



# General Assembly

Distr.: General  
28 August 2013

Original: English

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## Human Rights Council

### Twenty-fourth session

Agenda item 3

**Promotion and protection of all human rights, civil,  
political, economic, social and cultural rights,  
including the right to development**

## **Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff\* \*\***

### *Summary*

In the present report, the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence lists key activities undertaken under the mandate between August 2012 and July 2013. He also analyses selected challenges faced by truth commissions in transitional periods and proposes responses to strengthen the effectiveness of those mechanisms in addressing gross human rights violations and serious violations of international humanitarian law. The Special Rapporteur elaborates on the significant expansion of mandates of truth commissions, selection mechanisms for commissioners, and other issues relevant in the design and operation of commissions. Subsequently, he discusses concerns about lack of follow-up to truth commissions' recommendations, the importance of archives and cultural interventions.

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\* The footnotes in the present document are reproduced as received, in the language of submission only.

\*\* Late submission.

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## **I. Introduction**

1. The present report is submitted by the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence to the Human Rights Council pursuant to resolution 18/7. The report lists key activities undertaken by the Special Rapporteur from August 2012 to July 2013, and analyses selected challenges faced by truth commissions in transitional periods, while proposing responses to strengthen the effectiveness of those mechanisms in addressing gross human rights violations and serious violations of international humanitarian law.

## **II. Activities of the Special Rapporteur**

### **A. Country visits and regional consultations**

2. From 11 to 16 October, the Special Rapporteur undertook his first country visit, and thanks the Government of Tunisia for its invitation and cooperation. The report is contained in document A/HRC/24/42/Add.1.

3. The Special Rapporteur will visit Uruguay from 30 September to 4 October 2013 and Spain from 22 to 31 January 2014. He thanks both Governments for their invitations.

4. The Special Rapporteur had hoped to visit Guatemala in the first half of 2013, but was informed that the Government was unable to accommodate a visit this year. New country visit requests have been made to Brazil, Côte d'Ivoire, the Democratic Republic of the Congo, Indonesia and Rwanda. Other country visit requests are pending in relation to Guinea and Nepal.

5. The Special Rapporteur launched a process of regional consultations to gather information on national normative frameworks, experience and practices regarding transitional justice mechanisms to encourage experience-sharing and identify and promote good practices relating to the components under the mandate and their integration into a comprehensive policy. The first regional consultation, for the Middle East and North Africa region, was held in November 2012 in Cairo. The second, in the Latin American and Caribbean region, took place in December 2012 in Buenos Aires. A regional consultation for Africa is planned for November 2013 in Uganda; one for Europe is scheduled for 2014 in Germany, and one for Asia is envisaged for 2014/2015. The results of the meetings will form part of the Special Rapporteur's study requested by the Human Rights Council in its resolution 18/7 (para. 1 (f)).

### **B. Communications and press releases**

6. The Special Rapporteur sent communications in 2012 to Nepal<sup>1</sup> and in 2013 to Bangladesh, Burundi, Guatemala, Mexico, Nepal and Uruguay.<sup>2</sup>

7. Jointly with other special procedures, he issued press releases on Bangladesh,<sup>3</sup> Guatemala<sup>4</sup> and Uruguay,<sup>5</sup> as well as on the entry into force of the Optional Protocol to the

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<sup>1</sup> See A/HRC/22/67 and Corrs. 1 and 2, communication to Nepal (22 October 2012).

<sup>2</sup> See A/HRC/24/21, communications to Bangladesh (22 March 2013), Burundi (22 March 2013), Guatemala (15 March 2013), Mexico (15 March 2013), Nepal (22 March 2013) and Uruguay (14 May 2013).

International Covenant on Economic, Social and Cultural Rights,<sup>6</sup> on the call for the post-2015 development agenda to be urgently refocused with respect to equality, social protection and accountability,<sup>7</sup> and on the call to Governments to ensure that victims of torture and their families obtain redress and rehabilitation.<sup>8</sup>

### C. Other activities

8. In September 2012, the Special Rapporteur presented his first report to the Human Rights Council (A/HRC/21/46) on the mandate's foundations and implementation strategy. On that occasion, he met with the Ambassadors of Argentina, Nepal, the Republic of Korea and Tunisia, and was a panellist in a side event organized by Impunity Watch and in the high-level discussion on the role of judges and lawyers in transition, organized by the International Commission of Jurists.

9. The Special Rapporteur delivered the keynote speech at the international conference on "Right to truth, reparation and reforms: achievements of and perspectives for transitional justice", held in Rabat on 14 and 15 January 2013.

10. He participated in a conference on "Integrating transitional justice, security and development", held from 17 to 19 January by Wilton Park, Switzerland and Norway, with an intervention on "Linking human rights, justice, security and development".

11. On 22 January, the Special Rapporteur participated in the Development Talk on "Institutions and democratic governance", organized by Sweden in Stockholm, with a keynote speech on transitional justice and development.

12. He participated in the panel discussion on transitional justice and genocide prevention at the conference on the theory, policy and practice of mass atrocity prevention, held on 25 and 26 February by the Benjamin N. Cardozo School of Law and the Auschwitz Institute for Peace and Reconciliation.

13. On 27 February, the Special Rapporteur gave the keynote speech at the International Expert Seminar on "Access to justice for indigenous peoples including truth and reconciliation processes", co-organized by the Institute for the Study of Human Rights at Columbia University, the Office of the United Nations High Commissioner for Human Rights (OHCHR), and the International Center for Transitional Justice.

14. From 22 to 24 April, the mandate participated in a regional conference on the topic "For a strengthened effectiveness of transitional justice processes", held in Yaoundé, co-organized by OHCHR, France and Switzerland.

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<sup>3</sup> Available at:  
<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13204&LangID=E>.

<sup>4</sup> Available at:  
<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13330&LangID=S>; and  
<http://www.ohchr.org/SP/NewsEvents/Pages/DisplayNews.aspx?NewsID=13249&LangID=S>.

<sup>5</sup> Available at:  
<http://www.ohchr.org/SP/NewsEvents/Pages/DisplayNews.aspx?NewsID=13486&LangID=S>.

<sup>6</sup> Available at:  
<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13310&LangID=E>.

<sup>7</sup> Available at  
<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13341&LangID=E>.

<sup>8</sup> Available at:  
<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13482&LangID=E>.

15. On 1 May, the Special Rapporteur delivered opening remarks, via telephone link, to the Commonwealth round table on reconciliation.

16. On 30 and 31 May, in Berlin, he met with the Ministry of Foreign Affairs of Germany, the Office of the Federal President, the Parliamentary Committee for Human Rights and Humanitarian Aid, and the Institute for Human Rights, with a view to preparing the regional consultations for Europe. He also participated in a workshop organized by the Working Group on Peace and Development.

17. In May and July, the Special Rapporteur met in Geneva with the Ambassadors and/or representatives of Bangladesh, Brazil, Cambodia, China, Côte d'Ivoire, the Democratic Republic of the Congo, France, Guatemala, Indonesia, Japan, the Republic of Korea, Rwanda, Spain, Sri Lanka, Thailand, Uganda, the United States of America, Uruguay and the International Organization of la Francophonie.

### III. The right to truth

18. Truth-seeking entities, including truth commissions, aim at the fulfilment of the right to truth, which is enshrined in a number of international instruments, notably the International Convention for the Protection of All Persons from Enforced Disappearance and the 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. The Human Rights Council has placed the right to truth in the context of contributions to end impunity.<sup>9</sup> Similar references have been made by OHCHR,<sup>10</sup> treaty bodies,<sup>11</sup> and special procedures of the Council.<sup>12</sup>

19. At the regional level, the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights were at the forefront of developing jurisprudence on the right to truth of the victim, his or her next of kin, and the whole of society. Regarding the collective nature of this right, the Commission observed that “every society has the inalienable right to know the truth about past events, as well as the motives and circumstances in which aberrant crimes came to be committed, in order to prevent repetition of such acts in the future”.<sup>13</sup> In a more recent judgment, the Court framed the right to truth in the form of a positive State obligation, stressing that “the next of kin of the victims and society as a whole must be informed of everything that has happened in connection with the said violations”.<sup>14</sup> The African Commission on Human and Peoples’ Rights has recognized the right to truth as an aspect of the right to an effective remedy for a violation of the African Charter on Human and Peoples’ Rights.<sup>15</sup> In connection with gross human rights violations committed in the context of countering terrorism, the European

<sup>9</sup> Human Rights Council resolutions 12/12, para. 1; and 9/11, para. 1.

<sup>10</sup> E/CN.4/2006/91; A/HRC/5/7, both documents with further references.

<sup>11</sup> E.g. CAT/C/COL/CO/4 (2010), para. 27.

<sup>12</sup> A/HRC/16/48, para. 39; A/HRC/22/52, paras. 23-26, 32-34; A/HRC/7/3/Add.3, para. 82; A/HRC/14/23, para. 34.

<sup>13</sup> Inter-American Commission on Human Rights (IACCommHR), Annual Report, 1985-86, AS Doc. No. OEA/Ser.L/V/II.68, Doc. 8 rev. 1 (26 September 1986), p. 193.

<sup>14</sup> Inter-American Court of Human Rights (IACtHR), *Myrna Mack Chang v. Guatemala*, 25 November 2013 (Merits, Reparations and Costs), para. 274.

<sup>15</sup> The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa highlight that the right to an effective remedy includes “access to the factual information concerning the violations”. Principle C (b) (3).

Court of Human Rights acknowledged the right to truth not only for victims and their families but for the general public as well.<sup>16</sup>

20. The right to truth entitles the victim, his or her relatives and the public at large to seek and obtain all relevant information concerning the commission of the alleged violation,<sup>17</sup> the fate and whereabouts of the victim<sup>18</sup> and, where appropriate, the process by which the alleged violation was officially authorized.<sup>19</sup> With this legal framework in mind, in the aftermath of repression or conflict, the right to truth should be understood to require States to establish institutions, mechanisms and procedures that are enabled to lead to the revelation of the truth, which is seen as a process to seek information and facts about what has actually taken place, to contribute to the fight against impunity, to the reinstatement of the rule of law, and ultimately to reconciliation.

