

# 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

Honduras sets up  
disputed coup  
truth commission

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

Lebanon Needs  
A Truth Commission

Brazil's Lula to propose  
torture truth commission

Scotland's church and civic-backed Poverty 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)’

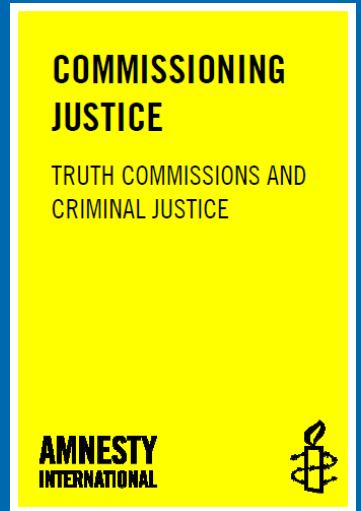
- *[None in Oxford English Dictionary]*
- Wikipedia.org
  - “A commission tasked with discovering and revealing past wrongdoing by a government (or, depending on the circumstances, non-state actors also), in the hope of resolving conflict left over from the past”
- United States Institute for Peace (USIP)
  - “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<sup>(-)</sup>, Indonesia<sup>(-)</sup>
- **2005-2010 [7x]**: South Korea, Liberia, Canada, Ecuador, Solomon Islands, **Kenya\***, Togo
- \* = established at time of ICC investigation; <sup>(-)</sup> = not appointed
- Report available at <http://www.amnesty.org/en/library/info/POL30/004/2010/en>



# 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 ⇒ 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
  - in English: <http://www.justice.gov.za/trc/report/index.htm>
- 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):
  - “Serving the interests of justice: Amnesties, truth commissions, and the [ICC]” (**Darryl ROBINSON**, in: “Bringing power to justice? The prospects of the [ICC]”, by Michael Milde, Montreal 2006) [*ICC Library no. KZ 6311 .B75*]
  - “Truth commissions and courts: the tension between criminal justice and the search for truth” (**William A. SCHABAS** (ed.), Dordrecht 2004) [*ICC Library no. K 5250 .A6 T78*]
  - “Post-conflict justice” (**M. Cherif BASSIOUNI**, 2002) [*ICC Library no. K5001 .P67*]
- 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*]
  - “Wahrheitskommissionen, dargestellt an den Beispielen von El Salvador, Guatemala und Südafrika” (**Wolfgang PASTERNAK**, Aachen 2003) [*IStGH-Bibliothek Nr. JC 580 .P37*]

*Vielen Dank*  
for your attention!

Your questions & feedback  
are most welcome:

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**Now  
it's your turn:  
Let's discuss!**