

# A study of the Nigerian truth commission and why it failed.



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## ABSTRACT

The Nigeria truth commission the Oputa Panel was set up in 1999 to investigate and recommend the appropriate redress of human rights violations committed between 1966 and 1999. Facing several delays and dangers of shut down the Commission finally handed over its report in May 2002. The Nigerian government responded by annulling the Commission and consequently refused to implement any of its recommendations. This thesis set out to identify the factors which can explain the failure of the Nigerian truth commission. We argue that the Oputa Panel was never endowed with the sufficient resources and powers to investigate its extensive mandate nor did it enjoy the governmental support necessary for the implementation of its recommendations which included recommendations of criminal investigations into 150 human rights crimes. The outcome can be explained by the invasive role of the military in Nigerian politics. Military officers remain a coherent force in Nigerian politics. They enjoy the loyalty of the Armed Forces and remain a threat to democratic stability. By virtue of their unique positions they have access to political decision-making channels and can circumvent any efforts to hold the military accountable for the brutal and systematic human rights atrocities which were committed during the military era.

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## 1.0 INTRODUCTION

This is a study of the Nigerian truth commission; The Human Rights Violations Investigation Commission, also known as the Oputa Panel where we seek to explain how and why the Commission failed. The Commission received an incredibly broad and powerful mandate where it was authorised to identify causes and consequences of all gross human right violations during the military era between 1966 and 1999 (Yusuf 2007: 271). It was also empowered to write a report on its findings including recommendations of measures of administrative, judicial or legislative nature which it considered necessary and appropriate to address these violations (ibid). In theory this was as very strong commission. In practice however the Commission lacked the resources, legal powers as well as appropriate time frame to conduct proper investigations and document the systematic abuses of consecutive military regimes. The commission nevertheless managed to finish a report which was handed over to the Nigerian government in May 2002 only to have its findings invalidated when the government's annulled the Commission in January 2003. The report was therefore never officially released and none of the Commission's recommendations were implemented.

In this paper we set out to identify the factors which we believe can explain the failure of the Nigerian truth commission. The paper is structured as follows: In this introductory chapter we give a short outline of the political context of the Commission, before we present the truth commissions and their role in the field of transitional justice. Lastly we present the methodology applied in this thesis. In the second chapter we outline the central variables in the theoretical framework which we apply in our analysis of the Nigerian truth commission. In the third chapter we utilise the theoretical framework deduced in the theory chapter to analyse our case; the Nigerian truth commission, before we in the fourth and last chapter summarise and conclude our findings.

### *1.1. Background*

With its 130 million inhabitants Nigeria is the most populous country on the African continent. The state was consolidated by the British in 1914 before it gained its independence 46 years later in 1960. This geographically diverse region is home to more than 350 ethnolinguistic groups (Sklar 2004: 39). Although Islam dominates in the North and mostly Christians inhabit the South, indigenous religions are also practiced. Ethnic and religious cleavages have been a source of conflict since pre-colonial time, but have been greatly exacerbated since the military overthrew the government in 1966. The military coup d'état

was initially considered to be a temporary corrective measure to a civilian leadership (Ajayi 2007). Instead it became the onset of numerous coup's and counter coups which institutionalised violence as the number one means of transfer of power (ibid: 50). The military subordinated the Nigerian constitution to various military decrees and political rights and civil liberties were routinely violated (ibid). Some of the eight military administrations were extremely repressive and political opponents were frequently incarcerated, tortured and even killed. The military, which was largely controlled by Northerners, the Hausa-Fulanis, employed a divide and conquer strategy playing ethnic and religious factions against each other with disastrous results. Large-scale ethno-communal violence was prevalent during the period of military rule, a trend which has continued after Nigeria's return to democracy. More than 100.000 people are thought to have been killed in armed communal violence after the military era ended (Ebo 2003). At the same time the country is facing major socio-economic problems: More than 70 percent of Nigerians live below the poverty line.<sup>1</sup> The conditions are particularly appalling in the Delta River Region in the South. Since natural resources were discovered in the region in the 1950s the income generated from oil extraction has become a source of personal enrichment for the military elite, whereas the Delta communities have suffered from environmental damages from oil spills and gas flares polluting the region. Communal protests against the oil companies and the military governments have typically been met with harsh crackdowns from the police and security forces.<sup>2</sup>

When Nigeria finally returned to democracy in 1999 the country had to come to terms with almost 30 years of severe widespread state-sponsored human rights abuses. At the same time a culture of violence had manifested itself in the Nigerian society with prevailing high levels of inter-religious and ethnic violence threatening the democratic consolidation. The president therefore set up the Human Rights Violations Investigations Commission (HRVIC) to deal with the human rights violations committed during the military era. The Nigerian truth commission was highly anticipated and enjoyed strong support by the general public. The Commission received more than 10.000 petitions from Nigerians and held numerous public hearings across the country to hear testimonies from victims and families of victims of crimes and abuses (Falana 2005). In May 2002, the Commission handed over an eight volume report to president Obasanjo which included recommendations of governmental actions and appropriate redress of past human rights violations. The report also included propositions for

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<sup>1</sup> Nigerian National Planning Commission. "Meeting Everyone's Needs. National Empowerment and Development Strategy." Abuja, 2004.

<sup>2</sup> <http://www.hrw.org/legacy/background/africa/nigeriabkg1214.htm>



Security Sector reforms and the restructuring of government institutions. The public release of the report and the implementation of its recommendations were however delayed for more than six months before the government in a public statement in January 2003 announced the annulment of the truth commission. The annulment came after a Supreme Court verdict which ruled the investigative powers vested in the Commission to be unconstitutional. Furthermore the Supreme Court judged that the power to establish investigative commissions rested with the state authorities, not the federal government. As a result the Commission's legal powers were only authoritative within the Federal Capital Territory. The Nigerian government used the verdict to justify the annulment of the Commission and although the decision was met with immediate condemnation by the civil society, its decision was largely left unchallenged. Consequently the Commission's report was never published and its recommendations were never implemented. The failure of the Nigerian government to release and implement the report is a symptom of the fragile nature of truth commissions. They reflect the political circumstances in which they are born in terms of powers and mandate. This is also one of the reasons why they are still considered to be a controversial mechanism for transitional justice.

### *1.2 Transitional justice and truth commissions*

Truth commissions are one of the newest mechanisms of transitional justice.<sup>3</sup> Transitional justice is an area of applied justice referring to a collection of approaches which after a transition seek to deal with past human rights violations. It is a multidisciplinary field which “encompasses aspects of law, policy, ethics and social science” (Freeman 2006: 4). It incorporates not only various measures to establish accountability for human rights breaches, but also objectives of truth and reconciliation. The field of transitional justice is unique in the sense that it focuses not only on justice for victims of long-lasting abuse from repressive regimes and/or militant opposition but is also concerned with peace-building and reconciliation. Transitional justice is not a particular form of justice, instead it is moulded by the particular context of the society in question. Transitional justice initiatives may take place in the immediate aftermath of a transition or sometimes as much as decades later if the political circumstances do not allow human rights violations to be addressed at an earlier point.<sup>4</sup> Since the 1948 Universal Declaration of Human rights, the approaches to human rights abuses have largely fallen into two categories: The first option, criminal prosecutions, have

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<sup>3</sup> Ruti Teitel is often credited for coining the term ‘transitional justice’ in her seminal work “Transitional Justice” from 2000.

<sup>4</sup> International Centre for Transitional Justice homepage: <http://www.ictj.org/en/tj/>

been sought in cases where the authoritarian regime is weak and does not constitute a threat to the new regime. The second alternative, impunity, has been applied in cases where criminal prosecutions were deemed to dangerous and thus a no-action policy would be adopted. The transitional justice field was expanded during the 1980s and 1990s when the world saw the collapse of authoritarian regimes in Latin America and Eastern Europe and new governments sought alternative approaches to dealing with human rights violations. The development was largely motivated by the need for a policy which did not endanger the transition but at the same time could satisfy the society's demand for justice for human rights violations. The transitional justice field was therefore expanded and came to include lustration, government and Security Sector reforms, reparations to victims, memorialisation initiatives, as well as truth commissions.<sup>5</sup>

A truth commission is an autonomous, government-sanctioned body established with the purpose of investigating past human rights abuses or international human rights law violations (Hayner 1994: 604). These abuses have typically taken place in relatively “recent periods of abusive rule or armed conflict” (Freeman 2006: 15).<sup>6</sup> They have a “predominantly national intrastate focus” (ibid: 14) and assess violations committed within the state (ibid 15-16).<sup>7</sup> Truth commissions' primary function is investigation. Furthermore their investigations are victim-centred and their attention “(...) is directed towards the victims' views and experiences, meanwhile witnesses and perpetrators are secondary” (ibid: 17). Truth commissions also attempt to paint a picture of the overall abuses within a defined period of time. Furthermore truth commissions must be endowed with some form of authority which allows it to access resources, information and “greater security or protection to dig into sensitive issues” (Hayner 1994: 604).<sup>8</sup> Finally, truth commissions make recommendations for further redress of human rights violations in order to prevent future abuses.

Since the first truth commissions were established in the 1980s they have been heralded as the future of transitional justice. Today truth commissions have grown in popularity and are frequently set up in transitional societies. However, societies in transition from authoritarian rule are fragile in the sense that the authoritarian regimes often still wield a lot of political power. The new government must therefore avoid a situation where the former

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<sup>5</sup> International Centre for Transitional Justice homepage: <http://www.ictj.org/en/tj/>

<sup>6</sup> These periods may or may not have drawn to close; some conflicts are dormant, low-intensity, or fighting parties have agreed to a ceasefire. Freeman underscores that truth commissions do not necessarily cover the whole of a period of repressive rule (2006).

<sup>7</sup> These violations constitute “severe acts of violence or repression” (Freeman, 2006: 14). Freeman mentions arbitrary detention, torture, forced disappearance and summary executions as examples (ibid).

<sup>8</sup> It is however important to notice that the extent of this authority varies greatly from case to case.

regime imposes sanctions which may jeopardise the nascent democratic regime. At the same time the new government is typically under pressure from the international community and civil society at home to address the human rights violations committed during the authoritarian era. In order to meet these demands the government may choose to establish a truth commission; a victim-centred, non-adjudicative body which focuses on investigating past human rights violations and recording truth narratives, but at the same time does not constitute a threat to the former regime. Truth commissions thus represent an 'alternative' approach to justice where the intention is to contribute to some form of justice for the victims of human rights violations but at the same time avoid actions which may threaten the transition. They have the ability to not only identify the magnitude of the human rights abuses, and the forces behind the widespread and systematic violations, but also contribute to the prevention of recurring abuses. Truth commissions are thus often viewed as a possible solution to the dilemma of settling “(...) a past account without upsetting the present transition” (O’Donnell and Schmitter 1995: 57).

Truth commissions can sometimes work side by side with common court processes. In Argentina, where the first truth commission was set up in 1983, the commission largely served as a foundation for later prosecutions of the military regime. Retributive justice and reconciliation are however often viewed as antithetical. A non-retributive approach to justice is therefore often promoted in transitional societies. The establishment of truth commissions is common in societies where the political context does not allow for criminal justice to take place. In Chile for example, the truth commission ‘replaced’ a judiciary which authority had been compromised by the former military regime.

