes the nature and degree of truth revealed': Strategy and Process (n 32) 155; 168–9; 185, and see this theme explored in A Rigby, *Justice and Reconciliation: After the Violence* (Lynne Reinner, Boulder, 2001).

[70] Victor de Waal's characterization of Zimbabwe's first decade after independence in 1980 is that it may have involved society as a whole deciding to simply move on, leaving the past behind: *The Politics of Reconciliation: Zimbabwe's First Decade* (David Philip, Cape Town, 1990) 45.

https://doi.org/10.1017/S002058930800081X Published online by Cambridge University Press

V. INTERNATIONAL LAW, MINIMUM STANDARDS AND A 'TRUTH COMMISSION NORM'

A new Zimbabwe Government will probably aim to appease international opinion. The MDC's 2008 Policy Statement notes that its justice strategy (including a truth commission) is intended to pre-empt criticism or alternative (international) remedies: '[n]othing can be gained by condoning violations of international law in our domestic law: victims will go above Zimbabwe's law and courts to international tribunals.'[71] The MDC's policy is said to be based on four international *legal* principles: the communal 'right to know', the right to justice and a remedy, the right to reparations, and the 'right to non-recurrence.' As noted above, while it does not expressly call for a truth commission, the September 2008 agreement records that the parties have considered the significance of taking measures to '*achieve national healing, cohesion and unity in respect of victims of pre and post independence political conflicts'* (emphasis added).

Aside from substantive international crimes which may have taken place in Zimbabwe (many of which are also violations of the Bill of Rights in Chapter III of the *Constitution of Zimbabwe* 1979), what international legal framework possibly informs, shapes or constrains the decision to pursue a truth-for-amnesty commission? We first consider the existence and content of the state's duty to afford a remedy for human rights violations, and the extent to which a concomitant of this might be a 'right to truth'; secondly, consideration is given to whether practice has led either to a minimum international standard for truth commissions' form and practice, or to a norm prescribing a truth commission process as a necessary component of a democratic transition from a violent past.

By its accession in 1991 to the *International Covenant on Civil and Political Rights* (ICCPR),[72] the Zimbabwean State has assumed the international obligation to afford an effective remedy to victims of human rights abuse (from whatever source). This amounts to a positive duty to investigate and to prosecute, bring to justice or take action against those responsible for serious violations of the rights provided for in that instrument; to provide victims with equal and effective access to justice; to provide appropriate remedies to victims; and to provide for (or at least facilitate) just and adequate reparations.[73] The State may also have a duty to provide protection

[71] MDC 2008 Policy (n 18) 1.

[72] ICCPR 1966, GA Res. 2200A (XXI), UN Doc. A/6316, entered into force 23 March 1976—Zimbabwe acceded on 13 August 1991. Importantly it is also a party to the *African Charter on Human and Peoples' Rights* (the 'Banjul Charter') 1981, entered into force 21 October 1986—Zimbabwe ratified on 30 May 1986.

[73] Article 2 ICCPR; see also Article 8 of the *Universal Declaration of Human Rights* 1948 (GA Res. General Assembly Resolution 217A (III)); UN Human Rights Committee, 'General Comment No. 31 on Article 2 of the Covenant: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' (UN Doc. CCPR/C/74/CRP.4/Rev.6 (2004), [15], [16]; UN *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law* (UN Commission on Human

https://doi.org/10.1017/S002058930800081X Published online by Cambridge University Press

and humanitarian assistance to internally displaced persons within its jurisdiction.[74]

In the context of very widespread victimization, scarce resources and capacity, and other competing considerations, it is suggested that the decision to establish a truth commission may be understood as a bona fide and sufficient attempt to fulfil the state's duties in this regard.[75] The second and third of the MDC's principles are clearly established in international law (a right to an effective remedy and to a form of reparation). Despite its unusual phraseology, the fourth (a 'right to non-recurrence') probably amounts to no more than the State's very well-established duty to promote human rights protection and prevent violations from whatever source. In relation to the first principle (the MDC's expression of an individual and communal 'right to know'), despite the trend for truth commissions in recent transitional arrangements, we are not sure of the solidity of arguments describing the alleged codification of a 'right to truth' in international law. While this has received some attention,[76] it is perhaps only one way of expressing the (well-established, perhaps expanding) duty on the State, referred to above, to at least initiate investigations into allegations of rights violations and attempt a reasonable remedy where appropriate.

At a more abstract level, some might argue that the form of truth commission that might be adopted is constrained normatively by what the

Rights, E/CN.4/Sub.2/1993/8; E/CN.4/1997/104); also (in relation to 'gross' violations), the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* adopted by the UN General Assembly on 16 December 2005 (A/Res/60/147). Under the 2005 *Basic Principles*, reparation should respond to the needs and wishes of the victims and be proportionate to the gravity of the violations and the resulting harm. It should include restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. In addition to providing reparation to individuals, states should make adequate provision for collective reparations for groups of victims and special measures should be taken to afford opportunities for self-development and advancement to groups who, as a result of human rights violations, were denied such opportunities.

[74] *UN Guiding Principles on Internal Displacement* (UN Doc. E/CN.4/1998/53/Add.2; 11 November 1998. In this respect, it is likely the Principles declare an international legal duty.

[75] The State's duty in respect of crimes of concern to the international community as a whole is considered below.

[76] See the positions expressed in 'Report of the Independent Expert: Update of Set of Principles to Combat Impunity' (E/CN.4/2005/102/) (Geneva, 2005) and 'Promotion and Protection of Human Rights: Study on the Right to Truth' (E/CN.4/2006/91) (OHCHR, Geneva, 2006). More study is necessary on the issue of sourcing support for the bindingness of rules from the practice and publications of influential intergovernmental agencies such as the OHCHR. The state duty to investigate alleged disappearances declared in the famous *Velasquez Rodriguez* case (Inter-American Court of Human Rights) (1989) 28 ILM 291 is one of the bases relied on in a recent overview expressing support for the existence of 'a right to truth': Parker (n 26) 22–25. Apart from the awkwardness of conceiving of a right to 'truth', we do not think that the sources of Art 2(3) ICCPR or *Velasquez* amount, as such, to an internationally enforceable 'right to truth': it is a duty to genuinely investigate and attempt to remedy human rights abuses, and no more precise content can be placed on it. For European practice, see A Mowbray 'Duties of Investigation Under the European Convention on Human Rights' (2002) 51 ICLQ 437.

https://doi.org/10.1017/S002058930800081X Published online by Cambridge University Press

international community would deem to be a 'respectable' form of process. A constitution-making analogy is instructive: Currie and de Waal, for example, have expressed the view that the diversity of constitutional alternatives before 1989 gave way to increased uniformity, with liberal constitutional principles becoming a prerequisite for 'international constitutional respectability'.[77] Klug too argued that during the 1990s it became possible to identify 'a thin, yet significant, international political culture, which is shaping the outer parameters of feasible modes of government.'[78] If the analogy could be applied to truth commissions and other temporary bodies, and although it is more likely to be a matter of political recognition than legal consequence, it could be argued that the quality of process (the sincerity of the effort, the extent to which it gives effect to internationally recognized rights, fulfils the State's duty to act on rights abuses and afford an effective remedy, the independence of the institution, and so on) and the legitimacy of the regime that sponsors it, can indicate whether a particular commission is accorded international 'respectability'.

Parker has recently expressed the view that an emerging international norm in relation to truth commissions can be discerned through both the practice and approval of States and of international organizations, and through the opinions of advocates, activists, and writers who consider such institutions to be necessary components of internationally acceptable and respectable transitions.[79] The implication of Parker's analysis is not just that commissions are coming to be required to display certain characteristics or features in order to pass legal muster as 'valid' institutions; it is that there is an emerging norm requiring a truth commission as a feature of a legitimate post-conflict transition. Parker's argument, couched mainly in international relations theory, seems directed more to the emergence of a political norm than one of 'hard' international law.[80] One question in determining the normative force to be attributed to a transitional State's decision to erect a truth commission is

[77] Currie & De Waal (n 56) 24.

