

RULE-OF-LAW TOOLS FOR POST-CONFLICT STATES

Establishing Truth Commissions¹

INTRODUCTION

It is increasingly common for countries emerging from civil war or authoritarian rule to create a truth commission to operate during the immediate post-transition period. These commissions—officially sanctioned, temporary, non-judicial investigative bodies—are granted a relatively short period for statement-taking, investigations, research and public hearings, before completing their work with a final public report. While truth commissions do not replace the need for prosecutions, they do offer some form of accounting for the past, and have thus been of particular interest in situations where prosecutions for massive crimes are impossible or unlikely—owing to either a lack of capacity of the judicial system or a de facto or de jure amnesty. As described below, the work of a truth commission may also strengthen any prosecutions that do take place in the future.

Unlike courts, for which there are clear international norms regarding their appropriate structure, components, powers and minimal standards for proceedings, truth commissions will reasonably differ between countries in many aspects. The experiences of over 30 truth commissions in the past two to three decades give rise to a number of best practice guidelines. This publication is intended to summarize these lessons, with the intention of guiding those setting up, advising or supporting a truth commission, as well as providing guidance to truth commissions themselves. The reader should also take into account the updated Set of Principles for the protection and promotion of human rights through action to combat impunity.

The United Nations and other international actors have an important role in assisting such bodies in their establishment and operation. Many critical operational decisions and difficulties are outlined below, as is the role that various national and international actors may play.

1 This OHCHR Nepal publication summarizes the key aspects of establishing a truth commission as presented in OHCHR's comprehensive tool on truth commissions: Rule-of-Law Tools for Post-Conflict States, Truth Commissions, OHCHR 2006.

Why establish a truth commission, and when ?

The right for individuals to know the truth about the fate of disappeared persons or information about other past abuses has been affirmed by treaty bodies, regional courts, and international and domestic tribunals. A truth commission reaches out to thousands of victims in an attempt to understand the extent and the patterns of past violations, as well as their causes and consequences. The questions of *why* certain events were allowed to happen can be as important as explaining precisely *what* happened. Ultimately, it is hoped that the work of the commission can help a society understand and acknowledge a contested or denied history, and in doing so bring the voices and stories of victims, often hidden from public view, to the public at large. A truth commission also hopes to prevent further abuses through specific recommendations for institutional and policy reforms.

When is a country ripe for a truth commission ?

Three critical elements should be present. First, there must be the political will to allow and, hopefully, encourage or actively support a serious inquiry into past abuses. Ideally, the Government will show its active support for the process by providing funding, open access to State archives or clear direction to civil servants to cooperate. Second, the violent conflict, war or repressive practices must have come to an end. Third, there must be interest on the part of victims and witnesses to have such an investigative process undertaken and to cooperate with it.

ESTABLISHING A TRUTH COMMISSION

A. Consultation

As noted above, the strongest truth commissions are founded through a process of consultation and careful consideration of what kind of commission would be most appropriate for the context. Each commission should be crafted to reflect national needs, strengths and opportunities. These consultative processes should have two equally important aims: increasing the understanding of a truth commission and strengthening its terms of reference through input about the most appropriate mandate. The consultation should explicitly include victim communities and civil society organizations, and should allow for a period of significant input into the fundamental mandate of the commission, as well as feedback on specific draft terms of reference as they are developed. This process, which typically

would include workshops, seminars, and opportunities to debate and suggest specific components of mandate and design, should generally take place over several months, at least, and should incorporate views from all parts of the country and all major sectors, especially those communities most affected by the violence. Communication with victim and civil society groups, especially, should also be maintained during the work of the commission to allow public feedback on the methodology and impact of the commission's work.

National NGOs often play an important role in this pre-commission phase, holding national conferences to debate proposed terms, helping to draft legislation to establish the commission, lobbying Government officials, providing training for the media and implementing a national outreach strategy to advance public understanding of the proposed commission.

B. Political will and operational independence

A commission is likely to be most successful if there is genuine political will for rigorous investigation and truth reporting. This will be reflected, for example, in the authorities' cooperation in giving a commission access to official documents and in the level of public funds allocated to its work. The Government should provide records to the commission pertinent to its investigations, including restricted documents. Officials or former officials with knowledge of the acts and events under investigation should be expected to provide information to the commission, either in public hearings or, at the discretion of the commission, in private meetings.

Such support for a commission's work should coincide with clear operational independence. The legitimacy and public confidence that are essential for a successful truth commission process depend on the commission's ability to carry out its work without political interference. Once established, the commission should operate free of direct influence or control by the Government, including in its research and investigations, budgetary decision-making, and in its report and recommendations. Where financial oversight is needed, operational independence should be preserved. Political authorities should give clear signals that the commission will be operating independently.