### *1.3 Applied Methodology*

The research design applied in this thesis is a case study research design. The choice of methodology was inspired by the desire to learn more about the Nigerian truth commission, a commission which has received very little attention from scholars in the field of transitional justice. A case study research design was therefore a natural choice allowing an in-depth analysis of a single truth commission. The case study is a type of method utilised when the objective is “to illuminate a decision or a set of decisions; why they were taken, how they were implemented and with what result” (Schramm, 2003: 12). Furthermore a case study investigates “(...) a contemporary phenomenon within its real-life context (...)”, particularly when “(...) the boundaries between phenomenon and context are not clearly evident” (ibid:

13). Cases studies are also signified by many independent variables. Moreover it is very common to utilise multiple sources of evidence in a triangulating manner. Sources can be historical records, archives, databases, documents, interviews etc. An examination of historical records, may also include direct observation of the events being studied and interviews of persons involved in the events (ibid: 7-8). Although some theorists consequently refer to case studies as qualitative case studies, Yin demonstrate that this is not necessary the case (2003: 14) Several case studies utilise quantitative as well as qualitative evidence.

In the case study analysis the investigator typically engage in pattern matching in order to examine the extent to which empirical observations correspond with the theoretical propositions, or if rival explanations account for possible diverging patterns. Case study research designs vary depending on the objective of the study. This study is a so-called explanatory case study. It is a research design where i) the research question is a ‘why’ or a ‘how’ question, ii) the investigator “(...) has little control over events, and iii) the focus is on a contemporary phenomenon within some real-life context” (Yin 2003: 1). The objective of this type of case study is to give insight to the case in question (ibid). In this type of study the case is pre-selected.<sup>9</sup> Earlier, case studies were not considered appropriate research methods to test or describe propositions and instead only applied as a part of a preliminary research strategy (Stake 1995) The case study was considered a weaker research method because the findings could not be generalised to a whole population in contrast to the statistical method (ibid: 8): Yin however maintains that although case studies are not generalisable to populations and universes, they are nevertheless generalisable to theoretical propositions (ibid:10). The choice of the case study as a research strategy can thus be considered appropriate when the goal is “to expand and generalise theories” (ibid: 10) and to make analytical, not statistical generalisations (ibid). By identifying causal links and compare the details of the case to other cases, these studies can contribute not only to further insight to the case in question but also to the development of theory within a particular field.

The case study is an all encompassing method which follows the study from start to finish: It covers logic of design, data collection techniques and various approaches to analysis (ibid: 14). In the section below we present the design of our case study as well as the types of data collected and the analytical approach utilised in the study.

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<sup>9</sup> Explanatory research designs in contrasts to exploratory case designs are concerned with questions of *where* and *what* and preoccupied with identifying and sequencing events rather than explaining them. Here, cases are not necessarily pre-selected. A third type of design is the descriptive case study or what Stake refers to as an instrumental case study where the objective is to contribute to an understanding of general tendencies (Stake 1995: 4).

The Nigerian truth commission was chosen as the unit of analysis of this single case study when a general review of the latest work on truth commissions revealed that very little had been written about the commission. Apart from some brief descriptive outlines of the Commission, the Nigerian truth commission has therefore never been scrutinised in a systematic manner. Whereas truth commissions in South America, South Africa and Asia have been the focal point of several scholarly works, Hakeem O. Yusuf is the only one who has analysed the Commission, its mandate and its report. His analysis is however fairly descriptive and does not explain the plausible factors which may have caused the government to annul the Commission. Although the Commission received a fair amount of attention throughout its operational time and the annulment was condemned and criticised, political scientists have yet to conduct an in-depth analysis of the Commission. We suspect that this might be explained by the simple fact that less successful truth commissions typically do not receive the same amount of attention as successful ones. We thus formulated a research question which asked the question; Why did the Nigerian truth commission fail?

In order to answer our research question we had to develop a theoretical framework which could be applied in our analysis. First we had to arrive at an understanding of what constitutes a failed or a successful truth commission respectively. Furthermore we had to investigate what causes a truth commission to fail. What are the central variables which will have the decisive effect upon its outcome? In order to identify these explanatory variables we utilised the vast array of transitional justice literature to develop several theoretical propositions against which our case, the Nigerian truth commission, was tested. The literature on truth commissions typically test theoretical propositions on empirical observations in single case studies and small N studies. A majority of these empirical studies have been made on truth commissions in South America. This is not surprising considering that a majority of the more than twenty truth commissions have been set up here. The Latin American context of course differs from that of the African. Nevertheless, the cases still have in common the fact that most of them are set up during times of transition, either from war or from authoritarian regimes. This type of context defines and delimits the options for human rights policies and the limiting or enabling factors are typically recognised in cases across continents. In the analysis of the truth commission, scholarly literature on the development of human rights in Nigeria was utilised. Email correspondence with Nigerian scholars provided important newspaper articles related to the Nigerian truth commission. In particular Hakeem Yusuf at the School of Law, University of Glasgow provided the latest articles and information on the Nigerian truth commission. Historical works and political analyses of the

authoritarian regimes were also utilised. In the analysis we relied mainly on secondary sources. Several attempts to contact Nigerian human rights organisations and networks by phone and email proved unsuccessful. Likewise email and phone interviews to key persons in the Nigerian human rights community were prepared, but several attempts of contact did not yield any results. Although we suffered from a lack primary sources on the truth commission itself, there is a considerable range of literature on the Nigeria's last transition period which proved invaluable in the testing of our hypotheses.

In the final chapter of this thesis we summarised our findings based on our analysis of why the Nigerian truth commission failed. Considering the fact that transitional justice is still a field in development the conclusions made in this thesis are inevitably tentative in their nature. Secondly, the modest amount of empirical data available did not allow us to make any finite conclusions. In that respect this case study offers a plausible, rather than a final answer to the research question, but at the same time the study can hopefully contribute to the understanding of what makes truth commissions fail as well as the critical discourse on truth commissions and their role as transitional justice tools.

## 2.0 OUTLINING THE THEORETICAL FRAMEWORK FOR THE ANALYSIS OF THE NIGERIAN TRUTH COMMISSION.

What does it take for a commission to be deemed successful? Against which criteria should a truth commission be judged? The South African Truth and Reconciliation Commission has often been heralded as the most successful commission in history. Similarly the Argentine Commission on the Disappearance of Persons has been regarded as a successful truth commission although its mandate was very different to that of the South African truth commission. Do these truth commissions, which are often viewed as model truth commissions, exhibit features which can be recognised in other truth commissions? We will try to answer these questions by reviewing the latest literature on truth commissions. The purpose of this exercise is to develop a set of criteria against which the Nigerian truth commission can be tested in order to determine the extent to which this commission failed. We recognise that the development of a theoretical framework consisting of a range of 'success criteria' will ultimately be normatively charged. Some scholars will argue that truth commissions which are able to complete their report can be considered successful. Others argue that truth commission can only be judged as successful as long as they also contribute towards accountability for human rights violations. In this thesis our arguments tend towards the latter. We agree with Stanley Cohen who argues that considering the fact that truth commissions are tools of transitional justice, principles of truth and accountability must govern their work (1995). At the same time the field of transitional justice is unique in the sense that it focuses not only on justice for victims of long-lasting abuse from repressive regimes and/or militant opposition but also incorporates the objectives of peace-building and reconciliation. Although the concepts of truth, justice and reconciliation are sometimes viewed as contradictory, truth commissions are often heralded as the transitional justice tool which best can consolidate these goals. We thus include the attempt to pursue reconciliation as the last success criterion in this theoretical framework. These criteria are further developed in point 2.1.

In the second part of this chapter we develop the framework of central independent variables which are considered to have a determining influence on the success of truth commissions: Truth commissions typically operate under volatile political circumstances and their work will be influenced by actors which have something at stake in a policy on human rights. We thus aim to identify how the political context defines and delimit the outcome of truth commissions. This topic further developed in section 2.2. A truth commission however

is not only influenced by political factors; the amount of time, legal powers and resources which is included in the mandate will influence the Commission's chance of fulfilling its duties. Some commissions are blessed with strong mandates where large budgets and a wide range of powers are guaranteed. Others commissions again are endowed with modest powers and resources. Some commissions are only obligated to investigate severe cases of human rights violations whereas others investigate a range of violations over a very long time span. We often observe that in societies where the outlook for transitional justice is meagre, a truth commission will be weaker and typically exhibit fewer powers and resources than in a society where there are no adverse risks associated with a proactive policy on human rights. Here a truth commission will typically enjoy a stronger mandate. In order to understand what influences a commission's subsequent success or failure in fulfilling its objectives we therefore need to identify the factors which can explain this variation. We devote section 2.2 *Establishment of the Commission and its Mandate* to this endeavour.

### *2.1 The Dependent variable - What Constitutes A 'Successful' Truth Commission?*

When truth commissions first emerged a lot of attention was devoted to how these transitional justice tools should be evaluated. Some argued that truth commission should be considered successful insofar they fulfilled the duties assigned to them (Brahm 2007: 17). As Chapman and Ball in Brahm (2007) emphasise the great variation in investigative mandates and political circumstances justifies a judgement of a truth commission on its own terms, not in comparison to its counterparts. Brahm therefore concludes that truth commissions which accomplish the objectives stated in the mandate could be viewed as successful (2007: 17). Although each mandate is uniquely tied to its political context, there are some general principles which are common to most of them. Firstly, a mandate will ask the commission to investigate, within some given parameters, a range of human rights violations which occurred during a finite period of time. Secondly, the commission will be asked to present its findings in a report which will be handed over to the government when the commission's work has come to an end. The report typically involves recommendations for further government actions in addressing human rights violations. These recommendations may or may not be mandatory. The investigations and writing of a truth report are thus considered the main activities of a truth commission. In section 2.1.1 we will further examine what these activities entail and determine what would be considered a successful truth commission in this regard.

As Brahm infers, the completion of a mandate is a great achievement in itself (2007).



However if we assume that truth commissions should contribute towards justice as well as truth, this success criterion appears inadequate. Truth commissions are not adjudicative bodies and unlike courts they cannot dispense justice, however their reports typically include recommendations of both criminal and non-retributive justice initiatives. In order for these recommendations to have an impact, a truth commission is dependent on the support and acknowledgement of the government. It follows that if the effect of a commission should work should go beyond the simple production of a truth report, the government must accept and implement the commission's recommendations. In section 2.1.2 we further develop what the implementations of recommendations entail for the success of a truth commission.

The last success criterion which will be evaluated in this thesis is the degree to which a truth commission has contributed towards reconciliation. Truth commissions are becoming increasingly popular in countries fractured by civil war and internal conflicts of communal, ethnic and/or religious nature. These conflicts often prevail even after the countries have returned to democracy. In these societies the need to reconcile political opponents and fighting communities is vital to secure the survival of a nascent democracy and truth commissions are often considered the best tool for securing peace and reconciliation. Still, the path(s) to reconciliation and if truth commissions can actually contribute to reconciliation is disputed. The indicators of reconciliation are also debated. Furthermore if these indicators change after a truth commission has been established, to what extent can the changes be ascribed to the commission and not to other aspects of the society such as culture and political institutions? Also if we do not observe measurable change, to what extent do we know circumstances would not have worsened in the absence of a truth commission? These are a few of the dilemmas which need to be resolved before a theory on truth commissions and reconciliation can develop.

Few would contest that reconciliation is a good thing and that pursuing this goal should in general be acclaimed. However since the relationship between truth commissions and reconciliation is not fully understood this part of the framework will be tentative in its nature and limited to whether the commission actively pursued reconciliation in its work. The pursuit of reconciliation as a measure of success is further developed in section 2.1.3.

### **2.1.1 Fulfilment of the objectives stated in the mandate - Investigations and writing of a truth report**

Truth commissions are first and foremost investigative bodies. Their prior objective is to clarify human rights violations that occurred in the past, something which is particularly

important in societies where the magnitude of the violations is not known to the general public. As Daly and Sarkin point out “(...) most oppressive regimes are characterised not only by their brutality, but also by a code of silence that enshrouds policies of violence and methods of control” (2006: 141). During these circumstances truth commissions typically have to engage in time- and resource consuming investigations in order to identify and establish the causes and consequences of the violations. In societies where the truth about human rights violations is widely known to the public, Hayner argues that a truth commission’s report is more important with respect to acknowledging past events rather than finding the truth (1998: 204). This was the case in South Africa where many of the violations of the apartheid regime were widely known to the public and the comprehensiveness of the TRC’s report made it impossible to both deny and justify the abuses that took place during the apartheid regime (Leman-Langlois and Shearing 2004: 229-230).

