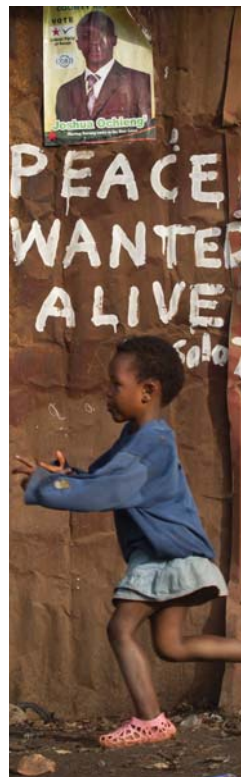
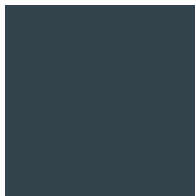


# Challenging the Conventional Can Truth Commissions Strengthen Peace Processes?

June 2014





Challenging the Conventional

# **Can Truth Commissions Strengthen Peace Processes?**

June 2014

## Acknowledgements

The International Center for Transitional Justice and the Kofi Annan Foundation acknowledge the generous contribution of the Government of Finland to support the symposium “Challenging the Conventional: Can Truth Commissions Effectively Strengthen Peace Processes?” and the research that provided the basis for discussions. We would like to thank the symposium participants who generously shared their time and experience and provided valuable contributions for the purposes of this debate. Our gratitude goes to a number of people who contributed to the preparation of this report, in particular: Meredith Barges, Barbara Goedde, Kelen Meregali, Muna Baig, Mariana Chambel, Nicole Charalambous, Rayne B. Holm, Christian Marxsen, Tze-Wei Ng, and Seira Tamang.

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## About ICTJ

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## FOREWORD

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Stopping the scourge of war and conflict is a moral imperative that demands urgent action requiring the concerted efforts of governments, mediators, the United Nations, and all those who abhor violence and human suffering. Nonetheless, experience shows that the cessation of hostilities and the compromises reached around a negotiating table are not enough to guarantee peace in the long run.

Sustainable peace requires more than agreements between leaders: it requires institutions that are worthy of trust, that respect human rights. In turn, these institutions require the confidence of citizens who previously only had reasons to distrust state authorities. Only then is the recurrence of violence less likely.

To help build this common ground of values and civic trust, peace mediators have increasingly recognized the need to give a voice to the victims of the conflict and examine the root causes of the violence. They have often turned to truth commissions, which vary in scope but coalesce around the same core mandate: to seek the truth about past abuses in order to recognize the dignity of victims, uphold human rights, and contribute to social change.

Exploring the interplay of peacebuilding and truth seeking was the purpose of the symposium “Challenging the Conventional: Can Truth Commissions Effectively Strengthen Peace Processes?” jointly convened by the International Center for Transitional Justice (ICTJ) and the Kofi Annan Foundation in November 2013, at the Greentree Estate, in New York.

The symposium provided an opportunity to bring together policy makers, practitioners, and scholars (whose names appear at the end of this report) with significant experience in peacebuilding and transitional justice for robust discussions and critical reflections on truth commissions and the challenges of addressing accountability in peace negotiations. I believe that these proceedings, summarized here, will be useful to mediators, jurists, government officials, and civil society activists working in countries affected by conflict around the world.

I would like to thank the Government of Finland for its generous grant as well as ICTJ and Foundation staff, led respectively by David Tolbert and Alan Doss, who made the symposium possible. I also thank the Greentree Estate for hosting our discussions.

Finally, I wish to acknowledge and thank all of the participants for their contribution and passionate participation in the debate, which speaks both to their wisdom and their moral commitment to peace and human rights.



**KOFI ANNAN**

Former Secretary-General, United Nations  
Chair, Kofi Annan Foundation





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## PREFACE

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This publication reports on the proceedings of “Challenging the Conventional: Can Truth Commissions Effectively Contribute to Peace Processes?,” a symposium jointly organized by the International Center for Transitional Justice and the Kofi Annan Foundation in November 2013.

The organizers had grappled with what seemed like a singular paradox. Several truth commissions had been created after armed conflicts, with a growing tendency towards uniformity in their mandates. At the same time, knowledge of the challenges faced by truth commissions has continued to grow, with a strong prescriptive bent, derived from the observation of comparative experiences. Despite the expansion of this collective knowledge, however, some recent truth-seeking processes have gone through near-paralyzing crises.

In the light of actual practice, the symposium reexamined assumptions about how truth commissions may be established and what makes them operate effectively. Participants wanted to take seriously a rule that is often expressed, but not always applied: there is no universal formula to fit every possible scenario.

Therefore, this report does not aim to substitute current standards with new ones. It is instead a call for well-informed analysis of concrete situations, distinguishing between those elements in truth seeking that are smart policy suggestions (prudent and effective in certain contexts but not always transferable to others) and those that constitute clear human rights obligations.

The reflections in this report may be useful for specific readers: first, peace advocates and supporters of negotiated settlements who envision truth-seeking as part of a peacebuilding process and need to know what challenges their proposals are likely to face, from inception to implementation. Second, human rights defenders and victims’ activists who are anxious to ensure that peace settlements and other forms of political agreement do not sacrifice victims’ rights for the sake of convenience. Third, international organizations and agencies making decisions on whether to support processes that are always fraught with risk, where ideal formulas are displaced by imperfect realities.

The report includes a summary of the topics examined at the symposium. Positions expressed are not attributed to individuals, as the discussion was conducted under Chatham House rules in order to facilitate candid exchanges based on direct, personal experience. The summary does not follow the structure of the agenda, but instead identifies the main issues that emerged at the symposium—particularly the challenges of creating effective truth commissions, the potential of commissions to consolidate peace, and practical responses to common challenges.

Two analytical essays explore the state of our knowledge regarding truth commissions. The first essay, “Set to Fail? Assessing Tendencies in Truth Commissions Created After Violent Conflict,” critically examines several trends in establishing truth commissions that are often identified as international standards or obligations, such as the preference for establishing truth commissions through legislation and the appointment of commissioners on the basis of representativeness, rather than competency. The paper suggests that some of these trends are in reality observations of practices that were highly sensitive to local circumstances; hence, they are not always the best choice for other contexts.

The second essay, “Risks and Opportunities in a Truth Commission Process,” reconstructs the phases in the evolution of a truth commission, from inception to implementation to conclusion. It identifies in each phase the risks that may affect the future effectiveness of the commission, as well as possible opportunities. The essay pays special attention to early phases in the process: the period leading up to the inclusion of a truth-seeking commitment in a peace agreement, the period in which a legal mandate is designed and enacted on the basis of guidelines set up in the peace agreement, and the selection of commissioners to lead the inquiry.

Both essays were presented as background papers at the symposium, but have since been updated to reflect the debates.

Five case studies follow, illuminating many of the practical realities of implementing truth commissions borne of peace negotiations. These papers examine the experiences in Guatemala, Sierra Leone, the Democratic Republic of the Congo, Kenya, and Nepal. Though originally drafted as background papers, they have since been revised to reflect discussions at the symposium.

The criteria for choosing cases require some explanation. The selections do not approach comprehensiveness, but are rather indicative of commissions established through truth-seeking provisions in a peace settlement. Cases like Cote d’Ivoire, Peru, and Timor-Leste were left out because their truth commissions were not established as part of a peace negotiation; their conflicts had a clear victor.

The five cases also present significant variety in calling attention to different phases in the truth-seeking process, as each truth commission experienced difficulties at a different juncture. In Nepal, for example, the establishment of a truth commission has suffered delays at the early legislative phase. (At the time of the symposium, Nepal’s initiative was still paralyzed.) In the Democratic Republic of the Congo, the truth commission was established and commissioners were named very quickly, but controversy and a lack of credibility resulted in only very limited implementation of the commission’s mandate.

The selection of cases, then, attempted to follow the “life cycle” of a truth commission, examining key moments when challenges can emerge and how responses of national advocates and experts, and international supporters, can sometimes contribute to a constructive response. The cases are significant because several of the challenges they present can scarcely be addressed through the automatic application of “best practices,” which may not work in all instances. In the five cases, constructive steps were taken as the result of the creativity, credibility and political courage of individuals and agencies engaged in the process.

Finally, the report offers a set of conclusions that, although tentative, seek to emphasize the critical questions that agents driving the truth-seeking process need to ask themselves at each phase. The conclusions propose forms of thinking that, while respecting the normative progress made on truth commissions, allow for analysis of the actual conditions in each context. They address five basic questions: 1) the reasons why a truth commission may be set up as part of a peace process; 2) the state of local demand and the political conditions in the country where a commission is being proposed; 3) the ability to persevere in the truth-seeking exercise; 4) the value of the various prescriptive assertions that are made about truth commissions (“standards,” “best practices,” etc.); and 5) the recognition that the credibility of those who are leading the process, especially the commissioners, are a fundamental factor for success.

The hope is that these reflections will assist in the decision-making process that negotiators and peacebuilders will face in future scenarios.

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## SUMMARY OF DISCUSSIONS

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Mr. Kofi Annan opened the symposium by calling on participants to take an honest, hard look at the successes and missed opportunities of truth commissions established in the wake of armed conflicts. He emphasized the complexity of the challenges facing mediators when incorporating truth commissions into peace processes. Mr. Annan also affirmed that measures of accountability like truth commissions, rather than undermining stability, help to pave the way to genuine peace.

The six sessions, held under Chatham House rules, favored debate over prepared speeches and presentations. The moderators, experts in their fields, ensured that discussions centered on relevant analysis and practical knowledge. The organizers focused the discussion on a limited number of cases, chosen to reflect the participants' experience as well as variations in the conflicts and political processes that truth commissions have addressed. As the case studies in this report show, some truth commission proposals have stagnated, as in Nepal, while others have faced severe difficulties at successive phases, as in the Democratic Republic of the Congo and Kenya. The conflicts from which commissions have emerged also vary significantly in intensity and duration.

The cases chosen for discussion all involved some degree of international mediation and support from friendly countries, regional organizations, or the United Nations. The principle aim of the discussions was to shed light on the problems that face international mediators and supporters of negotiations aimed at stopping violence and propose a range of possible solutions.

### **Avoiding Unrealistic Expectations Is Vital**

Participants identified as a critical problem the unrealistic expectations that are often set for truth commissions. Raising expectations among victims that a truth commission will solve all of their urgent demands can create frustration and mistrust, compounding an already difficult situation. Similarly, any suggestion that such a body could solve all of a country's ills only sets up the public for disappointment.

There was consensus among participants on the need to instill realistic expectations among civil society groups and the public by not "overselling" a truth commission, while striving to keep them committed to the process by explaining its potential contributions to peace.

It was stressed that truth commissions are part of a larger transitional justice process rather than integral, one-time solutions in themselves. Other measures, such as limited institutional reforms, may be carried out concurrently, thereby providing citizens with more immediate gains during a truth-seeking process that may take many years.

Peace negotiators should avoid thinking of a truth commission as the only means of securing victims' right to truth. Parties should identify other measures that can contribute practically to this right, such as providing better access to official records and taking urgent action to determine the fate of those who were forcibly disappeared during the conflict.

Civil society groups should be encouraged to engage in discussions about what the right to the truth entails and the process by which states carry out

investigations into gross human rights violations as part of their obligation to provide redress to victims. The right to truth is a right to a process of seeking information or forensic evidence, but not a right to guaranteed results. Therefore, it was suggested that the state and civil society should provide effective support to victims who may find the truth-seeking process an onerous and challenging journey.

### **Ever-Expanding Mandates Pose a Range of Risks**

The mandates of truth commissions have continued to expand in recent decades, as they have been required to cover an ever-wider range of violations and carry out a greater number of functions. This is a source of increasing concern for experts in the field, including the UN Special Rapporteur on truth, justice, reparations and guarantees of non-repetition, who emphasized this in his August 28, 2013 report.<sup>1</sup>

Early commissions had very limited mandates, with a restricted list of objectives. While mandates have since expanded, commissions have not been allocated additional resources. Parties and advocates engaged in a peace process must beware of the dangers of endowing a truth commission with an expansive mandate that is difficult or impossible to carry out. The differing experiences of truth commissions in Guatemala and Kenya illustrate these dangers.

In Guatemala, the mandate of the Commission for Historical Clarification (Comisión para el Esclarecimiento Histórico, or CEH) was fully negotiated by the parties to the 1996 Oslo peace process and implemented directly, without the mediation of a subsequent law or executive decree. Because the agreement limited the powers of the commission, it was criticized by advocates and victims' groups, and the CEH started its journey with very low expectations. Paradoxically, this provided commissioners with breathing space to start the process; it motivated them to deliver more and afforded them the flexibility to interpret their mandate in ways that reflected victims' demands.

In Kenya, by contrast, the Truth, Justice and Reconciliation Commission (TJRC) was a long-expected and delayed measure. A comprehensive commission was first proposed in 2002, when the transition to multiparty rule was energized by national optimism and mobilization. When the proposal was resurrected after the 2007–2008 post-election violence, the result was a highly ambitious mandate; but the political leadership was far less interested in the potentially embarrassing work of a truth commission. Further, the Kenya mandate was more stringent than other comparable commissions: it was cast in detailed legislation that demanded the full truth regarding acts amounting to violations that had occurred over the commission's lengthy jurisdiction—which covered more than 45 years—a task that proved almost impossible to complete.

Participants did not reach an agreement on whether the Kenyan TJRC's mandate was overextended. Some asserted that the broad mandate resulted from consultations with a well-organized and well-informed civil society, such that international advisors would have been ill placed to recommend a narrower mandate. Most important, Kenyans did not perceive the mandate as too wide.

Sometimes a broad mandate arises from political realities beyond the control of peace mediators and practitioners. It may be unwise to oppose a mandate that represents the genuine demands of key victim constituencies. Indeed, the legitimacy of a nascent commission may depend in part on how victims see their claims reflected in the mandate.

Broad mandates can give rise to an imbalance, however, between what truth commissions are expected to accomplish and the powers and resources they are allocated. As participants noted, this problem is often compounded by corruption and a lack of infrastructure and skills in fragile post-conflict environments.

The period of time to be covered by a mandate is highly political. During peace negotiations, each party seeks to include a range of years that favors its own version of the facts. Peace mediators must deal evenhandedly with such demands, to ensure that the truth commission is seen as legitimate, while encouraging the parties to settle on a time period that is short enough to be realistically covered. The period and thematic scope of a commission may also be disputed later by victims' groups, who are not usually present at peace negotiations and may want their own valid claims to be incorporated into the mandate.

Part of the problem with expansive mandates may be that societies believe that a truth commission is the only way to act decisively on victims' rights. But a truth commission may not be the best tool for investigating some issues that are significant elements of history for a post-conflict society. For example, economic injustice and corruption may be better addressed through investigations by a special prosecutor or through freedom of information legislation. To reduce inefficiencies and avoid wasting resources, it is also vital to ensure that as mandates broaden, they should not duplicate the work of previous, concurrent, or planned transitional justice mechanisms.

### **Dangers of Applying a Uniform Approach**

Participants expressed caution about the proliferation of a set of guiding norms ("best practices" or "lessons learned") regarding the creation of a truth commission. Not every practice that appears to be successful in one case should reach prescriptive status; the enormous diversity of cases and circumstances should force practitioners to avoid any kind of automatic application of rules.

Ideas often presented as strong standards include: 1) requiring legislative passage of a mandate, instead of issuance by decree or other means, 2) prioritizing reconciliation as the object of a truth commission, often above the goal of truth, 3) equipping a commission with powers to compel witnesses and documents that are often difficult to exercise, and 4) requiring “broad, extensive and prolonged” social consultations that could be simplified to take advantage of the momentum of the transition.

The knowledge accumulated about truth commission has laid the foundations of further efforts to meet the rights of victims, but applying it inflexibly, without analyzing concrete conditions, leads to situations in which the “best becomes the enemy of the good.”

A significant part of the discussion revolved around the risk of over-standardization (see Chapter One, *Set to Fail?*). While no one objected to an allegiance to key human rights principles, there was an understanding that activists and practitioners on the ground require flexibility in their assessment of conditions, especially while tackling operational challenges under less-than-ideal circumstances. A human rights approach requires that a truth-seeking initiative affirms the right to the truth as much as possible, respects the principle of nondiscrimination and basic guarantees of due process, and is incompatible with amnesties for acts considered crimes under international law.

There was a clear consensus against the “standardization” of truth commissions proposed in peace processes, in favor of carefully assessing local conditions, including: the security situation; the intentions and influence of potential spoilers; and the capacity, organization, and mobilization of victim constituencies. Neglecting to assess such factors may lead to the failure of a truth commission and harm the medium- to long-term viability of transitional justice policies. Another factor that often escapes analysis, and on which there was ample debate, is the difficulty of transposing practices applied in a post-dictatorial situation to a post-conflict situation.

The symposium examined a number of situations that defy supposed good practice because of context-specific factors. In some cases, the anxiety to comply with practices that are deemed “standard” may be counterproductive, introducing rigidities into negotiations and prolonging the policy-making process.

Participants were critical of the appropriateness of proposing a truth commission in Nepal, for example. There was little indication of local demand for such an institution, aside from the visibility of the issue of enforced disappearances, around which there already exists constituencies and formal promises by the parties. The proposal of a truth commission has

further complicated a situation characterized by the power of the Nepalese army to block any steps towards accountability, the defensiveness of Maoist leadership should they come to power, and the role and alignments of the most visible sectors of civil society. In the months since the symposium, those tendencies have prevailed, resulting in truth commission legislation that has been strongly resisted by victims’ groups and pays scarce attention to the search for the disappeared.

Premature action, with little preparation, has been a problem in some truth commissions. It is also true, however, that choosing a highly legalistic, institutionally heavy model may prolong the policy-making process, raising the risk that the political conditions and goodwill of locals towards a commission might falter. Insisting on an overly powerful and broad mandate can cause draft legislation to be held up in debates in parliament for many years and, worse yet, to be rejected for passage into legislation.

Setting the right balance and charting the right path on the basis of accurate analysis seems to be the fundamental challenge. Participants acknowledged the value of what has been achieved in establishing norms. Identifying fundamental human rights principles around truth seeking and information sharing has, among other benefits, empowered victims’ groups and their advocates.

In Colombia, for example, advocates have used well-established human rights standards in several areas of transitional justice, and the national courts have developed their own standards (to the extent that they may have become more stringent than international human rights instruments). The current peace process is taking place against a backdrop of energetic advocacy for the use of human rights principles, in a highly legalistic culture, where human rights defenders make extensive use of litigation.

The demand for a truth commission in Colombia has emerged from concrete local demands but has also been debated in the legislative branch and incorporated into the constitution as part of the framework for peace. Thus, the parties arrived at the peace negotiations conscious that standards exist and that any attempt to tinker with them would presumably be challenged in parliament or in the courts. It was posited that if a truth commission were created in Colombia, policymakers would probably endow it with wide investigative functions, scope, and powers, which would pose serious technical challenges to its effective implementation.

Opinions diverged significantly over the assertion that a truth commission implemented “by the book” may take an extremely long time to do its work and thus miss the window of opportunity created in a post-conflict situation. Most commissions have been created soon after the moment of a transition.



Some participants took this to mean that the momentum and political space created in the wake of a conflict must be seized and used to establish a truth commission, even if it is less than perfect. Other participants took this to mean merely that in many cases the political space to establish a commission may become available only years later and, therefore, that insistence on factors identified as good practice may eventually pay off, even if later on in the process. Further analysis is necessary to assess the degree to which the timing of the creation of a truth commission affects the perceptions of its success.

The discussion was inconclusive regarding how much of the design of a truth commission must be decided by the parties during peace talks. Undoubtedly, the parties will feel that there are more guarantees for them if they were to set up all of the elements of a mandate; but their interests may clash with some of the essential principles enunciated above. To date, commissioners have had room to interpret their mandates in ways that enhance and challenge the original parameters.

### **Commissioners and Staff Must Be Independent and Capable**

One point that emerged repeatedly in the symposium was the importance of leadership. An institution that emerges without precedent on the basis of an extraordinary arrangement and faces a task of enormous moral and symbolic significance needs strong, capable and independent guidance.

This point is clearly made in the 2013 report by the UN Special Rapporteur, which is very critical of the focus on the “representativeness” of commissioners that has come to dominate selection criteria for commissioners, instead of qualifications and personal attributes. The drafters of mandates have attempted to make truth commissions into microcosms of society, ensuring that all regions, ethnicities, and political positions are represented. While this trend is inspired by a valid concern with legitimacy and fairness, several commissions have faced crises over the aptness of some members. Commissioners need to be strong communicators and builders of trust in order to translate high expectations into concrete plans and activities and to explain the shape of the commission’s work.

The presentation and discussion on Guatemala emphasized the unique role that commissioners played in overcoming high levels of public mistrust that initially surrounded the commission. The commission was small, comprising just three members, and its membership was established on the basis of expertise and credibility, not representativeness. The commissioners were able to reach out to communities and open dialogue with civil society organizations to address victims’ concerns. In addition, the commission was equipped with well-qualified staff whose work allowed the commissioners to focus on the larger vision and the integrity of the exercise.

Kenya’s Truth, Justice and Reconciliation Commission provides a counterexample. It undertook a complex process to select commissioners on the basis of stringent legal requirements, but little attention was paid to the individual record of each member, resulting in a controversial appointment to the position of chairperson. When concerns were raised over the chairperson’s possible links to past human rights abuses, the legitimacy of the truth-seeking process was brought into question, and the commission had to spend significant time and energy to address the issue.

Strong commissioners are needed to hammer out persuasive policy recommendations. Recommendations that are too general, not based on the actual inquiry, or lacking the support of authoritative technical expertise will not have the credibility to garner the support needed for implementation.

It was also stressed that even detailed mandates will leave several areas open for the interpretation of commissioners. Participants in a peace process must be prepared for the mandate to be implemented by persons with the authority and capacity to set out their own vision.

### **Beware of Aiming to “Reconcile” a Divided Society**

Truth commission mandates identify reconciliation far more prominently as a goal than establishing the truth. And more and more commissions are being created with the expectation that their foremost task is to reconcile society or, in some cases, to reconcile individual victims and perpetrators.

The reconciliatory effort often oversteps its limits, however, and leads commissions into territory where they may neglect the rights of victims. This is especially likely when negotiators create a commission that may insulate perpetrators from future justice proceedings through mechanisms such as amnesties and other obstacles to accountability. While proponents may try to legitimize such maneuvering by pointing to the experience of South Africa’s Truth and Reconciliation Commission as a so-called “tradeoff of rights,” participants at the symposium stressed that such formulations are a warped and partial understanding of the complex mechanism used in that context, and its consequences.

Further, it is necessary to be honest about the confusions and mystifications that are likely to occur at the negotiating table. In particular, parties may link reconciliation to alternatives to criminal justice. Disabusing the parties of such notions may result in immediate disappointment, but it will also introduce elements of realism into how truth commissions are designed.

Societies may also mistakenly expect that by the time the truth commission’s work is completed, the country will be

reconciled, and that reconciliation is directly linked to forgiveness, which victims may be expected to grant. This is a recipe for skepticism and resistance to the work of a truth commission.

### **Why Support from the International Community Waxes and Wanes**

Supporting truth commissions entails a risky “bet” by international organizations. Commissions are ad hoc institutions that must achieve increasingly ambitious mandates within tight timeframes in divided societies; they often lack sufficient infrastructure, expertise, goodwill, public trust, and good faith guarantees from those in power.

Historically, members of the international community have withdrawn their support—political, technical, financial, or moral—in response to an internal crisis or because of changes in their own national policies or political administrations. The phenomenon of “pick and choose” may result in funding for some truth commissions, while leaving others deprived of resources, despite an equal need for support.

In Kenya, prolonged litigation over the suitability of the TJRC chairperson caused a credibility crisis, first in civil society and then among international organizations. As the dispute evolved, Kenyan civil society groups granted or withdrew their support for the commission and, consequently, so would donors and international nongovernmental organizations.

While participants agreed that international support for commissions is desirable, an open crisis may evoke varied responses from institutions. Was withdrawing support from Kenya’s commission appropriate, given the deeply problematic situation of its chairperson, or did it deprive good-faith commissioners of their chance to succeed in the struggle? The symposium did not attempt to respond definitively to such issues, but the persistence of different analyses of Kenya’s commission reinforced the theme that guiding norms and standards cannot cover all circumstances and that in a situation of crisis practitioners must rely on strong analysis and political responsibility.

Participants also stressed the importance of technical competence and agreed that it is unproductive to channel financial resources into an institution without strong, independent commissioners or competent staff.

An idea that was presented, but which required more discussion, was whether donors should set up an ongoing trust fund, or another mechanism of consultation and cooperation, to finance the establishment and/or operation of truth commissions.

### **Is a Truth Commission Appropriate? The Need for Serious Political Analysis**

Participants stressed that ignoring the local context leads to failed or ill-timed truth commissions. In particular, failing to contain spoilers or identify structural constraints to accountability undermines the medium- to long-term viability of commissions. It is thus imperative that peace mediators and transitional justice practitioners undertake a thorough analysis of the political landscape before recommending the establishment of a truth commission and defining its scope and powers. There was a consensus that it is better to have no truth commission in the short term than one that fails, demoralizes victims, and disappoints stakeholders.

A fundamental element seems to be the makeup of civil society. Is it independent enough to advance the rights of victims? Is it sophisticated enough to articulate comprehensive transitional justice agendas and make difficult tactical decisions?

Analysis may reveal that a truth commission is not warranted, but that the right to the truth—and the rights of victims in general—may benefit from other practical measures or reforms. For example, if spoilers are powerful and pose a threat to victims, policies such as vetting and security sector reform may be made a priority. If a lack of transparency is a problem, measures of access to information and government accountability may be critical.

### **Timing and Strategies for Ensuring Accountability**

If peace mediators have the responsibility to put issues of accountability on the table, when is the best time to do so?

In the past, mediators have raised the possibility of a truth commission as a first step toward accountability. Warring parties have avoided taking up such proposals when they felt that the findings of a truth commission would jeopardize their political aspirations. Mediators could then rely on the passage of time for judicial accountability to eventually provide justice for victims. But are the same tactics available to a mediator today, with the notoriety of war crimes prosecutions in recent decades, at The Hague, in Rwanda, and elsewhere, coupled with developments in international criminal law? More fundamentally, a new framework of international law incorporates the rights of victims, including the right to know the truth about past abuses, as a critical consideration in a peace deal.

Transitional justice provides tools to navigate these tensions. However, sometimes the notion of comprehensive approaches to truth, justice, reparation, and guarantees of non-repetition is seen as an incentive to set up institutions that run parallel in time, which may not always be possible. An inflexible approach may deprive participants in a peace-and-accountabil-

ity process of the strategic vision needed to think in the long term and, in some cases, to proceed incrementally in favor of accountability.

Colombia is taking a frank approach in this regard. In negotiations with the Revolutionary Armed Forces of Colombia (FARC), the government has been direct about the legal constraints that now exist domestically and internationally, instead of avoiding the issue. The government has publicly urged the FARC to see that it has no option but to engage in a negotiation that contemplates—at some future point—the prosecution of those most responsible for international crimes. FARC, on the other hand, has also found reasons to include a truth commission in the peace deal, as otherwise there may be little space for a political assessment of the causes of the conflict.

Previously identified “good practices” provide little guidance on the timing of accountability measures. An ideal, purely legal vision may see all transitional justice policies as requiring immediate action, but there was clear consensus at the symposium that in most cases limitations on security, capacity, levels of demand, and the sustainability of the peace process will force the parties and mediators to think in terms of sequences. What seems to be vital is the productivity of the first steps and how much of a dividend they pay to society.

## Conclusions

The symposium was the first such gathering that convened participants from the peace negotiation and truth-seeking fields to discuss their role in peacebuilding. It provided a rare opportunity for participants to see other approaches to key issues of transitional justice and peace processes and to develop new tools for stronger, more effective, and resilient peace processes.

The fundamental goal of creating a forum to exchange views and experiences among the different communities of practitioners was regarded satisfactorily by the participants. The hope was expressed that further exchanges and debates would follow what had been an encouraging discussion.

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1. Pablo de Greiff, Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, A/HRC/24/42, August 28, 2013 [Hereinafter “De Greiff Report,”] at 16 ff.



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## PROGRAM OF THE SYMPOSIUM

**WEDNESDAY, NOVEMBER 13, 2013**

**9:30-9:40**

### **Greetings & Goals of Meeting**

**David Tolbert**

*President, International Center for Transitional Justice*

**9:40-10:00**

### **Keynote Speaker:**

**Kofi Annan**

*United Nations Secretary-General (1997-2006)  
Chairman of the Kofi Annan Foundation*

**10:00-10:30**

### **Q&A with Kofi Annan**

**10:45-12:00**

### **Session One. Peace Agreements and Truth Commissions**

A discussion on why truth commissions have been proposed in peace processes. Who were the primary proponents of truth commissions in peace processes, and what did they expect from the commissions? Since they were established initially in post-dictatorial scenarios, what challenges do they face in post-conflict settings? What challenges are faced by commissions emerging from peace negotiations?

#### **Moderator:**

**Alan Doss**

*Senior Political Advisor, Kofi Annan Foundation  
Former Special Representative of the Secretary-General for the Democratic Republic of the Congo and Liberia*

#### **Speakers:**

**Pablo de Greiff**

*UN Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-recurrence  
Director of Research, International Center for Transitional Justice*

**Jean Arnault**

*Former Special Representative of the Secretary-General for Georgia, Afghanistan, Burundi, and Guatemala  
Non-Resident Senior Fellow, Center on International Cooperation, New York University*

**12:00-13:15**

### **Session Two. Conventional Wisdom and Standards**

A discussion on what essential principles and practices must be followed in order to establish independent, credible, and effective truth commissions. Do current guidelines and trends on truth commissions serve that purpose? Examine situations where a lack of standards has resulted in weak truth-seeking mechanisms and others where presumably “too much standardization” has become problematic.

#### **Moderator:**

**David Tolbert**

*President, International Center for Transitional Justice*

#### **Speakers:**

**Cécile Aptel**

*Senior Legal Policy Adviser, Office of the UN High Commissioner for Human Rights*

**Eduardo González**

*Director of the Truth and Memory Program, International Center for Transitional Justice*

**14:15-15:30**

### **Session Three. Factors of Risk for Truth-Seeking Processes**

Address key milestones in the life of a truth commission, particularly in its earlier stages (peace agreement provisions; legal mandate; appointment of members). Describe examples of stagnation or failure to launch truth commissions and explore the role of peace mediators and other international practitioners. Did weaknesses and failures emerge because of excessive zeal around existing guidelines and trends, or the lack of them? Could something have been done differently? What advantages and disadvantages have been observed about having direct international participation in commissions, whether as commissioners or staff?

#### **Moderator:**

**Jordan Ryan**

*Assistant Administrator and Director of the Bureau for Crisis Prevention and Recovery United Nations Development Programme*

#### **Speakers:**

**Ian Martin**

*Former Special Representative of the Secretary-General in East Timor, Nepal, and Libya  
Former Secretary-General of Amnesty International*

**Betty Murungi**

*Vice Chairperson of the Kenya Human Rights Commission  
Former Vice-Chair of the Truth, Justice and Reconciliation Commission of Kenya*

**16:00-17:30**

### **Session Four. Seizing Opportunities: How do you respond to critical moments on a truth commission?**

Describe successful responses to critical situations and challenges in truth commission processes. How have international stakeholders addressed weak legal mandates, waning political support, public mistrust, scarce resources, and other challenges? In new situations, when guidelines and comparative practice are scarce, how have international supporters of truth commissions acted?

#### **Moderator:**

**Alvaro de Soto**

*Former UN Envoy for Central America, Myanmar, Cyprus, the Western Sahara and the Arab-Israeli conflict  
Visiting professor of Conflict Resolution, Sciences Po, Paris*

#### **Speakers:**

**Marcie Mersky**

*Director of Programs, International Center for Transitional Justice*

**Howard Varney**

*Senior Program Adviser, International Center for Transitional Justice*

**17:30-18:00**

### **Closing Discussion**

#### **Speaker:**

**Joëlle Jenny**

*Director for Security Policy and Conflict Prevention, EEAS, EU*

THURSDAY, NOVEMBER 14, 2013

9:00-10:30

**Session Five. The role of the international community in facing difficult situations**

Drawing on experience, what should the international community and mediators do to anticipate problems as commissions emerge, and when they face difficulties? How do we ensure consistent international support for emerging commissions? Reflect on areas of challenges, such as sustaining domestic political support, ensuring international attention, and securing adequate resources. How do we improve current guidelines and knowledge about commissions?

**Moderator:**

**Priscilla Hayner**

*Independent Expert on Transitional Justice*

**Speakers:**

**Francesc Vendrell**

*Adjunct Professor of International Relations at the Paul H. Nitze School of Advanced International Studies, Johns Hopkins University;  
Senior Visiting Fellow, The London School of Economics and Political Science;  
Former Special Representative of the EU for Afghanistan and Former Personal Representative of the Secretary-General and Head of the UN Special Mission for Afghanistan*

**Ahmedou Ould Abdallah**

*Ambassador; President of the Centre for Strategy and Security in the Sahel Sahara;  
Former Special Representative of the Secretary-General for Somalia, Burundi, and for West Africa*

14:00-15:30

**Conclusion and Recommendations**

In the closing session, speakers will present an overview of the conclusions of the symposium, with a particular focus on recommendations made and next steps.

**Co-Chairs:**

**Alan Doss**

*Former Special Representative of the Secretary-General for the Democratic Republic of the Congo and Liberia*

**David Tolbert**

*President, International Center for Transitional Justice*

11:00-12:30

**Session Six. Where do we go from here:  
The urgent need for solutions**

Presentation and discussion of emerging situations where truth seeking may become part of a peace process, as in Colombia, Myanmar. How could peace mediators and TJ practitioners better contribute to those processes, if that is appropriate? How to take into account the significant cultural, political and institutional differences in new, emerging cases?

**Moderator:**

**Paul Seils**

*Vice President and General Counsel, International Center for Transitional Justice*

**Speakers:**

**Juanita Goebertus Estrada**

*Advisor, Office of the High Commissioner of Peace, Government of Colombia*

**Rodrigo Uprimny**

*Executive Director, Centre for the Study of Law, Justice and Society*

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# Set to Fail? Assessing Tendencies in Truth Commissions Created After Violent Conflict

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By Eduardo González

## Setting Out the Problem

Truth commissions have become common components of post-conflict policy,<sup>2</sup> with parties involved in peace processes routinely including commissions in the agendas of their negotiations and final agreements.<sup>3</sup>

There are good reasons to think that a truth commission can contribute to rebuilding a society torn apart by violent conflict. By establishing the facts of past violations with rigor and impartiality, it can help to restore victims' rights. By interpreting the conflict's historical context, it can identify the factors that drove the violence. And by providing a respectful and safe space for testimonials, it can pave the way for victims to heal and former combatants to reintegrate into society.

Conflicts that are not seriously examined persist in the form of polarized memories and strategic lies that can feed mistrust, humiliation, and new cycles of violence. By shining light on the facts and giving diverse groups the opportunity to tell their stories, commissions reduce the possibility of manipulation and hateful narratives, and may restore a sense of trust among citizens.

Some of these considerations figure prominently when parties to a conflict envision including a truth commission in an agreement to stop the violence. Former enemies may have a genuine intent to create a lasting peace and strengthen social solidarity. However, there may be pragmatic reasons for proposing a truth commission, such as finding an alternative to criminal prosecutions for violations committed during the conflict. The parties may see prosecuting acts committed by their supporters as dangerous, embarrassing trials may imperil the parties' political viability once the peace is won, and re-crimination between parties may continue after a peace agreement is signed.

For idealistic and pragmatic reasons then, truth commissions are incorporated into peace processes.

The international community has seen this tendency increase, and largely it has supported it. International practitioners in the field of human rights and peace mediation see truth commissions as part of an effective transitional justice policy and as instruments that can contribute to the rule of law and the rights of victims of gross human rights violations.

As a direct result of interest in truth commissions and the expanding knowledge about how they function, a number of principles, best practices, and recommendations have been identified that can provide guidance to national and international actors when truth-seeking institutions are proposed in the midst of a peace process.<sup>4</sup> Disseminating principles and best practices can

provide arguments in support of robust mechanisms and strengthen the position of victims and civil society organizations when their voices are marginalized.

Yet, surprisingly, despite high expectations for truth commissions and the growth of expertise around them, recent initiatives have faced serious crises that have undermined their performance.<sup>5</sup> Some recent negative examples seem to have a simple explanation: creating commissions without following best practices sets them up to fail.<sup>6</sup> What is more challenging to explain is why commissions that have benefited from significant international support, the participation of international experts, and knowledge of past examples have also failed to achieve their objectives.<sup>7</sup> Is it possible that the conventional wisdom that transitional justice offers is part of the problem? Is it possible that in spite of the caveats against the automatic application of best practices, drafters and other stakeholders pay more attention to what appears to be international standards than to realities on the ground?

The UN Special Rapporteur on the promotion of truth, justice, reparation, and guarantees of non-recurrence has sounded the alarm recently about these challenges, inviting the international community to critically examine trends in the practice of truth commissions.<sup>8</sup>

A critical appraisal of principles and best practices for truth commissions should not be seen as an attempt to devalue efforts to instill human rights considerations into peace processes by those in the fields of peace mediation and transitional justice. The international convergence around best practices reduces the ability of spoilers to block genuine investigations or establish weak commissions.<sup>9</sup>

Paradoxically, there may be risks in the success of truth commissions that “follow the book,” as it may suggest that best practices are easily transferable between contexts. There may be a lack of clarity on which guidelines actually derive from human rights obligations and which are merely the result of practical observation. And it may be that common features in commission mandates are seen as best practices when they are merely a trend.

This paper reviews strong tendencies in the establishment of truth commissions that have gained credence as good practice. It examines them critically and proposes questions that may encourage debate and new responses. The paper assumes that truth commissions can make powerful contributions to human rights in the fluid environment of a peace process, but it also takes seriously the caveats built into different enunciations of best practice.<sup>10</sup>

## Truth Commissions in Post-conflict Settings

The first truth commissions were implemented in post-authoritarian transitions, as in Latin America’s Southern

Cone. The first commissions implemented in post-conflict settings as a result of peace negotiations were established in El Salvador (1992) and Guatemala (1994).

Some suggest that implementing a commission in a post-conflict environment is more challenging than in a post-authoritarian context because of the methodological difficulty of investigating patterns of violations typical of internal armed conflicts.<sup>11</sup> Conflicts tend toward diverse patterns of violations by several different agents, in some circumstances blurring the distinction between victim and perpetrator.<sup>12</sup> By contrast, investigations into patterns of violations typical of authoritarian regimes generally focus on violence that is overwhelmingly committed by one agent: repressive government forces.<sup>13</sup>

However, this distinction is based on observations of a certain type of authoritarian regime and internal conflict, and, like any generalization, it has limited value. There are many mixed cases, because internal armed conflicts sometimes result from escalating tensions caused by an oppressive regime, as in Guatemala and El Salvador. There are also cases in which an authoritarian regime is installed once a conflict has eroded democratic institutions, as in Mali.

A more significant distinction between truth commissions concerns the form in which the transition takes place, either through the total defeat of one side of the confrontation or through negotiation. Conflicts—political or armed—that end with total victory leave the victor with enormous power to maneuver and pursue accountability for perpetrators on the opposing side (“victor’s justice”). However, conflicts or authoritarian regimes that are settled through negotiation see the parties engage in a game of calculation and compromise when key aspects of the transition are set, including accountability.

In protracted conflict situations, a conclusive military victory has become increasingly rare, as in Sri Lanka. In many cases, negotiations take place once the exhausted rivals decide to preserve their partial gains rather than risk a total loss or continued bloodshed. Unique to post-conflict commissions, their mandates often reflect complicated negotiations and the positions of the stakeholders, rather than the realities of the conflict and the interests of the victims.

In such a scenario, self-interested actors concerned with vindicating their role in the conflict and enhancing their prestige in the new political arrangement may have little appetite for an inquiry into past abuses, even though they harbor resentment about violations committed by rivals. When the parties are convinced of the potential benefits of a truth commission, they may have exaggerated expectations based on incomplete knowledge of well-known experiences, like South Africa’s.

The first complication for a future truth-seeking institution then is not the complexity of its investigation, but the process of its establishment. Parties with a problematic human rights record are often the ones setting the basic framework of a future commission. At this stage, the challenge for mediators and experts consists in navigating the tensions of a negotiation and trying to preserve the independence and effectiveness of the truth-seeking process, while managing expectations.

The pitfalls are many. Parties may be reluctant to commit themselves to truth seeking and refuse to recognize its importance to peace building. They may also include some language on a commission only to later neglect their commitment. Both attitudes—active opposition and benign neglect—require consistent, stable responses from mediators, experts, friends of peace processes, and other international stakeholders in order to encourage more constructive engagement.

The challenge for mediators and transitional justice practitioners is to encourage the parties to: ensure that there are sufficient guarantees for the independence of the commission as soon as interest has been expressed in creating it, maintain material and political support active for the duration of the inquiry, and commit to seriously consider the findings and recommendations produced by the commission over the long term.

## Reappraising Practices and Tendencies

Interrogating some current trends about truth commissions and the circumstances in which they emerge out of peace processes requires making a distinction between two types of prescriptions: 1) those anchored in human rights principles that should be advocated strongly in all circumstances, and 2) those based on observations of factors of success in specific contexts. Prescriptions of the first type include the recognition of the rights of victims to redress, the protection of due process guarantees, and the principle of nondiscrimination.

Following these principles, for example, ensuring that truth commissions do not include provisions forcing victims to waive certain rights in exchange for others is a strong standard, based on human rights obligations. Victims' rights are integral, as are state obligations to guarantee human rights; nobody should force victims to choose between their right to the truth and their right to pursue criminal investigations or reparations. Similarly, ensuring that truth commissions respect basic elements of due process is consistent with basic human rights protections, when commissions have a mandate to contribute actively to eventual criminal justice processes.<sup>14</sup>

Principles of nondiscrimination are also fundamental. To avoid discrimination, intentional or not, commissions should strive to give consideration to the specific rights of groups that are historically marginalized or particularly vulnerable, such as women,<sup>15</sup> children,<sup>16</sup> and indigenous people.<sup>17</sup> Such efforts are not only consistent with human rights principles, but they are good policy because they result in encouraging participation in the commission and enrich the commission's findings and recommendations.

Further, there may be prescriptions not specific to a certain country, but technically necessary for any viable institution. These are merely technical recommendations, regarding the management of the truth commission, ensuring adequate funding and budgeting, or reasonably clear terms of reference for the inquiry. These basic competencies are required of any institution, not just a truth commission.

What requires critical reappraisal are guidelines and trends that may not be directly linked to human rights principles and go beyond basic competencies.

### *Overly Ambitious Truth Commission Mandates*

The mandate of a truth commission is its foundational legal document, most often taking the form of an executive decree or a bill, though some commissions have been established by other means.<sup>18</sup> Legal mandates typically encompass the following elements:

- Objectives of the truth commission
- Authorized functions
- Scope of the inquiry
- Powers and resources, including the amount of time allowed for operations
- Composition of the commission<sup>19</sup>

The strongest tendency in the practice of current truth commissions is toward complexity, which is reflected in wide mandates with more ambitious objectives, more functions, larger scopes of inquiry, more powers, and larger commissions representing all sectors of society. It is possible to see this expansion as an effort to ensure that more victims have an opportunity to be acknowledged and give more sectors of society a stake in the experience. But, as we will see, this trend is problematic.

Early truth commissions had limited objectives and functions, typically focused on fact-finding through investigation. They had a limited focus on certain patterns of human rights violations committed over a very limited period of time,<sup>20</sup> and limited powers and resources that, nonetheless, proved adequate.



As an example, the Chilean Truth and Reconciliation Commission had as its objectives fact-finding and contributing to policy, with the ultimate end of preventing repetition.<sup>21</sup> The commission's functions were investigative and limited to those actions necessary to prepare an authoritative report. Its focus was on only three types of conduct: arbitrary executions, enforced disappearances, and murders committed by armed opponents. The powers of the commission were limited to asking possible sources for information, but not compelling individuals to cooperate with the commission.

Yet the tendency over the past three decades has been toward expanding the mandate in all dimensions, and this trend has been represented often as a good practice or a human rights obligation.<sup>22</sup>

A recent example is the Kenyan Truth, Justice and Reconciliation Commission (TJRC),<sup>23</sup> whose mandate lists 18 separate objectives, 12 separate functions, and a large catalog of conducts to be investigated. Although its mandate includes some redundancies, it expresses a clear willingness to create a comprehensive institution, charged not just with factually establishing events, but also with the historical and social explanation of those events. In addition to ambitious investigative objectives and functions, the commission was charged with a series of objectives and functions to provide redress to victims and offer policy recommendations to different state institutions. The TJRC had to focus on gross human rights violations defined so as to include all crimes against humanity, but also other abuses and conducts, including economic marginalization, ethnic oppression, and corruption that took place after Kenyan independence in 1963. The TJRC was endowed with significant powers, including the capacity to subpoena people and documentation, the possibility of facilitating amnesties for people cooperating with the inquiry, and the power to make its recommendations mandatory for Kenyan governmental institutions.

Clearly an extremely wide mandate, as the Kenyan example illustrates, will pose difficult technical challenges to any investigation. As the commission recognized in its final report, even under ideal circumstances with unflinching political support and abundant resources,<sup>24</sup> complying with such a mandate would be extremely challenging. In real-world conditions with less-than-ideal political support and scarce resources, an extremely wide mandate may set unrealistic expectations among stakeholders, insoluble technical problems for researchers, and failure to discharge even basic functions in a timely, efficient manner.

