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# TRUTH COMMISSIONS, THE EUROPEAN UNION AND REPARATIONS FROM BUSINESS

Shane Darcy\*

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Truth and reconciliation commissions are an increasingly common mechanism used in post-conflict or transitional societies. These commissions might act as means of accountability, establish a record of past events, help individuals and society come to terms with a repressive past, and make recommendations for reparations for victims. This essay begins by briefly exploring the purpose, powers and processes of truth commissions. It then turns to examine the relationship between the European Union and such truth commissions. Thus far, this has largely involved the European Union playing the role of financial donor. While the principal focus of these truth commissions has been on situations outside of Europe, some of their findings have highlighted the role played by European interests during the respective conflicts or periods of repression. The involvement of business in violations of human rights or humanitarian law is specifically examined. In the final section, the essay considers the recommendations of truth commissions regarding reparations from complicit companies and assesses possible implications for the European Union.

## I. TRUTH COMMISSIONS

Somewhere between 30 and 40 truth and reconciliation commissions have been established since the emergence of this mechanism over recent decades.<sup>1</sup> They have been particularly common in Latin American and sub-Saharan African States in transition and the creation of a truth commission is almost inevitably suggested nowadays for a society moving from conflict or a period of repression involving serious human rights abuses.<sup>2</sup> Such commissions are seen as a mechanism for establishing a historical record of past events, of dealing with the past, and as a forum and possible source of reparations for victims.<sup>3</sup> Truth commissions have been viewed as a complementary process to criminal trials or even as an alternative to criminal justice, where trials are unlikely because of an overwhelming number of perpetrators,

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<sup>1</sup> See generally P Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* (Routledge, New York, 2011); M Freeman, *Truth Commissions and Procedural Fairness*, (CUP, Cambridge, 2007); E Wiebelhaus-Brahm, 'Truth Commissions and Other Investigative Bodies' in CM Bassiouni (ed), *The Pursuit of International Criminal Justice: A World Study on Conflicts, Victimization, and Post-Conflict Justice*, Vol. 1 (Intersentia, Antwerp/Oxford/Portland, 2010) 477.

<sup>2</sup> See for example M Michel, 'Egypt after Mubarak: finding truth in transition' (22 February 2011) <<http://www.opendemocracy.net/opensecurity/marc-michael/egypt-after-mubarak-finding-truth-in-transition>> accessed 5 April 2011.

<sup>3</sup> See *The Chicago Principles on Post-Conflict Justice* (2007), Principle 2, 24 <<http://www.isisc.org/public/Chicago%20Principles.pdf>> accessed 5 April 2011.

a destroyed justice system, or, as has happened in the past, due to political deals involving amnesty.<sup>4</sup>

The United Nations Secretary General described truth commissions as ‘official, temporary, non-judicial fact-finding bodies that investigate a pattern of abuses of human rights or humanitarian law committed over a number of years’.<sup>5</sup> These are ‘victim-centred’ bodies,<sup>6</sup> to be distinguished from other investigative mechanisms such as commissions of inquiry, like the Bloody Sunday Inquiry in Northern Ireland, or standing national human rights commissions.<sup>7</sup> Although described as ‘non-judicial’ bodies, truth commissions are official bodies, established by legislation and often with a wide range of legal powers such as subpoena, search and seizure to assist them in their work.<sup>8</sup> Aspects of their work, such as the hearings of the Amnesty committee of the South African Truth and Reconciliation Commission, may approximate that of more formal judicial bodies.<sup>9</sup>

The mandates of many recently established truth commissions contain common objectives; in the case of Sierra Leone, the establishing legislation stated that the object of the Truth and Reconciliation Commission was ‘to create an impartial historical record of violations and abuses of human rights and international humanitarian law related to the armed conflict in Sierra Leone [...]; to address impunity, to respond to the needs of the victims, to promote healing and reconciliation and to prevent a repetition of the violations and abuses suffered’.<sup>10</sup> Truth commissions generally seek to address patterns of human rights violations or breaches of international humanitarian law, rather than solely individual violations and, moreover, as was the case in Liberia, to establish ‘the antecedents, circumstances, factors and context of such violations and abuses’.<sup>11</sup> This aspect of the work of truth commissions is of course challenging. Phil Clark has observed that ‘attempts to produce an account of the past that will adequately represent, and be acceptable to, all individuals and groups who engage in the post-conflict truth process are inherently limited and likely to prove acrimonious’.<sup>12</sup> The oft-cited view of Michael Ignatieff is that truth commissions can only serve ‘to reduce the number of lies that can be circulated unchallenged in public discourse’.<sup>13</sup> However, the challenges associated with macro-level truth should not detract from work which truth commissions may do regarding the establishment of facts at a micro-level. The Sierra Leone Commission, for example, included detailed lists in its final report of all the victims of the armed conflict based on the statements it had collected.<sup>14</sup>

The question of reconciliation is perhaps an even greater challenge. Amnesty International, in a 2007 report entitled *Truth, Justice and Reparation: Establishing an*

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<sup>4</sup> W Schabas and S Darcy (eds), *Truth Commissions and Courts: The Tension between Criminal Justice and the Search for Truth* (Kluwer, The Hague, 2005).

<sup>5</sup> *The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies, Report of the Secretary-General*, UN Doc. S/2004/616, 3 August 2004, 17.

<sup>6</sup> *ibid.*

<sup>7</sup> Freeman (n 1) 40–69.

<sup>8</sup> *ibid.* 188–221.

<sup>9</sup> See generally A du Bois-Pedain, *Transitional Amnesty in South Africa* (CUP, Cambridge, 2007).

<sup>10</sup> The Truth and Reconciliation Act (No. 4 of 2000), Section 6.

<sup>11</sup> An Act to Establish the Truth and Reconciliation Commission of Liberia, 2005, art IV, Section 4(a).