#### **IV. Selected current problems in the operation of truth commissions and proposed responses to increase their effectiveness**

21. The past two decades have seen a steady increase in the establishment and use of various truth-seeking mechanisms, ranging from State-sanctioned truth commissions to “unofficial” truth-seeking processes, carried out by civil society groups, including victims’ organizations.<sup>20</sup> Truth-seeking has also been pursued at the international level through international commissions of inquiry and fact-finding missions.

22. The present report will focus on selected current problems of State-sanctioned truth commissions in the aftermath of gross human rights violations and serious violations of international humanitarian law, and proposes responses to increase their effectiveness. It identifies some challenges stemming from trends that can be usefully addressed in a text of this sort. Hence, the report will deal with aspects related to the establishment and operation of truth commissions that, if addressed adequately *ex ante*, improve the likelihood of a commission being able to make its distinctive contribution. It also deals with topics that might improve the chances of a commission’s recommendations being taken up *ex post*, emphasizing an underlying practical interest.

##### **A. The state of the field: achievements and challenges**

23. As temporary, *ad hoc* institutions, truth commissions are not part of an established institutional framework and have no pre-existing political constituency or cadres of well-established bureaucrats. Yet they have proven to be capable of making significant contributions to transitional processes in the over 40 countries that have implemented them

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<sup>16</sup> European Court of Human Rights (ECtHR), *El-Masri v. the former Yugoslav Republic of Macedonia* (n° 39630/09), 13 December 2012, para. 191, the Court emphasizes “the great importance of the present case not only for the applicant and his family, but also for other victims of similar crimes and the general public, who had the right to know what had happened”.

<sup>17</sup> E/CN.4/2006/91, para. 38.

<sup>18</sup> A/HRC/16/48, pp. 12-17.

<sup>19</sup> General Assembly resolution 60/147, annex, para. 24; see also IACCommHR (fn 13), p. 193; IACtHR (fn 14), para. 274; ECtHR (fn 16), para. 192.

<sup>20</sup> Some of them have produced important reports, including Brazil’s *Nunca Mais*, Guatemala’s *Proyecto Interdiocesano de Recuperación de la Memoria Histórica (REHMI)*, Uruguay’s *Nunca Más*, Northern Ireland’s *Ardoyne: the Untold Truth*, and Greenboro’s *Truth and Reconciliation Commission’s Final Report*.

since the 1980s.<sup>21</sup> Those that have had such impact derive this potential from, among other factors:

- The moral standing of their members.
- Their establishment in the wake of social turmoil or upheaval, when the basic “social contract” is being revised.
- The fact that the topics that they address closely relate to fundamental rights.
- A sound and consistent methodology.
- Openness to civil society.
- A “victim-centred”, inclusive approach.

24. Successful truth commissions have made, inter alia, the following contributions:

- Giving a “voice” to and empowering victims: commissions can create platforms for victims to tell their stories – for example, by holding public hearings – thereby giving them a place in the public sphere for the very first time. This is part of the process of affirming the status of victims, often members of socially marginalized groups, as equal rights holders.
- Fostering general social integration: official acknowledgment of atrocities contributes to ending cycles of resentment and mistrust.
- Helping set reform priorities: in the aftermath of massive atrocities, commissions have been sources of information about systemic failure, which has helped in setting up reform agendas.
- Providing important information for the other transitional justice measures: commission reports and other information gathered by commissions have been useful for prosecutorial efforts and fundamental to reparation programmes and institutional reforms.

Ultimately, commissions have provided recognition to victims as rights holders, fostered civic trust, and contributed to strengthening the rule of law.<sup>22</sup>

25. It is crucial to keep in mind however that what truth commission reports, on their own, are primarily capable of delivering is not the same as actual transformation; hence the importance of reaffirming the need to strengthen the links among truth, justice, reparation and guarantees of non-recurrence,<sup>23</sup> and more broadly, between those measures and other coexisting policy interventions.<sup>24</sup>

26. The Special Rapporteur emphasizes that despite its importance, truth cannot be a substitute for justice, reparation or guarantees of non-recurrence, singly or collectively, and recalls that there are abiding national and international obligations concerning each measure, compelling practical moral and political reasons for implementing them, as well

<sup>21</sup> Mandates and final reports of commissions are available at: <http://www.usip.org/publications/truth-commission-digital-collection>; see also Priscilla Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions*, 2<sup>nd</sup> ed. (London, Routledge, 2011).

<sup>22</sup> A/HRC/21/46, paras. 28-46; A/67/368, paras. 23-57.

<sup>23</sup> A/HRC/21/46, paras. 22-27.

<sup>24</sup> *Ibid.*, paras. 47-53; see forthcoming report of the Special Rapporteur to the General Assembly at its sixty-eighth session.

as convincing empirical evidence that they work best, as justice measures, when designed and implemented in a comprehensive fashion rather than in isolation from one another.<sup>25</sup>

27. Given the perceived potential of truth commissions, they have become a habitual response to the challenges posed by transitional situations and the legacies of atrocities. The impetus to establish them has not waned. Indeed they have become “normal” responses not just in post-authoritarian but also post-conflict transitions. Some countries have even implemented transitional justice measures in the absence of a political transition and while conflict is still ongoing.<sup>26</sup> Consequently, truth commissions are now frequently also tasked with investigating serious violations of international humanitarian law.<sup>27</sup>

28. Some contextual characteristics made truth commissions apt mechanisms in the aftermath of violations committed by authoritarian regimes:

- The denial of gross or systematic violations, which was as deliberate as the planning and execution of those violations by past regimes, made truth-seeking an appropriate response.
- Given the nature of many transitions from authoritarianism, in which predecessor regimes retained, at least temporarily, the capacity to destabilize the transitional process, a policy of truth was a sensible first step towards more comprehensive redress.
- Authoritarian State institutions were responsible for the overwhelming majority of violations that required investigation and disclosure, which made the task of commissions at least feasible.

29. Truth commissions in post-conflict settings face particular challenges. They must provide an account of violations often perpetrated by a multiplicity of agents of violence, each much less structured than the security sector of authoritarian regimes and frequently with circulating membership, while the perpetrator/victim line is often porous. Furthermore, security concerns negatively affect virtually all aspects of the operation of commissions, providing powerful disincentives to potential witnesses, statement-takers and even commissioners. Commissions in post-conflict contexts operate in an overall environment of weak institutions, depleted social capital, fragmented civil societies, severe capacity and resource constraints, and often in situations marked by deep ethnic cleavages.

30. However, truth commissions face challenges that do not relate only to the peculiarities of post-conflict settings. The Special Rapporteur would like to call attention to the overburdening of truth commissions worldwide as manifested by the following factors, among others:

- The inability of truth commissions to meet the deadlines set forth in their mandates.
- Controversies surrounding the aptness of particular appointments of commissioners, posing serious problems for an institution that derives much of its potential from the moral authority of its leadership.

<sup>25</sup> Pablo de Greiff, “Theorizing Transitional Justice”, in: Nomos LI: *Transitional Justice*, Melissa S. Williams, Rosemary Nagy and Jon Elster, eds. (New York, New York University Press, 2012).

<sup>26</sup> For the “normalization” of transitional justice measures, see Pablo de Greiff, Some thoughts on the development and present state of transitional justice, *Journal for Human Rights*, vol. 5, No. 2 (2011).

<sup>27</sup> See para. 35 below. The resolution establishing this mandate refers both to addressing “gross human rights violations and serious violations of international humanitarian law”, Human Rights Council resolution 18/7, preamble, eleventh paragraph.



- Publicly expressed differences and, indeed, discord, among commissioners over fundamental issues concerning a commission's operation and conclusions.
- Abiding critiques about poor implementation of commission recommendations.
- A worrisome trend towards the seemingly open-ended expansion of commission mandates, not just thematically, but functionally, leading to doubts about whether there is any institution encompassing all the competencies required by such expansion.

31. In highlighting these challenges, the Special Rapporteur intends to contribute to maintaining the integrity of commissions and strengthening their efficacy, given past experiences which demonstrate that they can be useful, and at times key, transitional instruments.

## B. Ex ante challenges

### 1. Mandates

32. The greatest challenge currently facing truth commissions concerns the expansion of their mandates. By a "mandate", the Special Rapporteur refers to the foundational document, taking the form of an executive decree, a legislative act, a peace agreement, or a United Nations regulation. Foundational documents typically define (a) the duration of a commission's operation; (b) the temporal scope of the mandate defining the period in which the violations must have occurred to be under the commission's purview; (c) the thematic mandate - the types of violations that the commission is authorized and/or obligated to address; (d) the commission's functions - the actions it is supposed to undertake; and (e) the objectives or ends the commission is requested to fulfil.<sup>28</sup> The Special Rapporteur will use this classification for analytical purposes and to call attention to some trends.<sup>29</sup>

33. *Duration.* The period assigned to truth commissions to complete their tasks has expanded, albeit within limits. Illustrative is that truth commissions of the 1980s and 1990s, with the exception of the South African Truth and Reconciliation Commission, tended to last one year or less.<sup>30</sup> Commissions of the past decade have tended to last over one year and up to three years.<sup>31</sup> Experience has shown that performing such complex tasks in only a few months is unfeasible. At the same time, prolonging indefinitely the lifespan of a commission is also unfeasible, as it would diminish the commission's function of signalling in a timely fashion the break with past abusive practices.

<sup>28</sup> Mandates frequently include other elements, such as the specifications of the powers of the commission (e.g., subpoena, search and seizure), selection and appointment procedures, or the names of appointees.

<sup>29</sup> Hastening to add that as tendencies, "outliers" can be identified regarding most of them, and that the rate and even the direction of expansion are often not linear.

<sup>30</sup> Argentina (9 months); Chile (6 months with a possible 3-month extension); El Salvador (6 months); Guatemala (6 months with a possible 6-month extension). South Africa (24 months with a 3-month extension).