An overly ambitious mandate requires choices to be made, and perhaps, simplification of its implementation. In Kenya, faced with an insurmountable task, the commission decided, quite reasonably, to interpret its mandate as requiring investi-

gation into three main problems: "(1) Unlawful killings and enforced disappearances (including political assassinations, extra-judicial killings and massacres); (2) Unlawful detention, torture and ill-treatment; and (3) Sexual violence."<sup>25</sup> Similarly, faced with a temporal mandate of almost 50 years of Kenyan history, the commission chose to study only 6 specific periods of violence.<sup>26</sup>

The Chilean experience is a useful contrast. While the Chilean TRC had a limited mandate, which was criticized for being too narrow, the credibility of the report persuaded ample sectors of stakeholders and the government that the model was useful. Therefore, a second commission was established, which reported in 2004 on other patterns of violence, including torture and sexual violence.<sup>27</sup> In contrast, the risk of a mandate that is too wide, as exemplified in Kenya, is that the results of the inquiry cannot satisfy the public and may provide fodder to spoilers. While this paper does not suggest a return to extremely narrow mandates limited to a few violations, it is important to understand the risks and challenges regarding very wide scopes.

Another element deserving mention is enhancing the mandate to include strong powers, such as subpoena powers, the capacity to grant amnesties to people cooperating with the commission, and the compulsory nature of policy recommendations. The argument in favor of such strong powers is that they may help ensure an appropriate inquiry in the face of spoilers' resistance and actual effectiveness.

The results of enhancing the powers of a commission, however, are not always stellar. Some commissions operate in weak institutional environments in which a subpoena may not be enforced or de facto powers may mock any effort by the commission, making it look weak and ineffective. The Liberian Truth and Reconciliation Commission, for example, was endowed with a special judicial chamber attached to the commission with the sole purpose of issuing subpoenas, which was a resource-consuming effort and not always productive. In addition, as we will see below, giving a commission strong powers may require it to be established through law, opening a potentially difficult and protracted debate in parliament.

The debates around including amnesty powers have proven divisive in countries such as East Timor, Kenya, Liberia, Nepal, and Sierra Leone.<sup>28</sup> Faced with strong opposition and legal arguments, no mandate has authorized amnesties for gross violations of human rights in any way comparable to the mandate of the South African Truth and Reconciliation Commission. So-called amnesty powers have been reduced to amnesties for crimes not reaching the threshold of international crimes, or they have been reduced to powers to merely recommend amnesties, or left unused by the commission, persuaded of its ultimate ineffectiveness to elicit usable information.

Another trend regarding the widening of mandates concerns the capacity to make compulsory recommendations, like in Kenya, Liberia, and Sierra Leone.<sup>29</sup> The notion of compulsory recommendations flies in the face of logic and constitutional reasoning because they would amount to usurping the powers of government. In fact, in Kenya the compulsory character of the recommendations resulted in a constitutional lawsuit against the commission, seeking to block implementing recommendations.<sup>30</sup>

Paradoxically, commissions without strong powers may—in the right political conditions—make a stronger contribution by examining available evidence and using powers of persuasion. Until the recent experience of the Brazilian National Truth Commission, none of the Latin American truth commissions had subpoena power, and yet they managed to get the necessary information to produce strong reports.

The examination of cases may put into question the assumption that commissions are always better off with a wide mandate. Issues of practicality, resources, and the need to ensure timely passage of legislation must be given consideration.<sup>31</sup>

### *Extensive Social Consultations*

National consultations are formal processes of dialogue between government institutions and civil society that are conducted to gauge views, obtain proposals, and ascertain conditions for future engagement with a truth commission. They may take the form of meetings with representative civil society leadership, public opinion surveys, focus groups, and public fora.

Consultative approaches to creating and operating a truth commission are one of the strongest elements usually cited as good practice.<sup>32</sup> Typically, consultation is seen as a way to encourage support and legitimacy; it enriches the design of a transitional justice instrument. However, it has also been suggested that consultation constitutes a human rights obligation,<sup>33</sup> supported by key human rights instruments. While consultation may be smart policy, the argument that it constitutes a right of victims or a duty on states is less persuasive.

There is evidence that truth commissions established in a rushed manner without basic communication with victims' groups will have difficulty explaining their purpose to the population, gaining the necessary confidence of participants, and establishing partnerships. A recent example is Cote d'Ivoire's Truth and Reconciliation Commission,<sup>34</sup> which was installed in an expeditious manner, without a proper mandate, without appointing all of its members, and without any consultation with victims' groups. The commission itself was supposed to consult the population about the most adequate thematic mandate to carry out its inquiries. In September 2013, on the date of its legal expiration, the commission had just finalized an extensive program of consultations

on what its mandate should be, and it had not interviewed any victims.

There is no doubt that citizens have a right to participate in public affairs; the question is the shape and instruments of such participation. Would direct engagement with key civil society leaders satisfy the obligation to respect public participation, or should it entail some form of massive public mobilization? Are representative government institutions enough to satisfy such a right, or must consultation always be carried out through direct, local involvement?

These are questions of means, goals, and context. At least in the short term, with a narrow window of opportunity,<sup>35</sup> consultation is a tool to achieve the goal of the perception of a legitimate, effective truth commission. It is important to calculate how much support already exists for accountability and, therefore, how much time and political capital should be invested in what form of consultation. In contrast with such a pragmatic view, some current formulations on consultation refer to "broad," "comprehensive," or "extended" activities that can be very complex and develop along successive stages:<sup>36</sup> public sensitization and outreach,<sup>37</sup> mapping the effects of violence on the population,<sup>38</sup> and activities to measure public opinion, among others.

The idea of consultation as an onerous multistage procedure assumes that the entity leading the consultation knows little about the situation and has the resources and time to conduct such operations. A mobilized partner in the form of a civil society organization may offer indispensable shortcuts toward a more efficient process.

The use of consultations may also depend on flexible analysis of political conditions. Where there is already active social mobilization in favor of accountability, targeted discussions to obtain specific proposals may be sufficient. In other cases, however, when political leaders quickly create a weak, politically dependent, or noncredible institution, advocating for consultation and slowing down a process can be useful to empower marginalized sectors and dampen efforts to impose ill-prepared initiatives.

Also, if conditions are not ideal to conduct extensive consultations over a prolonged period of time, it may be possible to schedule consultations in stages, focusing initially on civil-society sectors that are already engaged and victims who are already mobilized, then move on in subsequent phases to include larger sectors of the general population. Another possibility is to set up specific mechanisms and time frames to conduct inclusive consultations with specific groups.

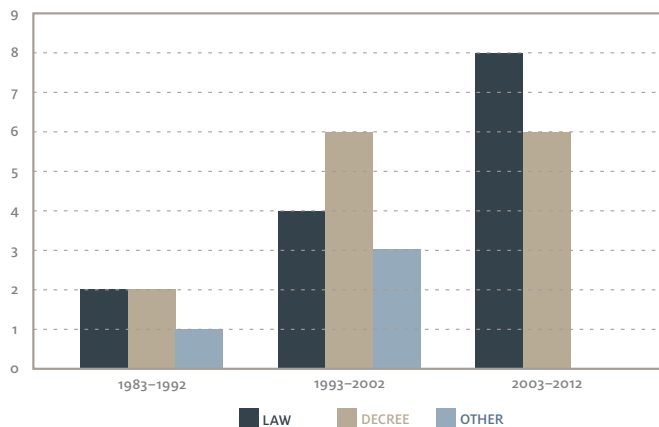
An interesting recent example took place in Colombia with the passage of a law on victims' rights and land ownership,<sup>39</sup>

which included the creation of the Historical Memory Commission. The government faced the dilemma of moving ahead with legislative passage or conducting key consultations with Afro-descendant populations and indigenous peoples. The choice was significant because Colombia's Constitution recognizes the right of these two specific populations to be consulted before any act of legislation is passed that affects their interests.<sup>40</sup> Moving ahead without consultation could risk the constitutionality of the project, but waiting for full consultation could entail the loss of a unique political opportunity to ensure passage. The government, in consultation with the leadership of well-organized organizations of these two groups, opted for passing the law with the proviso that it would not be applicable to indigenous people until they had approved, together with the government, a specific framework that would be added later to the law as a presidential decree.

### *Tendency Toward Legislative Passage of Mandates*

The growing complexity of commissions has led to a tendency to create mandates through laws, because in most constitutional frameworks providing a temporary body with powers similar to a jurisdictional institution may require an instrument stronger than an executive decree. Also, some may see legislative creation as a stronger source of democratic legitimacy, because congress is by definition a pluralistic body.<sup>41</sup> Most recent truth commissions have been established by law.

### **GRAPHIC 1: MEANS OF ESTABLISHING A TRUTH COMMISSION, BY DECADE<sup>42</sup>**



As with other prevailing trends, a realistic assessment of the political pace of the transition seems to be fundamental to determining the adequacy of the instrument to ensure the goal of an effective commission. Unless a strong political consensus exists, legislative passage may entail risky scenarios, when the integrity of the mandate is affected or its passage is not prioritized due to competing objectives.

While successful legislative processes may strengthen the instrument establishing the commission, in some conditions the risk of not passing a mandate is serious, and it should in-

vite a sober assessment of the best tactical route. The Indonesian law establishing a truth commission was passed in 2004, six years after the fall of President Suharto; the instrument was so compromised that the Constitutional Court voided it in 2005.<sup>43</sup> In Nepal protracted parliamentary negotiation about both a truth commission and a commission on disappearances developed unproductively and finally stagnated as a governance crisis resulted in the dissolution of the Constituent Assembly of Nepal.<sup>44</sup> In Tunisia, in spite of an expeditious, efficient consultation process, the bill proposing transitional justice policies and a truth commission fell behind other priorities, affected by the suspension of the work of the National Constituent Assembly.<sup>45</sup>

International participants in the early stages of a transition should encourage local stakeholders to consider seriously all possible options for creating a commission. An adequate evaluation of the political balance of forces in congress is an obvious prerequisite to embarking on a legislative avenue. Will congress respect the political accords expressed in the peace framework? Would potential spoilers take advantage of parliamentary procedure to slow down the process or compromise the resulting mandate of the commission?

While no form of passage constitutes a guarantee of success, comparative experience demonstrates that commissions established by instruments other than a law can comply with their objectives.

The Moroccan commission was established by a royal decree, or *dahir*,<sup>46</sup> and the Timorese Commission of Reception Truth and Reconciliation was established by an ordinance of the UN Transitional Administration.<sup>47</sup> Some early Latin American truth commissions were established by presidential decree, and the Guatemalan Commission for Historical Clarification (CEH) and the Truth Commission for El Salvador were established directly by implementation of the peace agreements, which had provisions establishing the mandates.<sup>48</sup>

Opting for establishing a commission by any instrument other than a law may feel like a capitulation for some stakeholders, believing that legislative passage is the sole way to conform to current trends and that such trends constitute best practice. The key criteria to respond to this dilemma is to start from the characteristics of the desired commission. Does it require powers that have to be created by law? Would it be able to use such powers? What is the balance of political forces and alliances that may ensure the creation of a strong, effective, and independent commission?

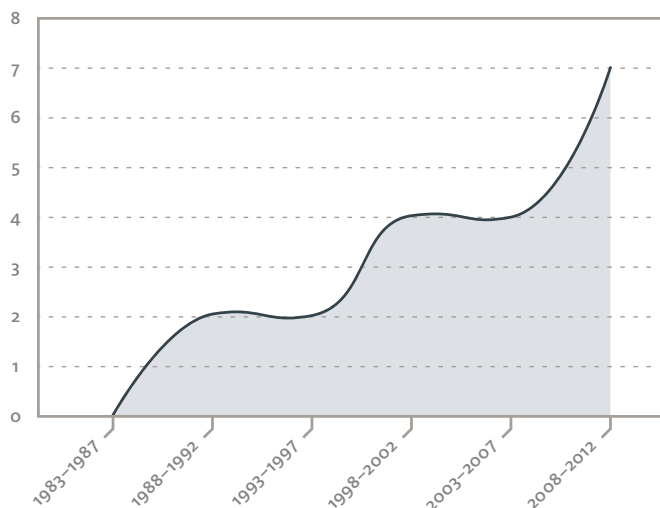
### *Assuming Reconciliation as a Goal*

Several mandates of truth commissions call explicitly for reconciliation as an objective.<sup>49</sup> Such an invocation after periods



of conflict appears as a commonsensical choice, expressing the hope that examining the past will contribute toward a more peaceful society.

## GRAPHIC 2: TRUTH COMMISSIONS WITH RECONCILIATION AS AN OBJECTIVE



Yet, an orientation toward reconciliation is not without problems. An intrinsic difficulty is the ambiguity of the concept, which introduces significant confusion in the mandate of truth commissions and—in some cases—misplaced expectations or fears. It is very common, for example, to find negotiators and drafters of truth commissions expressing the view that a TRC will ensure that individual victims and perpetrators will “forgive each other” in a sort of micro-process of peace-making. Some victims and civil society groups think of reconciliation in similar terms and fear that a truth commission will force victims to forgive perpetrators and relinquish their rights to effective remedy.

The UN special rapporteur on truth, justice, reparations and guarantees of non-repetition has warned against any understanding of reconciliation that may impose on victims abusive transactions that waive their rights. This is not just a theoretical point because in some countries drafters of commission mandates link measures of impunity to victims forgiving perpetrators.<sup>50</sup> Similarly, there are countries where civil society groups have effectively advocated against an inclusion of “reconciliation” in the mandate or even in the name of the truth commission.<sup>51</sup>

Other considerations calling for a sober use of the notion of reconciliation include the nature of the conflict that the commission will address. Some conflicts may have involved several countries or—as in the case of the Western Balkans—may have resulted in the partition of territory and separation of groups. It is not apparent that in such circumstances truth commissions with a “national reconciliation” mandate will contribute to reconciliation across groups, as may be necessary.

It is also possible that in some conflicts indigenous people are involved as victims or as part of sectors waging war. For some indigenous people, with their own identities as nations, it is not evident that national reconciliation provides an adequate framework for achieving the objectives of a truth commission. Indeed, from the perspective of indigenous groups subjected to longstanding oppression, the idea of reconciliation as the reconstruction of an ideal previous state of harmony among groups rings hollow because such a situation likely never existed. In fact, for some indigenous groups, the idea of “nation-to-nation” or “people-to-people” reconciliation may sound more attractive or acceptable.<sup>52</sup>

## Additional Ideas

A complex element in this critical reading of standards and tendencies the question of timing. It is impossible to prescribe a balance between flexibility and urgency, that can respond to the art of politics. But a few considerations should be made that take into consideration actual comparative experience.

Out of more than 40 truth commissions, about one third appear to be created within one year of the key transitional event and about a half in the first two years. The rest were established up to 23 years later. This would indicate that there is a window of opportunity and that attempts to establish a truth commission should occur sooner rather than later. After the window of opportunity is closed, proposals for the creation of a truth commission may lose a sense of urgency or priority in comparison with other elements of a normalized political agenda. After a short time, the period of social mobilization and political fluidity of a transition may tend toward seeking stability, as a new political balance takes hold or sometimes as spoilers, weakened at the time of the agreements, reclaim political space. While it will depend on the context, a truth commission may have greater ability to help shape discourse and attitudes if it is created in the immediate period after the end of conflict and help legitimize further measures for justice and reparations.

Of course this observation does not indicate that the rapid installation of a truth commission is a guarantee of its subsequent quality. Stakeholders need to make a decision early on about whether there should be a truth commission and if so, precisely what for. How ambitious that early vision is and how thoughtful the initial discussions are will determine the best tactical routes to follow and will help stakeholders make reasonable assumptions about the amount of political capital, resources, and time to invest in the process. If there are reasonable conditions for a truth commission, such as effective political support and the actual cessation of violence, the process of establishment should receive strong support. The momentum created by the successful conclusion of a peace agreement may entail those factors, but this is an issue of political appreciation.

If there are political and security conditions, how extensive should the consultation be? Should a mandate be created through legislation, executive decree, or by other procedures? How will commissioners be selected and appointed? These basic questions require early decisions and a deliberate strategy, following either a relatively quick pace to take advantage of existing political will or a longer process predicated on continuous commitment.

### Reaffirming the Importance of Sequencing

When transitional justice is explicitly discussed over the course of a peace negotiation, the integrality and interrelationship of the different justice policies may pose difficulties for the parties. The situation is compounded when efforts to develop an integral approach to transitional justice are understood to mean simultaneous implementation. Factors behind such difficulties include the unavailability of local justice or rule-of-law institutions, a lack of financial or human resources, and the different degree of willingness by political stakeholders toward each transitional justice component.

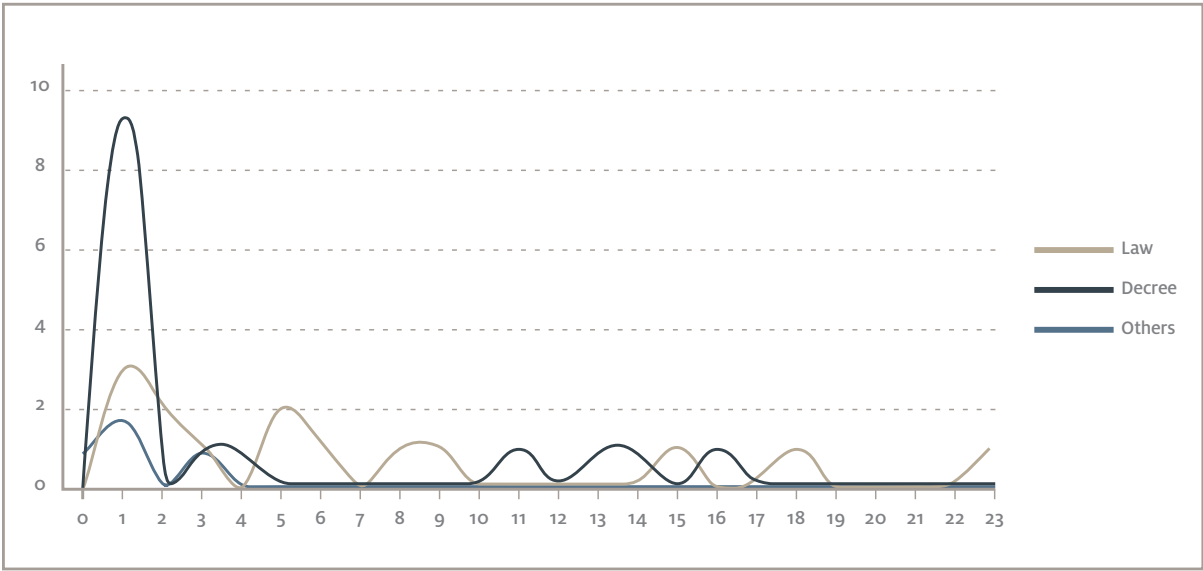
In a certain view of the situation, some may conclude that because justice measures respond to victims’ rights and state obligations, the only consistent form worth advocating for is

prosecutions, may affect the viability of the entire package. In Burundi, proposed formulas on transitional justice includes both the proposal of a truth commission, which inspires certain resistance, and a special tribunal, which causes strong resistance; thus, the national government, the United Nations, and civil society organizations have spent almost 10 years negotiating this package, without getting closer to actual implementation or making progress only regarding the truth commission.

Resistance to sequencing may respond to a fear that truth commissions would be the only response to impunity, short-changing victims and possibly postponing measures of criminal justice indefinitely. In fact, in Nepal civil society groups have advocated consistently for a truth commission, which would solve issues of justice, referring cases for prosecution or amnesty; they fear that a purely investigative commission will not generate the links to any justice measure pursued later on. However, truth commissions that can operate effectively may also mobilize victims, educate the citizenry, and establish an authoritative account of past atrocity, thereby creating better conditions for further measures of justice.

Another difficulty of taking an integral approach is that it may lead policymakers to the very complicated attempt to

**GRAPHIC 3: MEANS OF PASSING TRUTH COMMISSION MANDATE VERSUS NUMBER OF YEARS SINCE TRANSITION**



an integral policy, applying different measures of justice at the same time. In this view, postponing some policies may equate to neglecting them, without a clear expectation or commitment to actually putting them in place later on.

However, there are risks to proposing a full transitional justice framework to operate simultaneously.<sup>53</sup> Political resistance to some measures, like the predictably strong resistance to

establish several institutions with one single, comprehensive, and extremely complex legal instrument. It may be more time- and resource-effective to establish a specific institution, like a truth commission, rather than a set of institutions.

The current experience in Tunisia may present relevant points on these dilemmas. The government was clear very early on that it had a strong preference for a comprehensive law on all

measures of transitional justice and that it would conduct extensive consultations and take into account the input. As a result, the government presented a bill on transitional justice to parliament. However, the bill is mostly devoted to the creation of a truth commission, and the sections dedicated to other transitional justice policies are too generic, leaving significant questions unaddressed and too much vagueness that will have to be lifted during the eventual implementation of the law.

### *Managing Expectations*

Expectations for a truth commission—both positive and negative—are rarely based on the explicit terms of reference agreed on in the peace framework or the legal mandate. They respond to strategic calculations, levels of mutual trust, and confidence in the general course of the transition. Therefore, even a concerted effort to strike the right balance in a peace accord or in a legal mandate requires additional and sustained dialogue among stakeholders to understand the potentials and limitations of the initiative.

Political stakeholders interested in the stability of the newly recovered peace probably expect a commission to consolidate the agreements; thus, their public discourse may be overly optimistic. By contrast, spoilers who feel threatened by including accountability in the peace framework may have an exaggerated view of the potential of a commission and will denounce it stridently.

Such polarization in the debate hinders dialogue and creates a dynamic of alignments that civil society and victims' groups would do well to avoid. Civil society and victims are fundamental to the work of a commission as possible staff, partners, and participants. It is essential that they engage the commission and understand its actual potentials and shortcomings to make their involvement more effective.

Extremely optimistic discourse around what a truth commission can do may set up victims and civil society organizations for disappointment and have a negative effect on the public's perception of the commission's effectiveness. In Kenya the final report of the TJRC recognized that the mandate was too wide and that to manage it, the commission had to be selective, creating tensions with groups that had high expectations given the all-inclusive mandate and felt left behind by those decisions.

An inverse phenomenon took place in Guatemala: the mandate—as decided in the peace accords—was decried by civil society as too narrow and weak. The CEH, however, interpreted its mandate in a way that provided opportunities for cooperative work with civil society organizations and indigenous communities. As a result, it built up alliances and was able to surprise skeptics with a final product that went beyond the original low expectations.

Specific areas that require managing expectations include: the actual treatment of individual cases, given the large amount of situations the commission may face; the effectiveness of the commission to refer cases to criminal justice mechanisms or reparations procedures; the actual impact of a commission in a polarized political scenario; and the commission's effectiveness in compelling policymakers to design and implement reforms in key institutions.

### *Encouraging Cooperative Decision-Making*

Those with information about good practices and an understanding of trends in the field should avoid inflexibility during peace negotiations. A rigid approach may take hold if certain actors believe that any compromise on international experiences is unacceptable: here, the best may become the enemy of the good.

The challenge is to identify clearly those elements among international standards that are effectively indispensable: those that respond to human rights obligations and technical considerations to ensure the viability of the institution. We have mentioned those obligations and technical parameters above; all seem to be strong standards requiring commitment from all stakeholders. Similarly, smart policy-making should ensure that there are enough guarantees in the early instruments of a peace agreement or in the mandate for a functional truth commission. Commitments on resources, support for managerial tasks, and other seemingly modest contributions may be significant factors in achieving success down the road.<sup>54</sup> However, there are a number of practices that may not be automatically transferable from one experience to the next, or points that may respond exclusively to areas of policy and design, and we have expressed some doubts about them above.

The challenge when reviewing trends and good practices consists in not losing sight of the ultimate goal: establishing a truth commission that is independent of political patronage, credible in its work and findings, and ultimately effective to put in motion necessary policy.

To arrive at that objective may require flexibility and analysis of the needs and conditions on the ground—seeking a balance between the commission that is needed and the commission that is possible, while striving to leave open avenues for civil society and victims to advance their rights.

**TABLE 1: TRUTH COMMISSIONS CREATED AFTER A TRANSITION, SINCE 1983  
(IN CHRONOLOGICAL ORDER, BY DATE OF ESTABLISHMENT)<sup>55</sup>**

COUNTRY	DATE OF TC ESTABLISHMENT*	START OF TRANSITION	TIME ELAPSED (YEARS)	FOUNDING DOCUMENT	RECONCILIATION AS GOAL
ARGENTINA	DECEMBER 1983	OCTOBER 1983	0.2	DECREE	NO
URUGUAY (1 of 2)	APRIL 1985	NOVEMBER 1984	0.4	LAW	N/A
CHILE (1 of 2)	MAY 1990	DECEMBER 1989	0.4	DECREE	YES
CHAD	DECEMBER 1990	DECEMBER 1990	0.1	DECREE	NO
GERMANY (1 of 2)	MAY 1992	AUGUST 1990	1.8	LAW	NO
EL SALVADOR	JULY 1992	JANUARY 1992	0.5	PEACE AGREEMENT	YES
GUATEMALA	JUNE 1994	JUNE 1994	0	PEACE AGREEMENT	NO
HAITI	APRIL 1995	JULY 1994	0.8	DECREE	YES
GERMANY (2 of 2)	JUNE 1995	AUGUST 1990	4.8	LAW	NO
SOUTH AFRICA	DECEMBER 1995	APRIL 1994	1.7	LAW	YES
ECUADOR (1 of 2)	SEPTEMBER 1996	AUGUST 1996	0.1	MINISTRY OF POLICE	N/A
NIGERIA	JUNE 1999	FEBRUARY 1999	0.4	DECREE; STATUTES	NO
SIERRA LEONE	FEBRUARY 2000	JULY 1999	0.6	PEACE AGREEMENT**	YES
URUGUAY (2 of 2)	AUGUST 2000	NOVEMBER 1984	15.8	DECREE	NO
SOUTH KOREA (1 of 2)	OCTOBER 2000	JUNE 1987	12.3	DECREE	N/A
PANAMA	JANUARY 2001	DECEMBER 1989	10.2	DECREE	NO
PERU	JUNE 2001	NOVEMBER 2000	0.6	DECREE	YES
GHANA	JANUARY 2002	JANUARY 1993	9.0	LAW	YES
EAST TIMOR	FEBRUARY 2002	AUGUST 1999	2.5	UN MISSION	YES
CONGO	JULY 2003	DECEMBER 2002	0.6	PEACE AGREEMENT**	YES
CHILE (2 of 2)	SEPTEMBER 2003	DECEMBER 1989	13.8	DECREE	NO
PARAGUAY	OCTOBER 2003	FEBRUARY 1989	14.7	LAW	NO
MOROCCO	APRIL 2004	JULY 1999	4.8	ROYAL DECREE**	YES
SOUTH KOREA (2 of 2)	MAY 2005	JUNE 1987	17.9	LAW	YES
LIBERIA	FEBRUARY 2006	AUGUST 2003	2.3	PEACE AGREEMENT**	YES
ECUADOR (2 of 2)	MAY 2007	JANUARY 2007	0.4	DECREE	NO
SOLOMON ISLANDS	AUGUST 2008	OCTOBER 2000	7.8	LAW	YES
KENYA	OCTOBER 2008	DECEMBER 2002	5.8	PEACE AGREEMENT**	YES
TOGO	FEBRUARY 2009	FEBRUARY 2005	4	DECREE	YES
HONDURAS	APRIL 2010	OCTOBER 2009	0.5	DECREE	YES
THAILAND	JULY 2010	DECEMBER 2007	2.6	DECREE	YES
COTE d'IVOIRE	JULY 2011	APRIL 2011	0.3	DECREE	YES
BRAZIL	NOVEMBER 2011	OCTOBER 1988	22.1	LAW	YES

\* BY LAW/DECREE OR DATE OF OPERATION IF BEFORE LAW/DECREE  
\*\* FOLLOWED BY LEGISLATION

2. Recent legislation in post-conflict countries has established truth commissions in Burundi and Nepal. A peace negotiation taking place in Colombia includes the right to the truth in its agenda. Discussions on the suitability of setting up a truth commission have taken place for Afghanistan, Darfur, Iraq, Libya, Mali, Myanmar, the Philippines, and Yemen.

3. Truth commissions are now being discussed as the result of a peace process in Burundi (2000), Nepal (2006), and Colombia (current). Attempts to create, recommend, or discuss the suitability of setting up a truth commission have occurred in Afghanistan, Darfur, Iraq, Libya, Mali, Myanmar, the Philippines, and Yemen.

4. Louise Joinet, Revised Final Report, Question of the Impunity of Perpetrators of Human Rights Violations, June 26, 1997 (E/Cn.4/Sub.2/1997/20); Diane Orentlicher, Independent Study on Best Practices, Including Recommendations to Assist States in Strengthening their Domestic Capacity to Combat All Aspects of Impunity, February 27, 2004 (E/CN.4/2004/88); United Nations Secretary-General, The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, August 23, 2004 (S/2004/616); Diane Orentlicher, Report of the Independent Expert to Update the Set of Principles to Combat Impunity, February 8, 2005 (E/CN.4/2005/102/Add.1); Office of the High Commissioner for Human Rights, Rule-of-Law Tools for Post-Conflict States: Truth Commissions, 2006; Office of the High Commissioner for Human Rights, Rule-of-Law Tools for Post-Conflict States: National Consultations on Transitional Justice, 2009; United Nations Secretary-General, The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies (S/2011/634).

5. De Greiff Report, 8, ¶ 30 (see Summary of Discussions, n. 1).

6. Some recent inquiries in post-conflict settings that have been criticized with regard to their credibility include: Algeria's Ad Hoc Inquiry Commission in Charge of the Question of Disappearances, established in 2003; The Truth and Reconciliation Commission in the Democratic Republic of Congo, established in 2003; and the Lessons Learned and Reconciliation Commission of Sri Lanka, established in 2010.

7. Recent post-conflict commissions experiencing near-incapacitating challenges, in spite of significant use of transitional justice expertise in their nascent stages, include Liberia and Kenya.

8. De Greiff Report, 6, ¶ 22.

9. See, for example, the use of principles and best practices of transitional justice to assess actual practice in the case of Sri Lanka, in Amnesty International, *When Will They Get Justice? Failures of Sri Lanka's Lessons Learned and Reconciliation Commission* (2011).

10. "A truth commission is not appropriate for every country or every transition, and the decision to have a commission must

always be taken by nationals." OHCHR, *Rule-of-Law Tools for Post-Conflict States: Truth Commissions*, 2006, 5. "The UN eschews one-size-fits-all formulas and the importation of foreign models, and bases its work upon a thorough analysis of national needs and capacities, drawing upon national expertise to the greatest extent possible." Guidance Note of the Secretary-General, United Nations Approach to Transitional Justice, 2010, 5.

11. See, for example, De Greiff Report. See also Matiangai V.S. Sirleaf, "The Truth About Truth Commissions: Why They Do Not Function Optimally in Post-Conflict Societies," *Cardozo Law Review* 35 (2014) (forthcoming).

12. De Greiff Report, 8, ¶ 29.

13. De Greiff Report, 8, ¶ 28.

14. Mark Freeman, *Truth Commissions and Procedural Fairness* (Cambridge: Cambridge University Press, 2006). Commissions that may make adverse findings against specific people should give those people the right to respond to the allegations.

15. Vasuki Nesiah et al., "Truth Commissions and Gender: Principles, Policies and Procedures" (New York: ICTJ, July 2006).

16. UNICEF Innocenti Research Centre and ICTJ, *Children and Truth Commissions* (August 2010).

17. Eduardo González and Joanna Rice, eds., *Strengthening Indigenous Rights through Truth Commissions: A Practitioner's Resource* (New York: ICTJ, 2012).

18. Guatemala's Historical Clarification Commission (CEH) was established through the direct implementation of a clause in one of the peace agreements ("Agreement on the Establishment of the Commission to Clarify Past Human Rights Violations and Acts of Violence that Have Caused the Guatemalan Population to Suffer", June 23, 1994). Also, a truth commission was established by judicial means in Canada, as a result of a class action by indigenous survivors of abuse against the government and churches. (The relevant decision is the "Indian Residential Schools Settlement Agreement", May 8, 2006). In the case of East Timor, the Truth, Reception and Reconciliation Commission (CAVR) was established by regulation of the UN Transitional Administration in East Timor (UNTAET) Regulation 2001/10, July 13, 2001.

19. Issues regarding composition of the commission are examined in Chapter Two, "Risks and Opportunities in a Truth Commission Process."

20. De Greiff Report, 12–13, ¶ 39–52.

21. Report of the Chilean National Commission on Truth and Reconciliation. (Notre Dame, IN: University of Notre Dame Press, 1993).

22. Human rights advocates often express a strong preference for commissions with wide mandates. See, for example, Amnesty



International, Truth Justice and Reparation: Establishing an Effective Truth Commission (2007):

The mandate of a truth commission must be broad, beyond human rights violations that might constitute crimes under either national or international law. In particular, the investigations should concern all cases of past human rights violations and abuses, whether committed by government forces or by non-state actors, as well as violations of both civil and political and economic, social and cultural rights . . . Truth commissions should be given broad temporal mandates.

See also OHCHR, *Rule-of-Law Tools for Post-Conflict States: Truth Commissions* Geneva, 2006, 8: “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.”

23. Truth, Justice and Reconciliation Commission Bill 2008.

24. Report of the Truth, Justice and Reconciliation Commission (Kenya: TJRC, 2013), Vol. I, iv-v.

25. Kenya TJRC Report, 66–67.

26. Such interpretation has been challenged by activists, who think the commission disregarded a legal mandate that ordered it to establish the full picture of all past violations. The commission’s report has been the target of several lawsuits. See George Ngero Gichuru & 23 Others v. Truth Justice & Reconciliation Commission, Constitutional Petition No. 29 of 2013, Nakuru, Kenya.

27. Informe de la Comisión Nacional sobre Prisión Política y Tortura (National Commission on Political Imprisonment and Torture Report), November 2004; Nómina de Personas Reconocidas como Víctimas en etapa de Reconsideración (List of People Recognized as Victims at the Reconsideration Stage), June 2005. The commission reopened again in February 2010 to hear more cases.

28. The Truth and Reconciliation Commission Act 2000 (Sierra Leone); The Truth and Reconciliation Commission of Liberia Mandate, May 12, 2005; Terms of Reference for the Commission of Truth and Friendship established by the Republic of Indonesia and the Democratic Republic of Timor-Leste, August 5, 2006 (East Timor); and The Truth, Justice and Reconciliation Bill 2008 (Kenya).

29. The Truth and Reconciliation Commission Act 2000 (Sierra Leone); the Truth and Reconciliation Commission of Liberia Mandate, May 12, 2005; and the Truth, Justice and Reconciliation Bill 2008 (Kenya).

30. The Submissions of ICTJ as Amicus Curiae in Constitutional Petition No. 286 of 2013, in the High Court of Kenya at Nairobi, Kenya (September 2013).

31. “The Special Rapporteur urges prudence in the drafting of the mandate of truth commissions, heeding basic considerations

of functional adequacy. Commissions that are laden with objectives which they have no means to satisfy will predictably disappoint expectations.” De Greiff Report, 15, ¶ 52.

32. “Another important factor behind successful programmes is the broad participation of citizens, including victims, in deliberations about their design.” Orentlicher, Independent Study on Best Practices, 2. “[T]he most successful transitional justice experience owes a large part of their success to the quantity and quality of public and victim consultation carried out.” UN Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies* (2004), 7.

33. “There is a requirement for national consultations under international human rights law.” OHCHR, *Rule of Law Tools for Post-Conflict States: National consultations on transitional justice*, Section II, 4–5.

34. Commission Dialogue, Vérité et Réconciliation (Dialogue, Truth and Reconciliation Commission), Presidential Ordinance 2011–167, July 13, 2011.

35. See Graphic 3.

36. See, for example, “To the greatest extent possible, decisions to establish a truth commission, define its terms of reference and determine its composition should be based upon broad public consultations in which the views of victims and survivors especially are sought.” Diane Orentlicher, Report of the Independent Expert to Update the Set of Principles to Combat Impunity, 8 (Principle 6). For a more detailed view, including estimates of time dedicated for consultation, see OHCHR, *Rule-of-Law Tools For Post-Conflict States: Truth commissions*, Geneva, 2006, 7:

The consultation 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 . . . 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.

37. OHCHR, *Rule of Law Tools for Post-Conflict States: National consultations on transitional justice*, Section V.

38. *Ibid.*, Section VII.

39. Colombia: Ley de Víctimas y Restitución de Tierras (Ley 1448), June 10, 2011.

40. This specific dilemma—consultation of indigenous people—may also be significant in future cases, as international principles on their rights affirm their right to give or withhold consent on some forms of national government policy. See more in González and Rice, *Strengthening Indigenous Rights Through Truth Commissions*.

41. "Truth Commissions are usually created either through national legislation or through presidential decree. There may be advantages and disadvantages to either . . . However, where either is an option, consideration should be given to factors of timing . . . the potential for political influence . . . and political or popular legitimacy (the legislative process can potentially generate broader political support for a commission)." OHCHR, *Rule-of-Law Tools For Post-Conflict States: Truth Commissions*, 12.
42. All graphics in this paper were created using data on 33 truth commissions set up after a political transition. Commissions of inquiry and unofficial commissions are not included. See supporting data and sources in Table 1.
43. See ICTJ, Kontra S., "Derailed: Transitional Justice in Indonesia Since the Fall of Soeharto" (ICTJ, March 2011).
44. See Chapter Seven, "Nepal: Case Study."
45. Draft Organic Law on the Organization of Transitional Justice (2013).
46. Dahir No. 1.04.42, April 10, 2004.
47. UN Transitional Administration in East Timor (UNTAET) Regulation 2001/10, July 13, 2001.
48. Agreement on the Establishment of the Commission to Clarify Past Human Rights Violations and Acts of Violence that Have Caused the Guatemalan Population to Suffer, June 23, 1994; Marcie Mersky, "Human Rights In Negotiating Peace Agreements: Guatemala," 2005, International Council on Human Rights Policy. "Peace Agreements: The Role of Human Rights in Negotiations," review meeting, International Council on Human Rights Policy, Belfast, March 7–8, 2005.
49. A majority of post-transition commissions in the past three decades invoked reconciliation in their mandates: Brazil, Chile, Congo, Cote d'Ivoire, East Timor, El Salvador, Ghana, Haiti, Honduras, Kenya, Liberia, Morocco, South Africa, Sierra Leone, Solomon Islands, South Korea, Thailand, and Togo. In the past decade, most commissions created have been called truth and reconciliation commissions.
50. Such mechanisms, with objectives called variously *reconciliation* or *arbitration*, have been proposed or included in legislation in Indonesia (2004), Nepal (2013), and Tunisia (2013).
51. See examples of Paraguay (2004), Ecuador (2007), and Brazil (2011).
52. González and Rice, Strengthening Indisgeous Rights Through Truth Commissions.
53. There are also difficulties of sequencing when making the functioning of one mechanism a precondition of establishing the next. This has been a problem for establishing reparations programs in some places when they were to be created following the recommendations of a truth commission, which can take a number of years.
54. Comisión para el Esclarecimiento Histórico, Las operaciones de la Comisión para el Esclarecimiento Histórico en Guatemala: sistematización de la experiencia de la Oficina de Apoyo de la CEH (The Operations of the Commission for Historical Clarification in Guatemala: systemization of the experience of the Support Office for the CEH), UNOPS, 1999.
55. Sources of data: Priscilla B. Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* (New York: Routledge, 2011), U.S. Institute of Peace, and news reports.





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# Risks and Opportunities in a Truth Commission Process

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By Eduardo González

## Introduction

The goal of this paper is to examine the different stages of a truth-seeking process carried out by a truth commission borne of a peace process. It identifies the choices and dilemmas that stakeholders face in ensuring the independence, credibility, and effectiveness of a truth commission. In particular, it examines critical decisions that need to be made from the perspective of international supporters of a peace process, including mediators, groups of friends, and guarantors.

The paper identifies the stages as linked and evolving in complexity over time. It explains why certain actions taken in the early phases make it difficult to correct the course once the commission is installed. Finally, it aims to show the need for strategic thinking, consistent approaches, and continuous support for truth-seeking processes.

## Early Phases

### *From Initial Discussions to Agreement*

Judging from the language in some peace agreements,<sup>56</sup> the basis for creating a truth commission is a renewed commitment to human rights and hope for reconciliation. In Guatemala, the parties drafted and signed a specific agreement on the establishment of a truth commission to “help lay the basis for peaceful coexistence and respect for human rights among Guatemalans” and to promote “a culture of harmony and mutual respect that will eliminate any form of revenge.”<sup>57</sup> In Sierra Leone, the peace agreement justifies the establishment of a truth commission “to address impunity, break the cycle of violence, provide a forum for both the victims and perpetrators of human rights violations to tell their story, get a clear picture of the past in order to facilitate genuine healing and reconciliation.”<sup>58</sup>

Other agreements eschew aspirational language; they appear to establish a truth commission as an afterthought to otherwise detailed agreements. For instance, the agreement to end the conflict in the Democratic Republic of the Congo (DRC) mentions the truth commission as merely one of five “institutions to support democracy.”<sup>59</sup> The Aceh agreement between the government of Indonesia and the Free Aceh Movement (GAM) guerrilla group simply states that an Acehnese truth commission “with the task of formulating and determining reconciliation measures”<sup>60</sup> would be created by an Indonesian national truth commission (which itself had not been established yet), without providing further details.

The specificity of the language and the clarity of intention expressed in the peace agreement are indicative of the interest of the parties, especially when compared to the amount of time and detail seemingly invested in drafting other sections, such as those on demobilization or power-sharing

mechanisms. Devoting time to the shape and role of a truth commission in the agreements denotes an understanding of the role that the truth commission could play, or at least an expectation for that role. It may also indicate that the parties are mindful of the perceived interests of stakeholders who are capable of exercising pressure. By contrast, the absence of substantive language or basic details about the commission, and the vision proposed for it, may indicate the disinterest of the parties and an inability on the part of victims' groups to propose policy or apply necessary pressure.

Still, the language in a peace agreement does not represent the complete picture. While agreements that include only cursory language may reflect disinterest, carefully negotiated ones may also hide a number of motivations. An unspoken expectation may be that establishing a commission will postpone and probably weaken demands for prosecutions. The parties may expect that a truth commission will make trials less likely or unnecessary, while still providing some form of satisfaction to victims; they may perceive the pursuit of criminal accountability as a risky step that may provoke spoilers. It is also possible that the parties believe a truth commission will be helpful in eliminating hostility and recrimination from the political arena, thus facilitating a better transition. In many scenarios, the parties may think that restoring victims' rights is secondary to addressing urgent political needs.

The risk is that civil society will dismiss a commission that is proposed with the explicit or thinly veiled purpose of "solving" the legal problems faced by powerful spoilers, rather than addressing victims' rights and needs. If victims mistrust a commission to the extent that they refuse to participate in it or feel compelled to protest against it, the viability of the commission will be put into question, unless serious changes are made.

In Guatemala, certain provisions in the peace agreement that established the Commission for Historical Clarification (CEH) provoked serious mistrust and criticism from civil society groups,<sup>61</sup> particularly a provision stating that the commission would not name individuals responsible for crimes. However, the CEH was able to respond effectively to this criticism and work with civil society and victims' groups to make the most of its mandate.

The Commission on Truth and Friendship was established by an agreement between East Timor and Indonesia in the hope of producing a report that would be less politically damaging than the report presented by the previous commission, the UN-established Commission for Reception, Truth and Reconciliation (CAVR).<sup>62</sup> However, it was received with dismay by civil society in both countries. Strong criticism and demonstrations, which included victims denouncing impunity in hearings, eventually persuaded the commissioners to treat the CAVR's findings seriously.

In the DRC, mistrust of the Truth and Reconciliation Commission (TRC), which emerged from a final peace deal, proved to be insurmountable.<sup>63</sup> Relevant provisions in the peace agreement showed that there was little desire for a substantive mandate; even so, the parties proceeded to appoint commissioners who were widely perceived as representing the interests of the various factions. The government tried to address the criticism by naming additional commissioners; however, it did not alter the sense that the institution was merely an arena for power sharing. Ultimately, changes in the composition of the TRC were not enough to persuade victims' groups to cooperate with the process.

At the inception of a truth commission, peace mediators may be in a unique position to identify the expectations, hopes, and fears of participants in the peace negotiation. They are placed to facilitate discussions to ensure that the commission's purpose is clear and the parties understand the risks of incorporating vague and imprecise language into the mandate. Mediators should also encourage the parties to be absolutely clear about the relationship the truth commission would have to other accountability instruments established at the same time or envisioned for the future. They need to ensure that the parties do not see the commission as an alternative to criminal justice, rendering other transitional justice measures unnecessary.

Introducing human rights and transitional justice considerations into the process is critical, not just to give it legitimacy and resilience, but also—in the case of a truth commission—credibility, without which the institution will surely fail. Adequate time must be dedicated to a discussion of the role that accountability should play in the peace process and, more specifically, the intended role of the truth commission. Why do the parties think a commission is necessary? What do they think it can achieve? Do they understand the needs and demands of victims and civil society, and how will they respond to them? How prepared are they to incorporate human rights principles in an explicit manner as the foundation of a future truth commission?

In the absence of interest or a genuine willingness to consider a truth commission that is credible and capable of carrying out independent and effective work, the parties probably should not act to establish a commission nor should negotiators encourage them to do so. Including language on a commission just to "check the box" or for cosmetic reasons may negatively affect the credibility of the parties and the peace commitments when it becomes obvious that some components of the process have not been taken seriously.

#### *From Agreement to Legal Mandate*

Peace agreements can set the political framework for a truth commission and open a window of opportunity for truth seeking. In most cases, countries treat the peace framework

as the basis for further action—such as passage of a law or an executive decision—that will set out the commission’s exact mandate. A small number of truth commissions have been established directly by provisions in a peace agreement.

