A Discussion about Truth Commissions

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Some sobering preliminary thoughts

• There is no monolithic ‘the truth’
• Not every inquiry is a truth commission
• A truth commission is no solve-it-all
• There is no ‘one size fits all’ design
• Appreciate complexity
Not everything’s a truth commission

Sen. Patrick Leahy
A Truth Commission to Investigate Bush-Cheney Administration Abuses

Iceland’s independent Special Investigation Commission – dubbed the “truth commission” in the English media –

Lebanon Needs A Truth Commission

Honduras sets up disputed coup truth commission

Scotland’s church and civic-backed Poverty Truth Commission,

Brazil’s Lula to propose torture truth commission

Canada’s Indian Residential School Truth and Reconciliation Commission
Agenda

• Definition
• Countries with truth commissions
• Why a truth commission?
• Trials vs. Truth commissions
• Design, e.g.
  - Structure & composition
  - Investigatory mandate
  - Information gathering
  - Confidentiality vs. due process
  - Standard of proof
    . . .
Agenda (cont’d)

- Amnesty: notably South Africa’s ‘TRC’ model
- ‘Truth for amnesty’: PROS and CONS
- Final Report
- Naming Names?
- Recommendations
- Conclusion I: What a truth commission can do
- Conclusion II: Lessons from previous truth commissions
- Discussion!
Defining ‘truth commission(s)’

• [None in Oxford English Dictionary]

• Wikipedia.org
  - “A commission tasked with discovering and revealing past wrongdoing by a government (or, depending on the circumstances, non-state actors also), in the hope of resolving conflict left over from the past”

• United States Institute for Peace (USIP)
  - “Commissions established to research and report on human rights abuses which have occurred over a certain period of time in a particular country under a particular regime or in relation to a particular conflict”
Some technical points

• Request & Suggestion
  - Questions? Please intervene any time (compliment)!
  - Remarks/comments? Suggestion to hold for discussion

• Abbreviations used
  - ‘TCo(s)’ = ‘Truth commission(s)’
  - ‘TRC’ = ‘Truth and Reconciliation Commission’ (South Africa)
  - ‘HR’ = human rights

• Signs
  - ‘►’ = ‘I will come back to that aspect in more detail later’
Recent report by *amnesty int’l*

- Counts 40 truth commissions from 1974-2010
  - **1974-1995** [12x]: Uganda (2), Bolivia, Argentina, Uruguay, Nepal, Chile, Chad, **El Salvador**, Germany (2), Haiti
  - **1995-2001** [10x]: Sri Lanka, **South Africa**, Ecuador, **Guatemala**, Nigeria, South Korea, Sierra Leone, Uruguay, Panama, FR Yugoslavia
  - **2001-2004** [11x]: Peru, Timor Leste, Grenada, Ghana, Algeria, Chile, Paraguay, Morocco/Western Sahara, **DR Congo***, Burundi(-), Indonesia(-)
  - **2005-2010** [7x]: South Korea, Liberia, Canada, Ecuador, Solomon Islands, **Kenya***, Togo

- * = *established at time of ICC investigation*; (-) = *not appointed*

WHY a truth commission?

• **Victims**
  - Know the truth ⇒ closure
  - Receive public + official recognition
  - See perpetrators held accountable
  - Receive reparation

• **Society**
  - Face vs. forget the past
  - Build a new state: democratic; rule of law

• **Perpetrators**
  - Essentially exact opposite of victims’
  - Stay hidden; at least be protected by amnesty
WHY: Public + official recognition

- New truth instead of old lie
  - Prague 1968
  - Budapest 1956
  - Katyn 1943

- Rehabilitation
  - Steve Biko
  - Walesa / Havel / Mandela

- Public recognition (+ apology)
  - ‘Comfort women’
  - Popielusko murder
  - Bloody Sunday
**WHY: Face vs. forget the past**

- **CONS facing (= PROS forgetting)**
  - Too fresh for historic judgment
  - Energy needed for rebuilding
  - Hampers consolidation of new order
  - Don’t tear open old wounds
  - Witch hunt

- **PROS facing (= CONS forgetting)**
  - Victims’ rights / Don’t protect the perpetrators
  - Wounds have festered, not healed
  - Expose rotten apples, save honest part of institution
  - Lustration (disqualification)
Trials vs. Truth commissions

• **PROS Trials**
  - Ideal case: truth, accountability, recognition, justice
  - Reinforcement of rule of law
  - Deterrent

• **CONS Trials**
  - Worst case: acquittal ⇒ ‘total whitewash’
  - Prosecuting ailing old folks: justice?
  - Justice system may be overwhelmed
  - Limited attention for victims
Details: Cons Trials