<sup>31</sup> Sierra Leone (3 months preparatory period, 12 months of operation with possible 6-month extension); Peru (3-month preparatory period extended one month, 18-month duration, 5-month extension); Timor-Leste (2-month preparatory period, 2 years of operation with a possible 6-month extension); Liberia (3-month preparatory period, 2 years of operations, a 3-month wrap-up period, and a possible 3-month extension); Kenya (3-month preparatory period, 2 years of operation, 6-month extension). See Hayner (fn 21), pp. 268-273 and corresponding mandates.

34. *Temporal scope.* Although patterns of atrocities rarely emerge or end at sharply determined points in time, most commissions take recognized junctures, such as the dates of coups, uprisings or the initiation of conflict as starting points, and the cessation of conflict or the fall of an abusive regime as cut-off dates. Excluding clear patterns in the distribution of violations and important incidents of violations from the temporal scope of a commission's work raises general doubts as to the mechanism's impartiality. Because there are limits to plausible periodizations, choices concerning the temporal scope are somewhat bounded. Commissions have been asked to investigate violations ranging from under a dozen years (Argentina, 7 years; Sierra Leone, 11 years; El Salvador, 12 years) to over 20 or more years (Timor-Leste, 25 years; South Africa and Guatemala, 34 years; Morocco, 43 years; Kenya, 44 years), which demonstrates an expansion in temporal scope.

35. *Thematic mandates.* During a period of repression or violence, violations of many rights occur. Mandates determine which kinds of violations will be investigated by commissions. Here again a trend towards expansion is observable in the following select examples:

- The National Commission on the Enforced Disappearance of Persons (CONADEP) in Argentina was tasked with investigating disappearances, understood as kidnappings with no remains ever found;<sup>32</sup>
- The Truth Commission in El Salvador received a general mandate,<sup>33</sup> which it interpreted to focus on 32 exemplary cases of disappearance, extrajudicial killing, and massacre in addition to its consideration of the overall context of these crimes.
- The Act establishing the South African truth commission mandated it to investigate "gross violations of human rights", which it defined as: "(a) the killing, abduction, torture or severe ill-treatment of any person; or (b) any attempt, conspiracy, incitement, instigation, command or procurement to commit" such violations.<sup>34</sup>
- The regulation of the United Nations Transitional Administration in East Timor that established CAVR determined the thematic scope as human rights violations "committed within the context of the political conflicts in East Timor between 25 April 1974 and 25 October 1999", comprising "(i) violations of international human rights standards; (ii) violations of international humanitarian law; and (iii) criminal acts".<sup>35</sup> These included violations of economic, social and cultural rights.<sup>36</sup>
- The Act establishing the Truth and Reconciliation Commission in Liberia defines the mandate by reference to "human rights violations", by which it means "(1) violations of international human rights standards, including, but not limited to, acts of torture, killing, abduction and severe ill-treatment of any person" and "(2) violations of international humanitarian law, including, but not limited to, crimes against humanity and war crimes". The mandate also comprises "abuses ... including massacres, sexual violations, murder, extra-judicial killings and economic

<sup>32</sup> Decree/Decreto 187/83, 15 December 1983.

<sup>33</sup> Mexico Peace Agreement -Provisions Creating the Commissions on Truth, art. 2 : "serious acts of violence [...] whose impact on society urgently demands that the public should know the truth".

<sup>34</sup> South African Promotion of National Unity and Reconciliation Act 1995 (Act 95-34), 26 July 1995, ch. 1, definitions, available at: <http://www.justice.gov.za/legislation/acts/1995-034.pdf>.

<sup>35</sup> Regulation No.° 2001/10 on the Establishment of a Commission for Reception, Truth and Reconciliation in East Timor, UNTAET/REG/2001/10, 13 July 2001, section 1(c).

<sup>36</sup> *Ibid.*, section 1 (e) in conjunction with Regulation No. 1999/1 on the Authority of the Transitional Administration in East Timor, UNTAET/REG/1999/1, section 2.

crimes, such as the exploitation of natural or public resources to perpetuate armed conflicts”.<sup>37</sup>

- In this incomplete but representative sample, the Act establishing the Truth, Justice and Reconciliation Commission of Kenya constitutes the most expansive thematic mandate. The commission was directed to investigate, inter alia: “violations and abuses of human rights and economic rights inflicted on persons by the State, public institutions and holders of public office, both serving and retired...”. The Act mentions specifically: massacres, sexual violations, murder, extrajudicial killings, abductions, disappearances, detentions, torture, ill-treatment and expropriation of property, and includes in terms of economic crimes “grand corruption and the exploitation of natural or public resources”, “the irregular and illegal acquisition of public land”, “economic marginalization of communities” and the “misuse of public institutions for political objectives”. The Act also calls on the Commission to inquire into the “causes of ethnic tensions”.<sup>38</sup>

36. *Gender considerations.* An unambiguously positive aspect of the expansion of thematic mandates concerns the specific attention dedicated to women’s rights (and in some cases to gender issues more broadly). While early truth commissions were “gender blind”, ignoring manifest violations against women, over time, both by design and through practice, commissions made significant progress in addressing the violations of the rights of women. The Truth and Reconciliation Commission in Peru set an important precedent by establishing a dedicated gender unit and trying to mainstream gender considerations throughout its report.<sup>39</sup> It is encouraging that the reports of the truth and reconciliation commissions of Sierra Leone and Liberia, as well as of CAVR, paid sustained attention to women and children.<sup>40</sup> This is a trend that needs to be celebrated and reinforced.<sup>41</sup>

37. *Functional mandate.* The functional mandate specifying the concrete functions commissions are expected to fulfil has also witnessed notable expansion, with commissions being expected to satisfy increasingly complex functions. At the most basic level, commissions were expected to carry out a fact-finding function. Thus, CONADEP, in Argentina, was tasked with clarifying the facts regarding the disappearance of persons. Since disappearances were such a prevalent violation in the countries where the earlier commissions were set up, their other main function was to help determine the whereabouts of the disappeared – a victim-tracing function.

38. It is difficult, however, to confront the enormity of violations of this sort and not be propositive. Although it was not part of its mandated functions, CONADEP proposed in its

<sup>37</sup> See Act to Establish the Truth and Reconciliation Commission of Liberia (TRC Act of Liberia), 12 May 2005, arts. II and IV, available at: <http://trcofliberia.org/about/trc-mandate>.

<sup>38</sup> The Truth, Justice and Reconciliation Commission Act 2008 of Kenya (TJRC Act of Kenya), part II, arts. 5(a), 5(c), 6 (a), available at: <http://www.tjrkenya.org/images/documents/TJRC-Act.pdf>.

<sup>39</sup> See Final Report of the Truth and Reconciliation Commission/Informe Final de la Comisión de la Verdad y Reconciliación (TRC of Peru), vol. 6, ch.1, sect. 5 and 8; vol. 8, ch. 2, sect. 1, available at: <http://www.cverdad.org.pe/ifinal/index.php>.

<sup>40</sup> See Report of Truth and Reconciliation Commission of Sierra Leone (TRC of Sierra Leone), Witness to Truth, ch. 2, pp. 100, 105, 169, available at: <http://www.sierraleonetr.org>; Truth and Reconciliation Commission of Liberia, Final Report, vol. II, consolidated final report, pp. 222, 252, 279, available at: <http://trcofliberia.org/reports/final-report>; Final Report of the Commission for Reception, Truth and Reconciliation in East Timor (CAVR), *Chega!*, part 7, ch. 7.7, 7.8, part 11, ch. 4.1; available at: <http://etan.org/news/2006/cavr.htm>.

<sup>41</sup> See the useful UN-Women publication by Nahla Valji, with Romi Sigsworth and Anne Marie Goetz, *A Window of Opportunity: Making Transitional Justice Work for Women*, 2nd Edition (UN-Women, 2012), pp. 9-16.

report judicial reform measures and economic assistance for the family members of victims.<sup>42</sup> In this way, the commission acquired two additional functions, a victim-redress function, and a preventive function, largely centred on institutional reform proposals. It is important to note, however, that in contrast to the fact-finding and victim-tracing powers, the victim-redress and preventive functions are merely potentialities; commissions typically cannot reform institutions or provide reparations, they can merely make recommendations. The subsequent history of truth commissions speaks of the growing complexity of these four functions and of the attribution to commissions of new ones, as well as of the omission of the difference between actual functions and mere potentialities.

39. Even the fact-finding function has become significantly more complex: while the Argentinean commission's task was limited to clarifying the facts regarding the disappearance of persons, the National Commission for Truth and Reconciliation in Chile was mandated "to clarify in a comprehensive manner the truth about the most serious human rights violations committed in recent years in our country"<sup>43</sup> and the Truth and Reconciliation Commission in South Africa was asked to establish "as complete a picture as possible of the nature, causes and extent of gross violations of human rights".<sup>44</sup> The decree establishing the truth commission in Peru (before it became a truth and reconciliation commission, which involved the attribution of yet another function) continued this process of expansion by requiring the commission "to analyse the political, social and cultural conditions, as well as the behaviours, both within society and by State institutions, that contributed to the tragic situation of violence experienced by Peru".<sup>45</sup> The pattern continued with the Liberian Truth and Reconciliation Commission, which was to investigate "the nature, causes and extent of gross violations and abuses of human rights, including the root causes, circumstances, factors, context, motives, and perspectives which led to such violations".<sup>46</sup> Finally, there is no better illustration of such expansion than the Act establishing the Kenyan truth commission. With respect to an already all-encompassing catalogue of violations, it describes the commission's task in terms of "establishing an accurate, complete and historical record of violations and abuses of human rights and economic rights inflicted on persons by the State, public institutions and holders of public office, both serving and retired ... including the (i) antecedents, circumstances, factors and context of such violations; (ii) perspectives of the victims; and (iii) motives and perspectives of the persons responsible for commission of the violations", as well as "establishing as complete a picture as possible of the causes, nature, and extent of the gross violations of human rights and economic rights".<sup>47</sup>

40. Hence, fact-finding has ceased to be an effort aimed at clarifying cases, the fate of individual victims, and (when mandated and possible) the identities of those responsible for those violations, and has become an undertaking to understand comprehensively root causes, circumstances, factors, context and motives of countrywide situations of repression and/or violence. There is of course much to be said in favour of wide analysis, but it must be clear (a) that even deep analysis is not the same as transformation, and (b) that given

<sup>42</sup> The Report of the Argentine National Commission on the Disappeared (CONADEP), *Nunca Más* (1984), ch. 6; available at: [http://www.desaparecidos.org/nuncamas/web/english/library/nevagain/nevagain\\_001.htm](http://www.desaparecidos.org/nuncamas/web/english/library/nevagain/nevagain_001.htm). It is worth pointing out that all recommendations of the commission fit in a single page.