After a peace agreement is signed, policymakers and members of the international community who are involved in the process must juggle competing priorities and contingencies that may affect a still-delicate political situation. The key question seems to be how to keep decision makers engaged while the mandate is drafted and fundamental elements are laid out. These elements include:

- The objectives of the commission
- Its authorized functions to fulfill those objectives
- The scope of the inquiry
- Its guaranteed powers, duration of operation, and resources<sup>64</sup>

The parties need to be committed to drafting a legal instrument that provides enough guidance to the future commission to carry out its tasks. Drafters probably will review the constitutional and international human rights obligations applicable to their country. Because the commission will be an ad hoc institution likely without precedent, they will need to identify how it will fit in the structure of the government. They probably should consult with experts and advocates and decide on the best type of instrument for creating the mandate.

Unless the truth-seeking provisions in the peace agreement are self-executing, as in the cases of El Salvador and Guatemala, a key question is whether to establish the mandate by law or by executive decision, like a supreme decree. In several recent cases, countries have favored legislative action.<sup>65</sup> Such a route may have certain advantages, including generating debate among representatives of different constituencies and consulting with the public, which may give much-needed legitimacy to an instrument that needs to be seen as credible by all sectors. In certain constitutional traditions, passage by law may be necessary to endow the commission with strong investigative powers.

However, legislative action can be slow. Proponents of a truth commission bill must be prepared to compete with other initiatives and priorities for attention. Taking a proposal to congress on a subject that in all likelihood will be new to most legislators requires significant prior and ongoing advocacy. More worrying is the possibility that weak interest in the bill may subject its approval, or its final shape, to compromises. Any weakness carried forward in the language of a peace agreement is likely to pose increasing problems during legislative debate. In Nepal, clauses in the peace agreement envisaged action on two separate institutions: a commission to seek information on enforced disappearances and a truth

commission that would probably open the way to the nonjudicial resolution of cases.<sup>66</sup> In Burundi, the peace agreement called for two truth-seeking institutions, with overlapping, equally unclear mandates.<sup>67</sup> Confusion over the intention of peace agreements hinders the work of legislators and—even worse—makes the situation convenient for spoilers who may seek to delay or weaken the truth-seeking process.

Legislative passage requires strong political support from the parties and the international community, which takes advantage of the momentum generated by the political transition. The Sierra Leonean bill that established the Truth and Reconciliation Commission was passed very quickly, about seven months after peace agreements were signed, thanks in part to strong technical support from the UN Office of the High Commissioner for Human Rights (OHCHR).<sup>68</sup> Similarly, the Kenyan legislature passed a bill establishing a truth commission only seven months after parties had agreed to a framework of principles to establish it.<sup>69</sup> Nepal and Burundi, as suggested earlier, provide examples of legislative deadlocks because both countries were not able to pass legislation on truth commissions years after their respective peace agreements were signed. In Nepal, in fact, the dissolution of the Legislative Constituent Assembly in May 2012 paralyzed any legislative action on truth seeking and opened the door to a presidential ordinance to create a truth commission, which led to a constitutional challenge and further delays.<sup>70</sup>

In El Salvador and Guatemala, commissions were installed without the passage of a law, using provisions in their respective peace agreements as mandates. Such a step places extra importance on the appointment of strong, capable commissioners who will be called on to interpret the provisions of the agreement in the absence of public or legislative debate. Obviously, such a procedure requires that the language in the peace agreement provides sufficient detail and adequate guidance on the constitutive elements of a mandate as well as negotiations of supplementary agreements to ensure the independence of the commissioners.<sup>71</sup>

With only a peace agreement as a framework, the appointment of commissioners requires the mobilization of practical and actionable political will. Both the Salvadoran and Guatemalan commissions were supported by the United Nations; indeed, the Salvadoran commission was fully staffed by international experts. In Guatemala strong civil society networks had already organized victims and advocated for a truth commission for a number of years. Also, the country had undergone a previous inquiry, conducted under the auspices of the Catholic Church: the Recovery of Historical Memory Project (REMHI).<sup>72</sup>

Bypassing legislation in the absence of a well-defined framework in the peace agreement or strong support from political

leaders and civil society is ill advised.<sup>73</sup> In the DRC, members of the TRC were appointed only seven months after the peace agreement was signed. However, the agreement barely defined the contours of the truth commission—its objectives, functions, scope of inquiry, powers.<sup>74</sup> What was even more troubling was that parliament waited over a year after the commissioners were appointed to pass a law on the commission.<sup>75</sup> The intervening time opened the door for political polarization and the accurate perception that the commission had been conceived as another institution for power sharing between factions, without real guarantees of political independence.

From the standpoint of peace mediators and friends or guarantors of the peace process, the key question at this stage is both technical and inevitably political. What central elements of the mandate must be reflected in legislation or in another means of creating the commission? Does the political context allow for swift progress that takes advantage of the momentum generated by the transition? Or should the process, for lack of clarity or preparation, proceed at a slower pace, allowing time to hold consultations, encourage more members to participate, build capacity, or conduct preliminary mappings of violations?

Some past cases seem to suggest that peace processes present only a small window of opportunity for action, as institutional fragility, unstable political calculations, and competing priorities can erode the initial support for a truth commission, which may already be modest. However, bypassing stages and boldly jumping ahead entails risks too.

Key elements that should be taken into account to assess the pace of the legislative process seem to be: the strength of the commitment for a truth commission during peace negotiations (which may be reflected in the peace agreement's language on accountability and truth seeking); the completeness of the peace agreement provisions and their level of sufficiency to establish an independent, credible, and effective commission; the relative strength of spoilers in the legislative branch who could put up obstacles to passing a bill promptly and effectively; and the strength of civil society and victims' groups to articulate mandate proposals, advocate effectively during the legislative process, and advocate during the appointment process. If these elements appear to be strong, it may be safer to keep the momentum going; in their absence, however, more reflection and consultation may be needed.

#### *From Legal Mandate to Appointment*

The quality of the commissioners leading the truth commission is central to its effectiveness. Most commissions are one-time experiences,<sup>76</sup> without precedent in the history of the

country.<sup>77</sup> As a consequence, the message and legitimacy of the commission is often conveyed by the integrity and charisma of its leadership.<sup>78</sup>

Both individually and as a group, commissioners need certain key characteristics, principally the moral authority and political finesse necessary to overcome political polarization, inspire trust, and obtain effective cooperation from different stakeholders. At the same time, key intellectual and organizational competencies are required to conceptualize and manage what will be a complex inquiry that mobilizes a range of resources in a short amount of time.

Commissioners are the main interpreters of the mandate; they must make concrete decisions on how to implement key dispositions. In particular, they need to decide on the exact scope of conduct to be investigated and the persons and institutions to be involved. At the end of the commission's work, the commissioners will endorse findings that can be politically volatile and recommendations that may be bold. If they lack the independence and integrity needed to resist outside pressures or if they have a conflict of interest regarding aspects of the inquiry, the commission's integrity and work will suffer.

Personal prestige may be based on demonstrable achievements, a record of civil courage, and a commitment to human rights under difficult circumstances. Also, appointees must be untarnished by affiliations or experiences likely to give rise to mistrust or charges of a conflict of interest. Prestige, then, is quite unique; it is harder to identify than competencies. Some commissions, like the East Timorese CAVR,<sup>79</sup> may rely on well-organized international staff and technical support to cover limitations in expertise at the national level—which is understandable in countries that have suffered devastating conflicts. It is far more difficult to replace charisma and integrity or fight the damage caused by questionable appointments.

Bad appointments can unravel the gains of earlier phases of the process, including the careful hammering out of truth-seeking clauses in a political agreement and the diligent work of drafting a legal mandate. A commission that has lost its credibility over questionable appointments will not receive the cooperation it needs to conduct its work, and key constituents will regard its results with suspicion. Commissioners without the necessary independence will undermine the truth-seeking exercise, and those without basic competences will be ineffective unless they can secure the help and training they need.

Even appointments that are appropriate and take into account each appointee may not guarantee a commission's success in the absence of group cohesion. If commissioners do not have the tools necessary to navigate inevitable political or methodologi-



cal differences, internal tensions can result in open disputes. In Canada, the creation of the Truth and Reconciliation Commission was delayed for more than a year due to differences of opinion between the chairperson and the commissioners that were made public and resulted in all of the members resigning.<sup>80</sup> The parties had to reconvene to appoint new commissioners.<sup>81</sup>

The UN special rapporteur on truth, justice, reparations, and guarantees of non-repetition, Pablo de Greiff, was concerned about truth commissions in which “controversies surrounding the aptness of particular appointments of commissioners [pose] serious problems for an institution that derives much of its potential from the moral authority of its leadership” and “publicly expressed differences and, indeed, discord, among commissioners over fundamental issues concerning a commission’s operation and conclusions” affect the viability of the institution.<sup>82</sup>

De Greiff criticized the fact that current trends in the appointment of commissioners have focused on selection procedures rather than selection criteria.<sup>83</sup> Indeed, some commission laws and bills, relative to other areas, are extremely detailed on the commissioner-selection process.<sup>84</sup>

The complex procedures for commissioner selection and appointment that have become a trend are motivated by the goal of generating support from different sectors of the population. A consultative process of appointment may offer certain bulwarks against exclusively “political” nominations left to policymakers. Both are valid considerations in a post-conflict situation.

The risk that some consultative appointment processes pose is that they may tend to weaken individual prestige and capacity criteria in favor of the commission’s “representativeness,” that is, the extent to which it reflects demographic, ethnic, and cultural identities in the society. Further, the composition of a commission on the basis of demographic criteria—such as ethnicity—may actually reintroduce factiousness and political affiliations to the truth-seeking process.

However, some recognition of the different identities in the country may still be necessary. In some post-conflict environments, transitional justice must be seen as a common enterprise undertaken by groups that had been in conflict. The challenge is to balance political and social needs with the fundamental requirement of providing the commission with authoritative, competent leadership.

The influence and support of international mediators and friends in the appointment process may be important to encourage key political institutions to act prudently and endow the commission with able leadership. However, the role of international supporters may be less influential than during

previous phases because national actors may regard decisions about the membership of the commission as a symbolic act of sovereignty and autonomy.

In a few cases (all involving commissions established after violent internal conflict), the legal mandate of a truth commission requires the participation of international commissioners. In those cases, the international community has assumed responsibility for selecting commission members:

- In El Salvador, the UN Secretary General appointed three commissioners in consultation with the parties; the commission itself selected its chairperson.<sup>85</sup>
- In Guatemala, the peace agreements<sup>86</sup> stated that the moderator of the peace negotiations would serve as chairperson,<sup>87</sup> and that he—with the agreement of the parties—would select two additional commissioners, both Guatemalan nationals.
- In Sierra Leone,<sup>88</sup> OHCHR recommended three international commissioners (out of seven), the president then formally appointed them.
- In Kenya,<sup>89</sup> the three-person Panel of Eminent African Personalities recommended three international commissioners out of nine to be formally appointed by the president.
- In the Solomon Islands,<sup>90</sup> OHCHR recommended two international commissioners out of five to be appointed by the prime minister.

Their presence may give a nascent commission three advantages: an image of impartiality and independence (because they are unlikely to be connected to the parties); specific technical competencies and expertise that the country may lack; and links to international public opinion, enhancing the commission’s leverage. However, de Greiff said that—notwithstanding their possible contributions—the appointment of international commissioners in itself might not overcome deficiencies in the selection of national members.<sup>91</sup>

Appointing international commissioners involves asking important technical questions. Will they be devoted exclusively to the commission and reside in the country? If not, how will the commission maintain constant communication with them and budget for frequent travel and temporary lodging? How will the work of international commissioners be compensated, and will compensation standards for internationals create inequalities regarding standards of compensation? Will the work of the international commissioners raise special issues, such as security, legal protections, and immunities? These are considerations that so far have been resolved on a case-by-case basis; they require further study.

## Regular Operations and Reporting

The contributions of mediators and friends of the peace process become vital once a commission has been established and started its work. A commission established with basic political support, a workable mandate, and confident leadership is better placed to identify its needs, seek support, and launch operations. However, bad decisions taken in the early stages can weaken a commission throughout its tenure, limiting the effectiveness of international support efforts.

### *Challenges and Opportunities During Regular Operations*

As described earlier, ambiguities or equivocation in the peace agreements make it easier for spoilers to produce weak legal mandates and, at the same time, more difficult for commissions to act independently, credibly, and effectively. Predictably, such situations will provoke resistance from both national and international human rights defenders and advocates, and prolong the legislative process.

In such cases the international community has seen its potential support limited to containing the fallout from earlier phases. In Burundi and Nepal, as mentioned earlier, the international community has supported local civil society in resisting the establishment of commissions that would compromise the interests of victims or violate their rights.

In other cases controversy over the composition of the commission has resulted in near-incapacitating internal disputes. In Kenya, concern about the aptness of the chairperson resulted in costly, onerous litigation between the commission and the chairperson, and hurt the commission's credibility.<sup>92</sup>

Not all early weaknesses are irreversible, however. In Liberia, international experts—acting with local organizations—persuaded parliament and the government to correct weaknesses in the nomination and appointment process.<sup>93</sup> In Guatemala, in spite of civil society's low expectations for the CEH, the commission was able to reach understandings and agreements such that civil society organizations engaged in its investigative activities.<sup>94</sup>

Once established, the operations of a truth commission include several phases.<sup>95</sup> The preparatory phase typically lasts three to six months,<sup>96</sup> during which the commissioners become familiar with their mandate and make key decisions about how to make the commission operational. In this phase, commissioners hire senior staff and managers to prepare a budget and the action plans that will guide the commission's work. The budget and plans, which are based on the mandate and interpreted by the commissioners, will steer the commission's investigative work, outreach, and internal rules and procedures as well as decide how it will build alliances. The commission may conduct some basic mapping of viola-

tions under its mandate, and the commissioners may contact policymakers, civil society groups, and international supporters to forge partnerships and obtain cooperation.

During this phase, or shortly thereafter, the commission often first contacts the government—and international donors, if appropriate and authorized to do so—to secure adequate funding. This, then, presents some important opportunities for international organizations to support a truth commission. They can cooperate in activities such as:

- Sharing information prepared by international agencies, including preliminary reports that may be useful for the commission as it prepares its investigations
- Presenting the mandate to donors and supporting the preparation of effective, consistent funding proposals
- Offering advice to commissioners on the analysis of their mandate
- Offering training to civil society groups in areas that will be critical to facilitating partnership with the commission, such as documentation of abuses and support for victims and witnesses

The regular operations of a truth commission fall under three areas: investigations, outreach, and management.

Most mandates establish investigations as the core function of a truth commission.<sup>97</sup> Typically, a commission that can secure appropriate funding and hire adequate staff will initiate ambitious investigations, seeking the testimony of primary sources—mainly victims who have witnessed human rights violations—and other informants, such as political leaders and former combatants. If conditions allow, a commission may also have access to secondary sources from the national archives.

The length of time allotted for investigations defines the commission's actual tenure and whether it will be able to comply with the deadlines set by the mandate or if it will need extensions. As mandates have expanded over time, the complexity of their investigative work has grown. A commission needs skilled researchers drawn from different disciplines, including law, social sciences, history, and psychology, and a shared vision that will allow contributions from multiple disciplines to coalesce in the form of a comprehensive final report.

International support for the commission's investigative work may include:

- Seconding experts and researchers to contribute to the analysis of information and the preparation and use of tools, such as interview forms and databases

- Supporting the process of interviewing victims and witnesses who have been displaced to other countries or live in exile communities
- Obtaining any relevant information from the archives of other countries

Outreach is conducted to support investigations. Outreach activities include: partnering with civil society organizations, including victims' groups; disseminating information to the public; and providing a platform for victims and survivors to share their experiences with the public. Because these activities try to communicate the commission's messages to the public, they can consume significant attention and resources.

International contributions to outreach may include:

- Sharing information about innovative outreach activities that other truth commissions have used
- Organizing, in agreement with the commission, outreach activities, such as informational events and public hearings in diaspora communities

Because managing a large operation with adequate staff, an appropriate presence on the ground, and effective communications requires efficient support services, commissions must assemble a compact and efficient management team. Access to public resources and international donations requires transparency and diligence to show effective use of funds.

Because truth commissions operate over a relatively short period of time and usually without precedent in the country, setting up an effective management system can be a challenging task. In several cases, including El Salvador, Guatemala,<sup>98</sup> and East Timor,<sup>99</sup> UN missions engaged in the peace process were fundamental to supporting the operations of the commission and providing expert personnel. In other cases, such as Sierra Leone and Peru, UN agencies, including the UN Development Programme, the UN Office for Project Services, and OHCHR, have contributed to local administrative services, including intermediation with donors and contracting personnel.

#### ***The Final Report of a Truth Commission and Recommendations***

At the end of its tenure, a truth commission is expected to produce a comprehensive report presenting its main findings and recommendations. This creates a surge of interest in the commission, its mandate, its members, and, of course, its findings and recommendations. Expectations from earlier phases of the process may be revisited in light of the intervening time. At this point, the alliances formed by the commission become instrumental to ensuring that the report is disseminated and society holds a fair discussion of the report's findings and recommendations.

Again, decisions made in the early phases have clear consequences later on. Commissions endowed with strong authority and independence to challenge a society and make strong findings and recommendations are better situated to intervene with their recommendations in the national agenda. Conversely, early decisions on the agreements, the mandate, or the appointment of commissioners betraying an intention to create a weak commission will result in serious difficulties, as a commission faces a public verdict on its credibility.

In the case of Guatemala, the public presentation of the CEH's report became an event of national and international significance. Although the Guatemalan commission was limited by its mandate to carrying out most of its activities in private, the public presentation of its findings and recommendations caused a sensation and empowered civil society and victims in their quest for justice. Indeed, the Guatemalan commission considered the public presentation of its conclusions to be both an effective measure of dissemination and a moral duty to the victims. In addition, the commission thought that issuing a report directly to the public would contribute to a "change of logic" in the transition, from one strictly dominated by the parties to one in which civil society could assert itself in the public sphere.<sup>100</sup>

In some cases, however, the commission has not been mandated to present its final report publicly. Such a provision is deeply problematic, as it empowers local elites to control the national discussion on the findings of the commission. In East Timor, the mandate of the CAVR originally called for a limited presentation of the report to the UN administrator and later to the UN Security Council. As the country installed its first government, that provision was altered to add that the president was to receive the Report and, later, discuss its findings with the Timorese parliament. When the CAVR finalized its work, the Timorese government had reservations regarding the contents of the report; it feared it might compromise bilateral relations with the former occupying power, Indonesia, whose responsibilities it spelled out. As a result, the report's dissemination to parliament and, by extension, to the public was delayed several months. In fact it was presented to the UN Security Council before it was presented to the Timorese Parliament or the public. Eventually, the report was released, but it had less of an impact due to delays and leaks to the media.

The mechanism of indirect publication through the highest executive authority has also been problematic in two recent cases, the Solomon Islands and Kenya. In the Solomon Islands, the TRC finished its work and duly presented its final report to the office of the prime minister in February 2012. However, the report has never been tabled in parliament, nor has it been published in the national gazette.<sup>101</sup> In April 2013, the chairperson of the commission, in response to general in-

terest and the government's inaction, presented the report *motu proprio* to the press, but this lacked the solemnity and symbolic power of a formal presentation by the state.

In Kenya, the Truth, Justice and Reconciliation Commission presented its report to the president in May 2013. However, the release was surrounded by controversy. The international commissioners announced publicly that the national commissioners—under pressure from the president's office—had consented to alter a section of the report, which described misconduct by the president's family. Only after the report was altered was it received by the president's office and forwarded to parliament.<sup>102</sup>

The role of former mediators and friends of a peace process becomes critical to urging parties and the government to publicize the final report and ensure that the appropriate government authorities give it attention and fair consideration. This is particularly true when mediators or international organizations are mandated to play a role in receiving the report.

Encouraging the public presentation and discussion of the final report is important, not just to guaranteeing that society has access to the commission's main findings, but also to ensuring that its policy recommendations are discussed and implemented as appropriate. Implementation of the recommendations seems to be an especially vexing phase in the process, as even commissions that have passed through several challenges may find their inputs marginalized in the political agenda.<sup>103</sup> Policy recommendations are strengthened by the moral authority gained by the commission during its tenure, the professional quality of its work, and the alliances and partnerships it has forged.

Because implementation results from a convergence of factors, some informed by political will, it is illusory to assume that it will follow legal provisions in the mandate. Provisions cannot be interpreted as more than procedural steps for ensuring that the different branches of government address the recommendations and consider them seriously.

The mandates of the truth commissions of Liberia, Kenya, and Sierra Leone state that the government must implement the commission's recommendations. However, that has not happened in any of these cases—and in Kenya it has led to a constitutional challenge to the commission.

Another avenue that may be more productive in carrying out recommendations is to establish successor organizations, charged with following up on the implementation of the recommendations and disseminating the information created by the commission. In East Timor, in spite of government skepticism regarding the CAVR, it consented to create a successor mechanism, the Center of Information. It has conducted numerous activities to strengthen civil society's capacity to

establish dialogue with authorities and negotiate to implement measures recommended by the commission. In Peru, the commission's recommendations have been followed by the National Ombudsman Office (which also protects the archives of the commission) and several platforms established by civil society following the presentation of the report. In both cases, international agencies and donors had the opportunity to support the sustainability of the truth-seeking process.

## Conclusions

The tenure of a truth commission is marked by a succession of decisions that are based on the early, and sometimes fragmentary, vision articulated in the peace process. Each step is marked by tensions, differences in how the commission will be conceptualized, and risks, as the parties and society project their expectations and fears onto the commission.

Decisions taken in the early stages influence deeply the subsequent opportunities for the truth commission to achieve its objectives. Limitations set on its capacity to act independently of political pressure will be felt later, sometimes to the point of incapacitation. The hurdles that a commission must pass over are not identical, but become progressively more complex.

Mediators and friends of the peace process can have the most impact in the early phases of the exercise. In the early phases, international mediators and supporters can help to infuse human rights considerations in the debates between the parties, and then with policy makers. Also, internationals can be called on to maintain the momentum of discussions if there is progress and parties are open to forms of effective accountability through truth telling. Conversely, if there is little interest or—worse—a spoiling attitude from the parties, mediators may encourage a more intentional, reflective process around truth seeking, avoiding hasty or ambiguous decisions that may compromise the rights of victims.

The opportunities for international support during the regular operations of a truth commission are multiple. Technical and political support from experts, fellow participants in similar truth commissions, peace-building institutions, and UN agencies can counteract the impact of some weaknesses. Transitional justice practitioners will share their experiences, build capacity, and give technical support within the parameters defined by the political will expressed by the parties, the mandate, and the leadership of the commission.

The end of a commission's tenure, when the commission prepares and presents its final report, may open up new opportunities for peace mediators and supporters to play a positive role. To take advantage of this opportunity, it is important



from the earliest stage to ensure that the commission will have the power to present its report to the general public, at the same time that it presents the report to the highest country authorities. Also it is essential to ensure that policy makers will consider the commission's policy recommendations seriously and fairly.

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56. Since 1992, nine countries have passed legislation or otherwise authorized norms establishing a truth commission after negotiations between parties previously engaged in violent confrontation: El Salvador (1992), Guatemala (1995), Sierra Leone (2000), Democratic Republic of the Congo (DRC) (2003), Liberia (2006), Kenya (2008), Honduras (2010), Nepal (2014), and Burundi (2014).

57. Agreement on the establishment of the Commission to clarify past human rights violations and acts of violence that have caused the Guatemalan population to suffer. Oslo, Norway. June 23, 1994.

58. Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone. Lomé, Togo, July 7, 1999.

59. Global and Comprehensive Agreement on the Transition in the Democratic Republic of Congo. Pretoria, South Africa. December 16, 2002.

60. Memorandum of Understanding between the Government of the Republic of Indonesia and the Free Aceh Movement. Helsinki, Finland. August 15, 2005.

61. Agreement on the establishment of the Commission to clarify past human rights violations and acts of violence that have caused the Guatemalan population to suffer. Oslo, Norway, June 23, 1994.

62. Terms of Reference for the Commission of Truth and Friendship, established by the Republic of Indonesia and the Democratic Republic of Timor-Leste, March 10, 2005. The CTF was established after the Timorese government expressed its displeasure with the CAVR report's findings. The terms of reference explicitly indicated an intention to contribute to the consolidation of the democratic transition in Indonesia, and minimized the crimes committed during the Indonesian presence in East Timor as "residual problems" to be solved to expand bilateral relations. For a complete analysis of the commission's weaknesses, see Megan Hirst, *Too Much Friendship, Too Little Truth: Monitoring Report on the Commission of Truth and Friendship in Indonesia and Timor-Leste* (New York: ICTJ, 2008).

63. See Chapter Five, "Democratic Republic of Congo: Case Study."

64. See Chapter One, "Set to Fail? Assessing Tendencies in Truth Commissions Created After Violent Conflict," for a discussion on the historical expansion of mandates in truth commissions.

For a more detailed description of the elements in a commission's mandate, see Eduardo González, *Drafting a Truth Commission Mandate: A Practical Tool* (New York: ICTJ, 2013).

65. The DRC, Kenya, Liberia, and Sierra Leone established their commissions through law. See Chapter One, "Set to Fail? Assessing Tendencies in Truth Commissions Created After Violent Conflict" for a discussion on the recent tendency to establish commissions by law.

66. See Chapter Seven, "Nepal: Case Study."

67. The Arusha Peace and Reconciliation Agreement for Burundi (August 28, 2000), Protocol I, articles 6 and 8 called for the establishment of an "International Judicial Commission of Inquiry on genocide, war crimes and other crimes against humanity" and a truth commission. Although both would examine exactly the same subject, the first one would conduct a legal analysis of the events, while the second would limit its work to descriptive fact-finding. After extensive consultations with the UN, and the help of international experts, Parliament passed legislation establishing a truth and reconciliation commission on April 28, 2014.

68. See Chapter Four, "Sierra Leone: Case Study."

69. In May 2014, Nepal's Constituent Assembly passed a bill to establish two separate commissions, one on truth seeking and one on the disappeared. See Chapter Six, "Kenya: Case Study."

70. See Chapter Seven, "Nepal: Case Study."

71. In Guatemala, the UN and the government decided to apply the immunities established in the UN Convention on Privileges and Immunities to the commissioners and their support personnel, international and Guatemalan. See UNOPS, "The Operations of the Historical Clarification Commission in Guatemala," Guatemala, 2000.

72. See Chapter Three, "Guatemala: Case Study."

73. Without political support and civil society strength, even legislation will be weak because legislators will continue to operate in the same political environment (see Case Study: Nepal). However, opening the legislative debate may at least give civil society and the international community opportunities to revisit a framework it had no chance of discussing previously, as well as to build capacity and conduct preliminary inquiries.

74. The Pretoria Peace Agreement of December 2002 did not indicate any content in the provision regarding the truth commission. Only, with the Sun City Accord in April 2003 did the parties include basic definitions of a commission's mandate. But they did not become final until a law was passed.

75. The law was backdated to August 2003.

76. There are exceptions. In Chile, a national commission for truth and reconciliation known as the Rettig Commission was established in 1990, but was only allowed to investigate crimes

resulting in death and disappearance. Victims and civil society called for broader investigation of abuses under military rule, and the president created the Valech Commission in 2003.

77. Exceptions to this include commonwealth countries with tradition of nonjudicial “commissions of inquiry.”

78. The concept derives from Max Weber, “The Three Types of Legitimate Authority.”

79. United Nations Transitional Administration in East Timor Regulation No. 2001/10 Establishment of a Commission for the Reception, Truth and Reconciliation in East Timor, July 13, 2001.

80. Eduardo González, “Give Truth a Chance, Canada,” *The Globe and Mail*, November 3, 2008.

81. The Canadian Truth and Reconciliation Commission was established by a judicially mediated agreement between the government of Canada, the Assembly of First Nations, representing indigenous organizations, and Christian churches. The commission investigates a pattern of inhumane treatment of indigenous children in schools authorized by the state and run by religious institutions. Indian Residential Schools Settlement Agreement, Schedule N, “Mandate for Truth and Reconciliation Commission,” May 8, 2006.

82. De Greiff Report, 8–9, 30 (see Summary of Discussions, n. 1).

83. De Greiff Report, 18, ¶ 61.

84. For example, the Draft Organic Law on the Organization of Transitional Justice Foundations and Area of Competence.

85. El Salvador: Mexico Peace Agreements—Provisions Creating the Commission on Truth. Mexico City, April 27, 1991.

86. Agreement on the establishment of the Commission to clarify past human rights violations and acts of violence that have caused the Guatemalan population to suffer. Oslo, Norway, June 23, 1994.

87. In the end, the moderator, Jean Arnault, was named special representative of the UN Secretary General in January 1997; as a result, the Secretary General, with the agreement of the parties, named German jurist Christian Tomuschat chairperson of the commission. Tomuschat was very familiar with Guatemala, as he had served as independent expert on the country for the UN Human Rights Commission. See UNOPS, “The Operations of the Historical Clarification Commission in Guatemala.”

88. The Truth and Reconciliation Commission Act 2000, enacted by President and Parliament of Sierra Leone, February 2000.

89. The Truth, Justice and Reconciliation Commission Bill 2008, enacted by the Parliament of Kenya, May 8, 2008.

90. The Truth and Reconciliation Commission Act 2008, passed by the National Parliament of Solomon Islands, August 28, 2008.

91. De Greiff Report, 18, ¶ 62.

92. See Chapter Six, “Kenya: Case Study.”

93. Notwithstanding some successes, the Liberian commission’s tenure was marked by successive difficulties. See Paul James Allen, *Beyond the Truth and Reconciliation Commission. Transitional Justice Options in Liberia*. May 2010.

94. UNOPS, *Las operaciones de la CEH en Guatemala. Sistematización de la experiencia de la oficina de apoyo de la CEH*. Capítulo 2, “Visiones y percepciones externas.”

95. See Eduardo González and Howard Varney, eds., *Truth Seeking: Elements of Creating an Effective Truth Commission* (Brasília: Amnesty Commission of the Ministry of Justice of Brazil; New York: ICTJ, 2013).

96. De Greiff Report, 18, ¶ 63 (indicating that the preparatory periods set by several mandates are too short and unrealistic, particularly when the scope of the research is too large).

97. See Chapter Five, “Democratic Republic of the Congo: Case Study” for a situation when the mandate gave the commission strong conflict resolution and mediation functions.

98. UNOPS, *Las operaciones de la Comisión para el Esclarecimiento Histórico en Guatemala: sistematización de la experiencia de la Oficina de Apoyo de la CEH* (The Operations of the Commission for Historical Clarification in Guatemala: systemization of the experience of the Support Office for the CEH), 1999.

99. Commission for Reception, Truth and Reconciliation in Timor-Leste, *Chega! The Report of the Commission for Reception, Truth and Reconciliation in Timor-Leste*, (Timor Leste: 2005), Chapter 1.

100. See “Las principales lecciones aprendidas” in *Las operaciones de la Comisión para el Esclarecimiento Histórico en Guatemala: sistematización de la experiencia de la Oficina de Apoyo de la CEH* (The Operations of the Commission for Historical Clarification in Guatemala: systemization of the experience of the Support Office for the CEH).

101. ICTJ, “The People of the Solomon Islands Have the Right to Know the Truth,” press release, February 15, 2013.

102. Paul Seils, “Integrity of Kenya’s Truth Commission Report Must Be Restored,” *Al Jazeera*, June 9, 2013, [www.aljazeera.com](http://www.aljazeera.com)

103. De Greiff, Report, 20–22.

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# Guatemala: Case Study

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by Félix Reátegui

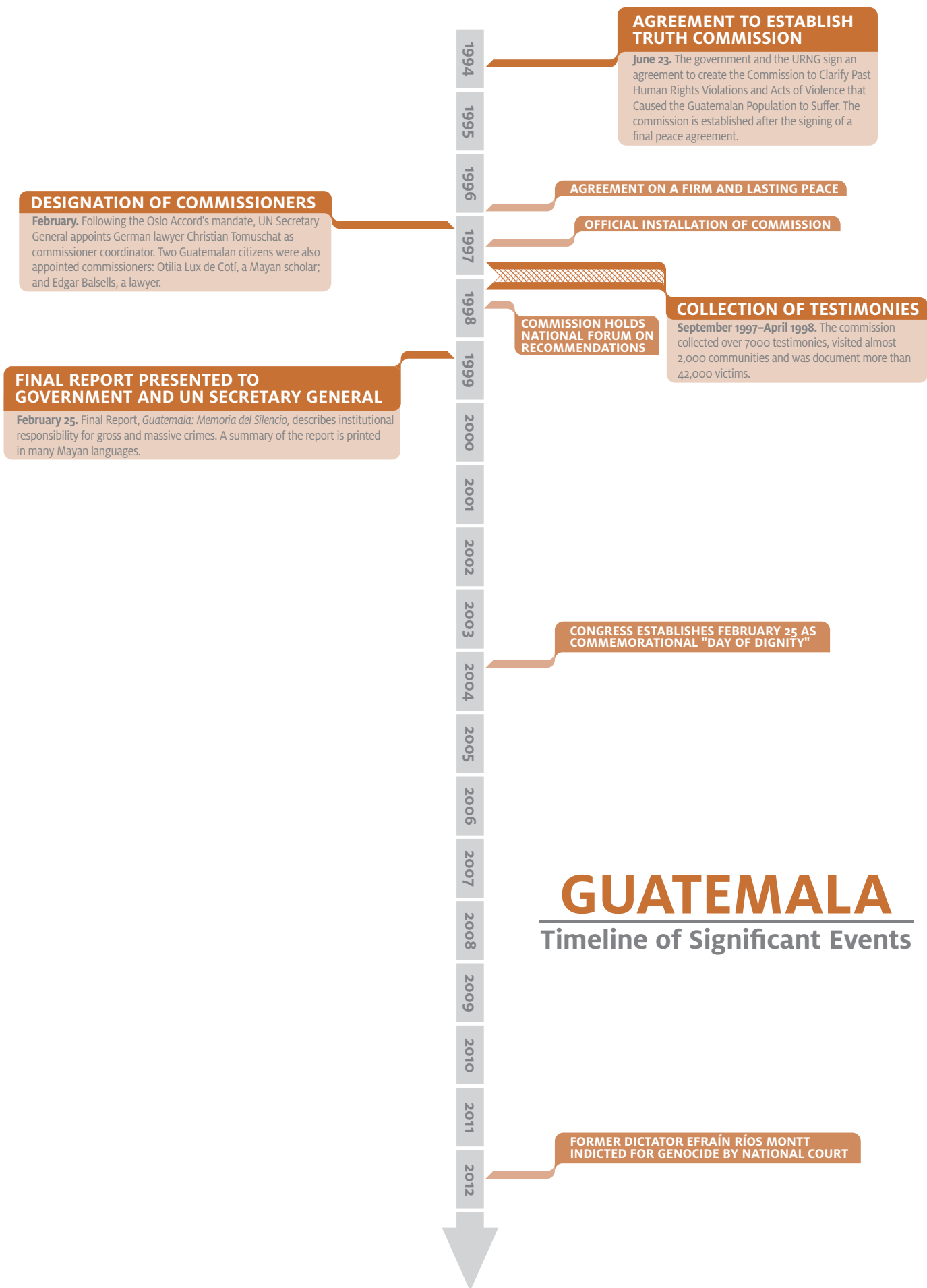
## Introduction

Guatemala's Commission for Historical Clarification (Comisión para el Esclarecimiento Histórico, CEH) was a truth-seeking mechanism that emerged from peace negotiations between the government of Guatemala and the Guatemalan National Revolutionary Union (Unidad Revolucionaria Nacional Guatemalteca, URNG), an alliance of four left-wing guerrilla groups. The peace process, which ended a 36-year conflict, was concluded in 1996 with the signing of the Agreement for Firm and Lasting Peace and was preceded by several accords, among them the Agreement on the Establishment of a Commission to Clarify Past Human Rights Violations and Acts of Violence that Have Caused the Guatemalan Population to Suffer (CEH agreement). The CEH started its work in July 1997 and presented its final report, Guatemala. Memoria del silencio, 20 months later, in February 1999.<sup>104</sup>

Although the CEH initially faced skepticism from victims' groups and human rights organizations due to the perceived limitations of its mandate, the commission is widely considered to be a successful experience on at least four counts. First, it was able to collect vast amounts of firsthand information from victims and process it effectively. Second, it produced a comprehensive final report establishing an authoritative record of serious crimes and human rights violations. Third, the commission gained victims' trust, cultivating a sense of ownership of the truth-seeking process among victims and reflecting their voices in its final report. Fourth, although the government did not diligently follow the CEH's findings and recommendations once they were presented, they have since impacted Guatemala's political, social, and judicial life. The most recent and well-known example is the trial of former dictator José Efraín Ríos Montt for genocide and crimes against humanity.<sup>105</sup>

During the 20 months that the CEH was active, it found that 200,000 people had been killed or disappeared during Guatemala's internal armed conflict. It attributed 93 percent of fatalities to the state and concluded that acts of genocide targeting the Maya people had been committed. It also documented the role of paramilitary structures and gave considerable attention to an analysis of the underlying structural and historical causes of violence and gross human rights violations in Guatemala. The CEH had been preceded by a civil society, church-based truth-seeking initiative, the Project for the Recovery of Historical Memory (Proyecto Interdiocesano de Recuperación de la Memoria Histórica, REMHI), which had mobilized indigenous communities, obtained thousands of testimonies, and examined the perspectives of communities affected by state violence.

The CEH succeeded in spite of the difficult institutional framework stemming from the peace negotiations. The difficulties it faced were not unlike those facing commissions in other peace processes: tepid official support, public skepticism, and marginalization of victim communities. Thus, the truth-seeking process in Guatemala furnishes some lessons on the possibility of overcoming challenging circumstances, particularly by addressing initial negative perceptions concerning important aspects of the truth-seeking pro-



cess, such as the mandate and the time and resources available to the commission.

Peace Negotiations

In December 1996 a peace agreement was signed in Guatemala City between the government and delegates of the URNG, a coalition of guerrilla forces emerging from disparate groups, one of which had started its armed struggle in 1960. The Agreement for Firm and Lasting Peace put an end to a violent period during which massive serious human rights violations were committed, mainly by state security forces against the civilian population. The worst violence occurred in the 1980s under the governments led by Gen. Romeo Lucas Garcia (1978–1982, especially from 1981–1982), Gen. Efraín Ríos Montt (1982–1983), and Gen. Mejía Victores (1983–1986). Massacres and scorched-earth tactics characterized this period of intensive counter-insurgency.

After a new constitution was adopted in 1986, a new civilian administration sought a political settlement to end the conflict. The first milestone in the peace process was the signing of an agreement in Oslo on March 30, 1990, whereby the state, represented by the National Reconciliation Commission of Guatemala, and insurgent groups agreed to initiate talks.

The negotiation period, starting with the involvement of a United Nations “observer,” lasted for approximately 10 years. From 1994–1997, official negotiations took place under UN mediation, which led to the adoption of 10 specific agreements and a final accord.<sup>106</sup>

Although negotiations involved civilian-elected governments, the military maintained a strong influence over political life in the country and thus the peace talks, which underwent periods of stagnation and setbacks. The UN moderator made serious efforts to keep the parties at the negotiation table. An important limitation that helps to explain these difficulties was the comparative weakness of the negotiating parties from the outset. It has been noted that both the government and the URNG had “weak representational claims”<sup>107</sup> and that the URNG did not pose a strategic challenge to the military and, therefore, could not make significant demands. Adding to this, spoilers encouraged resistance to specific agreements, particularly among the armed forces, which saw itself as the victor and forced to negotiate with a defeated adversary. Finally, international participants did not have much leverage

HYBRID COMMISSION COMPOSED OF  
1 INTERNATIONAL AND 2 NATIONALS

OPERATIONS LASTED  
19 MONTHS

USD BUDGET  
\$9,796,167

TOTAL OFFICES MAINTAINED  
FOURTEEN

INTERVIEWS CONDUCTED  
MORE THAN 7,000

VILLAGES VISITED  
MORE THAN 2,000

VICTIMS RECORDED  
MORE THAN 42,000

APPROXIMATE NUMBER OF PEOPLE  
KILLED OR DISAPPEARED  
200,000

PERCENTAGE OF HUMAN RIGHTS VIOLATIONS  
BY THE STATE  
93

because of Guatemala’s limited dependence on international assistance.<sup>108</sup>

The cycle of negotiations that led to a final peace accord can be organized into three distinct phases.<sup>109</sup> In the last phase, 10 specific agreements, incorporated by reference into the final agreement, were signed before the final accord.

The Agreement and Mandate of the Commission

The CEH’s foundation was laid out in an agreement signed in Oslo on June 23, 1994, and preceded by the Comprehensive Agreement on Human Rights (CAHR), signed in Mexico City on March 19, 1994. Originally the CAHR was intended to include provisions for the establishment of an official truth-seeking mechanism; however, the parties could not reach a settlement on this issue. To move ahead, they agreed to negotiate on truth seeking at a later date.

TABLE 2: PHASES OF NEGOTIATIONS LEADING TO THE FINAL PEACE ACCORD

PHASES	DEVELOPMENTS
1986–1990	LOW-LEVEL COVERSATIONS. IN 1990, THE UNITED NATIONS WAS ASKED TO ACT AS OBSERVER AND GUARANTOR.
1991–1993	DIRECT NEGOTIATIONS. IN 1991, THE PARTIES AGREED ON AN 11-POINT AGENDA THIS PHASE ENDED IN 1993 WITH THE CONSTITUTIONAL CRISIS.
1994–1996	DIRECT NEGOTIATIONS AND AGREEMENT WITH THE UNITED NATIONS ACTING AS MEDIATOR.



**TABLE 3: AGREEMENTS SIGNED BETWEEN 1994 AND 1996**

AGREEMENT	DATE	CITY
COMPREHENSIVE AGREEMENT ON HUMAN RIGHTS	MARCH 19, 1994	MEXICO CITY
AGREEMENT ON RESETTLEMENT OF THE POPULATION GROUPS UPROOTED BY THE ARMED CONFLICT	JUNE 17, 1994	OSLO
AGREEMENT ON THE ESTABLISHMENT OF THE COMMISSION TO CLARIFY PAST HUMAN RIGHTS VIOLATIONS AND ACTS OF VIOLENCE THAT HAVE CAUSED THE GUATEMALAN POPULATION TO SUFFER	JUNE 23, 1994	OSLO
AGREEMENT ON IDENTITY AND RIGHTS OF INDIGENOUS PEOPLES	MARCH 31, 1995	MEXICO CITY
AGREEMENT ON SOCIAL AND ECONOMIC ASPECTS OF THE AGRARIAN SITUATION	MAY 6, 1996	MEXICO CITY
AGREEMENT ON THE STRENGTHENING OF CIVILIAN POWER AND ON THE ROLE OF THE ARMED FORCES IN A DEMOCRATIC SOCIETY	SEPTEMBER 19, 1996	MEXICO CITY
AGREEMENT ON THE DEFINITIVE CEASEFIRE	DECEMBER 4, 1996	OSLO
AGREEMENT ON CONSTITUTIONAL REFORMS AND THE ELECTORAL REGIME	DECEMBER 7, 1996	STOCKHOLM
AGREEMENT ON THE BASIS FOR THE LEGAL INTEGRATION OF URNG	DECEMBER 12, 1996	MADRID
AGREEMENT ON THE IMPLEMENTATION, COMPLIANCE, AND VERIFICATION	DECEMBER 29, 1996	GUATEMALA CITY

The subsequent CEH agreement stated that the commission would serve three purposes:

- I. To clarify with all objectivity, equity, and impartiality the human rights violations and acts of violence that have caused the Guatemalan population to suffer, connected with the armed conflict.
- II. To prepare a report that will contain the findings of the investigations carried out and provide objective information regarding events during this period covering all factors, internal as well as external.
- III. Formulate specific recommendations to encourage peace and national harmony in Guatemala. The Commission shall recommend, in particular, measures to preserve the memory of the victims, to foster a culture of mutual respect and observance of human rights, and to strengthen the democratic process.<sup>110</sup>

The text also established the period of time to be investigated by the commission: “from the start of the armed conflict until the signing of the firm and lasting peace agreement.” It also set the following criteria for the commission’s composition:

The Commission shall consist of the following three members:

- (i) The present Moderator of the peace negotiations, whom the Secretary-General of the United Nations shall be asked to appoint.
- (ii) One member, a Guatemalan of irreproachable conduct, appointed by the Moderator with the agreement of the Parties.
- (iii) One academic selected by the Moderator, with

the agreement of the Parties, from a list proposed by the University presidents.

According to the mandate, the commissioner coordinator appointed by the UN Secretary-General should have been Jean Arnault, who had steered the negotiation process as the UN mediator. However, Arnault became head of the UN Verification Mission in Guatemala (MINUGUA). Christian Tomuschat, a German lawyer who had served for years as the UN independent expert on Guatemala, was appointed commissioner coordinator in his place. Tomuschat chose the Guatemalan commissioners—Otilia Lux de Cotí and Alfredo Balsells—after several meetings with civil society organizations.<sup>111</sup>

The Operations section of the CEH agreement established the functions and powers that the commission would have to accomplish its mission:

- I. The Commission shall receive particulars and information from individuals or institutions that consider themselves to be affected and also from the Parties.
- II. The Commission shall be responsible for clarifying these situations fully and in detail. In particular, it shall analyse the factors and circumstances involved in those cases with complete impartiality. The Commission shall invite those who may be in possession of relevant information to submit their version of the incidents. Failure of those concerned to appear shall not prevent the Commission from reaching a determination on the cases.
- III. The Commission shall not attribute responsibility to any individual in its work, recommenda-



tions, and report nor shall these have any judicial aim or effect.

