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ON THE TRUTH COMMISSIONS AND THE APPLICATION OF JUSTICE IN PROCESSES OF DEMOCRATIC TRANSITION

Resumen

El artículo comienza ofreciendo una definición ampliamente aceptada de lo que es una comisión de la verdad. Enseguida describe las funciones principales de semejante institución en cinco puntos: aclarar la verdad, atender a las necesidades de las víctimas, contribuir al proceso de administración de justicia, proponer reformas institucionales y avanzar en mecanismos de reconciliación. Más adelante desarrolla un análisis comparativo de las diferentes comisiones de la verdad que han existido hasta ahora. El artículo alerta sobre el nacimiento de una cuarta generación de comisiones de la verdad, caracterizadas por el hecho de que son establecidas en mitad de un conflicto no resuelto, como una herramienta de la "diplomacia restaurativa" y la construcción de la paz. El análisis subraya la importancia de contar con ciertas condiciones mínimas para que una comisión de este tipo pueda tener éxito, a saber, el consenso de todas las partes, el cese al fuego y el apoyo tanto de la sociedad civil como de la comunidad internacional. El artículo concluye con una breve revisión del caso de Sierra Leona, dado su interés metodológico.

Abstract

A widely accepted definition of what a Truth Commission is, is presented as an introduction for this article. The definition is followed by a description of its five main functions: to clarify the truth; to deal with the need of victims; to contribute to the process of justice administration; to propose institutional reforms and to move forward in the development of reconciliation mechanisms. Furthermore, the article analyses comparatively examples of existing Truth Commissions, and focuses on the possible birth of a fourth generation of Truth Commissions. The latter could be characterised by their establishment in the middle of a non-resolved conflict, as a tool for 'restorative democracy' and for peace building. The analysis presented here highlights the need for minimal conditions for a Truth Commission to be successful. Those conditions being: an overall consensus between parts, a cease-fire, and the support of civil society and the International Community. The author concludes with a brief sketching of the Sierra Leone case, emphasising on its methodological value.

When I first became aware of the intention of the United Nations High Commissioner of Human Rights to help Sierra Leone set up a Truth and Reconciliation Commission, I was surprised. As far as I knew, Sierra Leone was in the middle of an atrocious conflict, and according to standard accounts, this fact would definitively run against the nature of a Truth Commission, since all previous commissions had worked after the end of conflicts or authoritarian regimes. Under circumstances like in Sierra Leone, it seemed impossible to set up anything similar without risking many human lives. I was surprised even more when I heard that although Sierra Leone had just witnessed the breakdown of a peace agreement and might be entering another period of extremely bloody violence, the intention to start a truth commission remained firm.

Truth commissions have come to be considered as a pragmatic instrument in the toolbox of conflict resolution, an example of "re-constructive diplomacy", in a development still not perceived by other analysts, as far as my knowledge goes.

In fact, the United Nations and the international community,

conscious of the limitations of maintaining the peace once a crisis has broken out, have started to lay more emphasis on international preventive action and peace-building¹. Part of that strategy seems to be to press for the establishment of such truth commissions in many different parts of the world, starting from East Timor, the Former Yugoslavia, Burundi, to Rwanda and Sierra Leone.

This article uses a comparative approach with different countries who have experienced successfully or unsuccessfully the setting up of truth commissions through an horizontal comparison. The document describes what truth commission are, their purpose and evolution, and offers a totally new concept about truth commissions as an innovative element of restorative diplomacy approaches.

A. What is a Truth Commission?

According to Hayner, a Truth Commission is a temporary body that is established by official act of State, and is in charge of investigating widespread

¹ See the Report of the Panel on United Nations Peace Operations, UN Doc. No. A/55/305, S/2000/809, p. 5-8, which recommends that "the United Nations and its members face pressing need to establish more effective strategies for conflict prevention, in both the long and short terms".

politically motivated atrocities and massive human rights violations lying in the past². Truth Commissions are generally created after a democratic regime has replaced a totalitarian or authoritarian one³. In this sense, they are central elements of political transition processes⁴.

Furthermore, these bodies are not conceived as substitutes for criminal prosecution; as Hayner has succinctly put it: "truth bodies do not and should not be seen to replace judicial action"⁵. They have mandates which are usually broader than criminal courts and can consequently elicit broader historical truths than trials⁶. While not a substitute for criminal justice, they can be certainly a complementary, or as Alex Boraine pointed out, "the combination between judicial stick and TRC carrot may emerge a potent force in flushing out former operatives who have adopted the 'wait and see' approach"⁷.

Truth Commissions are an effort to find out what really happened in a tortuous past, to seek to "uncover the past in order to answer questions that remain unanswered: What happened to husbands, sons, wives and lovers at the hands of the ousted regime? Who gave the orders? Who executed the orders? What was the grand design? Who benefited?"⁸ The full disclosure of all human rights abuses should ensure that these facts are not forgotten but remain in collective memory⁹.

In Hayner's account, there have been 21 such official Truth Commissions since 1974, ranging from countries as diverse as Uganda to Argentina and from Sri Lanka to Germany¹⁰. Not in the least due to all their differences, these countries had very varied experiences with the Truth Commission mechanism, and some of them failed completely (especially in Africa). Nevertheless, all of these experiences have

² See P. Hayner, *Unspeakable Truths. Confronting State Terror and Atrocity*, New York, 2001, p. 14. Priscilla Hayner is one of the most prominent analysts of Truth Commissions.

³ R. Rotberg, "Truth Commissions and the Provision of Truth, Justice and Reconciliation" in *Truth v. Justice*, eds. R. Rotberg & D. Thompson, Princeton, 2000, p. 3.

⁴ For political transitions in general cf. J.J. Linz, & A. Stepan, *Problems of Democratic Transition and Consolidation: Southern Europe, South America, and Post-Communist Europe*, Baltimore, 1996.

⁵ Hayner, *Unspeakable Truths* (supra note 184), p. 87.

⁶ R. Brody, "Justice: The First Casualty of Truth? The Global Movement to End Impunity for Human Rights Abuses Faces a Daunting Question", *The Nation*, April 30, 2001.

⁷ Boraine, "Alternatives" (supra note 155), p. 9.

⁸ Rotberg, "Truth Commissions" (supra note 185), p. 3.