<sup>12</sup> P Clark, ‘Establishing a Conceptual Framework: Six Key Transitional Justice Themes’ in Phil Clark and Zachary Kaufman (eds), *After Genocide: Transitional Justice, Post-Conflict Reconstruction and Reconciliation in Rwanda and Beyond* (Hurst, London 2009) 203.

<sup>13</sup> M Ignatieff, ‘Articles of Faith’, 5 *Index on Censorship* (1996) 113.

<sup>14</sup> *Report of the Sierra Leone Truth and Reconciliation Commission*, Vol. 2, (2004), Chapter 5: Lists of Victims, 273–503.

*Effective Truth Commission*, stated their preference for the nomenclature ‘truth commission’. It was the organization’s view that ‘while some form of reconciliation may be the desired outcome of a truth-telling process over the medium or longer term, that cannot be imposed by either a truth commission or any other body or procedure’.<sup>15</sup> Mark Freeman warns that ‘national reconciliation, an inherently long-term process, may not emerge as a natural consequence of historical clarification’.<sup>16</sup> Nevertheless, more recent commissions have emphasized the goal of reconciliation; the Liberian Truth and Reconciliation Commission was tasked with:

Providing a forum that will address issues of impunity, as well as an opportunity for both victims and perpetrators of human rights violations to share their experiences in order to create a clear picture of the past to facilitate genuine healing and reconciliation;<sup>17</sup>

An emphasis on perpetrators is similarly present in the legislation establishing the Kenyan Truth, Justice and Reconciliation Commission, which was tasked with ‘providing repentant perpetrators or participants in gross human rights violations with a forum to confess their actions as a way of bringing reconciliation’.<sup>18</sup> One of the most harrowing and dramatic aspects of the work of truth commissions has been the public hearings element, where victims may recount the abuse they suffered or even confront perpetrators, and where perpetrators might confess or even apologise for human rights violations. The South African process may have epitomized this public and often televised catharsis, under the chairmanship of Archbishop Desmond Tutu, particularly in the context of Amnesty hearings, and more recent truth commissions have also employed this public hearing aspect. It may bear remembering that in the South African context amnesty, rather than truth, was initially put forward as the means for advancing ‘reconciliation and reconstruction’.<sup>19</sup>

Public hearings also serve as a source of information for truth and reconciliation commissions, whose ultimate task is the production of a detailed and comprehensive written report of their findings. In addition to statement-taking and research, hearings might be dedicated to examining the role of various institutions during the period in question, such as the media, business, or the judiciary.<sup>20</sup> It is quite common for a truth commission’s final report to include recommendations aimed at government regarding the reform of particular institutions. Some commissions have had the power to ‘name names’, to identify individuals responsible for human rights violations or breaches of international humanitarian law.<sup>21</sup> This power may raise issues regarding the due process rights of those identified and has prompted Mark Freeman to urge caution in the application of this power, that naming individuals

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<sup>15</sup> Amnesty International, *Truth, Justice and Reparation: Establishing an Effective Truth Commission*, 11 June 2007, AI Index: POL 30/009/2007, 1.

<sup>16</sup> Freeman (n 1) 34.

<sup>17</sup> An Act to Establish the Truth and Reconciliation Commission of Liberia, 2005, Article IV, Section 4(b).

<sup>18</sup> The Truth, Justice and Reconciliation Commission Bill, 2008, Section 5(q).

<sup>19</sup> 1993 Interim Constitution Post-Ambler: ‘National Unity and Reconciliation’. See R Wilson, *The Politics of Truth and Reconciliation in South Africa: Legitimizing the Post-Apartheid State* (Cambridge University Press, Cambridge, 2002) 98–100.

<sup>20</sup> *Truth and Reconciliation Commission of South Africa Report* (1998), Volume 4.

<sup>21</sup> See for example Republic of Liberia, Truth and Reconciliation Commission, Volume II, *Consolidated Final Report*, June 30 2009, 369–376.

should be permitted but not necessarily required.<sup>22</sup> Finally, truth and reconciliation commissions will usually include recommendations in their final report regarding the making of reparations to victims. Rarely does the commission have the power to directly pay compensation, as was exceptionally the case in Morocco, and the task of making reparations usually falls to government.

## II. THE EUROPEAN UNION AND TRUTH COMMISSIONS

The European Union has provided substantial funding to the truth commissions in South Africa, Sierra Leone, Liberia, East Timor, Morocco, and the Solomon Islands. It has also provided funds under its Instruments for 'Stability' and 'Democracy and Human Rights' for States where truth commissions have been mooted, such as in Indonesia and Zimbabwe.<sup>23</sup> One of the first and largest contributions made by the European Union was to the Truth and Reconciliation Commission in South Africa. Commending the body for its 'extraordinary efforts of remembering and establishing the truth',<sup>24</sup> the Union provided around R10 million (€1 million), which was in addition to that provided by individual European Union Member States.<sup>25</sup> This funding:

...included the provision of eight investigators from EU and ACP (African, Caribbean and Pacific) countries; support for the commission's research activities, including the funding of researchers; and assistance with the cost of interpretation and translation services.<sup>26</sup>

The funding provided by the European Union frequently covers 'technical assistance', as has been the case with regard to the commissions in Honduras<sup>27</sup> and the Solomon Islands.<sup>28</sup> The amounts donated have been significant: US\$500,000 for the Commission of Reception, Truth and Reconciliation in East Timor,<sup>29</sup> €1 million for

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<sup>22</sup> Freeman (n 1) 274.

<sup>23</sup> See Delegation of the European Union, Indonesia, 'European Instrument for Democracy and Human Rights: EU aid in furthering democracy and human rights in Indonesia' <[http://ec.europa.eu/delegations/indonesia/documents/eu\\_indonesia/eidhr\\_en.pdf](http://ec.europa.eu/delegations/indonesia/documents/eu_indonesia/eidhr_en.pdf)> accessed 5 April 2011; Laura Davis, 'The European Union and Transitional Justice', Initiative for Peacebuilding, June 2010, 3 <<http://www.initiativeforpeacebuilding.eu/pdf/EUTransJustice0610.pdf>> accessed 5 April 2011. See further M du Plessis and J Ford, 'Transitional Justice: A Future Truth Commission for Zimbabwe?' (2009) 58 ICLQ 73.