IV. The Commission's proceedings shall be confidential so as to guarantee the secrecy of the sources and the safety of witnesses and informants.

V. Once it is established, the Commission shall publicize the fact that it has been established and the place where it is meeting by all possible means, and shall invite interested parties to present their information and their testimony.

Some of these provisions were perceived from the start as limitations or potential obstacles to effective truth seeking, in particular the inability to attribute individual responsibilities. In the context of 1996, such a limitation was likely judged against the experience of the Salvadoran Truth Commission, which had directly named people whom the commission found responsible for the worst atrocities. Also, the notion—although vague—that the report would not have judicial effects created the impression that the CEH would maintain the situation of impunity.

Because the commission was not given powers to issue subpoenas, it was very difficult, if not impossible, for it to interview reluctant potential informants, such as alleged perpetrators, military authorities, or witnesses to crimes. Although the agreement said the commission “shall receive particulars and information from . . . institutions,” it did not invest the CEH with compulsory powers to require official documents. In fairness, however, previous commissions in Latin America had operated under the same constraints.

An additional perceived limitation was the short amount of time allotted to the CEH to carry out its work—six months, which could be extended to one year. Again, when compared to Latin American truth-seeking processes that it preceded (which were the only examples at that time), six months could be perceived as reasonable; the Salvadoran commission had been given the same six-month mandate, and it eventually finished its work in less than one year.

Compared with later practice, the CEH mandate looks limited indeed, and the misgivings of civil society activists are understandable. At the time, truth commissions were still largely experimental organizations, and the framers may have thought they were applying the yardstick of actual, previous experiences. But the reasons behind misgivings were not technical, but political: the agreements were the work of the parties, which had not held wider consultations. In the case of the CEH, this was made more evident by the fact that the mandate would not require additional debate or passage by parliament or another government body. Therefore, the CEH lacked both an executive decree and a law to ground its man-

date. (However, additional action was necessary at the executive and legislative levels to establish the relevant immunities and privileges for the commissioners during their operation.) In such a situation, a decision on the part of civil society and victims to participate in the CEH process would have been a bet requiring strong will.

In this regard, the choice of commissioners was fortunate. The chairperson had been a UN expert on Guatemala who held the respect of civil society advocates and had extensive knowledge about abuses committed in the conflict; his choices for the two Guatemalan commissioners were seen as correct. In a context in which any move by the commissioners would affect public perceptions, the mutual engagement between the CEH and civil society was constructive, starting with an open-door policy that guaranteed advocates access to the commission to apply pressure, but any pressure would take place along institutional lines.

Another positive development was the independence granted to the commissioners to interpret their mandate without favor or prejudice. Because the mandate was fully contained in a brief peace agreement that lacked the detail that future truth commission bills would reach, it offered ample space for interpretation, which required the sound judgment of the commissioners.

The commissioners determined that they were requested to clarify “not . . . the armed confrontation, itself, but rather the human rights violations and acts of violence connected to it,” thus affirming the focus on abuses, rather than potentially the justness of the conflict. The commissioners also established that it was their function to recommend reparations for victims, although this point had not been fully formulated in the mandate. To do so, the commissioners pointed out that the CAHR had already mandated that the entity in charge of reparations “shall take into account the Commission on Historical Clarification’s recommendations in this regard.”<sup>112</sup>

The commissioners duly acknowledged that there were limitations in the mandate’s prohibition on attributing responsibilities to individuals for human rights violations and acts of violence and the lack of judicial aim or effect for the CEH’s findings. The first limitation led commissioners to focus instead on institutional responsibilities and the state, whose overwhelming responsibility was established in the final report. Such a change of focus was not necessarily a recognition of a weakness, as findings still could have strong political and moral impact. Addressing the CEH’s judicial effects, the commissioners made it clear that a citizen or an official institution could not be deprived of the right to use the commission’s findings to seek or to administer justice. After all, the mandate could be reasonably interpreted to refer to an obvious circumstance: that the commission was not a judicial

body; and it did not determine how the de-linking of truth and justice would take place. For the commission:

Nothing prevents State institutions, particularly the responsible for the administration of justice, from using elements contained on the Report. The same reasoning applies to citizens who were victims or relatives of victims, who maintain the same rights that they may have, as such, to legally pursue cases discussed in the Report.<sup>113</sup>

## Operations

CEH operations received substantial logistical, technical, and financial support from both the UN and the international community. The international commitment to Guatemala's truth-seeking process was reflected in the composition of the commission staff, which included both nationals and internationals.

The commissioners made a crucial decision at the outset to ask for "assistance from the United Nations in seeking the best mechanism to design and organize the Commission's operative support structure."<sup>114</sup> In response, in May 1997 the UN Office for Projects (UNOPS) took on the responsibility of "organizing and managing the Support Office's operations, as well as managing the commission's fund."<sup>115</sup> Within one month, the Support Office (essentially the commission staff) was organized to facilitate the CEH's work "with a team of collaborators who would carry out the Commissioner's decisions . . . and conducting all activities with transparency so that the Commissioners had constant access to the information needed to make decisions."<sup>116</sup>

Another key decision was establishing that the comprehensive structure of the Support Office "was to function in a decentralized manner, with a network of offices assuring national coverage, especially in regions historically most affected by the armed conflict."<sup>117</sup> The project operated with "26 different structural parts; staffed and worked in 14 offices throughout the entire country; [and] visited nearly 2,000 villages, entering into contact with more than 20,000 citizens."<sup>118</sup> During its period of greatest field coverage, the Support Office enlisted 273 people,<sup>119</sup> at one point from 32 nations, with international staff working alongside Guatemalan personnel. The commission also received experts from the United Nations, the UN High Commissioner for Refugees, the UN Children's Fund, the UN Development Program, the International War Crimes Tribunal for the Former Yugoslavia, and UNOPS. MINUGUA provided logistical support.<sup>120</sup> The CEH became the largest truth commission ever assembled, surpassing by far in scale and international involvement all previous Latin American commissions.

Throughout its operations and especially initially, the CEH experienced considerable financial insecurity. To pay for its

operations, the commissioners appealed to the Guatemalan government and the international community, with the latter contributing more than 90 percent of funds. The financial commitment of the international community was substantial, as was the allocation of international resources for its development. The CEH had a final budget of USD \$9,796,167.<sup>121</sup>

## Final Report

The CEH released its final report on February 25, 1999, after two six-month extensions. That it was granted two extensions when only one was permitted in the mandate is proof that the CEH had gained sufficient political support to protect and facilitate its operations.

The report has been widely acknowledged as a strong contribution to establishing the truth about human rights abuses in Guatemala. According to William Stanley and David Holiday:

The conclusions . . . hit the Guatemalan political landscape like a bombshell. The commission's basic findings—that the military was responsible for 93 percent of the total human rights violations and other acts of violence they documented—were not unexpected. But the charges of genocide and racism committed by the armed forces in their ruthless campaign against the guerrillas in the early 1980s came as a surprise, issued as they were from a U.N.-sponsored effort . . . 122

The report was the outcome of a complex research process. Among the most important activities conducted during the research and investigation phase were the collection of victims' testimonies and case documentation, investigation of cases, local sociohistorical investigations and contextual reports, interviews of key witnesses, and the search for documents and illustrative cases.<sup>123</sup>

Over the course of its operation, the CEH recorded testimonies from more than 42,000 men, women, and children who were victims of atrocities. It used statistical methods to estimate that approximately 200,000 people were victims of extrajudicial killing and enforced disappearance.

The final report described and analyzed violations committed by all of the armed groups. It examined state crimes, which included enforced disappearances, arbitrary executions, rape, use of death squads, denial of justice, and forced and discriminatory military recruitment.<sup>124</sup> It concluded that "agents of the State of Guatemala . . . committed acts of genocide against groups of Mayan people which lived in the four regions analysed."<sup>125</sup>

The prohibition on attributing individual responsibility for crimes led the commissioners to put particular emphasis

sis on institutional responsibility, a decision that proved fruitful to historical clarification and serving victims' right to truth. In Conclusion 105 of the final report, the CEH states:

The majority of human rights violations occurred with the knowledge or by order of the highest authorities of the State. Evidence from different sources . . . all coincide with the fact that the intelligence services of the Army, especially the G-2 and the Presidential General Staff (Estado Mayor Presidencia), obtained information about all kinds of individuals and civic organisations, evaluated their behavior in their respective fields of activity, prepared lists of those actions that were to be repressed for their supposedly subversive character and proceeded accordingly to capture, interrogate, torture, forcibly disappear or execute these individuals.<sup>126</sup>

Among the commission's achievements are assessing the full scope and pervasiveness of the violence, demonstrating the quantitative volume and legal nature of the crimes, giving an explanation about the root causes of the conflict, and establishing the high institutional responsibility of the state.

The CEH also made important recommendations regarding the preservation of victims' memory, compensation for victims, measures to foster mutual respect and protect human rights, strengthening the democratic process, ensuring peace and national harmony, and measures to establish a follow-up mechanism for its recommendations.

Although not all of its recommendations have been implemented to satisfaction, the CEH has helped to advance the acknowledgment of past crimes and abuses and the plight of victims. It is not a minor achievement that the CEH could convince thousands of victims to come forward with their information. Although this process had been initiated by the REMHI project,<sup>127</sup> the CEH surpassed that experience, carrying out truth-seeking work in different regions, among several groups of victims, and through networks not directly linked to the Catholic Church.

A reparations program for victims was established in 2003, four years after the presentation of the final report. Some judicial actions have taken place in connection to the commission's work, like the trial against Ríos Montt. According to Aryeh Neier:

One of the crucial moments in the struggle to hold Ríos Montt accountable was the publication in February 1999 of the [Commission's] nine-volume report . . . [which] documented many of the abuses committed during Ríos Montt's presidency, and included thousands of cases of murder, rape, and torture.<sup>128</sup>

## Conclusions

The CEH made valuable contribution to restoring truth and memory in Guatemala despite serious constraints. Some of its initial weaknesses turned out to be potential strengths, such as the looseness of its mandate, which allowed the commissioners to interpret their mission and make decisions based on the best interests of victims. Nevertheless, even that potential strength depended on some basic elements, such as the composition of the commission itself, international and national support, and expectations about the peace process in general and the truth-seeking exercise in particular.

An assessment of the CEH's key features and decisions that helped it to succeed should include the independence of the commissioners and their ability and openness to reach out to wide sectors of society, like victims who had direct stakes in the truth-seeking process and those that could contribute to outreach and research processes, like civil society groups and academics.

UNOPS's systematization emphasizes that:

The Commissioners' openness, independence from the parties to the conflict and their will to conduct operations with the highest level of transparency permitted by the mandate, culminated in the Final Report's public presentation in the National Theater, in front of thousands of citizens and government and URNG representatives. The Coordinator of the CEH presented the Report's key conclusions and recommendations. They had been given just hours before to both parties to the conflict, while the whole body of the Report was delivered to them for the first time during the public act. The fact that the Final Report's main conclusions and recommendations were announced publicly in the presentation has been recognized by Guatemalan society not only as a demonstration of transparency but also of respect for the armed conflict's 200,000 victims.<sup>129</sup>

The independence and credibility of the commissioners—as well as their ability to gain the trust of victims' groups and technical support from UNOPS—allowed the CEH to overcome the limitations of its mandate. Good judgment and flexibility enabled the commission, from an early stage, to make important decisions like interpreting the restriction on attributing responsibilities on an individual basis in positive terms as an obligation, or an opportunity, to focus on institutional responsibilities.

The decision to focus on institutional involvement in serious crimes also lent particular strength to recommendations for institutional reform. The commission was able to show that deeply rooted historical injustices and weaknesses in national

institutions were strong underlying causes of the conflict, the vulnerability of the targeted population, and ensuing and enduring impunity.

Finally, among the most important features of the CEH's success was its ability to overcome the deep initial mistrust of victims' groups. The CEH was able to build relationships that enabled it to carry out a successful testimony-taking process. UNOPS documents on the CEH's systematization state that:

In spite of the fears, the number of people who gave testimonies increased steadily over the course of this phase of the work. In time, the intensity of work in the field totally surpassed the Commission's expectations and capacity. Many people were inspired to give testimony after others in their community did so. In many cases, people testifying identified other victims of the same incidents or of the other events, who lived in the same communities or elsewhere. Investigators were able to follow up these cases with visits to the new witnesses and victims, in some cases accompanied by those who had already testified.<sup>130</sup>

The UNOPS document affirms that coordination with local social organizations gave the commission credibility. "One activity that generated positive feedback—informs the document—was the forum held with civil society organizations in May 1998. The forum was held to receive suggestions from civil society regarding the formulation of CEH recommendations."<sup>131</sup> One interviewee, Juan Tipa, reports that Commissioner Lux de Cotí met with organizations to request their collaboration.<sup>132</sup>

In this respect, perhaps it is fortunate that the CEH started its work under the perception that it was weak, which reduced the expectations of stakeholders at the outset. For civil society advocates, familiar with the struggle for human rights carried out under difficult circumstances, any positive step acquired strong value; the openness of commissioners and their signals of independence convinced civil society leaders that it was reasonable to support the CEH's activities.

The CEH's experience shows that in the context of a large, complex peace-building framework, limitations and weaknesses at the inception of a truth commission can be overcome during the setting-up period and in fieldwork. In Guatemala, the appropriate professional and individual strengths of the commissioners and intense international attention and concern prevented the truth-seeking process from being derailed or transformed into a superficial process. At the same time, the openness of the commission enabled civil society leaders to overcome their well-founded initial mistrust and take the political decision to support the process.

104. Historical Clarification Commission, Guatemala. *Memoria del silencio*, [http://shr.aaas.org/projects/human\\_rights/guatemala/ceh/mos\\_en.pdf](http://shr.aaas.org/projects/human_rights/guatemala/ceh/mos_en.pdf)

105. International Crisis Group, "Justice on Trial in Guatemala. The Ríos Montt Case," *Latin America Report* 50 (September 2013), 23.

106. Marcie Mersky, "Human Rights in Negotiating Peace Agreements: Guatemala," working paper presented at the review meeting of "Peace Agreements: The Role of Human Rights in Negotiations," organized by the International Council on Human Rights Policy, Belfast, March 7–8, 2005, 2–3.

107. William Stanley and David Holiday, "Broad Participation, Diffuse Responsibility: Peace Implementation in Guatemala," in Stephen John Stedman, Donald Rothchild, and Elizabeth M. Cousens, eds., *Ending Civil Wars: The Implementation of Peace Agreements* (AU: Lynne Rienner Publishers, 2002), 3.

108. Stanley and Holiday, "Broad Participation," 10.

109. Mersky, "Human Rights in Negotiating Peace Agreements: Guatemala," 4–5.

110. Agreement on the Establishment of the Commission to Clarify Past Human Rights Violations and Acts of Violence That Have Caused the Guatemalan Population to Suffer, 1994.

111. Tomuschat met numerous times with the parties and a wide spectrum of civil society representatives between February 19 and 21, 1997. As a result of these meetings and with the concurrence of all parties to the conflict, Cotí and Balsells were named commissioners on February 22, 1997. Balsells was selected from a list of people nominated by university rectors.

112. United Nations Office for Project Services, The Operations of the Historical Clarification Commission in Guatemala. Systematization of CEH Office of Support Experiences, Appendix I. Historical Clarification Commission: Mandate and Investigative Procedures. Reproduced from the CEH's final report, 105.

113. *Ibid.*, 106.

114. *Ibid.*, 25.

115. *Ibid.*

116. *Ibid.*

117. *Ibid.*, 27.

118. *Ibid.*, v–vi

119. *Ibid.*, ii.

120. *Ibid.*, 25 and 98–99.

121. *Ibid.*, 98.

122. Stanley and Holiday, "Broad Participation," 45.
123. United Nations Office for Project Services, The Operations of the Historical Clarification Commission in Guatemala, 46–56.
124. Historical Clarification Commission, *Guatemala. Memory of Silence*, 34–37.
125. Ibid., 41.
126. Ibid., 38.
127. William D. Stanley, "Business and Usual? Justice and Policing Reform in Postwar Guatemala," in Charles Call, ed.), *Constructing Justice and Security After War* (Washington, DC: USIP, 2007), 125–26.
128. Aryeh Neier, "Guatemala: Will Justice Be Done?" New York Review of Books 60, no. 11 (June, 20, 2013), [www.nybooks.com/articles/archives/2013/jun/20/guatemala-will-justice-be-done/](http://www.nybooks.com/articles/archives/2013/jun/20/guatemala-will-justice-be-done/)
129. United Nations Office for Project Services, The Operations of the Historical Clarification Commission in Guatemala, 41.
130. Ibid., 50.
131. Ibid., 16–17.
132. Ibid., 16.





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# Sierra Leone: Case Study

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By Elena Naughton

### Introduction

Between 1991 and 2002, Sierra Leone experienced an internal armed conflict between the government and insurgent factions. In July 1999, the main rebel force, the Revolutionary United Front (RUF), led by Foday Sankoh, and the government of President Ahmad Tejan Kabbah signed a peace agreement in Lomé, Togo.<sup>133</sup>

The Lomé Peace Agreement (LPA) granted a blanket amnesty for all combatants and called for the establishment of the Truth and Reconciliation Commission (TRC), which would receive testimony from all sides and perspectives: combatants and noncombatants, victims and perpetrators. Legislation establishing the TRC was passed seven months later, in February 2000.<sup>134</sup>

Soon thereafter, the power-sharing elements of the peace agreement collapsed, and the country suffered a serious outbreak of violence in May 2000, at the end of which an international armed intervention arrested Sankoh and other members of the RUF.

The terms of the ceasefire had to be renegotiated and the LPA reaffirmed by two subsequent protocols signed at Abuja (the first on November 10, 2000, and the second on May 2, 2001) before meaningful disarmament could be achieved.<sup>135</sup> Despite these events, the terms of the LPA relating to the TRC were not altered.

At that stage, the government and the international community agreed to establish not only the TRC but also a hybrid Special Court for Sierra Leone (SCSL), where those bearing the “greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law” would be tried.<sup>136</sup>

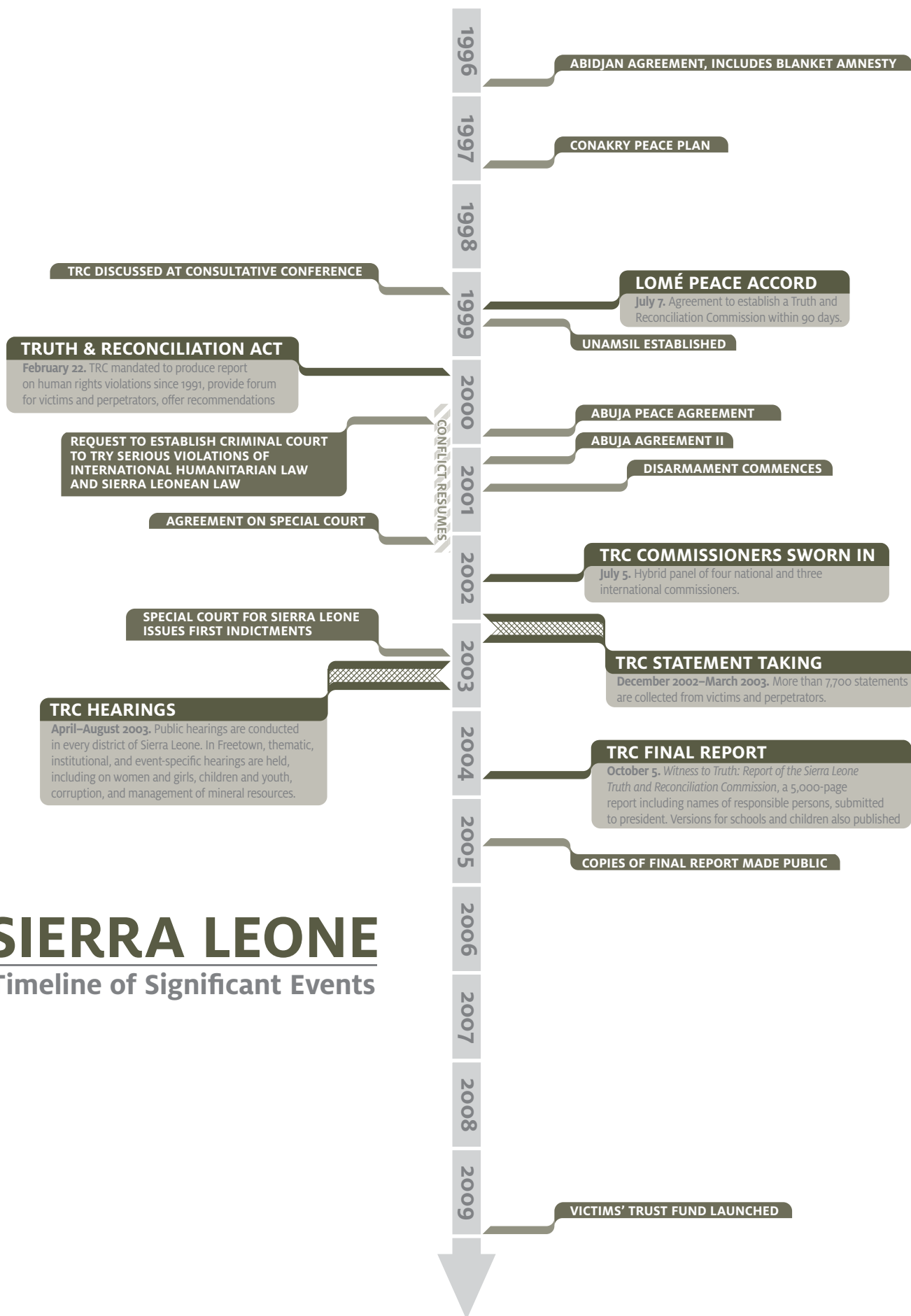
How did the idea of truth seeking survive first a severe reversal in the peace process and then a newly reconfigured post-conflict environment that included a parallel criminal justice process at the SCSL?

This paper explores the dynamics of shifting international support for truth seeking in Sierra Leone at key moments in the process. It focuses on:

- *The vision for truth seeking in the peace agreement:* It reviews the Lomé peace talks and the original commitment to truth seeking articulated there, then discusses how parliament refined that commitment when it passed the TRC’s formal statutory mandate into law only seven months later and how the TRC’s mandate affected the later workings of the commission.
- *Responding to crisis:* It summarizes the steps taken by the international community to sustain the commitment to truth seeking after serious ceasefire violations occurred and the power-sharing elements of the peace agreement collapsed. Challenges faced by the TRC: It discusses a few of the challenges to truth seeking that arose during the TRC’s tenure: insufficient funding, alleged mismanagement and staff recruitment problems, and

# SIERRA LEONE

## Timeline of Significant Events



allegations of government interference in the selection of the commissioners and publication of the final report.

### Building Support for Human Rights and the TRC

Civil conflict began in Sierra Leone in March 1991; however, it was not until February 1995 that the UN Secretary-General Boutros Boutros-Ghali appointed a special envoy, Berhanu Dinka, of Ethiopia, to negotiate a settlement of the conflict in response to a request from Sierra Leone's president.<sup>137</sup> In July 1998, the UN Security Council established the UN Observer Mission in Sierra Leone (UNOMSIL) under the leadership of the special envoy.<sup>138</sup> That mission was terminated on October 22, 1999, when the Security Council authorized a larger peacekeeping operation—the United Nations Mission in Sierra Leone (UNAMSIL)—to assist with implementation of the LPA.<sup>139</sup>

The Lomé peace negotiations began on May 25, 1999, under the auspices of Togo President Gnassingbé Eyadéma, then-chair of the Economic Community of West African States (ECOWAS).<sup>140</sup> The LPA was drafted with input from a cross section of international and local actors. Government and rebel forces participated in discussions, along with a host of observers from ECOWAS, the Commonwealth of Nations, the Organization of African States, the United Nations, and the governments of Libya, the United Kingdom, and the United States. Leaders from the international and national human rights community also attended.<sup>141</sup>

Given the dynamics of the conflict and the political situation at the time, a clear consensus in favor of amnesties appears to have prevailed during talks.<sup>142</sup> Two earlier ceasefire agreements, the Abidjan Agreement signed on November 30, 1996, and the Conakry Peace Plan, issued on October 23, 1997, had both contained amnesties.<sup>143</sup>

To counter the trend, the human rights community had been promoting accountability and the significance of human

STATEMENTS RECORDED  
**7706**

TOTAL VIOLATIONS REPORTED TO THE COMMISSION  
**40,242**

SPECIFIC CATEGORIES OF VIOLATIONS  
**OVER SIXTEEN**

MASS GRAVES AND OTHER SITES LOCATED  
**113**

HEARINGS LASTED  
**FIVE MONTHS**

PROCEEDINGS BROADCAST LIVE ON  
**RADIO**

HEARINGS CONDUCTED IN  
**EVERY DISTRICT**

TESTIMONY RECEIVED  
**THOUSANDS OF HOURS**

TESTIMONY GIVEN BY  
**MORE THAN 450 WITNESSES**

In June 1998, Carol Bellamy, head of UNICEF; Sergio Vieira de Mello, head of the UN Office for the Coordination of Humanitarian Affairs; and Mary Robinson, then UN High Commissioner for Human Rights, issued a joint statement describing the acts of the rebels as “outrageous violations of human rights . . . and grave breaches of international humanitarian law.”<sup>147</sup>

Faced with proposals for blanket amnesties again at Lomé, a coalition of international and local human rights groups advanced the idea of a truth and reconciliation commission in February 1999.<sup>148</sup> The proposal was for an approach that

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*How did the idea of truth seeking survive first a severe reversal in the peace process and then a newly reconfigured post-conflict environment that included a parallel criminal justice process at the SCSL?*

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rights for some time in Sierra Leone.<sup>144</sup> On December 23, 1996, the government established the National Commission for Democracy and Human Rights (NCDHR) to promote democracy building and human rights.<sup>145</sup> It received USD \$1.6 million in funding from the UN Development Programme (UNDP) for a three-year “National Awareness-Raising Program” that sought to promote peace, reconciliation, respect for human rights, and “support for the government policy for seeking an end to the war.”<sup>146</sup>

would include a TRC whereby perpetrators would be able to tell the “truth,” survivors would be helped, and the “worst perpetrators” would be recommended for “judicial prosecutions.”<sup>149</sup>

Again in April 1999, a month before Lomé, civil society groups called for the creation of a truth commission at a National Consultative Conference on the Peace Process held in Freetown under the auspices of the NCDHR. Over the

course of three days, key stakeholders raised issues of human rights and the incompatibility of blanket amnesties with international human rights standards as they sought to work out a viable political framework.<sup>150</sup>

Key policymakers supported the TRC publicly, keeping it on the public agenda during talks. In June 1999, a few months after the National Consultative Conference and while peace talks were in progress, Robinson again drew attention to the continuing human rights crisis when she visited Freetown and publicly supported the idea of a truth commission as a mechanism for advancing human rights.<sup>151</sup> On June 24, 1999, Robinson—together with Kabbah; Francis Okelo, the UN Secretary-General Special Representative for Sierra Leone; the chair of a coalition of nongovernmental organizations; and the head of the UN peacekeeping force—adopted a “human rights manifesto” that committed the Office of the High Commissioner for Human Rights (OHCHR) “to provide appropriate technical assistance for the establishment of the Commission.”<sup>152</sup>

By the time the LPA was finalized in July, “humanitarian, human rights and socio-economic issues” warranted a specific section of the peace agreement, and provisions relating to the TRC were placed under that umbrella.<sup>153</sup> They were not grouped with “political issues,”<sup>154</sup> such as pardons, amnesty, elections, and a review of the constitution, but were rather a mechanism for “upholding, promoting and protecting the human rights of every Sierra Leonean, as well as the enforcement of humanitarian law.”<sup>155</sup>

Although the LPA included and expanded on the blanket amnesty provided by an earlier agreement at Abidjan, it now also included a commitment to truth seeking, something earlier agreements had lacked.

### **Vision for Truth-Seeking at Lomé and the Development of a Formal TRC Mandate**

The LPA was a political agreement designed to effect changes in the structures of power, including in relation to the control and management of valuable strategic resources. A single document rather than a series of documents, the LPA was comprehensive in scope.

- It provided for an immediate end to hostilities and established mechanisms for monitoring the ceasefire; moving forward with the disarmament, demobilization and reintegration of combatants; restructuring the armed forces; and withdrawing mercenaries.
- It granted an “absolute and free pardon” to Corporal Foday Sankoh and a blanket amnesty to “all combatants and collaborators in respect of anything done by them in pursuit of their objectives, up to the time of the sign-

ing of the present Agreement.”<sup>156</sup> At the signing, the UN refused to recognize the amnesties, saying “the amnesty and pardon shall not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law.”<sup>157</sup>

- It contained power-sharing mechanisms and sought to address long-standing electoral grievances. There was to be a government of “national unity.” The RUF/SL was “to transform itself into a political party” and join an expanded government through various cabinet, ministerial, and public sector positions.<sup>158</sup>
- A mixture of verification and monitoring mechanisms were set in place, but they were essentially hortatory. The government of Togo, the UN, the Organisation of African Unity (OAU), ECOWAS, and the Commonwealth were to act as “moral guarantors” to ensure implementation was accomplished “with integrity and in good faith by both parties.” A Council of Elders and Religious Leaders was to resolve disputes over the interpretation of the agreement’s articles, with the Supreme Court given final review power of appeals.<sup>159</sup>

On “humanitarian, human rights and socio-economic issues,” the LPA included mechanisms for meeting the war’s legacy of human rights abuses and ensuring that human rights were respected in the future. The TRC and a National Human Rights Commission were to be established to address allegations of human rights abuses in the past and future, respectively. A Special Fund for War Victims; the National Commission for Resettlement, Rehabilitation and Reconstruction; and other humanitarian initiatives were to address the rehabilitative needs of the war’s many victims of human rights abuse and displacement.<sup>160</sup>

Institutional structures to oversee implementation of these mechanisms, however, were weak. While the LPA required the creation of some committees with specific substantive responsibilities (e.g., the Constitutional Review Committee and the National Electoral Commission), it did not create a separate mechanism to ensure that the TRC was created, resourced, and functioned effectively. A temporary body, the Commission for the Consolidation of Peace (CCP), was assigned a role to coordinate all official peace initiatives, including those relating to the TRC, with limited oversight by the president.<sup>161</sup> The CCP was given a short tenure: its mandate was to end with the general election in 2002.<sup>162</sup> The timing targets for the TRC were similarly truncated: a 90-day window for establishing the TRC and 12 months for it to issue its final report.<sup>163</sup>

As a result, the UN and various international and domestic human rights organizations acted quickly to provide the technical support necessary to establish the TRC. The gov-

ernment of Sierra Leone formally and publicly pledged its support for the process of reconciliation on July 15, 1999.<sup>164</sup> On July 29, 1999, the Sierra Leone Human Rights Committee (SLHRC), a consortium of local and international organizations committed to the protection and promotion of human rights, adopted a mechanism to keep track of the implementation of the human rights provisions of the Lomé Peace Accord.<sup>165</sup> In August 1999, a Truth and Reconciliation Commission Working Group (TRCWG) was created to ensure that civil society's views on truth seeking would be represented in the process.<sup>166</sup>

Efforts were begun to draft the necessary enabling legislation for the truth commission. OHCHR held consultations with civil society, the government, and rebel groups on a draft statute between July and December 1999.<sup>167</sup> On December 29, 1999, UNAMSIL provided a draft statute to the Sierra Leonean government, "with the understanding that it represented technical assistance and did not impede the sovereign right of Sierra Leone to determine the exact nature of the law to be adopted."<sup>168</sup> The government accepted the proposed draft with few changes.<sup>169</sup>

At the time of the agreement's signing, the UN submitted a disclaimer excluding certain serious crimes from the amnesty provisions,<sup>171</sup> although it did not change the grant of immunity. When parliament passed the Act, it abided by the earlier deal: although it granted the commission the power to issue summonses and subpoenas to compel participation, it did not offer any additional mechanism to address criminal accountability.<sup>172</sup>

In the final report, the commissioners themselves were strongly critical of the approach to impunity taken at Lomé and in the Act, saying: "The paradox of the Lomé Agreement, and of the Truth and Reconciliation Act 2000 that was adopted to give effect to certain of its provisions, is that it both enshrines impunity and seeks to address it."<sup>173</sup> As the commissioners stated, "In terms of addressing impunity . . . the Lomé Agreement is unquestionably deficient."<sup>174</sup>

Therefore, to provide an additional measure of accountability, the commissioners decided to name in the final report the individuals and factions responsible for violations and abuses committed during the conflict.<sup>175</sup>

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*The signatories to the Lomé Peace Accord articulated broad objectives for the Truth and Reconciliation Commission, envisioning a body that would accomplish many things simultaneously: accountability, truth telling, and truth seeking.*

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Sierra Leone's parliament passed the Truth and Reconciliation Act (the Act) on February 22, 2000, only seven months after the LPA was signed, despite the deteriorating security situation.<sup>170</sup> This relatively quick turnaround of the TRC's statutory mandate ultimately proved an enormous boost to truth-seeking efforts; once conflict finally subsided and disarmament recommenced in May 2001 policymakers had the necessary legislative mandate in hand.

#### **Objectives Articulated for the TRC in the Peace Agreement**

The signatories to the LPA articulated broad objectives for the TRC, envisioning a body that would accomplish many things simultaneously: accountability ("address impunity"), truth telling ("a forum for both the victims and perpetrators to tell their story"), and truth seeking ("get a clear picture of the past")—all aimed at promoting "genuine healing and reconciliation."

No specifics for how the TRC would achieve these objectives were provided, and no clear priorities were established between or among the different objectives. The responsibility to "address impunity" is listed first, but the LPA does not expressly resolve what form that would take, given the LPA's grant of blanket amnesties. Impunity, it was implied, would be addressed through truth seeking—by publicly holding perpetrators to account during proceedings.

The LPA's vision for truth seeking was expressed in deep moral terms, but remains practical by not calling for all of the ills of Sierra Leonean society to be addressed. The language is aspirational but generally restrained ("break the cycle of violence," "provide a forum," "facilitate," "get a clear picture of the past.") While setting lofty goals, the document itself did not overpromise.

Parliament later added details to clarify the mandate by including a provision in the TRC Act requiring that an "impartial historical record" be created.<sup>176</sup> In a Memorandum of Objects and Reasons attached to the Act, Parliament called the historical record "the principal function of the Commission," further elevating its importance.<sup>177</sup>

Parliament had resolved any ambiguity in the wording of the peace agreement in a way that helped the TRC understand and ultimately complete its objectives. As the commissioners described it, "The incontestable conclusion is that the historical component of the Commission's mandate was strengthened by Parliament, and that is of central importance to the fulfilment of its solemn mission."<sup>178</sup>

Interestingly, the use of generic language in the agreement ultimately left important space in the political dialogue, especially after conflict had resumed and the power-sharing



and amnesty portions of the peace agreement collapsed and Sankoh was arrested. The terms negotiated at Lomé with respect to the centrality of truth seeking could not contradict the later focus on criminal justice, when the Special Court of Sierra Leone was established.

#### *Time Period and Violations to Be Examined*

The LPA established few parameters for the fact finding tasks entrusted to the TRC. It did, however, establish 1991 as the beginning point for the inquiry, referring to the outbreak of conflict.

#### *Lomé Peace Agreement*

2. In the spirit of national reconciliation, the [Truth and Reconciliation] Commission shall deal with the question of human rights violations since the beginning of the Sierra Leonean conflict in 1991.

Later parliament would include an end point—the “signing of the Lomé Peace Agreement”—and other clarifications of the period under consideration.<sup>179</sup> The TRC was to create “an impartial historical record” that would encompass not only the “nature and extent of the violations and abuses” that occurred during the conflict but also “the causes, nature and extent of the violations and abuses” more broadly, including “their antecedents” “the context;” whether “deliberate planning, policy or authorisation by any government, group or individual” played a part; and “the role of internal and external factors in the conflict.”<sup>180</sup>

Relying on language of the TRC Act on antecedents and context, the commissioners would expand their inquiry, looking into events outside of the specific dates set down in both the LPA and the TRC Act, concluding that it could not consider the conflict “in an accurate and faithful manner if it were to begin mechanically with 23 March 1991 and to conclude in an equally mechanical manner with 7 July 1999.”<sup>181</sup>

The substantive mandate of the TRC is addressed by the LPA in generic terms: it uses the phrase “human rights violations” on several occasions, without defining what types of violations the commission would address in the context of a war in which various abuses had occurred at the hands of many competing forces.<sup>182</sup>

The commissioners devoted considerable time and space in their work to interpret the mandate and left a useful testimony of their deliberations in the final report, which examined the language of the LPA and explained the commission-

ers’ judgment regarding the interstices and ambiguities they encountered in both the LPA and the TRC Act.<sup>183</sup>

Ultimately, the commissioners interpreted the mandate by mentioning general human rights concepts and principles set down in the LPA and referring to the Universal Declaration of Human Rights and the African Charter of Human and Peoples’ Rights. Thus, they supported their decision to inquire into “violations of economic, social and cultural rights as well as of civil and political rights . . . as well as other categories of rights such as the right to development and the right to peace.”<sup>184</sup>

The commissioners also looked outside of the peace agreement, drawing on international norms and standards as well as practices from other contexts. In the end, they found their mandate was not “confined to violations of human rights that might constitute crimes, under either national or international law, nor is it limited to violations committed by States or governments.”<sup>185</sup>

The commissioners then worked to resolve unaddressed issues through a careful exegesis of the mandate. Although they conformed to what had been decided at Lomé and in legislation passed by parliament, they exercised their own judgment to decide on several open questions. In the light of their deliberations, it appears that greater specificity in the foundational texts might have inhibited their capacity to act independently in response to the challenges of a complex inquiry.

#### **The Commitment to Truth Seeking Comes Under Stress**

In May 2000, soon after passage of the TRC law, serious violations of the ceasefire occurred and the power-sharing elements of the peace agreement effectively collapsed. An international intervention stabilized the security situation and RUF-leader Sankoh was arrested. In this uncertain environment, the continued commitment of international agencies appears to have been critical to maintain momentum and keep truth-seeking in the national agenda.

Specific agencies and groups within the international community, specifically the UN, took on particular roles and responsibilities at times. OHCHR provided consistent assistance and support to the TRC, reporting that it “was involved in every phase of the development of the Commission.”<sup>186</sup> Of note was the technical and operational support that proved important to getting the TRC up and running. Other agencies contributed as well, including UNDP and UNAMSIL. Some interventions were direct and specific to the truth commission; other initiatives were indirect and mediated through implementing partners, with OHCHR playing a supportive role.

- OHCHR orchestrated the creation of an Interim Secretariat for the TRC in late March 2002. Such a position

had not been mandated by the TRC Act, but it was decided that it would help “to facilitate a quick start for the TRC by performing a series of initial tasks.”<sup>187</sup>

- OHCHR coordinated a series of public information and education campaigns with grants to the International Human Rights Law Group and local civil society groups, the National Forum for Human Rights, and the National Commission for Democracy and Human Rights, and it supported a mapping of the conflict through a local civil society grantee, the Campaign for Good Governance.<sup>188</sup>
- UNAMSIL established human rights offices across Sierra Leone, launched and assisted with the TRC sensitization program in various parts of the country.<sup>189</sup> It also launched the TRC web page in August 2001.<sup>190</sup> The TRC sensitization programs were held mostly with UN support. UNAMSIL partnered with the Ministry of Justice and the Attorney-General’s Office to reach out to communities, to familiarize them with the goals and procedures of the TRC. These outreach efforts included programs tailored for members of the RUF and the Civil Defense Forces (CDF), ex-combatants, and local populations.<sup>191</sup>
- When the selection process for national commissioners stalled, UNDP helped restart the process, on the recommendation of OHCHR, by re-advertising the positions.<sup>192</sup> The advertising campaign for the commissioners’ positions not only served to increase public awareness about the credentials necessary to serve as commissioner but also educated the public generally about the role and importance of the TRC.

Although these efforts were not always successful—some were criticized in the final report—the level of engagement proved significant to the overall effort.<sup>193</sup> For the UN, the TRC and its final report ultimately had great “symbolic meaning,” representing a success for the peacekeeping effort as a whole.<sup>194</sup> The TRC was seen as a pillar of a peace process that had to be reinforced. The objectives of peacemaking and truth seeking were seen to be in alignment:

### Support for the Truth Commission Wanes

The LPA was weak on institutional and funding mechanisms that could have solidified the financial commitment to truth seeking. A section titled “International Support” listed twelve nations that were said to be “facilitating and supporting the conclusion” of the agreement.<sup>195</sup> But it does not address how the TRC would be funded. The LPA raised the expectations of Sierra Leoneans but did not offer a vision of how support for truth seeking would be marshaled.

Section 12 of the TRC Act provides that “the operations of the Commission shall be financed by a fund consisting of

moneys and other resources (a) paid or made available to the Commission by the Government; and (b) obtained by the Commission as gift of donation from foreign governments, intergovernmental organizations, foundations and non-governmental organizations.”

Statements of support had been made by major donors to advance human rights and the truth commission in the midst of the peace talks. On July 8, 1999, Robinson, then High Commissioner for Human Rights, offered assistance for the TRC to President Kabbah.<sup>196</sup> On January 14, 2000, Peter Hain, Minister of Foreign Affairs for the United Kingdom, announced that the United Kingdom would give £250,000 (USD \$400,000) to Sierra Leone to support a TRC.<sup>197</sup>

Even with the OHCHR taking responsibility for coordinating fundraising efforts, the TRC faced consistent funding shortfalls that forced delays and the redesign of some commission activities, staff reductions, and a host of other basic procurement-related difficulties.<sup>198</sup> A lack of clarity about how the operation would be funded—which date back to the peace talks—may also have contributed to difficulties in ensuring adequate resources.

The provisional budget produced in February 2002 for the TRC had projected funding needs in excess of USD \$9.9 million. It ultimately had to make due with less than USD \$5 million in donor and government contributions to conduct scaled-down operations.<sup>199</sup> Meanwhile, the SCSL was receiving up to USD \$25 million annually.<sup>200</sup>

In the TRC’s final report, the commissioners make mention of the many operational difficulties presented by its “bare bones budget.”<sup>201</sup> Planning for the budget had been based on the “optimistic expectation that the international community would provide the funding for all activities.”<sup>202</sup>

The lack of adequate and consistent funding impaired the TRC’s operations at every level. As a result, the TRC “re-aligned [its requirements] to meet the funding prospects”:

- The Interim Secretariat, established to help with preparations, needed to rely on civil society to conduct sensitization programs.<sup>203</sup>
- Fund disbursements were delayed, making planning difficult.<sup>204</sup>
- Operations were hampered by a variety of logistical constraints: for instance, computers became available only in April 2003, and an inadequate supply of reliable vehicles made it difficult to reach distant areas of the country.<sup>205</sup>
- TRC staff was reduced to save costs,<sup>206</sup> and units of the commission were merged.<sup>207</sup>

Since the end of the conflict in Sierra Leone, the UN and the international donor community have done much to improve the coordination and funding mechanisms necessary to ensure more effective budgeting and fund management in post-conflict situations. The Peacebuilding Fund and Multi-Partner Trust Funds are but two examples. Further effort in this regard, especially within the body of a peace agreement itself, may further improve the capacity of transitional institutions, like truth commissions, to fulfill their missions in the future.<sup>208</sup>

### Management and Staffing Issues

Funding constraints were not the only challenge faced by the TRC. Internal “mismanagement and staff recruitment problems in its preparatory phase” contributed to the difficulties, eroding confidence among potential donors, which exacerbated the already-difficult funding environment.<sup>209</sup>

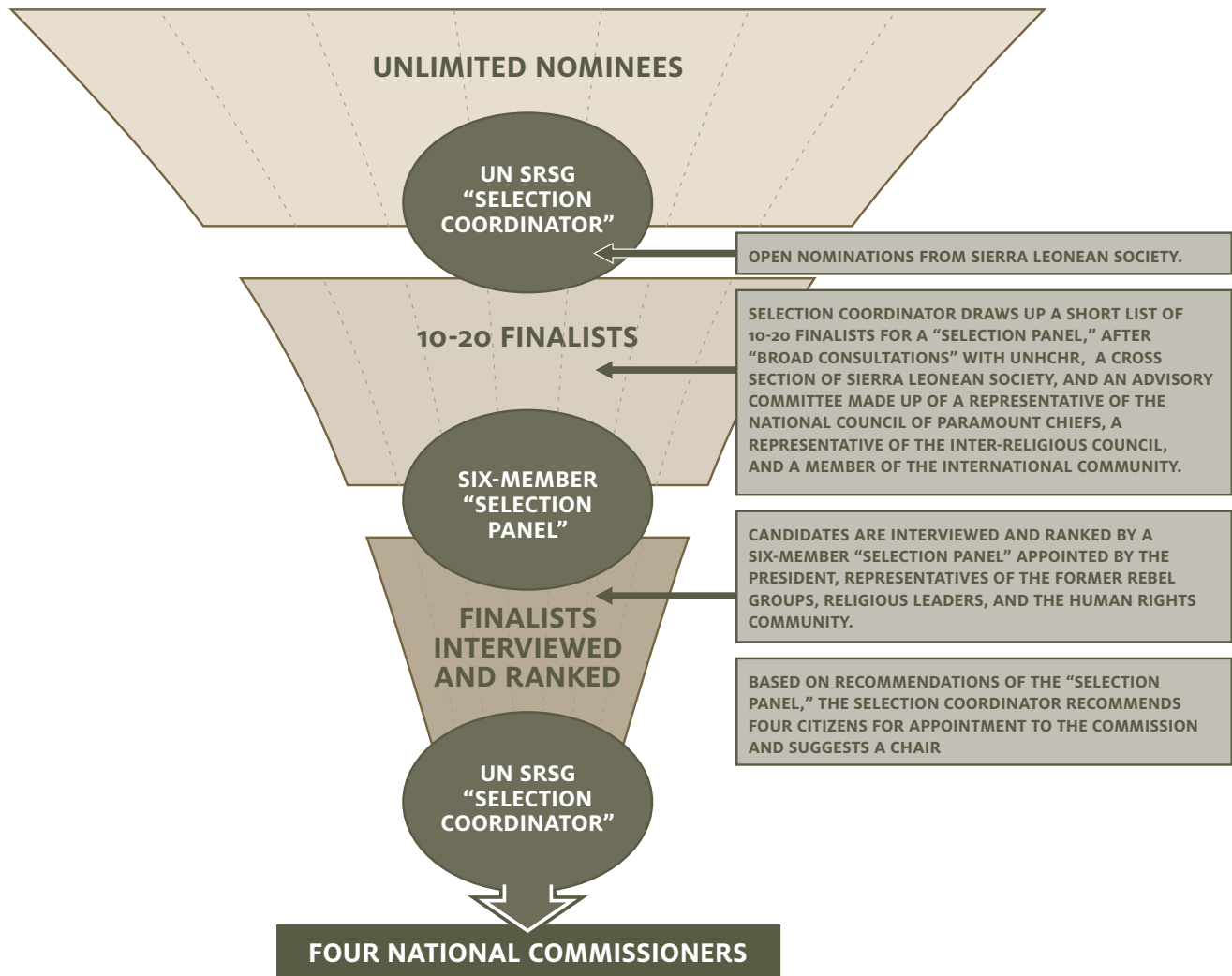
As the Final Report states, “Problems arose almost immediately in the Interim Secretariat with the recruitment of six national consultants.”<sup>210</sup> No “clear guidelines or minimum

standards of qualification for recruitment” were issued. Advertisements for positions were not published and no “interview board was set up.”<sup>211</sup> The results were not good: “approximately a third of those hired were deemed unqualified for their positions or redundant.”<sup>212</sup>

Staffing of the permanent Secretariat faced some initial problems as well:

Positions were listed nationally and internationally in August but the application deadline was 30 September, only five days before the operational phase of the TRC was to begin. The commissioners initially assumed responsibility for the hiring process but turned it over to UNDP after concerns were raised about transparency and fairness . . . The qualifications set for the key job of Executive Secretary were also controversial. Claims were made that the requirements for this and other positions were written to fit the profiles of certain candidates, and that Interim Secretariat staff were automatically moved to

**GRAPHIC 4: SELECTION PROCESS FOR TRUTH AND RECONCILIATION COMMISSION FOR SIERRA LEONE**



the short list even after being disqualified by UNDP review.<sup>213</sup>

Eventually, the commission got on track. As the final report concludes, the commission “managed to weather the storm that threatened to tear it apart and move quickly to consolidate its activities, with a view to restoring donor and stakeholder confidence in its activities.”<sup>214</sup> The report does not describe, but rather implies, the tensions and tough decisions that had to be made by the commissioners to overcome the challenges.