⁹ L. Huyse, *Young democracies and the choice between amnesty, truth commissions and prosecutions*, Policy Study on Development Co-operation, Brussels 1998, p. 4.

¹⁰ Hayner, *Unspeakable Truth* (supra note 184), pp. 32ss.

brought valuable lessons to be taken into account.

B. Uses and possible benefits derived from the installation of a Truth Commission

According to Priscilla Hayner, Truth Commissions can contribute to the accomplishment of five goals¹¹: (a) clarify and acknowledge the truth, (b) respond to the needs of victims, (c) contribute to justice and accountability, (d) outline institutional responsibility and suggest reforms, and (e) promote reconciliation and resolve tensions resulting from past violence¹².

These goals are partially overlapping, but can still be seen as a sequence ranging from the *minimum* of establishing the truth (short term) to the *maximum* of attaining reconciliation (long term). In what follows, I will briefly discuss these different goals and the means necessary to attain them.

1. Clarifying the Truth

As already implied in its name, every truth commission tries to clarify the truth¹³ about what happened by a comprehensive process of fact-finding. Establishing the truth means clarifying the mechanisms of repression, or in other words, overcoming denial and exposing the facts about past political crimes and atrocities.

¹¹ Hayner, *ibid.*, pp. 24-31.

¹² For M. Minow, *Between Vengeance and Forgiveness: Facing History After Genocide and Mass Violence*, Boston, 1998, p. 88, there are a number of aspirations animating societal responses to collective violence. Most of them, upon close examination, can be subsumed under one of Hayner's categories: "1. Overcome communal and official denial of the atrocity and gain public acknowledgement; 2. Obtain the facts in an account as full as possible in order to meet victims' need to know, to build a record for history, and to ensure minimal accountability and visibility of perpetrators; 3. End and prevent violence; transform human activity from violence -and violent responses to violence- into words and institutional practices of equal respect and dignity; 4. Forge the basis for a domestic democratic order that respects and enforces Human Rights; 5. Support the legitimacy and stability of the new regime proceedings after the atrocity; 6. Promote reconciliation across social divisions; reconstruct the moral and social systems devastated by violence; 7. Promote psychological healing for individuals, groups, victims, bystanders and offenders; 8. Restore dignity to victims; 9. Punish, exclude, shame, and diminish offenders for their offences; 10. Express and seek to achieve the aspiration that "never again" shall such collective violence occur; 11. Build an international order to try to prevent and also to respond to aggression, torture and atrocities; 12. Accomplish each of these goals in ways that are compatible with the other goals".

¹³ I will not go into details about the perennial question already posed by Pilate "What is the truth?" (Gospel of St. John, 18, 38). In connection with truth commissions, one could ask e.g. whether absolutely all violations need to be accounted for in order to speak of the "truth" or how to deal with testimony which cannot be objectively verified, see H.J. Steiner, ed. *Truth Commissions*, WPF Report 16, Cambridge 1997.

In many countries, silence about crimes of past regimes is officially "institutionalised". A truth commission has to cut through this web of lies and come up with a picture of events as complete as possible. Many commissions have been able to attain this minimum result, by publishing an extensive report about their findings.

The second aspect of truth telling is public acknowledgement, or in other words, an official recognition of past wrongdoing. The South African truth commission attained this objective by holding public hearings^{13a}, the report of the Chilean commission formed the basis for a public apology by the nation's President, but others, e.g. in Haiti¹⁴, were not able to fulfil such expectations of a public accounting.

2. Needs of the Victims

Responding to the needs of the victims is an important aim, since the victims are profoundly traumatized by what they have

experienced and many of them have additionally suffered under feelings of powerlessness, guilt and shame created by official denial and impunity¹⁵. However, although many authors dedicate themselves to the topic¹⁶, it is not always easy to identify exactly what the needs of victims are, since they may want different things.

They find themselves not only caught in the dilemma of having to choose between remembering and forgetting, but also between different and potentially conflicting aspirations with regard to their past experiences. Some victims may be content with the minimum that someone responsible for what was done to them acknowledges their suffering, and recognises that it was wrong by offering an apology.

Others may want financial compensation for the wrongs committed against them or judicial prosecution of their tormentors. Some victims may expect that the perpetrator recognises their violated human

^{13a} Former apartheid president and National Party chairman Frederik Willem de Klerk issued a formal apology for past wrongs in his testimony before the TRC, cited in R.L. Brooks ed., *When Sorry Isn't Enough*, New York 1999, pp. 505s. Of course other apartheid figures remained unrepentant, e.g. Pik Botha, but General Pinochet never apologized for his crimes either.

¹⁴ K. Roth, "Human Rights in the Haitian Transition to Democracy," in *Human Rights in Political Transitions*, eds. C. Hesse & R. Post, New York 1999, p. 121.

¹⁵ Boraine, "Alternatives" (supra note 155), p. 7.

¹⁶ E.g. Minow, *Vengeance* (supra note 194), Hayner, *Unspeakable Truths* (supra note 184), R. Bhargava, "Restoring Decency to Barbaric Societies" in *Truth v. Justice*, ed. R. Rotberg & D. Thompson, Princeton 2000.

dignity or even long for "mutual emphatic understanding of each other's fears, political ideals and aspirations for the nation"¹⁷ between them and their violators. A minority of victims might also want to commit individual acts of vengeance.

Under these circumstances, it is impossible to identify a single prevalent "need" of victims, but it is clear that a truth commission cannot possibly address or satisfy all these wishes.

Various minimum steps have to be taken, however. Firstly, the personal safety of victims who testify before the truth commission has to be guaranteed by a witness protection program. Secondly, the issue of financial reparation has to be addressed.

Lastly, the commission itself should be required to show sufficient responsiveness towards the specific psychological situation of the victims suffering under severe post-traumatic stress. Such victims "need to tell their stories to someone who will listen seriously, and who validates them with official acknowledgement"¹⁸.

Talking about their terrible traumas may work as a personal catharsis and thereby contributes to healing individuals and the whole society. The South African commission has dealt with these issues by establishing a well-structured witness protection program, a reparation committee, and a psychological support group¹⁹.