<sup>43</sup> Supreme Decree No. 355, 25 April 1990, Art. 1.

<sup>44</sup> Act 95-34 (fn 34), art. 3, para. 1 (a). It should be noted that this phrase, mostly without any changes in the wording, recurs in the mandates of many subsequent commissions.

<sup>45</sup> Higher Decree (Decreto Supremo) No. 065-2001-PCM, art. 2 a.

<sup>46</sup> TRC Act of Liberia (fn 37), art. VII, section 26 a (ii).

<sup>47</sup> TJRC Act of Kenya (fn 38).

relevant constraints it sometimes comes at the expense of functions that commissions can actually complete.

41. The preventive function of truth commissions has widened (in theory) alongside the expansion of “fact-finding”. This has not happened necessarily by design. Mandates are not more elaborate concerning concrete preventive mechanisms; rather, the wide-ranging analysis seems to invite similarly wide-ranging transformation proposals in the name of prevention. Thus commissions have made proposals for the transformation of various institutions, including the judiciary, security forces, education, media, civil registries, electoral systems, and land tenure patterns.

42. Perhaps the only original function of commissions that has not seen a comparable expansion is victim tracing. This function has gained neither increased prominence, nor elaboration in commission mandates, yet the need for it has by no means waned. On the one hand, in most situations where truth commissions are implemented the fate of thousands of victims remains unclarified and thousands of bodies remain unidentified, even when mass burial sites have been located. On the other hand, professional competence in forensics has grown significantly. Considering how exhumations can contribute significantly to truth and justice processes, and the cross-cultural importance for families of victims and entire communities of ensuring proper burial of the deceased, the Special Rapporteur calls for renewed attention to the victim-tracing function of commissions. On their own, truth commissions are unlikely to assume full responsibility for exhumations and identification when a large universe of victims exists. Support from other institutions is needed, but commissions in the past have played a useful role in tracing victims and identifying burial sites.<sup>48</sup>

43. The victim-redress function of some earlier truth commissions has, by contrast, become a staple of virtually all commissions and has grown in complexity. Most mandates require commissions to make recommendations concerning victim reparation. Some commissions have specifically recommended establishing complex programmes<sup>49</sup> which distribute a variety of goods both symbolic and material (including cash payments and the provision of services), and both to individuals and to communities. Truth commissions have often articulated comprehensive proposals, such as those by the Peruvian commission,<sup>50</sup> the South African commission,<sup>51</sup> and CAVR in Timor-Leste.<sup>52</sup>

44. The overwhelming majority of truth commissions have not been called to implement reparations programmes, but to make recommendations concerning their design. Given that reparations programmes are usually long-term projects that outlast the commission’s life, and that the more complex the programme the heavier its administrative load, there are

<sup>48</sup> The TRC of Peru devoted significant attention to recommendations concerning exhumations. See Final Report (fn 39), vol. IX, ch. 2, sect. 3.

<sup>49</sup> For the notion of complexity in reparations programmes as well as detailed information and analysis of reparations programmes, see Pablo de Greiff, ed., *The Handbook of Reparations* (Oxford, New York, Oxford University Press, 2006).

<sup>50</sup> See TRC of Peru, Final Report (fn 39), vol. IX. Only parts of the comprehensive reparations programme have been implemented.

<sup>51</sup> Truth and Reconciliation Commission of South Africa (TRC of South Africa), Final Report, vol. 5, p. 312, paras. 22-23, available at: <http://www.justice.gov.za/trc/report>. The reparations proposals were rejected by the government, which implemented a significantly more modest programme, see, e.g., Christopher J. Colvin, “Overview of the Reparations Program in South Africa”, in De Greiff, *The Handbook of Reparations* (fn 49), p. 176.

<sup>52</sup> Report of the CAVR (fn 40), part 11, ch. 12.

good reasons behind the continued trend not to make commissions responsible for their implementation.<sup>53</sup>

45. In addition to the four core functions, truth commissions have been attributed additional functions, including contributing to prosecutorial efforts, either by providing information they gather (for example in Argentina)<sup>54</sup> or, as in the case of the Truth and Reconciliation Commission in Peru, by actively constructing cases to be presented to prosecuting authorities.<sup>55</sup>

46. It is thus a misperception that most truth commissions have been created as substitutes for criminal justice and that they are closely related to amnesties either as one of their characteristic functions or as an indirect consequence. Most commissions have had no relationship with amnesties. Even in the oft-mentioned South African case of “truth in exchange for amnesty”, the relation was complex. The amnesty for which those who provided testimony could apply, or remain liable to prosecution was (a) conditional on the crimes committed having been “political” and on full disclosure and (b) granted or denied by a subcommittee of the commission which was independent from the one receiving the testimony.<sup>56</sup> Indeed, most of those who provided testimony to the Truth and Reconciliation Commission had their applications for amnesty turned down.<sup>57</sup>

47. Another function truth commissions have increasingly been given relates to reconciliation. The Special Rapporteur reiterates that there are no shortcuts to reconciliation, and in particular, that meaningful reconciliation requires, in addition to truth, the implementation of the remaining three elements: justice, reparation and guarantees of non-recurrence.<sup>58</sup> Thus truth commissions on their own cannot achieve reconciliation, and the inclusion of the term in their titles likely generates expectations that cannot be satisfied.

48. In this regard, the Special Rapporteur is concerned about the inclusion of victim-perpetrator pardon mechanisms in two recent draft laws on truth commissions. Although the legal consequences of such mechanisms are presently unclear, they risk undermining the realization of international obligations to prosecute. These proposed pardon mechanisms, ostensibly an aspect of reconciliation, misunderstand its nature, especially when the procedures can be initiated without a request from victims. In circumstances of continuing significant power asymmetries between perpetrators and victims and the ongoing security concerns of the latter, forcing victims to participate in procedures that bring them face to face with those who are presumably responsible for the violations they suffered imposes huge burdens on them and exposes them to great risk. Additionally, it raises serious questions about the voluntary nature of the pardons that may flow from such procedures.<sup>59</sup>

<sup>53</sup> Despite this, Tunisia is presently considering a draft law creating a commission with the responsibility to also implement reparations programmes (see A/HRC/24/42/Add.1, para. 37).

<sup>54</sup> Chile’s TRC was barred from making attributions of responsibility – that function was reserved to judicial authorities – but this did not prevent it, in accordance with its mandate, from referring evidence of criminality to courts. The Commission on Truth for El Salvador refrained from pushing for prosecutions, not because it did not find sufficient prima facie evidence of violations, nor because it thought prosecutions in any way undesirable, but because it did not trust Salvadoran courts at the time to be capable of carrying out fair trials, see Hayner (fn 21), p. 49.

<sup>55</sup> The TRC of Peru constructed 47 such cases, see Final Report (fn 39), vol. VII, chap. 2. Progress on these cases, however, has been slow.

<sup>56</sup> South African Act 95-34 (fn 34), ch. 4.

<sup>57</sup> Subsequent prosecutions have been scant, however.

<sup>58</sup> A/HRC/21/46, paras. 36-39.

<sup>59</sup> See A/HRC/22/67 and Corrs. 1 and 2, communication to Nepal (22 October 2012).

49. Furthermore, the Special Rapporteur emphasizes that reconciliation at the social level cannot be reduced to one-to-one encounters. Gross human rights violations do not constitute only a violation of an individual, but additionally a violation of the very principle of the rule of law. Thinking that one-on-one pardons undo all the damage that such violations bring about fails to consider their systemic and structural dimension. Social reconciliation requires, *inter alia*, establishing institutions that are trustworthy and that genuinely embody the idea that each individual is a rights holder. This process cannot happen via victim-perpetrator encounters alone.<sup>60</sup>

50. A novel function of the truth commissions under consideration in at least one country is an arbitration function for the settlement of individual cases of corruption. Given the quasi-judicial procedures required to guarantee minimal fairness in decision-making, a huge additional workload is to be expected. Furthermore, arbitration of corruption cases involves a significant likelihood of defeating the expectations of the public, which is likely to have maximalist aspirations of recovery and punishment. In short, the very same truth commission mandated to be proactive concerning prosecutions or vetting is also expected to act as a neutral arbitration and settlement body. The Special Rapporteur would like to highlight the enormous challenges and internal tensions that this combination of functions is likely to generate.<sup>61</sup>

51. On the basis of the above analysis, it can be concluded that most elements of the mandate have suffered significant expansion: truth commissions today are expected to address a broader array of violations, occurring over longer periods of time, where the objective has shifted from clarification of cases to comprehensive analysis of whole contexts and underlying causes, motivating, in turn, the call for comprehensive reform proposals. The Special Rapporteur, pulling together the tendencies reviewed in this chapter, points to the following: institutions that have usually been underfunded, insufficiently staffed in terms of numbers or expertise, that by their very nature remain infrastructurally and politically weak, that have a relatively short operation period, and whose authority depends to a great extent on commissioners to vow to the seriousness of the investigations (rather than on their technical capacities concerning institutional design matters) are now expected to fulfil enormously more complex functions, as reflected in the expansive list of objectives assigned to them in their mandates. From this perspective, it should come as no surprise that commissions are finding it increasingly difficult to satisfy growing expectations.

52. 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. Truth commissions were important human rights instruments because they proved functionally adequate in satisfying their core functions, which was an important step

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<sup>60</sup> See A/HRC/24/21, communication to Burundi (22 March 2013).

