

A Discussion about Truth Commissions

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ICC - June 30, 2010

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**

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)'

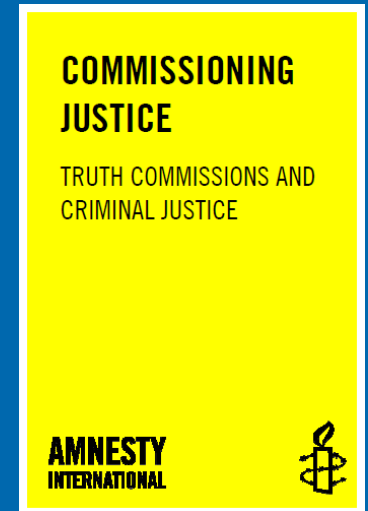
- *[None in Oxford English Dictionary]*
- **Wikipedia.org**
 - “A commission tasked with discovering and revealing past wrongdoing by a government (or, depending on the circumstances, non-state actors also), in the hope of resolving conflict left over from the past”
- **United States Institute for Peace (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
- Report available at <http://www.amnesty.org/en/library/info/POL30/004/2010/en>



WHY a truth commission?

- **Victims**
 - Know the truth \Rightarrow 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 \Rightarrow '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 \Rightarrow 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 \Rightarrow *Less* info about *more* cases (e.g. Guatemala)
 - Deep \Rightarrow *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, Siphiso Mtshali, 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 Benzi 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. Iustration): 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!