3. Justice and accountability

In some occasions, although their difference from judicial organs has already been stressed, truth commissions can also contribute to the judicial prosecution of perpetrators²⁰. There are different ways this could happen, e.g., through handing over a list of names or other evidence to the criminal courts or even by recommending some alleged perpetrators for prosecution.

In practice, truth commission can either directly or indirectly contribute to criminal trials. José Zalaquett gives an example for the first approach: "In Chile, (...) we sealed all the information on perpetrators and sent it to the courts"²¹.

¹⁷ Steiner, Truth Commissions (supra note 195), p. 28.

¹⁸ Minow, Vengeance (supra note 194), p. 62.

¹⁹ Cf. C. Villa-Vicencio, "Why Perpetrators Should not Always be Prosecuted: Where the International Criminal Court and Truth Commissions Meet", *Emory Law J.*, vol. 49 (2000), no. 1, pp. 101-118.

²⁰ Robertson, Crimes (supra note 154), p. 266, sees this as the only valuable function a truth commission can serve.

²¹ Cited in Steiner, Truth Commissions (supra note 195), p. 58.

The Argentinean Commission on the Disappeared followed similar patterns²². The South African commission²³ had a more complex procedure, which involved a trade-off between truth, which was rewarded with amnesty on an individual basis, and trials, which awaited those not willing to appear before the commission or who had committed atrocities for personal gain or out of personal malice²⁴.

Indirect contributions can be seen when criminal courts later resort to the evidence originally documented by a truth commission, as happened for example in El Salvador for the El Mozote massacre or in Spain with the case against Augusto Pinochet. In general, however, the relationship of prosecutions to truth commissions remains problematic, since the suspicion that truth will serve as a weak substitute for criminal justice is always present. Faced with such inherent tensions and given the difficulty of the task, the goal of contributing to prosecutions

appears incidental and not purposive, rather a side product of the commission's activity than one of its main purposes.

4. Institutional responsibility and reforms

Henry Steiner formulates an important question each commission is faced with sooner or later: "should truth commissions assume the ambitious role (of) advancing broader criticisms of past conduct, that specify or imply fundamental cultural or political change?"²⁵

There are very diverse responses to this question. Minow favours a comprehensive approach: "A commission can try to expose the multiple causes and conditions contributing to genocide and regimes of torture and terror"²⁶. Similarly, Hayner believes that "truth commissions are uniquely positioned to undertake this evaluative and prescriptive task"²⁷.

²² See Americas Watch, *Truth and Partial Justice in Argentina: An Update*, New York 1991.

²³ A. Boraine, "Truth and Reconciliation in South Africa: The Third Way", in *Truth v. Justice*, eds. R. Rotberg & D. Thompson, Princeton 2000, pp. 148s

²⁴ As Hayner, *Unspeakable Truths* (supra note 184), p. 100 reports, the relationship between criminal investigators and the TRC was sometimes conflictive, since they were basically targeting the same people. Some suspects who had been targets of intensive investigations and were on the brink of arrest shortcut the prosecution's efforts by applying for amnesty with the TRC. However, the evidence accumulated through the Commission's hearings undoubtedly also aided the criminal justice system in its task of bringing the perpetrators to justice.

²⁵ Steiner, *Truth Commissions* (supra note 195), p. 17.

²⁶ Minow, *Vengeance* (supra note 194), p. 78.

²⁷ Hayner, *Unspeakable Truths* (supra note 184), p. 29.

Other authors like Zalaquett caution against broadening the scope of truth commissions much beyond establishing the facts of repression: "A truth commission is not the appropriate place to try to explain the whole chain of historical factors that has caused human rights abuses. That would be a very controversial undertaking"²⁸. In similar vein, Bhargava argues that truth commissions should be restricted to restoring a "minimally decent order", i.e. focus on the rehabilitation of political victims and the restoration of basic procedural justice²⁹.

In the end, very much will depend upon the act or compromise which establishes the truth commission. If there is political consensus that the commission should take a more comprehensive approach to the problem of endemic violence, the body can also address the structural conditions under which the violence was carried out, for example, the malfunctioning administration of justice, the social misery in which many people live or the low overall legitimacy of the State.

If a Truth Commission addresses these larger structural issues, its report will be like a critical picture

of society which can induce a wider process of reflections; thus the citizens are forced to think about foundational questions like "Which people do we want to be?" or "Which society do we want to have?"³⁰ Such a truth commission is not merely an investigative body, but can also serve as an input for the reconstitution of the social fabric after a period of profound convulsion and trauma.

Parting from this premise, the South African commission believed that an "honest assessment and diagnosis of the sickness within society"³¹ was a cornerstone of its work including "at least a strong commitment to transformation in the economic and social life of the majority"³². The results of the TRC's work with regard to this ambitious goal can be qualified as reasonable positive. According to Richard Goldstone, the commission "undoubtedly facilitated the introduction of programmes for the redistribution of wealth"³³ because it made whites aware of the injustice of existing structures.

On the other hand, the Commission's research director, Charles

²⁸ Cited in Steiner, Truth Commissions (supra note 195), p. 53.

²⁹ Bhargava, "Restoring Decency" (supra note 198), pp. 475.

³⁰ Ronald Dworkin, cited in Villa-Vicencio, "Why perpetrators?" (supra note 201), p. 115.

³¹ Boraine, "Truth", (supra note 205), p. 142.

³² Boraine "Alternatives" (supra note 155), p. 2.

³³ R. Goldstone, Truth Commissions and Tribunals: Contradictory or complementary?, Paper presented to a Symposium on Justice, Truth, and Reconciliation, Geneva, 11 Dec. 1998.

Villa-Vicencio believes that, due to limitations in time, resources and mandate, they were not able to uncover more than "the tip of an iceberg of truth"³⁴. In other cases, like Uganda, Burundi, or Nepal, the implementation of the commission recommendations failed partially or completely³⁵.

5. When truth and reconciliation meet

Many Truth Commissions were also established to bring about "reconciliation". However, reconciliation is a big word often used too carelessly. Some critics have pointed out that "reconciliation was a code word for those who wanted nothing done"³⁶, others question whether any commission has the moral authority to try to force the families of victims to reconcile with their executioners³⁷.

This does not mean that reconciliation should not be an aspiration, that it should not be

the final outcome³⁸, but I do suggest that maybe—in an understandable desire of showing tangible results—many have been too quick to call "reconciliation" what in reality was hardly more than superficial consensus.