<sup>61</sup> Tunisia country visit report, A/HRC/24/42/Add.1, paras. 38-39. A possible way of addressing both systemic issues and individual cases of corruption would be the establishment of dedicated independent bodies with the professional capacities and specialisation for investigating financial files and settling individual corruption cases by arbitration. These bodies may conduct joint investigations and/or establish meaningful information sharing methods. In Tunisia, a specific investigation body was established, the National Commission of Investigation on Corruption and Embezzlement, that was composed of generalists on the systemic issue of corruption and technicians with specific expertise on investigating financial files. This Commission ran in parallel to a fact-finding commission on the gross human rights violations committed during the uprising. The Commission of Investigation on Corruption and Embezzlement then recommended the establishment of a permanent anti-corruption body at the constitutional level, see A/HRC/24/42/Add.1, para. 53.

in transition processes. The more the bulk of a commission's work ventures into functions that strain both its capacities and its sources of authority and legitimacy, the more difficulties it will encounter demonstrating its effectiveness.

## 2. Selection of commissioners

53. Truth commissions derive their power to a large extent from the moral authority and competence of commissioners. Hence selecting suitable commissioners is a crucial factor in their good functioning. As selection modes vary greatly, this report will distinguish in a simple manner methods of direct selection from consultative procedures which formally involve a variety of stakeholders in the selection process.

54. Direct selection, usually by the same authority that establishes the commission's mandate and without a process of formal consultations, has been used in a large number of cases, such as in Argentina,<sup>62</sup> Chile,<sup>63</sup> Peru<sup>64</sup> and Brazil.<sup>65</sup> Direct selection is however not a Latin-American phenomenon, as demonstrated by the Moroccan case, where the commissioners of IER were appointed directly, through a Royal Dahir, by King Mohammed VI.<sup>66</sup>

55. It is not only executive powers that have used direct selection. The draft transitional justice law currently being considered in Tunisia empowers the National Constituent Assembly, and, in first instance, a committee composed of the President or Vice-President of the Assembly and the presidents of the parliamentary blocs to appoint the 15 commissioners, ensuring that each sex represents at least one third of the membership.<sup>67</sup>

56. On the opposite side of the spectrum lie selection processes that are by design consultative in nature. This approach has been adopted for the selection of commissioners in South Africa,<sup>68</sup> Sierra Leone,<sup>69</sup> Liberia,<sup>70</sup> Timor-Leste<sup>71</sup> and Kenya.<sup>72</sup> The model involves

<sup>62</sup> Decree 187/83 (fn 32). Confirming the point that most cases do not fall squarely on either side of the classificatory spectrum, the decree creates a 16-member commission, with ten members appointed by the President and three additional members to be appointed by each of the two chambers of Congress "as direct representatives of the people and of the Provinces of the Nation". One of the chambers did not make any appointments. The design thus involved also the legislative power in the selection of commissioners (12 men and one woman finally appointed).

<sup>63</sup> In the Supreme Decree that established the National Commission for Truth and Reconciliation of Chile, President Aylwin announced the names of the eight commissioners (six men, two women), designated its president, and even its executive secretary, see Supreme Decree No. 355, 25 April 1990.

<sup>64</sup> Higher Resolutions/Resoluciones Supremas N° 330-2001-PCM, 6 June 2001; N° 065-2001-PCM, 4 June 2001; N° 101-2001-PCM, 4 September 2001; N° 438-2001-PCM, 5 September 2001 (ten men, two women appointed).

<sup>65</sup> Law No. 12.528, 18 November 2011; *Diario Oficial da Uniao* LIII, No. 91, 11 May 2012 (five men, two women appointed).

<sup>66</sup> Dahir No. 1.04.42 of the 19<sup>th</sup> of Safar 1425, 10 April 2004 (16 men, one woman).

<sup>67</sup> Legislative bodies may be considered more deliberative and consultative than executive powers. This may or may not be the case. In Chile, for example, transitional justice measures had long been debated by the different parties of the coalition that won the elections which brought President Aylwin to power, and were part of the political platform of the coalition, so in this sense, the measures had been the subject of public deliberation. See Elizabeth Lira, *The Reparations Policy for Human Rights Violations in Chile*, in: de Greiff, *The Handbook of Reparations* (fn 49). On Tunisia, see the Special Rapporteur's report on his visit to the country, A/HRC/24/42/Add.1.

<sup>68</sup> 17 members (nine men, eight women), see TRC of South Africa, Final Report (fn 51), vol. 1.

<sup>69</sup> Seven members (four men, three women), see TRC of Sierra Leone, Final Report (fn 40), vol. 1, ch. 2.

<sup>70</sup> Nine members (five men, four women), see TRC of Liberia, Final Report (fn 40), vol. 1.



a selection panel with seats apportioned to the representatives of different stakeholders including victims' groups, non-governmental organizations (NGOs), professional associations, religious organizations, local leaders and even representatives of the international community. The panel accepts submissions from the public, determines a shortlist of candidates, orders them by rank, and passes on the recommendation to an appointing authority. In some countries public hearings with those shortlisted were also required.

57. A thorough analysis of the costs and benefits of the two selection methods is beyond the aim of this report. However, some observations are in order. First, there is no fail-safe method of selection. While the overwhelming majority of commissioners have made important contributions, neither method has proven to be immune from occasionally questionable appointments. Second, both selection methods, while entailing certain advantages, involve costs. Direct appointments are expeditious, but the method does not check for potential narrowness in the range of candidates considered by the appointing authority.

58. Countries have opted for consultative processes for reasons that include: increasing the representativeness of commission members, broadening the pool of candidates, strengthening popular "buy in" and legitimacy. Indeed, these are valid arguments that speak in favour of consultative procedures in many domains. There are, of course, negatives, such as the lengthy amount of time which the operation of selection mechanisms requires.<sup>73</sup> A less explored risk relates to the incentives that consultative procedures create for overemphasizing "representativeness" as a criterion of selection.

59. The use of selection panels is certainly more appropriate than the effort to guarantee representation through the outright apportioning of commission's seats on the basis of criteria relating to ethnicity, political or other type of affiliation. However, selection bodies that are designed to secure wide representation are themselves at risk of having a skewed membership whereby technical expertise in the core areas of work of a commission is secondary to types of affiliation. In such circumstances there are few reasons to expect these bodies to make their selection primarily on the basis of technical expertise.<sup>74</sup>

60. Emphasizing the representativeness of commissioners, their capacity to act as "stand-ins" for particular groups, or the appeal of particular individuals to a multiplicity of groups may not always serve a commission well. This is the case when records of some of these persons raise questions of conflict of interest given their connection with events or represented groups that the commission is likely to investigate; when the candidates' inter-group appeal translates to unwillingness to take strong stands; or when they simply lack the technical capacity to make real contributions. Against this background, the Special Rapporteur calls for the development of international guidelines on incompatibilities, conflicts of interest, and moral fitness of individuals serving in truth commissions.

<sup>71</sup> Seven members (five men, two women), see, on the selection procedure, UNTAET/REG/2001/10 (fn 35), section 4.

<sup>72</sup> Seven members (four men, three women), see TJRC Act of Kenya (fn 38), clauses 9, 10, and first schedule.

<sup>73</sup> Imposing narrow deadlines on consultative procedures defeats part of the purpose of establishing them in the first place, see TJRC Act of Kenya (fn 38), first schedule.

<sup>74</sup> The fact that selection panels are not responsible for appointments but merely for recommendations also weakens the incentive to think about their selections in a way that would, at least *jointly*, cover the required technical competencies; they have no reason to think what a *group* of commissioners would look like from a technical perspective for the panels do not determine the composition of the commission as a whole.

61. The design of selection procedures has received more attention than the selection criteria. To the extent that foundational documents of truth commissions mention criteria that commissioners have to satisfy – many do not – they include generalities relating to moral standing and reputation, rather than actual achievements in related areas or technical expertise. The Special Rapporteur urges those responsible for designing truth commission mandates, including selection mechanisms, to articulate more clearly the relevant criteria, beyond generalities concerning reputation. No position of comparable responsibility would be filled on the basis of such poorly defined standards.<sup>75</sup>

62. Of late, several truth commissions have included non-national members. The motivation for this seems to be twofold: to enlarge the pool of candidates, and to appoint individuals who are unrelated to local disputes. Generally, this has been a fruitful effort. However, the Special Rapporteur highlights that international appointments cannot make up for deficiencies in the selection procedures of truth commissioners.

### 3. Staffing, budgeting and management

63. Considering the actual lifespan of commissions and the immensity of their task, time is a scarce resource. Lengthening their operational mandate is not a viable solution in most cases.<sup>76</sup> In this context, the preparatory period is crucial. Some commissions have been given a preparatory period of two to three months,<sup>77</sup> which has proven to be insufficient, as many truth commissions are still dealing with operational matters well beyond this period. Extending the preparatory phase to about a six-month range would increase the likelihood that commissions would be able to discharge their substantive responsibilities during their allotted temporal mandate. This report emphasizes three sets of issues whose resolution during a preparatory period would have a positive impact on the subsequent performance of a commission.

#### (a) Staffing

64. Staffing needs of a truth commission are related to many contextual factors, including the universe of cases to be addressed, the pre-existing work on those cases (largely by NGOs), the collaboration it receives from authorities and other former agents of violence and, importantly, the mandated goals of the commission. However, two general points can still be made. First, truth commissions have become large operations: CONADEP (1983) had 60 staff members, the staffing of many others was in the range of 200-300, while CAVR (2002) had over 500 staff.<sup>78</sup> Clearly, institutions with such large staff numbers require careful advance planning, budgeting and management, especially if they are to operate efficiently during a relatively short lifespan. Second, given current trends, commissions call for staff with multidisciplinary competences.<sup>79</sup> As not all labour

<sup>75</sup> The criteria should be both positive (e.g., demonstrable commitment to and leadership in the cause of human rights; demonstrated *accomplishments* in the area) as well as negative (e.g., demonstrable lack of conflict of interest – no prior membership in or support for an organization whose behaviour might be the subject of investigation by the commission).