[78] Klug (n 46) 6. The corollary of such comments ties into wider debate, beyond the scope of this paper, on whether an emerging norm of a right to democratic governance exists in international law (such as the work of Thomas Franck) or the more controversial claim attributed to Francis Fukuyama as to whether western liberal democracy is now recognised as the 'final form' of government.

[79] Parker (n 26). In support of the norm's crystallisation, her work chronicles the patterns of recommendation, praise and adoption of truth commissions, for example in UN-sponsored peace agreements or by agencies of the UN and international NGOs. We think it is misconceived to posit a norm on these bases alone. See also E Newman, 'Transitional Justice: the Impact of Transnational Norms and the United Nations' in Newman & Schnabel (eds) *Recovering from Civil Conflict* (Crown House, London, 2001).

[80] At other points, however, it is clearly asserted as a legal norm: Parker's conclusion not only confuses two bodies of law, but goes too far. She argues that 'not only does the truth commission mechanism agree with international principles of human rights law, but are in fact demanded by international humanitarian law itself' (25). The praise and practice (mainly of NGOs) narrated by Parker cannot be said to amount to a norm that a truth commission is an obligatory part of transitional justice.

https://doi.org/10.1017/S002058930800081X Published online by Cambridge University Press

whether this is done as a result of a legal conviction that it is bound to adopt such a strategy, or whether it is simply responding to local or international social and political demands. The practice of transnational NGO networks (and the uptake and response to their output) can contribute to norm development.[81] However, the mere fact that there is uniformity in guidelines, handbooks and other resources (for example, recommending a certain form of truth commission) is not itself indicative of a norm: many international transitional justice NGOs are entrepreneurial, self-interest is often at place their advocacy of 'minimum standards' surely needs to be seen in this light.

Perhaps supporting Parker's argument, and while not all 'transitional' situations are 'post-conflict' situations, some have argued that any new or emerging 'post-conflict law' would include justice and reconciliation models for criminal responsibility, as based on recent practice.[82] Related to such arguments is the question of whether the UN's practice and policies, which take place against the backdrop of overarching legal principles, have themselves contributed to the development of a normative or legal framework for the guidance and regulation of future UN involvement in post-conflict situations, including in relation to transitional justice options.[83] In our view, the merits and prevalence of truth commissions does not mean that a transition which forsakes such an institution has breached any norm. Provided the core of the Article 2(3) ICCPR duty is met, it is more likely that the politics of institution-making remain eclectic so that States have a range of alternatives in terms of transitional justice strategies.[84] Where the issue is likely to matter is in relation to the external or global validity of any amnesties provided by a national commission, which we return to below.

VI. A ZIMBABWEAN TRUTH COMMISSION: ESTABLISHMENT, MANDATE AND PROCESS

The reader will be conscious that, subject to the various cautions expressed above about the utility or appropriateness of comparative models and

[81] M Keck and M Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics* (Cornell University Press, Ithaca, 1998).

[82] C Stahn, '"Jus ad Bellum", "Jus in Bello" . . . "Jus Post Bellum"? Rethinking the Conception of the Law of Armed Force' (2006) 17 European Journal of International Law 921, 938–41. The difficulty in characterising very diverse political situations as 'transitional' or 'post-conflict' is, we would add, one consideration undermining the supposed normative conclusions to be drawn.

[83] N White & D Klaasen (eds), *The United Nations, Human Rights and Post-Conflict Situations* (Juris/Manchester University Press, 2005) 1, 3; the argument appears to be that since the UN with its 'unique claims to universal competence in human rights' has 'to a large degree' responsibility for setting the standards in this area, its practice can be the basis of new normative frameworks. See also Newman (n 79) 31. And see too R Cryer, 'Post-Conflict Accountability: a Matter of Judgment, Practice or Principle?' in N White & D Klaasen (eds), *The UN, Human Rights and Post-Conflict Situations* (Manchester University Press/Juris, 2005) 281–286 on the significance to be placed on the practice, which he chronicles, of the UN in negotiating peace agreements and it policy on amnesties.

[84] Klug (n 46) 23 (in relation to constitutional forms adopted by new or transitional states).

https://doi.org/10.1017/S002058930800081X Published online by Cambridge University Press

experiences (and other risks of a truth commission process), we are favourably disposed to these institutions as a form of practical but principled[85] compromise in transitional justice settings, partly on the empirical basis that they have assisted other societies faced with similar dilemmas. There are lessons to be learned from other experiences in relation to the various challenges that Zimbabweans might confront should they attempt to create a truth commission in future.[86] What follows is an attempt to briefly survey some comparative practices of States in establishing and carrying on national truth commission processes. We have selected ten design and operational features to illustrate that a diverse range of practices and procedures have been adopted. This survey will reveal that provided the commission represents a genuine attempt to provide a remedy (in fulfilment of the general duty discussed), it is really only in relation to the grant or purported grant of amnesties for serious crimes of concern to the international community as a whole that international normative considerations become apparent. As we discuss below, whether any grant of amnesty is recognized in international or foreign forums is partly dependent on the nature and quality of the process that gave rise to it, and (in turn) the legitimacy of the regime which set that process in place. That is, an essentially political assessment (locally and internationally) as to the independence, good faith and comprehensiveness of a commission is likely to be important to any legal issues arising about whether the state has discharged its remedial duty, or about the validity of amnesties granted.

First, the presence or absence of international support or even pressure leading to a commission or involved in its operation does not necessarily affect a commission's legitimacy. By contrast, international sponsorship may greatly assist a local commission's credibility, profile, perceived independence, as well as its funding and skills-base.[87] Secondly, the degree of genuine

[85] Cf Emmanuel (n 52).

[86] A number of tools and resources exist: see for example *Reconciliation after Violent Conflict* (International Institute for Democracy and Elections, Stockholm, 2003); D Orentlicher, *Report of the Independent Expert: Update of the Set of Principles to Combat Impunity* E/CN.4/2005/102 (United Nations, Geneva, 2005); *Rule of Law Tools for Post-Conflict Societies: Truth Commissions* (Office of the High Commissioner for Human Rights, Geneva, 2006); Amnesty International, *Truth, Justice and Reparation: Establishing an Effective Truth Commission* (London, 2007). See also generally the resources pooled at www.ictj.org (the International Centre for Transitional Justice, New York). For a comparative overview of different processes, see www.truthcommission.org (Harvard law school & the European Centre for Common Ground). See also Hayner, *Unspeakable Truths*, Chapters 4 & 5, and also P Hayner, 'Fifteen Truth Commissions—1974 to 1994' (1994) 16 *Human Rights Quarterly* 597. Some of these issues were canvassed by one of the authors in 2002: M du Plessis, 'Truth and Reconciliation Processes: Lessons for Zimbabwe?' Report No. 44 (South African Institute of International Affairs, Pretoria, 2002).

[87] International civil society organizations may play a very important role. See generally K Kumar (ed), *Rebuilding Societies after Civil War: Critical Roles for International Assistance* (Lynne Reinner, Boulder, 1997), and for a case study, McPherson, 'Supporting Post-Conflict Reconciliation: An Assessment of International Assistance to South Africa's Truth Commission (CSVR, Johannesburg, 2001); Cf J Braithwaite (n 44) 187 (outside peacemakers can seldom

https://doi.org/10.1017/S002058930800081X Published online by Cambridge University Press

participation of reputable local NGOs in designing and operating the commission is likely to shape perceptions of the standing and merit of the institution.[88] Thirdly, the degree of (perceived) operational independence from other arms of government is likely to be significant for judgments on the commission's legitimacy.[89] Fourthly, and directly related to capacity for independence but also of obvious practical importance, are issues of funding: a successful and legitimate process requires genuine commitments in the form of sufficient resources to investigate, research, conduct hearings, and so on.[90] Fifthly, the funding question becomes more complicated in practice if it is envisaged that the commission not only fund its own operations, but also be responsible for distributing any form of monetary compensation for some victims which may be envisaged.[91] On one view, the new government will have inherited, in effect, certain liabilities against the State, some of which may have been acted upon (by instituting civil claims). Issues might arise of deprivation of property if the new order decides to attempt to retrospectively immunise itself from already instituted civil (delict or tort-based) suits; the international right to an effective remedy might be triggered. But there is no clear duty to afford *monetary* compensation to victims. There is very little practice on which to identify a normative trend.[92] Moreover, one is unlikely to develop since there are both practical considerations (limited resources and management of payment schemes in a weak governance scenario) and issues of principle: to what extent is monetary compensation appropriate, especially

deliver the sort of engagement required at community level). There are many examples of commissions receiving external funding.