Reconciliation cannot be imposed from above, by authoritative decision issued by a State institution. It has to grow from below, evolve naturally and out of a desire shared by victims and victimisers.

It should therefore not be expected that reconciliation will in any way be an automatic outcome of a Truth Commission's work. The discussion, debates, analysis, listening and truth telling which will take place in the framework of the commission can serve as a starting point, as an initial input for the healing process³⁹. Reconciliation may happen between victims and perpetrators later on⁴⁰.

³⁴ C. Villa-Vicencio & W. Verwoerd, "Constructing a Report: Writing up »the Truth«", in Truth v. Justice, eds. R. Rotberg & D. Thompson, Princeton 2000, p. 288.

³⁵ Hayner, *Unspeakable Truths* (supra note 184), pp. 56-57.

³⁶ J. Méndez, cited in Hayner, *Unspeakable Truths* (supra note 184), p. 160.

³⁷ Cf. for example, Horacio Verbitsky cited by R. Brody, "Justice" (supra note 188), M.C. Bassiouni, "Searching for Peace and Achieving Justice: The Need for Accountability" *Law & Contemporary Problems* vol. 59 (Autumn 1996), p. 19, or C. Hesse & R. Post "Introduction", in *Human Rights in Political Transitions: Gettysburgh to Bosnia*, New York, 1999, p. 17.

³⁸ This is a goal Bishop Desmond Tutu defends very vociferously; see e.g. his work *No Future Without Forgiveness*, London 1999.

³⁹ Boraine, "Alternatives" (supra note 155), p. 11.

⁴⁰ For a more pessimistic view on this issue, cf. Minow, *Vengeance* (supra note 194), p. 62: "Survivors of mass atrocity may feel as though in fact they have died, or live among the dead. Perhaps, endurance, not healing, is what survivors at best can seek".

Almost all authors agree that such a result will require long time⁴¹, but this is in sharp contradiction with the normally overwhelming expectations society has for a truth commission process. People often expect immediate reconciliation with the release of the final report and the eventual implementation of reparation programmes. As such hopes in society are practically never fulfilled, especially when the circumstances are not favourable to rapid reconciliation or economical reconstruction, a general sentiment of disillusion and resentment often sets in, negatively affecting the long-term prospects.

In reality, the release of the report is not the end, but only the beginning. Reconciliation in the most basic definition requires the recognition of something which unites in spite of all the differences which divided. In other words, it calls for mutual recognition of the opponent's humanity. In Crocker's useful categorisation, there are three different meanings of reconciliation, ranging from "thicker" to "thinner" conceptions⁴². All of them, from the minimal "peaceful coexistence" to the more ambitious notion of a shared comprehensive vision of the past,

require that all concerned parties acknowledge their shared condition as humans. In the long run, this basis can then be a source of common memories, a foundation for the construction of the community.

In its most advanced form, reconciliation produces a form of social memory where a traumatic collective experience is not remembered from two completely irreconcilable perspectives—victims and perpetrators—, but in an integrated manner. This does not imply the production of an "official history" by the State, but it provides a common understanding of the past. In this sense "memory is not only retrospective, it is prospective as well. Memory provides a perspective for interpreting our experiences in the present and foreseeing those that lie ahead"⁴³.

I believe that such an outcome of reconciliation is enormously difficult to achieve, even on the level of simple individuals. It is harder still on the collective level. It can work, but it will surely be a long-term process. A more modest understanding of what a Truth Commission can achieve, a successful process of truth finding can be an important and

⁴¹ Among others, Goldstein, Minow, Boraine, and Hayner all support this expectation.

⁴² D. A. Crocker, "Truth Commissions, Transitional Justice and Civil Society" in *Truth v. Justice*, eds. R. Rotberg & D. Thompson, Princeton, 2000, p. 108.

⁴³ J. Fentress & C. Wickham, *Social Memory: New Perspectives on the Past*, Oxford 1992, p. 51.

even crucial step for reconciliation later on.

Finally, seen from a broader perspective, I suggest that the word "reconciliation" is repeatedly used not necessarily because this will be the direct outcome of the commission's process, but because this is a 'politically correct word'. A society extremely hurt through a violent past will probably be very reluctant to support confrontation as a method of conflict resolution. As there is a feeling to "let sleeping dogs lie", a commission has to thread carefully to find legitimacy for its work. The term "reconciliation" in the mandate or the name of the commission itself is a clear message about the aim of the body: it doesn't want to destabilise the fragile transition by generating more conflict but represent the primary need of peacefully coming to terms with the past.

C. Establishing a Truth Commission in the middle of the conflict?

1. Three subsequent "generations" of truth commissions

As we have seen, over the last two decades there have been numerous truth commissions in different national settings. In this succession of commissions, it is possible to detect a continuous evolution of these bodies: they follow certain regularities but also learn from previous experiences. This learning process has been especially notable in South Africa, where experts from different Latin American commissions were invited to share their experiences for the benefit of the incipient truth and reconciliation process^{43a}.

In order to describe the sequence of commissions, I have developed the concept of different "generations" of truth commissions. As the words "generation" implies, there is a certain time element included in the classification, since I believe that the passage of time has helped the institution to learn from previous mistakes and

^{43a} Similar passing on of knowledge can be found in many other examples as well, e.g. the recent announcement of Yugoslav President Kostunica that former vice president of the South African TRC Alex Boraine would serve as special external adviser to the Yugoslav truth commission launched in April 2001.

mature. However, time is not the most important element of qualification: later in time is not always better. This is so because TCs operate in many different contexts; the social and political circumstances may vary enormously. So the crucial variables in my comparison of different such institutions are not lineal, but qualitative. The typology I'm suggesting concerns qualitative differences, for example the powers held by the commissions, their relation with the criminal justice system and the settlement of complementary programs.

A *first generation* of truth commissions was the result not so much of internal consensus and a real political will to come to terms with a traumatic past, but was created in response to the enormous external pressure, because of international concerns with a negative human rights record.