<sup>24</sup> 'European Union Praises South Africa Truth Report', South African Press Association, Brussels (4 November 1998) <<http://www.justice.gov.za/trc/media/1998/9811/s981104a.htm>> accessed 5 April 2011.

<sup>25</sup> 'EU to give Truth Commission R10 million', South African Press Association, Cape Town (16 September 1996) <<http://www.justice.gov.za/trc/media/1996/9609/s960916a.htm>> accessed 5 April 2011.

<sup>26</sup> *ibid.* The final report of the South African Truth Commission duly noted the European Union's contribution, see *Truth and Reconciliation Commission of South Africa Report*, vol One, 328, Appendix 3, 317.

<sup>27</sup> Letter from the European Commission, External Relations Directorate General, Brussels (19 October 2010) <[http://www.cifca.org/20101019\\_Reply%20EC\\_%20to%20CSO\\_Honduras.pdf](http://www.cifca.org/20101019_Reply%20EC_%20to%20CSO_Honduras.pdf)> accessed 5 April 2011.

<sup>28</sup> Commission of the European Communities, 'Accompanying Document to the Report for the Commission to the Council and the European Parliament', Brussels, 9 July 2009, 41 <[http://www.eeas.europa.eu/ifs/docs/sec09\\_932\\_en.pdf](http://www.eeas.europa.eu/ifs/docs/sec09_932_en.pdf)> accessed 5 April 2011.

<sup>29</sup> *Final Report of Commission for Reception, Truth and Reconciliation in East Timor (CAVR) Annex 4, Acknowledgements*, 3 <<http://www.cavr-timorleste.org/chegaFiles/finalReportEng/12-Annexe4-Acknowledgements.pdf>> accessed 5 April 2011.

the Sierra Leone Truth and Reconciliation Commission,<sup>30</sup> and over US\$250,000 for the Truth Commission in Liberia.<sup>31</sup> In the latter case, consultants for the European Union worked with the Commission, providing technical assistance in the form of ‘conflict analysis’.<sup>32</sup>

Information is not publicly available as to the extent, if any, to which the European Union seeks to influence the operation of the truth commissions for which it provides funding, or whether any conditions are attached to the support, beyond what would be expected concerning financial propriety. According to the European Union’s Instrument for Stability, financial and technical support can include:

...support for international criminal tribunals and ad hoc national tribunals, truth and reconciliation commissions, and mechanisms for the legal settlement of human rights claims and the assertion and adjudication of property rights, established in accordance with international human rights and rule of law standards.<sup>33</sup>

The reference to ‘human rights and rule of law standards’ could be interpreted as extending also to truth commissions, in addition to those mechanisms aimed at settling human rights claims. In practice, follow-up work by the European Union on the work of truth commissions has taken place as part of ‘human rights strategies’ for particular countries. The European Union’s ‘Human Rights Strategy in Sierra Leone’, for example, seeks to ensure that the recommendations of the Truth and Reconciliation Commission are implemented.<sup>34</sup> Likewise in the context of Liberia, where the European Union noted that it has ‘provided support to the Truth and Reconciliation Commission in the past, and we are ready to further promote national reconciliation. This could include support for the Independent National Commission on Human Rights, which is supposed to follow up on the recommendations of the TRC’.<sup>35</sup> Regarding Honduras, Catherine Ashton, the Union’s High Representative for Foreign Affairs and Security Policy urged ‘the establishment without delay of the Truth Commission’ as set out in the relevant peace accord and asserted the commitment of the European Union ‘to lend its support to the reestablishment of constitutional and democratic order and to the process of national reconciliation in Honduras’.<sup>36</sup>

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<sup>30</sup> Sierra Leone-European Community Strategy Paper and National Indicative Programme for period 2003-2007 <[http://ec.europa.eu/development/icenter/repository/print\\_sl\\_csp\\_en.pdf](http://ec.europa.eu/development/icenter/repository/print_sl_csp_en.pdf)> accessed 5 April 2011.

<sup>31</sup> Republic of Liberia, Truth and Reconciliation Commission, Volume II, *Consolidated Final Report*, June 30 2009, xxi, 40.

<sup>32</sup> *ibid* 9–10. See also ‘Republic of Liberia Country Strategy Paper and Indicative Programme for the period 2008-2013’ (2007) 58 <[http://www.dellbr.ec.europa.eu/en/eu\\_and\\_liberia/\\_scanned\\_lr\\_csp10\\_en.pdf](http://www.dellbr.ec.europa.eu/en/eu_and_liberia/_scanned_lr_csp10_en.pdf)> accessed 5 April 2011.

<sup>33</sup> Art 3(2)(d) of Regulation (EC) No 1717/2006 of the European Parliament and of the Council of 15 November 2006 Establishing an Instrument for Stability, Official Journal, L 327/1, 2006.

<sup>34</sup> European Union’s Human Rights Strategy for Sierra Leone (14 July 2010) <[http://ec.europa.eu/delegations/sierra\\_leone/documents/eu\\_sierra\\_leone/20101118\\_eu\\_hr\\_strategy\\_en.pdf](http://ec.europa.eu/delegations/sierra_leone/documents/eu_sierra_leone/20101118_eu_hr_strategy_en.pdf)> accessed 5 April 2011.

<sup>35</sup> EU Speaking Points, United Nations Peacebuilding Commission: Liberia (6 October 2010) <[http://www.eu-un.europa.eu/articles/en/article\\_10169\\_en.htm](http://www.eu-un.europa.eu/articles/en/article_10169_en.htm)> accessed 5 April 2011.

