



Extracted from *Reconciliation after Violent Conflict*
© International Institute for Democracy and Electoral Assistance 2003.

International IDEA, Strömsborg, 103 34 Stockholm, Sweden
Phone +46-8-698 37 00, Fax: +46-8-20 24 22
E-mail: info@idea.int Web: www.idea.int

Truth-Telling

MARK FREEMAN AND PRISCILLA B. HAYNER
INTERNATIONAL CENTER FOR TRANSITIONAL JUSTICE*

8.1 Introduction

Confronting the past in a reconciliatory way requires the mobilization of a variety of techniques. Historical accounting via truth-telling is one of the most important steps in the reconciliation process. But how does seeking accuracy about the past help a society to move from a divided past to a shared future?

The term “reconciliation” is widely used but not often clearly defined or understood. A study by the Johannesburg Centre for the Study of Violence and Reconciliation of the impact of the South African Truth and Reconciliation Commission (TRC) on one community showed that residents of the area had very different ideas of what reconciliation meant. A common underlying theme involved building a relationship between groups or individuals, but the definitions of that relationship differed depending on culture, particular experience of human rights abuse, position in the political structure and personal circumstances. There does, however, appear to be generally uniform agreement among most experts that reconciliation is more a process than an achievable objective.

In the context of truth commission work, perhaps the most important distinction that must be made is that between individual reconciliation and national or political reconciliation. While a truth commission may be a useful mechanism in advancing the latter to the extent that it may help prevent basic points of fact from continuing to be a source of conflict or bitterness among political elites, reconciliation on an individual level is much more complex and probably more difficult to achieve by means of a truth commission. Forgiveness, healing and reconciliation are deeply personal processes, and each person’s needs and reactions to peacemaking and truth-telling may be different.

Nevertheless, many continue to assert that it is necessary to know the truth in order to advance reconciliation. It is of course possible to point to evidence and to quote survivors to show that this is the case: sometimes it is, for some people or in some circumstances. Yet it is easy to imagine that

Truth may be only one of many possible elements in the pursuit of reconciliation.

the opposite may also be true, or that reconciliation may be more affected by factors other than knowing or acknowledging the truth about past wrongs. For example, true reconciliation might depend on a clear end to the threat of further violence; acknowledgement by the state or by perpetrators of the injuries suffered; a reparation programme for those injured; attention to structural inequalities and the basic material needs of victimized communities; the existence of natural linkages in society that bring formerly opposing parties together; or, most simply, the passage of time.

Thus, truth may be only one of many possible elements in the pursuit of reconciliation. Transitions in places such as Spain and Mozambique suggest that a substantial degree of national reconciliation can sometimes occur even in the absence of a formal truth-seeking process. Whether reconciliation in

* *The International Center for Transitional Justice is a nongovernmental organization based in New York which provides technical assistance to countries in transition. The authors can be reached at the ICTJ at 20 Exchange Place, 33rd Floor, New York, NY 10005; 917-438-9300; phayner@ictj.org or mfreeman@ictj.org*

these and other cases can or will be as genuine or as sustainable as in places where truth commissions were instituted remains very much an open question.

8.2 Instruments of Truth-Seeking

One of the most popular transitional mechanisms in recent years is what has come to be known, in its generic form, as the truth commission. Section 8.3 is entirely devoted to this major instrument for dealing with a painful past. Although truth commissions were developed only recently, their potential contribution has been widely recognized, to the extent that transitional societies today are almost certain to consider establishing them. In recent years two major truth commissions, in Guatemala and South Africa, have brought considerable attention to the subject of official truth-seeking. They are examined in the case study at the end of this chapter. New commissions are under way or very recently concluded, as of mid-2002, in places such as Panama, Uruguay, the Federal Republic of Yugoslavia (FRY), Nigeria, East Timor and Peru, and are in the process of formation in Sierra Leone and Ghana.

Because truth commissions deal with many events that could also be the subject of judicial trial, many observers confuse truth commissions with courts, but truth commissions should not be equated with judicial bodies, nor should they be considered to be a replacement for judicial trials. Truth commissions are non-judicial bodies and as such clearly have fewer powers than do courts. They have no power to put anyone in prison, they cannot enforce their recommendations and most have not even had the power to compel anyone to come forward to answer questions.

While this chapter focuses largely on the experience and challenges of truth commissions, the importance of other truth-seeking mechanisms should not be overlooked. There are at least three other kinds of truth-seeking inquiries into human rights violations that can be contrasted with truth commissions. All are important forms of inquiry in their own right. In addition, in some contexts they may constitute the only available mechanism for truth-seeking, or perhaps the most appropriate one.

In some countries, governments have established “historical commissions”. These are present-day inquiries into state abuses that took place and ended many years, or even decades, ago. In contrast to truth commissions, historical commissions are not established as part of a political transition and may not even pertain to today’s political leadership or practices. Instead, they serve to clarify historical truths and pay respect to previously unrecognized victims or their descendants. Another distinction is that, in contrast to truth commissions, historical commissions have generally not investigated instances of widespread political repression but have instead focused on practices that may have affected specific ethnic, racial or other groups. Examples include the US Commission on Wartime Relocation and Internment of Civilians, and the Canadian Royal Commission on Aboriginal Peoples.