Consequently, these commissions operated often very much against the will of the government that had created them. They had a low profile and narrow mandates to investigate just certain types of crimes and their work was completely detached from the institutions of ordinary criminal justice. Reports were either kept

secret or very sparsely distributed. Not surprisingly, their effects were hardly notable. Examples for such first generation commissions would be the ones about Uganda (1974), Bolivia, Uruguay, Zimbabwe, Haiti, and Nepal.

The report on Uganda was never published nor were its recommendations implemented, similar to Zimbabwe where the report was never available to the public. The Bolivian commission was dissolved due to the lack of resources⁴⁴. A similar fate occurred to the first Nepalese Commission, which operated only a couple of weeks.

The Uruguayan commission's mandate was framed to prevent the investigation of illegal imprisonment or torture, the most widespread repressive methods under the military dictatorship and its final report was changed at the last minute and not widely distributed⁴⁵. The second Nepalese commission, formed to replace the unlucky predecessor, produced a report but very few of its recommendations were implemented. In the case of Haiti, the commission did not consult with local NGOs, its mandate prohibited it from initiating prosecutions of documented human rights violations, and the government

⁴⁴ E. Cuya, "Las comisiones de la verdad en América Latina", *Kooga'neta*, Revista de Derechos Humanos (1 March 1999), p. 6.

⁴⁵ J. Dassin, "Preface to the new edition", in *Torture in Brazil*, Austin 1998, p. xvi.

chose not to publish the report in its entirety, creating widespread disillusion with the whole process⁴⁶.

The *second generation* of truth commissions had broader mandates, held some powers of investigation and developed some direct or indirect relation to the criminal justice system, where the reports turned into important pieces of evidence to support trials against perpetrators. Even though some of these commissions failed too, they are qualitatively different from those of the generation before them. This group would be represented by the cases of Uganda (1986), Chad, Argentina, Chile, El Salvador and Ecuador.

The Truth Commissions in Chile and Argentina for example, met with practically no co-operation from the military and police forces, but held a high public profile and were fully supported by NGOs⁴⁷. Their reports were widely distributed and followed by reparation programs. Neither of them named perpetrators, but in the case of Argentina, after the military's self-amnesty had

been annulled, the National Commission on the Disappeared turned its files over to the prosecutor's office. In this way, it contributed to bring some main perpetrators to jail⁴⁸. In Chile, the follow-up to the Rettig Commission report initially disappointed many human rights activists⁴⁹, but later on the report acquired new significance when used by judge Garzon in Spain to assume jurisdiction over the Pinochet case⁵⁰.

The Chad commission was the first one to publicly identify alleged perpetrators as well as to discuss the involvement of foreign governments in the human rights violations, later to be followed in that regard by the Salvador commission. The Chad report was also used as evidence to strengthen international efforts to prosecute former dictator Hissène Habré⁵¹. While the El Salvador report was followed by a blanket amnesty, recent developments suggest that there may still be a chance to bring to justice some of the officers involved, where the

⁴⁶ Roth, "Human Rights in the Haitian Transition" (supra note 196), p. 121.

⁴⁷ For Argentina cf. A. Brysk, *The Politics of Human Rights in Argentina: Protest, Change and Democratization*, Stanford 1994; for Chile see Human Rights Watch, *Human Rights and the Politics of Agreement: Chile During President Aylwin's First Year*, New York 1991.

⁴⁸ Cf. Human Rights Watch, *Truth* (supra note 204).

⁴⁹ M.A. Garretón, "Human Rights in Democratization Processes," in *Constructing Democracy*, eds.: E. Jelin & E. Hershberg, Boulder 1996, p. 43.

⁵⁰ R. Wedgwood, "International Criminal Law and Augusto Pinochet" *Va. J. Int'l. Law*, vol. 40 (2000).

⁵¹ F. L. Kirgis, "The Indictment in Senegal of the Former Chad Head of State", *ASIL Insight* Feb. 2000.

investigations carried out by the Truth Commission may be a fundamental piece of evidence.

Despite its broad mandate, including a specific mention of its relation with the judiciary, the Ecuador commission ceased its activities after five months due to the lack of resources and trained personnel⁵².

Commissions that present important qualitative improvements in comparison with the second generation represent the *third generation*. Here we can classify both commissions organised by the African National Congress, the South African model of a Truth and Reconciliation Commission (TRC), Guatemala and Germany.

The two commissions established by the African National Congress are milestones in several respects: Firstly, they represent important preliminary exercises that directly helped to shape the South African TRC. Secondly, they also constitute the first attempt of a non-state actor to reflect about its own responsibility for the facts that lead to political violence and human rights violations.

The commissions in South Africa, Germany and Guatemala all possessed strong and extensive powers, had received democratic backing, were launched with active involvement of the media and the international community and—very importantly—had considerable, although not unlimited resources at their disposal.

The archetypal third generation commission is without doubt South Africa's, a fact that is also illustrated in the enormous amount of analysis this commission has generated⁵³. The Truth and Reconciliation Commission had a very complex structure, consisting of three separate committees in charge of human rights violations, reparations, and amnesties, respectively. It was created in a transparent and democratic manner, by an act of parliament after extensive popular consultations.

The TRC hearings were public and repeatedly broadcast on national television. The amnesty committee had authority to grant amnesties on an individual basis when stringent criteria were fulfilled⁵⁴. The reparation committee suggested a number of

⁵² See Hayner, *Unspeakable Truths* (supra note 184), p. 69.

⁵³ Among many others, see R.L. Brooks ed., *When Sorry Isn't Enough*, New York 1999, pp. 443-510; J. Dugard, "South Africa's Truth and Reconciliation Process and International Humanitarian Law", *YB of Int'l. Hum. Law*, vol. 2, 1999, pp. 254-263; Boraine, "Truth" (supra note 205); R. Rotberg & D. Thompson eds., *Truth v. Justice: The Morality of Truth Commissions*, Princeton 2000; Tutu, *No Future* (supra note 220); Steiner, ed. *Truth Commissions* (supra note 195).

⁵⁴ As Dugard (supra note 235), p. 257 stresses, there have been over 7.000 applications for amnesty, but up until 1999, the Commission had only granted 150 and dismissed more than 5.000.

comprehensive programs to redistribute the wealth⁵⁵. In spite of a number of limitations, criticisms, and trade-offs, the TRC is generally regarded as a successful example of dealing with gross human rights violations.

