

# TRANSITIONAL JUSTICE AND TRUTH COMMISSIONS

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## Key aspects of Transitional Justice:

1. Justice and peacebuilding are vital elements and at times appearing contradictory during transition. Addressing the question of human rights abuse in transitional and post-conflict situation is instrumental in order to foster reconciliation and build sustainable peace and stability. Justice in times of transition, therefore, goes beyond a narrow definition of criminal justice - punishing the perpetrators of crime. Justice also seeks to acknowledge the harms inflicted on the victims, and, crucially, to recognize that this was and is wrong. It aims to restore the victims' dignity and to (re)establish their position in society as fully rights-bearing citizens. A more inclusive understanding of justice is therefore particularly important to building sustainable peace.
2. Addressing the past will help build a more just society in the future. For example: justice-sensitive institutional reform is not only intended to reform an abusive institution, making it a defender of the citizens' rights and responsive to the citizens' needs, but also to empower victims to become citizens and hold public institutions to account. The institution is not reformed in a vacuum: its relationship with the population and its place in society are also transformed as victims become citizens. Transforming abusive public institutions in this way is vital for building democracy, promoting good governance and the rule of law.
3. Acknowledging that the victims are citizens whose rights have been abused and whose rights are now restored to them is an important part of building a just society in which access to resources, services and rights is based on equity, not membership of one powerful group, and a society in which all people are equal before the law, and equally protected and served by the state. This is only possible through a adopting an integrated, holistic and comprehensive justice strategy to address that past of human rights abuses. This is what is today being referred to as transitional justice.
4. In transitional contexts, while the perceived need for justice is high, there are usually real constraints on the capacity or willingness of successor government(s) to deliver this justice. At the same time, the pursuit of justice and reconciliation must be combined with other public interest objectives, such as the consolidation of peace and democracy and the need for economic development and public security.
5. Transitional justice (justice in times of transition) is commonly understood as a framework for confronting past abuse as a component of a major political transformation - from war to peace or from authoritarian rule to democracy. This abuse can include past human rights abuses, mass atrocities, or other forms of severe social trauma, including genocide or civil war.

6. The United Nations defines transitional justice as the full range of processes and mechanisms associated with a society's attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation. These involve judicial and non-judicial mechanisms (with differing levels of international involvement, or none at all) that include individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof. The most commonly-cited examples include the South African Truth and Reconciliation Commission, or the International Criminal Court, but there are many other mechanisms in operation, as illustrated by this guide.
7. Transitional justice processes may have a variety of aims, such as to resolve the divisions in society caused by the human rights violations; to contribute to the healing process for victims and witnesses; to determine legal accountability; and/or to establish a historical record of the war and to educate. Wider institutional aims might be to restore the rule of law, democratize security institutions by promoting human rights, and to promote a stable peace.
8. The selection and design of transitional justice programmes must be unique for each country. Factors to take into account include the regime's level of legitimacy and political security, its relationship with human rights violators, the strength of opposition groups, the activities of civil society and the presence of international actors.
9. Understanding the needs and perceptions of local populations concerning transitional justice and social reconstruction is imperative to the development of a legitimate transitional justice strategy and in promoting sustainable peace.
10. Transitional justice is not in itself a special form of justice, but constitutes a set of approaches that seeks to bring about justice in extraordinary conditions. It places the victim at the centre, ensuring that the victims of conflict or oppression are recognized as such, and are empowered as dignified, fully rights-bearing citizens.
11. Transitional justice offers a number of tools and processes that facilitate the transformation state. Although the specific mix of tools needs to be tailored to each specific situation, there are nevertheless key elements which should be considered from the early stages of developing transitional justice mechanisms. These include criminal prosecutions (whether national, international or hybrid); truth commissions; reparations programmes; and vetting/lustration programmes; constitutional and legal reforms; gender justice; and memorialization.
12. Non-negotiable minimum demands for a transitional justice process:
  - No amnesty for crimes against humanity, torture, rape and other sexual offences, and economic crimes such as corruption;
  - No extinguishing of civil claims against the perpetrators or the state;
  - Comprehensive reparations for victims of human rights violations;
  - No guarantee of job security for those found responsible for gross human rights violations and corruption.