A truth commission’s report is often considered a superior accounting of the past because of its ability to integrate several perspectives. Unlike court trials, truth commissions have a more comprehensive understanding of the concept truth and often incorporate various types of ‘truths’ in their report.<sup>10</sup> In contrast to the rudimentary perception of truth which dominates the court system where the findings are limited to identifying the crime and the wrongdoers, truth commissions take into account the underlying structural causes and consequences of mass atrocities and contribute to the “understanding of institutional failings that allowed the crimes to occur” (Brahm 2007: 21). Truth commissions are also known to be victim-centred bodies which mean that they emphasise what is known as narrative truths. Narrative truths are the victims’ own testimonies of abuses and the receiving and recording of these statements constitute a major part of a commission’s work. The statements represent the victims’ subjective experiences of the events and may not be equated with scientific truths; however they can be instrumental in revealing underlying structural causes of mass atrocities.<sup>11</sup> In Chile for instance the Rettig Commission used information from individual cases to demonstrate “how each act of violence formed part of a conscious and deliberate policy to eliminate opponents of the Pinochet regime” (Gairdner 1999: 29).

Unlike other historical documents, a truth commission’s report can have unique

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<sup>10</sup> The South African Truth and Reconciliation Commission identified several types of truths which it attempted to integrate in its report: narrative, historical, forensic and social truth (Daly and Sarkin 2007: 148).

<sup>11</sup> It is important to recognise that even if mechanisms such as truth commissions are employed by the state and ‘everybody’ is invited to contribute this truth is ultimately a ‘partial truth’ (Stanley 2005: 589); it is for example very common that women who are victims of violence do not come forward, and that the official truth ultimately is gender-biased (Stanley 2005: 589-590). This is particularly true in cases of sexual violence which are often considered a taboo and as a consequence rarely vocalised (Daly and Sarkin 2007: 144).

preventative functions. Truth commissions unearth abuses and conflicts as well as the underlying structural causes and can therefore recommend the appropriate measures in order to prevent future recurrence. Furthermore the truth report may serve as an instrument of accountability particularly in societies where trials are not feasible. This accountability function is stronger when truth commissions are authorised to identify individual responsibility for crimes and name names of alleged perpetrators in their reports. The notion behind this ‘truth as justice’ mechanism is that even though perpetrators for various reasons cannot be persecuted, truth commissions can expose the crimes and those responsible to the public (Daly and Sarkin 2007: 143). The punishment is “(...) not the classic model of incarceration (...), rather, punishment is of a moral dimension, entailing shame, opprobrium, and disgrace” (Daly 2001: 135). This type of accountability is often viewed as a milder form of retributive justice and often referred to as ‘naming and shaming.’ Naming of alleged perpetrators is controversial because it is not considered to be according to due process (Cassel 1995: 329). However, in cases where commissions have named names, this is commonly done according to some pre-established criteria where reliable evidence must be presented.<sup>12</sup> The ‘truth as a justice’ mechanism was emphasised by the truth commissions in Chile and El Salvador which both had the powers to name names in their reports (Gloppen 2005: 37). However as Daly and Sarkin observe public shaming “presupposes a moral reference group that most perpetrators avoid by isolating themselves happily in their own ethno-racial enclave with similar beliefs” (2007: 143). Consequently this form of accountability will have few or no consequences for perpetrators who either flee the country or live relatively isolated from the rest of the population. Shaming by naming names is also limited by the fact that perpetrators may remain indifferent to public condemnation and even defend criminal actions in the face of public scrutiny.

We thus conclude that a successful truth commission is one which conducts thorough investigations of the range of violations identified in the mandate. This involves indentifying not only which crimes were committed but also why they were committed. A successful truth commission also identifies causes and consequences of widespread abuses and focus on the victims’ experiences by including narrative truths in its report. A report may include names of alleged perpetrators (if reliable evidence is available) and thus contribute towards some form of accountability. This can be particularly important in societies where the court system is

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<sup>12</sup> For example the Salvadoran truth commission was mandated to name names of alleged perpetrators when reliable evidence was available (Salvadoran truth commission Report; From Madness to Hope: The 12 Year War in El Salvador [http://www.usip.org/library/tc/doc/reports/el\\_salvador/tc\\_es\\_03151993\\_mandate.html](http://www.usip.org/library/tc/doc/reports/el_salvador/tc_es_03151993_mandate.html)).

rendered inoperable.

### **2.1.2 Implementation of recommendations**

As we established in the last section truth commissions are non-adjudicative bodies and typically do not have the powers to sanction or prosecute. Thus when a commission finishes its report further address of the violations identified here is at the hands of the government. An affirmative government will actively pursue the implementation of a commission's recommendations. Less supportive governments on the other hand have been known to reject the commission's findings altogether and even refuse to release the report. Most governments do however publish the reports but with few implications beyond moral condemnation of the abuses depicted by the commission.

Some truth commissions include recommendations for prosecutions in their report and sometimes their findings serve as preliminary foundation for later criminal investigations. If the political circumstances allow for prosecutions to take place, the findings of the commission can be handed over to the Prosecutor's Office and legal proceedings may be pursued. Should truth commissions recommend criminal sanctions and should contribution towards criminal justice be a criterion for a successful truth commission? Many theorists would respond positively to this question. They would argue a strong case for a criminal justice response to past human rights violations based on international law. Walsh contends that "(...) regardless of who leads the government, the state has a duty under international law to compensate victims for breaches of state obligations" (1999: 43). An extension of this argument emphasises a state's obligation to prosecute past violations (Mendez 1997: 259; Pasqualucci 1994: 29-330; Roht-Arriaza, 1990: 449).<sup>13</sup> This is also the view of Freeman who claim that states have the responsibility to "investigate, prosecute, and punish serious human rights violations (...), to identify victims and perpetrators, and to offer some form of compensation to the victims as well as guarantees of non-repetition" (2006: 6). Some theorists thus argue that truth commission should only be judged successful insofar their findings and recommendations lead to criminal investigations. As Aukerman observes, prosecutions help to establish the rule of law and reinforces "moral norms and contribute to shared understanding that certain behaviour is wrong" (2002: 72-73). In this respect truth commissions are useful only to the extent that they actually contribute to future prosecutions (Brody 2001).

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<sup>13</sup> This argument is further developed by Othman 2005: 249-253 and by Hall 2003: 47-72.

Many theorists would however contest the claim that only truth commission which lead to prosecutions should be deemed successful, particularly those that favour a non-retributive approach to human rights violations (Minow 1998; Villa-Vicencio; 2000; McEvoy 2007). Government reforms, lustration, compensations to victims, memorialisation initiatives are examples of non-retributive approaches to human rights violations and these are often a part of a truth commission's recommendations. Even though non-retributive forms of justice do not lead to incarceration, non-retributive sanctions can have serious implications for perpetrators, such as the loss of positions and respect in society. They are also arguably easier to enforce than criminal sanctions. Non-retributive sanctions are in Villa-Vicencio's words a "more realistic way" of preventing future human rights abuses (2000: 208). Moreover many societies in transition lack the sufficient judicial infrastructure and suffer from inadequate institutional capacity rendering the court system unable to deal with the type and magnitude of violations which are committed in repressive regimes (Othman, 2005: 264). In a transitional society the judiciary is often compromised by the authoritarian regime. The judiciary may comprise of corrupt judges and officers with dubious connections to the former regime. It is therefore not uncommon to observe violations of the requirements of legal justice on a routine basis (Elster 2004: 86-88). Another strong argument against a retributive approach is that the respective violations are of such magnitude that the judiciary will fail to "(...) prosecute all equally culpable individuals (...)" (Aukerman 2002: 61). This is a violation of the principle which states that crimes of like nature must be treated alike (ibid). This principle is "further undermined when prosecutions target lower-level offenders while ignoring more blameworthy ones (...)" (ibid).

The latter argument presented above would justify a truth commission which strictly adheres to non-retributive principles, particularly if the commission operates during volatile political circumstances where criminal sanctions could become a destabilising factor. The problem is that if securing the transition as a political project becomes the superior goal of the truth commission, they cannot be considered appropriate tools of transitional justice. Although most transitional justice scholars do agree that truth commissions have "the potential to support transitions from authoritarian to democratic governance" (Brahm 2007: 25),<sup>14</sup> some scholars believe that non-retributive transitional justice strategies are often promoted, not because of their moral superiority but because the political profits which can be reaped from this approach (Wilson 2001). Transitional justice should enforce the rule of law

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<sup>14</sup> See also Gairdner, 1999: 3; Minow 1998; Teitel 2000; Freeman and Hayner 2003; Quinn 2003.

and since human rights atrocities are not unlike any other crimes, they should be treated accordingly. This view is also strongly supported by legal arguments derived from international law. As Aukerman observes, non-retributive mechanisms of transitional justice are “simply not proportional to the crimes committed by human rights violators” (2002: 58). We recognise that the political context defines and delimits the extent to which truth commissions can contribute towards accountability (particularly in the short run), nevertheless we will regard truth commissions which contribute towards criminal justice as more successful than cases where only non-retributive measures are implemented.

### **2.1.3 Pursuit of Reconciliation**

Truth commissions have often been heralded as superior instruments for achieving reconciliation as opposed to other tools of transitional justice such as trials and prosecutions. Reconciliation has thus become an integrated part of many transitional justice initiatives the last two decades and is even incorporated in the name of some truth commissions (such as the South African Truth and Reconciliation Commission and the Sierra Leonean Truth and Reconciliation Commission). This is largely due to truth commissions’ emphasis on non-retributive approaches to human rights violations as well as specific activities of the commission which are considered by to be guided by reconciliatory principles.

What does the concept reconciliation entail? The Oxford English Dictionary defines the verb ‘to reconcile’ to mean “to bring a person again into friendly relations after an estrangement (...). To bring back into concord, to *reunite* (persons or things) in harmony” (Hayner 2001: 154). It is thus a process which entails *mutual* efforts and responses by relevant parties in order to mend a broken relationship. In a transitional justice context this would necessarily involve the process of reconciling political enemies and combatants on opposite sides in what have often been prolonged war-like conflicts. The concept however does not readily translate to transitional societies, particularly because the restoration of ‘friendly relations’ and the pursuit of ‘harmony’ would also involve reconciling victims and perpetrators where perpetrators are often responsible for prolonged, deliberate and grave human rights violations involving torture, abductions, and murder.<sup>15</sup> In most societies this is

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<sup>15</sup> This dilemma exemplifies how reconciliation is a contested concept, not only in substance, but also whether it should be pursued at all. Is reconciliation beyond a simple agreement to abstain from the use of violence something worth striving for? Is it fair to ask victims to agree on some form of relationship with their abusers? Furthermore, critics of truth commissions as instruments of reconciliation question whether reconciliation can be sanctioned by an authoritative body: Truth commissions’ reconciliatory initiatives might lead to a situation where victims feel pressurised into accepting the apology and to forgive the abuser (Burgess, 2007: 194). Reconciliatory efforts may be especially provoking if they do not seem to have an effect on sustainable peace.

just not a realistic scenario. Crocker has developed a more practical understanding of the concept which is applicable to a transitional justice context. He depicts reconciliation as a layered concept where the 'thin' version of reconciliation relates to a simple agreement between former enemies to live together and use other means than violence to resolve conflicts, also referred to as political reconciliation.<sup>16</sup> In a 'thicker' version of reconciliation we enter a space where former enemies not only agree to live together in peace, but also interact in areas of common concern with mutual respect for each other. An even thicker version of reconciliation would involve a process of mutual forgiveness and healing (2000: 108). This type of reconciliation may take place on individual and communal as well as elite levels (Gloppen 2002: 6).