2. A fourth generation is born

After this brief description of how such institutions have evolved in the past, I will now come to what I call the *fourth generation* of truth commissions. This evolving new group has a number of characteristics that set it apart from its precedents.

Firstly, and this is a very important difference, this type of truth commissions is no longer a "accompanying vehicle of political transitions", because it is not set up after a change of political regime, but in the middle of an ongoing conflict. They are set up either after a cease-fire has been reached, or there is at least a strategic window of opportunity where political violence has decreased considerably.

Societies where such commissions are established are therefore characterised by very high levels

of political violence, armed insurgencies and civil wars. The surrounding environment under which these truth commissions have to work is much more conflictive and setting up such a institution is a high-risk operation.

To illustrate this characteristic, it is useful to resort to the distinction made by Bhargava⁵⁶ between symmetric and asymmetric barbarism. In his view, a society where all concerned parties violate the most minimal moral rules is characterised by symmetric barbarism, whereas a society where one actor is the main culprit for the violations is asymmetrically barbaric.

Examples for asymmetric barbarism would be Nazi Germany or the Argentinean and Chilean military dictatorships. Symmetric barbarism could be found e.g. in the religiously motivated violence during the partition of India (1948) or in the recent history of Rwanda⁵⁷.

Past generations of truth commissions have been concerned with situations of asymmetric barbarism where the major perpetrator of political violence was the State through its agents⁵⁸.

⁵⁵ H. Mkhize, "Introductory Note to the Presentation of the Truth and Reconciliation Commission's Proposed Reparation and Rehabilitation Policies", reprinted in Brooks, *When Sorry* (supra note 235), p. 501.

⁵⁶ Bhargava, "Restoring Decency" (supra note 198), p. 58.

⁵⁷ Ibid.

⁵⁸ Although the South African TRC was preceded by two commissions in charge of investigating the violations carried out by the armed opposition (ANC), in the end its clearly identified the apartheid regime as the overwhelmingly responsible perpetrator.

A very important feature of fourth generation commissions is that they deal with symmetrically barbaric conflicts where multiple actors/perpetrators exist and each bears a roughly proportional responsibility for the atrocities.

Such commissions are set up in the middle of hostilities precisely with the aim of clarifying the exact amount each party has committed human rights violations⁵⁹.

Table 1
TRUTH COMMISSIONS IN THE MIDDLE OF THE CONFLICT

Country	Initiative	Creation by	Party agreement	Civil soc.	Effects
Sri Lanka	Internal	Presidential decree	No, Tamil Tigers were not consulted	Medium, hearings of victims and officials	Report, limited reparations, contributed to limited prosecution conflict ongoing
Burundi	External	UN Security Council Res.	No, unilateral government request to UN without opposition involvement	None, confidential UN investigations	Report concluded, no follow up, conflict ongoing
Sierra Leone	Internal + External	Peace agreement	Partial, only Government and major insurgent group agreed to set up TC	Low, some preliminary seminars took place	First TC never started ist work, currently again in negotiation, conflict on going
East Timor	External	In negotiation	In negotiation		
FRY	Internal + external	In negotiation	In negotiation		

⁵⁹ This can be an extremely necessary step because in many cases of internal armed conflict there are no clear battle fronts, and all sides commit atrocities and do not usually admit them. Unacknowledged human rights violations are a major factor of distrust between the combatants. The denial of human rights violations committed by one side in the end will originate retributive violations by the other side, speeding up the escalation of the violence. A truth commission, by establishing clearly who did what can deter the reciprocal use of violent methods through their public denunciation, and in this way may contribute to a definitive solution of the conflict.

In order to systematically show some common as well as differentiating features for this kind of truth commissions, the following table gives some examples of commissions that were established or are currently being discussed for ongoing conflicts.

What can we see from this table? The initiative to establish a commission in all cases but one included substantial international participation, which already gives us an indication that the focus of setting up such commissions has shifted from a purely internal mechanism of coming to terms with the past to being a tool of international crisis diplomacy⁶⁰.

Probably because of the origin of such commissions in the international community, the participation of civil society in the work of these commissions was low or non-existent. Regarding the important issue of how other actors in the conflict (insurgents, etc.) were involved in the decision to create a truth commission, again in most cases, they were not consulted.

I suggest that these three factors are importantly related to the eventual success or failure of the truth commission. Too much *international interference* works to the detriment of the process, because often experiences from other parts of the world are transferred too thoughtlessly without looking at the local circumstances and necessities⁶¹. As a matter of principle, such an effort of national reconstruction belongs to the people and should not be taken out of their hands by benevolent international experts.

This already brings us to the second point. If a truth commission wants to be successful at its task of restoring some minimum decency, it needs widespread *participation by civil society*. A truth commission, after all, is supposed to be a collective undertaking to reconstruct the public sphere, a restoration of basic procedural justice and the "political rebirth of members of society"⁶² that had been violently silenced in the past. Therefore, if the commission is not heard, seen, and engaged with, it is hardly going to work,

⁶⁰ In the light of this feature, it appears only natural that some authors propose the establishment of a "permanent international truth commission" to accompany the International Criminal Court established through the Rome Statue 1998, cf. M. P. Scharf, "The Case for a Permanent International Truth Commissions" Duke J. Comp. & Int'l. Law, vol. 7 (2000), pp. 375-403.

⁶¹ The primary example for this was certainly the Truth Commission in Burundi, which was closely but erroneously modeled on the one in El Salvador, see Hayner, *Unspeakable Truths* (supra note 184), p. 68.

⁶² Bhargava, "Restoring Decency" (supra note 198), p. 47.

Finally, a requisite that we can draw from our comparison is *consent by all actors* about setting up a truth commission. On the premise that the truth procedure is about establishing a minimum level of compliance with moral rules and thereby contributing to a culture of mutual respect and procedural justice, the very act of its establishment needs to be as broadly based as possible, because otherwise the whole purpose is rendered meaningless. In such an exercise of collective action, no free riders can be permitted, if universal recognition of minimum moral standards is intended.

Since at least one of these criteria was absent in all cases, the outcome has not been very encouraging. None of the commissions that got off the ground (Sri Lanka, Burundi) was able to make a difference; none had a measurable impact on the further course of the armed conflict, which continued unabated.