<sup>76</sup> In addition to losing part of the signalling power, a very extended mandate makes commissions miss a window of opportunity that allows them to capitalize on the positive reformist impetus of transitional periods, increases the resource burden, and generates challenges associated with the rotation of personnel, including commissioners.

<sup>77</sup> See Hayner (fn 21), pp. 33, 43, 58.

<sup>78</sup> Dates in parenthesis correspond to the year each commission started operations; numbers of staff at peak-years, see Hayner (fn 21), pp. 268-273.

<sup>79</sup> Aside from lawyers and other professionals familiar with criminal law; human rights, including economic, social and cultural rights; and humanitarian law, truth commissions require competencies

markets make specialists in all the required fields readily available, provisions should be made, ideally during the preparatory phase, for the hiring and training of staff.

(b) *Budgeting and procurement*

65. Compared to other expenditures, such as security and military costs, truth commissions are relatively inexpensive. Nevertheless, they still require significant resources, the flow of which needs to be secured, ideally in advance. Some commissions have been greatly hampered by a scarcity of resources and unstable flows, which force them to scale back operations. To illustrate the quantities involved, the Chilean commission budgeted \$1 million for nine months of operations; the commission in Sierra Leone, \$4.7 million for two years; the Liberian commission, \$7.6 million for three and a half years; the Commission for Historical Clarification (CEH) in Guatemala, \$9.5 million for one and a half years; the Truth and Reconciliation Commission in Peru, \$13.5 million for two years; and the South African commission had a budget of almost \$18 million per year at the peak of its operations.<sup>80</sup> The spread is large, but even the figures on the lower end require advance planning if they are going to be raised.

66. Second, most of these commissions required international assistance for (most of) their budgets. While the responsibility for planning belongs to truth commissions and accumulated experience suggests that commissions are often remiss or overtly optimistic regarding fundraising, the Special Rapporteur calls the attention of the international community to the need to assist truth commissions financially in expeditious, forward-looking and reliable ways.

67. Third, when international agencies are involved in managing budgets of truth commissions, the latter have encountered difficulties gaining access to the funds. Given their short lifespans, commissions cannot afford, nor are they administratively configured to deal with the slow pace and the documentation-heavy, rule-laden procedures that characterize most international agencies. While commissions need to comply financially with standards of transparency, efficacy in the execution of plans is essential. The Special Rapporteur invites agencies that frequently support truth commissions to systematize and make available useful previous experiences concerning staffing, budgeting and procurement procedures.

(c) *Internal operations*

68. Managerial and administrative functions have to be legally stipulated and both differentiated from, and related to, substantive functions. Commission presidents usually have legal responsibility for the overall operations. Experience has demonstrated that the assumption by presidents of large responsibility for the everyday management and administration is less than desirable; differentiating the administrative functions, delegating them to an executive director reporting to the presidency, is a more efficient arrangement.

69. Most commissions, particularly given the growing complexity of their mandates, come to establish different operational units, defined sometimes by topic<sup>81</sup> or function<sup>82</sup> and often by a combination of both. There is no formula for internal labour division that should be replicated regardless of context. It is crucial that in the preparatory phase the processes

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in the following fields, among others: data entry, database design/ operation; translation; sociology, history, and anthropology (forensic and social); psychology and other trauma-related disciplines; gender; security sector experts (for witness protection, among other functions); development.

<sup>80</sup> See Hayner (fn 21), pp. 268-273.

<sup>81</sup> E.g. reparations, disappearances, torture, gender violence.

<sup>82</sup> E.g. investigations, public hearings, report writing.

of internal differentiation and harmonious integration are anticipated and resolved as much as possible.

70. Finally, truth commissions have often found it challenging to articulate the relationship between the commissioners. This issue inevitably involves a personal dimension, hence it is even less likely than the previously mentioned topics to be resolved through a formulaic approach. However, some structural factors can exacerbate potential frictions. A non-exhaustive list includes the following:

- Appointment procedures that sacrifice competence for the sake of representativeness. These risk introducing into the nucleus of the commission prevailing political or social cleavages.
- Loose internal regulations, or a protracted period before internal regulations are defined, which allow each commissioner to carve out his or her own functions independently of a coherent, shared plan.
- Ambiguous rules concerning the public role of commissioners and the authority to speak on its behalf.
- Unclear rules concerning relations between commissioners and different stakeholders both within and outside government.
- Commissioners that act *ad honorem* and only part time, and who therefore need to keep their regular occupations, and hence allegiances to particular constituencies.

## C. Ex post challenges

### 1. Implementation

71. Truth commissions have become the subject of increased criticism for the lack of follow-up on their recommendations. The Special Rapporteur emphasizes that truth commissions are only in exceptional cases and in relation to only few initiatives, implementing agencies. As temporary bodies, most commissions will have ceased to exist at the time of implementation of their recommendations, a responsibility that lies primarily with governments.

#### (a) *Articulating recommendations*

72. The call for comprehensiveness regarding analysis and proposals for thorough institutional restructuring has led to a significant expansion in the length of commission reports, which poses a problem for them being used as policymaking tools.<sup>83</sup> The main difficulty, however, is that in a short timespan no commission can make its recommendations on institutional design involving political, economic and legal dimensions truly “policy friendly”. In some cases, complex legislative action is not all that is required; constitutional reforms may also be necessary.<sup>84</sup>

<sup>83</sup> Again, even if not linear, the expansion in length of truth commission reports has led to documents that virtually no policymaker will read in their entirety: the shortest report is that of the Commission on Truth for El Salvador, at 252 pages; CONADEP’s report was less than 500 pages long; Chile’s TRC more than 1,100 pages; South Africa’s TRC more than 4500; Peru’s TRC almost 8,000; Sierra Leone’s TRC almost 1,900; East Timor’s CAVR more than 3200; Liberia’s TRC almost 1,400.

<sup>84</sup> Indeed, Sierra Leone’s TRC suggests the country should consider “the creation of a new constitution”, TRC of Sierra Leone, Witness to Truth (fn 40), vol. 2, ch. 3, para. 38.

73. If commission mandates continue with the aforementioned expanded scope (something about which the Special Rapporteur reiterates his reservations), and the implementation of their recommendations by government agencies is to improve, then the competency of truth commissions in framing recommendations must improve. To this end, commissions will need to learn how to generate budgets and plans for their recommendations and increase their familiarity with how these relate to sectoral reform projects and development plans. They will need to engage earlier with different government agencies and development agents regarding the articulation of their recommendations in actionable ways. Similarly, it is critical for commissions to establish close relationships with civil society. In the end, the fate of recommendations depends to a large extent on the leadership, advocacy and persistence of civil society organizations.

74. By the same token, the Special Rapporteur calls on the international community, donors included, to examine their patterns of support – technical, financial, political – for truth commissions. He is concerned that as conflict wanes, but long before transformation is completed, support frequently wavers. Neither the cessation of conflict, nor the end of a truth commission’s duration, is reason for support to diminish, as the implementation of recommendations depends significantly on continued support.

(b) *Follow-up to recommendations*

75. Some cases demonstrate an attempt to “short cut” the problem of implementation by declaring in the mandates that the commissions’ recommendations are legally binding. This includes those of Sierra Leone<sup>85</sup> and Liberia.<sup>86</sup> However, such attempted short cuts raise serious constitutional questions regarding the separation of powers, as commissions cannot order Parliament to enact certain laws, impose policies on the executive, or demand that prosecutors pursue particular cases and that courts hear them.<sup>87</sup> The more far-reaching the recommendations are, the more they deal with issues that in democratic countries should be the subject of political contestation. Moreover, as empirical evidence demonstrates, proclaiming recommendations obligatory offers no guarantee for their implementation.

76. Over time, three different institutional solutions for follow up have been tried: (a) the creation of purpose-specific, stand-alone bodies, as witnessed in Chile<sup>88</sup> and proposed in Peru,<sup>89</sup> (b) the establishment of functional units within existing ministries, as observed in

<sup>85</sup> The mandate of Sierra Leone’s TRC states that “the Government shall faithfully and timeously implement the recommendations of the report that are directed to state bodies and encourage or facilitate the implementation of any recommendations that may be directed to others”, see The Truth and Reconciliation Commission Act 2000, Supplement to the Sierra Leone Gazette Vol. CXXXI, No. 9, 10 February 2000, part V, art. 17.

<sup>86</sup> The Act that established Liberia’s TRC (fn 37) stipulates succinctly, “All recommendations shall be implemented,” section 48.

<sup>87</sup> The Liberian Supreme Court struck down article 48 of the TRC Act which made it mandatory for the government to implement the Commission’s recommendations. The Court concluded that the article usurped the powers of other branches of government which was not authorized by the constitution, see *Williams v. Minister of Justice*, Attorney General, Independent National Human Rights Commission and Government of Liberia, Supreme Court of the Republic of Liberia, 21 January 2011; available at: [www.mediafire.com/?u1n6zkqoxl1zn3o](http://www.mediafire.com/?u1n6zkqoxl1zn3o).

<sup>88</sup> For example, Chile’s Corporación Nacional de Reparación y Reconciliación is an example of a stand-alone institution created specifically to complete the fact-finding, victim-tracing, and the reparation functions described in the mandate of the TRC.

<sup>89</sup> Peru’s TRC recommended the establishment of a temporary interministerial working group and a permanent autonomous body (Consejo Nacional de Reconciliación) attached to the presidency of the council of ministers, which would have as its responsibilities to coordinate national policies implementing the TRC’s recommendations, and to prepare draft bills that the executive could present

Argentina;<sup>90</sup> and (c) the assignment of follow-up responsibilities to independent human rights institutions, as seen in practice in Sierra Leone.<sup>91</sup>

77. Stand-alone official bodies have two main virtues: they can play a useful convening and coordinating role among specialized agencies and ministries, and, as autonomous bodies, they enjoy a certain degree of political independence. However, as agencies and ministries are not under their authority, in the face of recalcitrant attitudes, they prove to be feeble. Units within ministries, by contrast, can be effective implementers – but within their narrow domain of competencies, and provided political willingness exists. Finally, independent human rights bodies have more autonomy than stand-alone institutions and moral authority unmatched by either stand-alone bodies or units within ministries. Nevertheless, they tend to have narrow competencies and even less power to direct than stand-alone specialized official institutions.