A number of examples of official or semi-official inquiries into past human rights violations share the main characteristics of truth commissions but are distinguishable by the fact that they are less independent of political processes, or more limited in scope or authority, or undertaken only as a precursor to a fully-fledged truth commission. Examples of such commissions include the various parliamentary inquiries and congressional investigative committees established by legislatures around the world, the inquiry undertaken by the National Commissioner for the Protection of Human Rights in Honduras in 1993 regarding disappearances in that country, the investigations carried out by the Northern Ireland Victims Commissioner in the late 1990s, or the various event-specific tribunals of inquiry that are commonly established in Commonwealth countries and elsewhere. Other

forms of official or semi-official inquiry that overlap with truth commissions include a variety of international inquiries, often sponsored by the UN or by regional organizations, which investigate and report on war victims or national cases of severe repression. Examples of these inquiries include the Organization of African Unity (OAU, now the African Union), International Panel of Eminent Personalities to Investigate the 1994 Genocide in Rwanda and the Surrounding Events, and the various war crimes commissions and bodies established by the UN to look into violations committed in places such as East Timor, Rwanda and the former Yugoslavia. Generally speaking, these inquiries have the advantage of being relatively easy to establish in comparison to a truth commission, and of being more official and powerful than a purely non-governmental project. At the same time they may head off calls for a more independent, comprehensive or robust inquiry, notwithstanding the fact that limitations in their independence, scope or authority will often result in a less than complete picture of the past.

There have been a great number of non-governmental projects which, like truth commissions, have documented violations and patterns of abuse of a previous regime - generally at great personal risk. These projects are usually undertaken by national human rights organizations, sometimes with church backing, and have sometimes produced remarkable results. Prominent examples include the work of organizations such as the Service for Peace and Justice in Latin America (Servicio Paz y Justicia en América Latina, SERPAJ) in Uruguay in the 1980s and the Inter-Diocesan Project for the Recovery of the Historical Memory (Proyecto Interdiocesano para la Recuperación de la Memoria Histórica, REMHI) in Guatemala in the 1990s. In contexts where official truth-seeking is not possible, non-governmental projects are particularly important because they may provide the only reliable documented record of victims and past violations. At the same time, non-governmental projects lack the very important attributes of many modern truth commissions such as powers of investigation, guaranteed access to government records, personal immunity for commissioners and the benefit of a state obligation to implement or at least report on the implementation of final recommendations.

8.3 Understanding Truth Commissions

The purpose of this section is not to survey or examine all or even most of the past and current truth commissions in the world. Instead it seeks to explain in practical terms what a truth commission is, how it operates and what it can potentially achieve for a country in the process of democratic transition.

The section is divided into six subsections. Subsection 8.3.1 defines what a truth commission is and then distinguishes commissions from other truth-seeking mechanisms. Subsection 8.3.2 explores the potential benefits, as well as the potential risks, of having a truth commission. Subsection 8.3.3 provides a brief review of the various constraining and enabling factors that can affect the establishment and operation of a truth commission. Subsection 8.3.4 briefly explains how a truth commission typically is sponsored while subsection 8.3.5 provides a review of the principal design concerns in establishing a truth commission. Subsection 8.3.6 takes a close look at how truth commissions operate and explores a few of the more difficult issues that they must confront. The chapter concludes with a comparative examination of the truth commissions of South Africa and Guatemala.

8.3.1 What is a Truth Commission?

Generally, the term “truth commission” refers to bodies that share the following characteristics. At least 25 official truth commissions have been established around the world since 1974, though

Box 8.1: The Characteristics of Truth Commissions

Truth commissions generally:

- are temporary bodies, usually in operation from one to two years;
- are officially sanctioned, authorized or empowered by the state and, in some cases, by the armed opposition as well as in a peace accord;
- are non-judicial bodies that enjoy a measure of de jure independence;
- are usually created at a point of political transition, either from war to peace or from authoritarian rule to democracy;
- focus on the past;
- investigate patterns of abuses and specific violations committed over a period of time, not just a single specific event;
- complete their work with the submission of a final report that contains conclusions and recommendations; and
- focus on violations of human rights and sometimes of humanitarian norms as well.

they have gone by many different names. There have been “commissions on the disappeared” in Argentina, Uganda and Sri Lanka; “truth and justice commissions” in Haiti and Ecuador; “truth and reconciliation commissions” in Chile, South Africa, Sierra Leone and now the Federal Republic of Yugoslavia; and most recently a “commission for reception, truth and reconciliation” in East Timor. Although these commissions all fit within the definition above, it should be noted that some of them did not at the time of their operation consider themselves to be truth commissions, nor were they understood to be such by the wider public.

At least 25 official truth commissions have been established around the world since 1974.

8.3.2 Potential Benefits and Risks

Potential Benefits

Although truth commissions may not be appropriate in every context, they have the potential to generate many benefits for societies in transition. The following list of potential benefits may assist in initial reflections on the role and focus of a truth commission while a new commission is in development:

Commissions can help establish the truth about the past. They can establish a record of the past that is accurate, detailed, impartial and official. This record can serve to counter the fictitious or exaggerated accounts of the past that were propagated by the previous regime (or other parties to a past conflict) and bring the true scale and impact of a violent past to the public consciousness. In addition, commissions can locate the whereabouts of missing victims who may have been forcibly “disappeared” or buried clandestinely.

Truth commissions can promote the accountability of perpetrators of human rights violations.

They can complement the work of criminal prosecutors by gathering, organizing and preserving evidence that can be used in prosecutions. They can also build a case for and recom-

Box 8.2: Reasons for Establishing a Truth Commission

A truth commission can:

- help establish the truth about the past;
- promote the accountability of perpetrators of human rights violations;
- provide a public platform for victims;
- inform and catalyse public debate;
- recommend victim reparation;
- recommend necessary legal and institutional reforms;
- promote social reconciliation; and
- help to consolidate a democratic transition.

mend forms of accountability short of criminal sanction, such as civil liability, removal from office, restitution or community service schemes.

Commissions can provide a public platform for victims. They can put victims - long ignored and forgotten by the public - at the forefront and centre of the transition process. This can help to make victims whole again, both individually and as a group, and give them a sense of personal vindication. In addition, by providing a public platform for victims to speak in their own voices, commissions can help to educate the public about the individual human impact of past crimes and thereby build support for further victim-centred transitional justice initiatives such as reparation programmes.