• Justice system may be overwhelmed
  - Sheer number of cases / ‘scapegoat’
  - Hard to meet strict requirements
  - Dysfunctional justice system ⇒ ‘kangaroo court’
  - Limited capacity for historic record

• Limited attention for victims
  - ⇒ ICC: Standing + role of victims: crucial innovation
Trials vs. Truth commissions

- **CONS Truth commissions**
  - Can achieve too little
  - Destabilizing effect
  - Not fit for the job: Has no ‘teeth’
  - Does not mete out (‘real’) punishment
  - No deterrent ⇒ promotes impunity
Trials vs. **Truth commissions**

- **PROS Truth commissions**
  - Minimum: Reduce lies that can be circulated unchallenged
  - Can handle large numbers of victims
  - Incentive for perpetrators: if ‘stick & carrot’
  - Incentive for state authorities: PR / protect institution
  - Better suited to establish historic record
  - Better suited for large-scale HR violations
  - Ideal case: Forum for remorse, forgiveness, reconciliation
Details: **Pros Truth commissions**

- **Better suited for large-scale HR violations**
  - More flexible re depth of investigation
  - More flexible re differentiation (level/certainty of guilt)
  - Complex crimes / patterns
  - No obstacle: Amnesty (Franco era? Brazil?)
  - No obstacle: Death (Milosevic)
  - No obstacle: Old age / illness (Honecker)
  - No obstacle: Unknown whereabouts (Mladic)
Political surroundings and „birth“

- Sole factor beyond creators’ influence

• Second-best: Revolution / one-sided victory
  - Temptation: Biased look at past, winners/losers
    ⇒ ICC: deals with “situations”, not designated players
  - Danger: Threat by ancien régime

• Best: Settlement of tired, equal opponents
  - El Salvador (UN-brokered)
  - South Africa: Multi-party talks, power sharing

• Seize window of opportunity
  - For creation
  - For actual work (including report)
Structure of the Commission

• Commissioners: Nationals or foreigners?
  - Foreign TCo: e.g. El Salvador
  - Mixed: e.g. Guatemala
  - National: e.g. South Africa, Argentina, Chile

• Commissioners: Profile?
  - Diversity background: regional, religious, ethnic, gender, etc.
  - Need for experienced professionals
  - Integrity, standing
  - Ideally iconic personality: e.g. Tutu
Structure of the Commission

• **Structure, staff and resources**
  - Regional offices?
  - Local/foreign staff?
  - Resources crucial for success ⇒ powerful lever

• **Legal status of TCo, members + staff**
  - Like diplomats?
Investigatory mandate: Scope

• **Time corridor (being under investigation)**
  - Usually entire conflict: possibly decades

• **Mandate restriction: Only certain types of acts?**
  - Argentina: only disappearances

• **Discretion + self-restriction: broad vs. deep**
  - Broad ⇒ *Less* info about *more* cases (e.g. Guatemala)
  - Deep ⇒ *More* info about *less* cases (e.g. El Salvador)
  - Broad + deep: e.g. South Africa

• **Exploring implication of foreign powers?**
  - Little to win, much to lose: foreign support (may be crucial)
Applicable law

• Starting point: Commission mandate

• State obligations
  - Human rights law
  - Humanitarian law
  - National law

• Insurgents’ obligations?
  - At very least if ‘effective control’ over area
Information gathering

• How to find out ‘the truth’?
  - Infos by third parties: e.g. NGOs (human rights, church, etc.)
  - Cooperation by former conflict parties
  - Reach out to victims, witnesses, perpetrators
  - Challenges: Mistrust, country size, languages, sheer number

• Powers to subpoena / of search and seizure?
  - Gives ‘teeth’
  - But weakens TCo’s separation from state

• Confidentiality vs. due process

• Time restriction (for TCo’s work)?
Confidentiality vs. due process

- **Pros Confidentiality**
  - Incentive for victims + perpetrators ready to talk but fearful
    - but due process rights of those accused?
  - Conducive uncertainty: ‘How much does TCo know?’