[88] International Centre for Transitional Justice *Truth Commissions and NGOs: the Essential Relationship* (ICTJ, New York, 2004). Aside from advice, support, counselling and other activities, raising public awareness of the proposals for a truth commission or of the commission's work once established or completed is an important role for local civil society.

[89] The ideal is of an institution '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' Hayner, *Fifteen Truth Commissions* (n 87) 179. One factor in favour of stronger international involvement in such an institution is the influence a strong external actor can bring to bear, through conditionality and other controls, or even 'hybrid' structures with expatriate impartial staff, in both ensuring operational independence and the perception of such independence.

[90] Financially under-resourced truth commissions have failed: Hayner, *Unspeakable Truths*, 69, 224. Throughout its operation the Guatemalan commissioners were constantly diverting their energy away from the work of the truth commission and towards attempts to raise money from networks within the international community: Tomuschat (n 68) 248.

[91] A truth commission's work may involve indirect financial consequences if, for example, it recommends certain institutional and legal reforms or human rights training for security services, refers matters for prosecution, proposes monuments and symbolic measures, or communal reparation in the form of development projects, or recommends the establishment of various bodies to oversee and resolve land and property disputes.

[92] The South African TRC was empowered to make smaller 'Urgent Interim Reparation' payments to victims (or their families) in urgent need, and 'Individual Reparation Grants' for up to six years to 'eligible' victims. 22,000 eligible victims were identified during its proceedings, and eventually a one-off payment of R30,000 was given to such persons from the specially constituted President's Fund.

https://doi.org/10.1017/S002058930800081X Published online by Cambridge University Press

in cases of widespread victimization?[93] In Zimbabwe's own case, public compensation schemes have in the past been heavily subject to abuse and looting.[94] The *Breaking the Silence* report expressed the view in relation to the 1980s violence that individual compensation in Zimbabwe was not a feasible option, and this view may remain dominant. Given the practical need to ensure the integrity of any truth commission, and the critical economic situation, it would be very difficult to argue that the duty on the Zimbabwean State to afford redress included monetary compensation to victims.[95] There is no principle of international law and scant practice to suggest that, where other reparation measures are attempted, lack of monetary compensation is unacceptable.

Sixthly, the mandate of the commission may be significant to its political and normative acceptability. But commissions have been established in a wide variety of ways, the majority by presidential decree (Argentina, Chile, Haiti, Sri Lanka, Chad, Uganda), some by peace accord (El Salvador, Guatemala), and others created as a statutory body by the national legislature (South Africa).[96] Written mandates for truth commissions often have restricted terms of reference that reflect the political compromises agreed upon in the transition negotiations. Argentina, Uruguay and Sri Lanka's commissions were restricted by their mandate to consider only disappearances; 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.[97] 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, preferably leaving it to the commission to decide the most appropriate cases or practices to investigate.[98] 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'.[99] 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

[93] There is perhaps a tendency in the literature to focus on psychological aspects of communal 'healing', while glossing over the real needs victims may have for specific medical treatment and rehabilitation.

[94] See discussion in relation to the Zimbabwe context in the earlier section (n 13 above).

[95] Specific attention will be needed to the place of existing pension and compensation mechanisms which may be subject to legitimate claims preceding the recent crisis. A Zimbabwe commission might make recommendations but leave service provision to a range of other government and civil bodies.

[96] For a comprehensive list of the ways in which truth commissions have come to be established, see Hayner *Unspeakable Truths*, Appendix 1.

[97] Hayner *Unspeakable Truths* 72.

[98] Hayner *Fifteen Truth Commissions* 636.

[99] Hayner *Unspeakable Truths* 73. See too the South African TRC's mandate which called for investigation of 'gross violations of human rights, including the violations which were part of a systematic pattern of abuse'.

https://doi.org/10.1017/S002058930800081X Published online by Cambridge University Press

issues necessary for the achievement of reconciliation.[100] The variety of mandates and bases for mandates again reveals the lack of clear practice of the sort that might accrue some sort of normative weight in giving any content to the duty to afford a remedy.

Seventhly, it goes almost without saying that the empirical legitimacy of the commission—its ability to be accepted by the population as a credible body capable of finding some 'objective' truths—generally depends on the stature and reputation and ability of its senior members.[101] The merits of a 'hybrid' commission, including some foreign members, can be quite apparent in terms of both substance (skills) and form (local confidence).[102] The manner of appointing commissioners will be significant, although it is likely to be heavily influenced by the political power balances at the time. In recent years several commissions have adopted processes that have ensured transparency and public participation.[103] The South African model illustrates that it is possible to make some parts of the appointment process visible (for example, public interviews).[104] In South Africa, an Act of Parliament created the commission as an independent investigative body. A selection committee was formed, including representatives of local human rights NGOs, which then called for nominations from the public, and compiled a shortlist from which President

[100] Note, however, criticisms directed at the *overly* broad mandate of the Guatemalan Clarification Commission which was required to investigate 'the' human rights violations—textually meaning 'all' relevant human rights violations committed during twenty years of different dictatorships, provided they were linked to the armed confrontation. This overburdened the commission: Tomuschat (n 68) 239–240. The Nigerian equivalent's mandate to consider 'human rights violations or abuses' was understood very broadly: in its first few weeks of work 90 per cent of the 10,000 submissions pertained to labour disputes. The commission adjusted itself to focus on 'gross violations of human rights only': Hayner, *Unpseakable Truths* 69. One issue in Zimbabwe will be a mandate that includes human rights abuses associated with land invasions and displacement, without dragging the commission into the politics of land redistribution as they then stand.

[101] Sarkin (n 53) 804. Considerations also include the extent to which commissioners are seen to be representative of a range of perspectives, racial, ethnic and other backgrounds Hayner, *Fifteen Truth Commissions* 654. While institutional independence is significant, it is not out of the question to include political party actors. In Chile, eight commissioners were appointed from both sides: Sarkin (n 54) 806; Hayner *Unspeakable Truths* 35. This may be a political necessity, despite the ideal of non-partisanship. 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). However, it may be unavoidable that political party representatives are included—at least they are engaged.

[102] Both the Cambodian and Sierra Leone courts have been 'hybrid courts' involving local and foreign judges. See generally L Dickinson, 'The Promise of Hybrid Courts' (2003) 97(2) American Journal of International Law 295. 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. It is unlikely that exclusively foreign commissioners would be acceptable in any Zimbabwean commission, and there are good reasons for including nationals.

[103] Sarkin (n 54) 806; Hayner, *Unspeakable Truths* 216.

[104] J Sarkin, 'The Trials and Tribulations of the South African Truth and Reconciliation Commission' (1996) 12 South African Journal on Human Rights 617, 621.

https://doi.org/10.1017/S002058930800081X Published online by Cambridge University Press

Mandela chose the Commission.[105] International actors can bolster legitimacy of this stage and help build confidence among the various actors. There has been great variety in terms of the professional backgrounds of commissioners,[106] the staffing size of the commission, and so on.[107]

An eighth area of consideration is that of timing of a truth commission. Here while a long delay might undermine the 'effectiveness' of any remedy, the considerations are almost entirely practical as well as dependent upon political imperatives. Experience shows that often the quicker the commission is set up and begins its work, while the window of opportunity and local and international political momentum is strong, the better.[108] On the other hand, a drawn-out design process can increase public awareness and legitimacy: there is no point establishing a wonderful new institution if nobody knows about it or uses it.[109] The 18 months spent designing the South African Truth and Reconciliation Commission after the democratic elections of April 1994, allowing broad input, political buy-in and nuanced legislative development might be seen as critical to the international recognition afforded to its outcomes overall. A second timing issue relates to the duration of a commission's mandate: a long, drawn-out process could still be fairly cosmetic. The majority of truth commissions have had very limited time to complete their work, usually between six months and a year to complete all investigation and to submit a report.[110] More recent commissions have worked for longer (almost five years in total for the South African TRC). Hayner suggests that one to two-and-a-half years is probably optimal.[111] On the other hand, it will take time for people to learn about, let alone trust and engage with such an

[105] A similar process was followed in Sierra Leone where the Special Representative of the UN Secretary General was appointed as selection co-ordinator and was directed to call for nominations from the public.