Commissions can inform and catalyse public debate. They can help stimulate public deliberation on the complex array of moral, political and legal issues that must be addressed during a transition process. This can be achieved by engaging with the public through commission activities and encouraging broad media coverage. In addition, truth commissions can themselves serve as a model for the public, as the public begins to take up again the critical practice of discussing controversial political subjects without fear of recrimination or resort to violence. Commissions can also serve as independent, impartial and public arbiters if and when members of the previous regime grossly misrepresent or distort events of the past.

Commissions can recommend victim reparation. They can build a case for reparation as a necessary form of compensation for past abuses and for ongoing psychological, physical and economic injuries experienced by victims. They can also establish fair and effective definitions and categories of “victim” for the purpose of financial reparation or benefits to follow. In addition, commissions can help to repair the moral dignity of victims by carrying out their work in a manner that is both sensitive to and acknowledges the harm suffered by them. Commissions can also make creative and appropriate suggestions regarding symbolic forms of reparation for victims, such as memorials, reburials and commemorative ceremonies.

Commissions can recommend necessary legal and institutional reforms. Through their investigations they can provide clear evidence of how particular institutions individually and collectively failed to uphold human rights protection in the past. In addition, commissions can identify and recommend specific legal and institutional reforms that will enable the country to achieve the long-term social, economic and political objectives that are essential to ensuring a better future. Such reforms

Truth commissions can promote reconciliation by providing a safe and impartial forum for direct restorative justice processes.

may include, for example, strengthened civilian oversight of intelligence agencies and the military; new appointment, tenure and disciplinary rules for the judiciary; the establishment of an independent and well-financed prosecutor’s office; redesign of the electoral and political system; land reform; and new human rights training programmes for the police and armed forces.

Commissions can promote reconciliation. They can promote tolerance and understanding by allowing conflicting parties to hear each other’s grievances and suffering. This may help build empathy, thereby deterring acts of vengeance and countering the rivalries and hatreds arising from past events. Commissions can also provide a safe and impartial forum for direct restorative justice processes in which the victim, the offender and/or other individual or community members can actively participate in the mediation and resolution of past grievances of a less serious nature. In addition, commissions can recommend practical and fair measures for the necessary reintegration of certain categories of offenders back into society.

Commissions can help to consolidate a democratic transition. By all the above means, they can signal a

formal break with a dark and violent past, and the transition to a more open, peaceful and democratic future. If they are successful, truth commissions can have the effect of weakening anti-democratic actors who might otherwise continue to pursue their goals outside the democratic process.

Reasons Why Truth Commissions Are Not Always Used

Just as truth commissions have the potential to generate many benefits for societies in transition, they also have the potential to produce certain harms. In fact, precisely to avoid specific harms, in transitional contexts ranging from Spain in the 1970s and Cambodia in the 1980s to Mozambique in the 1990s, civil society and democratic political leaders have sometimes consciously opted against any attempt at formally establishing the truth about the past. The hesitation to engage in official truth-seeking initiatives in these and other cases generally appears to be based on one or more of the following considerations:

Fear of ongoing or renewed violence or war. There is a perception that violence would increase, war could return or the current violence or war would not end if old crimes were revisited.

Ongoing conflict. The utility of a truth commission in a context where an intense armed conflict is ongoing is particularly dubious because it would be virtually impossible to achieve the appearance of neutrality, or to ensure victim and witness participation and security. In addition, geographical access as well as access to key information is likely to be severely limited in such a context. At the same time, even in the middle of a conflict, it may be useful to begin to deliberate and plan some form of official truth-seeking to take place following the ending of the conflict and the beginning of a transition.

Lack of political interest. There is little or no interest on the part of the political leadership in truth-seeking and a lack of pressure from significant non-governmental actors.

Other urgent priorities. The government and public want to focus on survival and rebuilding in the aftermath of extensive destruction.

Insufficient capacity. There is a lack of resources or basic institutional structures to support a formal truth-seeking process.

Alternative mechanisms or preferences. The indigenous national culture is one that eschews confronting past crimes, or there are existing community-based mechanisms that can better respond to the recent violence.

These all appear to be reasons why societies in transition forgo official truth-seeking and why it may be preferable or necessary to focus instead on non-governmental truth-seeking mechanisms. It will, however, often be a difficult decision, particularly if a number of victims are calling for a truth commission. Certainly, one should treat with considerable scepticism any decision to forgo official truth-seeking that is taken with little or no public consultation, or by parties who have an interest in preventing investigation of the past.

Potential Risks

Improper motives. Even where a truth commission is established, there is no certainty that it has been established with the proper motives or that it will achieve the many potential benefits discussed above. For example, it is possible that a government may perceive a truth commission as a vehicle for the indirect pursuit of political vendettas or as a way to delegate responsibility to others for difficult tasks that it is not willing to carry out itself. It may also make the commission deliberately weak and thereby make it easier to challenge or reject the results later. Cynical governments may also establish truth commissions to try to insulate themselves against criticism from victims that not enough has been done to redress the human rights abuses of the past.

Bias. In addition, commissioners themselves may approach commission work with a bias that would make an objective and complete account of the past impossible.

Unrealistic expectations. On a different level, commissions must also be careful not to foster unrealistic expectations on the part of victims and the public generally, which can lead to renewed frustrations and further distress for victims.

In fact, experience to date shows that few past commissions have suffered from the first two possible risks listed above. In particular, where there are a strong civil society and vocal and independent media in a given country, many of these risks can be mitigated through public pressure. None of these risks is unavoidable. However, in many transitional contexts neither civil society nor the media will be particularly strong. As a consequence, these risks must be understood in advance by those who would, in good faith, advocate the use of a truth commission.