<sup>36</sup> Council of the European Union, *Declaration by the High Representative on behalf of the EU on the Situation in Honduras: inauguration of Mr. Porfirio Lobo*, Brussels, 27 January 2010, 5746/10, P 04/10. Several civil society groups wrote to the High Representative, asserting that:

The European Union's involvement in transitional justice efforts in Morocco has been seen as something of a departure from its more traditional role as donor given its increased engagement in the process there. The Fairness and Reconciliation Commission was created in 2004 by King Mohammed VI under 'an alliance between the throne and elements of civil society'.<sup>37</sup> The Commission, which completed its report in 2005, had been given the mandate to:

(i) establish the truth about human rights violations that occurred in Morocco between 1956 and 1999 in order to satisfy the right of victims and their families to the truth; (ii) explain the context of these violations, i.e. clarify their institutional, socio-economic, political, judicial and legal causes with a view to ensuring that they are not repeated; (iii) preserve memories: this is regarded not only as part of the reparation process but also as a form of education in citizenship.<sup>38</sup>

In terms of reparations, the Commission paid out US\$70 million in compensation to around 10,000 individual victims.<sup>39</sup> It also recommended a community reparation scheme, 80 per cent of the cost of which is being met by the European Union to the amount of €3 million.<sup>40</sup>

In contrast to its previous involvement with truth commissions, the European Union devised an action plan with Morocco providing for monitoring of reparations payments to be undertaken by the Moroccan Advisory Committee on Human Rights.<sup>41</sup> Coming under the European Union's 'Neighbourhood Policy', one of the objectives of the European Union/Morocco National Indicative Programme (2007–2010) was to '[c]ontribute to the effective implementation of the IER's recommendations and so underpin the overall process of democratic transition in Morocco by supporting the institutions designed to preserve memory and the adoption of related policies'.<sup>42</sup> European funding was also made available for the creation of public archives as had been recommended by the truth commission.<sup>43</sup> It has been

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Albeit an important step, the establishment of a Truth Commission is not sufficient. It is necessary to establish a mechanism for an autonomous and impartial judicial administration that can investigate and convict those responsible for the coup d'état and the crimes perpetrated since the coup.

<<http://www.cifca.org/Bruselas%2029%20de%20enero%20de%202010%20EN.pdf>> accessed 5 April 2011.

<sup>37</sup> P Hazan, *Judging War, Judging History; Behind Truth and Reconciliation* (Stanford University Press, Stanford, 2010) 96.

<sup>38</sup> European Neighbourhood and Partnership Instrument, Morocco, 2007-2010 National Indicative Programme, Section 3.2.2(a)

<[http://www.acel.to.it/twinning/allegati/country\\_strategy\\_papers/Morocco/enpi\\_nip\\_morocco\\_en.pdf](http://www.acel.to.it/twinning/allegati/country_strategy_papers/Morocco/enpi_nip_morocco_en.pdf)> accessed 5 April 2011.

<sup>39</sup> Hazan (n 37) 121.

<sup>40</sup> T Unger, 'The European Union and Transitional Justice', *Centre for the Law of EU External Relations*, 15 <[http://www.asser.nl/upload/documents/2172010\\_25518CLEER%20WP%202010-1%20-%20UNGER.pdf](http://www.asser.nl/upload/documents/2172010_25518CLEER%20WP%202010-1%20-%20UNGER.pdf)> accessed 5 April 2011; International Centre for Transitional Justice, 'The Rabat Report: The Concepts and Challenges of Collective Reparations', February 12–14 2009, <[http://www.ictj.org/static/Publications/ICTJ\\_Reparations\\_RabatReport\\_pb2010\\_en.pdf](http://www.ictj.org/static/Publications/ICTJ_Reparations_RabatReport_pb2010_en.pdf)> accessed 5 April 2011.

<sup>41</sup> Davis (n 23) 15.

<sup>42</sup> European Neighbourhood and Partnership Instrument, Morocco (n 38) Section 3.2.2(b).

<sup>43</sup> *ibid* Section 3.2.2(d)(2). See K Kausch, 'How Serious is the EU about Supporting Democracy and Human Rights in Morocco?', European Council on Foreign Relations <[http://ecfr.3cdn.net/1ace9540f6deee7731\\_pxm6iyy8u.pdf](http://ecfr.3cdn.net/1ace9540f6deee7731_pxm6iyy8u.pdf)> accessed 5 April 2011.

observed that the closer involvement with Morocco can be explained because the country falls within the ‘Neighbourhood Policy’ and because ‘EU countries together make up its principal foreign investor, trading partner, and provider of development cooperation assistance’.<sup>44</sup> Pierre Hazan has observed that the establishment of the truth commission gave Morocco a degree of ‘international respectability’, and made for ‘easier political and economic *rapprochement* with the EU countries and the United States, leading notably to the adoption of free trade agreements’.<sup>45</sup> Accordingly, a spokesperson for the European Union conceded that their approach here was not ‘representative’,<sup>46</sup> although it has been seen by one commentator as ‘an interesting precedent for greater political support to other non-prosecutorial transitional justice endeavours around the world’.<sup>47</sup>

Despite its financial and occasionally more substantive involvement in the work of such transitional justice bodies, the European Union has not issued any policy document regarding its relationship with truth and reconciliation commissions. As Laura Davis wrote in 2010, the European Union ‘has no policy or agreed approach to transitional justice’.<sup>48</sup> In contrast, international criminal justice is addressed in a more coherent and concerted manner by the European Union, as evidenced by its strong financial and political support for the various *ad hoc* international criminal tribunals and the International Criminal Court, including its encouragement of non-member States of the International Criminal Court to join the institution.<sup>49</sup> With respect to truth and reconciliation commissions, the European Union seems less proactive and somewhat deferential to national initiatives. It has however, obviously recognized the role to be played by truth and reconciliation commissions as a non-judicial means of accountability and as a mechanism to assist in the realization of the emerging right to truth.<sup>50</sup>

In its support of the emerging right to truth, the European Union has iterated its strong commitment to the fight against impunity, ‘particularly in cases of gross human rights violations and serious breaches of international humanitarian law’.<sup>51</sup> This may give rise to a tension where the European Union provides support for a truth commission which has the power to grant amnesty.<sup>52</sup> The European Union’s position on addressing impunity by way of criminal prosecutions seems unambiguous. Its ‘Guidelines on Promoting Compliance with International Humanitarian Law’ state that ‘the European Union should ensure that there is no impunity for war crimes. To have a deterrent effect during an armed conflict the prosecution of war crimes must be visible, and should, if possible, take place in the State where the violations have occurred’.<sup>53</sup> In a similar vein, a 2007 statement by European and African leaders stated that ‘[t]he most serious crimes of concern to the international community as a

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<sup>44</sup> The Rabat Report (n 40).