## Selection of Commissioners

The LPA offered few details on the selection of commissioners and failed to lay out any standards or principles to ensure the independence of the commission and commissioners. It did, however, decide on an important issue: the TRC would be a hybrid body composed of national and international staff.

### *Lomé Peace Agreement*

Membership of the Commission shall be drawn from a cross section of Sierra Leonean society with the participation and some technical support of the international community.

The parliamentary act established a process for selecting the seven commissioners—four nationals and three internationals—to “ensure the Commission’s independence and impartiality.”<sup>215</sup>

The four national commissioners were selected by international and national stakeholders.

The international selection process was less participatory. Suggestions for the three international members were to be submitted to the UNHCHR. The UNHCHR then recommended three international candidates to the president, after first inviting comments from the Selection Panel.<sup>216</sup>

Despite the multilevel selection process, allegations of government manipulation arose. For instance, the International Crisis Group suggested that government manipulation occurred at the very end of the selection process for national commissioners, “when extra names were added to the list by the government without consulting the selection commission.”<sup>217</sup> It also claimed that the commission was “dominated by commissioners with strong and direct ties” to the party of the president.<sup>218</sup> The later TRCWG study raised similar concerns about the impartiality and competency of some of the commissioners.<sup>219</sup>

However, in the end, it is clear the commissioners were able to take independent decisions, including accepting adverse findings against the president’s party—Sierra Leone People’s Party (SLPP)—and against Kabbah himself. The solid evidence developed by commission investigators and the fact that the three international commissioners would have made it public in a dissenting report (had the local commissioners refused to incorporate them), were factors that encouraged an independent stance. In the end, Chair Bishop Humper and the local commissioners stood by the findings and defended them.<sup>220</sup>

It is difficult to assess whether more might have been done in the LPA or by parliament or the international community representatives who participated to prevent interference by powerful political players who hoped to control the outcome of the truth-seeking process. In his recent report, the UN Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff, found that “there is no currently employed selection procedure that necessarily guarantees good outcomes or one that cannot be foiled.”<sup>221</sup> However, he did call “for a clearer articulation of the relevant selection criteria of commissioners, which must include professionalism, integrity and expertise, in addition to reputation, as fundamental criteria” as well as avoiding incompatibilities and conflicts of interest.<sup>222</sup>

Such standards might have been included in the peace agreement itself or in the TRC Act, although whether such an approach might have mitigated the risk of interference later on or prevented the TRC’s staffing troubles remains an open question. At a minimum, it may have strengthened the viability of any future claims to enforce the TRC’s selection procedures.

## Final Report and Recommendations

The LPA established requirements for the content and submission of the TRC’s final report and recommendations:

This Commission shall, among other things, recommend measures to be taken for the rehabilitation of victims of human rights violations.

This Commission shall be established within 90 days after the signing of the present Agreement and shall, not later than 12 months after the commencement of its work, submit its report to the government for immediate implementation of its recommendations.

In the TRC Act, parliament layered on additional requirements for the final report, and its publication, that improved on the model set forth in the peace agreement. Significantly, the president was required to submit a copy (1) “immediately” to the UN Secretary-General with a request that it be



tabled before the Security Council within 30 days, and (2) within 30 days to parliament.<sup>223</sup>

Consistent with these requirements, on October 5, 2004, the final report of the TRC was submitted to Kabbah at a formal ceremony at the State House in Freetown and to the UN representatives at UN headquarters in New York.<sup>224</sup> The process of presentation was not free of tension, as there were strong allegations of last-minute changes to the text and corrections to those changes.<sup>225</sup> Even in the face of these tensions, and delays, authentic copies of the report were handed over to the president and the Security Council in 2004 and given a full print.<sup>226</sup>

The TRC ultimately delivered a credible final report to the people of Sierra Leone. By any measure, the TRC is a testament to intensive work over a two-year period in difficult circumstances, with scarce resources, dealing with extremely sensitive information.<sup>227</sup> The TRC's final report—issued in 2004 in a multiple-volume set, with additional appendices and a series of accessible popular versions—provides an extensive record of the human rights violations that occurred in Sierra Leone between 1991 and 2002, offers insights into the root causes of the conflict, and makes specific recommendations on how Sierra Leone could move forward as.<sup>228</sup>

Recommendations were issued at four levels of urgency—namely, “imperative,” “work toward,” “serious consideration,” and “calls on”—and across seventeen broad categories addressing structural and institutional reforms. A very innovative element was the project “National Vision for Sierra Leone,” which allowed ordinary citizens to participate in policy recommendations in the light of their own experiences, and in their own voice.<sup>229</sup>

Based on the recommendations of the TRC, reparations have been delivered—with limitations—to victims of human rights abuses.<sup>230</sup> Parliament has passed into law some of the legislation recommended by the TRC, including some designed to fight corruption.<sup>231</sup> Although more still needs to be done, Sierra Leone does offer an example of progress against difficult odds.

## Conclusions

Sierra Leone's transitional justice arrangement was based on two mechanisms—a TRC and the SCSL—which were the result of separate and very different political situations: a peace agreement predicated on power-sharing and later the collapse of power-sharing, including the capture of the main leaders of a former rebel force. Still, even though the situation had changed so radically, and the TRC mandate was in some ways residual from the original conditions, national and international stakeholders persevered and decided that truth seeking had an important role in the country.

Sierra Leone's experience with truth seeking offers elements for deep reflection, beyond this summary discussion, first and foremost, on the importance of strong and consistent political will by the international community to object to measures detrimental to victims' rights; to facilitate technical support and ensure viable funding; and to provide legitimacy and a valid forum to the final products of a commission.

The case suggests the inescapable importance of the process of consolidation of a common vision within the commission, including commissioners from different perspectives and staff. Such a process of consolidating common positions was not always harmonious or without tensions, but it helped all the participants in the experience to coalesce around the final product. In order to reach such a degree of frank discussion, the commission needed to ensure first a certain basic degree of competence for which tough managerial decisions were needed.

Second, the capacity of the commissioners to act independently is another suggestive element that can be extracted from the experience. Notwithstanding acute debates regarding the appointment process, the fact is that the commissioners had to take decisions independently, particularly to illuminate ambiguous areas of their mandate or deal with insufficient guidance. It is dubious that—even in the best circumstances—a legal mandate can anticipate all questions in a complex inquiry; a mandate hammered out in a short period of time, in a rapidly changing environment, could not aspire to be perfect. Paradoxically, a less-than-perfect mandate provided opportunities for the commissioners to exercise their judgment and consolidate some elements of a common vision.

A third conclusion indicates the importance of quick passage of the legislation necessary to establish the commission. Considering how quickly the peace process deteriorated, it was fortunate that legislation had been passed quickly, because the passage of time without a concrete piece of legislation would have allowed spoilers to renege on their commitments. Fourth, consistent engagement on the part of international and domestic actors in support of truth-seeking was crucial. In Sierra Leone, the international community provided vital technical and expert assistance at key moments early on, to build support and sustain momentum for truth seeking and to organize the basic institutional structures that would allow it to do its work.

Finally, it is worth considering whether better funding and other mechanisms might have been built into the body of the peace agreement to forestall or prevent some of the challenges that threatened TRC processes in Sierra Leone. At a minimum, it may be time to consider whether stronger principles and guidelines might be included in the body of a peace agreement to ensure the independence of commissioners and staff and adequate financial support.



133. Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone (Lomé Agreement), S/1999/777 (July 1999).

134. Truth and Reconciliation Commission Act 2000, [www.sierra-leone.org/Laws/2000-4.pdf](http://www.sierra-leone.org/Laws/2000-4.pdf)

135. See Abuja Agreement, Annex to S/2000/1091 (November 14, 2000) and Abuja Ceasefire Review Agreement (May 2, 2001) in Mark Malan, Phenyio Rakate, and Angela McIntyre, *Peacekeeping in Sierra Leone: UNAMSIL Hits the Home Straight* (Institute for Security Studies, 2002).

136. [www.sc-sl.org/LinkClick.aspx?fileticket=CLk1rMQtCHg%3d&tabid=176](http://www.sc-sl.org/LinkClick.aspx?fileticket=CLk1rMQtCHg%3d&tabid=176)

137. Letter dated February 1, 1995, from the Secretary-General addressed to the president of the Security Council, S/1995/120 (February 7, 1995).

138. One of its primary tasks was “to report on violations of international humanitarian law and human rights in Sierra Leone, and, in consultation with the relevant United Nations agencies, to assist the Government of Sierra Leone in its efforts to address the country’s human rights’ needs.” See United Nations Observer Mission in Sierra Leone Mandate, S/RES/1181 (July 13, 1998).

139. United Nations Assistance Mission in Sierra Leone, webpage, [www.un.org/en/peacekeeping/missions/past/unamsil/](http://www.un.org/en/peacekeeping/missions/past/unamsil/)

140. Lomé Agreement, Preamble.

141. See Michael O’Flaherty, “Sierra Leone’s Peace Process: The Role of the Human Rights Community,” *Human Rights Quarterly* 26 (2004), 30–62.

142. For a detailed discussion of the peace process, see Priscilla Hayner, *Negotiating Peace in Sierra Leone: Confronting the Justice Challenge* (December 2007). (As she concludes, “Virtually everyone involved in the Lomé talks, or who closely observed them, now agrees without hesitation that an amnesty was necessary for a peace agreement to be reached. Whether some limitation or condition on the amnesty would have been possible, however, is still an open question.”)

143. See Abidjan Agreement at UN Security Council, S/1996/1034 and Communiqué issued at Conakry on October 23, 1997, at the conclusion of the meeting between the Ministers of Foreign Affairs of the Committee of Five on Sierra Leone of the Economic Community of West African States and the delegation representing Major Johnny Paul Koromah, S/1997/824 Annex (October 28, 1997). Both of these agreements were weak on other transitional justice initiatives; see Mohamed Gibril Sesay and Mohamed Suma, *Transitional Justice and DDR: The Case of Sierra Leone* (June 2009).

144. In March 1997, for instance, the United States Information Services had invited human rights organizations to Freetown for

a symposium to deliberate on issues of human rights in Sierra Leone. The National Forum for Human Rights, a loose coalition of civil society groups, was established as a result to help promote concerted efforts to advance human rights. See [www.slchg.org/NFHR/about.htm](http://www.slchg.org/NFHR/about.htm). For a full discussion of the impact of the human rights community on the peace process and the decision to establish a truth commission, see Michael O’Flaherty, “Sierra Leone’s Peace Process: The Role of the Human Rights Community,” *Human Rights Quarterly* 26 (2004): 37–38, and International Council on Human Rights Policy, *Negotiating Justice? Human Rights and Peace Agreements* (2006), 33–34.

145. National Provisional Ruling Council Decrees (Repeal and Modification) Act, Supplement to the Sierra Leone Gazette Extraordinary Vol. CXXVII, No. 78 (December 23, 1996), [www.sierra-leone.org/Laws/1996-3.pdf](http://www.sierra-leone.org/Laws/1996-3.pdf); see also Solomon E. Berewa, *A National Perspective on Governance, Leadership and National Building in Sierra Leone* (2011), 208.

146. Human Rights Watch, “Protectors or Pretenders?: Government Human Rights Commissions in Africa” (2001), 275–85.

147. “Joint UN Statement: Crisis in Sierra Leone Highlights Urgent Need for an International Criminal Court,” <http://reliefweb.int/report/sierra-leone/joint-un-statement-crisis-sierra-leone-highlights-urgent-need-international> (17 June 1999).

148. See *Witness to Truth: Report of the Sierra Leone Truth & Reconciliation Commission (Final Report)*, volume 1, chapter 1, 28, and Michael G. O’Flaherty, “Human Rights in Negotiating Peace Agreements: Sierra Leone” (2005): 9, paper presented at the International Council on Human Rights Policy Review Meeting titled “Peace Agreements: The Role of Human Rights in Negotiations” (Belfast, March 7–8, 2005).

149. Michael G. O’Flaherty, “Human Rights in Negotiating Peace Agreements: Sierra Leone” (2005): 9, paper presented at the International Council on Human Rights Policy Review Meeting titled “Peace Agreements: The Role of Human Rights in Negotiations” (Belfast, March 7–8, 2005).

([T]he disturbing cycle of impunity in Sierra Leone will not be broken unless there is some form of censure or punishment to some perpetrators of gross abuses of human rights in the country . . . Therefore, the Human Rights Community proposes the creation of a Truth, Justice and Reconciliation Commission in Sierra Leone which will, inter-alia, enable the country to cope with the aftermath of the crisis by hearing the truth directly from perpetrators of gross human rights violations, help survivors of violations cope with their trauma, and recommend judicial prosecutions for some of the worst perpetrators of the violations.)

150. The TRC was proposed as “another option” that “would provide a forum for victims to tell their story and ultimately seek

- justice and, probably, reparation.” See NCDHR, “The Road to Peace: Report of the National Consultative Conference on the Peace Process in Sierra Leone,” 6.6 (April 1999).
151. Mary Robinson, *Everybody Matters: My Life Giving Voice* (New York: Walker & Company, 2012), 219.
  152. Witness to Truth: Final Report of the TRC, volume 1, chapter 1, 29, ¶ 16.
  153. Lomé Agreement, Part Five (“Humanitarian, Human Rights and Socio-Economic Issues”).
  154. Lomé Agreement, Part Three (“Other Political Issues”).
  155. Lomé Agreement, Part Five, ¶ 1.
  156. Lomé Agreement, Article IX.
  157. Norimitsu Onishi, “Pacts Reached on Congo and Sierra Leone,” *New York Times*, July 8, 1999, <http://partners.nytimes.com/library/world/africa/070899sierra-leone-rebels.html>
  158. The parties were to approach the international community for assistance mobilizing the resources needed to enable the RUF/SL to function as a political party. Lomé Agreement, Articles III and V.
  159. Lomé Agreement, at Article VIII.
  160. Lomé Agreement, at Part V.
  161. Lomé Agreement, at Article VI.
  162. The CCP also was under-resourced. [www.i4pinternational.org/sierra-leone](http://www.i4pinternational.org/sierra-leone)
  163. Draft Schedule of Implementation of the Peace Agreement, Annex 5 to LPA.
  164. Final Report, volume 1, chapter 2, 49, ¶ 1.
  165. UNAMSIL, Human Rights Newsletter No. 1, December 10, 1999, <http://reliefweb.int/report/sierra-leone/unamsil-human-rights-newsletter-no-1>
  166. Final Report, volume 1, chapter 5, 157, ¶ 75.
  167. Final Report, volume 1, chapter 2, 49, ¶ 5.
  168. Final Report, volume 1, chapter 2, 51, ¶ 6.
  169. See OHCHR, Annual Report (2001) and TRC Report, volume one, chapter two, Setting Up the Commission, 49–51, ¶ 6, [www.sierraleonetr.org/index.php/view-report-text-vol-1/item/vol-one-chapter-two](http://www.sierraleonetr.org/index.php/view-report-text-vol-1/item/vol-one-chapter-two).
  170. First Report on the United Nations Mission in Sierra Leone, S/1999/1223 (December 6, 1999), 2, ¶ 7.
  171. Final Report, volume 2, chapter 2, 110, ¶ 585.
  172. TRC Act, section 8(1)(g).
  173. Final Report, volume 1, chapter 1, 43, ¶ 72.
  174. Final Report, volume one, chapter one, 45, ¶ 80.
  175. Final Report, volume 2, chapter 2 (“Findings”). Some peace agreements have addressed the question directly; in Guatemala, for instance, the peace agreement expressly forbade the naming of names. Agreement on the establishment of the Commission to clarify past human rights violations and acts of violence that have caused the Guatemalan population to suffer, A/48/954, S/1994/751 (“The Commission shall not attribute responsibility to any individual in its work, recommendations and report nor shall these have any judicial aim or effect”).
  176. TRC Act, section 6(1) (“The object for which the Commission is established is to create an impartial historical record of violations and abuses of human rights and international humanitarian law related to the armed conflict in Sierra Leone, from the beginning of the Conflict in 1991 to the signing of the Lomé Peace Agreement; to address impunity, to respond to the needs of the victims, to promote healing and reconciliation and to prevent a repetition of the violations and abuses suffered”).
  177. Memorandum of Objects and Reasons attached to the Bill, (“Accordingly, by clause 6, the principal function of the Commission is to create an impartial historical record of events in question as the basis for the task of preventing their recurrence.”).
  178. Final Report, volume 1, chapter 1, 31–32, ¶ 25.
  179. TRC Act, section 6(1).
  180. TRC Act, section 6(2)(a).
  181. Final Report, volume 1, chapter 1, ¶ 69–71.
  182. Atrocities had been committed not only by the chief rebel force, the RUF, which had become notorious for its practice of amputating the limbs of innocent civilians, perpetrating widespread sexual violence, and abducting children for its fighting force, but by members of other warring factions as well. Sierra Leone’s army, the paramilitary forces known as Civilian Defense Forces (CDF), and the troops of ECOMOG, a regional intervention, were all implicated.
  183. Final Report, volume 1, chapter 1, 23–46.
  184. *Ibid.*, at 38.
  185. *Ibid.*, at 36, ¶ 46.
  186. OHCHR Annual Report, (2002): 211.
  187. International Crisis Group, *Sierra Leone’s Truth and Reconciliation Commission: A Fresh Start?* (December 20, 2002), 2.
  188. Final Report, volume 1, chapter 2, ¶ 11.

189. See, for example, UNAMSIL to open a human rights office in Kenema on May 2, 2001, <http://reliefweb.int/report/sierra-leone/unamsil-open-human-rights-office-kenema-2-may-2001>

190. See UNAMSIL Press release, “UNAMSIL launches the Truth and Reconciliation Commission web page,” August 29, 2001, <http://reliefweb.int/report/sierra-leone/unamsil-launches-truth-and-reconciliation-commission-web-page>

191. One such program was held for the RUF and the CDF on October 4, 2001, in the town of Koidu in Kono District. The program was organized by the UNAMSIL Human Rights Section in collaboration with the TRC Northern Area Working Group, the National Forum for Human Rights, the World Council on Religion and Peace, and Caritas-Makeni. See <http://reliefweb.int/report/sierra-leone/truth-and-reconciliation-commission-sensitization-held-kono-district>.

192. International Crisis Group, *Sierra Leone’s Truth and Reconciliation Commission: A Fresh Start?* (December 20, 2002), 6.

193. Final Report, volume 1, chapter 2 (“Setting up the Commission”).

194. Ambassador Oluyemi Adeniji, who served as SGSR, connected the success of the TRC in Sierra Leone to the success of peacekeeping at the UN more broadly: “There are a number of factors. One is the determination of the UN to see it through—in other words, not to be discouraged by the first sign of a reverse. This is a new factor because in 2000, one of the parties to the agreement signed by the Sierra Leoneans in Lomé was not serious about implementing it. When that happened, in the past the UN would have said ‘let us just pack up and go because they are not yet ready.’ The UN decided at that time that they were going to stick it out.” Interview with Ambassador Oluyemi Adeniji (July 9, 2002), [www.irinnews.org/fr/report/32888/sierra-leone-irin-interview-with-ambassador-oluyemi-adeniji](http://www.irinnews.org/fr/report/32888/sierra-leone-irin-interview-with-ambassador-oluyemi-adeniji)

195. Compared to the more specific language of Article XVI relating to Encampment, Disarmament, Demobilization, and Reintegration, which provides:

Upon the signing of the present Agreement, the Government of Sierra Leone shall immediately request the International Community to assist with the provision of the necessary financial and technical resources needed for the adaptation and extension of the existing Encampment, Disarmament, Demobilization and Reintegration Programme in Sierra Leone, including payment of retirement benefits and other emoluments due to former members of the SLA.

196. Mary Robinson, *Everybody Matters: My Life Giving Voice*, 218, “Afterwards, I wrote to President Kabbah offering the support of human rights officers, and, in particular Brian Burdekin to help establish the truth and reconciliation commission referred to in the manifesto”; Michael O’Flaherty, “Sierra Leone’s

Peace Process: The Role of the Human Rights Community,” *Human Rights Quarterly* 26 (2004), 29–62.

197. BBC, “Truth commission for Sierra Leone,” January 14, 2000, [http://news.bbc.co.uk/2/hi/uk\\_news/603166.stm](http://news.bbc.co.uk/2/hi/uk_news/603166.stm)

198. Final Report, volume 1, chapter 4 (“Management and Operational Report”).

199. *Ibid.*, appendix 2 (Audit Report).

200. Tom Perriello and Marieke Wierda, *The Special Court for Sierra Leone Under Scrutiny* (March 2006): 29

201. Final Report, volume 1, chapter four, 106, ¶ 90.

202. Final Report, 106, ¶ 90.

203. Final Report, volume 1, chapter 2, 58, ¶ 34.

204. Final Report, volume 1, chapter four, 93, ¶ 13.

205. *Ibid.*, 96, ¶ 29.

206. *Ibid.*, 104, ¶ 77–78.

207. *Ibid.*, 104, ¶ 80.

208. De Greiff Report, 27, ¶ 104(b) (see Summary of Discussions, n. 1): “The international community should assist truth commissions financially in expeditious and reliable ways and not overburden commissions with slow-paced, documentation-heavy, rule-laden procedures affecting the disbursement of funds.”

209. Beth Dougherty, “Searching for Answers: Sierra Leone’s Truth & Reconciliation Commission,” *African Studies Quarterly*, 8 (Fall 2004): 42; see also Alex Bates, “Transitional Justice in Sierra Leone: Analytical Report” (July 2010).

210. Final Report, volume one, chapter two, 56, ¶ 26.

211. *Ibid.*

212. International Crisis Group, *Sierra Leone’s Truth and Reconciliation Commission: A Fresh Start?* (December 20, 2002): 5.

213. *Ibid.* (footnotes omitted).

214. Final Report, volume one, chapter two, 65, ¶ 68.

215. Memorandum of Objects and Reasons attached to the TRC Act.

216. When choosing commissioners for the TRC, the selection panel and coordinator were directed under the TRC Act to “take into account gender representation.” Ultimately, the TRC comprised four men and three women.

217. ICG Africa Report, No. 49, *Sierra Leone After Elections: Politics as Usual?* (July 12, 2002): 18, footnote 68.

218. *Ibid.*

219. The Sierra Leone Working Group on Truth and Reconciliation, *Searching for Truth and Reconciliation in Sierra Leone: An Initial Study of the Performance and Impact of the Truth and Reconciliation Commission* (February 2006).
220. Interview of TRC staff on file with ICTJ.
221. De Greiff Report, 26–27, ¶ 103(a).
222. *Ibid.*, ¶ 103(c).
223. TRC Act, section 15.
224. UN Press Release, ECOSOC/6140, GA/10287, SC/8227 (October 27, 2004).
225. See, for example, White Paper on the Report of the Truth and Reconciliation Commission (June 2005), 4.
226. Interview with TRC staff on file with ICTJ.
227. See [www.sierraleonetr.com/index.php/resources/trc-research-data](http://www.sierraleonetr.com/index.php/resources/trc-research-data) and “Statistical Appendix to the Report of the Truth and Reconciliation Commission of Sierra Leone: A Report by the Benetech Human Rights Data Analysis Group to the Truth and Reconciliation Commission” (October 5, 2004).
228. “Statistical Appendix to the Report of the Truth and Reconciliation Commission of Sierra Leone: A Report by the Benetech Human Rights Data Analysis Group to the Truth and Reconciliation Commission” (October 5, 2004).
229. Sierra Leone Truth and Reconciliation Commission, *Recommendations Matrix*, [www.sierraleonetr.com/index.php/resources/recommendations-matrix](http://www.sierraleonetr.com/index.php/resources/recommendations-matrix)
230. Mohamad Suma and Cristián Correa, ICTJ, *Report and Proposals for the Implementation of Reparations in Sierra Leone* (December 2009).
231. *Recommendations Matrix*, [www.sierraleonetr.com/index.php/resources/recommendations-matrix](http://www.sierraleonetr.com/index.php/resources/recommendations-matrix)

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# Democratic Republic of the Congo: Case Study

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By Elena Naughton

## Introduction

In February 2007, the Truth and Reconciliation Commission (TRC) of the Democratic Republic of the Congo (DRC) presented its final report to parliament. Surprisingly, it recommended the creation of a second truth and reconciliation commission and attached a proposed draft law to begin the legislative process.<sup>232</sup> With the ink barely dry, it was already painfully clear that the initial “quest for truth” in the DRC had failed.<sup>233</sup>

The TRC’s scanty 84-page final report reveals much about what went wrong. Although the commission operated officially for approximately four years (from mid-2003 to February 2007), it issued no findings and made only generic recommendations.

With conflict still ongoing in parts of the country, the commission did not conduct investigations or take statements from victims. No hearings were held, and perpetrators did not acknowledge or disclose the specifics of their wrongdoing. The commission carried out some limited activities, purportedly focused on reconciliation, but these activities consisted mostly of outreach and mediation exercises between military and political leaders.

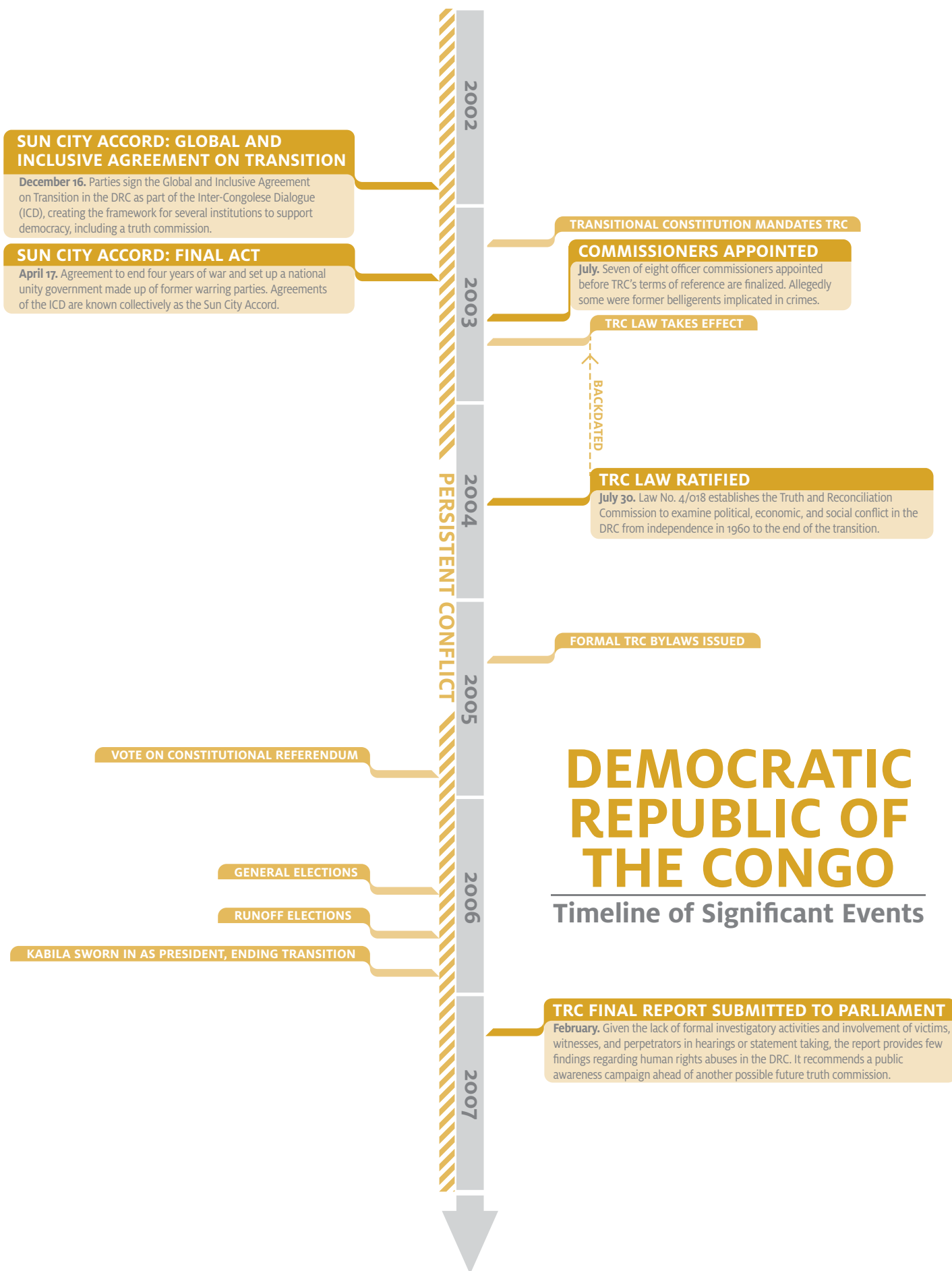
The TRC was “tasked with the responsibility to reestablish the truth” and to promote “peace, justice, forgiveness and national reconciliation.”<sup>234</sup> But little truth was achieved.<sup>235</sup> Accountability was sorely lacking in a process and an environment where combatants continued to commit human rights violations with impunity.<sup>236</sup>

To better understand how the peace accords, known as the Sun City Accord, and their implementation affected the DRC’s truth seeking efforts, this paper examines the agreements and resolutions to establish the TRC that came out of the peace process.

It focuses on several attributes of the peace deal and the commitment to truth seeking:

- Applying a power-sharing logic to the TRC: It looks first at the overall transitional agenda set by the Sun City Accord to understand how the TRC’s activities were affected by the broader power sharing deal established there. It then reviews the membership selection process at the TRC, through which representatives of the various warring factions who had committed heinous acts during the conflict were allocated positions within the commission.
- Pegging TRC operations to the period of the transition and upcoming elections: It discusses the implications of the decision to link TRC operations to the transition and upcoming elections and considers how the electoral process and ongoing violence, some connected to the elections





themselves, changed the focus of activities at the TRC from truth seeking and reconciliation to outreach, electoral support, and conflict mediation.

- Pursuing an ambitious truth-seeking mandate while conditions of insecurity persisted: It looks more generally at the question of timing and investigative scope. It considers what the TRC’s temporal mandate, spanning over 40 years of human rights violations with an uncertain end date tied to the “end of the transition,” meant in practical terms for truth seeking, especially given realities on the ground.

### Background

The travails of the DRC are well known to the humanitarian and human rights communities. For years, the country has been plagued by a succession of wars and the flagrant violation of human rights on a tragic scale. Ethnic tensions combined with fierce competition over natural resources complicated stabilization and peacekeeping efforts. A series of peace and ceasefire agreements were negotiated among the different warring groups and neighboring states, only to collapse in renewed violence as rebel groups, often supported by foreign governments, vied for power.

Efforts at peace have come in fits and starts. An initial breakthrough came in July and August 1999, when a ceasefire agreement was signed in Lusaka, Zambia, by the leaders of the DRC and five regional states (the Lusaka Ceasefire Agreement). It provided for a cessation of hostilities and the “final withdrawal of all foreign forces from the national territory of the DRC.”<sup>237</sup> That agreement required the government and the armed and unarmed opposition in the DRC to “enter into an open national dialogue” under the aegis of a neutral facilitator that would “lead to a new political dispensation and national reconciliation.”<sup>238</sup> That dialogue was to establish a process for holding democratic elections and writing a new constitution, among other things.

In accordance with the terms of the Lusaka Ceasefire Agreement, the UN Security Council set up the UN Mission in the DRC (MONUC) on November 30, 1999.<sup>239</sup> But fighting soon resumed, and the Inter-Congolese Dialogue (ICD), scheduled to begin within 45 days, never commenced.

When President Laurent-Désiré Kabila was assassinated in January 2001, his son Joseph Kabila succeeded to the presidency and called for the resumption of peace talks. After an initial false start in October 2001, the first round of the ICD finally took place from February 25 to April 12, 2002; but that meeting was generally considered a failure. According to analysis by the International Crisis Group, the parties only realigned their political interests, but there was no true progress. Forty-five days of negotiations had resulted in “technical resolutions” but little progress on “the politically sensitive questions.”<sup>240</sup>

COMMISSION COMPOSED OF  
**8 OFFICERS AND 13 PROVINCIAL REPRESENTATIVES**

NATIONALITY OF ALL COMMISSIONERS  
**CONGOLESE**

COMMISSIONERS APPOINTED  
**ONE YEAR BEFORE STATUTORY MANDATE PASSED**

OPERATIONS LASTED  
**3 YEARS, 10 MONTHS**

HEARINGS CONDUCTED  
**ZERO**

PAGE COUNT OF FINAL REPORT  
**84**

When negotiations resumed at the end of 2002 under the auspices of United Nations Special Envoy Moustapha Ni-asse, the parties were able to obtain a more far-reaching agreement. On December 16, 2002, a partial agreement known as the Global and Inclusive Agreement on Transition in the DRC (the Global and Inclusive Agreement) was signed to establish an interim framework for the cessation of hostilities.<sup>241</sup> The eight parties to the Global and Inclusive Agreement were: the DRC government; five armed groups (the Congolese Rally for Democracy, RCD; the Movement for the Liberation of the Congo, MLC; the Congolese Rally for Democracy/Liberation Movement, RCD/ML; the Congolese Rally for Democracy/National, RCD/N; and the Mai-Mai); the unarmed political opposition; and civil society. This agreement contained the first formal commitment to truth seeking in the DRC.<sup>242</sup>

A series of resolutions were later signed in April 2003, which, together with the December 2002 Agreement, are jointly referred to as the Sun City Accord.<sup>243</sup>

The peace accord affirmed that, “lasting national peace and reconciliation could never be built on lies or impunity.” Yet the political leadership of the different factions did not give the future truth commission a specific mandate. Rather the relevant provisions lacked key substantive language and guidance, merely establishing it along with other temporary institutions as an instrument to “support the transition.”<sup>244</sup>

The priorities of the political actors lay elsewhere. For them, power sharing and the allocation of key offices in the interim government were the most immediate concerns. It was agreed that a principle of shared government would extend across all institutions of the transitional government. A transitional

constitution and elections to select a new government would come next, all in pursuit of “a new political order.”

Regrettably, power sharing applied not only to the political branches of government, but also to the TRC as well.

### **An Agreement for the Transition**

Under the terms of the Global and Inclusive Agreement, a transitional government of “national unity” was to be formed in the DRC. The transitional government was to consist of a transitional executive, a transitional parliament, and a judiciary composed of the existing courts and tribunals.<sup>245</sup> The transitional executive was to be established with one president who would act as head of state and four vice presidents each of whom would be in charge of one of four government committees (political, economic and finance, reconstruction and development, and social and cultural).<sup>246</sup>

Joseph Kabila was to retain the presidency; the four vice presidents were to come from the ranks of the government, the MLC, the RCD, and the political opposition.<sup>247</sup>

This transitional government would take office on an interim basis, until national elections were held within 24 months, by June 30, 2005. If problems arose in the organization of the elections, two six-month extensions could be granted on the recommendation of an electoral commission and a decision of parliament.<sup>248</sup> They were to be the first free and fair elections held in the DRC in 46 years.

The parties also called for the creation of “an international penal court to judge war crimes, crimes against humanity, crimes of genocide and other large-scale violations of human rights.”<sup>249</sup>

To establish a legal basis for the government, a transitional constitution was to be drafted and adopted. It would specify the conditions under which the transitional institutions would govern and administer the nation’s affairs.<sup>250</sup>

The Global and Inclusive Agreement also required the creation of five ad hoc “transitional institutions” that would be tasked with “supporting democracy.”<sup>251</sup> They were the TRC, the Independent Electoral Commission, the National Watchdog on Human Rights, the Media Authority, and the Committee on Ethics and the Fight against Corruption.<sup>252</sup>

To help guarantee a peaceful transition, all of the transitional institutions of government were to be set up under a “principle of inclusiveness and equitable sharing between the various elements and entities” involved in the ICD.<sup>253</sup> Power sharing was to occur across state institutions and across levels of government. Balance between, and among, repre-

sentatives from the provinces and “the different tendencies within the political and social forces” were to be ensured.<sup>254</sup> Charts by ministry and branch of government were attached to the Global and Inclusive Agreement, allocating positions among representatives of the government, the armed and unarmed opposition, and civil society (the eight parties to the ICD).<sup>255</sup>

#### *Global and Inclusive Agreement. III.6.*

The division of responsibilities within transitional institutions and at different State levels shall be done on the basis of the principle of inclusiveness and equitable sharing between the various elements and entities involved in the Inter-Congolese Dialogue, in accordance with criteria such as ability, credibility and integrity and in a spirit of national reconciliation.

The TRC and the other ad hoc commissions were not excluded from the power-sharing regimen. Instead, power sharing was to be comprehensive.

Under the Global and Inclusive Agreement, civil society, as one of the parties to the Sun City Accord, was to be given the “duties of the presidents of the institutions supporting democracy.”<sup>256</sup> They were supposed to have the “status of minister” and to “function independently of the transitional government.”<sup>257</sup> Although civil society was supposed to play a leading role, as time would tell, its leadership was vulnerable to influence by the warring parties.<sup>258</sup> Civil society’s bargaining strength in a treacherous political landscape was limited.<sup>259</sup> As Laura Davis concludes, “There had been hope—unrealistic, perhaps—that civil society would control the institutions to support democracy, during the transition. Instead, each institution had a member of civil society at its head, with the other groups represented throughout the structure.”<sup>260</sup> Ultimately, “civil society participation in the peace processes weakened civil society, as leaders gained positions within the institutions or were co-opted by political forces, while those outside the institutions struggled to find a role in the transition and suffered repression.”<sup>261</sup>

### **Political Accommodation in the Selection of TRC Members**

With the Sun City Accord’s transitional framework in hand, the parties undertook steps to implement its provisions. A representative of civil society was to chair the TRC, as with the other “transitional institutions,” membership would be allocated according to constituency and groups participating in the ICD.<sup>262</sup>

*Transitional Constitution, Article 157*

Institutions for democracy are chaired by representatives from the “Civil Society” (“Forces Vives”) constituency, in accordance with the relevant provisions of the comprehensive and inclusive agreement.

The other Constituencies and Groupings of the inter-Congolese Dialogue fall under their respective offices.

The specific Resolution on the Institution of a “Truth and Reconciliation” Commission (Resolution) provided for members of the commission to “be appointed by consensus from the ranks of the components according to the criteria established by the ICD,” such as good morals and demonstrated knowledge and competence in relation to truth seeking.<sup>263</sup>

The phrase “ranks of the components” confirmed the power-sharing mechanisms of the transition in the selection process for the TRC’s membership, albeit here with competency and ethical standards for the members added.

Later, Law No.4/2004, passed by the National Assembly and Senate to formally create the TRC, again carried forward that approach.<sup>264</sup>

Although this law also required transparency and public consultation in the selection of 13 of the 21 members, it did not lay out

*Law No. 4/2004 018, Article 9*

The Truth and Reconciliation Commission is composed of twenty-one members, including eight officers.

The President and the other seven members forming the Board are appointed by the elements and entities in the Inter-Congolese Dialogue in accordance with the Constitution of the transition.

The other members are personalities from the religious denominations, scholarly associations, women’s groups and other organizations whose activities are related to the purpose of the Truth and Reconciliation Commission, chosen in a transparent and public way by each Province and upholding representation at 30%, according to a method which will be specified in the bylaws.

the specifics for how or when those consultations were to occur. It stated only that the “method” would be “specified in the bylaws.”

The bylaws provided no more details but merely referred back in circular fashion to Article 9 of the enabling legislation.<sup>34</sup> With no defined selection process, members were appointed directly by the different components with little consensus or regard to standards of competency.

A civil society representative was placed at the head,<sup>266</sup> but seven of the eight members on the TRC’s implementation and coordination body—the bureau<sup>267</sup>—were appointed by their respective parties in July 2003, even before the TRC law was passed.<sup>268</sup> This irregularity helped to undermine the legitimacy and effectiveness of the commission.

The selection of the 13 additional members took place only almost a year and a half later,<sup>269</sup> after the TRC law was passed.<sup>270</sup> These additional members were to be “chosen in a public and transparent way” by province (from a total of 12 provinces, with two seats for the capital, Kinshasa)—“under the direction of the bureau.”<sup>271</sup> Thus, the TRC law and the bylaws allowed the political parties to retain control over the appointment of commissioners who were meant to be independent.<sup>272</sup> The results were problematic, resulting in the selection of commissioners who were unfit for the task.<sup>273</sup>

A project evaluation undertaken jointly by UNDP and the UK Department for International Development identified power sharing as a major weakness of the transitional institutions established in support of democracy, citing in particular “their composition on the basis of political sharing of public jobs rather than pure merit.”<sup>274</sup>

In effect, the commission lost its legitimacy from the outset because of the inclusion of representatives of warring factions, some implicated in human rights abuses themselves.<sup>275</sup> As Laura Davis has concluded:

There should be limits to the extent of power-sharing. Extraordinary measures—such as a truth commission—may help contribute to both reconciliation and accountability without having to rely on dysfunctional courts. The presence of the belligerents in the structures of the TRC and the lack of public engagement in the institution’s creation fundamentally undermined it from the start. At the very least, the representatives of the belligerents should have been carefully scrutinized for their personal suitability as commissioners.<sup>276</sup>

*Pegging the TRC to the Transition and Upcoming Elections*

The TRC’s operations, like those of the other transitional institutions established by the Sun City Accord, were to be limited to the period of the transition. Under the terms of the Global and Inclusive Agreement, the TRC was to end with

the election of a president, following multiparty elections that were scheduled to occur within 24 months, with two potential six-month extensions.<sup>277</sup>

In accordance with the temporal constraints placed on the electoral calendar, Article 159 of the Transitional Constitution established a limit on the tenure of the chair and other members of the TRC: they were to be “appointed for the duration of the transition.” The commission was to table its final activity report to parliament “at the end of the transition period.”<sup>278</sup> Likewise, the substantive mandate of the commission was tied to the “end of the transition.”

Thus, TRC operations were to conform to the schedule set for the DRC’s electoral process.<sup>279</sup> Extensions would come only if an extension were granted in the election calendar. There seemed to be no separate extension procedure for the TRC

Preparations at the TRC suffered. Although the transitional constitution in April 2003 confirmed the establishment of the commission, implementing legislation was not passed until July 20 2004, over a year later, after only limited consultations. It was then backdated to August 28, 2003,<sup>282</sup> because the TRC had already begun some limited preparatory activities—for example, it held its first partial bureau meeting in May 2003—in the lag time between the adoption of the Transitional Constitution and the passage of the official statutory mandate.<sup>283</sup> The lack of enabling legislation slowed down the commission’s operations and the selection of the commissioners.<sup>284</sup>

The commissioners ended up drafting the TRC law largely on their own, without support to palliate their lack of expertise.<sup>285</sup> The swearing-in of all of the commissioners took place in December 2004. Formal bylaws for the commission fol-

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*The TRC law and the bylaws allowed the political parties to retain control over the appointment of commissioners who were meant to be independent. The results were problematic, resulting in the selection of commissioners who were unfit for the task.*

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itself. Subsequent TRC documents carried forward this temporal constraint.