[106] There are strong arguments for having a range of professions, beyond the legal profession: see Hayner, *Unspeakable Truths* 217.

[107] In terms of staffing numbers, experiences again vary. Whereas Latin American commissions have enjoyed relatively large staff complements (Chile and Argentina had approximately sixty full time staff members each), others have had to do with very few personnel. Sarkin (n 53) 814. South Africa's TRC had the highest staff complement to date, with around three hundred staff between 1996 and 1998: Hayner *Unspeakable Truths* 218.

[108] Hayner *Unspeakable Truths* 221; also Hayner *Fifteen Truth Commissions* 640.

[109] 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' Hayner, *Unspeakable Truths* 221.

[110] The Argentine, Chilean and Salvadoran Commissions were established very quickly by decree and had only nine months to generate an authoritative account.

[111] Hayner, *Unspeakable Truths* 222: 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. The Ugandan commission (narrated by Hayner) demonstrates the dangers: set up in 1986, the Commission of Inquiry in Uganda was given no time limit. 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 of the work of a commission.

https://doi.org/10.1017/S002058930800081X Published online by Cambridge University Press

institution.[112] Reconciliation and trust-building is a long-term process, of which any formal institution is only a part. Depending on the extent of public awareness-raising that is possible before it starts its work, and funding availability, any Zimbabwean commission might run for about two years. A more nuanced and possibly effective strategy would be for a permanent body but with a gradually narrowing mandate that looks later on at broader and historical issues too.[113]

A third, more controversial timing question, related to mandate and resource availability, concerns which periods of history a commission may be expected to study: how far back does 'the past' go?[114] In relation to the particular dynamics of the Zimbabwe situation this is likely to be a problematic issue, for while common sense, practicality and limited funds might suggest that the violence that has marked political repression since 2000 ought to be the primary focus of any commission, there will be various interest groups for whom the present is not explicable without a process that engages with the period 1980–2000 (in particular the *gukurahundi* period), before that with Rhodesia 1965–1979, and indeed going back to European settlement in 1890. The Rhodesian period is less suited to a truth commission than the 1980s since much more is known about the abuses that took place before 1980—even if those issues are not 'resolved'. There are a number of reasons why a future commission is unlikely to focus on the Rhodesian era directly.[115] One thing that may be considered relevant from the Rhodesian conflict was that it set in motion the pattern of non-inquisition and amnesty that has continued to this day. Structural and particular abuses during the Rhodesian era and the culture of impunity created are no doubt likely to form the backdrop to any future commission's report (and surviving Rhodesian or colonial era legislation may be the subject of recommendations for reform), but will not be considered further here.

[112] Whereas a formal institution needs to establish public trust and awareness in quite a short time, whereas local, women's and Church groups have long been familiar to the community (and are likely to still be operating long after a truth commission has wrapped up). Judicial and quasi-judicial mechanisms are not likely to be sufficient to reconstruct the moral order: other needs on the cultural, the social, the psychological, and spiritual levels may be called for: E Kiss, 'Moral Ambition within and beyond Political Constraints: Reflections on Restorative Justice' in Rotberg & Thompson (eds) (n 24).

[113] One idea is that the gradually narrowing mandate and budget enables the commission to ultimately run as a self-funding national attraction, by way of a museum. We are grateful to Professor John Braithwaite for this idea.

[114] Sarkin (n 53) 811–812.

[115] We think these reasons include the lapse of time; the legal barriers resulting from a succession of amnesties including under the Indemnity and Compensation Act 1975, the Amnesty Ordinance 1979, and the Amnesty (General Pardon) Act 1980 (Ch 9); the fact that the amnesty resulted from a compromise that effectively ended a decade-long civil war; the fact that a broad and largely effective political reconciliation process was set in motion at the time in 1980; the need to limit and focus any commission's mandate and workload; and the fact that the state abuses cannot be attributed to the Mugabe regime, whereas those from 1980 onwards can.

https://doi.org/10.1017/S002058930800081X Published online by Cambridge University Press

As mentioned earlier, a more difficult question is whether the 1980s *gukurahundi* and State violence in Matabeleland issue is the subject of any formal national process. Many civil claims against the State will now fall outside the limitations period for instituting these. It is impossible to say that any 'effective remedy' has been provided. This period in Zimbabwe's past is arguably unresolved and 'unprocessed' and represents a possible future source of civil disunity.[116] It may be that it is a subject-matter best left until greater political stability ensures that this fault-line will not be re-opened in a way that leads to ethnic division and disorder in any transitional Zimbabwe. It may be possible—and from the perspective of international legal duties acceptable—that a mandate is devised that preoccupies the commission with the post-2000 State violence, but which endeavours at a later date, and on a more broad level, to uncover some of the unknown facts of Zimbabwe's often violent past and offer a form of account and redress as appropriate or possible.

A ninth issue would be the various difficult questions of methodology regarding, for example, how any Zimbabwean commission will gather evidence, due process rules and procedures, the level of proof relied upon to reach conclusions, confidentiality issues, and so on. Here there is some rather more solid normative background relating to internationally recognised rights to due process,[117] although practice has varied widely. In the Latin American countries, most of the hearings of those truth commissions were behind closed doors, whereas in South Africa hearings were public (with high levels of media coverage). The latter approach increases public appreciation of such commissions' work (in terms of allaying concerns about bias or cover-up) and prevents continued denial by sectors of society. Including in relation to the intended cathartic and therapeutic dimensions of publicly acknowledged processes,[118] public hearings importantly shift the focus from a mere *product* (a report), to the *process* itself.[119] In terms of procedure, it is to be expected that victims have a central role.[120] While it may be preferable for any

[116] In legal terms, it is this period that arguably witnessed the most serious crimes including possible crimes against humanity (systematic attacks on a civilian population during an internal armed conflict). On the other hand, Part IV of the 1997 *Breaking the Silence* report, while not a judicial verdict, accepted the view that the effect of the grant of amnesties is immunity from prosecution, and this view has not been challenged in any legal forum to date.

[117] See for instance article 14 of the ICCPR. For comprehensive treatment, see M Freeman, *Truth Commissions and Procedural Fairness* (n 24).

[118] Hayner, *Unspeakable Truths* 134. By contrast see Shaw's views that this is a peculiarly 'Western', 'Freudian' concept and not necessarily of application in some African countries: (n 36).

[119] Hayner, *Unspeakable Truths* 225. Sarkin (n 53) 817.