<sup>45</sup> Hazan (n 37) 103.

<sup>46</sup> The Rabat Report (n 40)

<sup>47</sup> Davis (n 23) 17.

<sup>48</sup> *ibid* 11.

<sup>49</sup> Council Common Position 2003/444/CFSP of June 16 2003 on the International Criminal Court, Official Journal, L150/69, 2003, Article 2.

<sup>50</sup> EU Intervention—United Nations Human Rights Council 13<sup>th</sup> Session, Panel discussion on the Right to Truth (item 3), Geneva, 9 March 2010, EUUNG10-008EN.

<sup>51</sup> *ibid*.

<sup>52</sup> See generally L Mallinder, *Amnesty, Human Rights and Political Transitions: Bridging the Peace and Justice Divide* (Oxford, Hart, 2008).

<sup>53</sup> Updated European Union Guidelines on Promoting Compliance with International Humanitarian Law (IHL), Official Journal C 303/12, 2009, para 16(g).



whole ... should not go unpunished and their prosecution should be ensured by measures at both domestic and international level'.<sup>54</sup> However, several of the truth commissions which have received European Union funding have had the power to grant amnesty for violations of human rights, possibly even for those amounting to international crimes.

Amnesty was most notably available at the South African Truth and Reconciliation Commission, for crimes committed for a political purpose and where the perpetrator made a full disclosure to the Amnesty Committee.<sup>55</sup> It was a controversial aspect of the transitional justice process in Sierra Leone.<sup>56</sup> Amnesties also featured in the more recent truth and reconciliation process in Liberia, although the relevant legislation stipulated that amnesty could not be granted for violations of international law. The Commission was tasked with:

Recommending amnesty under terms and conditions established by the TRC upon application by individual persons making full disclosures of their doings and thereby expressing remorse for their acts and/or omissions, whether as an accomplice or a perpetrator, provided that amnesty or exoneration shall not apply to violations of international humanitarian law and crimes against humanity in conformity with international laws and standards;<sup>57</sup>

However, the Truth Commission itself subsequently stated that:

While the TRC will not recommend general amnesty, except as provided in Count 5 above, the Commission however holds that all individuals admitting their wrongs and speaking truthfully before or to the TRC as an expression of remorse which seeks reconciliation with victims and the people of Liberia will not be recommended for prosecution.<sup>58</sup>

In its final report, the Liberian Truth and Reconciliation Commission made a strong declaration against amnesties, declaring that peace agreements allowing for amnesty for such abuses were 'unlawful under regional and international law'.<sup>59</sup> It added that:

The TRC believes and consistent with international standards that amnesty for heinous crimes is unacceptable, immoral and promotes impunity. The TRC therefore refrains from granting amnesty to any

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<sup>54</sup> *The Africa-European Union Strategic Partnership; A Joint Africa-EU Strategy*, as adopted by the Lisbon Summit, Portugal, 9 December 2007, 10.

<sup>55</sup> Promotion of National Unity and Reconciliation Act 1995, section 20.

<sup>56</sup> cf *Prosecutor v Kallon and Kamara*, Case Nos. SCSL-2004-15-AR72(E) and SCSL-2004-16-AR72(E), Appeals Chamber, Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, 13 March 2004 and *Report of the Sierra Leone Truth and Reconciliation Commission*, Vol. 2, (2004), Chapter 2: Findings, 109–110.

<sup>57</sup> An Act to Establish the Truth and Reconciliation Commission of Liberia, 2005, Section 26(g).

<sup>58</sup> Republic of Liberia, Truth and Reconciliation Commission, Volume One, *Preliminary Findings and Determinations*, 6. See also Republic of Liberia, Truth and Reconciliation Commission, *Reparation, Prosecution and Amnesty*, Policy Bulletin, No. 4, 31 March 2008 <[http://trcofliberia.org/press\\_releases/164](http://trcofliberia.org/press_releases/164)> accessed 5 April 2011.

<sup>59</sup> Republic of Liberia, Truth and Reconciliation Commission, Volume Two, *Consolidated Final Report*, 2009, 332.

individual involved in the commission of such crimes in Liberia. In the case of children in armed conflicts, the TRC says is inapplicable since it raises the presumption of liability or responsibility for the crimes committed.<sup>60</sup>

However, although the Liberian Commission did make recommendations for prosecution of the leaders of the warring factions and notorious perpetrators, it also recommended that a number of persons, ‘though found to be responsible for gross human rights violations including violations of international humanitarian law, international human rights law, war crimes and egregious domestic laws violations of Liberia are recommended not be prosecuted because they cooperated with the TRC process, admitted to the crimes committed and spoke truthfully before the Commission and expressed remorse for their prior actions during the war’.<sup>61</sup> A similar situation may prevail in Kenya, where the current Truth and Reconciliation Commission can ‘facilitate the granting of conditional amnesty to persons who make full disclosure of all the relevant facts relating to acts associated with gross human rights violations and economic crimes and complying with the provisions of this Act’.<sup>62</sup> No amnesty shall be granted, however, for crimes against humanity or genocide.<sup>63</sup>

Those that view the granting of amnesties as contrary to a State’s duty to prosecute and as compromising justice might consider that the European Union’s financial support for amnesty-granting truth commissions is inconsistent with its declared position on impunity. It bears noting, however, that the type of amnesties involved are so-called ‘conditional amnesties’, requiring confession or even remorse on the part of a perpetrator, as opposed to the blanket amnesties that had been so favoured by outgoing military dictators.<sup>64</sup> The potential inconsistency may be due to the European Union’s lack of a transitional justice policy, which, according to Laura Davis, ‘means that the EU effectively out-sources its understanding of justice, and particularly the pursuit of justice in crises’.<sup>65</sup> The European Union itself has noted that:

Although it is widely acknowledged that it is only through justice to victims that enduring peace can be achieved, there are often tensions between these two objectives, and the EU should consider on a case by case basis how best to support transitional justice mechanisms, including addressing impunity.