The road to reconciliation outlined above is just one of several plausible paths to reconciliation. Some theorists however argue that truth commissions may not be the best way to achieve reconciliation. They argue that impunity and oblivion can serve purposes of peace and stability. As Minow observes truth commissions can also give produce "too much memory" (cited in Hayner 2001: 241). Particularly when justice is unattainable 'too much' truth may cause people "(...) to clamor for justice, and its absence is likely to impede reconciliation" (Daly and Sarkin 2006: 140; Stanley 2005: 583). Other theorists again argue that a retributive justice is a better way to achieve reconciliation. It represents the clearest break with the past; It is the proof that "we are not like them" (Vaclav Havel cited in Aukerman 2002: 49). Retributive justice can contribute to reconciliation by "restoring human dignity by levelling the playing field after the perpetrator's mastery of the victim (...)" (Wilson 2001: 546). Furthermore retributive justice "can help by affirming to the victim that his suffering counts enough for the rest of the community to do something about it (...)" (ibid). It is "(...) a message to the community of equal dignity and worth of all persons" (Hampton 2001: 536): In fact Wilson argues that true forgiveness and reconciliation may *only* be possible once retribution has been exacted (Wilson 2001: 545). Wilson further notes that many oppose retributive justice as a path to reconciliation because they mistake retributive justice for a quest for revenge, but at the same time it is important to note that in some societies reconciliation beyond a simple agreement to co-exist may not be plausible (ibid:

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There is also the danger those severe human rights abuses are downgraded to be about conflictual relationships instead of being treating as criminal acts. This is also the view of Wilson who argues that face-to-face meetings between victims and perpetrators where the perpetrator can apologise and offer some sort of restitution to the victim reduces a violation of "moral and legal imperatives (...)" (2001: 552) to a conflict that needs to be resolved.

<sup>16</sup> Political reconciliation is a type of reconciliation "(...) where former enemies agree to use non-violent means to resolve conflicts" (Gloppen, 2002: 1).

538). In this framework we will not try to resolve the issue of which is the best approach to reconciliation. Instead we will investigate how truth commissions intend to pursue reconciliation through public hearings and the production of a truth record and further critically review how these activities may be considered reconciliatory.

## *2.2 The Independent Variables - What Factors Influence The Success of a Truth Commission?*

In the last section we established three criteria against which the success of a truth commission will be measured:<sup>17</sup>

1. Fulfilment of the objectives stated in the mandate
2. Implementation of recommendations
3. Pursuit of reconciliation

However which factors influence the success of a truth commission? The first criterion, the commission's ability to fulfil the objectives stated in the mandate, is typically related to aspects of the mandate itself: The funding, legal powers and the time determine how meticulous and thorough the investigations and the commission's report will be. A comparison of truth commissions show that these parameters vary greatly across cases. For instance the South African Truth and Reconciliation Commission (TRC) enjoyed a budget of 18 million USD per annum whereas Chadian commission was so poorly funded it had to relocate to a detention centre (Brahm 2007: 30). The Sierra Leonean truth commission enjoyed a range of legal powers whereas the Guatemalan commission had restricted search and seizure powers. The South African TRC lasted from 1995 to 2000 whereas the Salvadoran Commission only was given six months to finish its work.

This variation is not surprising considering that the investigative periods span from a few years to several decades and the range and magnitude of violations under investigations vary. However when controlled for these factors, there is still a significant difference in the powers and resources enjoyed by the commissions: For instance both the South African and

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<sup>17</sup> Apart from the last phase, Pursuit of Reconciliation (which takes place throughout the duration of a commission's work), The criteria developed in this framework are really phases of a truth commission's work which take place in a chronological order: Each phase presupposes the former. Stage two; the Implementation of Recommendations takes place only after the commission has investigated human rights violations, written and handed over its report. Stage one; the investigating and writing of a report, presupposes the Establishment of the Commission. The Establishment of the Commission is a preliminary phase where the strength of the mandate is determined.



the Chadian truth commission had very broad mandates in terms of the range of violations to investigate. But the Chadian truth commission only had a fraction of the budget of the South African TRC. This variation in powers, time and resources are indicators of the strength of a commission and is largely explained by the political circumstances in which a commission is born. How strong a commission will be is ultimately determined by the struggle between the forces which have something to lose or gain from the establishment of such a commission. As a consequence of this struggle some commissions will receive very strong mandates with extensive legal powers whereas others will have few powers allowing the commissions only to conduct superficial investigations.

Which factors determine whether or not a truth commission is established and how strong its mandate will be? Truth commissions with weak mandates are often observed in societies where the authoritarian regime still wields a lot of influence on the political scene. This is not surprising considering that the authoritarian regime is the main specimen under the truth commission's investigative lens. The authoritarian regime is typically responsible for a majority of human rights breaches committed in the past and will try to undermine any efforts to address these violations. If the authoritarian regime enjoys the loyalty of the military and effectively constitutes a destabilising force in the nascent democracy, the new government will be unwilling to establish a commission at all. Consequently if the authoritarian regime is weak and does not constitute a threat to the new regime, the government is arguably more willing to authorise a commission with a strong mandate. Furthermore a new government is often under pressure from both international and domestic human rights actors to adopt a proactive stance on human rights. A new government has to prove that it is genuinely committed to the democratic project and the protection of human rights in order to achieve international legitimacy. In this respect the establishment of a strong commission can be a viable strategy to achieve this objective and further strengthen its legitimacy both on the domestic and international scene. Thus, we will firstly investigate how the political factors outlined above; the new government, the authoritarian regime and the human rights community influence the establishment of a truth commission and the strength of its mandate in the section *Establishment of the Commission and its Mandate*. We will treat the variables the new government and the authoritarian regime together throughout this framework because it is the relative strength between them that is considered to define and delimit the scope of human rights policies in a new democracy. In the section *Fulfilment of the Objectives Stated in the Mandate* we will turn our attention to how the particular aspects of the mandate, the legal powers, the monetary resources and the time available to the commission affect our first

success criterion; the fulfilment of duties assigned to the commission.

Our second criterion for success is the implementation of a commission's recommendations. Which factors influence the implementation of these recommendations? Most truth commissions operate during politically volatile circumstances in the wake of transitions from authoritarian rule, or after a civil war, when human rights are sensitive issues. Several actors with opposing agendas will therefore have a stake in the implementation of the commission's recommendations and the development of a policy on human rights. The new government on one hand is concerned with legitimising itself in order to secure the survival of the regime. Enforcing criminal accountability for human rights violations may be instrumental in increasing the government's popularity and secure the survival in future elections. The former regime on the other hand is invariably concerned with avoiding accountability for human rights crimes and will try to evade any form of sanctions, loss of reputation, positions, or at worst the loss of freedom or life. At the same time the new government may be under pressure from domestic human rights organisations and the international community to hold human rights violators accountable. If the human rights community is able to maintain a consistent pressure the government may be compelled to enforce criminal accountability for human rights violations. This strategy can serve to increase the legitimacy of the new regime and secure its survival in future elections. However if a truth commission energises calls for stronger accountability measures, the military may be compelled to take action against the new regime. In these scenarios, the government may preclude any prosecution attempts by granting amnesties to alleged perpetrators or strictly adhere to non-retributive policies.

When on the other hand political circumstances are conducive to criminal sanctions, truth commissions sometimes serve as a preliminary exercise for later prosecutions. Here the truth commission is authorised to recommend legal proceedings in cases where this is considered appropriate and its findings are typically handed over to the Prosecutors' office. The opportunities for legal proceedings however depend as much on the state of the legal system as they do on the political climate. In some societies the judiciary has remerged relatively unscathed from authoritarian rule whereas in others the judiciary is plagued with corrupt judges and inadequate infrastructure. Thus without a functioning judiciary the big fish are much more likely to avoid prosecutions (although these may take place long after the return to democracy).<sup>18</sup> The role of the judiciary will be further investigated in the section *Implementation of the Mandate*. Here we also examine how the new government and the

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<sup>18</sup> Crimes against humanity as defined in the International Military Tribunal, Nurnberg, of 8 August 1945 do not have a statute of limitations ([http://www.unhcr.ch/html/menu3/b/p\\_limit.htm](http://www.unhcr.ch/html/menu3/b/p_limit.htm))

authoritarian regime as well as the human rights community, as outlined above, influence the implementation of the recommendations.

Lastly, in section 2.2.9 *Pursuit of Reconciliation*, we will examine the reconciliatory elements of a truth commission's work. Reconciliation is by many scholars considered an important and necessary step towards democratic consolidation. Still, how and to what extent truth commissions can contribute towards reconciliation is disputed in the literature. Some commissions, such as the South African TRC explicitly set out to write a report which would serve as a foundation for future peace-building and reconciliation. Some truth commissions also hold public hearings which are often an attempt to reconcile victims and perpetrators and former political opponents (such as for instance the South African TRC, The Timor Leste Commission for Reception, Truth and Reconciliation and Sierra Leone Truth and Reconciliation Commission). Thus in this section we will critically review a truth commission's activities in order to make some tentative conclusions about how they may or may not contribute towards this objective.

### *Establishment of the Truth Commission and its Mandate*

#### **2.2.1 The power balance between the authoritarian regime and the new government**

In this section we will examine how the power balance between the authoritarian regime and the new government influence the establishment of a truth commission. There is a general agreement among scholars that the relative power balance between the authoritarian rulers and the pro-democratic forces is “(...) the most important variable in explaining where truth commission are likely to emerge” (Brahm 2007: 14).<sup>19</sup> The nature of the transition is thus considered to have a crucial impact on future human rights policies. Transitions are defined as the “interval between one regime and another” (O'Donnell 1986: 6) and may also signify a movement towards another authoritarian regime or a revolutionary alternative (ibid).<sup>20</sup> Transitions are periods of uncertainty where the rules of the political games are not defined, instead they are in constant flux and continuously contested (ibid). The rules and procedures that do exist are at the discretionary hands of the rulers (ibid). The authoritarian rulers commonly control the Armed Forces and hold the upper hand in the transition. This does not

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<sup>19</sup> See also Zalaquett 1989; Pion-Berlin 1994; Barahona de Brito, Aguilar, and Gonzalez Enriquez 2001. An empirical study by Skaar largely supports this conclusion; it suggests that governments are most likely to establish truth commissions when the demands from the public and the authoritarian regime's demands are “roughly equal” (1999: 1109-1110).

<sup>20</sup> Our understanding of a transition will also include the process of moving from state of war to a state of peace (Quinn and Freeman 2003: 1119).

mean the new regime's own preference is irrelevant, only that the boundaries of a human rights policy will be defined by those controlling the means of coercion especially if their own existence is at stake. Hence if a repressive military regime negotiates its own exit, it is very unlikely to support trials and prosecution against members of the regime. As Skaar observes, the former regime will always prefer inaction (1999: 1112) and if a truth commission is established it is because the outgoing regime cannot withstand the pressure for a policy on human rights. Consequently we would expect the former regime to challenge the establishment of a strong truth commission. Contrary, when a transition is the result of an overthrow by a pro-democratic opposition and the authoritarian regime does not enjoy the loyalty of the military, the political context will allow for a stronger policy on human rights. The new regime can mandate a stronger commission, because the former regime does not represent a threat to the new regime. Below we further develop this idea by applying Huntington's three-folded typology of transitions from his seminal work *The Third Wave Democratisation in the Late Twentieth Century* (1991).