The decision to peg the truth commission to the transition had profound consequences for the TRC. As MONUC reported, “the entire electoral process represented one of the most complex votes the United Nations had ever helped organize.”<sup>280</sup> That complexity left the TRC to compete with other transitional initiatives for resources and funding.

Under the terms of the Sun City Accord, elections originally were to occur on June 30, 2005. The International Committee Supporting Transition in DRC (CIAT) and donors provided substantial funding, with UNDP and MONUC playing a major role in supporting the electoral process.

Ultimately, a vote on the constitutional referendum was held on December 18 and 19, 2005. General elections were held on July 30, 2006. When none of the presidential candidates received the required simple majority of votes, a runoff election was held on October 29, 2006.

With so much attention and resources focused on an intensive electoral calendar, it was difficult for the TRC to attract capable personnel or, indeed, conduct effective outreach. Because all eyes were on other ministerial posts and the electoral commission, TRC positions, considered “residual and non-prestigious,” were given to whoever wanted to occupy its posts.<sup>281</sup>

lowed much later, in March 2005, and were finally approved by the Supreme Court on April 1, 2005.<sup>286</sup> As a result, the actual operational period for the TRC was quite short.

Peace immediately after a ceasefire is always fragile. In the case of the DRC, fighting never fully ceased. The ICD and the Global and Inclusive Agreement signed at the end of 2002 represented only a partial peace. Some powerful players had been left out of the talks and out of the settlement. As a result, spoilers continued operating to “derail the process through violence.”<sup>287</sup> In the east, conflict continued largely unabated.

The TRC had to operate within this environment, not only at the national level, but at the provincial and local levels as well.<sup>288</sup> The lack of security posed both physical and psychological obstacles for staff, victims, and witnesses. It meant that there were only dangerous options for accessing certain parts of the country or no access at all. With violence and human rights violations ongoing, victims and witnesses did not dare to come forward, fearing revenge.

The link between the TRC, the transition, and elections only made matters worse. With the press of events, especially in the Congo’s volatile east, the commission gave up on truth seeking and instead focused on conflict-prevention and conflict-mediation activities.<sup>289</sup> As a result, whether by necessity or by choice, the TRC worked in support of the elections. Its complaint-based, investigatory functions were abandoned.



The TRC describes the shift in its final report:

Elections are a duty and a legitimate right of citizens in all countries of the world. It is with this perspective in mind that Congolese citizens mobilized and registered in such large numbers for elections in the Democratic Republic of the Congo. However, that electoral process was continuously being disrupted by political agitations which, due to manipulations, put the normal course of the electoral process at risk . . . These occurrences did not leave the Truth and Reconciliation Commission indifferent. Conscious of its mission to work toward peace, cohesion and national reconciliation, it decided to focus on activities to calm people's spirits, as well as on mediation and negotiation as between political actors.<sup>290</sup>

In the end, as described in its report, the TRC conducted:

- Dialogue between communities on tolerance and peace
- Work with political parties to create a culture of peace
- Outreach to students on the electoral process
- Reconciliation between some military groups
- Activities to reduce interethnic conflict
- Calming-of-the-spirit activities after the occupation of a village by the insurgency
- Work with refugees, including to encourage their return home
- Outreach to engage the population in registering and voting in peace
- Promotion of respect for election results by political parties, population, and media

These “reconciliation” activities were aimed not at past crimes, but at resolving current disputes and preventing future conflict.

The TRC never got to the truth-seeking component of its mandate. It did not register complaints or conduct investigations or hearings. It did carry out some preparatory activities in relation to truth seeking, such as reinforcing the capacity of its members on the operation of a truth commission and the techniques of registering complaints and managing information and archives, but it never got to the substantive core of

its truth-seeking mandate. It did not make recommendations on rehabilitation and reparations or suggest reforms. No proposals were issued on amnesties.

As a result, the DRC's truth commission did not support the fundamental objectives of a truth commission: accountability through fact finding, acknowledgment of victims, and truth seeking to identify the root causes of violence to prevent its recurrence.<sup>291</sup>

### **Pursuing an Ambitious Truth-Seeking Mandate While Conditions of Insecurity Persisted**

Given the situation on the ground in the DRC at the time of the peace talks, it is important to consider whether it was even an appropriate time to undertake truth seeking in the DRC in the years in question.

The justice deficit in the Congo was immense. Congolese civil society and the unarmed opposition were the first parties to call for the creation of a truth-seeking body to address accountability.<sup>292</sup>

To examine the extensive legacy of human rights abuses in the DRC, the TRC's mandate covered a broad scope of human rights violations and crimes. According to paragraphs 3 through 6 of the TRC Resolution, the TRC was to investigate political crimes and gross violations of human rights, committed both inside and outside of the DRC, if they related to conflicts within the DRC. It was also meant to establish the truth on both political and socioeconomic events that happened in the DRC that were relevant to reconciliation and to hear victims, “taking all the necessary measures to compensate them and completely restore their dignity.”<sup>293</sup>

The mandate was also broad in the period of investigation it was to cover. It included not only the past but extended to the present as well. According to paragraph 3 of the Resolution, it was to investigate violations “since the country's access to independence.” Article 6 of the TRC law expanded on the scope of the inquiry to be undertaken to include not only crimes of the past but also crimes and violations of human rights committed during the period of the transition:<sup>294</sup>

There was no doubt that the need was great, but the parties to the peace talks might have given more consideration to the appropriate timing of the measures.

Indeed, in 2003, some Congolese civil society organizations and the international community, through the United Na-

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*Persons linked to the warring factions were allowed to serve on the TRC's executive bodies, making it less an exercise in truth seeking and more a mirror of the conflict and the political and military allegiances of the parties contending for power.*

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*Law No. 4/2004 018, Article 6*

The Truth and Reconciliation Commission knows of events as well as crimes and violations of human rights committed during the period from 30 June 1960 until the end of the transition.

a) this period is divided into two: the first from 1960 to 1992, in consideration for which it updates and complete records of the Congolese National Conference and lets deal with any individual or collective victims' requests;

b) the second from 1963 to the end of the transition for which it requests or receives.

tions, counseled further reflection and consultation before establishing the TRC and had asked for a postponement.<sup>295</sup> As a result, in February 2004, MONUC, Office of the United Nations High Commissioner for Human Rights, Global Rights, and the International Center for Transitional Justice co-organized a consultation on the law—a national seminar on the TRC attended by representatives from all of the provinces and several Congolese officials. The conclusion of the seminar was that “it seems that the establishment of a TRC in the DRC should take more time before it can start functioning effectively and in conformity with the objectives conferred to it.”<sup>296</sup>

Similarly, at a MONUC workshop in February 2004, several participants from the eastern part of the country questioned how one could start speaking about truth and reconciliation when the conflict was not over and violations continued unabated.<sup>297</sup> Some reports at the time said grassroots activists and international observers asked whether a truth commission was even viable at this time when “the country is still at war with itself.”<sup>298</sup> Nevertheless, the TRC went ahead.

In the midst of continued fighting, the TRC did not dare to bring in anyone from any political faction. In this context of violence and severe mistrust, any attempt to investigate an allegation of a crime by someone in power would be considered a provocation and a sign of working for a particular political party.<sup>299</sup> Similarly, in a climate of continued violence and uncertainty, alleged perpetrators had no incentive to come forward.

In November 2006, near the end of the TRC's tenure, the president of the commission, Bishop Jean-Luc Kuye, appealed for international peacekeepers to stay longer and said

of the country's restive east: “Many cases are brought to us, but we can do nothing without security. We ask them to wait till the time when they can make their case openly, and justice can be rendered.”<sup>300</sup>

## Conclusions

The TRC in the Democratic Republic of Congo faced incapacitating challenges. Despite the passage of comprehensive laws and bylaws on its operation and the goodwill of some commissioners to venture out to conduct limited reconciliatory and mediation activities, the TRC was tainted from the outset due to a catastrophic convergence of several factors: lack of independence, inadequate timing, and persistent insecurity.

During the peace talks, powerful stakeholders assigned themselves priority over victims' needs and rights, without effective counterweights. The TRC was to all effects a footnote in a larger arrangement, dominated by concerns for power sharing.

Persons linked to the warring factions were allowed to serve on the TRC's executive bodies, making it less an exercise in truth seeking and more a mirror of the conflict and the political and military allegiances of the parties contending for power. As a result, key sectors of the international community determined that the effort was not credible and withdrew any significant support. The TRC was co-opted by politics and the short-term goal of maintaining the peace in advance of elections. Victims' right to know the truth about abuses they had suffered was lost in the pursuit of the interests of more powerful actors in the transition.

While it is impossible and probably unfair to assess the choices adopted during the process, it is necessary to indicate that at several critical moments, activists and international experts did suggest alternative routes and affirmed principles of independence, effectiveness, and legitimacy, each of which was overruled in the appointment process, challenged by the continued insecurity and subordinated to the electoral calendar.

The DRC case underscores the importance of meticulous assessment of the local conditions, including the structure of interests of the participants in a peace negotiation, the relative capacity of civil society to effectively insert human rights concerns into a transitional process, and the basic security conditions. Most of these considerations required good judgment rather than preexisting templates. In fact, the application of well-established knowledge was selective and improvised. Even at the stage of defining an unrealistic mandate, the TRC was already widely considered illegitimate.

232. Draft Law on the Organization, Powers and Operations of the National Truth and Reconciliation Commission, 2 (February 2007).
233. Explanatory Statement, Law No. 4/018.
234. Inter-Congolese Dialogue: The Final Act, Resolution No. DIC/COR/04, Article 1.
235. According to the former Secretary-General of the Congolese National Human Rights Observatory, Dieudonne Diku Mpongola, “The TRC never really became operational.” “It made no effort to receive complaints, denunciations or confessions, there was no investigation into the crimes committed in the DRC, and the victims were never identified.” Dieudonne Diku Mpongola, “Dealing with the Past in the DRC: The Path Followed.” *Politorbis* 50 (March 2010). Other commentators, more sympathetic to the work of the TRC, described it as mainly playing the role of a “firefighter.” Raphael Wakenge and Geert Bossaerts, *La Commission Vérité et Réconciliation en RDC: Le travail n’a guère commencé* (August 23, 2006).
236. Under the terms of the peace agreements, amnesties became available for “acts of war, political and opinion breaches of the law, with the exception of war crimes, genocide and crimes against humanity.” See the Global and Inclusive Agreement on Transition in the DRC (December 2002): Art 8. The DRC made a referral in April 2004 to the newly established International Criminal Court (ICC); crimes committed during the two Congolese Wars occurred before July 1, 2002, and do not fall under the court’s jurisdiction. Furthermore, all six arrest warrants issued by the ICC since the referral targeted rebel leaders who did not take part in peace negotiations.
237. Lusaka Ceasefire Agreement, S/1999/815, ¶ 12 (July 23, 1999).
238. *Ibid.*
239. S/RES/1279 (1999).
240. International Crisis Group, “Storm Clouds over Sun City: The Urgent Need to Recast the Congolese Peace Process” (May 14, 2002) 5.
241. Global and Inclusive Agreement on Transition in the Democratic Republic of the Congo (Global and Inclusive Agreement) (December 16, 2002).
242. *Ibid.*
243. Inter-Congolese Dialogue: The Final Act and Resolutions.
244. Déclaration des principes fondamentaux des négociations politiques inter-congolaises, Lusaka, May 4, 2001.
245. Global and Inclusive Agreement, Article V (Transitional Institutions).
246. *Ibid.*
247. Global and Inclusive Agreement, Article V.C.h.
248. Global and Inclusive Agreement, Article IV (Duration of the Transition).
249. See Resolution No. DIC/DOR/04, Preamble.
250. Global and Inclusive Agreement, Article VII (Final Provisions).
251. Global and Inclusive Agreement, Article V (Transitional Institutions).
252. Global and Inclusive Agreement, Article V (Transitional Institutions).
253. Global and Inclusive Agreement, Article III, section 6.
254. Global and Inclusive Agreement, Article III, section 1.
255. Annexes to Global and Inclusive Agreement.
256. Global and Inclusive Agreement, Article V, section (4)(c). Civil society also was given a few ministerial (e.g., human rights) and deputy ministerial posts (e.g., agriculture) and allotted positions in the National Assembly and the Senate. See Annexes to Global and Inclusive Agreement.
257. *Ibid.*
258. Laura Davis and Priscilla Hayner, ICTJ, “Difficult Peace, Limited Justice: Ten Years of Peacemaking in the DRC,” (March 2009), 21.
259. Davis and Hayner, “Difficult Peace,” 36.
260. Laura Davis, “Power Shared and Justice Shelved: the Democratic Republic of the Congo,” *International Journal of Human Rights* 17:2 (January 24, 2013), 295.
261. *Ibid.*, 296.
262. Transitional Constitution of the Democratic Republic of the Congo (2003).
263. *Ibid.*
264. Law No. 4/2004 018.
265. Article 46 (“the Thirteen other members are personalities from the religious denominations, scholarly associations, women’s groups and other organizations whose activities are related to the purpose of the TRC, chosen in accordance with Article 9 paragraph 3 of the organic law”); Article 60 (“The Board consists of eight members appointed by the elements and entities in the Inter-Congolese Dialogue, in accordance with Article 9 of the Organic Law and Article 46 of these Rules.”).

266. Laura Davis, "Power Shared," 299.
267. Law, No. 4/2004 018, Articles 18 and 19 ("The Truth and Reconciliation Commission is headed by a Bureau consisting of a President, three Vice-Chairman, a Rapporteur and three-Assistant Rapporteurs from each, elements and entities of the Inter-Congolese Dialogue in accordance with Article 157 of the Transitional Constitution").
268. Federico Borello, ICTJ, "A First Few Steps: The Long Road to a Just Peace in the Democratic Republic of the Congo," (October 2004), 41.
269. Final Report of the TRC (February 2007), 25.
270. Loi 04/018 du 30 Juillet 2004 portant organization, attributions et fonctionnement de la Commission vérité et réconciliation.
271. Final Report of Activities of the Truth and Reconciliation Commission of the DRC (February 2007), 8.
272. Borello, A First Few Steps, 42.
273. Ngoma-Binda and Maître Nuabda Vuidi, "Justice Transitionnelle en R.D. Congo. L'expérience de la Commission Vérité et Réconciliation," *Congo-Afrique* (2007). According to Ngoma-Binda, Vice President of the TRC, the 13 commissioners were recruited in haste, and three-quarters of them did not have the intellectual capacity or professional experience required for the TRC. Many had not completed a university education; many had an occupation that bore little relevance to truth and reconciliation. The vice president believed that of 21, only five "could be considered truly competent, credible . . . with a great capacity for rigorous thinking, judgment on balance and integrity morality." As a result there was chronic absenteeism and bad faith. Some members of the commission did not work more than 90 days over three years' time and "only worked little but always on time to collect wages." Commissioners were also suspicious of each other; some work for which money was allocated was never carried out, and some money from external donors never arrived.
274. Carrol Faubert, "Evaluation of UNDP Assistance to Conflict-affected Countries: Case Study Democratic Republic of the Congo," UNDP, 21, following a visit in early 2006.
275. "Democratic Republic of the Congo: Confronting Impunity, Human Rights Watch Briefing Paper," January 2004.
276. Davis, "Power Shared," 302.
277. Global and Inclusive Agreement, Article IV.
278. Law No. 4/2004 018, Article 55.
279. Indeed, under Article 222 of DRC's current constitution, the TRC and the other democracy-supporting institutions were to be "automatically dissolved" once a new parliament was established. To recommence truth seeking, parliament would need to establish other such institutions by organic law.
280. [www.un.org/en/peacekeeping/missions/past/monuc/background.shtml](http://www.un.org/en/peacekeeping/missions/past/monuc/background.shtml)
281. P. Ngoma-Binda and Maître Nuabda Vuidi, "Justice Transitionnelle en R.D. Congo. L'expérience de la Commission Vérité et Réconciliation," *Congo-Afrique* (2007).
282. A national consultation on the draft law was held in February 2004, organized by MONUC, OHCHR, Global Rights, ICTJ, and attended by the DRC transitional government, local civil society, international NGOs, and local partners.
283. Final Report of the TRC (February 2007).
284. The TRC was to be made up of a Plenary Assembly, the Bureau, two Permanent Special Commissions, and Provincial and Local Committees (Law Art 15-27). The Plenary was meant to be the decision-making body, where decisions must be made by a three-quarter majority, while the Bureau was to implement the decisions. The Bureau was made up of the eight officer-commissioners that were to be appointed by the eight parties to the ICD. The president, also a member of the Bureau, was to be appointed by civil society and enjoyed the rank of a minister.
285. Borello, A First Few Steps, 40-41.
286. [www.leganet.cd/Legislation/DroitPenal/ReglementInt.CVR.htm](http://www.leganet.cd/Legislation/DroitPenal/ReglementInt.CVR.htm)
287. Laura Davis, "Power Shared."
288. Resolution No. DIC/COR/04, On the Institution of a "Truth and Reconciliation Commission," Final Act, Inter-Congolese Political Negotiations, ¶ 2 (April 2002).
289. Final Report of the Truth and Reconciliation Commission, (February 2007), 51.
290. Ibid. "L'élection est un devoir et un droit légitime des citoyens dans tous les pays du monde. C'est dans cette optique que les citoyens congolais se sont mobilisés et inscrits nombreux au processus électoral de la République Démocratique du Congo. Cependant, ledit processus est continuellement perturbé par certaines agitations d'ordre politique qui, par des manipulations ont risqué d'entraver la marche normale de son parcours.... Toutes ces situations n'ont pas laissé la Commission Vérité et Réconciliation indifférente. Celle-ci soucieuse et consciente de sa mission d'oeuvrer pour la paix, la cohésion et la réconciliation Nationale la CVR s'est investie dans des activités d'apaisement des esprits, de médiation et de négociation entre les acteurs politiques."
291. Eduardo González and Howard Varney (eds.), ICTJ, Truth Seeking: Elements of Creating an Effective Truth Commission (2013), 9.
292. Roundtable on DR Congo ends in Brussels, Pan African News Agency, [reliefweb.int](http://reliefweb.int) (January 18, 2002). Laura Davis and Priscilla Hayner, *Difficult Peace, Limited Justice: Ten Years of Peacemaking in the DRC*, ICTJ (March 2009), 36.

293. Resolution No. DIC/COR/04, ¶ 5.

294. It is unclear how the TRC Act ended up mandating investigations into violations that happened concurrently with the operation of the TRC. This naturally made investigations by the TRC even less welcome.

295. Civil society sent an open letter in August 2003; the president of Security Council issued a statement in December 2003 urging an extension of the consultation process; ICTJ encouraged the continuation of the consultation process on several occasions. Borello, *A First Few Steps*.

296. *Ibid.*, 41.

297. *Ibid.*, 46.

298. John Kasuku and Tyrone Savage, “DRC: The Long Road to Reconciliation,” *Africa News Update*, Norwegian Council for Africa (September 23, 2004).

299. Ngoma-Binda Nuabda Vuidi, “Justice Transitionnelle en R.D. Congo.”

300. Kasuku and Savage, “DRC: The Long Road, to Reconciliation,” 200.





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## Kenya: Case Study

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By Elena Naughton

### Introduction

Kenya's Truth, Justice and Reconciliation Commission (TJRC) released its final report in May 2013, after four years of work and three extensions of its mandate. The text documents extensive gross violations of human rights and other injustices committed during the British colonial period and across the administrations of the country's first three presidents.

Nearly 2,000 pages in length, the report strives to comply with an ambitious investigative mandate, exploring several decades of human rights violations and formulating sound recommendations aimed at preventing the recurrence of crimes. It appends lists of persons who are adversely mentioned in the report with a recommendation for further investigation or prosecution where warranted.<sup>301</sup> Notably it dedicates a section to explain candidly, and in detail, the methodological and legal difficulties it experienced during its tenure.

Concluding as it did in 2013, the TJRC benefited from years of past experience and reflections on truth seeking available in abundant academic literature, expert reports, and the work of dozens of preceding truth commissions.<sup>302</sup> A government task force, led by eminent jurist Makau Mutua, had recommended the formation of a truth-seeking body years earlier, after the 2002 elections. National consultations on the issue had provided valuable insights into what Kenyans wanted and hoped to achieve by undertaking such a process.<sup>303</sup> As a result, the TJRC mandate adopted and refined practices used elsewhere.<sup>304</sup>

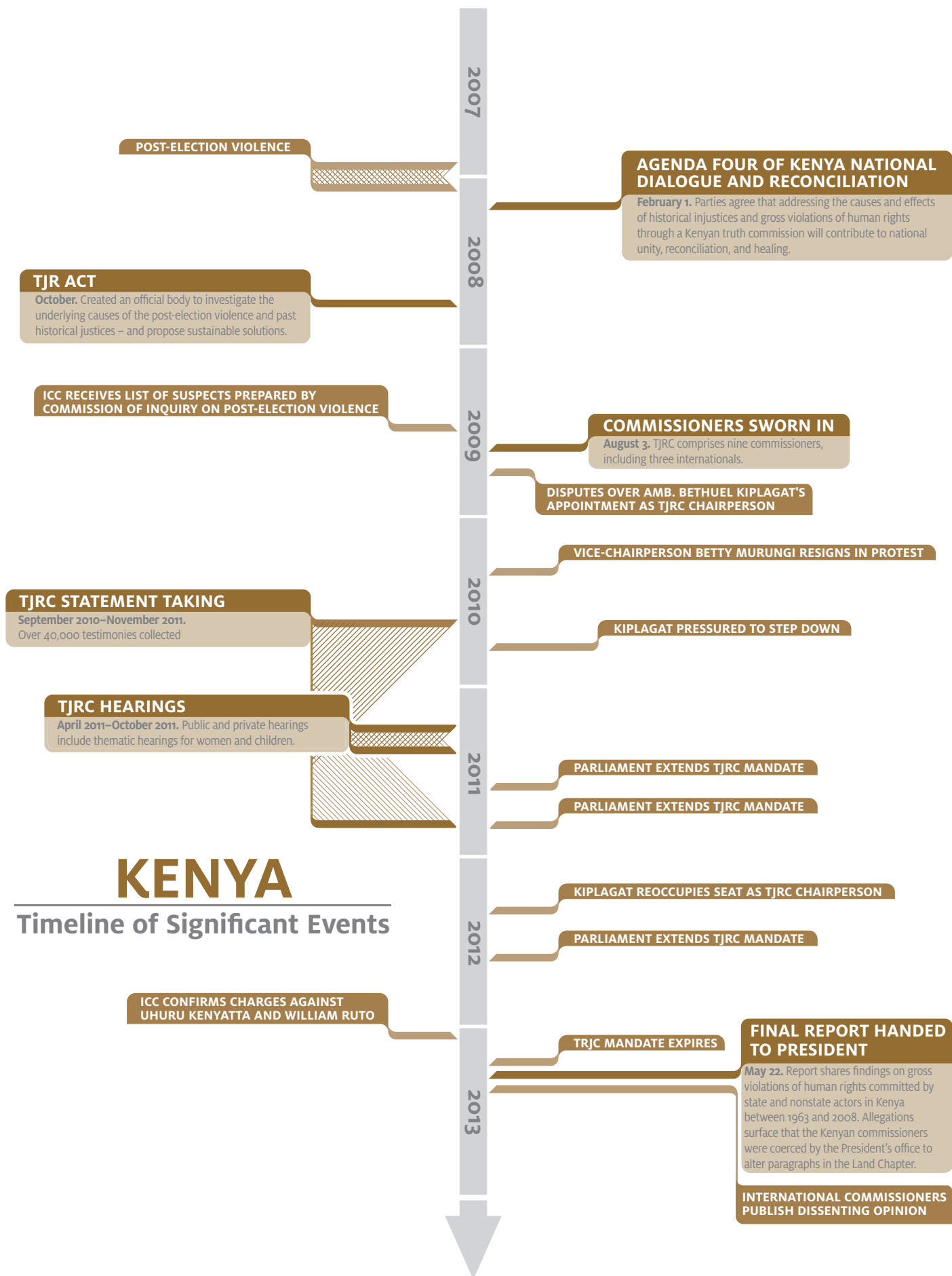
Yet while the TJRC represented a considerable effort, both its process and its most tangible product—the final report—were fraught with controversy stemming from divisions among the commissioners. The report, issued late after the official expiration of the mandate, was immediately subject to charges that the Kenyan commissioners had altered a section in response to political pressure. Since the report's release, lawsuits have been filed challenging the report's content, operations, and recommendations.<sup>305</sup>

The TJRC was engulfed in controversy and lawsuits almost from the start, and it nearly failed to conclude its mandate.<sup>306</sup> Its most public difficulties centered on the credibility and suitability of its chairperson, Ambassador Bethuel A. Kiplagat, who allegedly participated in government decisions that resulted in gross violations of human rights under the Kenya African National Union regime. The controversy prompted the resignation of the commission's vice chair, Betty Murungi, and undermined public confidence in the commission itself. Financial and resource constraints and a lack of governmental cooperation with the commission further complicated its work.

This paper seeks to draw out some cautionary lessons from a case that built on the collective experience of almost three decades of truth-seeking processes.

# KENYA

## Timeline of Significant Events



It focuses in particular on three key elements of the Kenyan experience:

- The TJRC's official start as one component of Kenya's National Dialogue process, to better understand what the parties committed to with respect to truth seeking. Truth seeking was undertaken in Kenya based on commitments made in the accord signed by key political actors in the country during the 2008 mediation known as the National Dialogue and Reconciliation, after the Post-Electoral Violence. It looks briefly at the talks themselves and considers how the negotiations and priorities set there influenced the truth-seeking process. For context, it goes back in time and reviews some earlier truth-seeking proposals for insight into what the parties to the talks brought with them to the table in terms of understanding and expectations.
- The TJRC's mandate, to assess what challenges the commission faced when implementing Kenya's truth-seeking model as written. It reflects in particular on the scope of the mandate that was carried over from the peace process. It identifies inconsistencies in the TJRC's mandate that complicated its effectiveness.
- The challenges that nearly overwhelmed the TJRC and compromised its credibility and effectiveness. Here it focuses on the commission's financial difficulties, the lack of sustained political will to support key operations, and—perhaps the most troubling episode during the TJRC's tenure—the controversy over its chairperson. It considers the impact that guiding principles and standards articulated in the peace accords and in the statutory mandate had on the commission's ability to overcome the challenges it faced.

### **The National Dialogue and the Commitment to Truth Seeking in Kenya**

The TJRC was born from the aspiration for reform and political reconciliation following the period of severe post-election violence in late 2007 and early 2008. Part of the commit-

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HYBRID COMMISSION COMPOSED OF  
**6 NATIONALS AND  
3 INTERNATIONALS**

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OPERATIONS LASTED  
**ALMOST 4 YEARS**

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STATEMENTS RECORDED  
**42,465**

---

MEMORANDA RECEIVED  
**1,529**

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HEARINGS HELD IN  
**ALL REGIONS**

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TESTIMONY GIVEN BY  
**MORE THAN 680 INDIVIDUALS**

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SPECIAL HEARINGS HELD FOR  
**WOMEN**

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into civil war. The National Dialogue process started in earnest with a statement of general understanding of the agenda items that would make up the negotiations. The Annotated Agenda and Timetable (the Agenda), signed on February 1, 2008, set out the steps for resolving the political crisis and tackling long-term issues that were seen as necessary to explain the root causes of conflict.<sup>308</sup>

The Agenda contained four items: item one recognized the need for immediate action to stop the violence and restore fundamental rights and liberties; item two aimed at “immediate measures to address the humanitarian crisis” and “ensuring that the processes of national healing, reconciliation and restoration start at once;” item three aimed at overcoming the current political crisis; and item four addressed the long-term causes of the crisis. The tasks to be completed under item four were ambitious. Kenya was to address “poverty, the inequitable distribu-

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*The Truth, Justice and Reconciliation Commission was engulfed in controversy and lawsuits almost from the start, and it nearly failed to conclude its mandate. Its most public difficulties centered on the credibility and suitability of its chairperson.*

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ments to peace mediated by the Panel of Eminent African Personalities, chaired by Kofi Annan, the TJRC was intended to help Kenya achieve lasting peace by addressing “deep-seated and long-standing divisions within Kenyan society.”<sup>307</sup>

The stakes were high when talks began at the end of January 2008, as frequent outbreaks of violence threatened to escalate

tion of resources and perceptions of historical injustices and exclusion” by, among other things, undertaking “constitutional, legal and institutional reform;” “combating regional development imbalances;” “tackling unemployment, particularly among youth;” “undertaking a Land Reform;” and “addressing transparency, accountability and impunity.”

Implementation of the agenda was divided into two stages: the first three items were to be addressed within 7 to 15 days, whereas agenda item four was to be resolved within one year of the commencement of the National Dialogue.<sup>309</sup>

In this Agenda, the parties articulate a vision for what needs to be done and why: all involved acknowledged that there was an acute “political crisis” that must be resolved immediately. They also agreed that Kenyans must come to terms with some chronic problems—the “root causes” of the conflict—if they were to prevent a recurrence. A framework to achieve peace now and in the future was outlined, implicating economic as well as political and civil rights. Although truth seeking was not mentioned by name, the Agenda committed the parties to discuss a comprehensive set of issues and long-term reforms of the type facilitated by truth commissions and other transitional justice mechanisms.

Details for how this would occur were provided in statements and subsequent agreements signed during the National Dialogue process.<sup>310</sup> In an agreement titled Agenda Item Three: How to Resolve the Political Crisis, dated February 14, 2008, the parties committed to establish a “truth, justice, and reconciliation commission” by name as one mechanism of the reform and transition.<sup>311</sup> It was closely linked to Agenda item four, as it identified needed reforms in the constitution, parliament, police, and judiciary, as well as the identification and prosecution of perpetrators and respect for human rights, among other things.

Here a direct connection is made between the TJRC and the other comprehensive reform imperatives that mediators and parties were describing generically as the “root causes of the conflict.”

The role assigned to the TJRC in the talks seems enormous and probably beyond what any single institution could accomplish. However, it is important to remember that reform in Kenya and the role a truth commission might play both in that effort and in investigating Kenya’s legacy of human rights abuse were not merely an outgrowth of the talks under the National Dialogue; they were part of a reform agenda that had been under discussion for years. As the TJRC framed the issue: “In essence, the Commission’s work evolved at a particular historical moment that coincided with a reform process. Thus, the Commission viewed its role as that of building on the existing reform initiatives.”<sup>312</sup>

In 2003, a Task Force on the Establishment of a Truth and Reconciliation Commission (the Task Force) had held a broad and open consultative process involving Kenyans and international experts to determine whether a truth commission was right for Kenya. That process had been undertaken at a moment of political transition, when the

National Rainbow Coalition (NARC) defeated the Kenya African National Union (KANU), the party in power since independence, in elections in 2002. These consultations had found that an overwhelming majority of Kenyans—90 percent—wanted the government to establish an effective truth commission and made recommendations about how and when such a commission should be established.<sup>313</sup> In its final report, the Task Force recommended the establishment of a commission by presidential order, covering the period of 1963 to 2002.<sup>314</sup> The commission was to investigate “systemic patterns or state policies, actions that were carried out as policies of the state to abrogate the rights of Kenyans.”

Proposals for a human rights body with broad truth seeking functions were also part of discussions around the draft constitution of Kenya that had included public hearings for “listening to the people.”<sup>315</sup> It, too, was to investigate and “deal with past human rights abuses” and “redress historical injustice.”<sup>316</sup>

The severity of the 2007–2008 political crisis and the presence of the international community and civil society during the National Dialogue finally drove the key players to make the necessary commitments to move forward with truth seeking. The dynamics during this period appeared right for a truth process. The parties’ commitment to truth seeking was specific and definite in the peace agreement, as were other commitments, like for constitutional reform. The TJRC was to accomplish an enduring goal of those who hoped to reform Kenya’s autocratic systems and address decades of human rights abuses.

### **The National Dialogue’s Vision: Immediate Peace, Then Comprehensive Reform**

Driven by the ferocity of the crisis and the threat of civil war, priority in the negotiations was given first to items one through three on the agenda—the drivers of the conflict itself—the particulars of the electoral dispute that had precipitated the crisis and the governance and constitutional issues that might resolve it. Under the direction of Annan and Jakaya Kikwete, president of Tanzania and chair of the African Union, a political settlement was reached on February 28, 2008, by President Mwai Kibaki and Raila Odinga that resolved the power-sharing aspects of the dispute and brought an end to the crisis. Two agreements were signed: 1) an Agreement on the Principles of Partnership of the Coalition Government and 2) the draft of the National Accord and Reconciliation Act, which would be submitted to parliament for passage.

These agreements secured positions in the government for the principals and members of their coalitions. The draft of the National Accord and Reconciliation Act was to serve as



the implementation mechanism for the agreement until an amended constitution was enacted that reflected the newly configured government.<sup>317</sup> Both agreements reaffirm the essential nature of “reform” in Kenya and underscore the threat that unaddressed divisions in Kenyan society present for “a unified country,” as the Agreement on the Principles of Partnership of the Coalition Government emphasized.<sup>318</sup>

Initially the locus of energy in the negotiations had been centered on issues of power sharing and governance. After the final power-sharing settlement was reached, however, the parties finalized the operational details necessary to the reform agenda.<sup>319</sup> On March 4, 2008, they signed several agreements laying out the general parameters and guiding principles for a number of commissions, including the TJRC.<sup>320</sup> Two bodies were given limited mandates that focused on the most recent and intense episodes of violence connected with the elections.

- An Independent Review Committee was to be established to investigate “all aspects of the 2007 Presidential Election and make findings and recommendations to improve the electoral process.”<sup>321</sup> It was to be a nonjudicial body made up of Kenyan and non-Kenyan “electoral experts” of the “highest professional standing and personal integrity.” It was to operate for 3 to 6 months and deliver a report to the president, with a copy to the Panel, which would then be made public within 14 days.
- The Commission of Inquiry on Post-Election Violence (CIPEV), which became known as the “Waki Commission” after its chair, Justice Phillip Waki.<sup>322</sup> The CIPEV would “(i) investigate the facts and surrounding circumstances related to acts of violence that followed the 2007 Presidential Election, (ii) investigate the actions or omissions of State security agencies during the course of the violence, and make recommendation as necessary, and (iii) to recommend measures of a legal, political or administrative nature, as appropriate, including measures with regard to bringing to justice those persons responsible for criminal acts.” The CIPEV was to be composed of “three impartial, experienced, and internationally respected jurists, or experts in addressing communal conflict or ethnic violence. Two of these shall be international, and one shall be Kenyan.” They were to be selected by the Panel following consultation with the Government/PNU and the ODM, and appointed by the President.<sup>323</sup>

In addition, the CIPEV was specifically tasked with making “recommendations, as it deems appropriate, to the Truth, Justice, and Reconciliation Commission.”<sup>324</sup>

With respect to the TJRC, the parties settled on general provisions for the mandate, competencies, and functions based on the far-reaching parameters set down earlier in the negoti-

ations.<sup>325</sup> The TJRC mandate was to be temporally as well as substantively broad. It was to cover over 45 years of Kenyan history, reaching from Kenya’s independence on December 12, 1963, to the official settlement of the post-election violence on February 28, 2008. The commission was to investigate “antecedents” to its temporal mandate as well, “in order to understand the nature, root causes, or context that led to such violations, violence, or crimes.”<sup>326</sup>

The crimes to be inquired into included not only human rights violations committed by the state, groups, and individuals but also an extensive list of other injustices:

This includes but is not limited to politically motivated violence, assassinations, community displacements, settlements, and evictions. The Commission will also inquire into major economic crimes, in particular grand corruption, historical land injustices, and the illegal or irregular acquisition of land, especially as these relate to conflict or violence. Other historical injustices shall also be investigated.”<sup>327</sup>

The parties decided further that the commission would be created by an act of parliament and complete its work within two years. The commission was to comprise Kenyans as well as international commissioners nominated with the participation of a cross section of representative groups. It was to have the power to recommend amnesties; however, excluded were serious international crimes as well as amnesties for the benefit of persons bearing the greatest responsibilities for the crimes committed. It was agreed that the final report would have to be made public within fourteen days after having been submitted to the president.

Funding was to be provided mainly by the government, although additional support could be obtained from donors, foundations, or other independent sources.

By and large, discussions over the general parameters and guiding principles for the TJRC seem not to have been contentious, although it appears that both the mediators and principals had some doubts about the scope of truth seeking under consideration.<sup>328</sup>

### The TJRC’s Mandate

The TJRC’s statutory legislative mandate became official in 2008 with the passage of the act creating a comprehensive legislative framework for the commission and implementing the provisions of the agreements signed during the National Dialogue.<sup>329</sup>

The TJRC’s mandate was threefold. First, it had truth seeking, reconciliatory, and justice components, although the priority was primarily on the first two elements. In its *truth seeking component*, the commission was to establish a complete

and accurate historical record of rights violations and abuses that had been inflicted between 1963 and 2008. The inquiry was directed to the causes of these violations and included the historical antecedents and context as well as the perspectives

However, the peace agreement mandate was not limited to violations of international human rights law, serious violations of humanitarian law, and land-related issues alone but spoke more generally of “economic crimes.” In the March 4th

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*The TJR Act, as written, presented challenges that would have been significant to any investigative body. As the peace process required, the TJRC was given an extraordinarily broad mandate, covering 45 years and a diverse catalogue of violations, including crimes against humanity, genocide, enforced disappearances, and gross human rights violations.*

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of victims and perpetrators.<sup>330</sup> The commission was meant to provide the public, victims, and perpetrators with a platform for truth telling<sup>331</sup> and deliver a publicly accessible report.<sup>332</sup>

In regard to its *reconciliatory component*, the commission was to offer victims and perpetrators a forum. Victims were provided with “a forum to be heard and restore their dignity,”<sup>333</sup> while perpetrators were given “a forum to confess their actions as a way of bringing reconciliation.”<sup>334</sup> A second reconciliatory dimension lay in the commission’s mandate to make recommendations to the Kenyan authorities. The commission was to facilitate the granting of certain amnesties to persons who made full disclosure.<sup>335</sup>

The provisions providing a justice component were the least robust because they were expressed only in relation to the commission’s authority to make recommendations. The TJRC would determine “ways and means of redress for victims of gross human rights violations”<sup>336</sup> and would “make appropriate recommendations.”<sup>337</sup> The commission was also meant to recommend the “prosecution of perpetrators of gross human rights violations.”<sup>338</sup>

#### **Scope of the Mandate**

The terms and language that were presented to parliament for the TJRC’s mandate received input and comments from the international community. It mirrored aspects of mandates from other contexts and reflects some of the insights provided by the Task Force.<sup>339</sup> It also reflects suggestions made by the diverse and different constituencies represented at a national and international conference held during the period July-August 2003 to support the work of the Task Force.<sup>340</sup>

The act as written presented challenges that would have been significant to any investigative body. As the peace process required, the TJRC was given an extraordinarily broad mandate, covering 45 years and a diverse catalogue of violations, including crimes against humanity, genocide, enforced disappearances, and gross human rights violations. Because of the importance of land-related issues in Kenya, it was widely accepted that the TJRC mandate would have to include investigations into illegal land transactions.<sup>341</sup>

Agreement, it was decided that the mandate would include “major economic crimes, in particular grand corruption, historical land injustices or irregular acquisition of land.”<sup>342</sup> Casting the net even wider, the parties also included “other historical injustices.”<sup>343</sup>

The TJR Act widened the commission’s functions even further to include:

6. The functions of the Commission are to . . .

(g) investigate economic crimes . . .

(n) investigate economic crimes including grand corruption and the exploitation of natural or public resources and the action, if any, taken in respect thereof;

(o) inquire into the irregular and illegal acquisition of public land and make recommendations on the repossession of such land or the determination of cases relating thereto;

(p) inquire into and establish the reality or otherwise of perceived economic marginalization of communities and make recommendations on how to address the marginalization;

(q) inquire into the misuse of public institutions for political objectives . . .

The crimes referred to here were insufficiently described and defined.<sup>344</sup> Although the TJR Act offers definitions of most of the human rights violations covered by the mandate, it does not define the terms “economic crimes,” “economic marginalization,” “grand corruption,” or “exploitation of natural or public resources.” That ambiguity presented practical difficulties for the commission, which faced challenges, for instance, in conceptualizing “economic marginalization” and had trouble coming up with “reliable and quality data” and meaningful indicators for assessing it.<sup>345</sup> The legal mandate required that the commission report on all violations in a form that was “accurate” and “complete,” including antecedents, circumstances, perspectives of the victims and those responsible for human rights violations, including their motives.<sup>346</sup>

Given its wide mandate and the limited duration allotted for commission operations, the commission needed to be “selective of the events it would concentrate on in terms of research [and] investigation.” To narrow the scope of its inquiries, it prioritized violations across seven specific contests: the Shifita War (1965–1967); security operations in North Eastern, Upper Eastern, and North Rift (1963–2008); attempted coup (1982); crackdown on multiparty and pro-democracy activists (1986–1991); ethnic and politically instigated clashes (1991/1992 and 1997); activities of and crackdown on militia groups (2006–2007); and post-election-violence (2007–2009).

The TJRC’s findings are uneven, with violations covered in varying detail. As has been the experience of many truth commissions, hearings were designed around illustrative cases (“window cases” that were to show “broader patterns and trends of gross violations of human rights in a particular region or area”).<sup>347</sup> As a result, violations committed in certain regions of the country, like the north, were explored in detail,<sup>348</sup> whereas other episodes, violations, or regions received less attention.

To save time, the commission relied on the work of other commissions of inquiry, like CIPEV, to fill in its findings. Though certainly a reasonable approach, at times it meant that existing gaps in previous inquiries were merely carried forward, rather than resolved.<sup>349</sup>

Inconsistencies and ambiguities in the TJR Act intensified the challenges faced by the commissioners as they worked to implement their mandate.<sup>350</sup> For instance, the TJRC found:

- “several incongruent references to the nature of the rights to be investigated: ‘violations and abuses of human rights and economic rights’; ‘gross violations of human rights and economic rights’; and ‘gross human rights violations and violations of international human rights law and abuses’.
- In essence, it is not clear whether the drafters intended that the Commission focus on ‘ordinary’ violations of human rights or on gross violations of human rights.”<sup>351</sup>
- “multiple sections of the Act offer different prescriptions on the same topics. For instance, on the subject of sexual violations, section 5(c) refers to ‘sexual violations’ but section 6(h) refers to ‘crime of a sexual nature against female victims.’”<sup>352</sup>
- “it is not evidently clear whether the intention of Parliament was for the Commission to focus on ‘ordinary violations’ or ‘gross violations of human rights’, the Commission made a decision to focus on the latter. After a careful scrutiny of the TJR Act, the Commission concluded that there was a strong textual indication all over the Act to suggest that Parliament intended gross violations of human rights should be the focus of the Commission’s inquiry.”<sup>353</sup>

These examples illustrate the tension between the ambitious vision created for the TJRC, and the requirements for making it operational. It also may indicate the difficulties of the commissioners to interpret their mandate, deprived of leadership after the separation of the chairperson and the resignation of the second in command.

The truth commission’s mandate—articulated first during the National Dialogue and made official by an act of Parliament—was “by far the broadest of any truth commission ever established, encompassing inquiry into violations of civil and political rights as well as socio-economic rights” and its “temporal mandate was similarly wide.”<sup>354</sup> With limited resources and an initial grant of two years to complete its mandate,<sup>355</sup> the mission was overwhelming; its concomitant risk of failure was higher.

Indeed, given the immensity of the human rights deficit in Kenya, the Task Force in 2003 had advised care when crafting a truth commission mandate, saying “it is practically impossible for a truth commission to address more than several thousand cases. That is why the Task Force has identified individual cases and groups of violations that it believes ought to be the subject of inquiry.”<sup>356</sup>

And when discussing economic crimes, the Task Force had emphasized that “economic crimes, due to their complexity, are very difficult to investigate.”<sup>357</sup> It recommended a limited approach and gave examples:

Yet, the Task Force believes that a truth commission should investigate a selected set of economic crimes that directly lead to the violations of economic, social and cultural rights. A few examples will suffice. The failure by a contractor for the production and provision of clean and safe drinking water because of fraud or threat of public funds resulting in ill health or deaths ought to be the subject of an investigation by a truth commission. The same should be true for the grabbing of public land to displace a school, a community cultural center, or other public amenities.

Surely it was a decision for Kenyans to decide what issues the TJRC should address and at what time, but as Priscilla Hayner cautioned during the peace talks, a truth commission’s mandate may not “necessarily be well suited to cover all issues.”<sup>358</sup> At a minimum, the inclusion of economic crimes, for example, might have been regulated more thoroughly, restricting it perhaps to a discrete set of well-defined crimes.

In the best of circumstances, however, such a broad mandate would have presented great challenges. Although better planning and management of the commission might have mitigated some of these difficulties, in the environment that existed during the time the commission operated, problems

presented by the TJRC's mandate—coupled with a sharp decline in active international and domestic support brought on by the controversies surrounding the chairperson—only complicated the job the TJRC had to do.<sup>359</sup>

### **The TJRC Faces Financial Hardships, Controversy, and Insufficient Political Support**

In its final report, the TJRC discusses some of the other significant challenges it faced in the execution of its mandate. We look at three of those issues here: financing, the controversy surrounding the credibility of the commission's chair, and the "lack of sufficient state and political will" to support its work.<sup>360</sup>

#### ***Chronic Financial Shortfalls***

From the beginning, the commission suffered from a "lack of sufficient funds and resources to efficiently and effectively conduct its operations."<sup>361</sup> The TJR Act required the establishment of the Truth, Justice and Reconciliation Fund, which was to receive monies allocated by parliament and "any grants, gifts, donations or bequests."<sup>362</sup> Neither ultimately proved sufficient to meet the commission's operational needs.