Therefore, a Truth Commission, which really corresponds to the

model of the fourth generation had not been realised yet. The experiences of Sri Lanka, Sierra Leone and Burundi helped to show how enormously difficult it is to establish a truth commission in the middle of an ongoing conflict. However, as recent efforts in Indonesia⁶³, Rwanda⁶⁴ and Yugoslavia⁶⁵ show, the effort to introduce similar bodies to some of the most intractable conflicts in the contemporary world is still very much ongoing, it is even picking up strength as it appears.

The Fourth Generation of truth commissions is coming onto centre stage, because it is increasingly perceived as an element, which can reinforce other peace-making strategies, all of them with a view of attacking a conflict at its roots. The fourth generation is crucially related to efforts of restorative diplomacy, where the international community only facilitates the means so that the afflicted society can fix its own problems. The people themselves need to participate in the resolution of their own conflict and therefore

⁶³ International Crisis Group, Indonesia: Impunity versus Accountability for Gross Human Rights Violations. Jakarta/Brussels, ICG Report Asia, no. 12, 2 February 2001.

⁶⁴ J. Sarkin, "The Necessity and Challenges of Establishing a Truth and Reconciliation Commission in Rwanda" Hum. Rights Quarterly vol. 21 (1999), pp. 767-823.

⁶⁵ In Yugoslavia, many are still plagued by the sensation that the war is not over, that there has been no "closure" of events, The TRC could give people the chance to reflect on the war and start to leave it behind, cf. statement by Kostunica adviser Nalic saying that "there is no one that doesn't have a story to tell. They are searching for a place to come to with their stories and broken lives," AFP, Dawn, 9 April 2001.

need to think about which kind of justice and as a consequence, which kind of society they want for themselves.

Clearly, the fourth generation needs to be a step ahead, building on what has been accomplished in South Africa. If it wants to be successful at contributing to the reestablishment of "minimum rules of decency" in barbaric societies, it needs wide powers, a good working relationship with the justice system, democratic foundations, sufficient financial resources, and the support of the international community, which should be steady but not imposing. Furthermore, a cease-fire and respect for the minimum standards established by international law and for the rights of victims would be essential.

3. Introducing a fourth generation commission in Sierra Leone

In order to deal a little more in detail with the major elements of fourth generation commissions, this chapter concludes by discussing the case of Sierra Leone, which as case study, sets some very

important precedents and can serve as a point of departure for our further analysis of Colombia.

The armed conflict in Sierra Leone dates from March 1991, when fighters of the Revolutionary United Front (RUF) launched a war to overthrow the government⁶⁶. The RUF's tactic was to unleash a terror campaign against the civilian population, where rape, torture, amputations, massacres and the systematic use of child soldiers were commonplace. In eight years of war, at least 50,000 people were killed and an estimated 100,000 more fell victim to torture or mutilation⁶⁷. At different times during the conflict, estimates of the number of displaced people ran as high as 2,5 million-more than half of the entire population⁶⁸.

The civil war deteriorated over time, as different armed actors, government, rebels, foreign armies, mercenaries, and paramilitary militias engaged in combat. In such a chaotic situation of general order breakdown and symmetric barbarism, a process of establishing minimum rules of decency seemed a crucial step of reconstructing this broken society⁶⁹.

⁶⁶ For background on the history of the conflict see D. Pratt, *Sierra Leone: The Forgotten Crisis*; Report to the Minister of Foreign Affairs Lloyd Axworthy from David Pratt, Special Envoy to Sierra Leone, Ottawa 1999, and International Crisis Group "Sierra Leone: Time for a New Military and Political Strategy", ICG Africa Report no. 28, Brussels, 11 April 2001.

⁶⁷ S. Robinson, "On the Edge of Chaos", *Time*, 15 May 2000, p. 30.

⁶⁸ Pratt, Report (supra note 249), p. 15.

⁶⁹ A coalition of different human rights NGOs started promoting the establishment of a Truth Commission for Sierra Leone in July 1998. During a visit to Freetown in June 1999, the UN High

In July 1999, under heavy international pressure, the two major parties, the government and the RUF concluded a peace agreement in Lomé, Togo. This Lomé Agreement combined a blanket amnesty for all human rights violations committed since 1991⁷⁰ with the parallel commitment to establish a Truth and Reconciliation Commission to "get a clear picture of the past in order to facilitate genuine healing and reconciliation"⁷¹.

In the face of the preceding horrors, such high-flung expectations were certainly unrealistic from the outset. The seriousness of the commission was moreover put in question by former RUF commanders praising reconciliation under the slogan "we were all victims"⁷².

In practice, public rhetoric about forgiveness and reconciliation

was accompanied by a "total lack of trust, as well as fear, among the conflict groups, especially at the leadership level"⁷³. The scale of human rights abuses declined significantly after the signing of the agreement, but by late 1999 violations by marauding rebel combatants and ex-members of the Sierra Leone Army were again on the rise⁷⁴.

In such an unhealthy climate, the TRC could never get off the ground, and the reigning distrust already foreshadowed the coming breakdown of the peace process, which came when the RUF took hundreds of UN peacekeepers hostage in early May 2000⁷⁵. Only an armed international intervention led by British troops could free the blue helmets, arrest some major RUF leaders, and beat the rebellion back from the capital,

Commissioner for Human Rights, Mary Robinson supported the idea; see "High Commissioner calls for Urgent Attention to Situation in Sierra Leone", UNHCHR Press Release, 25 June 1999.

⁷⁰ The United Nations representative in Sierra Leone made a public reservation that the UN could not accept the amnesty of crimes against humanity and war crimes contained in the Lomé agreement, cf. Statement made by the President of the UN Security Council on behalf of the Council on the human rights and humanitarian situation in Sierra Leone, UN Press Release, 8 March 2000.

⁷¹ See Peace Agreement between the government of Sierra Leone and the Revolutionary United Front of Sierra Leone, Art. IX (Pardon and Amnesty) and XXVI (Human Rights Violations), at <http://www.sierra-leone.org/lomeaccord.html>.

⁷² Cf. the statements cited in A. Abu & F. Hazely, "Dialogue on justice and reconciliation" in *Paying the Price: The Sierra Leone Peace Process*, ed. D. Lord, Sept. 2000, at <http://www.c-r.org/accord9/index.htm>.