Huntington in his framework emphasises the relative strength between outgoing regime and the opposition and he analytically distinguishes between three types of transition.<sup>21</sup> The first type he identifies is so-called *transformations*<sup>22</sup> also referred to by Huyse as *reform* (1995: 113). Reform is the type of transition resulting from a process where the outgoing regime commonly dictates all the terms of exit: The transition is initiated by liberalisers within the authoritarian regime and is a process where the "regime reformists are able to steer the transition and define the boundaries of the new democracy" (Fishman 1990: 432). The outgoing regime typically controls the means of coercion leaving the opposition weak with and with little leeway for negotiations. In these types of transitions prosecutions are almost non-existent. If the regime is too weak to resist a human rights policy it will "(...) strive to obtain iron-clad guarantees that under no circumstances will the past be unearthed" (O'Donnell and Schmitter 1995: 58). Chile is an example of a 'reform' transition where the president Patricio Aylwin was left with little room for a human rights policy after Pinochet stepped down from office in 1990. "The amnesty constrained Aylwin's options for responding to the abuses of the Pinochet regime. The president instead decided on a truth commission to establish the truth about the past" (Hayner 2001: 35). The Chilean truth commission was also vested with few investigative and reporting powers (ibid: 322). Realities are that transitional

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<sup>21</sup> These categories of transition are for constructed for analytical purposes. Empirical cases are rarely this clear-cut.

<sup>22</sup> Huntington, 1991: 114.

governments often have formidable problems with addressing the authoritarian regime's human rights abuses, especially in cases where members of the former regime still retain a lot of political power and where the military is not subjected to civilian control (Valenzuela 1990). Truth commissions therefore end up with few powers and little resources and often exist only to polish the façade of the new regime.

The second type Huntington identifies is *transplacements* also referred to as *compromises* by Huyse (1995: 113). Compromises involve “combined actions” of the old regime and the new government (Huntington 1995: 66) and are regularly accompanied by pacts. A pact is an agreement “among contending elites establishing formulas for i) sharing or alternating in office ii) distributing the spoils of office and iii) constraining policy choices in areas of high salience to the groups involved” (O'Donnell and Schmitter 1995: 58). The outgoing regime can make several demands in the pact-making which may involve blanket or conditional amnesties for members and associates of the former regime. A truth commission may be a part of the agreement, however the outgoing regime can force through so-called exit guarantees; “the assurance that the members of military will not be prosecuted for past human rights abuses” (ibid). One example is the TRC in South Africa which was a compromise solution negotiated by the governing National Party and the ANC guaranteeing a peaceful transition to democracy (Sarkin, 2004: 32-36). Although amnesties for politically motivated criminal acts<sup>23</sup> were a part of this compromise, the commission was nevertheless endowed with extensive search and seizure and subpoena powers (Hayner 2001: 41). The commission was also granted the largest budget in the history of truth commissions. In ‘compromise’ transitions a truth commission is often established because the former regime is not strong enough to enforce a policy of immunity and oblivion, and the new government does not possess the power to prosecute members of the authoritarian regime. Although it is not uncommon that the commission is bestowed with extensive legal powers the outgoing regime may negotiate guarantees that the findings cannot be used in court.

The last type of transitions is referred to as *replacements* also described by Huyse as overthrow (1995: 114). ‘Overthrows’ are transitions where democratisation “results from the opposition gaining strength and the government losing strength until the government collapses or is overthrown” (O'Donnell and Schmitter 1995: 65). If reformers within the regime exist, they are commonly too weak to push for an agenda. The chances for trials and prosecutions are greatest when democratisation is a product of an overthrow (Huyse 1995: 114), Ideally we

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<sup>23</sup> A modified version of the Norgaard principles of politically motivated crimes was included in the TRC Act (Bhargava 2002).

would expect a commission with a strong mandate where the commission may serve as a preparatory exercise for later prosecutions, as was the case in Peru (Cueva 2007: 83). Considering the weakness of the authoritarian regime, the new regime will set the terms of negotiations. Argentina’s Commission on the Disappearance of Persons (CONADEP) is an example of a truth commission established after an overthrow. It was born in the aftermath of the transition to democracy in 1983. The transition was initiated after the military administration collapsed as a result of the defeat in the Falkland Islands war and rendered the Armed Forces unable to negotiate the terms of its own exit (Sikkink and Booth Walling: 305). The truth commission was the first of its kind, and although its mandate was weak compared to its successors it was *comparatively* ground-breaking. Given this frame of reference we thus suggest the following hypothesis:

H.2.2.1: “Where the former authoritarian regime is strong relative to the new government this will lead to the establishment of a truth commission with a weak mandate.”

For analytical purposes we give the variable **The power balance between the authoritarian regime and the new government** three values which correspond to three outcomes in reference to the establishment of commission and its mandate. The values are stated in the table below:

Table 2.2.1: *How the power balance between the authoritarian regime and the new government is assumed to influence the establishment of the commission and its mandate.*

<i><b>The power balance between the authoritarian regime and the new government</b></i>	<i><b>Establishment of the commission and its mandate</b></i>
Strong authoritarian regime/Weak new government (reform)	A commission's mandate will be weak. Prosecutions are precluded in the mandate.
Authoritarian regime and New government are equally strong (compromise)	A commission's mandate will be moderately strong but coupled with amnesties. Prosecutions are precluded.
Weak authoritarian regime/Strong new government (overthrow)	A commission's mandate will be strong and allows for recommendations to prosecute.

### **2.2.2 The human rights community**

In this section we will examine how the domestic and international human rights actors, here referred to as the human rights community, can influence the establishment of a truth commission in a society in transition. During an authoritarian era, fundamental political rights and civil liberties are typically abolished, which often also involves the right to organise. Political organisations within civil society are either tried co-opted into the government, or banned entirely (Gyimah-Boadi 1996: 123). Thus it is not uncommon that human rights activists are arrested, incarcerated and even prosecuted for illegal activities. In some societies the authoritarian regime has dismantled the organisational infrastructure of the civil society completely, but in less repressive regimes organisations may continue to operate illegally. In the last scenario human rights organisations often re-emerge as central actors on the political scene. Human rights issues however are global issues, thus it is not uncommon to observe international actors getting involved in transitional justice processes. Although international involvement in post-transitional societies is a controversial issue because it arguably challenges to the sovereignty of the state<sup>24</sup> the international community has often played an important role by “encouraging a serious truth-seeking effort (...)” (Hayner 2001: 200) and demanding accountability for past crimes. This cross-pressure from domestic and international human rights organisations has created what Sikkink and Booth Walling refer to as ‘opportunity structures’ where international and domestic human rights actors can, if there exists a general desire for truth-seeking, open up a space where human rights violations may be addressed (2007: 302).

The new government wants to avoid reactions from the old regime, but it is also concerned with pleasing “(...) the electorate and giving a favourable impression to the international community” something which combined with public pressure can become an important political force for the establishment of a truth commission (Skaar 1999: 1125). For a nascent democratic state it is important to build legitimacy on the international arena, and the establishment of a truth commission is one way to increase its legitimacy. However even if the political will to establish a commission exists, a transitional government can be pressured into holding off investigations by potentially destabilising forces (Hayner 1995: 250). During such circumstances domestic human rights activists and organisations may benefit from international involvement providing “(...) greater leeway to confront powerful forces within the country with less fear of reprisal” (ibid: 251). Crocker maintains a similar

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<sup>24</sup> The issue of the rights and responsibilities of the international community to intervene is further discussed in Aukerman 2002.

position; He argues that effective truth commissions can in fact only be established with “(...) a vigorous domestic civil society, backed up on occasion by certain types of international civil society (...)” (2000: 109).

There are several empirical examples of case studies where complementary pressure from the domestic and international human rights community has played an important role in enforcing a stronger policy on human rights. In Argentina, after the military regime collapsed, international and domestic activists collaborated in order to pressure the Alfonsín government into adopting a proactive stance on human rights. Here international initiatives became a complement to domestic and regional activism (Sikkink and Booth Walling, 2007: 315). Guatemala and El Salvador are other examples where the processes leading up to the establishments of the truth commissions were collaborations between international community, represented by the UN, and domestic human rights organisations (Quinn and Freeman 2003: 1117-1123; Hayner 2001: 38-40). The Guatemalan History Clarification Commission was, similarly to the Salvadoran Commission, set up under “intense international pressure” (Popkin and Roht-Arriaza 1995: 92). Similarly in South Africa, domestic civil society organisations “helped forge the idea of a truth commission” (Crocker 2000: 110) and played a central role in “(...) composing the Commission and its mandate” (Rotberg, 2000: 13). Here civil society benefitted from the widespread moral condemnation of the apartheid system and the international attention to the transitional justice process. Based on these observations we suggest the following hypothesis:

H.2.2.2 “Strong pressure from the human rights community will compel the government to establish a truth commission with a strong mandate.”

For analytical purposes we give the variable **Pressure from the human rights community** three values which correspond to three outcomes in reference to the establishment of the commission and its mandate. The values are stated in the table below:

Table 2.2.2: *How pressure from the human rights community is assumed to influence the establishment of the commission and its mandate.*

<b><i>Pressure from the human rights community</i></b>	<b><i>Establishment of the commission and its mandate</i></b> <sup>25</sup>
Weak pressure	A commission's mandate will be weak.
Moderate pressure	A commission's mandate will be moderately strong.
Strong pressure	A commission's mandate will be strong.

<sup>25</sup> Given that the mode of the transition allows for a truth commission to be established.



## *Fulfilment of the Objectives Stated in the Mandate*

### **2.2.3 Legal powers**

This section will be devoted to the examination of how a truth commission's legal powers relate to fulfilment of the objectives stated in the commission's mandate. As we already established the objectives of a truth commission may vary from cases to case, however a common denominator to all commissions is the duty to investigate and report. The violations under investigation and the scope and boundaries of the investigation will be outlined in the mandate. In general, the mandate will also ask the commission to recommend what would be the appropriate way to address the victims and perpetrators of these crimes. We will therefore focus on the powers which are related to investigations (subpoena, search and seizure, and witness protection powers) and reporting (powers of naming names as well powers to make recommendations) (Hayner 2001: 322). Adjudicative powers such as power to grant amnesties and powers to authorise contracts of community work are also included in the framework.

A truth commission must enjoy the necessary legal powers in order to conduct exhaustive investigations and obtain a complete picture of the past. Daly in fact considers legal powers to be one of the two most important factors for the fulfilment of the mandate (2001: 98).<sup>26</sup> Extensive search and seizure powers are considered to contribute to more thorough investigations by giving the commission the necessary powers to call for evidence from official sources, state archives, databases and sources otherwise which may contribute to unearth the truth about human rights crimes. Moreover, a truth record is likely to be more comprehensive if the commissioners can summon witnesses to give testimony: It is not uncommon that both victims and perpetrators are unwilling to testify (Burgess 2007). Perpetrators will not implicate themselves in criminal activities and victims may fear the repercussions from perpetrators or consider testifying about past abuses to be too traumatic. In these situations a truth commission with summoning powers can compel witness to come forward *if* this considered appropriate. In cases where the danger of repercussion is real, witness protection powers are a logical extension of a commission's legal powers.

Several empirical studies reveal that weak legal powers may result in a superficial and unbalanced account of the past: In Timor Leste the commission did not have the powers to summon alleged perpetrators something which resulted in a one-sided account of the incidents. (Burgess 2007: 202). Similarly the Chilean truth commission did not enjoy

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<sup>26</sup> A truth commission can be established by the legislature (South Africa), the executive (Chile) or through a peace agreement (El Salvador) (Freeman 2006: 28). It is important to note that the powers to imbue truth commissions with the legal powers such as the power to "compel testimony or to search premises and seize evidence" rests, in most states, with the legislative branch (ibid).

summoning powers and the lack of cooperation on the military's part thus led to a narrow interpretation of the political mandate (Popkin and Roht-Arriaza 1995: 97). The Guatemalan truth commission did not have the powers to name names and although it did find the Armed Forces to be accountable for thousands of human rights violations, individual accountability could not be reported even in the face of overwhelming evidence (Keller 2000). In contrast the South African Truth and Reconciliation Commission held "summons or subpoena powers, search and seizure powers (with concomitant penalties for non-cooperation), and witness protection powers" (Freeman 2006: 34). The last case is an example of by far the most ambitious undertaking of a truth commissions till today and the resulting report has made it impossible to doubt the apartheid past.