C. Terms of reference

The consultative process suggested above should include a close consideration of the specific aspects of the mandate, or terms of reference. Ultimately, the terms of reference may address each of the following subjects:

1. *Period of operation*

The terms of reference should establish start and end dates for the operation of the commission. These dates can be flexible, allowing for one or more possible short-term extensions. However, the total possible period of operation must be fixed, otherwise the commission can go on for too long, lose focus and momentum, and ultimately cease to interest the public. Experience indicates that a period of one and a half to two and a half years of operation is generally desirable.

2. *Temporal mandate: period of time under investigation*

The specific span of time that the commission is to inquire into should also be set out in the mandate. Some commissions have examined violations that took place over a 35-year period or longer, while others have examined a much shorter period. This should be based on those periods in the nation's history when the worst or the greatest number of violations took place. To avoid the appearance of bias, the time period should usually be consecutive, rather than broken up to focus on only select periods in a nation's history. Likewise, no key periods should be left out in a way that might make the commission appear politically partial in its scope.

3. *Types of violations to be investigated*

The commission's mandate should in some areas be specific and relatively detailed, but it must also remain flexible enough to allow interpretation and definition by the commissioners. It is generally preferred, for example, that a commission's mandate does not list specific events to be investigated, instead using more general language to indicate what kinds of violations it should investigate. This provides guidance to the commission, while also allowing it to shape its investigations and report around the facts and patterns revealed. Language calling for investigation into "serious acts of violence which have had an impact on society" or "gross violations of human rights or humanitarian law, including violations which were part of a systematic pattern of abuse," for example, have been used in mandates for past truth commissions.

Truth commissions have traditionally focused their investigations on serious human rights abuses (torture, disappearances, extrajudicial killings, crimes against humanity, genocide, etc.), as well as violations of international humanitarian law and war crimes. A commission's focus should correspond to those abuses that society at large and victims in particular consider to be the most serious and most urgently need to be addressed. Thus, a careful balance may have to be found to define a sufficiently narrow universe of crimes or events that allows the commission to fulfil its mandate, while avoiding an unduly restrictive mandate that may exclude acts or events that are felt to warrant investigation.

4. Special attention to key victim populations

Where specific populations have been particularly affected by the violence, and especially where this violence is thought to be underreported or misunderstood, it is useful to direct the commission to pay particular attention to these victims or types of abuses. For example, some commissions have been directed to give special attention to abuses against women and children, or to victims of sexual abuse. The commission may need to establish special procedures for such populations, such as assuring children a greater degree of confidentiality—be they children who were victims or perpetrators of abuse—or setting up specific procedures for survivors of sexual abuse to take part in hearings. It is best for the terms of reference to guide the commission to give special attention to these or other special populations, but to let the commission itself take the specific operational decisions.

5. Key activities

The terms of reference should list the key functions or activities that the commission is expected to undertake. For example, they might note that the commission may take statements from victims, witnesses and others; undertake research and investigations; hold public hearings or sessions; and undertake all other activities necessary to uncover the truth within its mandate. In some cases, a commission has been directed to incorporate traditional or religious leaders into its work, such as paramount chiefs in some African contexts.

6. Powers

The powers given to a commission will help to determine its strength and reach. At a minimum, commissions generally need to be able to interview anyone who can provide relevant information, receive the cooperation of public authorities and carry out any on-site visits that may be necessary. Increasingly, truth commissions are given powers of subpoena, search and seizure, and witness protection. To protect the rights of those persons who may be compelled to testify against themselves when served a subpoena, a commission may also need the power to grant *use immunity*, whereby individuals can be assured that information they provide will not be used against them in any criminal proceeding.

The commission should also be given sufficient power to ensure that penalties—perhaps fines, imprisonment, or both—can be imposed upon anyone who improperly interferes with or knowingly provides false information to the commission, or who violates its subpoena or witness protection powers, for example.

7. *Link to amnesty or to prosecutions?*

Most truth commissions do not have the power to grant amnesty to perpetrators. The great majority, in fact, recommend in their final report that there be criminal prosecutions (or judicial investigations leading to possible prosecutions) for the events that they have documented, and they often turn over any evidence they have to prosecuting authorities. Because a truth commission by its very nature is working with information pertaining to crimes, and often massive crimes, careful consideration must be given to the relationship between its investigations and those of any separate criminal procedure. As non-judicial bodies, commissions themselves of course cannot prosecute anyone. They must rely on the judicial system to carry forward any criminal case.