78. Absent governmental commitment, an “institutional fix” to the lack of implementation of recommendations is unlikely. Discussions about follow up, however, have concentrated on institutional solutions rather than on functions. The urgent challenge is to strengthen the incentives governments have for implementation. This will not happen without a vigilant and involved civil society and a cooperative and yet demanding international community. Increased attention should be paid to monitoring the implementation of recommendations, because such processes can generate useful incentives, and because effective monitoring is in any case necessary for sound accountability. A good model of a monitoring mechanism is the interactive recommendation matrix established by the Human Rights Commission of Sierra Leone with the collaboration of the United Nations.<sup>92</sup>

79. There is an urgent need to strengthen the leverage of civil society with a view to improving the implementation record of governments. Therefore, the Special Rapporteur encourages reflection on means available to truth commissions, governments and international donors to strengthen civil society. During their operation, commissions can strengthen civil society organizations and encourage the formation of networks of organizations. After their operation, they can recommend the establishment of regular forums where NGOs could share with governments the results of monitoring, which would strengthen the accountability of authorities for the effective implementation of recommendations.

## 2. Archives

80. Archives – both the commission’s own and general/national archives – are a natural extension of the life and legacy of a truth commission, and permanent in nature. They are instruments for realizing the right to truth.

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to the legislature concerning four broad areas: reparations, historical memory, justice, and institutional reform, see Final Report (fn 39), vol. IX, ch. 2, sect. 4. This body, however, was never established.

<sup>90</sup> In Argentina, for example, responsibility for the implementation of the various reparation plans was eventually assigned to the Secretaría de Derechos Humanos within the Ministry of Justice, Security, and Human Rights, see e.g., María José Guembe, *The Reparations for Grave Human Rights Violations: The Argentinian Experience*, in de Greiff, *The Handbook of Reparations* (fn 49), p. 21.

<sup>91</sup> Not by design but by default, in Sierra Leone, the Human Rights Commission – the establishment of which was one of the recommendations of the TRC – has assumed the role of a Follow-up Committee envisaged by the Act, see TRC Act 2000 (fn 85), part V.

<sup>92</sup> Available at <http://www.sierraleonetr.org/index.php/resources/recommendations-matrix>.

81. The Special Rapporteur welcomes ongoing efforts by the Human Rights Council as well as by OHCHR<sup>93</sup> to systematize existing standards in the area of access to information, protection and preservation of records, and management of archives.<sup>94</sup> He welcomes particularly the role of the United Nations Educational, Scientific and Cultural Organization in this regard. There are noteworthy efforts at the regional level, including by the Council of Europe.<sup>95</sup>

82. In many countries where truth commissions operate there are no pre-existing national archive laws or legislation regulating data access and privacy matters. Recommendations of truth commissions concerning these aspects contribute importantly to the promotion of human rights. In its final report, the IER of Morocco, for example, made recommendations about the preservation and organization of, and access to, national archives. Following these recommendations, an archive law was adopted in 2007 covering all records received and produced by the public service, including the Commission's own records.<sup>96</sup> A law on access to information is currently being prepared.<sup>97</sup>

83. The archives of commissions are, to a great extent, composed of victims' testimonies and statements. They are a means of guaranteeing that the voices of victims will not be lost, and they contribute to a culture of memorialization and remembrance. They also provide a safeguard against revisionism and denial – essential given the long duration and non-linearity of social reconciliation and integration processes. Furthermore, archives can play crucial roles in prosecutions, reparations and other transitional justice measures. These are important reasons for truth commission to prioritize early thinking on the establishment of their own and national archives by following up-to-date practices.

84. The Special Rapporteur acknowledges that the balance between accessibility and openness of archives on the one hand, and confidentiality and privacy on the other, is not easy to achieve. Difficulties are exacerbated wherever security threats persist and data and document management infrastructures are weak. However, there are ways of achieving a proper balance, as suggested below.

85. An elemental question is the disposition of the archives. Commissions have stipulated that their archives should be deposited in national archives,<sup>98</sup> be transferred either to ministries or to independent human rights institutions,<sup>99</sup> be deposited in follow-up institutions,<sup>100</sup> or transferred to the United Nations.<sup>101</sup> The decision concerning the

<sup>93</sup> The Special Rapporteur would like to specifically highlight the OHCHR seminar on experience of archives as a means to guarantee the right to the truth (2011), see report of the Office of the United Nations High Commissioner for Human Rights on the seminar on experiences of archives as a means to guarantee the right to the truth, A/HRC/17/21.

<sup>94</sup> See Human Rights Council resolution 21/7 on the right to the truth, 10 October 2012; report of the Office of the United Nations High Commissioner for Human Rights: Implementation of the right to the truth, A/HRC/12/19 (2009).

<sup>95</sup> Council of Europe, Committee of Ministers, Recommendation No. R (2000) 13 to Member States on a European policy on access to archives, 13 July 2000.

<sup>96</sup> Dahir Nr. 1-07-167.

<sup>97</sup> The corresponding decrees implementing it should be elaborated and contain aspects relating to accessing the archives of the Commission.

<sup>98</sup> Which of course assumes their existence and (ideally) their good functioning. E.g., TRC of South Africa, Report (fn 51), vol. 6, sect. 5, ch. 7, p. 729.

<sup>99</sup> E.g., TRC of Sierra Leone, *Witness to Truth* (fn 40), vol. II, p. 203. In Peru, the mandate of the TRC required it to transfer its archives to the national Ombudsman office: S.D., 065-2001-PCM, confirmed by Supreme Decree No. 101-201-PCM, 4 September 2001.

<sup>100</sup> E.g., CAVR, Final Report (fn 40), part 11, p. 44; Truth Justice and Reconciliation Commission of Kenya, Final Report, vol. IV, pp. 76-77, available at: [www.tjrkenya.org](http://www.tjrkenya.org).

repository of the archives is not inconsequential. Consideration should be given to the following factors:

- Physical access. Transferring archives to far-away locations or abroad, even in a host institution with liberal access policies, puts non-digitalized sources out of reach for concerned populations.
- Preservation. Documents, even in digital form, need to be preserved, not simply warehoused.<sup>102</sup>
- The trustworthiness of the repository institution in the eyes of different stakeholders, including victims. Placing archives in institutions that are widely mistrusted by victims due to their past involvement in human rights violations, for example, generates powerful disincentives for victims and others to seek access to the archives or raises concerns about the accuracy of the contained information.

86. There is no uniformity in the criteria for obtaining access to archives. On one end of the spectrum are the archives of the CEH of Guatemala at the United Nations in New York, which require written authorization “signed by the Secretary-General in person” to open a sealed container prior to 1 January 2050.<sup>103</sup> At the opposite end lie the archives of the truth commission of the Republic of Korea, which recommended that “the records should be utilized in extensive scale to find more facts and to be studied as historical sources”, and directed the repository to cooperate with all interested stakeholders.<sup>104</sup> Most commissions’ archives lie between these extremes, some limiting access to parts of the archives, particularly witness statements<sup>105</sup> and material that may disclose the identities of child

<sup>101</sup> See ST/SGB/1999/6, whereby Secretary General Annan established “a special regime for the management, utilization, preservation and disposition of the documents, records and other materials of the Commission for Historical Clarification” in the archives of the United Nations in New York.

<sup>102</sup> All the records transferred from Guatemala’s CEH to the United Nations in New York are sealed, and as far as anyone can tell, not even preservation efforts have been carried out. See, e.g., Trudy Peterson, *Final Act* (2005), pp. 74ff. Aside from technical aspects relating to preservation there is the question of the sheer physical safety of the archives, which have become an issue in different countries.

<sup>103</sup> See Secretary-General’s bulletin, Commission for Historical Clarification, ST/SGB/1999/6, 8 June 1999. The Oslo Peace Agreement between the Government of Guatemala and the Unidad Revolucionaria Nacional Guatemalteca (URNG) stipulated that the “Commission’s proceedings shall be confidential so as to guarantee the secrecy of the sources and the safety of witnesses and informants.” This, in itself, however, does not call for totally sealed archives, as is made plain by the Secretary-General’s bulletin, which contains an exception for records “specifically designated by the Coordinator of the Commission as being for the public domain”, although no such designation appears to have been ever made, see Oslo Peace Accords, 23 June 1994, 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, Operation, para. IV. For an in-depth description on the question of the archives see Trudy Peterson, *Final Act* (2005), pp. 68ff.

<sup>104</sup> Final Report of the Presidential Commission on Suspicious Death (Republic of Korea), recommendations 14-4 and 15-3.

<sup>105</sup> E.g., Liberia’s TRC, which, after stating the framing principle that “all TRC documentations [...] are deemed confidential insofar as it does not affect the public interest objective of the TRC,” stipulated that “all TRC witnesses statements marked ‘confidential’ or ‘not for public’ and TRC minutes and Commissioners memos shall be deemed strictly confidential and subject to [a] 20-year prescription”, see TRC Report (fn 40), vol II, pp. 335 and 394.



combatants and victims of rape and sexual violence,<sup>106</sup> others limiting the purpose for which documents can be accessed.<sup>107</sup>

87. Considering first the importance of the information contained in national and truth commission archives and their contribution to the realization of the right to truth and the other measures under the mandate, and second the technological advances in archiving, which allow for selected blocking of parts of documents – including names and other markers of individual identity – the Special Rapporteur encourages truth commissions to adopt in their recommendations policies that maximize access consistent with considerations of privacy and personal safety.

88. Against this background and the inconsistencies in practice, the Special Rapporteur calls for the development of international standards on this matter.