Because of a lack of funds, the TJRC operated without a secretary or a secretariat during its first fiscal year and was administered instead by Kenya's Ministry of Justice until July 2010.<sup>363</sup> During its second fiscal year, the TJRC again was allocated only half of its proposed budget.<sup>364</sup> As a consequence, the commission had to postpone the hiring of staff and had to limit essential mandate-related operations. To fill these gaps at times, commissioners loaned the TJRC money or the Kenyan government belatedly provided supplementary funding or deployed support staff from government ministries, which undermined the financial and operational independence indispensable for a truth-seeking body to be effective and transparent. These and other limitations resulted in delays and the TJRC's need for extensions in order to complete its work.

The accords signed during the National Dialogue did not require specific funding commitments. Instead, the parties merely "encouraged strong financial support to the Commission."<sup>365</sup> And Kenya's government was "expected" to provide "a significant portion of the Commission's budget," but the TJR Act did not require earmarking or a dedicated source of support. As the commission complained, it "operated on a paltry budget throughout its life. The financial situation was so dire that at times it had to seek loans from Commissioners."

#### ***Debilitating Controversy***

The TJRC faced its most serious internal challenge in regard to its chairperson, Kiplagat. We do not review here the many twists and turns of that protracted fight—such reporting has

been treated in detail in the commission's report and other sources.<sup>366</sup> Instead, we look at some weaknesses that emerged during implementation of provisions of the mandate regarding commissioner selection, conflict of interest, and removal and assess how delays, maneuvering, and public statements, including attempts to mobilize sectarian elements in support of personal interests, sometimes magnified the existing challenges.

The Act provides for a commission comprising nine commissioners: three noncitizens selected by the Panel of Eminent African Personalities<sup>367</sup> and six Kenyans selected according to a four-step process. A nine-member Selection Panel was to be made up of individuals from different social, economic, religious, and civil society organizations.<sup>368</sup> That panel was to invite applications from qualified individuals by posting advertisements in Kenya's major daily newspapers and then, with the assistance of a human resource firm, select potential candidates for interview.<sup>369</sup> The Selection Panel would narrow the list of candidates to 15 and submit those names to the National Assembly for consideration.<sup>370</sup> The National Assembly would then nominate six persons for appointment as national commissioners and forward the names of all nine commissioners (including those nominated by the Panel of Eminent African Personalities) to the president for nomination.<sup>371</sup>

In accordance with this process, the president appointed nine commissioners, including Commissioner Kiplagat as chair. Soon after, Kiplagat's suitability came into question. He was accused of having been involved in three incidents that not only were linked to human rights violations under investigation by the TJRC but also implicated him in possible crimes. The charges involved were serious, possible involvement in: the murder of Dr. Robert Ouko; the planning of the Wagalla Massacre in 1984; and illegal or irregular land transactions.<sup>372</sup> These allegations stood in possible contravention of section 10(6)(b) of the TJR Act:

No person shall be qualified for appointment as a commissioner unless such person . . .

(b) has not in any way been involved, implicated, linked or associated with human rights violations of any kind or in any matter which is to be investigated under this Act . . . .

As the TJRC's final report concludes, the fallout from this controversy "adversely affected the operations of the Commission throughout its life. The controversy diverted and distracted the attention and energy of the Commission from executing its core mandate."<sup>373</sup>

The parties to the agreement knew that controversies in the composition of any of the bodies emerging from the National Dialogue would be debilitating and had tried to prevent them. Cognizant that an electoral conflict had precipitated



the crisis, the agreement excluded members if they could be “seen to represent a specific political group.”<sup>374</sup>

These general provisions were elaborated on in the TJRC Act. But they, too, proved weak in the face of abuses. Commissioners were to be of “good character and integrity.” They must not have been involved in violations within the mandate of the TJRC and were to be impartial.<sup>375</sup> Four of the commissioners were to have at least 15 years of experience in matters relating to human rights law;<sup>376</sup> five were to have “knowledge of and experience in forensic audit, investigations, psychosociology, anthropology and social relations, conflict management, religion or gender issues.”<sup>377</sup>

On paper, the TJRC Act appeared to provide a sound selection process that reflected international best practices, especially as it required the participation of a cross section of groups in its Selection Panel. In practice, however, its defects proved glaring. Besides the initial Selection Panel, a wider public scrutiny of the nominees was not possible and no vetting process was envisioned. Opening the selection process for a short period of public (written) consultation on the suitability of shortlisted candidates might have brought up relevant information. But that time and opportunity were not required, and as a result, readily available information was not brought out. Instead when the president made the final decision about the appointments, including the chair, protests arose almost immediately, over the selection of Kiplagat as chairperson.

A flurry of opposition followed and support for the TJRC suffered. In August 2009, human rights defenders and victims’ groups filed a lawsuit before the Kenyan High Court against the TJRC in which they sought the dissolution of the commission.<sup>378</sup> Soon thereafter, the Kenya Transitional Justice Network, a network of civil society organizations, announced its disengagement from the commission, mentioning the allegations against the chairperson as a major reason.<sup>379</sup> In February 2010, former members of the South African, Peruvian, and Sierra Leonean Truth Commissions, led by Archbishop Desmond Tutu, called on Kiplagat to resign.<sup>380</sup> Finally, Murungi and international commissioner Ronald Slye publicly asked the chairperson to resign the following month; Kiplagat, however, remained in office. Shortly after, in March, Murungi announced her resignation.<sup>381</sup>

The provisions of the TJRC Act on the removal of commissioners failed to resolve the crisis. Section 17 established a meticulous legal procedure for removing a commissioner:

- (1) (a) “(...) (2) Where the question of the removal from office of the chairperson or a commissioner arises under subsection (1)- (a) the Chief Justice shall, by notice in the Gazette, appoint a Tribunal which shall consist of a chairperson and two other members selected by the Chief Justice from among

persons who hold or have held office as judges of the High Court; (b) the Tribunal shall inquire into the matter and report on the facts to the Chief Justice and recommend whether the chairperson or the commissioner ought to be removed from office and the Chief Justice shall communicate the recommendations of the Tribunal to the President. (3) Where the question of the removal the chairperson or a commissioner has been referred to a Tribunal under subsection (2), the President may suspend the chairperson or the commissioner from the Commission and the suspension may at any time be revoked by the President and shall in any case cease to have effect if the Tribunal recommends to the President that the chairperson or the commissioner, as the case may be, should not be removed.”

Section 17 also enumerated the grounds for removing the chairperson or a commissioner:

17. (1) Without prejudice to section 16, the chairperson or a commissioner may be removed from office by the President—
  - (a) for misbehavior or misconduct;
  - (b) if the chairperson or commissioner is convicted of an offence involving moral turpitude but not sentenced to a term of imprisonment;
  - (c) if the chairperson or commissioner is unable to discharge the functions of his office by reason of physical or mental infirmity; or
  - (d) if the chairperson or commissioner is absent from three consecutive meetings of the Commission without good cause but shall not be removed except in accordance with this section.

In April 2010, eight commissioners, not including the chairperson (but with his support at the time), filed a petition to the Chief Justice of the High Court and requested the appointment of a tribunal to inquire into whether the chairperson should be removed from his position.<sup>382</sup> The Chief Justice did not establish the tribunal for more than half a year, and when he finally did so in late October 2010, Kiplagat issued a signed media statement in which he announced he was “‘stepping aside’ from his duties” and then filed an application with the newly appointed tribunal to challenge its jurisdiction. When the tribunal decided it had jurisdiction, Kiplagat moved the High Court for a stay and was granted one, pending decision on the substantive jurisdictional question.<sup>383</sup>

During the jurisdictional challenge, the tribunal’s six-month mandate expired, and it ceased its activities without reaching a formal result. The Chief Justice refused to grant an extension of



the tribunal's tenure, and it was disbanded. In the absence of any final decision from the tribunal, Kiplagat claimed that he had been cleared, withdrew his jurisdictional challenge in the High Court, and reoccupied his former position as chair in April 2012.<sup>384</sup> The TJRC did not oppose the withdrawal of the jurisdictional challenge as it removed the stay. At the end of this protracted fight, no court had ruled on the substantive charges leveled against Kiplagat.

While the TJR Act provided what seemed like a strong procedure for addressing allegations against commissioners, ultimately, the procedure proved to be a legalistic bottleneck and an arena for inconclusive litigation. It is worth considering whether better procedures might have been set in place to compel quick action to protect the credibility of the commission. For instance, additional grounds for exclusion might have been added (such as summary dismissal of commissioners on the basis of material nondisclosure), making it easier for dismissal to occur expediently.

Instead, controversy over the suitability and credibility of the chair continued for the duration of the TJRC's operations and hampered commission processes. As the commission itself concluded, "the controversy diverted and distracted the attention and energy of the Commission from executing its core mandate."<sup>385</sup> The commission lost the services of Murungi, whose position was never refilled.<sup>386</sup> Civil society and development partners grew reticent to provide assistance, with some even going as far as to work against it.<sup>387</sup>

Some TJRC civic education and outreach activities had to be shortened or discontinued in the face of protests against Kiplagat.<sup>388</sup> Many victims, their families, and witnesses refused to participate or otherwise "to be associated with [the commission]" in any way.<sup>389</sup> The commission was able to organize activities, nonetheless, but its legitimacy and capacity to gain support was eroded.

### *Lack of Political Will*

In its final report, the TJRC discusses the level of political will offered in support of the commission by the government and found it lacking. It cited specific instances when the government failed to cooperate with the work of the commission and then sought to understand its causes,<sup>390</sup> attributing the government's lack of cooperation to a reassertion by vested interests of their prerogatives and political backsliding away from reform. It cited corruption, the accumulation of wealth, and the desire for power as leading motivations and found that the lack of political will by those in power came from the "absence of a clean break with the past."<sup>391</sup>

Equally troubling was a government declaration soon after the TJRC's formation that the commission, not the

ICC, would present "the most appropriate mechanism for securing justice for post-election crimes": a declaration that was "interpreted as a bid to buy time with the aim of defeating the cause of justice" rather than an affirmation of the role truth seeking can play in addressing impunity by publicly holding perpetrators to account during proceedings.<sup>392</sup>

Assessing the consequences of that noncooperation, the report concludes that the commission had been negatively impacted both in its "operations" and in the "public perception of its work."<sup>393</sup>

In general, the vagaries of political will and the dangers of political interference are a risk factor in the life of all truth commissions, as they ultimately proved to be during the TJRC's tenure. At the time of the TJRC's establishment, however, they were a well-articulated matter of concern.

Commissions of inquiry have been common features in Kenya.<sup>394</sup> However, more often than not, they have been "inherently political inquiries," both susceptible to bias and lack of impact.<sup>395</sup> The political vulnerability of truth commissions was discussed by the Task Force, when it recommended against using an act of parliament to implement its earlier proposals, presciently saying:

The Task Force rejected the legislative route because it is of the view that the Kenyan parliament has too many competing, vested, and self protective interest that would delay, scuttle, or give the country a truth commission that would be devoid of any meaningful powers. Many members of parliament and some political parties are either ambivalent or hostile to a truth commission. The recent debate in parliament regarding the resettlement of clash victims is instructive in this respect. Taking the matter to parliament is certain to kill it or produce an anemic truth commission.<sup>396</sup>

Parliament did not produce an anemic mandate, but it produced an intricate, unrealistic one, complicated by the country's legalistic traditions, which raised difficulties from the start. The extraordinary and paradoxical element in the Kenyan case is that the participants managed to create a deeply challenged exercise while ostensibly receiving and accepting the best possible practices and principles identified internationally.

Indeed, in the peace agreement itself, the parties agreed on five general principles that would guide the TJRC's work, taking into account international standards and best practices: independence, fair and balanced inquiry, appropriate powers, full cooperation by the government and other state offices, and financial support.

During the talks, the parties discussed many of the elements essential to a credible and effective truth-seeking process (including those like independent sources of financing that eventually almost overwhelmed the TJRC) but did not agree on how to engineer a commission so it would not fall prey to them. The recitation of standards did little to help. What more might have been done remains an open question.

## Conclusions

The interventions of the Panel of Eminent African Personalities and international advisors to the Kenyan National Dialogue process proved essential to negotiating peace in Kenya and establishing the TJRC. The national accord provided a binding foundation and moral vision that helped ensure that the parties would honor their commitment to establish the TJRC and, thus, fulfill a long-standing goal of many Kenyans.

However, the breadth of that vision and of the mandate promulgated by parliament to implement it, which had to be interpreted and implemented in the context of a deeply divided and highly legalistic political culture, complicated the TJRC's

a deeply controversial chairperson, public suggestions that the TJRC would be an alternative avenue to the ICC, and the lack of financial support. The commission itself concluded that all were symptomatic of a lack of political will.<sup>397</sup>

Yet, despite many obstacles and some shortcomings, the TJRC was able to produce and present a final report that significantly responds to key elements of its mandate in terms of findings and recommendations. The commission included in the report a detailed self-critical assessment of its tenure, providing an invaluable tool for understanding the challenges it faced and the practical responses to address them.

Three elements are remarkable and should be briefly noted to understand how the commission managed to comply with its obligations:<sup>398</sup> first, the need to interpret and operationalize its mandate; second, the need to identify and develop "core concepts" to guide the research of the commission; third, the use of a methodology<sup>399</sup> where phases and areas of activity overlapped, encouraging cooperation among teams and facilitating the resources that would be necessary for the compilation of the report. The report is

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*Ultimately, the deepest problems and challenges of the commission did not result entirely from flaws in the mandate. Despite pledges of change formalized in the peace accords, the political will and institutional support for truth seeking in Kenya proved profoundly conflicted.*

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operations. Along with violations of international human rights law and serious violations of international humanitarian law, the TJRC was tasked with investigating a set of economic crimes without sufficient definitional guidance or limits. Surely, the mandate's expansiveness responded to a democratic impulse, to act on the requests of a broad range of constituencies, but the balance between that ethos and practicality was lost.

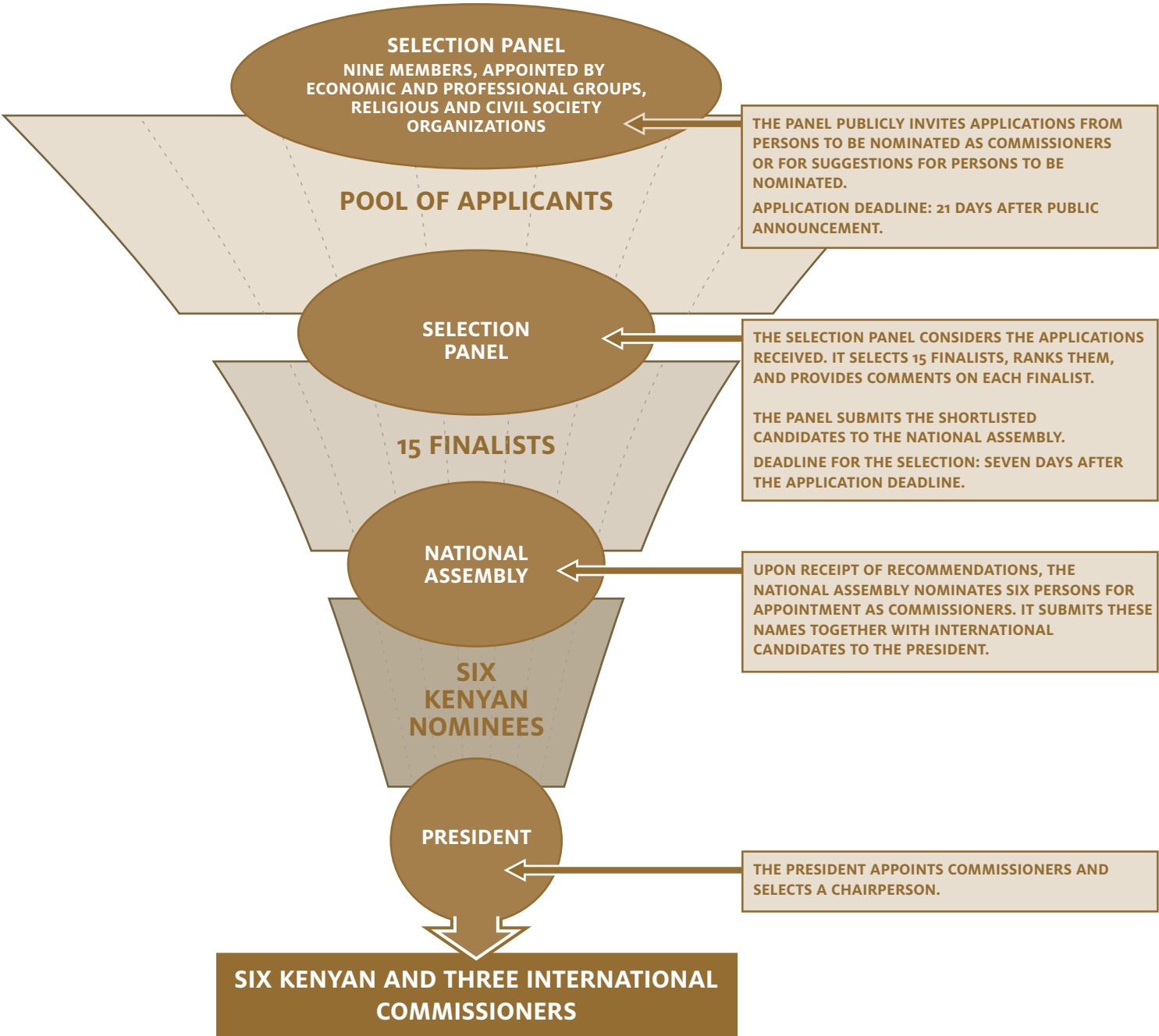
Ultimately, the deepest problems and challenges of the commission did not result entirely from flaws in the mandate. Despite pledges of change formalized in the peace accords, the political will and institutional support for truth-seeking in Kenya proved profoundly conflicted. Certainly, self-interest among political elites and the fear of prosecution played a role. Many of the individuals in power had some role in events under investigation by the TJRC. Indeed, in Kenya, there was no significant political group that was not potentially implicated somewhere within the commission's expansive 45-year mandate. Consequently, few individuals in power were truly disinterested and committed to an effective and independent truth commission.

As a result, the commission never received the support it needed and faced several serious related obstacles: the designation of

right to indicate that several of the final decisions of the commission were the result of approximations to the most effective methods, prioritization, and extensive use of time extensions (i.e., obtaining approximately 18 more months of tenure, which required amendments to the legal mandate of the commission).

The report has met with strong political resistance and legal challenges from sectors incensed by the TJRC's findings on economic crimes that implicate political leaders of the past, and recommendations regarding accountability and reparations. The Parliament of Kenya has debated the ultimate meaning of its obligation to "consider" the report and the institutions that should implement its recommendations. After a controversial debate, it amended the Truth Justice and Reconciliation Act, raising fears among activists that some members of parliament seek to alter the report. Nonetheless, the report may provide a platform on which human rights defenders can build. Kenyan civil society and the international community will have an important role to play in monitoring and seeing it through to implementation.

GRAPHIC 5: SELECTION PROCESS FOR KENYA’S TRUTH, JUSTICE AND RECONCILIATION COMMISSION



301. TJRC Kenya, Report of the Truth, Justice, and Reconciliation Commission [hereinafter TJRC Final Report], volume IV.

302. TJRC Final Report, volume I, chapter two, 40 (“The Commission also benefitted immensely from the experiences of other truth commissions and the writings of scholars and practitioners. Moreover, the Commission drew inspiration from United Nations’ work in transitional justice. In particular, the Commission used the following UN documents as -interpretative guides: Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies; 1 Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity; 2 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law; and 3 the Report of the Special Rapporteur on the Promotion and Truth, Justice, Reparation and Guarantees on Non-Recurrence.”).

303. See Republic of Kenya, Report of the Task Force on the Establishment of a Truth, Justice and Reconciliation Commission (August 26, 2003) [hereinafter Report of the TJRC Task Force].

304. For instance, the TJRC adopted special procedures to ensure that vulnerable groups, including women, children, and persons with disabilities, were represented in the proceedings or were given another opportunity to share their experiences. (Final Report, volume I, executive summary, viii.) Women and, where appropriate, victims, were engaged as statement takers. (Final Report, volume I, chapter 3, 83.) Consistent with its gender policy, the commission ensured that all of its appointments were made with regard to the principle of gender equality. (Final Report, volume one, chapter one, 33.) When designing its reconciliation policy, it looked at procedures used by Sierra Leone’s Truth and Reconciliation Commission. (Final Report, volume I, chapter 2, 46.)

305. See, e.g., [www.standardmedia.co.ke/?articleID=2000090220&story\\_title=uhuru-s-kin-sue-tjrc-over-report](http://www.standardmedia.co.ke/?articleID=2000090220&story_title=uhuru-s-kin-sue-tjrc-over-report); [http://ictj.org/news/ictj-kenya-high-court-uphold-victims-rights-truth-justice?utm\\_source=International+Center+for+Transitional+Justice+Newsletter&utm\\_campaign=aa14e33662-ICTJ\\_In\\_Focus\\_Issue\\_33\\_Oct\\_2013&utm\\_medium=email&utm\\_term=0\\_2d90950d4d-aa14e33662-245958769](http://ictj.org/news/ictj-kenya-high-court-uphold-victims-rights-truth-justice?utm_source=International+Center+for+Transitional+Justice+Newsletter&utm_campaign=aa14e33662-ICTJ_In_Focus_Issue_33_Oct_2013&utm_medium=email&utm_term=0_2d90950d4d-aa14e33662-245958769)

306. See, e.g., *Augustine Njeru Kathangu & Nine Others v. TJRC and Bethuel Kiplagat* (High Court Misc App No. 470 of 2009).

307. Kenya National Dialogue and Reconciliation: Statement of Principles on Long-Term Issues and Solutions, with Matrix of Implementation Agenda [Agenda Item 4], (May 23, 2008): Preamble.

308. Kenya National Dialogue, Annotated Agenda and Timetable (February 1, 2008).

309. Ibid.

310. In a public statement released on February 4, 2008, the parties mentioned a “Truth, Justice and Reconciliation Commission that includes local and international jurists should be established.”

311. Kenya National Dialogue, Agenda Item Three: How to Resolve the Political Crisis (February 14, 2008).

312. TJRC Final Report, volume IV, 6, ¶ 17.

313. Report of the TJRC Task Force (August 26, 2003).

314. Ibid., 11.

315. The Constitution of Kenya Review Commission (CKRC), as merged with the Ufungamano Initiative in December 2000, had taken steps to solicit the views of Kenyans on some of the very same questions. Mandated to explore the need for a new constitution, the CKRC’s Final Report, approved for issuance on February 10, 2005, included a proposal to establish a human rights body named the Commission on Human Rights and Administrative Justice that Kenyans said should:

act as a watchdog against the existing widespread violation of human rights; ensure protection, development and attainment of human rights; investigate allegations of human rights violations; carry out programmes to educate the public on their rights; handle the 1991–1997 land clashes; deal with past human rights abuses; deal with past political assassinations; investigate and redress historical injustice among the pastoralists in North-Eastern Province during colonial and past colonial era; promote dialogue and peaceful conflict resolution through mediation and arbitration; deal with losses and displacement of land; deal with poor political representation and exploitation; deal with social and economic injustices such as ethnicity, corruption and nepotism committed against Kenyans since colonial times; and deal with those who have looted public funds since 1963 and ensure that they make restriction.

316. The Final Report of the Constitution of Kenya Review Commission (February 10, 2005), 314.

317. National Accord and Reconciliation Act No. 4 of 2008 (date of assent and of commencement (March 20, 2008).

318. As the Agreement on the Principles of Partnership of the Coalition Government emphasized:

Preamble: The crisis triggered by the 2007 disputed presidential elections has brought to the surface deep-seated and long-standing divisions within Kenyan society. If left unaddressed, these divisions threaten the very existence of Kenya as a unified country . . . This agreement is designed to create an environment conducive to such a partnership and to build mutual trust



and confidence. It is not about creating positions that reward individuals. It seeks to enable Kenya's political leaders to look beyond partisan considerations with a view to promoting the greater interests of the nation as a whole. It provides the means to implement a coherent and far-reaching reform agenda, to address the fundamental root causes of recurrent conflict, and to create a better, more secure, more prosperous Kenya for all.

319. An Independent Review Committee on the 2007 General Elections (IREC) also was to be established.

320. Odinga and Kibaki did not sign personally but had others sign on behalf of the government and the Orange Democratic Movement (ODM).

321. Kenya National Dialogue, Independent Review Committee (March 4, 2008).

322. An Independent Review Committee on the 2007 General Elections (IREC) also was to be established.

323. Kenya National Dialogue and Reconciliation: Commission of Inquiry on Post-election Violence (March 4, 2008).

324. *Ibid.*, "Key Activities."

325. *Ibid.*

326. *Ibid.*, 1.

327. *Ibid.*

328. Kenyan National Dialogue and Reconciliation, sessions of the parties appointed by President Mwai Kibaki and the Honourable Raila Odinga, Eighteenth session, February 29, 2008 (at the Serena Hotel, Nairobi, Kenya), [www.innercitypress.com/kenya18.doc](http://www.innercitypress.com/kenya18.doc)

329. The legislative process in connection with the TJR Act was abbreviated. The Attorney General's Office prepared a draft TJRC bill and "consulted with respected lawyers representing prominent non-governmental organizations." Broader consultations however were not held, a point of contention among civil society. See Cable 08NAIROBI1170, Update on Commission of Inquiry into Post-Election Violence and Commission for Truth, Justice, and Reconciliation (May 7, 2008), [http://www.wikileaks.org/plusd/cables/08NAIROBI1170\\_a.html](http://www.wikileaks.org/plusd/cables/08NAIROBI1170_a.html); Ndung'u Wainaina, "The Truth, Justice And Reconciliation Commission: A flawed law" (January 29, 2009).

330. TJR Act, Section 5 (1) (a) – (b).

331. TJR Act, Section 5 (1) (g).

332. TJR Act, Section 5 (1) (j).

333. TJR Act, Section 5 (1) (h).

334. TJR Act, Section 5 (1) (i).

335. TJR Act, Section 38.

336. TJR Act, Section 5 (1) (e) and 6 (c).

337. TJR Act, Section 5 (1) (e) and 34 (2).

338. TJR Act, Section 5 (1) (d).

339. The TJRC mandate followed the 2003 Task Force recommendations that had pointed out that "economic crimes are so intertwined with human rights violations" that a commission's mandate would have to cover them. The Task Force concluded that "a truth commission should address a selected set of economic crimes that have a direct bearing on the enjoyment of economic, social and cultural rights." Report of the TJRC Task Force, 11.

340. See Mutual Report of the Task Force on the Establishment of a Truth, Justice and Reconciliation Commission (2003): Annexes 3 and 4.

341. In the Statement of Principles on Long-Term Issues and Solutions dated May 23, 2008, the parties had described the importance of land issues as follows:

We recognize that the issue of land has been a source of economic, social, political and environmental problems in Kenya for many years. We agree that land reform is a fundamental need in Kenya and that the issue must be addressed comprehensively and with the seriousness it deserves. Towards this end, we agree to fully support efforts to establish the factors responsible for conflicts over land and to formulate and implement actionable short, medium and long-term recommendations on the issue.

342. Kenya National Dialogue, Truth, Justice and Reconciliation Commission (March 4, 2008): General Parameters.

343. *Ibid.*

344. Allan Ngari, "Reconciling Kenya—Opportunities for Constructing a Peaceful and Socially Cohesive Nation," Policy Brief 1 (July 2012): 5, [www.folkebernadotteacademy.se/Page-Files/7708/IJR%20Policy%20Brief.pdf](http://www.folkebernadotteacademy.se/Page-Files/7708/IJR%20Policy%20Brief.pdf); Stephen Brown, *The National Accord, Impunity, and the Fragile Peace in Kenya*, in Chandra Lekha Sriram, Jemima García-Godos, Johanna Herman, Olga Martin-Ortega (eds.), *Transitional Justice and Peacebuilding on the Ground: Victims and Ex-Combatants* (London: Routledge, 2013): 242; Godfrey M. Musila, Options for Transitional Justice in Kenya: Autonomy and the Challenge of External Prescriptions, *The International Journal of Transitional Justice* 3 (2009): 453.

345. TJRC Final Report, Executive Summary, xv.

346. TJR Act, art 5.

347. TJRC Final Report, volume I, chapter 3, 97, ¶ 66.



348. See findings of gross violations of human rights by state security agencies in the north.

349. Like the TJRC, the Waki Commission had limited resources and time, and thus, its “findings may not have been exhaustive. In some places, witnesses hardly turned up: The result is that when the Commission went to certain places such as Kisumu, there were no witnesses, other than the officials of professional groups and the civil service who turned up to testify on matters relating to violence in the Province.” Konrad Adenauer Foundation, Kriegler and Waki Reports: Summarized Version (Revised Edition, 2009): 47–48, [www.kas.de/wf/doc/kas\\_16094-1522-2-30.pdf](http://www.kas.de/wf/doc/kas_16094-1522-2-30.pdf)

350. See, for example, TJRC Final Report, volume I, chapter one, 41: The commission states:

By requiring the Commission to establish a complete historical record of violations and abuses committed within a 45-year period, section 5(a) imposed on the Commission an ambitious and almost insurmountable task. Section 5(b) took a more permissive language as it required the Commission to establish ‘as complete a picture as possible’. In essence, section 5(b) implicitly recognized that establishing a complete picture of the causes, nature and extent of violations could not be practically achieved. On the whole, however, given the fact that the Commission was a temporary body with limited resources, the contents of this Report are not exhaustive in terms of establishing a complete record of gross violations of human rights or painting a complete picture of the causes, nature and extent of these violations.

351. TJRC Final Report, volume I, chapter 2, 63.

352. *Ibid.*, 64.

353. *Ibid.*, 65.

354. TJRC Final Report, volume I, chapter 1, 36, ¶102.

355. TJR Act, Section 20(1).

356. See Report of the TJRC Task Force, 30.

357. *Ibid.*, 33.

358. Kenyan National Dialogue and Reconciliation, Sessions of the parties appointed by President Mwai Kibaki and the Honourable Raila Odinga, Eighteenth session, February 29, 2008 (at the Serena Hotel, Nairobi, Kenya), [www.innercitypress.com/kenya18.doc](http://www.innercitypress.com/kenya18.doc)

359. Interestingly, the TJRC faced at least one lawsuit contending that its mandate should have been broader; see *Augustine Njeru Kathangu & Nine Others v. TJRC and Bethuel Kiplagat*, 40 High Court (Nairobi) Misc App. 470 of 2009, discussed TJRC Final Report, volume I, chapter. 2, 60, ¶ 72.

360. TJRC Final Report, volume I, chapter 4, 123–54.

361. *Ibid.*, 144.

362. TJR Act, Sections 43 and 44.

363. Initially a total of 650 million Kenyan shillings were to be provided against a proposed budget of 1.2 billion. See TJRC Kenya, Report of the Truth, Justice, and Reconciliation Commission, volume I, chapter 1, 30, 144–48.

364. TJRC Final Report, volume I, 146.

365. Kenyan National Dialogue, Truth, Justice and Reconciliation Commission (March 4, 2008).

366. See Final Report, volume I, chapter 4, 124–43; The Commission on Administrative Justice Advisory Opinion on the Truth, Justice and Reconciliation Commission, Final Report, volume I, appendix 9; International Center for Policy and Conflict, Monitoring Report of the Truth Justice and Reconciliation Commission (April 2008–June 2010): A Case of Concealing Truth to Reward Impunity, [www.icpcafrica.org/index.php/component/content/article/43-resource-center/220-monitoring-report-of-the-truth-justice-and-reconciliation-commission.html](http://www.icpcafrica.org/index.php/component/content/article/43-resource-center/220-monitoring-report-of-the-truth-justice-and-reconciliation-commission.html)

367. TJR Act, Section 10(1)(a).

368. Section 10 (1), Truth, Justice and Reconciliation Act, 2008 mentions the following organizations: two members to be jointly appointed by several religious organizations: the Kenya Episcopal Conference; the National Council of Churches of Kenya; the Evangelical Alliance of Kenya; the Hindu Council of Kenya; the Seventh Day Adventist Church; and the Supreme Council of Kenya Muslims. One member each was to be appointed by: the Law Society of Kenya; the Federation of Kenya Women Lawyers; jointly by the Central Organization of Trade Unions and the Kenya National Union of Teachers; the Association of Professional Societies of East Africa; the Kenya National Commission on Human Rights; jointly by the Kenya Private Sector Alliance and the Federation of Kenya Employers; and one person by the Kenya Medical Association. A similar nomination process has been used previously in the selection of members in Kenya’s constitutional revision process. See, e.g., Constitution of Kenya Review Act, 1997, Kenya Gazette Supplement No. 73 (Acts No. 7), section 3 (December 30, 1998).

369. First Schedule to TJR Act (Procedure for Appointing Commissioners), Section 1.

370. First Schedule to TJR Act., Section 3, First Schedule.

371. First Schedule to TJR Act, Section 5.

72. TJRC, Progress Report to the National Assembly, submitted pursuant to section 20(3) of the Truth, Justice and Reconciliation Act No.6 of 2008, June 24, 2008, [www.tjrkenya.org/images/documents/progress-report.pdf](http://www.tjrkenya.org/images/documents/progress-report.pdf), at 38.

373. TJRC Final Report, volume I, 141.

374. Agreement on General Parameters and Guiding Principles of the TJRC (March 4, 2008): “The members shall be persons

of high moral integrity, well regarded by the Kenyan population, and shall include a range of skills, backgrounds, and professional expertise. As a whole, the Commission shall be perceived as impartial in its collectivity, and no member should be seen to represent a specific political group. At least two but no more than five of the seven commissioners should be lawyers.”

375. TJR Act, Section 10 (6).

376. TJR Act, Section 10 (5) (a).

377. TJR Act, Section 10 (5) (b).

378. International Center for Policy and Conflict, Monitoring Report of the Truth Justice and Reconciliation Commission (2010), 6.

379. The Kenya Transitional Justice Network (KTJN), Position on Truth Justice and Reconciliation Commission, September 18, 2009, [www.icpcafrica.org/pdf/Position%20on%20the%20TJRC.pdf](http://www.icpcafrica.org/pdf/Position%20on%20the%20TJRC.pdf)

380. *Capital News*, “Tutu wants Kenyan TJRC chair to quit,” February 25, 2010, [www.capitalfm.co.ke/news/2010/02/tutu-wants-kenyan-tjrc-chair-to-quit/](http://www.capitalfm.co.ke/news/2010/02/tutu-wants-kenyan-tjrc-chair-to-quit/)

381. *Daily Nation*, “Truth team boss resigns in protest,” March 29, 2010.

382. TJRC, Progress Report to the National Assembly, submitted pursuant to section 20(3) of the Truth, Justice and Reconciliation Act No.6 of 2008, June 24, 2008, [www.tjrkenya.org/images/documents/progress-report.pdf](http://www.tjrkenya.org/images/documents/progress-report.pdf), at 38.

383. TJRC Final Report, volume I, chapter 4, 131.

384. Lordick Mayabi, “Kiplagat, TJRC foes call a truce,” *Capital News*, April 11, 2012.

385. TJRC Final Report, volume I, chapter four, 141.

386. *Ibid.*, 142.

387. TJRC Final Report, volume I, chapter three, 81.

388. *Ibid.*, 81.

389. TJRC Final Report, volume I, chapter four, 142.

390. It mentioned inter alia: 1) the president failed to fill the position vacated when Commissioner Murungi resigned; 2) few political leaders spoke publicly in support of national unity and reconciliation; and 3) the commission was unable to secure an appointment with the president. See TJRC Final Report, volume I, chapter 4, 151.

391. TJRC Final Report, volume I, chapter four, 152–53.

392. Dr. Migai Akech, Institutional Reform in the New Constitution of Kenya (October 2010): 19.

393. TJRC Final Report, volume I, chapter four, 154.

394. Some commissions of inquiry have been quite effective, others less so. See Africa Centre for Open Governance, *Postponing the Truth: How Commissions of Inquiry Are Used to Circumvent Justice in Kenya* (2008).

395. Justice S.E.O. Bosire, J.A., “Report of the Judicial Commission into the Goldenberg Affair,” ¶ 37 (October 2005); see Africa Centre for Open Governance, *Postponing the Truth: How Commissions of Inquiry Are Used to Circumvent Justice in Kenya* (2008).

396. Report of the TJRC Task Force, 27.

397. TJRC Final Report, volume I, 151.

398. TJRC Final Report, chapter 2.

399. TJRC Final Report, chapter 3.

400. TJR Act (Amended), December 24, 2013.

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# Nepal: Case Study

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By Elena Naughton

## Introduction

Nearly seven years ago, Nepal's political leadership agreed during national peace talks to establish two commissions dedicated to learning the truth about crimes committed during the country's 10-year war: a Truth and Reconciliation Commission (TRC) and a Commission for the Investigation of Disappearances (COID).<sup>401</sup>

Attempts to enact the necessary legislation to establish these commissions failed repeatedly. The different proposed bills and ordinances to set up both institutions were flawed, envisioning partially overlapping bodies, riddled with confusing procedures that did not guarantee the rights of victims.<sup>402</sup> Issues of criminal accountability and potential amnesties for serious human rights violations have been persistent sticking points, as has been a lack of adequate measures to ensure independence or procedural safeguards to ensure the legitimacy of the truth-seeking processes.<sup>403</sup>

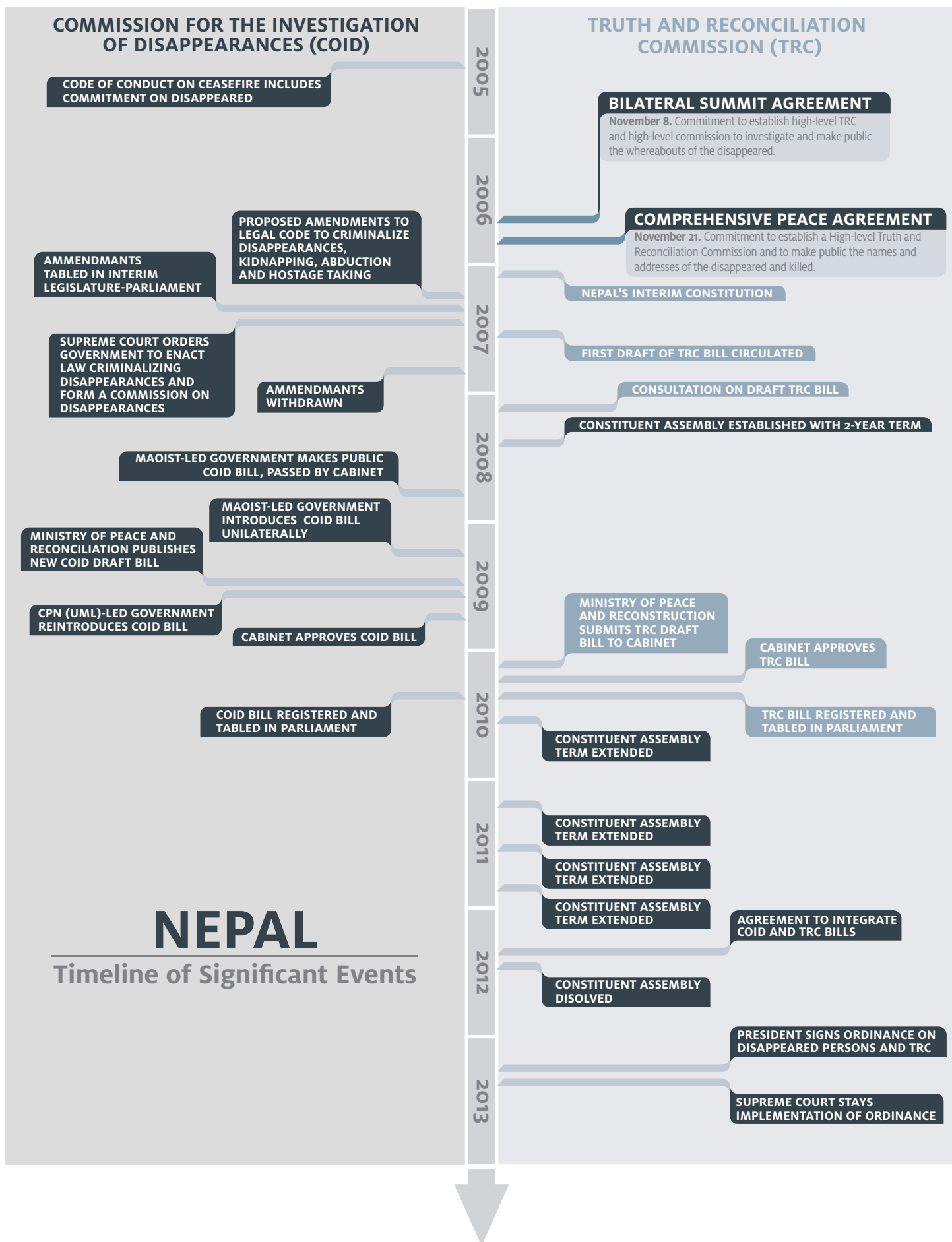
This paper examines how Nepal's commitments to truth seeking came to be included in the peace agreement that ended the conflict in Nepal—the Comprehensive Peace Accord (the CPA)—and how subsequent efforts have ended in impasse.

It looks back briefly at Nepal's peace process to understand what the parties pledged to accomplish there and where truth seeking fit within the broader peace agenda. It considers the sense of ownership manifested by key constituencies to establish truth seeking that is consistent with international standards while considering areas of resistance to those efforts and standards. It focuses on three components of Nepal's experience:

- **Mandate for Truth Seeking:** It looks at the language used by the parties to signify their commitment to truth seeking, first in the bilateral agreement signed at a summit meeting in early November 2006 and then in the CPA signed two weeks later.
- **Legislative Impasse:** It summarizes the many attempts to promulgate a statutory mandate for truth seeking between 2007 and 2013: some focused on disappearances, some to establish a TRC covering the wider range of violations of human rights and humanitarian law and another seeking to merge the TRC and COID into a single entity.
- **Institutional Mechanisms:** Finally it looks at the principal institutional mechanism designated to carry forward that transition in the CPA—the Constituent Assembly.

## An Ambitious Peace Agenda

On November 21, 2006, a peace agreement was signed between Nepal's government and the Communist Party of Nepal (Maoist) to bring an end to an armed conflict that had raged for over a decade.<sup>404</sup> Since the rise of the Mao-



ists in the early 1990s, the party had called for constitutional, social, economic, and political changes intended to make Nepal's stratified society more inclusive, especially for marginalized populations, including the rural poor. In particular, Maoists aimed to end the monarchic system of government.

The Maoists were not the only party vying for power or proposing sweeping reforms: a constellation of mainstream political parties, some with broad popular support, also stood in opposition to the monarchy, and the king's hand-picked governments, but rejected the insurgency tactics of the Maoists, demanding elections and multiparty rule.

The peace negotiations took place amid ongoing violence, against a backdrop of suffering and destruction. Almost every region of Nepal had been affected by the war. Conflict-related killings were reported in all but two of Nepal's 75 administrative districts.<sup>405</sup> More than 13,000 people, including combatants and civilians, were killed from 1996 to 2006, and approximately 1,300 were missing.<sup>406</sup> Atrocities included not only unlawful killings, but enforced disappearance, torture, arbitrary arrest, and sexual violence. The internally displaced were estimated to number between 100,000–200,000, and tens of thousands had fled across the border as refugees.<sup>407</sup>

To address the fundamental issues at the root of the conflict and to build a durable peace, the parties to the peace talks sought to combine stabilization and power-sharing mechanisms with reforms that would address the deep-seated inequities beleaguering Nepal society in a new, as-yet-unwritten constitutional framework and democratic system.

With so much to accomplish, the CPA was ambitious in its approach. In the preamble, the parties expressed their determination “to carry out a progressive restructuring of the state to resolve existing class-based, ethnic, regional and gender problems.” The agreement declared the “beginning of a new chapter of peaceful collaboration” that would include “the democratic restructuring of the state and social-economic-cultural transformation.”<sup>408</sup> The Nepali army was to be democratized as well and the Maoist combatants were to be reintegrated to society and once registered possibly absorbed into the Nepali security forces.<sup>409</sup>

The CPA promised not only to reconfigure the body politic, but also pledged compliance with “universally accepted principles of fundamental human rights”<sup>410</sup> across the spectrum—“civil, political, economic, social and cultural.”<sup>411</sup> The state was to be restructured in “an inclusive, democratic and progressive” manner.<sup>412</sup> Fundamental human rights were explicitly listed, including the right to life, individual dignity, freedom to locate one's residence, freedom of expression and information, and the right to health and education.<sup>413</sup> Land reform also was to be undertaken by ending “feudal

land ownership” and by adopting policies for providing land to landless squatters, bonded laborers and pastoral farmers,” among others.<sup>14</sup> Land and property seized by the Maoists during the conflict was to be returned.