⁷³ D. Bright, "Implementing the Lomé Peace Agreement" in *Paying the Price: The Sierra Leone Peace Process*, ed. D. Lord, Sept. 2000, at <http://www.c-r.org/accord9/index.htm>.

⁷⁴ Amnesty International, "Sierra Leone: Escalating human rights abuses against civilians" AI News Service 225/99, 30 November 1999.

⁷⁵ J. McGeary "When the Peace cannot be kept", *Time*, 22 May 2000, pp. 46s.

but in the interior of the country the war continues to rage⁷⁶.

However, the virtual collapse of the Lomé Agreement was not the end of the TRC. Various NGOs lobbied the UN to continue efforts towards setting up such a commission⁷⁷. They argued that the TRC "needed to be understood as a process with an institution at its apex, rather than an institution only"⁷⁸; preliminary work to facilitate local participation and sensitise about a truth procedure should not be postponed until a new settlement was reached.

Subsequently, the UN Secretariat proposed a Truth Commission as a complementary mechanism to a special criminal court⁷⁹. On 10 November 2000, the RUF and the government signed yet another cease-fire agreement at Abuja⁸⁰, but its implementation remained shaky⁸¹.

The Security Council rejected some of the Secretary General's recom-

mendations concerning the ad hoc tribunal, and stressed that the war crimes court should only target the leaders who bear the greatest responsibility for the crimes⁸². All other cases, including child soldiers, should be handled by the TRC⁸³.

Although the parties have pledged (yet again) in May 2001 to implement the Abuja cease-fire, and start a simultaneous disarmament process⁸⁴, the conflict is certainly far from over. Nevertheless, the UN is "cautiously optimistic" and currently searches for commissioners to fill the national and international slots on the Truth and Reconciliation Commission⁸⁵. There seems to be a consensus that the Truth Commission should become operational during the year 2001.

What can be concluded for our purposes from this brief discussion of the efforts to deal with the barbaric conflict in Sierra

⁷⁶ S. Robinson, "One More Chance?" *Time*, 29 May 2000, p. 28.

⁷⁷ "Sierra Leone: Rights Groups Call on UN to Restart Preparations for Truth Commission" *Africa Online News*, 14 July 2000, at http://www.afrol.com/News/sil012_article19_truthcommission.htm.

⁷⁸ Personal communication to author by Dr. Jon Lunn, Researcher with NGO "Article 19", 23 March 2001.

⁷⁹ See the Report of the Secretary General on the Establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915, presented pursuant to UN Security Council Res. 1315 (2000).

⁸⁰ Cf. the Eighth Report of the Secretary General on the United Nations Mission in Sierra Leone, UN Doc. No. S/2000/1199, of 15 Dec. 2000.

⁸¹ Cf. Human Rights Watch, "Rebel Abuses Against Sierra Leonean Refugees Returning from Guinea" *HRW News Release*, 3 April 2001.

⁸² "Security Council says that Sierra Leone War Crimes Court should target top leaders only," *UN Department of Public Information, Press Release*, 28 Dec. 2000.

⁸³ "Sierra Leone: Prosecuting Child Soldiers for War Crimes: Good or Bad Idea?" *Africa Online News*, 13 January 2001, at http://www.afrol.com/News2001/sil002_child_warcrimes.htm.

Leone? Having regard to the three criteria I postulated above, the starting conditions for the whole enterprise were highly problematic.

To begin, the origin of the Truth and Reconciliation Commission was not quite democratic: A conference of representatives of the warring parties conferred under the auspices of international mediators in a foreign country and concluded an elite pact which —among others— set up such a commission. This procedure almost automatically excluded all civil society participation.

The second fallacy concerned the requirement of establishing consent by all parties. The Lomé agreement was negotiated only between the government of Sierra Leone and the RUF, but did not include such forces as the Kamajors or neighbouring countries, especially Charles Taylor's Liberia. Even worse was the fact that the two parties involved in the agreement didn't show much commitment either.

They never really saw the commission as an incipient process of national reconstruction, but merely as a cheap mechanism to

whitewash all crimes they had committed. The total breakdown of minimal decency had created a morally anaemic society where distrust and fear reigned supreme. There was hardly any basis on which to build a common understanding on minimum rules of morality.

To top it off, international intervention contributed its fair share to the gloomy prospects, since it was undertaken half-heartedly and not impartially. The agreement brokered from the outside was perceived as imposition, not as an authentic expression of what the people really wanted. Rhetorically borrowing from the South African example, it was overlooked that the situation in Sierra Leone was radically different from the post-apartheid environment and would have called for a different approach to a truth telling process. Furthermore, as international enforcement was not provided for, the accord could be broken by the RUF at the first opportunity⁸⁶.

Further factors which didn't spell well for the Truth Commission in Freetown were the complete breakdown of the judicial system, which—if in decent working order—could have contributed to make

⁸⁴ "Sierra Leone army and RUF agree to stop fighting", afrol News service 16 May 2001, at http://www.afrol.com/News2001/sil018_stop_fight.htm.

⁸⁵ See the latest UNAMSIL Report: Tenth Report of the Secretary-General on the United Nations Mission in Sierra Leone, UN Doc. S/2001/267 of 25 June 2001.

⁸⁶ Especially critical of the international community's role in Sierra Leone has been the International Crisis Group Report, "Time" (supra note 249).

a TRC more credible, the complete lack of funding for its work⁸⁷, and the politically manipulative way of major perpetrators to present themselves as victims.

All these points aggravated the already serious deficits this settlement contained and showed clearly that a cease-fire was not enough for the establishment of a fourth generation truth commission. In any case, the Commission as envisaged in the Lomé accord, which could never start its work, would have found itself in the most awkward position,

since the odds were stacked so heavily against and the prearranged blanket amnesty had tied its hands in a way as to condemn it to insignificance and impotence from the start.

We do well to keep these points in mind, as we turn to the study of another conflict that I have already presented in great detail, the Colombian. Are the circumstances there more favourable to a fourth generation commission? The next chapter will discuss this in greater detail.

⁸⁷ Significantly, the Truth and Reconciliation Act passed in February 2000 asked the TRC in Section 5 (3) to "prepare a budget and secure funds for the commission (!!!)", at <http://www.sierra-leone.org/trc.html>.