8.3.3 The Political Context

Because truth commissions are created at points of political transition, there are a variety of constraining factors and enabling factors that can affect their establishment and operation.

Constraining Factors

Constraining factors tend to be greatest where the transition process is relatively non-consensual, although they may be present to greater or lesser degrees in more consensual processes.

Many political transitions are the result of bitter negotiation and may depend on the opposition conceding amnesties or “reserve domains” of power to the outgoing regime as the price of obtaining formal control of the state. It is also typical for there to be widespread destruction of evidence of crimes by the outgoing regime. There may be ongoing and legitimate public fears about testifying (and even private intimidation and threats against witnesses) that can significantly hamper the ability of a truth commission to get to the truth and force the commission to become a private and in some cases confidential process, rather than an open and public process. Weakness or corruption in the administration of justice and lack of cooperation from the police or army can make a truth commission something of a paper tiger, since commissions must rely to some extent on support and cooperation from key actors in the principal institutions responsible for the administration of justice. Finally, the establishment and operation of a commission can be undermined where there is widespread social identification with the perpetrators, rather than the victims, or when there are widespread concerns about scuttling a fragile process of demobilization, disarmament and reintegration.

Enabling Factors

Enabling factors tend to be strongest where the transition process is relatively free and consensual, although they may be present to greater or lesser degrees in constrained transitions as well. The following factors are particularly important:

- public support for the establishment of a truth commission; the presence of a vigorous and engaged civil society (and in particular of strong victims’ groups, human rights groups, religious leaders and intellectuals);
- widespread social identification with the victims of the abuses; vocal and independent media; and
- persistent international attention and pressure.

In the absence of these factors, a truth commission may not be useful, desirable or effective. Indeed,

public “ownership” and the active participation of certain key social sectors (both national and international) are critical ingredients in ensuring a successful commission.

8.3.4 Sponsorship

Truth commissions tend to be created in one of the following ways:

- the executive branch of government passes a decree establishing the commission;
- the legislative branch of government passes legislation establishing the commission; or
- the government and armed opposition sign an agreement authorizing the establishment of a commission (and there may or may not be a subsequent decree or legislation).

In many countries, the way in which a truth commission is created will have a direct effect on what its powers can be. For example, in democratic countries with presidential or semi-presidential forms of governance, the executive branch of government usually cannot, on its own, confer search and seizure or even subpoena powers; that tends to be the exclusive preserve of the legislative branch. The same may also be true in respect of powers of reporting, including the question of whether the commission can make binding recommendations. Similarly, who establishes the commission can affect the allocation of funding, since one branch of government may have greater access to resources and a greater commitment to the commission’s work.

8.3.5 Design

Some of the principal issues involved in establishing a truth commission are:

- the process of selection for and ultimate composition of the commission;
- the design of the commission’s mandate and powers; and
- decisions about material and human resources.

Composition

Perhaps more than any other single factor, the persons selected to manage a truth commission will determine its ultimate success or failure. In fact, several commissions have run into serious problems that were clearly rooted in weak management by commissioners. Although commissioners are generally not involved in the day-to-day administration of a commission, they usually direct investigations, shape commission policy and have the last word regarding what will go into the final report. As the public face of the commission, the commissioners’ personal and political authority can also be critical in dealing with recalcitrant authorities.

The members of most truth commissions have been appointed through procedures that relied on the good judgement of the appointing authority, with little to no consultation of civil society. This was the case, for example, in Argentina, Chad, Chile, Haiti and Uganda. In more recent years, however, the selection of commissioners has increasingly been conducted through more creative and consultative processes. The key lesson from past truth commissions is that a commission will generally garner greater public and international support where its members are selected through a consultative process and where an honest attempt is made to ensure a fair balance in the representation of political views, ethnic or religious groups and gender.

A powerful example of the consultative approach to commissioner selection is that of the South African TRC. A selection committee was formed that included representatives of human rights organizations. The committee called for nominations from the public and ultimately received some 300 nominations, which it then trimmed down to 50 people to be interviewed. The interviews took place

in public session and were closely followed by the press. The selection committee eventually narrowed the finalists to a list of 25 candidates, which it sent to President Nelson Mandela for final selection. To provide geographical and political balance, Mandela added two members who did not go through the full selection process.

A commission will generally garner greater public and international support where its members are selected through a consultative process and where an honest attempt is made to ensure a fair balance.

Another good example comes from Sierra Leone. There, the statute establishing the truth commission designated the Special Representative of the UN Secretary-General as selection coordinator and directed him to call for nominations from the public. At the same time, a selection panel was formed with representatives appointed by the former armed opposition, the president, the governmental human rights commission, the non-governmental inter-religious council and a coalition of human rights groups. This panel interviewed the final-

ists, ranked and commented on each and submitted the evaluations to the selection coordinator, who then selected the final four national candidates (the three international members of the commission were selected by the UN High Commissioner for Human Rights (UNHCHR). The lists of both national and international commissioners recommended were then submitted to the president of Sierra Leone for appointment. The commissioners were appointed in May 2002.

A similar consultative selection process was also employed in East Timor in establishing its truth commission.

Mandate and Powers

Every truth commission to date has been unique, differing in important ways from commissions in other countries. Truth commissions are inherently flexible and each new one can be crafted to respond to the specific needs and circumstances of the country in which it will work. While much can be learned from prior experience, including from the specific language used in the truth commission legislation of other countries, it is essential that any new truth commission be derived from an indigenous process of strategic planning and reflection on the needs and opportunities of the particular country.

Truth commissions enjoy greater legitimacy where the process of defining their powers and mandate includes active involvement from many different sectors of society.