[120] The process of course also has huge significance for perpetrators, and part of the aim of any such process is to provide a forum for their rehabilitation, expression of contrition, moral reconstitution and what Jeong calls 'the recovery of their own humanity' (*Strategy and Process* (n 33) 156). A commission may not have the resources or capacity for counselling services for those who testify. Community organizations, traditional healers, church structures, extended families and friends, and support groups may need to fill the breach: see Amoah & Greenbaum, 'Has Everything been Done? The Nature of Assistance to Victims of Past Political Atrocities in

https://doi.org/10.1017/S002058930800081X Published online by Cambridge University Press

Zimbabwean commission to follow the example of the South African, Argentine and Salvadoran commissions and undertake its own investigations rather than more passively relying on testimony and reports,[121] there are many political, resource and other considerations, and unsurprisingly this is not a trait universally discernable in such bodies. However, if it is to represent a comprehensive attempt (and part of 'an effective remedy'), a commission should at least aim to carry out an in-depth analysis of a fair number of violations so that it can document the types of violations that have been paradigmatic of the period.[122]

A tenth issue is the production of a report and recommendations by a truth commission. While the focus of a commission should be its process (which is itself a means of promoting reconciliation) interim and/or final reports can be very significant. To receive recognition and ultimately to fulfil its function, the report needs to be made readily available to the public, in publicly digestible form, and attempt 'closure' while not artificially cutting off debate. The final report is a formal attempt at capturing broadly 'the truth'—an overall acknowledgment of, attribution of responsibility for, and attempted redress of the abuses that occurred within the state.[123] A useful incidental function for a truth commission usually captured in any report, and one factor in

Southern Africa' and 'Resources on Services for Victims of Political Violence in Southern Africa' (Report and Bibliography for the Southern African Reconciliation Project) (CSVR, Johannesburg, 2005). Publication of the report and the termination of a commission's mandate is of course not likely to be—nor likely to purport to be—the 'end' of efforts at reconciliation, counselling, and other processes: see for example Kayser 'Interventions after the TRC: Reconciliation, Advocacy, Healing' (CSVR, Johannesburg, 2001).

[121] 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 Leone TRC was vested with far-reaching subpoena and search and seizure powers, although it did not make use of these extensively: see C 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. In Chile the commission did not carry out its own investigations despite its broad mandate, a feature viewed as a serious shortcoming: Sarkin (n 54) 816.

[122] Sarkin (n 53) 817. Due to its short mandate, the El Salvador commission conducted in-depth investigations of selected cases chosen as representative of typical victims, perpetrators, and types of abuse over the historical period of study. The South African approach was to attempt a more thorough engagement, rather than a typology: Hayner, *Unspeakable Truths* 73.

[123] While objective truth may be a difficult concept, and the official version likely to be contested, there is an inherent element of symbolism involved. Daly (n 28) 24, 28 criticises the attempt to promise or deliver 'a single unit of truth' or 'single . . . authoritative record': the truth is inherently elusive, not monolithic, subjective, cannot 'be described by a single, elegant narrative'. Of course the report will not and should not in a pluralist democracy be 'the last word on the history of a country for all' (29). However, we think that it is likely that a population will appreciate the unscientific, symbolic and representational nature of the exercise. Daly also focuses unduly on the written report of a commission (see especially 26–7, 33), whereas surely it is its *process* which can be more significant in fulfilling its functions.

https://doi.org/10.1017/S002058930800081X Published online by Cambridge University Press

considering the overall seriousness of the attempt, can be forward-looking recommendations for law reform and other measures aimed at reducing the prevalence of conditions that enabled abuse to be unchecked and unremedied for so long.[124]

What this survey of issues reveals is the complexity and plurality of issues involved in the design and conduct of a formal truth, justice and reconciliation institution. It ought to be clear that the diversity of past practice and the range of competing considerations that require attention are likely to preclude any attempt to identify a standardization with normative consequences. While one is most reluctant to endorse multiple tiers of human rights standards by reference to resource availability—this can be abused as a convenient argument for inaction on human rights—it is unrealistic to overlook the fact that what is possible in the form, mandate, duration, etc of a transitional justice strategy (prosecution, truth commission, or other) is dependent on context, including resources.[125] Political contexts are idiosyncratic: there are a number of valid reasons for national authorities to prefer amnesty-for-truth to prosecution, for example. It is not just the politics of institution-making that remain eclectic: the legal framework within which to operate would appear to remain broad and largely non-prescriptive. Provided a bona fide attempt is made to provide an effective remedy as possible for the thousands of victims, and to 'take action' on the perpetrators in some way (including processing them through truth commission testimony), and unless internationally recognized due process rights are infringed, for example in the process of transmission of a person's case from truth commission to criminal prosecution, it is only really on the question of the grant of amnesty for crimes which may be of interest to the international community as a whole that international normative issues arise for truth commissions. We now turn to this issue.

[124] Recent commissions have provided extensive recommendations for reforms across many sectors of government and public life, including proposals for human rights training and education. The El Salvadoran TRC's recommendations ran to over fifteen pages, the South African TRC's recommendations 45 pages, and Chile's over 45 pages: Hayner, *Unspeakable Truths* 167. See also M Ensalaco, 'Truth Commissions for Chile and El Salvador: A Report and Assessment' (1994) 16 Human Rights Quarterly 656, 666–670. The recommendations on law reform and institutional change of the El Salvador commission were its greatest legacy: R Mani, *Beyond Retribution: Seeking Justice in the Shadows of War* (2002) 102. We think this last function is particularly important since one dilemma of a strongly independent commission may be that it sets the accountability of the state at a further remove.

[125] See Cryer (n 83) 269–271, who notes that decisions on post-conflict justice options, and what constitutes a sufficient investigation, must be sensitive to context: European Convention standards may not be appropriate to Zimbabwe; Cryer selects two reasons: other priorities, and the likeliness of a weak prosecutorial and judicial system making it difficult to prosecute offenders *en masse* (therefore, making the decision to establish a truth commission reasonable).

https://doi.org/10.1017/S002058930800081X Published online by Cambridge University Press

VII. QUESTIONS OF AMNESTY

Amnesty from prosecution is often the main incentive for agreeing to peace in the first place, and for cooperating and revealing the truth.[126] Subject to some important qualifications, it is surely a legitimate option in transitional societies—and may be a political necessity.[127] Recent prominent commissions such as the South African TRC and that in Timor-Leste have been accorded the power to grant amnesty.[128] The power to afford immunity from prosecution for a cooperative and forthcoming individual in a truth process sets up something of a tension between restorative justice ideals and traditional retributive justice principles and imperatives.[129] However, these imperatives can be reconciled. For one thing, truth commissions can be complementary to prosecutions.[130]

The Timorese model is of particular interest because of the example it offers to Zimbabwe on this question. In Timor's commission, individuals were

[126] See *Azapo v President of the Republic of South Africa* 1996 (4) SA 671 (CC), 681–685 (constitutionality of amnesty provisions of the statute establishing the TRC):

> 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 . . .

[127] See generally P van Zyl, 'Justice without Punishment: Guaranteeing Human Rights in Transitional Societies' in Villa-Vicencio and Verwoerd (eds), *Looking Back—Reaching Forward: Reflections on the Truth and Reconciliation Commission of South Africa* (University of Cape Town Press, 2000). Indeed, international law has long acknowledged the place of amnesty. Notwithstanding that the *Geneva Conventions* regime is partly intended to prevent impunity, Article 4 of Additional Protocol II calls on states after the conclusion of internal conflicts to grant 'the broadest amnesty possible' to participants.

[128] On the South African TRC's amnesty process, see A 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, 164–170; Hayner *Unspeakable Truths*, 98ff. On the amnesty process in East Timor, see Stahn (n 121) 962–965. As discussed below, South Africa purported to grant amnesty for international crimes, whereas the Timorese commission was unable to formally grant amnesty for international crimes.

[129] See L McGregor, 'Individual Accountability in South Africa: Cultural Optimum or Political Façade?' (2001) 95 American Journal of International Law 32, 37; S Wilson 'The Myth of Restorative Justice: Truth Reconciliation and the Ethics of Amnesty' (2001) 17 South African Journal on Human Rights 531, 542–545.