- A credible and independent truth seeking inquiry into conflicts of the past which holds perpetrators to account and which provides victims the opportunity to tell their stories with a view to promoting genuine national healing and reconciliation.
  - Independent monitoring and reform of operations and structures of the police, army, paramilitary, security coordination, administration of justice, food distribution and other organs of state involved in the implementation of the transition.
  - Development of interim or transitional rules to guarantee the rule of law and upholding of all basic rights during the transition, including the right to engage in political activities. These rules must be enforceable. They must be encapsulated in amendments to the Constitution or an interim constitution. Such rules must remain in place until free and fair elections are held and until a final Constitution, endorsed by the people, is in place.
  - Gender equity in official bodies and for transitional justice initiatives to pay particular attention to marginalized communities in Kenya
13. These demands are very much a desirable processes and outcomes for transitional justice within the conception of the six key pillars of a holistic approach to transitional justice: Accountability; truth recovery; reconciliation; legal and institutional reform; reparations; and Historical memory and memorialization. The efficacy of these transitional justice processes need to be connected to broader structural changes in the socio-political and economy context.
14. Transitional justice approaches therefore facilitate:
- a. bringing those responsible for past abuses to account through criminal prosecutions and non-judicial forms of inquiry such as truth-seeking mechanisms;
  - b. Providing reparations to victims and going some way to satisfying their needs;
  - c. transforming security systems, making them accountable for past violations, and potentially removing human rights abusers from public institutions; and
  - d. Reforming legal instruments and public institutions to prevent the repetition of past violations
  - e. Preserving historical memories through memorialization, monuments etc

### **Truth Commissions**

A truth commission is a mechanism mandated to investigate past history of violations of human rights in a particular country, revealing past wrongdoing by a government (or non-state actors also), in the hope of reconciling people and avoiding the occurrence of conflict. It is a mechanism aimed at promoting restorative justice.

It is an officially sanctioned, temporary, non-judicial investigative body which is granted a relatively short period for statement-taking, investigations, research and public hearings, before completing its work with a final public report. It is normally set up by states emerging from periods of internal unrest, civil war, or dictatorship.

A number of other bodies have also been created to serve the similar function of investigating the past. In some instances, non-governmental organizations (NGOs) have sometimes created their own truth commissions where governments have failed to create one. For example the archbishop of Sao Paulo, with the support of the World Council of Churches, investigated human rights abuses under Brazil's military regime when the government refused their calls for a formal inquiry. Other commissions of inquiry have examined individual events.

Truth commissions also need not be national in scope. The Greensboro Truth and Community Reconciliation Project in North Carolina created a Truth and Reconciliation Commission in May 2004, to examine racially motivated killings by the Ku Klux Klan and the American Nazi Party in

1979.<sup>1</sup> They also need not be governmental at all. South Africa's African National Congress created two commissions in the early 1990s to investigate the internal activities of its own organization.

Four main characteristics of truth commissions:<sup>2</sup>

- First, they focus on the past. The events may have occurred in the recent past, but a truth commission is not an ongoing body akin to a human rights commission.
- Second, truth commissions investigate a pattern of abuse over a set period of time rather than a specific event. In its mandate, the truth commission is given the parameters of its investigation both in terms of the time period covered as well as the type of human rights violations to be explored.
- Third, a truth commission is a temporary body, usually operating over a period of six months to two years and completing its work by submitting a report. These parameters are established at the time of the commission's formation, but often an extension can be obtained to wrap things up.
- Fourth, truth commissions are officially sanctioned, authorized, or empowered by the state. This, in principle, allows the commission to have greater access to information, greater security, and increased assurance that its findings will be taken under serious consideration. Official sanction from the government is crucial because it represents an acknowledgment of past wrongs and a commitment to address the issues and move on. Furthermore, governments may be more likely to enact recommended reforms if they have established the commission.

Truth commissions cannot replace or be replaced by prosecutorial mechanisms such as the special tribunal. As such, in a number of recent cases, for example East Timor and Sierra Leone, truth commissions have been created alongside tribunals.

A crucial variable for the success of a commission is the size of its staff. The South African TRC, for example, was given a staff of three hundred and a budget of \$18 million per year for its two-and-a-half year existence. By contrast, due to lack of office space, Chad's truth commission was forced to set up its headquarters within the former secret detention center of the security forces.

#### **a. Composition of the Commission.**

How a truth commission will function is highly dependent on who is appointed to the commission. A number of commissions set up by new presidents were in fact highly partial. In Chad, for example, it became apparent that the truth commission was used to discredit the old regime and legitimize the new one. Where the commission is highly representative of all sides of the conflict, however, the outcome may be too inconclusive. In the case of Chile, the transition was not a clean break with the past and segments of the old regime maintained significant power. The truth commission contained an even split between Pinochet supporters and opponents, but the military still rejected the commission's findings. What has been perhaps the most common method is to appoint well-respected members of society to commissions.

Being perceived as above politics makes them an ideal choice, though they need not be strictly impartial. It would be difficult to remain so after living through such an experience. In some extreme cases, governments have sought foreigners to form the commission. In the case of El Salvador, for example, the violence was seen as so polarizing that no Salvadoran could fairly assess what had happened. The UN secretary-general, with the agreement of the parties to the peace accords, selected a former Colombian president, a former Venezuelan foreign minister, and a former president of the Inter-American Court of Human Rights to conduct the truth commission.