In recent years, it has become clear that truth commissions enjoy greater legitimacy where the process of defining their powers and mandate includes active involvement from many different sectors of society. Although there is often a need to move quickly at a point of transition, it is important to attempt to build a broad base of support for the commission among several important constituencies. In some countries where the government has established a truth commission with virtually no consultation with civil society, the commissions have suffered as a result. For example, in

Guatemala it took time and considerable effort for the truth commission to gain the backing of the religious and advocacy groups on which it depended to undertake its work.

In terms of the actual content of a commission's mandate, the sponsors of the commission - whether the executive or legislative branch of government or the parties to an armed conflict - will typically give consideration to a number of key issues. Among the most important will be the following:

Objectives. The terms of reference of the commission should generally set out its main objectives. These might include, for example, establishing the truth about the past, contributing to national rec-

conciliation, making recommendations to help victims and preventing a relapse into war or authoritarian rule. The objectives will serve as the guide for the commission's work and the yardstick against which it will be assessed.

Period of operation. The terms of reference will also need to 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 ultimately cease to interest the public. Past experience indicates that a time frame of 1–2 years of operation is generally desirable.

Types of violation under investigation. The terms of reference should set out what types of violation the commission is to examine. Human rights violations, of course, tend to be the focus of truth commission work; however, there are many different types of human rights violations and often too many for a single commission to tackle meaningfully in such a short period of time. Accordingly, the commission might be restricted to examining or prioritizing those violations that were most prevalent or considered to have been most serious or pernicious in that particular society. Such prioritization can, however, create understandable frustration on the part of victims of those violations that are excluded from the commission's mandate. When that is the case, it is essential that other public policies and mechanisms be implemented to assist those persons.

Period of time under consideration. The specific span of time the commission is to inquire into should be clear from the start. This is often a controversial aspect of a commission's mandate, particularly where there is a sense of victimization on the part of both or all sides of a past conflict. Some commissions have examined violations that took place over a 30-year period, while others have examined violations that occurred over much shorter periods of time. The particular span of time will generally be chosen on the basis of those periods in the nation's history when the worst or the greatest number of violations took place, and accordingly will often correspond to periods of civil war or authoritarian rule. To avoid the appearance of bias, it is generally important for the time span chosen to be consecutive and not broken up to focus only on selected periods in a nation's history.

Functions of the commission. The key functions of the commission through which it will pursue its objectives should also be indicated in the terms of reference. Normally these include publicizing its mandate, carrying out research and investigation, and submitting a final report setting out its findings and recommendations. Some commissions have also been directed to identify the individuals responsible for specific violations; in other cases commissioners have either been precluded from "naming names" or left with the discretion to decide for themselves. Truth commissions are also increasingly being authorized to hold public hearings, inspired in large measure by the power of the TRC experience in South Africa. In a few cases, truth commissions have also been asked to provide some form of emotional support or counselling to victims and witnesses, who may experience trauma in the course of recounting their stories.

Powers. The powers to be 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 necessary on-site visits (ideally unannounced). Increasingly, however, commissions are being given powers that extend well

Box 8.3: Key Variables in a Truth Commission Mandate

- objectives
- period of operation
- types of violation under investigation
- period of time under consideration
- functions
- powers
- sanctions
- follow-up

beyond those just mentioned to include powers of subpoena, search and seizure powers, and in some cases even witness protection. The conferral of such powers must be carefully balanced against the need to preserve the non-judicial character of the commission process. Each addition of such powers moves the process further away from that of a truth commission towards a court process.

Sanctions. The commission should generally be given sufficient power to ensure that sanctions - perhaps fines, imprisonment or both - can be brought against anyone who improperly interferes with or knowingly provides false information to it, or fails to respond to a subpoena without appropriate justification.

Follow-up. The terms of reference should ideally set out what obligations, if any, the government will have both to publicize the commission's final report and to implement its recommendations. Consideration will also have to be given to the auditing, safekeeping and general subsequent use to be made of the commission's files and records after it has ceased its operations.

Resource Issues

Even the best-designed mandate will not ensure a successful truth commission if it lacks adequate material and human resources. This is not to suggest that truth commissions are expensive undertakings. In fact, with the exception of the truth commissions in South Africa and Guatemala (which both had multimillion dollar budgets), truth commission budgets have all been less than USD 5 million and frequently less than USD 1 million. However, as the terms of reference of truth commissions become increasingly sophisticated and as the international community takes an increasing interest in

these bodies, the average budget of new commissions has risen to USD 5–10 million. This is true of several of the commissions now in operation or being set up, including those in Peru, East Timor, Ghana and Sierra Leone. In terms of the source of funds, the trend is to combine national government funds with funds

The average budget of new commissions has risen to USD 5–10 million.

received from donor states and private foundations, where available. Office space and equipment are generally provided directly by the national government.

The truth commissions in South Africa and Guatemala hired more staff than previous commissions - over 200 multidisciplinary staff each, including both nationals and non-nationals. Current commissions have followed a similar approach to staffing, although budget constraints may limit the numbers of persons hired. In those cases, greater reliance may be placed on staff seconded from the government.

8.3.6 Truth Commissions in Operation

The Preparatory Phase

It is generally a good idea for truth commission members to try to devote their first weeks after inauguration to essential preparatory tasks. These may include:

- developing a staffing plan and hiring staff;
- drafting internal regulations and policies;
- adopting a work plan;
- designing and installing an effective database for the storage, organization and retrieval of records and data;
- preliminary background research;
- collecting existing documentation from national and international NGOs, the UN, foreign governments and other sources;

- designing a public education campaign; and
- fund-raising and budget preparation.

Undertaking these preparatory activities in a timely manner can serve the commission extremely well in both the short and the long term. Indeed, past experience suggests that a commission that does not get off to a good start will lose precious time and political capital in the first year of its life.