[130] Where amnesty is not appropriate, there is in principle no reason why related information cannot be provided to prosecutors in the criminal justice system to pursue should they chose to do so according to existing criteria. See in this regard Hayner, *Unspeakable Truths*, Ch 7; also C Lerche, 'Truth Commissions and National Reconciliation: Some Reflections on Theory and Practice' (2000) 7(1) Peace and Conflict Studies 1.

https://doi.org/10.1017/S002058930800081X Published online by Cambridge University Press

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'.[131] The grant of immunity was limited to less serious offences, and made dependent on the performance of a visible act of remorse serving the interests of the people affected by the original offence.[132] This act may have involved community service, reparation, a public apology, and/or other acts of contrition. This Timor-style public contrition process facilitates community reintegration of low-level perpetrators and would be most apposite in particular to 'Border Gezi', 'Green Bomber' and other youth militia in Zimbabwe: given their large numbers, age and possibility of some duress involved in their participation in criminal acts, they can hardly all be prosecuted and are likely to be in need of serious rehabilitation and diversion into constructive ends. In addition to a symbolic act of contrition, a form of community or national service could be envisaged.[133] This reconciliation and rehabilitation procedure could be used to good effect to deal with certain less serious acts directed against persons and property in respect of land invasions in recent years.[134]

As a matter of the State's international legal obligations, it is not clear whether it is under a clear duty to prosecute and punish certain crimes, or may elect to deal with them through other means (such as amnesty). It may depend on whether the duty is actually to 'prosecute' and 'punish' or merely to 'take action against' or in respect of perpetrators, or even more broadly, a duty to ensure a process of 'justice'. That is, it may be that the duty is better expressed as a duty to investigate and to thereafter make a bona fide and considered decision and possibly take action against the perpetrator. In this case a possible position is that truth commissions (and other national-level processes) which may not result in any criminal trial and which may grant amnesty are either an acceptable form of 'punishment' (if that is the duty) or can fulfil the duty to investigate and take action against perpetrators.[135] The duty to take action relates to all human rights abuses (Article 2(3) ICCPR): a genuine truth commission process mainly without prosecutions may fulfil this, as it represents a form of providing justice. The problematic issue is in relation to amnesty and non-prosecution for abuses that are also international crimes.

[131] UNTAET Regulation 2001/10 (13 July 2001): this would preclude any criminal prosecution.

[132] Stahn (n 121) 963. Care must be taken to afford the perpetrator some dignity and redemption—it may be dangerous to institutionalize humiliation.

[133] Since 1992 Zimbabwean law has recognised a 'community service' alternative to prison.

[134] Arguably, a separate mechanism would need to be established for land claims issues. On overlaps between reconciliation and the land issue, see E McCandless, 'The Case of Land in Zimbabwe: cause of conflict, foundation of peace' www.restorativejustice.org/resources/world/africa3/africa/zimbabwe.

[135] See D Dyzenhaus, *Judging Judges, Judging Ourselves: Truth, Reconciliation and the Apartheid Legal Order* (Hart Publishing, Oxford, 1998) 28–33; also van Zyl (n 127) ('Justice without Punishment').

https://doi.org/10.1017/S002058930800081X Published online by Cambridge University Press

No 'all-encompassing' duty to prosecute can be discerned in international law: there is still room for movement.[136] For example, it remains an open question whether a duty to prosecute exists in relation to war crimes in an internal conflict. Arguably, it is still open to States to grant amnesty for international crimes without violating a rule of international law,[137] although it seems this will be a legally invalid act in respect of purported amnesties for the crimes of genocide, torture, and 'grave breaches' of the 1949 Geneva Conventions.[138] There appears to be a growing legal consensus that if granted, no purported amnesty for certain international crimes would be recognized as having any effect in international law, for example in providing immunity to any later international prosecution.[139] The Preamble of the Rome 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.'

In attempting to shape any future Zimbabwean truth commission process by reference to international standards, then, one issue might be whether only some amnesties 'count' internationally. The position appears to be that no

[136] R Cryer (n 83) 288.

[137] For a comprehensive consideration, see A O'Shea, *Amnesty for Crime in International Law and Practice* (Kluwer, The Hague, 2002). For discussion in favour of a general duty on states to prosecute and punish past crimes see for example D Orentlicher, 'Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime' (1991) 100 Yale LJ 2537; N Roht-Arriaza, 'State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law' (1990) 78(2) California Law Review 449; Dugard (n 25) 697 and the authorities cited therein. Much of the debate about the legality of amnesties is still—at least for now—somewhat academic: Hayner makes the important point 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' (*Unspeakable Truths*, 90).

[138] Dugard (n 25) 699. The duty on a state to extradite or prosecute individuals for torture or genocide may be a matter of customary international law: *Prosecutor v Furundzija* (ICTY) IT-95-17/1-T, [156]ff. See too W Schabas, 'The Relationship between Truth Commissions and International Courts: the case of Sierra Leone' (2003) 25 Human Rights Quarterly 3, 1035.

[139] See generally Jeong, *Strategy and Process*, 166; J Gavron, 'Amnesties in the light of Developments in International Law and the Establishment of the ICC' (2002) 51 ICLQ 91. The United Nations Secretary General's view is that UN-endorsed peace agreements can never grant amnesties for genocide, war crimes, crimes against humanity, or gross violations of human rights. Amnesties purportedly given for such offences will not be considered a bar before UN-established or assisted courts: UNSG Report (n 24) [21]; Cryer has demonstrated that by 1999 the UN would not be party to peace deal that included an amnesty for international crimes (n 83) 284. A number of international and other tribunals have refused to recognize amnesties for grave breaches of human rights: *Furundzija* (ICTY Trial Chamber, 10 December 1998), *Barrios Altos* (Inter-American Court on Human Rights, Vol. 75 (Series C), 27 November 1998), [39]–[41] and various cases in the Special Court for Sierra Leone in relation to the Lomé Accord amnesty. The House of Lords in *Pinochet* can be understood to have overwhelmingly rejected the argument that Chile's decision to grant amnesty (immunity from prosecution) as part of its peace process ought to be respected by another court: *R v Bow Street Magistrates Court; ex parte Pinochet Ugarte (3)* [1998] 4 All ER 897. Unlike an acquittal in another forum, there is no rule of law preventing a national court from disregarding an amnesty granted elsewhere, provided it has jurisdiction.

https://doi.org/10.1017/S002058930800081X Published online by Cambridge University Press

clear rules can be enunciated to distinguish (from the perspective of international law) between permissible and impermissible amnesties, but '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.'[140] It is arguable that provided a national transitional justice process was legitimate (a bona fide attempt to resolve past injustices at a national level, taken by a democratically-elected government) and included a number of safeguards, international deference might be given to the process, since in such cases the afflicted State concerned is itself best placed to decide what measures may be most conducive for the facilitation of reconciliation at the national level; it is something calling for a judgment falling substantially within the domain of those entrusted with the difficult issues of such transitions.[141] Particularly if the South African experience is given weight, Zimbabwe would not necessarily breach international law if, facing difficult political compromises to avoid catastrophic civil war, after a formal process it granted amnesty to (or simply did not prosecute) those allegedly responsible for international crimes. Whether or not a subsequent international or foreign tribunal with jurisdiction would be bound to recognise any immunity as a result is a related but separate issue to whether the mere grant of such amnesty violates an international duty.

It would now be politically difficult—if not yet clearly legally impossible—for any future Zimbabwean commission to purport to grant amnesty for the international crimes of torture, crimes against humanity or genocide (to the extent that there are Zimbabwean officials who may be guilty of such crimes). The South African TRC was opened to criticism on these grounds,[142] but was the result of serious and principled domestic deliberation on the consequences of not prosecuting certain international crimes and its amnesties have not been

[140] J Dugard, 'Possible Conflicts of Jurisdiction with Truth Commissions' (n 25) 700. As such, the blanket amnesty in Chile passed by the regime prior to the establishment of the commission may not meet the required standard, while the South African amnesties granted by a quasi-judicial amnesty committee functioning as part of a TRC process established by a democratically elected government, may well do so. See too Mani (n 124) 112–113.

[141] *AZAPO v President of the Republic of South Africa* (1996) 4 SA 671, (cc) [20], [31], [42]–[45]. The Court's use of 'entrusted' highlights how a decision taken by a politically illegitimate regime might not receive the same political deference or (which might in amount to the same thing) international legal recognition. Cryer argues (n 83) 274–7, 289) that this 'national deference' argument not only is open to abuse by complicit or self-interested national authorities, but also insufficiently takes into account the international community's legitimate interests. Local amnesties for non-international crimes are easier to defer to: the only question is whether the ICCPR Art. 2(3) duty is met).