EU mediation efforts must be fully in line with and supportive of the principles of international human rights and humanitarian law, and must contribute to fighting impunity for human rights violations.<sup>66</sup>

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<sup>60</sup> *ibid* 403.

<sup>61</sup> *ibid* 349–352.

<sup>62</sup> The Truth, Justice and Reconciliation Commission Bill, 2008, Section 5(m).

<sup>63</sup> *ibid*, Section 34.

<sup>64</sup> See generally M Freeman, *Necessary Evils*, (CUP, Cambridge 2010).

<sup>65</sup> Davis (n 23) 17.

<sup>66</sup> Concept on Strengthening EU Mediation and Dialogue Capacities, Doc. 15779/09 II.4(d), p. 8, cited in L Davis, ‘The European Union, Transitional Justice and Peace Mediation’, Initiative for Peacebuilding, July 2010, 10.

With the establishment of the International Criminal Court and the European Union's firm commitment to it, there is said to be an understanding amongst mediators that 'the EU can never witness or otherwise endorse an amnesty for international crimes'.<sup>67</sup> Nonetheless:

EU policy on amnesty is piecemeal: amnesties for certain crimes, such as war crimes, or against certain victims, such as children, are explicitly banned. Despite the EU's political commitment to supporting international justice, there is no central statement of EU policy on amnesty for all three of the core international crimes: genocide, war crimes and crimes against humanity.<sup>68</sup>

This seems to allow the European Union to defer to local preferences, including those which may favour the 'necessary evils' of amnesty,<sup>69</sup> and emphasizes that its engagement with truth commissions has been more financial than substantive. Several of these truth commissions, including those in receipt of European funding, have highlighted the issue of business complicity in human rights abuses and violations of international humanitarian law. Where such companies are based within the European Union, it may be the case that such a hands-off approach is less warranted.

### III. TRUTH COMMISSIONS AND REPARATIONS FROM BUSINESS

Given the broad scope of their truth-seeking mandate, it is unsurprising that several truth commissions have made findings regarding the role played by European States and companies in the commission of human rights abuses or the exacerbation of conflicts. The Truth and Reconciliation Commission in Liberia, for example, held that:

External State Actors in Africa, North America and Europe, participated, supported, aided, abetted, conspired and instigated violence, war and regime change against constituted authorities in Liberia and against the people of Liberia for political, economic and foreign policy advantages or gains.<sup>70</sup>

The part played by the colonial powers has obviously been identified in various truth commission reports,<sup>71</sup> and increasingly truth commissions are exploring the role of business in human rights violations and conflict abuses.<sup>72</sup> The Commission for Reception, Truth and Reconciliation in East Timor, for example, observed that violations of human rights are not committed solely by State actors, 'but also [by]

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<sup>67</sup> Davis (n 66) 10.

<sup>68</sup> *ibid.*

<sup>69</sup> Freeman (n 64).

<sup>70</sup> Republic of Liberia, Truth and Reconciliation Commission, Volume II, *Consolidated Final Report*, June 30 2009, 18–19.

<sup>71</sup> See for example *Final Report of the Commission for Reception, Truth and Reconciliation in East Timor*, 2006, Part 3: 'The History of the Conflict', 6–13; *Truth and Reconciliation Commission of South Africa Report*, Volume Two, Chapter Seven, 694; Volume Five, Chapter Six, 228, 278, 445; *Guatemala: Memory of Silence, Report of the Commission for Historical Clarification* (2002), 'The Tragedy of the Armed Confrontations', para 3.

<sup>72</sup> See BS Lyons, 'Getting to Accountability: Business, Apartheid and Human Rights' (1999) 17 *Netherlands Quarterly of Human Rights* 135; N Nattrass, 'The Truth and Reconciliation Commission on Business and Apartheid: A Critical Evaluation' (1999) 98 *African Affairs* 373.

members of opposition groups, political parties, militias, corporations and other individuals'.<sup>73</sup> In its view, funds from the coffee industry 'financed the military campaign in East Timor as well the military's ongoing repression of the local population'.<sup>74</sup> The private sector profited from commercial relations with Indonesia under the Soeharto Government,<sup>75</sup> including British and French arms companies who supplied arms to the regime.<sup>76</sup> The Sierra Leone Truth and Reconciliation Commission observed the role of the international diamond trading industry with regard to 'conflict diamonds' and stated how its indifference fuelled local conflicts, including that in Sierra Leone.<sup>77</sup> It also discussed the part played in the conflict by private military companies such as Executive Outcomes and Sandline, noting that there had not been 'a single allegation of any human rights violation against the mercenaries'.<sup>78</sup>

The South African Truth and Reconciliation Commission undertook the most in-depth consideration of any of the truth commissions into the role of business in human rights abuses. An institutional hearing on 'business and labour' was held, with written and oral submissions made by business organizations, companies, academics, civil society and the political parties. The Commission conceded that business largely refused to participate in these hearings, with multinational oil companies, the largest foreign investors in South Africa, not even responding to the invitation to take part.<sup>79</sup> One contributor to the hearing, former security official Major Craig Williamson, told the Commission that 'weapons, ammunition, uniforms, vehicles, radios and other equipment were all developed and provided by industry. Our finances and banking were done by bankers who even gave us covert credit cards for covert operations'.<sup>80</sup> The Commission's final report found that the business sector had been 'central to the economy that had maintained the South African state during the apartheid years'.<sup>81</sup> The Commission reported that:

Certain businesses, especially the mining industry, were involved in helping to design and implement apartheid policies. Other businesses benefited from co-operating with the security structures of the former state. Most businesses benefited from operating in a racially structured context.<sup>82</sup>

Serious findings were made against specific corporations, such as Swiss bank *Credit Suisse* and the United States mining company Anglo-American.<sup>83</sup>

The approach adopted by the Liberian Truth and Reconciliation Commission to the issue of business involvement in violations is also particularly relevant. The Commission reported that former President Charles Taylor set up deals to exploit

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<sup>73</sup> *Final Report of the Commission for Reception, Truth and Reconciliation in East Timor*, 2006, Part 2: 'The Mandate of the Commission', 4.

<sup>74</sup> *ibid* Vol. 7, 12.

<sup>75</sup> *ibid* 95.

<sup>76</sup> *ibid* 50.

<sup>77</sup> *Report of the Sierra Leone Truth and Reconciliation Commission*, Vol. 2, (2004), Chapter 2: Findings, 53.

<sup>78</sup> *ibid* Vol. 2, Chapter 2, Findings, 89; Vol. 3A, Chapter 3, 203; Vol. 3B, Chapter One, 26-27, 68-69.

<sup>79</sup> *Truth and Reconciliation Commission of South Africa Report*, Volume Four, Chapter Two, 18-19.

<sup>80</sup> *ibid* 24.

<sup>81</sup> *ibid* Volume Six, Section Two, Chapter Five, 'Reparations and the Business Sector', 140.

<sup>82</sup> *ibid* Volume Four, Chapter Two, 58.

<sup>83</sup> *ibid* 144, 151-155.

natural resources with what were termed ‘French and European interests including Providence Steel, a business corporation operating in Nigeria’.<sup>84</sup> The Commission identified a class of economic crimes committed during the conflict in Liberia and recommended ‘the prosecution for economic crimes, as gross human rights violations, all those persons; natural and artificial, it finds responsible for the commission of economic crimes during the period of the Liberian conflict’.<sup>85</sup> Individuals and companies were named in regard to these economic crimes, including the multinational Firestone and the Oriental and Royal Timber Companies. Guus Kouwenhoven, a Dutch national, was president of one these companies during the civil war and was specifically named in the Commission’s report. He was on trial in the Netherlands for smuggling arms to Charles Taylor.<sup>86</sup> The Truth Commission interestingly proposed that instead of prosecution in Liberia, perpetrators of economic crimes may apply to the Independent National Human Rights Commission for the purpose of making restitution ‘of the full sum of all gains from their engagement in such economic crimes’.<sup>87</sup> This amnesty-like approach was seen as eliminating the need for expensive and lengthy court proceedings and would allow for the benefits of the ‘mitigation of liability and sanctions, legal, judicial or otherwise’.<sup>88</sup>

Various truth commissions have recommended that business entities should contribute to reparations for victims of human rights abuses and violations of humanitarian law. The Commission for Reception, Truth and Reconciliation in East Timor recommended that ‘Indonesian business companies, including State Owned Enterprises, and other international and multinational corporations and businesses who profited from war and benefited from the occupation’ should contribute to the proposed reparation scheme.<sup>89</sup> It referred specifically to corporations which profited from the sale of weapons,<sup>90</sup> which would include European companies, as well as States and business corporations ‘who supported the illegal occupation of Timor-Leste and thus indirectly allowed violations to take place’. The latter, it was said, were ‘obliged to provide reparations to victims based on the principle of international responsibility recognised in the international customary law of torts’.<sup>91</sup> In South Africa, business had been urged by the Truth and Reconciliation Commission to contribute to a ‘business reconciliation fund’.<sup>92</sup> Several others initiatives were suggested to the South African government for its consideration, including a 1 per cent ‘wealth tax’, a once off levy on corporate and private income, and a retrospective surcharge on corporate profits.<sup>93</sup>

Recourse to implicated businesses for purposes of reparations makes sense both as a matter of legal obligation and given that ‘the scarcity of public resources is a

<sup>84</sup> Republic of Liberia, Truth and Reconciliation Commission, Volume II, *Consolidated Final Report*, June 30 2009, 19.

<sup>85</sup> *ibid* 370. See also Global Witness, *Bankrolling Brutality: Why European Timber Company DLH should be held to account for profiting from Liberian conflict timber* (2010).

<sup>86</sup> ‘Liberia’s Taylor to be called as witness in arms case’, *Reuter* (2 February 2011) <<http://af.reuters.com/article/topNews/idAFJOE71100T20110202>> accessed 5 April 2011.

<sup>87</sup> Republic of Liberia, Truth and Reconciliation Commission, Volume II, *Consolidated Final Report*, June 30 2009, 370.

<sup>88</sup> *ibid*.

<sup>89</sup> *Final Report of the Commission for Reception, Truth and Reconciliation in East Timor*, 2006, Part 11: ‘Recommendations’, 42.

<sup>90</sup> *ibid* 4, 34.

<sup>91</sup> *ibid* 42.

<sup>92</sup> *Truth and Reconciliation Commission of South Africa Report*, Volume Five, Chapter Eight, 319–320.