The devastating legacy of the war and the past received less attention in the body of the agreement.<sup>415</sup> Importantly, the parties, however, did commit to establish a TRC and promised to make information public about the location or fate of the disappeared.<sup>416</sup>

### *An Ambiguous Agreement on Truth*

The CPA and the commitment to truth seeking were the culmination of a fitful process of negotiation. In 2001 and again in 2003, peace talks had foundered, with the political parties, the Maoists, and the palace maneuvering for strategic advantage in a three-sided battle. Except for a string of short-lived ceasefire agreements, no formal commitments were made between or among the parties until the Maoists and mainstream parties finally formed an alliance and signed a series of bilateral agreements in response to King Gyanendra's coup on February 1, 2005. These bilateral agreements were the first to mention truth seeking in Nepal, focusing on detainees and the fate of the disappeared.<sup>417</sup>

Used as a counterinsurgency tool by the security forces, enforced disappearances were commonplace during the conflict.<sup>418</sup> Also, many victims of forced recruitment by the Maoists went missing. In 2003 and 2004, Nepal topped the list of countries in numbers of new reported cases of enforced disappearances.<sup>419</sup> Early on in the conflict, the families of the missing and detained pushed the issue onto the political agenda, including through the use of hunger strikes, and kept it there by filing reports with the police and habeas corpus actions with the courts.<sup>420</sup>

In response, the government established a number of commissions of inquiry on disappearances, although the results were generally disappointing.<sup>421</sup> For instance, an Investigation Commission on Disappearances created under the Home Ministry and chaired by the Joint Secretary for Home Affairs, Narayan Gopal Malego, investigated only 36 cases of disappearance and clarified the whereabouts of only 24.<sup>422</sup> Similarly, in April 2006, another committee—the Neupane Committee—inquired into the status of 776 disappeared persons, but only traced the status of 174.<sup>423</sup> In each of these instances, although a few cases were resolved, others met with denials and dismissals for lack of evidence, and many disappearances “became permanent.”<sup>424</sup>

During the bilateral talks, issues relating to abducted and disappeared persons were part of the negotiations. That led in late May 2006 to a preliminary promise on the part of



the Maoists and the government in a code of conduct for a ceasefire to “release the detainees gradually” and “disclose the whereabouts” of the disappeared.<sup>425</sup> Increasing the pressure to resolve these issues, that same month, the Office of the United Nations High Commissioner for Human Rights (OHCHR) issued a report on arbitrary detention, torture and disappearances by the Royal Nepali Army (RNA) during the period 2003–2004, making specific findings.<sup>426</sup>

In August 2006, the Supreme Court constituted a Detainee Investigation Team (DIT) led by a judge of the appellate court to inquire into cases of enforced disappearance. It recommended the creation of a commission on enforced disappearances and the formulation of a law to outlaw enforced disappearance in the future.<sup>427</sup>

Up to November 2006, when the CPA was about to be signed, the disappeared had been the main point of discussion for any truth-seeking instrument, it was an issue that was perceived as critical and that mobilized advocates and relatives throughout the country.<sup>428</sup> For the Maoists, enforced

ists did not easily accept the suggestion to form a TRC, maintaining that the names of the disappeared should first be published.<sup>430</sup>

The idea of truth commissions as part of a peace process had gained acceptance by 2006, to the point that for experts and international institutions, it had become somehow normalized or imperative. This phenomenon was likely reflected in the inclusion of a truth commission in the Nepalese peace process without active mobilization by stakeholders.<sup>431</sup> Perhaps more significantly, the idea of a truth commission was considered attractive to those seeking to evade criminal accountability for abuses, under the perception that the South African Truth and Reconciliation Commission had represented a truth-for-justice tradeoff. The idea of a “South Africa-style” commission, capable of offering amnesties for serious violations of human rights, contributed to confusion and mistrust among victims, without creating a constituency around the process.<sup>432</sup> On the contrary, that approach generated resistance among some and added complexity and delays to the legislation-passing process.

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*The disappeared had been the main point of discussion for any truth-seeking instrument, it was an issue that was perceived as critical and that mobilized advocates and relatives throughout the country. For the Maoists, enforced disappearances were a primary concern because persons accused of sympathizing with them represented a majority of those who had been disappeared.*

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disappearances were a primary concern because persons accused of sympathizing with them represented a majority of those who had been disappeared.<sup>429</sup>

It was in this context that the idea of a truth commission emerged, although it had a less-well-defined national constituency and many opponents among the armed actors. Warisha Farasat and Priscilla Hayner describe the evolution in thinking on Nepal’s truth commission:

The genesis of the Truth and Reconciliation Commission is less clear. Some fairly close observers were surprised to see the provisions for a truth commission in the CPA, not having heard of extensive discussion on the subject. Moreover, a senior advisor to the peace secretariat noted that there was no mention of a TRC in the first four drafts of the CPA. However, national members and international advisors to the peace secretariat recalled that forming a TRC had been informally discussed by both the peace secretariat and its task force. This discussion was initially fuelled by the interest of the [National Congress party] members of the government in forming a long-term mechanism to address past violations—which they assumed had been largely committed by the Maoists. In the beginning, the Mao-

In the end, the bilateral agreement signed by the Seven-Party Alliance and the Communist Party of Nepal (Maoist) after the summit meeting on November 8, 2006, was the first to mention both a high-level commission to investigate disappearances<sup>433</sup> and a TRC.<sup>434</sup> Known as the Decisions of the Summit Meeting of the Seven-Party Alliance and the Communist Party of Nepal (Maoist) (the summit agreement), it provided that:

I.2. A high-level commission shall be constituted to investigate and make public the whereabouts of citizens reported to have been disappeared by the State and the Maoists in the past.

...

IV.4. A high-level Truth and Reconciliation Commission shall be constituted on the basis of consensus for establishing the facts on those involved in gross violation of human rights and those who committed crimes against humanity in the course of the armed conflict and for creating an environment of reconciliation in society.

The CPA, which was signed two weeks later, contained the first written commitment to truth seeking agreed to by the government of Nepal. In its preamble, it referenced and reaf-

firmed the “full commitments” made by the parties in earlier bilateral agreements, including those contained in the summit agreement, which was attached as an addendum to the CPA and was to “constitute an integral part of [the] accord.”<sup>435</sup>

Commitments to establish a high-level TRC and to resolve questions surrounding the disappeared are set out in the CPA under the heading “Situation Normalization Measures” in the “Ceasefire” section:

5.2.3 Both sides agree to make public within 60 days of the signing of the agreement information about the real name, caste and address of the people ‘disappeared’ or killed during war and inform the family about it.

5.2.5 Both sides agree to set up a High-level Truth and Reconciliation Commission through mutual agreement in order to investigate truth about people seriously violating human rights and involved in crimes against humanity, and to create an environment of reconciliation in the society.

The provisions of both the summit agreement and the CPA relating to truth seeking are minimal. Unlike other aspects of the peace settlement, such as the provisions on disarmament, which are rendered in detail, all of the procedural and substantive details regarding truth seeking were left to be decided by future policymakers. No vision for truth seeking is offered by the parties, and no concrete objectives are set. There is no mention whatsoever of the truth as a right or a state obligation regarding victims of human rights violations.

In fact, the CPA was less specific than the summit agreement regarding enforced disappearances. Would the release of “information” relate only to cases of enforced disappearance during the 10-year period of Maoist insurgency? Would earlier cases be investigated by the TRC?

The language relating to the TRC in both agreements is similarly nonspecific. No sense is given of the scope of the inquiry or the period of time to be investigated. The agreements mention the “armed conflict” and “war,” but do not define what that means with any real specificity. Gross violations of human rights and crimes against humanity are mentioned, but no specific violations are identified. No parameters are offered for how the TRC should or would operate. Early agreements reveal an evolution from generalized expressions about “past mistakes and weaknesses” and a commitment to “investigate the incidents” to more detailed commitments to investigate “grave human rights violations” and implement mechanisms for truth seeking and redress.<sup>436</sup> However, the CPA does not contain specific mechanisms to address impunity and assign responsibility for the serious human rights violations that had occurred in Nepal.

The CPA instead allows for the withdrawal of “accusations, claims, complaints and cases under-consideration leveled against various individuals due to political reasons and immediately make public the state of those imprisoned and immediately release them.”<sup>437</sup> This language has been used to support the withdrawal of charges of “numerous political party cadres,” including for crimes of a non-political nature, like murder.<sup>438</sup>

Other parts of the CPA reiterate the need for investigation, but do not provide much detail:

7.1.3 Both sides express the commitment that impartial investigation and action would be carried according to law against people responsible for creating obstructions to the exercise of the rights envisaged in the letter of agreement and ensure that impunity will not be tolerated. Apart from this, they also ensure the right of the victims of conflict and torture and the family of disappeared to obtain relief.

7.3.2 Both sides, fully respecting the individual’s right to freedom and security, will not keep anyone under arbitrary or illegal detention, commit kidnapping or hold captive. Both sides agree to make public the status of every individual “disappeared” and held captive and inform about this to their family members, legal advisors and other authorized people.

Later high-level statements that followed the CPA are no more specific. Although they too express a commitment to truth seeking, they carry forward the CPA’s ambiguities. The Interim Constitution of Nepal 2063 (2007) obligated the government to set in place a number of transitional justice mechanisms, including the “high-level Truth and Reconciliation Commission” and a relief program for the families of victims of enforced disappearance.<sup>439</sup> The Interim Constitution, however, did little to resolve the abiding questions left unanswered in the CPA:

33. Responsibilities of the State: The State shall have the following responsibilities:

(p) To make arrangements for appropriate relief, recognition and rehabilitation for the family of the deceased persons, the disabled and helpless persons due to injury during the course of armed conflict.

(q) To provide relief to the families of the victims on the basis of the report of the Investigation Commission constituted to investigate the cases of disappearances made during the course of the conflict.

(s) To constitute a high-level Truth and Reconciliation Commission to investigate the facts regarding grave violations of human rights and crimes against humanity committed during the course of conflict, and create an atmosphere of reconciliation in the society.

A brief review of the legislative attempts to create the COID and the TRC since the CPA shows a pattern of stalling among Nepal's political leadership. The primary sticking points are questions on amnesties, criminal accountability, and reconciliation and how they would be balanced and operationalized within the framework of a truth-seeking institution or institutions.

### *Legislative Impasse*

Attempts to pass implementing legislation have been marked by failure for much of the last seven years. During that time truth-seeking initiatives followed two paths: one for the COID and one for the TRC.

The first initiatives presented in the interim legislature involved the disappeared and built on existing momentum and advocacy around that issue. However, rather than seeking to clarify the fate of the disappeared, as required by the CPA, these legislative proposals were prospective, designed principally to amend the national legal code by adding provisions to criminalize enforced disappearance. As a result, they were judged "severely deficient by human rights organizations and victims groups."<sup>440</sup> In June 2007, a decision of the Supreme Court of Nepal ordered the government to enact a special law to criminalize enforced disappearance, to form a commission to determine the whereabouts of disappeared persons, and provide interim relief to victims' families,<sup>441</sup> but it was not implemented.

Around the same time, in mid-2007, the Ministry of Peace and Reconciliation (MoPR) circulated a first draft of a Truth and Reconciliation Commission (TRC) Bill, 2064 (2007). Under that draft legislation, the TRC was to examine human rights violations that had occurred between February 13, 1996, and November 21, 2006.<sup>442</sup> The commission was to have the power to recommend amnesties if the perpetrator submitted an amnesty application showing regret for "the

guage on amnesties in the first draft, and future variations, was influenced by the text of the legislation that established the South African Truth and Reconciliation Commission,<sup>445</sup> but in a simplified manner, omitting the onerous requirements set by the South African law for the consideration of an amnesty petition. In particular, the South African law is meticulous in the definition of what a "political objective" may be and what conditions could become grounds for an amnesty; but those definitions were left out of the Nepalese version.

In November 2008, a Maoist-led government made public a bill on Enforced Disappearances (Crime and Punishment), 2065 (2008) and then issued it unilaterally as an ordinance in 2009 while parliament was in recess. Nonetheless that ordinance expired before implementation, due to a lapse of time. Various additional drafts of separate bills on a COID and a TRC followed, but none became law. (See Nepal: Timeline of Significant Events, in this chapter.)

More recently in August 2012, the president promulgated an ordinance establishing a "Commission on the Investigation of Disappeared, Truth and Reconciliation," which was to merge the functions of both the TRC and the COID.<sup>446</sup> That combined approach suffered from the "the same critical problems from the original bills and in some aspects, like the amnesty provisions, worsened them."<sup>447</sup> Civil society advocates resisted the move and litigated before the Supreme Court against its implementation, citing constitutional grounds.<sup>448</sup> Despite seven years and numerous attempts to establish a truth-seeking mechanism for Nepal's many victims, no official mechanism has yet been implemented.<sup>449</sup> The truth-seeking legislation advanced by the political parties has consistently contained significant flaws and run afoul of international standards and obligations, in particular over the terms, legality, and appropriateness of amnesties.<sup>450</sup> Op-

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*It is apparent that the language on amnesties in the first draft, and future variations, was influenced by the text of the legislation that established the South African Truth and Reconciliation Commission, but in a simplified manner, omitting the onerous requirements set by the South African law for the consideration of an amnesty petition.*

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misdeeds carried out" during the armed conflict.<sup>443</sup> Although amnesty could not be recommended for murder, inhumane treatment, torture, or rape, a person who was "found to have committed gross violation of human rights or crime against humanity" could receive an amnesty recommendation if those crimes were committed "in course of abiding by his/her duties or with the objective of fulfilling political motives." Although the amnesty provision had these caveats, the fact of its inclusion created enormous mistrust and resistance among civil society and victims' groups.<sup>444</sup> It is apparent that the lan-

guage on amnesties in the first draft, and future variations, was influenced by the text of the legislation that established the South African Truth and Reconciliation Commission, but in a simplified manner, omitting the onerous requirements set by the South African law for the consideration of an amnesty petition.

position to these provisions by civil society, victims' groups, and the international community were important factors in blocking approval of any of the proposed measures during this period.

As then Special Representative of the Secretary-General in Nepal Ian Martin noted in his comments to the Security Council in 2009: "One need for change to which no political party and neither army is yet truly committed is the need for an end to impunity."<sup>451</sup> Throughout the process, political par-

ties have envisaged a truth commission primarily as a vehicle for avoiding potential criminal liability for serious violations of human rights, rather than as a means to address the past in a manner consistent with the internationally recognized right of victims and society to know the truth.

Finally, although mechanisms for ensuring implementation of the peace agreement were envisaged in the CPA, they were not rendered adequately enough to overcome the enormous political obstacles standing in the way of implementing truth seeking in Nepal.

### **Weak Institutional Structures**

According to the CPA, a National Peace and Rehabilitation Commission was to “create mechanisms as necessary to make the peace campaign successful.”<sup>452</sup> The interim Council of Ministers was to “constitute and determine the working procedures” for the TRC.<sup>453</sup> But neither of these bodies was empowered to actually create the TRC in the absence of a statutory mandate. A general assumption appeared to be that legislation by parliament would be needed.

To pass legislation, the parties first needed to adopt an interim constitution, conduct elections,<sup>454</sup> and install a Constituent Assembly.<sup>455</sup> Once installed, the Constituent Assembly would draft a new constitution and act as the nation’s interim legislature-parliament. Only then could policymaking begin on key aspects of the transitional agenda, including truth seeking. That new policy would need to be conceptualized, promulgated, and eventually implemented within Nepal’s highly fragmented political structure and in the context of waning political cooperation.

Nepal conducted Constituent Assembly elections on two occasions since the signing of the peace agreement: the first election was held on April 10, 2008, after several delays; the next on November 19, 2013, to install a second assembly.<sup>456</sup>

The first Constituent Assembly worked for four years and received four extensions of its mandate, only to be dissolved by order of the Supreme Court on May 27, 2012, after failing to agree on a permanent constitution.<sup>457</sup> The writing of a new constitution had floundered amid debates over federalism and proposals for the creation of new states based on ethnicity.<sup>458</sup> As described by the International Crisis Group, the assembly “ended because leaders of all parties, new and old alike, made secretive, top-down decisions. They were dismissive of their own members and never explained the issues at stake to the public, relying instead on fear-mongering and extreme rhetoric.”<sup>459</sup>

Since the 2008 elections, the leadership of Nepal’s government changed multiple times, and the country experienced

sustained periods of political polarization and serious violent clashes.<sup>460</sup> At times, certain party blocks within the Constituent Assembly impeded all work, sometimes for months at a time.<sup>461</sup> Corruption, cronyism, and ethnic and regional politics contributed to delays as well. Party leaders, some of whom were not elected, frequently circumvented the Constituent Assembly entirely. Additionally, significant veto players outside the executive and legislative branches, like the Nepalese Army, at times blocked effective functioning of democratic processes.

In this fluid context, the legislation necessary to establish an official truth seeking mechanism, either as a truth commission or as a commission on the disappeared, received minimal attention or—when it was in the sights of policymakers—included language detrimental to the rights of victims, which was then consistently opposed by civil society and victims’ groups. Consultations organized between September and mid-November 2011 with the assistance of OHCHR attempted to build consensus on a TRC bill that would be compliant with international law and standards, but they had little impact. Although such consultations led to concrete alternative proposals, the bills emerging from the Constituent Assembly generally included measures that would allow a future commission to recommend amnesties for perpetrators of serious human rights violations. The process would stall again in the face of public opposition.<sup>462</sup>

### **Conclusions**

The CPA, which brought an end to the conflict in Nepal, committed the parties to a range of short-, medium-, and long-term measures for managing the cessation of hostilities and the transition to peace and democratic rule. It included commitments to truth seeking, but was devoid of any substantive, procedural, or organizational guidelines. Despite considerable assistance from the United Nations, Nepalese civil society, and other international actors to help formulate implementing legislation consistent with international obligations and standards, neither a TRC nor COID has as yet been installed.

Such a failure is unfortunate and paradoxical, considering that during the conflict, victims mobilized around enforced disappearances, and the issue received attention from the parties. The inclusion of brief language on a truth commission as part of the CPA, next to the well-established need to determine the fate of the disappeared, appears artificial in that it does not respond to concrete demands by clearly identifiable national constituencies. Indeed, it could be said that the ambiguity on truth seeking written into the CPA diluted gains in earlier agreements, betrayed the waning interest of the parties, and gave little guidance to future policy makers.

The subsequent decision, based on a Supreme Court ruling, to seek the creation of two separate institutions (a truth com-



mission and a commission on the disappeared), with many potential overlaps, generated additional complications, but these were technical issues and could have been resolved. However, in the context of powerful stakeholders, who are generally more interested in avoiding accountability than truth seeking, the difficulties became a pretext for inaction and equivocation. In this context, the insistence on passing legislation for both bodies, though legitimate, played into the hands of those interested in avoiding action.

The case of Nepal, indeed, presents a troubling situation in which a truth commission, originally without organic support from society, was included in a peace process mainly to satisfy the interests of powerful stakeholders interested in finding an alternative to criminal prosecutions, thus, opening an onerous and prolonged debate on the incompatibility between the international obligations of Nepal and amnesties for serious human rights violations.

For the “natural” constituencies of truth seeking, such as victims and civil society groups, the situation presented a tactical complication: there was urgency and basic support for the search for the disappeared, but the insistence on passing both the TRC and the COID at the same time meant that action on the disappeared was delayed due to difficulties around the TRC. Also, the misperception that international standards required that these bodies should only be created by parliamentary action confined the debate to the difficult space of the Constituent Assembly.

The factor of weak guidance from the peace agreement is significant when looking for explanations for the lack of progress on establishing the TRC and the COID, but perhaps mostly as an indicator of lack of interest. Other peace agreements—like Guatemala’s—have been scant on detail about truth seeking, but dispensed with the complexities of legislation, taking advantage of a fortunate alignment of basic political will, international interest, and victim mobilization around very concrete demands.

In Nepal, even the presence of a positive factor, like strong decisions by the Supreme Court regarding state obligations on the disappeared, was neutralized. Civil society advocacy, international interest, and correct judicial decisions were ineffective in a Constituent Assembly that would not produce legislation contrary to the interests of political and military elites, which have been consistent in their interest in TRC legislation that contained the possibility to recommend amnesties for serious human rights violations.

This is not to say that the struggle for truth in Nepal is lost. The contrary is true, as civil society and victims continue their work, strengthened by new judicial developments,<sup>63</sup> domestic and international. New avenues of advocacy and implementation may bear fruit in the future.

401. At the time of the Symposium, the TRC and the COID had not been established. In January 2014, the Supreme Court voided a presidential Ordinance establishing a merged institution and ordered the creation of two bodies. The Supreme Court ordered specifically to ensure that the TRC would not have the power to recommend amnesties for serious violations of human rights, as they would contradict Nepal’s international obligations. In April 2014, the government of Nepal revised the Ordinance and proposed a bill to Parliament, which was rapidly passed and enacted into law in May 2014. The Act establishes a separate TRC and COID, but it still retains language authorizing the recommendation of amnesties for serious violations of human rights, which casts doubt on whether the act will be the object of renewed legal challenges.

402. For a detailed criticism of the legislative proposals, see Eduardo González, ICTJ, *Seeking Options for the Right to the Truth in Nepal*, 2012.

403. Recently, for instance, the president promulgated an ordinance that was to combine the functions of both the TRC and the COID into one entity. See section 5, “Legislative Impasse” herein. For additional background, see González, *Seeking Options for the Right to Truth in Nepal*.

404. Comprehensive Peace Accord (CPA) signed between the Nepal Government and the Communist Party of Nepal (Maoist), November 22, 2006.

405. Based on findings by OHCHR, human rights violations were “widespread” with conflict-related killings “recorded in all but two of Nepal’s 75 districts, Manang and Mustang.” See Office of the United Nations High Commissioner for Human Rights, “Nepal Conflict Report” (2012), 15.

406. For a complete overview of the conflict and its consequences, see OHCHR, “Nepal Conflict Report” (2012), 15.

407. United Nations High Commissioner for Refugees, *Global Report 2006*.

408. CPA, preamble.

409. CPA, sec. 4; Army Act, 2063 (September 28, 2006).

410. CPA, sec. 3.4.

411. CPA, sec. 7.1.2.

412. CPA, sec. 3.5.

413. CPA, sec. 7.

414. CPA, sec. 3.7, 3.10.

415. In comparison, the set of agreements signed to bring an end to the conflict in Guatemala refer frequently to the long history of human rights violations and the suffering of victims. See, e.g., Agree-



ment on the establishment of the Commission to clarify past human rights violations and acts of violence that have caused the Guatemalan population to suffer, A/48/954, S/1994/751 (June 23, 1994).

416. The parties also agreed to, inter alia, allow the displaced to return to their former residences, reconstruct infrastructure, and release political prisoners. CPA, 5.2.1, 5.2.4.

417. See “Report of the Working Group on Enforced or Involuntary Disappearances,” E/CN.4/2003/70 (January 21, 2003). The UN Working Group of Enforced and Involuntary Disappearances (UNWGEID), OHCHR, ICRC, civil society, and the families of the missing and detained had put the issue of enforced disappearances on the transitional justice agenda in Nepal early on in the conflict and kept it there. See Madeleine Fullard, ICTJ, *Disappearances in Nepal* (2008) and Human Rights Watch, *Waiting for Justice: Unpunished Crimes from Nepal’s Armed Conflict* (2008).

418. Under the Terrorist and Disruptive Acts (Prevention and Punishment) Act, 2058 (2002), security personnel could detain individuals for a period not exceeding ninety days, “If there is a reasonable ground for believing that any person has to be prevented from committing any activity that could result in the terrorist and disruptive act.” [www.vertic.org/media/National%20Legislation/Nepal/NP\\_Terrorism\\_Act.pdf](http://www.vertic.org/media/National%20Legislation/Nepal/NP_Terrorism_Act.pdf)

419. See Report of the Working Group on Enforced or Involuntary Disappearances, E/CN.4/2003/70 (January 21, 2003). ICRC delegates operated from New Delhi, India, before finally moving to Kathmandu in 2001, [www.icrc.org/eng/where-we-work/asia-pacific/nepal/overview-nepal.htm](http://www.icrc.org/eng/where-we-work/asia-pacific/nepal/overview-nepal.htm)

420. For a fuller discussion of enforced disappearances in Nepal, see Madeleine Fullard, *Disappearances in Nepal*.

421. International Commission of Jurists, *Commissions on Inquiry in Nepal: Denying Remedies, Entrenching Impunity* (June 2012).

422. Erlinda Timbreza-Valerio, Kopila Adhikari and Dhiraj Pokhrel, *Nepal: A New Hope for the Disappeared* (2007): 101.

423. See Decision of the Supreme Court on Disappearance Case, writ no. 3775 (June 1, 2007), 6.

424. Madeleine Fullard, *Disappearances in Nepal*, 4.

425. The Code of Conduct for Ceasefire agreed between the Government of Nepal and the CPN (Maoist) (May 25, 2006).

426. Office of the United Nations High Commissioner for Human Rights, Report of investigation into arbitrary detention, torture and disappearances at Maharajgunj RNA barracks, Kathmandu, in 2003–2004 (May 2006), 67.

427. See Fullard, *Disappearances in Nepal*, and Human Rights Watch, *Waiting for Justice*, 7.

428. Ibid.

429. See ICTJ, “Beyond Relief: Addressing the Rights and Needs of Nepal’s Wives of the Disappeared” (August 2013): 3, citing Report of the UNWGED to the Human Rights Commission, Addendum, Mission to Nepal, UN Doc. E/CN.4/2005/65/Add.1. (January 28, 2005).

430. Warisha Farasat and Priscilla Hayner, ICTJ, *The Initiative for Peacebuilding, Negotiating Peace in Nepal: Implications for Justice* (June 2009), 20.

431. Ibid.

432. Ibid., 21.

433. The COID envisioned here would be established under Nepal’s 1969 Commission of Inquiry Act (COI Act), the “traditional” mechanism for establishing commissions of inquiry in Nepal. Carlos Fernández Torné, *Transitional Justice Process in Nepal: The State of the Art and Questions and Scenarios for the Future in Nepal* (2013), 72.

434. The seven party alliance is made up of: the Nepali Congress (NC); Nepali Congress (Democratic) (NC(D)); Communist Party of Nepal (Unified Marxist-Leninist) (UML); Janamorchha Nepal; Nepal Workers and Peasants Party (NWPP); United Left Front (ULF); and Nepal Sadbhavana Party (Aanandi Devi) (NSP(AD)).

435. CPA, 1.4. The summit agreement had similarly reaffirmed the commitments made in previous agreements. According to the International Crisis Group, “by reiterating that all past agreements would be implemented,” key issues did not need to be “renegotiated.” International Crisis Group, *Nepal’s Peace Agreement: Making it Work*, Asia Report No. 126 (December 15, 2006), 10.

436. See 12-Point Understanding reached between the Seven Political Parties and Nepal Communist Party (Maoists) (November 22, 2005) (“7. Making a self-assessment of the mistakes and weaknesses committed while staying in the Government and Parliament in the past, the Seven Political Parties have expressed their commitment to not repeat such mistakes and weaknesses in the future . . . 12. Regarding the inappropriate conduct that took place among the parties in the past, a common commitment has been expressed to investigate the incidents on which objection was raised and take appropriate actions if guilt is established in such cases, and make the same public.”); Code of Conduct on Ceasefire Agreed between the Government of Nepal and the CPN (Maoist) (May 26, 2006) (“17. Parties shall disclose, as soon as possible, the whereabouts of citizens who have disappeared”).

437. CPA, 5.2.7.

438. Nepal Human Rights Commission-Nepal and Office of the United Nations High Commissioner for Human Rights, *Remedies and Rights Revoked: Case Withdrawals for Serious Crimes in Nepal* (June 2011).

439. In an odd twist, Article 36 provides that “No questions shall be raised in any court as to whether provisions contained in this Part are implemented or not.” The Supreme Court found that although “they cannot be implemented through court,” as directive principles and policies of the state, they are “not mere show pieces and they cannot be overlooked” and found that the “court can and should provide a judicial evaluation as to whether or not the state has complied with its liability.” *Rabindra Dhakal and Others v. The Government of Nepal*, Writ No. 3575, Supreme Court decision (June 1, 2007), 23–24.

440. Fullard, *Disappearances in Nepal*, 7.

441. *Rabindra Dhakal and Others v. The Government of Nepal*, Writ No. 3575, Supreme Court decision (June 1, 2007), [www.icrc.org/ihl-nat.nsf/39a82e2ca42b52974125673e00508144/5eab6202e55a6ff3c125753f003a5722/\\$FILE/Decision%20of%20the%20Supreme%20Court%20on%20Disappearances%20Case.PDF](http://www.icrc.org/ihl-nat.nsf/39a82e2ca42b52974125673e00508144/5eab6202e55a6ff3c125753f003a5722/$FILE/Decision%20of%20the%20Supreme%20Court%20on%20Disappearances%20Case.PDF)

442. Truth and Reconciliation Act, 2064, sections 3 (“Establishment of the Commission”) and 27 (“Report to be Submitted”) (2007).

443. Truth and Reconciliation Act, 2064, section 25 (“Recommendation may be made for amnesty”) (2007).

444. See, for example, ICTJ, *Selecting Commissioners for Nepal’s Truth and Reconciliation Commission* (March 2011); Amnesty International, *Nepal: Reconciliation does not mean impunity: A Memorandum on the Truth and Reconciliation Commission Bill* (2007), [www.amnesty.org/en/library/asset/ASA31/006/2007/en/e2023c77-d373-11dd-a329-2f46302a8cc6/asa310062007en.html](http://www.amnesty.org/en/library/asset/ASA31/006/2007/en/e2023c77-d373-11dd-a329-2f46302a8cc6/asa310062007en.html)

445. Promotion of National Unity and Reconciliation Act 34 of 1995. See especially, chapter 4, articles 19 and 20.

446. *Nepal Gazette*, Ordinance number 8 of 2012/2013, *Ordinance on Investigation of Disappeared Persons, Truth and Reconciliation Commission*, March 14, 2013.

447. González, *Seeking Options*, 1.

448. The Supreme Court stayed the implementation of the Ordinance in April 2013 and issued a decision on January 3, 2014. In its decision, the court agreed with the petitioners, who claimed that the provisions in articles 23, 25, and 29 (allowing amnesties for serious human rights violations, and imposing strict time limits to the Attorney General to open an investigation) contradicted the constitution. The Court cited international law, the constitution, and its own previous decision of 2007 (see note 42) and ordered the government to issue a new ordinance that did not contain the offending provisions and the separate establishment of a truth commission and a commission on disappearances. See Order 069-WS-0057. Supreme Court Special Bench: Honorable Justice Kalayan Shrestha, Honorable Justice Girish Chandra Lal, Honorable Justice Sushila Karki.

449. As noted in Note 1, legislation to establish a truth commission and a commission on the disappeared was passed in April 2014 and enacted in May 2014, preserving the possibility of amnesty for serious human rights violations, a clause declared unconstitutional by the Supreme Court just a few months earlier. No steps had been taken to implement the commissions by the time of the publication of this report.

450. See González, *Seeking Options*.

451. Meeting of the Security Council, S/PV.6069 (January 16, 2009).

452. CPA, 8.2

453. CPA, 8.4

454. The Accord guaranteed the “fundamental right of the Nepali people to take part in the constituent assembly elections in a free, fair and fear-less environment.” CPA, Preamble. Elections were held on April 10, 2008, with support from UNMIN, after first having been pushed back from June to November 2011.

455. To get to the Constituent Assembly elections, the parties reinstated the House of Representatives, which then adopted an interim constitution based on a modified version of an earlier constitution and established the electoral framework needed to conduct elections. On November 8, 2006, in advance of the CPA’s signing, the Seven-Party Alliance and the CPN (Maoist) had agreed to a set of Decisions during a summit meeting. Here, the parties agreed that they would reinstate the House of Representatives, which then would adopt an interim constitution based on a modified version of an earlier constitution. International Institute for Democracy and Electoral Assistance, *Creating the New Constitution: A Guide for Nepali Citizens* (2008), 49.

456. <http://un.org.np/unmin-archive/?d=activities&p=electoral>

457. The original two-year term of the Constituent Assembly expired on May 28, 2010, and was extended as follows: May 28, 2010 (for one year); May 28, 2011 (for three months); August 31, 2011 (for three months); and November 30, 2011 (for six months). Elections for a second Constituent Assembly are scheduled for November 19, 2013, although some parties have threatened to boycott that vote. See Bahadur Basnet, Institute for Defence Studies and Analyses, “Calling Elections in Nepal” (June 24, 2013), [www.idsa.in/idsacomments/CallingElection-sinNepal\\_PostBahadurBasnet\\_240613](http://www.idsa.in/idsacomments/CallingElection-sinNepal_PostBahadurBasnet_240613)

458. For an extended discussion of politics in Nepal and maneuvering around the drafting of a permanent constitution, see ICG, *Nepal’s Constitution (II): The Expanding Political Matrix* (Asia Report No. 234 (August 27, 2012).

459. International Crisis Group, *Nepal’s Constitution (I): Evolution Not Revolution*, Asia Report No. 233 (27 August 27, 2012). i.

460. BBC, “Nepal Profile: Timeline,” [www.bbc.co.uk/news/world-south-asia-12499391](http://www.bbc.co.uk/news/world-south-asia-12499391)

461. Briefing by Ms Karin Landgren Representative of the Secretary-General in Nepal Meeting of the Security Council On the request of Nepal for United Nations assistance in support of its peace process (January 15, 2010): 1.

462. González, *Seeking Options*, 6.

463. A possible factor of pressure over the political and military elites is the legal proceedings that have affected a member of Army and Maoist cadres. In January 2013, British authorities arrested Nepalese Col. Kumar Lama, an active officer, and charged him with acts of torture committed during the conflict. Also in January 2013 five Maoist cadres were arrested in Dailekh, Western Nepal, and charged with a case of murder committed during the conflict.



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## CONCLUSIONS

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There is an inevitable tension between the role of mediators who seek a working peace settlement and transitional justice practitioners who seek accountability for violations and crimes committed during the conflict. Both disciplines are conscious of the need for an integral solution, but they are sometimes at odds, especially in terms of timing. Transitional justice experts are often brought into the picture once the fundamentals of a peace agreement have already been set up, to provide technical support to the accountability measures accepted by the parties. The peace community moves from mediation to the several tasks of peace building, one of which is transitional justice.

The fit is never easy: transitional justice practitioners may find themselves called to support accountability measures that respond more to the needs of the parties to the peace process than to victims' rights; peace mediators may find that the sustainability and legitimacy of the process is eroded by intractable tensions around accountability.

Efforts have been made to identify the principles and experiences that can shed light on these difficulties. A proliferation of literature on transitional justice has contributed to a sense that technical solutions may be available to political dilemmas, if only they can be put into practice. There are some doubts: technical responses operate within the parameters set by political decisions; the knowledge acquired and systematized in the last few years is important but cannot replace concrete political analysis and good judgment.

In some post-conflict settings, truth commissions have been variously credited with providing a space to process the trauma left by atrocity, giving victims and marginalized groups an opportunity to advocate for their right to an effective redress and providing policymakers with the information needed to devise guarantees of nonrepetition.

Some of these successes have been presented as a panacea, and some country experiences, especially South Africa's, have been seen as universally applicable. Most critically, a reductive view has witnessed commissions proposed as a workable alternative to criminal accountability, transforming feeble assumptions about the psychology of perpetrators and victims into solutions. Mere imitation has substituted for hard thinking on the dilemmas of accountability, and as a result, several attempts to create truth commissions have suffered from concept to implementation.

A growing body of observation of good practice has been applied mechanically to varied circumstances, with weak results. Some recent truth commissions have succeeded in the face of difficult conditions, but others have encountered severe problems, either because of a simplistic imitation of a specific country model or the rigid application of the growing body of knowledge in the field of transitional justice.

As truth commissions continue to be proposed and established around the world, such as in Colombia, Northern Ireland, and Mali, there is an urgent need to avoid such problems, so that peace processes can benefit from the contributions of a truth-seeking processing. Five major points emerged from the symposium that can help mediators and practitioners strengthen peace processes and transitional justice mechanisms.



### **1. Why a truth commission? All parties need to be clear about the purpose and vision of the peace and justice framework**

Parties to a peace process need to be clear about the reasons why a truth commission may be included in an agreement. It is simply not enough to affirm that such an institution has become a generalized practice or that it has succeeded in other countries. A generic or vague motivation may hide several incompatible expectations that hinder effective truth-seeking.

Different stakeholders will have different, and legitimate, expectations about what a truth commission can achieve. However, all need to recognize that without a clear commitment to guaranteeing victims' rights and needs, and therefore the confidence of victims, a truth commission will fail. The goals envisioned by participants in a negotiation have to be compatible with the key goal of truth seeking in its dimensions of fact finding, recognition of victims' experiences, and historical clarification.

In this regard, commissions need to reaffirm their commitment to the right to the truth. Whatever their contribution to other measures of accountability, truth commissions must be organized around the government's duty to conduct a genuine investigation, one as complete as possible, into gross human rights violations.

Clarity about the goals of a truth commission, the overarching commitment to the right to the truth, and expected contributions to the peace process must be complemented with realism. It is impossible for a commission to investigate all violations, discharge all functions of transitional justice, and serve all victims. Honesty to the stakeholders is key to ensuring that each group decides the measure of its commitments and contributions.

Clarity about the goals of the commission, and realism about what they can achieve, will also help to determine a workable legal mandate. Mandates should be narrow or expansive according to the expressed demands and actual capacities in the country, not because an abstract model or an observable tendency suggests that it should be so.

### **2. Where will the commission take place? There needs to be a realistic evaluation of conditions and demand**

To assess adequately the conditions in which a truth commission is proposed, it is vital to identify the type of conflict being addressed in the peace negotiations. Each conflict's intensity, duration, and patterns of violence will have different impacts on the needs of victims and the degree of judicial risk faced by the parties. It is also crucial to assess the relative strengths of the parties around the table, which will set the

parameters of the negotiation and the mutuality of the compromises achieved.

The kinds of violations committed by the parties and the relative power enjoyed by the parties at the negotiation stage may indicate their level of inclination to accept a truth commission and their attitude toward it. Without such an analysis, it would be difficult to understand the motivations of the different actors: whether, for example, they seek a commission to try to justify their role in the past conflict, to embarrass an adversary, to seek nonjudicial resolution of incidents they are involved in, or to provide avenues to redress for victims. In each situation, mediators and transitional justice practitioners need to find out whether there is enough organized and sustained local demand for truth seeking to overcome possible resistance or mistrust.

External participants have sometimes brought a truth commission model to a peace process and stoked demand artificially. While sharing information about available transitional justice policy is valid and useful, actively promoting a truth commission when there is little local understanding or demand risks creating a commission with a weak constituency that is incapable of overcoming the predictable obstacles raised by spoilers.

Other objective elements should also be carefully analyzed, including levels of security and the effective cessation of hostilities. It is also critical to know whether the country can mobilize adequate capacities and resources to sustain the transitional justice measures it has chosen.

### **3. When is the process expected to take place? It is vital to guide the peace process tactically through its phases**

An idealized, legalistic model would probably place all transitional justice measures in parallel, because reparations, truth seeking, and criminal justice respond to specific victims' rights that are demanded immediately. Given the characteristics of each peace process, however, accountability is likely to be a long-term process in which each transitional justice measure will have stages of different intensity and where different institutions will establish sequences with one another, sometimes causally.

Based on their analysis of the situation, mediators and transitional justice practitioners should gauge not only which measures are necessary, but also which are likely to succeed. In some cases, a desire for simultaneity and immediacy has led to the conflation of all expectations and many tasks into one single institution: a truth commission, powerful on paper, that will presumably establish the facts and determine prosecutorial policy and reparations. Such an approach may

result in an overextended mandate for a commission, excessively complex legal instruments, or an unrealistic demand on capacities and resources.

Another fundamental aspect of timing is the capacity to use the unique window of opportunity opened during a peace process. There will be periods of intense activity, when stakeholders are best disposed to make progress on transitional justice options and models; there will also be lulls, when political attention is scant. Mediators and transitional justice practitioners need to make sure that the parties are conscious of their own choices. Whether they value speed or a more deliberate and slow approach, their reasons and calculations need to be clear and conducive to the successful implementation of a commission.

#### **4. How could this vision be implemented? Distinguishing between human rights obligations and good practices is important**

The proliferation of standards that would govern the establishment and implementation of a truth commission has posed problems in some cases. It is unclear whether they constitute human rights obligations or whether they belong to a different order of prescription.

In some instances, practices that have been instrumental for success in one context have been taken as prescriptions for success in other contexts. But not all practices are transferable and accepting too many prescriptive propositions may result in a “one-size-fits-all” formula that deprives practitioners of initiative and creativity.

Clearly, some obligations of the state should be respected if the parties have committed to implement a truth commission and other transitional justice measures. Such obligations include the rights of victims to obtain integral redress, including: the right to the truth and the denial of amnesties for the most serious human rights violations; the obligation of any transitional justice measure to observe basic guarantees of due process; and the obligation not to discriminate against any group for reasons of race, religion, gender, or other characteristic. Other elements may constitute prudent approaches or desirable practices to be implemented if possible, but they are subject to local characteristics and conditions.

The importance of respecting human rights obligations is clear: in the absence of a firm commitment to human rights, powerful spoilers may pressure the parties to cheat victims of their rights by, for example, immunizing perpetrators through blanket amnesties or proposing a truth commissions in order to impede criminal investigations.

At the same time, recognizing the guiding role of human rights principles requires a measure of modesty. Truth com-

missions can contribute toward the implementation of victims’ rights, but the full implementation of the right to truth—each victim knowing all of the relevant facts regarding the circumstances and reasons for violations—is beyond the reach of most truth commissions.

Indeed, truth commissions are generally not designed to undertake forensic investigations of each violation. Vast patterns of violations committed over a prolonged conflict and period of repression may leave not only an impunity gap, but also an information gap. Truth commissions can contribute to identifying victims, establishing patterns of violations, clarifying historical contexts and, in some cases, clarifying the facts of specific incidents. Those tasks, as useful as they may be, should be seen as the beginning of larger social and governmental commitments, not their end.

Within the parameters set by human rights obligations, the participants in a peace process should preserve a certain degree of flexibility and creativity to provide the best odds for a future truth commission by, for example, deciding the speed of the process of creating a truth commission, the relative strength of its powers, the extension of its mandate, the form of appointment of its members, and other characteristics.

#### **5. Who will carry out this vision? The human factor is decisive in truth commissions**

Truth commissions are extraordinary institutions set up in extraordinary times, often without precedent. This uniqueness means it is often difficult to find adequate leadership. Commissioners who have had an important impact in their societies have combined personal authority, teamwork, and strong competencies. A fortunate combination of these characteristics has been able to rescue some commissions from difficult situations, weak mandates, or the mistrust of stakeholders. By the same token, commissions created “by the book” have stumbled over disputes as to the suitability or capacity of commissioners and staff.

Selecting strong commissioners and ensuring that they can hire competent staff is a *sine qua non* condition for success. Different cases indicate that there is not a single tested-and-true mechanism to ensure the best composition of a commission. The recent trend of choosing commissioners on the basis of representativeness is understandable in divided societies but does not ensure that commissions have the competencies, teamwork, or even the legitimacy that they will need.

Commissioners need to adopt key decisions regarding the priorities and methods of the commission, clarify obscure or ambiguous areas of their mandate, engage in dialogue with constituencies, seek alliances, and neutralize spoilers. If they

spend their time and energy instead dealing with internal conflict or basic training to cover capacity weaknesses, the commission will suffer.



We are convinced that truth commissions can contribute effectively to the resilience and sustainability of peace processes in the long run, but in order to do so, they must be able to function and discharge basic tasks. Too many recent commissions have run into trouble, operational or political, affecting the quality or timeliness of their products.

The accumulated knowledge of the transitional justice field has contributed to identifying good practices and positive lessons from different countries, but that cannot substitute for thorough analysis of local conditions. The guiding criteria should be a strong commitment to the rights of victims, in particular the right to the truth, while paying attention to the specific conditions of each peace process.

As mediators and transitional justice practitioners, we will inevitably have to deal with the questions and anxieties of the participants and other stakeholders in a peace process. It is our responsibility to help them to achieve maximum clarity of purpose and knowledge of their options with respect to human rights obligations. We should encourage the parties and other participants to put in place maximum guarantees to create a commission that is independent, effective, and legitimate so that it can contribute fully to the peace process.

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**Cover Images:** *Front, top row, from left:* Crosses at a shrine for victims killed by the Guatemalan Armed Forces at a demonstration outside of the Embassy of Guatemala in Buenos Aires (Marcos Brindicci/Reuters/Corbis); Nepal rebel fighters (Binod Joshi/AP/Corbis); Child speaking at an event for the Kenya Truth, Justice and Reconciliation Commission (Kenya TJRC). *Middle row:* A girl runs past pro-peace graffiti written during the 2007–2008 post-election violence and a poster of presidential candidate Raila Odinga, in the Kibera slum of Nairobi, Kenya (Ben Curtis/AP); Hearings of the Truth and Reconciliation Commission for Sierra Leone, 2003 (TRC). *Bottom row:* Man describes a relief mural depicting reconciliation, in Freetown, Sierra Leone (Kenny Lynch); Former President of Nigeria Olusegun Obasanjo, during peace talks in the Democratic Republic of the Congo (Lucas Dolega/epa/Corbis); Monitoring of the Final Report of the Commission of Truth and Reconciliation of Peru by the Inter-American Commission on Human Rights, November 2013 (Eddie Arrossi). *Back, top row, from left:* Guatemalan National Revolutionary Unity commanders sign the last in a series of peace accords setting the final time table for implementation of agreements (Douglas Engle); Mural depicting the Massacre at Rancho Bejuco, Guatemala, which took place on July 29, 1982 (Erik Hungerbuhler). *Middle Row:* Woman looks at photos of victims of enforced disappearance in Colombia, on the International Day of the Disappeared (Colectivo Desde el 12); Demonstrators marching in support and solidarity at the Truth and Reconciliation Commission for Sierra Leone's public hearing on women and girls, May 22, 2003 (Sara Tollefson/TRC); Forensic experts exhume a mass grave in Tomasica, where dozens of bodies of Bosnian civilians from Prijedor are believed to have been buried by Bosnian Serb forces (Samir Sinanovic). *Bottom row:* Family lights a candle to remember the missing in Nepal, on the International Day of the Disappeared (Santosh Sigdel/ICTJ); Dinah Shelton testifies at a hearing on the Public Policy of Reparations to Victims of the Internal Armed Conflict in Guatemala before the Inter-American Commission on Human Rights, March 15, 2013 (Eddie Arrossi); Government of Guatemala offers a public apology on December 15, 2011, for the Dos Erres Massacre, which took place on December 6, 1982 (Government of Guatemala).