[142] For a critical reflection on the South African TRC in this respect, see J Dugard, 'Retrospective Justice: International Law and the South African Model', 269ff, in J McAdams (ed), *Transitional Justice and the Rule of Law in New Democracies* (1997; n 24 above); also C Jenkins, 'After the Dry White Season: The Dilemmas of Reparation and Reconstruction in South Africa' (2000) 16 South African Journal on Human Rights 421.

https://doi.org/10.1017/S002058930800081X Published online by Cambridge University Press

legally challenged elsewhere.[143] There exists an unresolved tension between international principle and the (occasional) legitimate local need to afford amnesty even for very serious crimes. This tension would remain even if there was a clear norm against national amnesty for international crimes. Retaining the aura and integrity of international prohibitions is vital, but imposing a clear duty to prosecute might put unworkable strain on societies seeking a political compromise to avert or end conflict. There exists a dilemma whether to recognise a clear, 'bright line' norm (knowing it will not be met, often for understandable reasons), or whether the content of the norm retains some leeway and a margin of appreciation to States. The latter option might, perhaps paradoxically, have the benefit of retaining the integrity of international prohibitions.

VIII. THE INTERNATIONAL CRIMINAL COURT: ANY IMPLICATIONS?

It is relevant in discussing prospects for transitional justice in Zimbabwe, in particular the possible role and functions of a truth commission, to briefly address whether international or foreign criminal tribunals might in any way overlap with any truth commission's subject matter. First, possibly overlapping with any future truth commission's work is always the prospect of prosecutions by foreign national courts applying received international law, of Zimbabwean offenders for crimes in Zimbabwe but who come within that court's jurisdiction. In 2003, for example, efforts were made to bring such an action in Canada against Zimbabwean leaders, while more recently in May 2008 the names of 18 Zimbabwe security officials along with allegations of their responsibility for torture were forwarded to South African prosecutors in terms of its national legislation implementing international criminal acts.[144] Should a criminal prosecution be instituted by a State under its domestic legislation, a national amnesty does not have an extraterritorial effect and while in practice certain types of amnesty have been recognized abroad, there

[143] The pursuit of justice for such crimes has long been a selective and irregular process: see Gerry Simpson's historical overview of war crimes trials: (n 30). While the Timorese truth commission could not grant immunity to persons who had committed a 'serious criminal offence', including the international crimes of genocide, crimes against humanity, war crimes, and torture: Stahn (n 121) 957–958, for a range of reasons including local peace exigencies not all persons known to have committed such acts were prosecuted.

[144] This referral to the National Prosecuting Authority of South Africa by the Southern Africa Litigation Centre was for possible action should the accused be found within South African jurisdiction: *Legalbrief Africa*, Issue 279, 5 May 2008. The South African legislation is The Implementation of the Rome Statute of the International Criminal Court Act 2002: see further Max du Plessis 'Bringing the International Criminal Court Home' (2003) 1 South African Journal of Criminal Justice 1. An attempt to invoke the Act was made in September 2002 while Robert Mugabe was attending an international conference in Johannesburg, while in January 2004 a United Kingdom national sought an order against President Mugabe from a London magistrates court on torture charges. For an overview of this avenue see J Charney, 'International Criminal Law and the Role of Domestic Courts' (2001) 95 American Journal of International Law 120.

https://doi.org/10.1017/S002058930800081X Published online by Cambridge University Press

is no mandatory rule of international law requiring States' courts to recognise an amnesty granted by another State.[145] While the possibility of national-level prosecution (and certainly any ongoing or completed prosecutions at the time) ought to be factored into considerations of 'transitional justice' options, and might impact on a future commission's work, this topic is otherwise beyond the scope of this paper.

Secondly, since at least 2003, a number of actors including the International Bar Association have called for the ICC to examine the Zimbabwe situation.[146] Two issues arise here: the possibility of ICC investigations in relation to Zimbabwe (before or after transition); and the effect, under the ICC system, of any proposed amnesty granted by a future Zimbabwean truth commission. There are two main reasons why the ICC might not be involved in any transitional justice issue in Zimbabwe. First, the Court has limited subject matter and temporal jurisdiction.[147] Secondly, while a Party can refer a situation to the Court (or the prosecutor initiate an independent investigation), the alleged crimes must have been committed by nationals of a Party or have taken place in a Party's territory.[148] Zimbabwe is not (at this time) a party to the *Rome Statute*. A possible source of ICC jurisdiction in Zimbabwe would be the Court's ability to have jurisdiction conferred upon it including where it otherwise lacks jurisdiction, by virtue of the UN Security Council's power to refer country situations to the Court acting under Chapter VII of the Charter of the United Nations (read with article 13(b) of the Rome Statute of the International Criminal Court). If the situation in Zimbabwe were to deteriorate significantly, or there was a pronounced inability or unwillingness of Zimbabwean authorities to act in respect of certain allegations, with a concomitant impact on regional peace and security, it is possible that the Security Council may receive a request for an ICC referral on this matter.

[145] Dugard, *Conflicts of Jurisdiction* (n 25) 699. The exercise of that discretion might be mainly contingent on the quality of amnesty process that the state had followed, which no doubt inherently involves a political judgment about the democratic legitimacy of the regime sponsoring the amnesty.

[146] Mark Ellis, International Bar Association, 7 March 2003 (IBA Press Release); see *Legalbrief Africa*, 7 March 2003. The August 2003 Zimbabwe civil society symposium's Declaration appeared to support the use of ICC mechanisms by any new government.

[147] It would be a jurisdictional threshold question whether the level and kinds of violence perpetrated by certain individuals in Zimbabwe might trigger the International Criminal Court's subject-matter jurisdiction, including whether they could be considered part of an intentional widespread or systematic attack directed against a civilian population; and the Court has jurisdiction only in relation to crimes committed on or after 1 July 2002.

[148] See articles 12, 13 and 14 of the Rome Statute of the International Criminal Court; see also P Kirsch and D Robinson, 'Trigger Mechanisms' in A Cassese et al (eds), *The Rome Statute of the International Criminal Court: A Commentary*, vol 1 (Oxford University Press, 2002). Zimbabwe signed the Rome Statute on 17 July 1998, but has not ratified it. A future government in Zimbabwe could, in terms of Article 12(3) of the Rome Statute (with 11(2)), make an ad hoc acceptance of the exercise of jurisdiction by the Court over its nationals or crimes committed on its territory; see also H-P Kaul, 'Preconditions to the Exercise of Jurisdiction', in Cassese et al.

https://doi.org/10.1017/S002058930800081X Published online by Cambridge University Press

If Zimbabwe in future accepts the Court's jurisdiction over specific crimes for the period that it was not a party to the Statute (or a Zimbabwean otherwise comes before the Court), and if a truth commission purports to grant amnesties to individuals responsible for serious human rights abuses, the question might arise whether such national amnesties would constitute a bar to ICC prosecution. The Rome Statute is silent on amnesty.[149] National amnesties in Zimbabwe would not per se prevent prosecution before the ICC. However, the prosecutor can probably indirectly recognise a national amnesty by declining to initiate a prosecution 'in the interests of justice.'[150] Should a Zimbabwean commission (or other process) that emanates from a recognised legitimate regime elect for compelling reasons to provide amnesties, the prosecutor might respect that position.

Given the limited jurisdiction of the ICC, and other concerns about the appropriateness of an international prosecution strategy in a future Zimbabwe,[151] the issue might not unduly complicate the process of any truth

[149] Commentators argue that this is because the Rome Statute was never drafted with the intention of allowing amnesty to be raised as a defence: Dugard, *Conflicts of Jurisdiction with Truth Commissions* 700–701; cf D Majzub, 'Peace or Justice? Amnesties and the International Criminal Court' (2002) 3 *Melbourne Journal of International Law* 251. How the ICC should deal with national level amnesties was put aside during negotiations on the Rome Statute, as there seemed no prospect of a consensus: J Holmes, 'The Principle of Complementarity' in Lee (ed), *The ICC: The Making of the Rome Statute* (Kluwer, The Hague, 1999) 60. Cases would be inadmissible before the ICC if they had already been subject to a criminal proceeding. While Article 17 of the Rome Statute refers to 'investigation' it seems clear that a truth commission investigation before a non-judicial body (granting amnesty) would not be sufficient to amount to a prior proceeding (requiring inadmissibility): the use of 'investigation' is tied to criminal proceedings since one will not be genuine where it is inconsistent with an intent to bring the person concerned to justice—a bona fide prosecution trajectory is what is contemplated: see Chesterman (n 33) 164; also Cryer (n 83) 277; Dugard, *Conflicts of Jurisdiction* (n 25) 701–2. The prosecutor's discretion is very wide and it is not clear how pardons and amnesties would fall to be treated: see generally J Dugard, 'Dealing with Crimes of a Past Regime: Is Amnesty Still an Option?' (2000) 12 Leiden Journal of International Law 1001.