Principal Activities Of A Truth Commission During Its Lifetime

Outreach

Public outreach by a truth commission is critically important. The nature and the extent of a commission's outreach efforts will profoundly affect its access to information, its effectiveness in addressing the needs of victims, its ability to manage public expectations and its general reputation in the eyes of the public. Some of these efforts can be carried out directly by the commission through holding public information meetings and through the preparation, publication and dissemination of pamphlets, videos and publications in popular form about the role and mandate of the commission. The commission can also achieve its outreach goals by engagement with and effective use of NGOs, local grass-roots organizations and the media. Relations with civil society and the media can, however, be complicated by the fact that they will often play a dual role vis-à-vis the commission, working simultaneously as partner to it and as critical watchdog of its procedures and actions.

Public outreach by a truth commission is critically important.

Statement-Taking

Most truth commissions collect most of their information through private, closed-door meetings, usually by commission staff taking testimony from individual victims in one-to-one encounters. This process is referred to as “statement-taking” and typically involves both a meeting and the filling out of a statement form by the deponent. Statement-taking is important in at least two ways: it furthers the goal of establishing the truth about the past; and it provides an opportunity for victims to come forward and recount their traumatic experiences in a sympathetic and generally safe environment.

Because of the sensitive nature of the process and the often horrific character of the information involved, statement-taking requires staff to exhibit concentration, respect and emotional control, and should generally involve intensive training before it is undertaken. Statement-takers need to know when and how to listen and how to respect the often unexpected rhythm and logic of a person's memory. Although there can be a tension between the desire to focus only on the specific type of information being sought by the commission and the need to allow the deponent to tell the story in his or her own way, a statement-taker must find a way to strike the right balance.

For most victims and witnesses, a statement-taker will be the only personal contact they have with the commission, and as a result the impressions they leave on deponents and communities are especially significant and enduring.

Research and Investigation

Research units and police-like investigation units are increasingly becoming a part of the structure of truth commissions. Such units, however, tend to form only part of commissions with large budgets and robust mandates, such as the TRC in South Africa. Research units tend to be relatively small but

staffed by persons with strong research skills and familiarity with national think tanks, NGOs, local archives and other key sources of information. In contrast, investigative units may include people with legal backgrounds or even experience in law enforcement. Many truth commissions combine research and investigation into one department, which has many advantages.

Data Processing

Truth commissions have to deal with enormous volumes of information which must be organized and systematized. This requires, among other things, an effective database for the storage, organization and retrieval of records and data. Generally speaking, commissions which do rigorous data collection and analysis will be better able to defend their findings on scientific grounds. A strong data management system will help arrive at a “big picture” analysis of historical patterns that can show, for example, the exact ratio of violations committed by one side to those committed by the other. In terms of staffing, commissions should hire a programmer to write and maintain the basic software and to extract the data in formats appropriate for the analysts. They will also need professional statisticians (or social scientists fluent in statistical methods) to review the data before it is published, and a team of data processors to input all the information received by the commission.

Public Hearings

Most past truth commissions have not held public hearings. There is, however, an increasing trend to give commissions a mandate to do this. This is the case for the new commissions in Peru, East Timor and Sierra Leone, to name only a few.

There are persuasive reasons for a commission to hold public hearings. By giving victims and survivors a chance to tell their story before a public audience - particularly where the hearings are aired on television or the radio - a commission can formally acknowledge past wrongs, encourage public understanding and sympathy for victims, reduce the likelihood of certain sectors of society continuing to deny the truth, and enhance the transparency of its work. Public hearings can also help to shift a truth commission’s focus from product (i.e., its final report) to process, by engaging the public as audience, encouraging press coverage of its issues over a longer period of time and generally stimulating an authentic national discourse about the past.

The truth commissions in Uganda, Sri Lanka and Nigeria have all held public hearings, but it was the public hearings of the South African TRC that had the greatest international impact. Not only were there hundreds of days of public hearings; there was also a unique diversity in the types of hearing held, including victim hearings, amnesty hearings, special thematic hearings (e.g., on women and children), special event hearings (e.g., on the 1976 Soweto student uprising), institutional hearings (e.g., with the legal and health sectors) and political party hearings. Lured by the powerful example of South Africa, a number of analysts have recommended that all truth commissions should hold proceedings in public.

There may, however, be legitimate reasons not to do so, including security risks for commissioners and victims, time and resource constraints, and concerns about “judicializing” commission proceedings. At the same time, public “truth” proceedings are potentially powerful enough to at least warrant consideration by all commissions.

Emotional Support

Truth commissions seem to satisfy a clear need on the part of some victims to tell their stories, be listened to and ultimately be healed in some way. For others, however, the process can lead to re-

traumatization, which may in some cases have severe after-effects.

Past truth commissions have not generally given this issue enough attention, but this is starting to change. For example, in South Africa, the TRC hired four mental health professionals, provided training in trauma counselling for staff and hired “briefers” who had the job of providing constant support to those giving testimony at public hearings. It is worth noting that commission staff can themselves be traumatized by the process and require emotional support. In many societies, however, standard psychological counselling may not be the appropriate model for helping victims, for cultural reasons or because of resource constraints. The ideal source of support in some places, therefore, may be collaboration with community organizations, traditional healers, religious institutions or self-help support groups.

Truth commissions can lead to re-traumatization. Past truth commissions have not generally given this issue enough attention.

Final Reports

Often the defining moment for a truth commission is the completion and publication of its final report. Final reports have often constituted the enduring legacy of commissions and have also been used as a resource for human rights education or for subsequent prosecutions. If they are well documented and methodologically sound, final reports can serve as a critical guard against revisionism. In many ways, however, the impact of a final report may depend less on its content than on a variety of surrounding factors, including when and how the report is publicized, how widely it is distributed, how much coverage it receives in the media and whether there are both traditional and alternative presentations of the findings.