Data from the last 20 years and onwards reveal that younger truth commissions enjoy more legal powers than their predecessors. Some of the first commissions such as the Argentinean National Commission on the Disappeared (1983) and the Chilean Rettig Commission (1990) were granted few investigative powers. According to Hayner this led to a narrow interpretation of the mandate (2001: 34, 36). This claim is also supported by Popkin and Roht-Arriaza (1995: 97) who state that the lack of power to "compel testimony and production of documents, the inability to call hostile witnesses, preserve or obtain documents, and or visit military or police installations (..)" has prevented most commissions from producing more than mere description of patterns of abuses (ibid). Later commissions such as the Salvadoran truth commission enjoyed extensive legal powers, as well as powers to name names and mandatory recommendations: In its final report the commission implicated over "40 senior members of the military, judiciary and armed opposition for their role in the atrocities" (Hayner 2001: 39).<sup>27</sup>

Some truth commissions enjoy adjudicative powers such as the power to grant amnesty and the power to authorise community contracts. Many theorists consider these powers vital to compel witnesses of abuses to come forward and testify. The granting of amnesties and community work (instead of incarceration) in exchange for the truth are powerful tools which can contribute to the production of a more comprehensive truth record. These powers however are considered very controversial because they violate the principle of proportionality; the punishment should fit the crime. Furthermore they undermine truth commissions in the role they can play in achieving criminal justice. Nevertheless, they are

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<sup>27</sup> The Salvadoran government reacted by passing a sweeping amnesty law which guaranteed the alleged perpetrators impunity from prosecutions (Hayner, 2001: 91). "El Salvador is the clearest case to date of an amnesty law passed into law as a direct response to a truth commission's report" (ibid).

utilised in contexts where truth is considered a more important goal than retributive justice. These strategies are also favoured by commissions guided by the notion that amnesties for truth can contribute to reconciling estranged parties. The powers to grant amnesty in exchange for truth was utilised with moderate success in South Africa (Sarkin, 2004). Also in Timor Leste the granting of community contracts was viewed as a legitimate tool for obtaining truthful testimonies from perpetrators. Based on these observations we outline the following hypothesis:

H.2.2.3 “A truth commission endowed with extensive legal powers (search and seizure powers, reporting powers, amnesty powers) is more likely to fulfil the objectives stated in the mandate.”

For analytical purposes we give the variable **Legal powers** three values which correspond to three outcomes in reference to the fulfilment of the political mandate. The values are stated in the table below:

Table 2.2.3: *How legal powers are assumed to influence the fulfilment of the objectives stated in the mandate.*

<i>Legal powers</i>	<i>Fulfilment of the objectives stated in the mandate</i> <sup>28</sup>
Few	Incomplete
Some	Partial
Extensive	Complete

#### **2.2.4 Monetary resources**

Truth commissions are challenging ventures which demand a considerable amount of monetary resources in order to become genuine instruments of truth-seeking. Sufficient resources are thus a vital factor in terms of fulfilling a commission's objectives. In this section we further examine to what extent monetary resources or the lack thereof influences the work of the commission and its ability to fulfil its mandate.

Truth commissions are not under any circumstances modest undertakings and should not be expected to fulfil their duties without sufficient resources.<sup>29</sup> Salaries to staff, office space, investigations of cases, travel expenses to take statements from victims and the conduct of public hearings are typically large items on a commission's budget. Brahm suggests that

<sup>28</sup> Given that the other independent variables are at a constant maximum value.

<sup>29</sup> A truth commission's budget today tends to vary between 5 and 10 million USD (Freeman 2006: 31).

the funding affects both the quality and the quantity of the works of truth commissions: “(...) well-funded truth commissions seem likely to be better able to hire more staff and consequently, to investigate a greater number of cases and do so more thoroughly” (2007: 30). In many transitional states however the national economy is in poor conditions and the government struggles to meet the social and economic needs of its population. Transitional administrations often rely on foreign and international donors to fuel their budgets and in some cases they also fund truth commissions partly or in its entirety. This is not necessarily a bad thing for a truth commission: In societies where the public expresses a general distrust in governments, truth commissions will lose legitimacy if the funding is conditional on the goodwill of the government and as a consequence its ability to fulfil its duties in an unbiased manner will be questioned. This dilemma can be resolved with the use of international donors: Many truth commissions rely on international funding entirely such as the Salvadoran truth commission which was “financed by the US, EC, the Netherlands, Scandinavia and the UN amounting to a total of two and a half million dollars” (Buergethal 1995: 296). Another example is the Sierra Leone Truth and Reconciliation Commission where the majority of the funding came from international donors (Schabas, 2005: 133). Some commissions also receive a mix of national and international funding such as Peruvian truth commission (Freeman 2006: 31).

There are examples of truth commissions which were brought into stalemate due to severe underfunding. Brahm observes that “(...) budgetary problems forced Uganda’s CIVHR<sup>30</sup> to close for extended periods and the Chadian commission was forced to take up residence in a former detention centre” (2007: 30). The Haitian truth commission is a third example of a commission which never finished its report due to insufficient funding (Call 2004: 104). On the other end of the scale we find the South African Truth and Reconciliation Commission which had a budget of 18 million USD each year (Hayner 2001: 41). Despite generous funding, the South African TRC has often been criticised for a superficial interpretation and implementation of its mandate (Quinn and Freeman 2003: 1126). Commissions such as the South African TRC with clearly stated objectives of reconciliation and individual healing demand a greater deal of resources than commissions which primary focus is data collection and processing. On the other hand, commissions like the Salvadoran and the Chilean suggest that “extremely large budgets (...) are not necessary for real social change” (Brahm 2007: 30).

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<sup>30</sup> Commission of Inquiry into Violations of Human Rights.

The notion of what constitutes sufficient resources is relative to the breadth of the mandate of the truth commission. We nevertheless argue that there is a lower threshold for funding considering the fact that there are basic tasks truth commissions have to carry out: Commissions must be able to hire qualified and specifically trained staff and investigators to record stories and narratives, but also conduct in-depth investigations, verify facts and seek alternative information sources (Quinn and Freeman 2003: 1137). It follows that a truth commission which cannot carry out basic logistical tasks is rendered inoperable and is unlikely to be an instrument of genuine truth-seeking. Based on these observations we propose the following hypothesis:

H. 2.2.4: “A truth commission with generous monetary resources is more likely to achieve the objectives stated in the mandate.”

For analytical purposes we give the variable **Monetary resources** three values which correspond to three outcomes in reference to the fulfilment of the political mandate. The values are stated in the table below. The values are relative to the size of the commission's mandate.

Table 2.2.4: *How monetary resources are assumed to influence the fulfilment of the objectives stated in the mandate.*

<i>Monetary Resources</i>	<i>Fulfilment of objectives stated in the mandate</i> <sup>31</sup>
Insufficient	Incomplete
Reasonable	Partial
Generous	Complete

**2.2.5 Time frame**

A truth commission is a temporary body which operates for a limited period of time. The deadline for a commission’s work is typically stated in the mandate of the commission however some commissions are given the discretion to extend the length of their operations (Freeman 2006: 32). In this section we will examine how the time frame influences a commission’s work and the fulfilment of its obligations.

Truth commissions are dependent on the necessary time to conduct proper investigations and write their reports. The time necessary for a commission to complete its

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<sup>31</sup> Given that the other independent variables are at a constant maximum value.

work may however vary from case to case. This is not unexpected considering the great diversity in mandates and investigative periods. Commissions conducting public hearings commonly have a longer operational time, than those that do not. Freeman further notes that most commission which do not conduct public hearings typically operate for one year or less, meanwhile those that do not, operate for two years or more (2006: 32) Empirical studies show that many truth commissions experience time constraints which can lead investigations and analyses to be carried out in a hastened and superficial manner. This was the case of the Salvadoran truth commission. It was mandated to investigate “serious acts of violence” between 1980 and 1991 (Buergethal 1995: 293). The six-month deadline however “rendered the commission unable to investigate more than a careful selection of cases” (ibid: 297-298). Even though the time limit was extended, the commission had to focus its investigations on a few selective and representative cases. The Rettig Commission in Chile experienced similar problems; due to insufficient investigative time, the commission was only able to investigate violations which resulted in deaths (Stanley 2005: 589). Daly observes similar struggles in South Africa: Temporal limitations in the legal mandate of the South African TRC prevented the commission “from examining and therefore explaining the historical context that gave rise to the extreme violence that characterised the mandate period” (2001: 142). Unsurprisingly, the overwhelming amount of cases presented to the commissions leaves most of them struggling to meet the deadline (Freeman 2006).

At the other end of the spectrum we observe truth commissions where there was no time limit: The Ugandan Commission of Inquiry lasted for more than 9 years and as expected people lost faith in its report ever being published (Hayner 1995: 249). This suggests that an unlimited time frame is not of preference (ibid: 259). Since truth commissions show great variation in their mandates, the time needed to complete their objectives will vary accordingly. However as Quinn and Freeman observe minimally truth commissions need “(...) sufficient time to cover the injustices committed during the authoritarian past, including extra preparatory time” (2003: 1129-1130). To this we also add extra time to as finish the final report. Based on these observations we outline the following hypothesis:

H. 2.2.5: “A truth commission with a long time frame is more likely to achieve the objectives stated in the mandate.”

This proposition however rests on the presupposition of a clearly defined cut-off point for the commission’s work. For analytical reasons we give the variable **Time frame** three different

values. The values are relative to the size of the mandate:

Table 2.2.5: *How the time frame is assumed to influence the fulfilment of the objectives stated in the mandate.*

<i>Time frame</i>	<i>Fulfilment of the objectives stated in the mandate</i> <sup>32</sup>
Insufficient	Incomplete
Reasonable	Partial
Generous (with a deadline)	Complete

***Implementation of Recommendations***

**2.2.6 The power balance between the authoritarian regime and the new government**

This section is devoted to the examination of how the relative power balance between the old regime and the new government influences the implementation of a commission’s recommendations. A truth commission typically presents a set of recommendations in its final report where it includes propositions of government reforms,<sup>33</sup> lustration and compensation to the victims. Some reports also name names and make recommendations of criminal investigations and prosecutions. However a truth commission is not an adjudicative body and it does not have the power to enforce its own recommendations. When a commission has completed its report, the implementation of the recommendations is at the discretionary hands of the government. The recommendations of a truth commission are a proposed response to severe and systematic human rights abuses where a majority of these have been committed by the former regime. The government’s ability to act is therefore constrained according to the relative strength of the former regime.

In a democracy, the military is not an actor on the political scene and it does not partake in political decision-making. It is subjected to civilian control and its primary function is to protect the state from external aggression. The civilian government is thus insulated from unduly military influence. An authoritarian regime on the other hand is inherently a system of coercion. In order to secure its own survival the regime typically employ Armed Forces to suppress the opposition and eliminate individuals or groups considered to be a threat, real or perceived, to the regime. Thus, in transitional states we often find that the military has “(...) notorious problems with leaving politics, something which, to a varying degree, will constrain

<sup>32</sup> Given that the other independent variables are at a constant maximum value.