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<sup>1</sup> <http://www.gtcrp.org/>

<sup>2</sup> Priscilla B. Hayner, *Unspeakable Truths*. New York: Routledge, 2001, p. 14.

### **Its importance**

A truth commission serves to officially acknowledge what many already know about the past. Through this mechanism a government is able to establish legitimacy by espousing democratic ideals, the rule of law, formal legal equality, and social justice. Thus a truth commission is as much about looking backward as forward. The looking forward also involves societal transformation through reconciliation.

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. It is hoped that the work of a truth 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 seeks to provide a platform for the victims to tell their stories and obtain some form of redress. This is done through public hearings (some hearings are held in camera) and when the commission determines that a violation occurred to an individual or group of individuals then reparation may be recommended. Reparations embody measures that include restitution, compensation, rehabilitation, satisfaction and guarantee of non-repetition. Restorative justice which involves the process of coming to terms with the past can have great psychological benefit for those seeking trauma healing. By providing official acknowledgment of past crimes, the process helps restore dignity to victims.

A truth commission provides a quicker and a less expensive way of knowing the truth about human rights violations and here we mean civil, political, economic social and cultural rights. Whereas criminal prosecutions take so long with the possibility of exacerbating old wounds, a truth commission through its victim-centered approach and grant of conditional amnesties is able to reveal more truth and reconcile perpetrators and victims.

A truth commission may contribute to the prosecution of perpetrators of human rights violations. This is done by the commission's identification of any person who should be prosecuted for being responsible or involved in human rights violations and abuses followed by a recommendation for the prosecution of such persons by the relevant state organ.

A truth commission seeks to prevent further abuses through specific recommendation for institutional and policy reforms. In its working a truth commission is expected to investigate national institutions and their role in repression. After the investigations the commission is expected to recommend broad and specific reforms in the institutions it finds culpable.

In addition a truth commission provides a deterrent for the future and can end collective denial. By getting to the bottom of human rights violations, identifying persons and institutions responsible; it serves as a deterrent for future violations. Through public hearings usually captured by domestic and international media, a truth commission is a show of a country's commitment to end impunity.

By documenting past gross violations of human rights a truth commission establishes a country's memory scheme which helps in understanding the present realities and informing solutions to emerging issues in a country.

## **Findings: The Truth Commission Report**

The commission's final report is its legacy. It is a summary of the key findings. Patterns of abuse are outlined. Most importantly, the commission's report provides recommendations for rebuilding society. One of the key aspects of the report is the highlighting of the institutional factors that facilitated the abuse of human rights. Recommendations often center on judicial, military, and police reform. Some observers argue the implementation record of reform recommendations is often poor.<sup>3</sup> Reforms are often debated for years, may require legislation or a constitutional amendment, and may become overshadowed by other issues as time goes on. In order to have maximum impact on society, the report should be widely disseminated. It seems unlikely a truth commission can be considered a success if its findings are not made public.

## ***Strengths and Weaknesses***

Four main goals for truth commissions,

1. Truth commissions seek to contribute to transitional peace by "creating an authoritative record of what happened;
2. providing a platform for the victims to tell their stories and obtain some form of redress;
3. recommending legislative, structural or other changes to avoid a repetition of past abuses; and
4. Establishing who was responsible and providing a measure of accountability for the perpetrators."

## **Challenges**

It is also clear that such a set of demands are not likely to be implemented, given the nature of the February 2008 political agreement in Kenya, and the balance of political power in the country. Thus there is a danger of setting out civic demands for transitional justice that are, to use Mahmood Mamdani's critique of the ethos of the Truth and Reconciliation Commission in South Africa, a 'combination of strong moral fervor and weak political analysis. It is therefore important to understand the broader global context for establishing TJRC in which the latter have "served as instruments for re-establishing political and institutional stability according to liberal democratic norms" and the discourses of reconciliation, forgiveness and political consensus "have been understood as the basis for moving forward into an era of market-driven economic progress.

Amongst the major challenges facing truth commissions are: the problem of "over-reach" in the context of weakening economic and political conditions; lack of consultation with a broad range of political and civic actors; inadequate preparation by groups hoping to make inputs into the process; high expectations particularly around the problems of reparation and prosecutions; the absence of long-term institutional follow-up to support the process; avoiding the temptation to use other country experiences in this area as a model to be replicated in different contexts; funding

Prosecution aside, a key criterion in the success of a truth commission is that official support must be there at the highest level. If this is not the case, then the process is likely to be derailed by: debates around its preparation that last indefinitely; a toothless model being agreed to; the repression of the final report, or by creating unacceptable risks to those who come forward to testify. We need to be sure that conditions are right for an official, full disclosure of truth before

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<sup>3</sup> Ibid.

promoting a half hearted process that aggravates and thwarts the nation's ultimate need for truth and accountability.