- **Pros Public proceedings**
  - ‘Way is the goal’: Publicity \(\Rightarrow\) transparency, public awareness
  - May in turn increase input / pressure to come forward

- **Tension not unknown to ICC**
  - Under Rome Statute, rule: Public proceedings
  - Exception: Closed sessions, redactions
  - Practice? Protective measures for witnesses?
Other aspects of procedure

• **Time restriction (for TCo’s work)?**
  - **CONS:** Retain flexibility
  - **PROS:** Open-ended = never-ending?
    - Less is more
    - Get to it, then get over it

• **Need for professional assistance throughout**
  - TCo process as ‘treatment of wounds’
  - Victims/witnesses: (psychological) counseling
  - Commissioners/staff: de-briefing
Other aspects of procedure

• **Standard of proof**
  - Important for accurateness + credibility
  - El Salvador: “Overwhelming/substantial/sufficient evidence”
  - Guatemala: ‘Grados de convicción’
  - South Africa: Amnesty process within legal framework

• **Ability to deal with ambivalent figures**
  - Winnie Madikizela-Mandela (‘Mandela United Football Club’)
  - German Nazi general (von Choltitz) refused to destroy Paris
Amnesty: General points

• Definition and types
  - Amnesty
  - ‘Blanket amnesty’
  - Individual, conditional amnesty: South Africa’s TRC model

• Scope and reach
  - Scope: Penal / civil?
  - Reach: Only nationally? Or also beyond borders? (⇒ ICC! ▶)

• Compatibility with international law
  - Crimes under int’l law: ‘amnesty considered unlawful’ (ai)
  - Likely not valid for crimes under ICC jurisdiction
  - Pragmatic approach: ‘minimal standards for amnesty deals’
Amnesty: South Africa’s TRC model

• **Concept: ‘Stick & carrot’**
  - ‘Truth’ in exchange for individual amnesty...
  - ...or else threat of criminal prosecution

• **Requirements**
  - Act/omission/offence “associated with a political motive”
  - “Full disclosure of all relevant facts”
  - Not required: Remorse

• **Applicable periods**
  - During which to apply: almost 2 years after TRC nomination
  - Relating to which: extended to include ‘94 election violence
The South African TRC: Highlights

• Notorious cases/facts uncovered
  - Steve Biko, Griffiths Mxenge, Cradock Four, Pebco Three, Siphiwo Mtimkulu, Matthew Goniwe, Amy Biehl, St James Church massacre, Marius Schoon, Father Lapsley, Ruth First
  - Eugene de Kock, Vlaakplas; State Security Council; Wouter Basson, chemical & biological warfare programme
  - Involvement of e.g. business, labor, media, faith communities

• Other famous/memorable TRC moments
  - Winnie Madikizela-Mandela’s hearing
  - Jeffrey Benzien showing the ‘wet bag’ method
  - Brian Mitchell meeting with Trust Feed village community
  - Gideon Nieuwoudt visiting slain student’s family at home
The South African TRC: More info

• **Some statistics**
  - 7,127 applications
  - One-third dealt with in public hearings (!)
  - In approx. 10% of cases, amnesty granted
  - Of those denied, >75% for lack of political motive

• **TRC Final report (7 volumes, in English)**
  - Seven volumes

• **Worthwhile film about the TRC**
  - "Long Night’s Journey Into Day": Shows four TRC cases where victims’ families met face to face those responsible for their next of kin’s death
‘Truth for amnesty’: PROS and CONS

• **CONS**
  - Morally untenable; treachery on / abdication of rule of law
  - “Once you know the truth, you want more: justice”
  - ⇒ All true – but hey: let’s be realistic & pragmatic!

• **PROS**
  - ‘Truth without justice’ is more than ‘neither truth, no justice’
  - Amnesty is powerful (and essentially only!) ‘carrot’

• **Intricate problem**
  - Foreign obligation to recognize amnesty (ICC, other courts)?
  - Actions across borders: Attacks on exiled opponents
  - Laws with int’l reach: e.g. Alien Tort Claims Act (“ATCA”, U.S.)
Final Report

• **Significance**
  - The less public the process, the more important the report
  - Creates historic record: great responsibility!

• **Functions**
  - Present and explain findings, *modus operandi* followed
  - Ideally: Serve as basis for criminal prosecution
  - Enable + facilitate reference for future truth commissions

• **For impact, need for broad dissemination**
  - Availability in pertinent languages
  - Presentation: No phone book!
  - El Salvador: even comic strip version (for the illiterate)
  - Use of modern media (Internet, etc.)?
Naming Names?