<sup>33</sup> Reforming the Armed Forces, Security Sector and purging the government branches of authoritarian elements are ordinarily high on the agenda.

and affect the future policy-choices of the new government, especially in the area of human rights violations” (O’Donnell and Schmitter 1995: 62). If the military took part in systematic repression it will try to protect itself from human rights issues after the transition (Stepan, 1988: 69). This is particularly true in cases where the military still retain a strong position even after the transition. Hayner observes in her study of fifteen truth commissions that in eleven cases the military remained “largely unchanged and a potentially destabilising force” (1995: 250).<sup>34</sup> Military influence in nascent democracies may be miniscule when the institution is subjected to democratic control<sup>35</sup> and the power exercised on the political scene is formalised and transparent. However in cases where the Armed Forces still retain a lot of power, the military may reappear on the political scene as a coherent and authoritative force, influencing political decision-making both through formal channels as well as informally and indirectly. This is particularly true in regimes where the military becomes extremely politicised which is the case in militocracies. In militocracies the military takes on the role as the state’s executive administration, often through a personalistic style of ruling. It is a system “that values and accords primacy in state and society to the Armed Forces” (Ajayi 2007: 97). If the military continues to influence politics after the return to democracy, even non-retributive responses to human rights violations may be perceived as threatening.

Even though truth commissions do not have the power to sanction they can, as Pion-Berlin observes, become an impetus carrying events “further than desired. (...)” (1995: 95) and “energise societal calls for justice” (ibid). In these societies the new government will have greater difficulties carrying out reforms and dispose of elements that are loyal to the former regime (Fishman 1990: 429).<sup>36</sup> One example of this is El Salvador where the commission would not recommend prosecutions in its final report because of the lack of independence of the courts (Roht-Arriaza, 1998: 850). As Popkin and Roht-Arriaza observe: “The militaries, and their civilian supporters, retained a major share of power and were disinclined to allow legal action against their own” (1995: 103). Instead it advised the government to reform the judicial branch and the Security Sector (Arnson 1993: 21). The Salvadoran government’s

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<sup>34</sup> The truth commissions were established in: Bolivia, Argentina, Uruguay, Uganda (1974), Uganda (1986), The Philippines, Chile, Chad, Germany, El Salvador, Ethiopia, Rwanda, South Africa (ANC I), South Africa (ANC II) and Zimbabwe (Hayner 1995: 225-261).

<sup>35</sup> We use the term democratic control rather than civil control of the military to distinguish real democratic control from scenarios where the military is under civilian control, but where the authority is not necessarily democratic (Cawthra and Luckham 2003).

<sup>36</sup> This may occur through a process formally known as vetting. Vetting is process where the background of employees in the public sector is carefully examined in order to remove human rights violators from their jobs through “forced retirement” or by denying the same persons future employment in this sector (Mobekk 2006: 68).



subsequent refusal of the commission's findings and its decision to grant sweeping amnesties to all alleged perpetrators reflect the imminent fear of a military response had the commission's report gained further momentum. As Hayner observes; "El Salvador is the clearest case to date of an amnesty law passed into law as a direct response to a truth commission's report" (2001: 91).

Where amnesties are not a part of the pacts negotiated between the old and the new regime, truth commissions may recommend criminal investigations and prosecutions of members of the former regime. In some states commissions serve as preparatory exercises for later prosecutions. This was the case in Argentina and Peru where the commissions handed over the findings to the Prosecutor's Office (Cueva 2007: 83). However it is not uncommon that the military constitute a genuine threat to the new regime, precluding any opportunities for prosecutions of members of the former regime. Realities are such that very few members of the former regime are prosecuted and punished even when pacts are absent. Reports which do recommend prosecutions are therefore more problematic to enforce than reports which do not seek to establish strong links of accountability.

In her empirical study of transitions and associated human rights policy, Skaar finds that transitional governments are rather under- than overachievers in terms of human rights policies, even when the former regime is weak (1999). In Chile for instance the Rettig Commission suggested prosecution of several army officers, however many of these cases "have been suspended or amnestied with either no judicial investigation or only partial investigation (...)" (Report of the National Commission on Truth and Reconciliation, 1995: 104). Pion-Berlin notes that this was explicit decision to avoid a conflict between the new government and the military (2006: 26). As Mobekk observes "(...) the fear of destabilisation and renewed conflict is a primary reason why new regimes sometimes avoid prosecution and why commentators frequently argue against it (...)" (2006: 25). Based on these observations we suggest the following hypothesis:

H.2.2.6: "Where the former authoritarian regime is strong relative to new government this will lead to an incomplete implementation of the commission's recommendations."

We give the variable three values which correspond to three outcomes in reference to the implementation of the recommendations in the report. The values are stated in the table below:

Table 2.2.6: *How the power balance between the authoritarian regime and the new government is assumed to influence the implementation of the commission's recommendations.*

<i>The power balance between the authoritarian regime and the new government</i>	<i>Implementation of recommendations</i> <sup>37</sup>
Strong authoritarian regime/Weak new government	Incomplete (No or few recommendations are implemented)
Authoritarian regime and new government are equally strong	Partial (Some recommendations and non-retributive recommendations are implemented)
Weak authoritarian regime/Strong new government	Complete (A majority of the recommendations including retributive sanctions are implemented)

**2.2.7 The human rights community**

Truth commissions can, if they receive support from civil society, become a force for social change. As Hayner observes truth commissions, although they do not possess adjudicative powers, can become “(...) a pressure point around which civilian society and the international community can lobby for change in the future” (1995: 225). They will however have limited impact if new governments do not implement the recommendations which the commissions make. In transitional societies where the government lacks the political will and/or the ability to implement the propositions made by the truth commission the human rights community can positively influence the government into adopting proactive policies on human rights. In this section we will thus examine how and the human rights community can influence the implementation of truth commissions’ recommendations.

In a transitional society the new government is typically caught in the cross-fire between the former regime which will try to avoid accountability and human rights organisations demanding action on salient human rights issues. A government feels a stronger obligation to address human rights violations when civil society monitors and assesses whether the government keeps its promises and translates words into action (Crocker 2000: 111). A strong civil society can also generate the necessary media attention directing the eyes of the international community towards the new government, further increasing the pressure to implement the recommendations. However if these actions are viewed as threatening by the old regime, the latitude of the new government will be constrained accordingly, particularly if the government fear that even recommendations of moderate reforms and non-retributive justice might energise demands for stronger accountability for human rights abuses. On the

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<sup>37</sup> Given the other independent variables are at a constant maximum value.

other hand, a new government needs to build domestic legitimacy in order to secure the survival of the regime. Thus complying with a demand for stronger policies on human rights can be a successful part of a strategy to win the next elections.

Legitimacy on the international arena is also a central issue to new states and a proactive stance on human rights may be instrumental in achieving this. Empirical observations suggest that truth commission can play a vital role in achieving justice for human rights breaches: In Argentina regional human rights activists’ concerted effort contributed to the prosecution of several military officers. Similarly in Chile, domestic and international human rights activists cooperated in order to have Augusto Pinochet prosecuted for crimes against humanity (Sikkink and Booth Walling, 2007: 313-316). In South Africa the government was under fierce attack from domestic human rights groups who criticised the government for failing to compensate the victims of human rights violations and prosecute perpetrators who did not apply for amnesties (Crocker 2000: 112). This pressure was however not enough to compel the government into complying with the commission’s recommendations. Based on these observations we suggest the following hypothesis:

H.2.2.7 “A strong pressure from the human rights community will compel the government to implement the recommendations of a truth commission.”

For analytical purposes we give the variable three values which correspond to three outcomes in reference to the implementation of the recommendations in the report. The values are stated in the table below:

2.2.7: *How pressure from the human rights community is assumed to influence the implementation of the commission’s recommendations.*

<b><i>Pressure from the human rights community</i></b>	<b><i>Implementation of recommendations</i></b> <sup>38</sup>
Weak	Incomplete
Moderate	Partial
Strong	Complete

**2.2.8 The judiciary**

Unlike truth commissions, the judicial branch of a democratic government has the adjudicative powers to enforce retributive justice. If truth commissions make

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<sup>38</sup> Given that the other independent variables are at a constant maximum value.

recommendations of criminal investigations and prosecutions in their reports, these cannot be pursued without a functioning court system. The purpose of this section is to establish the role of the judiciary in the implementation of recommendations of criminal sanctions.

It is not uncommon for truth commissions to recommend criminal investigations into the responsibility of former leaders and military officers for authorising and executing criminal acts against the civilian population however more often than not prosecutions are not pursued. Prosecutions may not be plausible for a number of reasons. Political circumstances may prevent future prosecutions because guarantees of impunity have been agreed to and amnesty laws have been adopted. Unless these are repealed or judged unconstitutional they often limit the prospects of retributive justice. In societies in transition the judicial branch itself sometimes constitutes an obstacle to retributive justice: The judiciary is typically the first victim of an authoritarian regime. As Roht-Arriaza and Gibson observes

Some authoritarian regimes “(...) retain the judiciary out of necessity, it often seeks to neutralise the institution either by destroying or diminishing its judicial authority or by luring it into compromise through promises of respect for judicial determinations, adequate funding or even force or intimidation” (1998: 843-885).

Sometimes the regime tries to influence the court system by sacking disloyal judges and using threats and bribes to influence court decisions in its favour. At other times the judicial branch has been suspended all together, the constitution is annulled and the country is ruled by decree. As a consequence the judiciary is typically plagued with challenges, both administrative and institutionally when the country returns to democracy: “Infrastructural deficiencies are huge and prevents thee fair and accurate execution of justice” (Oko 2005: 42). Oko further notes that very often the system is fraught with corrupt judges who are still loyal to the former regime (ibid: 42).

The Salvadoran case is an example of the authoritarian regime's stranglehold of the state institutions: As the Salvadoran Commission on Truth observes: “None of the three branches of government – judicial, legislative, or executive – was capable of restraining the military's overwhelming control of society” (1995: 201). As a consequence after the civil war ended, the courts system was staffed by supporters of the old regime and unable to uphold and protect the values of a democratic regime (Daly 2001). Similar events took place in Chile under the Pinochet regime. Although the regime did not interfere with judicial processes to the same extent as in Argentina “(...) jurisdictional authorities in the field of human rights

were conspicuously deficient” (National Commission on Truth and Reconciliation, 1995: 125). The Chilean Commission further notes that the judiciary succumbing to the military junta led to “(...) an intensification in the process of systematic violations of human rights (...)” (ibid). This also had consequences in the long run because a tradition for impunity for repressive actions was institutionalised (ibid). Consequently the cases in which the Chilean truth commission recommended further prosecutions were “(...) suspended or amnestied with either no judicial investigation or only partial investigation (...)” (ibid: 163). The lack of “(...) judicial independence helps to explain the failure of the courts in these countries to invalidate amnesty laws and to uphold provisions of the constitution” (Roht-Arriaza and Gibson 1998: 878).

In some, although a lot fewer, cases the judiciary emerges relatively unscathed from the authoritarian period and prosecutions are feasible. Here truth commissions can play an important part in the investigations and later prosecutions of members of an oppressive regime.<sup>39</sup> The Argentinean case is an example of how several members of the Military Junta were prosecuted and sentenced to prison. Although the judiciary was dramatically subverted after the Armed Forces came to power in 1976 the judiciary recovered after the return to democracy. The Argentinean National Commission on the Disappeared truth (CONADEP) handed over its findings to the judiciary and worked in a complementary manner with the judiciary to prosecute individuals responsible for authorising and executing the crimes committed by the authoritarian regime. As Hayner observes, the CONADEP “(...) played a critical role in the trial against members of the former military junta leadership, serving as a model for the positive relationship that can exist between truth commissions and later prosecutions” (2001: 93). Based on these observations we suggest the following hypothesis:

H.2.2.8: “Unless there is an uncompromised judiciary, recommendations of criminal sanctions will not be implemented.”