### **Examples of truth commissions**

- Argentina (National Commission on the Disappearance of Persons, 1983)
- Bolivia (National Commission of Inquiry into Disappearances, 1982)
- Chad (Commission of Inquiry on the Crimes and Misappropriations Committed by the ex-President Habré, his Accomplices and/or Accessories, 1991)
- Chile (National Commission for Truth and Reconciliation, 1990; National Commission on Political Imprisonment and Torture, 2003),
- Democratic Republic of Congo (Truth and Reconciliation Commission, 2003)
- Ecuador (Truth and Justice Commission, 1996; Truth Commission, 2007)
- El Salvador (Commission of Truth, 1992)
- Germany (Commission of Inquiry for the Assessment of History and Consequences of the SED Dictatorship in Germany, 1992)
- Ghana (National Reconciliation Commission, 2002)
- Grenada (Truth and Reconciliation Commission, 2001)
- Guatemala (Commission for the Historical Clarification of Human Rights Violations and Acts of Violence which Caused Suffering to the Guatemalan People, 1997)
- Haiti (National Commission for Truth and Justice, 1995)
- Indonesia (Truth and Reconciliation Commission, 2004)
- Liberia (Truth and Reconciliation Commission, 2005)
- Morocco (Equity and Reconciliation Commission, 2004)
- Nepal (Commission of Inquiry to Locate the Persons Disappeared during the Panchayat Period, 1990)
- Nigeria (Human Rights Violations Investigation Commission, 1999)
- Panama (Truth Commission, 2001)
- Paraguay (Truth and Justice Commission, 2003)
- Peru (Truth and Reconciliation Commission, 2000)
- Sierra Leone (Truth and Reconciliation Commission, 2002)
- South Africa (Truth and Reconciliation Commission, 1995)
- South Korea (Presidential Truth Commission on Suspicious Deaths, 2000)
- Sri Lanka (Presidential Commission of Inquiry into Involuntary Removal and Disappearances of Persons in Western, Southern and Sabaragamuwa Provinces, Presidential Commission of Inquiry into Involuntary Removal and Disappearances of Persons in the Central, North Western, North Central and Uva Provinces and Presidential Commission of Inquiry into Involuntary Removal and Disappearances of Persons in the Northern & Eastern Provinces, 1994)
- Timor-Leste (Commission for Reception, Truth and Reconciliation, 2002)
- Uganda (Commission of Inquiry into the Disappearance of people in Uganda, 1974 and Commission of inquiry into Violations of Human Rights, 1986)
- Uruguay (Investigative Commission on the Situation of Disappeared People and its Causes, 1985 and Peace Commission, 2000)
- Yugoslavia, Federal Republic of (Truth and Reconciliation Commission, 2001)

### **Comparative view**

A survey conducted in South Africa revealed that two-thirds of the respondents felt the truth commission process had harmed race relations and made people angrier.[19] In El Salvador, by

contrast, a poll after the commission's conclusion indicated widespread acceptance of the commission's findings.

Despite positive potential, truth commissions have sometimes served merely as a means of legitimizing new governments. While they are generally associated with regime transitions, that transition need not be toward democracy. The 1986 Ugandan commission and the case of Chad are emblematic of truth commissions being used mainly as a tool to discredit the previous regime. In other cases, such as Uganda's 1974 commission, it seemed not to be a sincere attempt to rectify the past, but rather a flimsy effort to placate international pressure. Furthermore, in places such as Zimbabwe and Haiti, the publication of the commission's report was hindered or completely stopped because it was too critical of the new government. In Bolivia and Ecuador, commissions were disbanded before completing their work because the investigations became too politically sensitive. Clearly, the commissions cannot be solely blamed for this -- the political will to act on their findings did not exist.

In sum, the general population, as well as human rights advocates, often expect too much from truth commissions. First, they may have an impossible mission. The needs of victims may be incompatible with the needs of society. Second, it is argued they do not go far enough to deal with the past or generate reconciliation. They do not have the power to punish and have no authority to implement reforms. Third, wiping the slate clean benefits those who have committed human rights violations. This damages victims' self-esteem and denies them justice. Finally, erasing history is difficult. At minimum, truth commissions pursue different types of truth. They investigate the details of specific events while at the same time attempting to explain the factors and circumstances behind the gross human rights violations the state experienced. In short, truth commissions often seem asked to do too much with too little.