In some cases, information may be turned over to prosecutors even while a commission's work is still under way; more typically, such recommendations do not come until the commission's final report is released. The recommendation may be specific to named individuals, or may be a general recommendation for further investigations and criminal justice for past crimes.

8. *Legislative or executive establishment?*

Truth commissions are usually created either through national legislation or through presidential decree. There may be advantages and disadvantages to either, and the national context may automatically predetermine which route is clearly the best or is indeed required. However, where either is an option, consideration should be given to factors of timing (a presidential decree can be put in place more quickly than legislation); the potential for political influence (the legislature may include parties interested in weakening the commission's powers or reach); and political or popular legitimacy (the legislative process can potentially generate broader political support for a commission). In some legal systems, a legislative act is required for certain powers to be given to a commission, such as that of subpoena.

9. *Implementation of recommendations*

The terms of reference should commit the Government, and the legislature, to giving serious consideration to a truth commission's recommendations. In some cases, as in Sierra Leone, the terms of reference have set up a follow-up procedure requiring the Government to publicly report, on a quarterly basis, on the implementation of the recommendations emerging from the commission. There are two examples to date, in El Salvador and Sierra Leone, where truth commissions have been given the power to make mandatory recommendations (that is, with an agreement in advance that the Government will implement all recommendations of the commission).

However, this may raise constitutional or other difficult issues if the commission is perceived as usurping the powers of the legislature or executive. It may be preferable, therefore, to require serious consideration of the recommendations and regular public reporting on their implementation.

D. Selecting commissioners

Ultimately, no factor will more define the commission than the persons who serve as its members. Ideally, these should be widely respected members of society (or internationals) who are accepted as neutral by all sides of a previous conflict (or the group as a whole should be seen to be representative of a fair range of views). They may include a range of professions or backgrounds, such as religious leaders, practising lawyers or retired judges, psychologists, educators, experts on violence against women or children, human rights professionals and others. Some countries have chosen to include international commissioners; this decision will be based on a number of local factors and inclinations, and should ultimately be decided by nationals. One of the reasons for including non-national commissioners may be a felt need to involve persons who would be perceived as being more neutral than nationals, as well as persons who can bring special legal or other expertise to the process and international contacts for fund-raising, investigations and international outreach.

The process and timing of selecting the commissioners are key. First, commissioners should not be appointed until the commission's terms of reference have been set. Past attempts to jump-start the process through the swift appointment of commissioners, such as immediately following the conclusion of a peace agreement, have instead greatly weakened the prospects for an effective and widely respected commission. The terms of reference should spell out the process for selection and the general qualities or characteristics of the ideal commissioners. Any inclination to put political leaders or representatives of political parties, factions or former armed groups on the commission should be strongly resisted.

Instead, truth commissions will garner the greatest public and international support if their members are selected through a consultative process, and an honest attempt is made to ensure a fair balance in the representation of ethnic, regional or religious groups, gender, and political views. Such a consultative process may include inviting nominations from the public and forming a representative selection panel (appointed by a variety of sectors or societal groupings) to vet the nominations and interview the finalists, recommending the final commissioners to the appointing authority. Several past commissions have done this quite effectively. The selection of

international commissioners may involve international entities such as the United Nations, but should also be included in the national vetting process before the final appointment. Models for choosing international commissioners have varied. In Sierra Leone, OHCHR was asked to suggest three commissioners, who were commented on by the national selection panel.

E. Preparatory period

Many past truth commissions lost much time in administrative and logistical preparations, which cut significantly into their limited operational period. Essential organizational matters such as renting an office, hiring staff, buying desks and computers, and adapting or creating a database program, as well as larger tasks such as raising funds and designing a public outreach campaign, can easily consume months of a commission's time before it can reasonably begin investigations or statement-taking.

The terms of reference should thus set out a preparatory period of three to six months, once the commissioners are appointed, before the official operating period begins. Initial preparations may include:

- ❖ Developing a staffing plan and hiring initial staff
- ❖ Training statement-takers and others for the first phase of work
- ❖ Adopting a workplan
- ❖ Considering specific plans for possible public hearings
- ❖ Establishing a witness protection programme, if needed
- ❖ Preparing a budget and raising initial funds from national and international sources
- ❖ Designing and installing an effective database for the storage, organization and retrieval of the perhaps thousands of violations that will be reported to the commission
- ❖ Designing a public outreach campaign
- ❖ Undertaking preliminary background research
- ❖ Collecting existing documentation from national and international NGOs, the United Nations, foreign Governments and other sources

During this time, resources, support and international consultation should be provided as needed to assist in the commission's preparations.

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