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<sup>39</sup> In countries which base their legal system on civil law, the method of criminal procedure differs from that of common-law countries. Civil law legal systems emphasise the role of the judge. The judge is “(...) normally responsible for calling and questioning all witnesses, and the process is not separated into two distinct phases of trial and sentencing (...)” (<http://www.britannica.com/EBchecked/topic/142953/crime/261349/Anglo-American-countries#ref=ref990917>). Furthermore, most civil law countries maintain the principle of mandatory prosecution. This means that prosecutors in theory must prosecute “(...) all crimes that come to their attention, according to the letter of the law (...)” (ibid). Conversely in common-law countries the process of prosecution is distinguished from investigation and adjudication. Prosecutions are ordinarily performed by an authority which is neither a part of the police nor the judicial system. Here the Prosecutor enjoys extensive discretion in deciding whether or not to institute criminal proceedings (ibid). In some countries the Prosecutor’s Office is directly subordinate to the executive branch (ibid). In democratic states this subordination is only theoretical, whereas in less democratic states this relationship is often abused by the executive, unduly influencing the procedures of the prosecuting attorney.

For analytical purposes we give the variable three values which correspond to three outcomes in reference to the implementation of criminal sanctions recommended in the report. The values are stated in the table below:

Table 2.2.8 *How the judiciary is assumed to influence the implementation of the commission’s recommendation of criminal sanctions.*

<i>The judiciary</i>	<i>Implementation of recommendations of criminal sanctions</i> <sup>40</sup>
Weak	Incomplete
Moderate	Partial
Strong	Complete

***Pursuit of Reconciliation***

**2.2.9 Reconciliatory activities**

Truth commissions are often heralded as innovative transitional justice mechanisms with the ability to reconcile the seemingly antithetical notions of justice and reconciliation. As we recall reconciliation is a multifaceted concept which can take place on several levels. It may refer to a simple agreement to resolve conflicts through the use of non-violent means, while a ‘thicker’ version of reconciliation also involve interaction for common policy-making, forgiveness and healing (Crocker 2000). What lies behind truth commissions’ assumed contribution to reconciliation? Some theorists argue that the production of a truth record can promote reconciliation. A truth record is unifying in the sense that it takes into account several perspectives but at the same time is a systematic and lucid account of the abuse that took place; it is a production of a collective memory. Some truth commissions in their reports also recommend reconciliatory initiatives which can be conducive to peace-building and the reinforcement of democratic norms and values. Furthermore truth commissions sometimes hold public hearings which can become a space where perpetrators and victims reconcile. Some transitional societies exhibit lower level of conflict and violence after a truth-seeking process has taken place. The degree to which these outcomes can be attributed to the work of a truth commission is however disputed. The premises for reconciliation to take place are not readily understood and the difficulties in separating reconciliation as a result of truth commission's work and reconciliation as a consequence of factors in the political landscape

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<sup>40</sup> Given the other independent variables are at a constant maximum value.

prevent us from making a conclusive argument about the relationship between truth commissions and reconciliation. Thus, in this section we will judge a commission to be successful insofar as it promotes reconciliation through reconciliatory activities: Firstly we examine the reconciliatory role of a truth record and its recommendations, before we outline the role of public hearings in reconciliation.

The act of agreeing on a common understanding of the past is according to Crocker the first step towards reconciliation. As Crocker observes “(...) if reconciliation in any of its several senses is to take place, there must be some agreement about what happened and why. Former enemies are unlikely to be reconciled if what count as lies for one side are verities for the other” (2000: 101). Truth commissions can contribute to this through the production of an integrative truth report. This creation of a trustworthy account of the past “(...) is particularly important in polarised societies where interpretations of history are contested and potentially form the basis for future conflicts” (Popkin and Roht-Arriaza 1995: 93). A comprehensive truth record can therefore play a role in establishing common grounds where future interaction, cooperation and policy-making take place. As Gairdner observes; the past must be agreed on to the extent that it will not be an issue in future policy-making (1999: 55). A collective memory can also be important in order for individuals and communities to reconnect and forgive. As Hayner maintains one must know *what* to forgive in order to forgive (2001: 157). Problems can however arise if the truth report is perceived as unbalanced and biased. Critics of truth commissions claim that the extent to which they are reconciliatory is predicated on the participation of all relevant parties of the conflict and that the reconciliatory potential will be weakened when some parties choose not to participate. This was the case in South Africa where the majority of the apartheid regime’s supporters did not partake in the truth commission process and as a result the report became, in some people's views, a one-sided record of the past (Minow 1998: 336). Where conflicts cannot be reduced through writing a report or by holding public hearings, the commissioners may include in their reports recommendations for government initiatives to resolve political and social conflicts. Such initiatives, if implemented, can ease the tension between individuals and communities and lessen the quest for revenge. Sometimes conflicts have socio-economic dimensions and can be reduced if the government develops a policy to reduce poverty, improve resource management, and expand welfare services and so forth.

Some truth commissions hold public hearings for witnesses to give testimonies about human rights atrocities. These types of hearings are supposed to provide a public arena where victims of abuses can be heard and give testimony about their experiences and where the

public can gain knowledge about the abuses that took place. Public hearings have grown in popularity since the South African TRC in 1994.<sup>41</sup> Some are broadcasted in both radio and television such as the public hearings in South Africa. In South Africa both victims and perpetrators were called to give testimony. The hearings were supposed to provide a space where the victims' sufferings were exposed and their traumas were acknowledged. It was also a place where perpetrators could confess to their crimes and receive amnesty from future prosecutions in exchange. The perpetrators were given an opportunity to ask the victims or their relatives for forgiveness, although show of remorse was not a requirement to receive amnesty. This approach was, unlike court trials, considered to be reconciliatory. However "contrary to what might have been expected, the TRC-truth did not seem to bring reconciliation" (Gloppen 2002: 27). Hayner makes similar observations about the South African TRC: "Most amnesty-hearings did not end on a reconciliatory note" (Hayner 2001: 158).

The CRPs (The Community Reconciliation Processes) associated with the Timor Leste Truth Commission (The Commission for Reception, Truth and Reconciliation) were of a slightly different character than the public hearings in South Africa, which often took the like of trials (Burgess 2007: 198). The commission in Timor Leste aimed "to provide a space for perpetrators, victims and communities to seek solutions for reconciliation and reacceptance of those who have committed 'harmful acts' to the community" (ibid: 177). A mixture of concepts "drawn from criminal law, civil procedure, mediation, arbitration, and local traditional and spiritual practices" were applied in the process (ibid). Forgiveness was a central element in the hearings: The key to forgiveness lay in the 'strength of the confession of the Deponents'. "Full and frank statements", sincerity and apology, not the gravity of the act was most important for reconciliation (ibid: 188). This approach to reconciliation seemed to be productive: Victims said the Community Reconciliation Process helped to understand motivation and circumstances for actions of perpetrator (ibid: 187-188). Many of the perpetrators also claimed that CRPs helped repairing their relationship with the community (ibid).

Why was the CRP process more successful than the public hearings in South Africa? On one level it seems like the truth commission in Timor Leste was more successful in practicing what has been coined restorative justice. Restorative justice is by many scholars

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<sup>41</sup> Many political contexts however do not allow for public hearings to take place. One example is El Salvador where the circumstances were the military still constituted an imminent threat to peace even after the war had ceased. In this case public hearings were not an option (Brockett 1994)



viewed as instrumental in achieving reconciliation: It was also promoted in South Africa, however with less success. What is restorative justice? It is a form of justice which is victim-centred and aimed towards restoring human dignity and honour, and also believed to contribute to personal healing (Minow 1998: 329-332). The boundaries of this concept are blurred, and in order to understand how restorative justice can contribute to reconciliation we apply Johnston and van Ness' understanding of the term. They claim that restorative justice is predicated on the participation of all affected parties of a crime in face-to-face encounters (Johnstone and van Ness 2007: 13). The participation at these meetings must be mutually voluntary where the goal is to reach an agreement on reasonable reparative actions (ibid: 13). These may involve agreements on monetary or other forms of compensations to victims, as well as the terms of rehabilitation and reintegration of the perpetrator(s) into society. The active involvement of the victim in these encounters is of unique importance for the very reason that the victim will always know best what would be restorative for her/him (ibid: 44). The encounters also create opportunities for repentance and forgiveness.

Although the long-term effects are not known, the Community Reconciliation Processes seem to have been more successful than their South African counterparts. Burgess find that the "(...) target communities view CRPs, in general to have been a significant success" (Burgess 2007: 177). The community participation processes also reached a significant portion of the public: In March 2006 1471 cases were completed and 30-40.000 community members had participated in the hearings (ibid: 187). In South Africa contrary to expectations a national poll showed that "(...) two-thirds of the public believed that revelations resulting from the truth commission process had made South Africans angrier and led to deterioration in relations between races (...). Only 17 percent predicted people would become more forgiving" (Hayner 2001: 156).

Why were restorative justice initiatives more successful in Timor Leste than in South Africa? In Timor Leste the perpetrators had to make significant efforts to avoid criminal prosecutions. Perpetrators were required to pay money or symbolic valuable items to the victim, provide the victim with animals, help repair victim's house or make other forms of atonement (ibid: 194-195). In the CRPs the perpetrator was also strongly encouraged to apologise for his/her actions. Truthful testimony and the sincerity of the apology was the key to forgiveness (ibid: 188). In South Africa, although the perpetrators were required to give truthful testimony in order to be granted amnesty, the requirements for atonement were not as severe. The TRC did not require show of remorse, nor were perpetrators obligated to compensate the victim beyond giving truthful testimony of their crimes. As Stephen

Friedman, director at the Center of Policy Studies in Johannesburg notes; “(...) it would have been better if the amnesty applicants had been required to show repentance and possibly commit themselves to some kind of community service” (cited in Graybill 2002: 73). Furthermore in the CRPs, only minor crimes were dealt with. Unlike South Africa, in Timor Leste perpetrators of murder and torture did not receive clemency. By granting amnesties for abuses of a very grave nature, the TRC may have contributed to further anger and discord rather than to unite a deeply conflicted society

Although restorative justice as practiced in Timor Leste seemed to yield positive results, many scholars are cautious in their praise of truth commissions. As van der Merwe observes: “Reconciliation is not an event. People cannot simply one day decide that they want to forgive and forget” (2001: 157). Although truth commissions can open up spaces where forgiveness, personal healing and the restoration of human dignity may take place, these sentiments are individual-driven and depend on the unique and individual experiences of the victims. Thus when restorative justice is promoted by bodies such as truth commissions one can question whether such private feelings of human dignity and worth can at all be administered by an administrative organ (Wilson 2001: 544). Hayner also recognises this point and notes that reconciliation generally is too complex and “(...) difficult to achieve by means of a national commission” (2001: 154).

A second limitation to truth commissions and reconciliation is their temporary nature: Truth commissions only exist for a finite period of time. They have limited powers and resources, consequently their contribution to reconciliation will also be limited. Reconciliation is a process and cannot be expected to happen over night. It is in Wilson's words “wishful thinking” that one public hearing can lead to long-lasting results (Wilson 2001: 550). A truth commission can however “open up a public space to grapple with past injustices” (Nesiah 2005: 283). Nevertheless “(...) a truth commission is not an adjudicator of truth, but merely a catalyst for that dialogue” (ibid). This dialogue is important insofar as it changes people's perceptions and attitudes towards each other. This is probably all that truth commissions hope to do: “(...) to help realise the public conditions which encourage these internal moral transformations” (Wilson 2001: 547). Based on these observations we suggest the following hypothesis:

H.2.2.9: “A truth commission is more likely to contribute to reconciliation if it successfully pursues reconciliation strategies (such as creating an account of the past which is agreed upon to the extent that it (the past) no longer interferes with future

policy-making; and public hearings where victims and perpetrators can meet agree to some terms of reference for future co-existence).”