<sup>93</sup> *ibid* 318–319. See further CJ Colvin, ‘Overview of the Reparations Program in South Africa’ in Pablo de Greiff, *The Handbook of Reparations* (OUP, Oxford, 2006) 176.

serious restriction which limits the options of transitional societies'.<sup>94</sup> However, as noted above, truth commissions usually only have the power to recommend reparations and accordingly, the business contribution has been far less than the commissions have proposed. In South Africa, companies did provide some financial support for development, but insisted that this was referred to as 'nation-building', rather than 'community reparations'.<sup>95</sup> Dissatisfaction on the part of apartheid victims with the compensation awarded by the South African government, and the meagre contribution of companies, has led to civil litigation in the United States under the Alien Tort Claims Act.<sup>96</sup> Legal action has been taken by the Khulumani victims group against several major multinational corporations, including Ford, General Motors and IBM, German companies Daimler and the Rheinmetall Group, and British banking firm Barclays.<sup>97</sup> The South African government originally opposed the litigation, asserting that it could jeopardize transitional justice efforts and deter investment, but it reversed its position in 2009 and offered to assist with resolving the issue between the parties.<sup>98</sup>

The apartheid litigation has drawn significantly on the work of the South African Truth and Reconciliation Commission in terms of the factual findings made against companies and the Commission's articulation of legal responsibility.<sup>99</sup> The vice-chairman of the Commission, Alex Boraine, has argued that the lawsuit 'could damage investment and new jobs just when we need business to come here'.<sup>100</sup> However, the Commission's Chairperson, Desmond Tutu, and several other commissioners and committee members submitted *amici curiae* in support of the action:

In our collective opinion, formed of years of intimate experience in shaping and carrying out the mission of the TRC, litigation seeking individual compensation against multinational corporations for aiding and abetting the commission of gross human rights abuses during apartheid does not conflict, in any manner, with the policies of the South African government, or the goals of the South African people, as embodied in the TRC. To the contrary, such litigation is entirely consistent with these policies and the findings of the TRC.<sup>101</sup>

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<sup>94</sup> A Segovia, 'Financing Reparations Programs: Reflections from International Experience', in de Greiff (n 93) 651.

<sup>95</sup> B Hamber, 'Narrowing the Micro and Macro: A Psychological Perspective on Reparations in Societies in Transition' in de Greiff (n 93) 574.

<sup>96</sup> 28 USC §1350.

<sup>97</sup> See United States District Court, Southern District of New York, *In re South African Apartheid Litigation*, Opinion and Order, 02 MDL 1499 (SAS) 2009.

<sup>98</sup> Hausfeld LLP, 'South African Government withdraws opposition to apartheid lawsuits pending in U.S. federal court', Press Release, 3 September 2009 <[http://www.hausfeldllp.com/pages/press\\_releases/272/south-african-government-withdraws-opposition-to-apartheid-lawsuits-pending-in-u.s.-federal-court](http://www.hausfeldllp.com/pages/press_releases/272/south-african-government-withdraws-opposition-to-apartheid-lawsuits-pending-in-u.s.-federal-court)> accessed 5 April 2011.

<sup>99</sup> AR Chapman and H van der Werwe, 'Reflections on the South African Experience' in AR Chapman and Hugo van der Werwe (eds), *Truth and Reconciliation in South Africa; Did the TRC Deliver?* (University of Pennsylvania Press, Pennsylvania, 2008) 286.

<sup>100</sup> I Evans, 'Multinationals face damages claim from victims of apartheid', *The Observer*, 18 May 2008.

<sup>101</sup> *Brief of Amici Curiae Commissioners and Committee Members of South Africa's Truth and Reconciliation in Support of Appellants*, United States Court of Appeal for the Second Circuit, 30 August 2005, 1–2.

These members of the Truth and Reconciliation Commission took the view that other measures in addition to the Commission's original recommendations would be needed and that 'this litigation is one such additional measure'.<sup>102</sup>

It will be recalled that the European Union provided significant financial support for the South African Truth and Reconciliation Commission and other commissions which have demonstrated the complicity of European companies in violations of human rights and humanitarian law. In light of this, and in keeping with its declared policy against impunity for international crimes, it would seem incumbent on the European Union and its members to act on the recommendations of truth commissions, particularly where its citizens or companies have been implicated. In connection with this issue, the European Union has indicated its general support for the United Nations framework for business and human rights devised by John Ruggie, Special Representative to the Secretary General on Business and Human Rights.<sup>103</sup> This framework sets out that:

States should encourage business enterprises domiciled in their territory and/or jurisdiction to respect human rights throughout their global operations, including those conducted by their subsidiaries and other related legal entities.<sup>104</sup>

Several companies based within the European Union, including arms manufacturers and banks, have been identified by truth commissions as having failed to respect human rights in their operations overseas. The idea of holding European companies to account for complicity in serious human rights abuses is of course not unknown. Swiss banks have paid around US\$1.25 billion in compensation for their activities during the Second World War, while German companies which profited from slave labour during the War contributed approximately US\$2 billion to Germany's compensation scheme.<sup>105</sup> Interestingly, the legislation enacting the German slave labour compensation program only came about 'after lawsuits in the USA against many of Germany's largest and most powerful companies were initiated'.<sup>106</sup> The similarities with the current apartheid litigation should be significant enough to merit the European Union paying closer attention to the work of truth commissions.

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<sup>102</sup> *ibid* 2.

<sup>103</sup> European Union, Permanent Delegation to the United Nations office and other international organisations in Geneva, 'EU comments on the draft Guiding Principles for the implementation of the UN 'Protect, Respect and Remedy' Framework, Geneva 31 January 2010, D(2011) 702 246. See also D Augenstein, 'Study of the Legal Framework on Human Rights and the Environment Applicable to European Enterprises Operating Outside the European Union', October 2010; J Wouters and L Chanet, 'Corporate Human Rights Responsibility: A European Perspective' (2008) 6(2) *Northwestern Journal of Human Rights* 1

<sup>104</sup> *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, 'Guiding Principles for the Implementation of the United Nations 'Protect, Respect and Remedy' Framework', November 2010, 6* <<http://www.reports-and-materials.org/Ruggie-UN-draft-Guiding-Principles-22-Nov-2010.pdf>> accessed 5 April 2011.

<sup>105</sup> J Authers, 'Making Good Again: German Compensation for Forced and Slave Labour', in de Greiff (n 93) 420–421, 430.

<sup>106</sup> *ibid* 421.