• General points
  - Usually: in question those of perpetrators
  - But also: of victims ⇒ Basis e.g. for reparation
  - Mistakes more precarious re perpetrators: up to lynch justice

• Practice among truth commissions
  - Until 1992, none named perpetrators
  - ‘92-’94: e.g. Chad, El Salvador, ANC (South Africa), Rwanda
  - Until 1994, TCos’ mandates silent ⇒ left to TCo to decide
  - El Salvador: ‘How to achieve truth omitting known names?’
  - Guatemala: ‘shall not attribute responsibility to any individual’
  - South Africa: utmost publicity (hearings on TV), full names of successful amnesty applicants and others responsible
Cons Naming Names

- **Due process rights of incriminated**
  - Jeopardized if not personally heard by TCo?
  - Not if chance to be heard given but not used

- **Danger of false incriminations**
  - Personal safety of concerned
  - ‘Witch hunt’

- **Difficulty with TCo goal to be even-handed**
  - Perpetrators: of state easier identifiable than of insurgents
  - ‘Noms de guerre’ as obstacles
  - Number of abuses by state forces often greater
Pros Naming Names

- ‘Names part of truth’
  - Victims’ desire: Know perpetrators + see publicly exposed
    ⇒ Impossible to satisfy without naming names
  - Inter-American Court of HR in Velásquez-Rodríguez (1987):
    States’ duty “to guarantee HR” incl. identifying responsible
  - ⇒ Q: and publicly so?

- Further points
  - ‘TCo no judicial body: naming no judgment, rather opinion’
  - If no judicial pursuit, moral judgment as compensation
  - But still huge consequences ⇒ high standard essential
  - Identify + bar ‘rogue elements’ ⇒ bolster institution, state
Final report: Recommendations

• Measures to avoid repetition
  - Institutional: reorganization (e.g. security service), abolition (notorious units), creation (HR commission, ombudsman)
  - Personal: Lustration = disqualification for office ⇒ hot issue
  - Other: HR conventions, Rome Statute, HR in curricula

• Measures to facilitate reconciliation
  - Compensation ⇒ symbolic; crucial if perpetrators not touched
  - Rehabilitation: Official cleaning of name
  - Recognition: e.g. memorial day, naming of infrastructure after victims (schools, roads, squares...)
Final report: Recommendations

• **Binding character?**
  - Q: Mere symbolic/suggestion or crucial lasting TCo legacy?
  - Binding character in TCo ag’t and/or actual implementation important indicators of seriousness of TCo ag’t parties
  - El Salvador: Parties undertook to implement (!)
  - Guatemala: TCo ag’t silent
  - South African TRC: non-binding; Gov’t & Parliament to decide

• **Delicate balancing exercise for TCo**
  - If too demanding (e.g. lustration): Risk of non-implementation ⇒ even of feasible recommendation (cheap excuse)
  - If too little demanding: lose momentum, opportunity
  - The more binding, the more responsible this duty
Conclusion: What a TCo can do

• **Truth**
  - Closure for victims; put end to lies

• **Accountability**
  - for perpetrators; ‘stick and carrot’

• **Publicity**
  - ‘Not truth, but official recognition unique TCo contribution’

• **Building the future**
  - Controlled ‘explosion’ of ‘bomb’ truth; avoids myths
Lessons from previous TCos

• No ‘one size fits all’ ⇒ Do it your way!
  - What works in one country can fail in another
  - But: studying previous TCos helps to customize
  - TRC ‘stick & carrot’ approach success story

• Seek friends, supporters, drivers
  - South Africa: Nelson Mandela, Desmond Tutu
  - El Salvador, Guatemala: ‘Friends’ group countries

• Do it quickly, and do it right
  - Maximizes success chances, minimizes permanent disruption
  - Get the right people on board
  - Choose right mix of broad and deep investigation
Interested in more, the easy way?

- ICC Library search for “truth commissions”: 56 hits

- **In English** (selection @ ICC):

- **En français** (sélection @ CPI):
  - “La mémoire et le pardon: Les commissions de la vérité et de la réconciliation en Amérique latine” (Arnaud MARTIN, 2009) [*Bibliothèque CPI no. JC 599 .L3 M45*]
Interested in more, the easy way?

- **En español** (selección @ CPI):
  - “Entre el perdón y el paredón: Preguntas y dilemas de la justicia transicional” (Angélica RETTBERG, 2005) [Biblioteca CPI no. K5250 .E58]

- **Auf deutsch** (Auswahl @ IStGH):
  - “Die Zulässigkeitsprüfung vor dem [IStGH]: zur Auslegung des Art. 17 IStGH-Statut unter besonderer Berücksichtigung von Amnestien und Wahrheitskommissionen” (Claudia CÁRDENAS, Berlin 2005) [IStGH-Bibliothek Nr. KZ 6310 .C27]
  - “Apartheidkriminalität vor Gericht: der Beitrag der südafrikanischen Strafjustiz zur Aufarbeitung von Apartheidunrecht” (Volker NERLICH, Berlin 2002) [IStGH-Bibliothek Nr. KTL 1572 .N47]
Vielen Dank
for your attention!

Your questions & feedback
are most welcome:

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Now it’s your turn: Let’s discuss!