Although the content and format of reports will vary, final reports usually contain a section on findings and a section on recommendations. The findings section will typically identify the causes and patterns of past violations, as well as the victims of those violations. In some cases, individual and/or institutional responsibility for violations may also be reported - a practice which is examined in greater detail in the subsection on *Naming Names and Due Process* below. There may sometimes be a tension within a commission between a preference for a legal or empirical approach and an emphasis on a narrative, historical account.

In addition to reporting findings, truth commissions usually make recommendations, aimed variously at providing assistance or redress to victims, making necessary constitutional, legal and institutional reforms in order to prevent future relapse into war or authoritarian rule, and facilitating the consolidation of democracy and the rule of law. In many cases, commissions have also made recommendations for follow-up measures to ensure their timely and effective implementation. Unfortunately, the record on implementation of commission recommendations is not encouraging.

Naming Names and Due Process

A number of truth commissions have had the power to publicly name those individuals found to be responsible for human rights crimes. These include the commissions in El Salvador, Chad and South Africa. Others have not been expressly granted this power but have been creative in finding indirect ways of naming individuals. For example, some commissions have effectively identified individual perpetrators by printing (unchallenged) direct quotations of witnesses or victims that mention the perpetrators' names, or by identifying those who headed particular units or regions where particular violations took place, thereby making perpetrator identities easily discoverable. In other cases, attribution of individual responsibility has been effected through deliberate or unintentional press leaks by

the commission.

Few of the issues surrounding truth commissions have attracted as much controversy as this question of “naming names”, and the issue remains a point of tension for those crafting new bodies. The disagreement is between two contradictory principles, both of which can be strongly argued by rights advocates. The first is that due process requires that individuals accused of crimes be allowed to defend themselves before being pronounced guilty. Due process is violated if a commission, which is different from a court of law and does not have the same strict procedures, names individuals responsible for certain crimes. The second principle is that telling the full truth requires naming persons responsible for human rights crimes when there is clear evidence of their culpability.

The question therefore becomes: What standards and procedures of due process should apply to individuals who may be named in a report? Should they be informed of the allegations against them and told that the commission intends to name them in a public report? Should they be given the opportunity to respond to the evidence against them and offer a defence? Should the commission be obligated to state clearly that its own conclusions about individual responsibility do not amount to criminal guilt? These are the sorts of issue that commissions must grapple with.

Past experience seems to suggest that the best practice is to allow commissions to name names but ultimately to leave it at their discretion whether or not to do so. This is because there may be a range of legitimate reasons for not naming names. For example, there may be real security risks for commissioners, victims or witnesses, or there may be due process problems such as a lack of sufficient evidence to publicly condemn an individual, or an inability to afford proper notice or procedural safeguards for those accused of violations.

Few of the issues surrounding truth commissions have attracted as much controversy as the question of “naming names.”

If a commission decides not to name perpetrators, it should at least be required to set out its reasons for not doing so, and these reasons must be politically, morally and legally defensible.

Where a commission does decide to name names, it must clearly state that its findings do not amount to a finding of legal or criminal guilt. As to the due process entitlements that should apply, it seems that at a minimum persons who might be named should be (a) informed without undue delay of the allegations against them and of the intention to name them in a public report, and (b) given the opportunity to respond to the evidence against them and offer a defence, but not necessarily through an oral hearing. Additional due process entitlements, such as the right to counsel or the right to cross-examine witnesses, should be offered only in very exceptional circumstances.

As a general rule, it is both unnecessary and undesirable to burden truth commissions with due process requirements equivalent to those of a court. Burdening a commission in this way would seriously undermine its ability to carry out its most essential duties by considerably slowing down the investigation and hearing process, stifling its capacity to gather facts and evidence, and generally over-judicializing commission procedures.

This is not to say that commissions ought to sacrifice the rights of perpetrators in the name of the victims. It is simply to emphasize that a rational balance must always be found between the dual interests of fairness and efficiency.

The Challenge of Engaging Perpetrators in the Process

One of the greatest shortcomings of past truth commissions has been their inability to secure meaningful cooperation from perpetrators, whether in the police, the military, the intelligence agencies or elsewhere. The one significant (and controversial) exception is the TRC in South Africa, which

had the power to grant individual amnesty to perpetrators of politically motivated crimes. Amnesty was granted to those who fully confessed to their involvement in past crimes and showed them to be politically motivated. For particularly serious crimes, the applicant was required to appear in a public hearing to answer questions. Several thousand perpetrators came forward to the commission to disclose their involvement in and knowledge of past human rights violations under this process.

Of course, the use of a “truth-for-amnesty” formula as a means to secure perpetrator cooperation raises difficult moral, legal and political issues. Amnesties generally violate the right of victims to redress and will generally be inconsistent with a state’s obligation under international law to punish perpetrators of serious human rights crimes. They can also subvert the rule of law by allowing only certain groups of perpetrators to escape liability. They can undermine both specific and general deterrence, and promote cynicism and disillusionment among victims of human rights abuses, which in turn could cause them to take the law into their own hands and embark on acts of private vengeance. On the other hand, a “truth-for-amnesty” arrangement can be more defensible where: (a) the commission’s power has been given reasonably democratically; (b) amnesty is given on an individual, not class, basis; (c) a form of public procedure is imposed on its recipients; (d) victims are given an opportunity to question and challenge an individual’s claim to amnesty; and (e) reparation payments are made to victims. An amnesty’s scope can also be narrowed by making the grant of amnesty reversible following the commission of a new and similarly grave offence.

One of the greatest shortcomings of past truth commissions has been their inability to secure meaningful cooperation from perpetrators.