[150] A 'genuine' amnesty (see discussion at n 140 above) might be recognised in appropriate circumstances. Article 53(2)(c) of the Rome Statute allows the Prosecutor to refuse prosecution where, after investigation, he concludes that 'a prosecution is not in the interests of justice, taking into account all the circumstances'; see too Dugard, *Conflicts of Jurisdiction* 702; also Cryer (n 83) 278. The prosecutor would no doubt consider the quality of the truth commission's process (and of the bona fides and legitimacy of the regime sponsoring it), the nature of the offence, and the terms of disclosure on which amnesty was granted. The ICC scheme is not so blunt or automatic or insensitive to local realities that local imperatives for restorative justice cannot be accommodated. On the other hand, as Cryer has noted (278–281) these decisions are taken at an international level, and are out of the hands of the national authorities; the public interest of the 'international community' can be a veil for national self-interest of others: 283. See too the section 'Prosecutorial Discretion and the Interests of Justice' in Siels and Weirda, *The International Criminal Court and Conflict Mediation* (n 5) 12. William Schabas has also noted that a genuine but non-judicial effort at accountability, falling short of prosecution, might 'have the practical effect of convincing the Prosecutor to set priorities elsewhere': *An Introduction to the International Criminal Court* (2nd edn, Cambridge University Press, 2004) 87.

[151] John Braithwaite has cautioned against 'select [international] trials of demonized individuals that exonerate the collective and that may jeopardize responsive regulation to protect the vulnerable', and how selective prosecution sends the signal that whoever is not charged is innocent: (n 44) 204.

https://doi.org/10.1017/S002058930800081X Published online by Cambridge University Press

commission that is established. Provided we do not see mere deals between elites, the world might need to drop calls for strong punitive measures and learn to live with a local political compromise that works for all Zimbabweans themselves. As Chesterman has said, '[a] central problem in this respect is that commentators with an international perspective often view such internal transitions through the lens of international criminal law: either the wrongdoers are held accountable, or they enjoy impunity.'[152] As our discussion and the experience of recent truth commissions illustrates, it is possible and may be necessary to have a more nuanced and practicable approach.

IX. CONCLUSION

The literature on truth commissions is vast (and growing), and the general consensus is that they are less inimical to reconciliation than trials, may provide relatively more comprehensive accounts of past facts, patterns, causes and consequences of human rights abuses than trials (and certainly blanket amnesties) permit, 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 democracy of their countries. The 'singularity' of truth commissions—one-off, limited purpose and lifespan institutions carrying for this reason a 'never again' message—commends them as a highly visible and powerful mechanism to break with past troubles.[153] At the same time, formal processes such as truth commissions can catalyse but are only one part of wider social processes. The features of a Zimbabwean commission will necessarily reflect the political compromises and stresses that often accompany a transition from autocracy to democracy. There needs to be a public participatory dimension to the justice design process: one risk will be that political actors might by consensus opportunistically 'drop' the issue of transitional justice as 'too hard'.

We should not be taken to be arguing a 'soft' approach in this paper: if the political control exists in a future democratic Zimbabwe, there ought to be every effort to prosecute and punish in particular those principally responsible for ordering and carrying out the appalling abuses witnessed in that country. However, a truth and reconciliation commission would be a valuable collateral strategy. Also, not only do formal justice mechanisms require a modicum of stability, there may need to be some privileging of 'peace' over 'justice' in the way those involved in negotiation, design and conduct of a transitional justice process choose to deal with past abuses. In appropriate circumstances (such as to avoid further bloodshed), a locally made

[152] Chesterman (n 33) 156.
[153] This characteristic of 'singularity' is rightly emphasised by Iliff (n 13).

https://doi.org/10.1017/S002058930800081X Published online by Cambridge University Press

compromise can sometimes be understood as a principled and morally relevant choice, not simply a pragmatic one.[154]

Along with the 'emerging normativity of global transitional justice', there is more generally a call politically and intellectually for 'more law' or a greater legalization of transitional justice issues, what Teitel recently perceived as a demand 'for more judicialisation and tribunalisation.'[155] The focus ought not to be blindly on 'a truth commission' or its forms, but on what process and strategy best secures justice, reconciliation and repair in society. That is, a responsive, reflexive approach that seeks to identify important problems and fix them (including in consultation with those most affected and by reference to a consideration of needs), not one predetermined by certain choices of institutional forms or aimed at imposing the 'right' solution.[156] It is important to articulate and identify the problem that needs to be addressed as regards justice and reconciliation issues in transitional settings, and to design the institutional responses accordingly.[157]

International law would appear to set some minimum standards in particular in relation to the core duty of a State to provide remedial measures for human rights abuse and in relation to the international validity of national amnesties for certain crimes. Certainly, the 'impunity gap' remains. However, if the normative framework is evolving, as we think it is, there must be some space for national measures taken bona fide in the interests of securing a peaceful and legitimate transition to democracy, and attempts to describe a normative minimum standard framework for truth commissions and other transitional justice measures must, we think, accord a margin of appreciation to states in determining how best to proceed with these very difficult issues. This is especially so where the decision to pursue a particular track is that of an internationally recognized and democratically elected regime, and taken after a considered process where competing imperatives exist.

It is by no means clear what international legal requirements attend issues at stake in truth commissions, but what would seem clear is that attempts to foist upon States particular formulae for dealing with transitional justice might in fact prevent the incremental growth of a stronger normative underpinning to transitional justice mechanisms. States undertaking transitions are likely to resist narrower limits to their options for local solutions (although a high degree of international intervention in their peace process may compel it). While minimum standards can be identified, unrealistic demands are unlikely to attract the State support or response necessary for norm

[154] Compare Gutmann and Thompson's view that political stability is not itself a moral good unless it is necessary to the promotion of future justice: 'The Moral Foundations of Truth Commission' in Rotberg and Thompson (n 24) 23.

[155] R Teitel, 'Transitional Justice Globalised' (n 24) 2.

[156] See Sparrow, *The Regulatory Craft: Controlling Risks, Solving Problems, and Managing Compliance* (Brookings Institute, Washington DC, 2000).

[157] Braithwaite (n 44) preface.

https://doi.org/10.1017/S002058930800081X Published online by Cambridge University Press

accretion.[158] On the other hand, if such States do respond to purported international requirements (for example, on the advice of expatriate international lawyers), this might set too high a standard and so distort what is actually required in their particular situation in terms of an acceptable resolution: it is easy to imagine a scenario whereby a belief in an international obligation to prosecute at all costs could seriously undo a fragile peace. If international law is 'the law of peace'[159] we ought to bear such issues in mind when considering the delicacies of transition in a deeply fractured state such as Zimbabwe.

The real challenge will be to adopt a sophisticated approach to addressing past human rights tragedies that draws the best from previous commissions in Africa and elsewhere, allows for a response to the core international crimes which are of concern to the international community as a whole, but which meets the practical political and social realities of the particular transition process.

[158] Local exigencies mean that detailed transitional justice prescriptions are unlikely to attract the practice and recognition necessary for international legal normativity. See also Cryer (n 83) 269.

[159] Public international law courses at the University of Cambridge have traditionally been offered by the formal title of 'the Law of Peace'.

https://doi.org/10.1017/S002058930800081X Published online by Cambridge University Press