To date, only South Africa has used the “truth-for-amnesty” formula. The example should be copied only with the greatest caution, and only where there are similarly compelling circumstances. First, in the absence of a credible threat of prosecution (a factor which is rarely present in transitional contexts), it is unlikely that perpetrators will feel compelled to apply for an amnesty. They are more likely to prefer to remain silent, thereby avoiding any risk of public shame or social ostracism. Second, a range of mechanisms to encourage perpetrators to come forward may be available that are more principled and practical than the granting of amnesty and could better serve the causes of truth and reconciliation. For example, commissions might offer mechanisms for testimony to be provided on an anonymous or confidential basis; they might use a subpoena power; or they might be able to offer a witness protection/relocation service. Another possibility is that truth commission sponsors could create a new punishable offence of failure by witnesses (other than victims) to come forward to the commission with information about past crimes.

None of these alternative approaches will necessarily lead to extensive cooperation from perpetrators and reluctant witnesses. Without them, however, cooperation may be virtually non-existent.

Follow-Up Efforts

Once a truth commission submits its final report, archives its files and is formally dissolved, the task of carrying out its recommendations will naturally fall to others. Unfortunately, the implementation of recommendations has frequently been a major shortcoming for truth commissions, even where there has been a legal obligation on the part of government to implement them (as there was in El Salvador, for example).

The implementation of recommendations has frequently been a major shortcoming of truth commissions.

One of the main causes of non-implementation appears to be lack of political will; but even

when sufficient political will is present, there may not be sufficient institutional capacity or funds. Whichever the case, it is critically important for truth commissions to suggest mechanisms that can ensure proper monitoring and follow-up. Sometimes truth commissions are fortunate in that a plan of follow-up is built into the mandate, as is the case in Sierra Leone. For most, however, a system of follow-up must be recommended. In Chile, the commission recommended the creation of a public commission to continue some of its own work and to facilitate compliance with reparation measures. In Guatemala, the commission recommended the creation of a follow-up institution (the Foundation for Peace and Harmony, *Fundación por la Paz y la Concordia*, to be made up of government and civil society representatives) to implement some recommendations directly and monitor the implementation of others.

8.4 Concluding Remarks

This chapter has sought to explain in practical terms what a truth commission is, how it operates and what it can potentially achieve for a country in transition.

Scepticism has been expressed here as to the universal utility of truth commissions and as to the strength of the contribution truth-seeking can be expected to make to reconciliation, but it is nevertheless important to appreciate the sometimes remarkable but little-known contributions that truth commissions have occasionally made. For example, in Chile, almost entirely on the basis of the commission's findings, the state initiated a broad reparation programme for many victims of the Pinochet era. Critical judicial reforms were put in place in El Salvador following the truth commission investigations there. In South Africa, very few people will now defend or try to justify the system of apartheid or question the fact that brutal practices were used to keep apartheid in place.

A truth commission is, however, only one of the many mechanisms available to countries in transition that are seeking to consolidate democracy, human rights and the rule of law. Other possible components of a full programme of transitional justice could include trials, vetting programmes, legal reform, victim reparation, and restitution and reintegration measures. There appears to be a new trend towards the integration or synthesis of these different elements of transitional justice. This can be seen in places ranging from Sierra Leone (where a truth commission and a hybrid national–international criminal court will operate alongside one another) to Rwanda (where the new *gacaca* system is seeking to merge prosecutorial goals with the pursuit of truth and community reintegration) to East Timor (where a truth commission will serve as a facilitator of refugee return, the prosecution of serious crime, and restitution and reintegration for less serious offences). There are many challenges and complications in trying to integrate transitional goals and mechanisms in this way, generating creative and original solutions. Clearly the full story about truth commissions has yet to be written.

References and Further Reading

Main Sources

Hayner, Priscilla B. *Unspeakable Truths: Confronting State Terror and Atrocity*. New York: Routledge, 2001 (paperback edition, published as Hayner, Priscilla B. *Unspeakable Truths: Facing the Challenge of Truth Commissions*. New York and London: Routledge, 2002).

Truth Commissions: A Comparative Assessment. An Interdisciplinary Discussion Held at Harvard Law School in May 1996. Cambridge, Mass.: Harvard Law School Human Rights Program, 1996.

International Center for Transitional Justice,
<http://www.ictj.org>

Centre for the Study of Violence and Reconciliation,
<http://www.wits.ac.za/csvr>

Truth Commissions Project,
<http://www.truthcommission.org>

United States Institute of Peace Library,
<http://www.usip.org/library/truth.html>

Other Sources

Kritz, Neil (editor), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes, Vol. I-III*. Washington, DC: United States Institute of Peace Press, 1995.

Nunca Mas: The Report of the Argentine National Commission on the Disappeared. New York: Farrar Straus Giroux, 1986.

Report of the Chilean National Commission on Truth and Reconciliation (translated by Phillip E. Berryman; introduction by José Zalaquett), Notre Dame: University of Notre Dame Press, 1993.

From Madness to Hope: the 12-year War in El Salvador: Report of the Commission on the Truth for El Salvador. New York: United Nations, 1993.

Informe de la Comision de la Verdad de Panama, 2002. (Panama Truth Commission Report).

Biggar, Nigel (editor), *Burying the Past: Making Peace and Doing Justice After Civil Conflict*, Washington, D.C.: Georgetown University Press, 2001.

Internet Sources

Report of the Truth Commission on El Salvador,
<http://www.derechos.org/nizkor/salvador/informes/truth.html>

Commission for Reception, Truth and Reconciliation in East Timor,
<http://www.easttimor-reconciliation.org>

Peru Reconciliation Commission,
<http://www.cverdad.org.pe/>

Sierra Leone Truth and Reconciliation Commission,
<http://www.sierra-leone.org/trc.html>