### 3. Art exhibits and other cultural interventions

89. Finally, the Special Rapporteur highlights art exhibits and other cultural and social activities that involve victims and civil society, as they have the potential to extend the life of truth commissions' work. Most transitional justice work targets institutional change. It is clear, however, that the transformations that will be required to redress past and prevent future violations also call for changes in attitude. This is what these initiatives are intended to do, and when they have been tried, they have been particularly effective. Examples include Yuyanapaq, the photography exhibit organized by the Peruvian truth commission,<sup>108</sup> the poster exhibition organized by CAVR,<sup>109</sup> and the National Vision project organized by the truth commission of Sierra Leone.<sup>110</sup> The Special Rapporteur encourages activities which occupy and enhance a moral space vacated in the aftermath of atrocities and that have the potential of strengthening bonds of solidarity within society – so crucial in the wake of repression or conflict.<sup>111</sup>

## V. Conclusions and recommendations

### A. Conclusions

90. **The right to truth requires States, in the aftermath of atrocities, to establish mechanisms and procedures empowered to seek information, ascertain facts and effectively reveal the truth about what has happened, thereby contributing to the fight against impunity, the strengthening of the rule of law, and ultimately reconciliation.**

91. **Truth-seeking mechanisms, in particular State-sanctioned truth commissions, can be important instruments for the redress of gross and systematic human rights violations and serious violations of humanitarian law when implemented in a**

<sup>106</sup> TRC of Sierra Leone, *Witness to Truth* (fn 40), vol. 2, ch. 3, para. 534.

<sup>107</sup> E.g., Sierra Leone's TRC recommended that "Parliament refrain from passing legislation authorising access by criminal justice mechanisms, either directly or indirectly, to information in the archives of the Commission that was provided on a confidential basis", see *Witness to Truth* (fn 40) vol. 2, ch. 3, para. 533.

<sup>108</sup> See [http://www.cverdad.org.pe/apublicas/p-fotografico/e\\_yuyanapacha.php](http://www.cverdad.org.pe/apublicas/p-fotografico/e_yuyanapacha.php).

<sup>109</sup> See [http://www.cavr-timorleste.org/Posters/CAVR\\_poster.htm](http://www.cavr-timorleste.org/Posters/CAVR_poster.htm).

<sup>110</sup> See <http://www.sierraleonetrc.org/index.php/national-vision-for-sl>.

<sup>111</sup> For an elaboration of this topic, see Pablo de Greiff "On Making the Invisible Visible: the Role of 'Cultural Interventions' in Transitional Justice Processes," in *Beyond Outreach*, Clara Ramez-Barat, ed. (New York, forthcoming).

comprehensive manner. Truth commissions give voice to victims and affirm their status as rights holders, contribute to social integration, help set reform priorities, and provide essential information in realizing other transitional justice measures.

92. The appeal of truth commissions has not waned, but they face serious challenges, not limited to post-conflict situations. The Special Rapporteur calls attention to the overburdening of commissions as manifested by their difficulties in delivering on their objectives within the mandated deadlines; controversies surrounding the aptness of particular commissioners, and discord among them; and abiding critiques about poor implementation of their recommendations.

93. Mandates of truth commissions have suffered significant expansion: commissions are expected to address a significantly broader array of violations, occurring over longer periods of time, in more complex settings. One very positive dimension of the expansion of the thematic mandate of truth commissions relates to the specific attention they have increasingly paid to women's rights.

94. The functions of commissions have also considerably expanded: whereas commissions used to concentrate on fact-finding and victim-tracing (and made recommendations concerning victim redress and prevention), these functions have not only grown significantly in complexity, but new functions have been added. Commissions are now expected to provide comprehensive analysis of whole contexts and underlying causes. Furthermore, their preventive function now goes beyond making basic reform proposals regarding institutions actually involved in the violations. Rather, they are expected to generate comprehensive, structural reform proposals. Given these trends, it should come as no surprise that commissions are finding it increasingly difficult to satisfy growing expectations.

95. Moreover, the expansion in the functions of commissions appears almost open-ended. Two functions under consideration deserve special comment. First, a potential arbitration role for truth commission concerning cases of corruption has been suggested. The Special Rapporteur notes the enormous administrative burden, the challenge in guaranteeing fair quasi-judicial procedures, the reputational risks, and the tensions with the investigative function concerning human rights violations of a truth commission this combination may generate.

96. Second, some commissions under consideration are expected to achieve reconciliation with an emphasis on victim-perpetrator pardon procedures. These procedures will impose a huge burden on, and serious risks for, victims, raise questions about the voluntary nature of pardons, and are not designed to address the systemic and structural dimension of violations, thus falling short of ensuring reconciliation at societal level.

97. The tendency to expand the mandates of commissions, especially when not supported by adequate funding, multidisciplinary expertise of the commissioners and staff, and a sufficiently long preparatory period, is particularly challenging.

98. Truth commissions derive their power, to a large extent, from the moral authority and the expertise of commissioners, hence the selection of commissioners is crucial to their success. Neither direct nor consultative procedures have prevented some questionable appointments. Appointment procedures that insufficiently vet commissioners for professionalism, integrity and expertise or that prioritize the partisan political affiliation or ethnic identities of commissioners (likely to track prevailing political or social cleavages) continue to generate challenges to commissions. Apportioning seats within the commission to individuals who are meant to represent particular constituencies invites posturing and "block voting".

Additionally, more thought has been given to appointment procedures than to the underlying crucial criteria for selection.

99. As temporary bodies, truth commissions are, in general, not the implementing agencies of their own recommendations. This responsibility lies primarily on governments. Since attempted institutional fixes to the follow-up problem have not guaranteed the implementation of the recommendations, efforts should concentrate on the underlying function, which is to increase the accountability of governments.

100. However, the likelihood that *ex post*, commission recommendations will be heeded would improve if commissions strengthened their capability to frame recommendations in actionable terms. Furthermore, as experience has shown, in the end, the fate of recommendations depends largely on the leadership, advocacy and persistence of civil society organizations. Commissions should engage with such organizations as early as possible, and do whatever is in their power to strengthen them.

101. Commissions can significantly increase their impact by making contributions to the establishment of reliable and accessible archives – both those of truth commissions themselves as well as national archives. Finally, commissions are well placed to encourage and support cultural manifestations, art exhibits, memorials and museums, which enhance society's understanding of the plight and the strength of victims, empower them, and foster the formation of a culture of rights.

## **B. Recommendations**

102. On mandates, the Special Rapporteur urges States and other actors responsible for the design of mandates, including, when applicable, international actors, to exercise prudence in the drafting of mandates of truth commissions, which involves:

(a) Heeding basic considerations of functional adequacy: commissions should not be laden with objectives which they have no means to satisfy. The trend of moving away from assigning commissions discrete, specific functions, towards assigning to them open-ended objectives that cannot be satisfied needs to be stemmed;

(b) Paying renewed attention to the victim-tracing function, recalling the significant contribution that earlier truth commissions made to this task, and recent advances in forensics;

(c) Ensuring that truth commissions continue to dedicate specific attention to women's rights and adopt a gender-based approach in their design and functioning;

(d) Recognizing that reconciliation is not a function commissions can bring about on their own. In particular, perpetrator-victim pardon procedures place undue burdens on victims and cannot redress the systemic and structural dimension of atrocities, which constitute an attack against the very principle of the rule of law;

(e) Treating with caution the assignment of arbitration functions to a truth commission, and inviting States instead to consider establishing functionally differentiated, albeit significantly coordinated, bodies dedicated to corruption cases and other economic crimes.

103. On the selection of commissioners, the Special Rapporteur:

(a) Recalls the importance of making correct choices, given that the authority and legitimacy of truth commissions depends heavily on the qualities and standing of commissioners. At the same time, he notes that there is no currently

employed selection procedure that necessarily guarantees good outcomes or one that cannot be foiled;

(b) Underlines that consultative methods of selection, while reflecting the very idea of inclusive transitional justice measures, should not be set up in ways that overemphasize criteria of representativeness at the expense of competence;

(c) Calls 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. Whether direct appointment or consultative procedures are employed to select commissioners, a careful balance between expediency and representativeness must be ensured, with competence as the guiding principle;

(d) Recommends the development of international guidelines on incompatibilities, conflicts of interest and ethical standards for truth commissioners.

104. On staffing, budgeting and management, the Special Rapporteur emphasizes that:

(a) Given the increased complexity of the functions of truth commissions, which has led to an expansion of their staff sizes and composition, their budgets, and their internal operations, the proper setting up of a commission predictably takes time. As preparatory periods of two to three months have proven insufficient, this period should be extended to about six months;

(b) 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. At the same time, truth commissions are required to make use of the funding in a responsible and transparent manner;

(c) Donor States and agencies should systematize and make available relevant experiences concerning staffing, budgeting and procurement procedures;

(d) Those responsible for the design and operation of truth commissions should take measures that facilitate the harmonious and efficient operation of commissions and that prevent the emergence of internal fractures. Adopting efficient means of vetting commissioners for professionalism, integrity and expertise; avoiding appointments on the basis of criteria that will likely reproduce existing social cleavages; adopting promptly provisions that define the public role of commissioners and their relationship with different stakeholders; and making the posts of commissioners full-time, paid positions are some of the measures that help mitigate internal tensions.

105. On recommendations and follow-up, the Special Rapporteur urges:

(a) States to meet their responsibility of implementing a truth commission's recommendations, most adequately through a robust network of implementing entities;

(b) Truth commissions, especially if their functions retain the present breadth, to increase their own competencies in budget generation and planning and articulate recommendations aligned with sectoral reform projects and development plans, to increase the likelihood that their recommendations will be seriously considered and implemented by State agencies;

(c) Civil society (unhindered and enabled by governments) to assume its vigilant and involved role, and the international community its cooperative and yet

demanding functions, so as to increase the incentives for governments to implement commission recommendations;

(d) Truth commissions and civil society to establish close and stable cooperation between them during the work of a commission, cooperation that should extend to follow-up mechanisms. Civil society organizations should play a fundamental role in monitoring implementation, and their training, support and strengthening should represent a priority for donors within a comprehensive transitional justice approach.

106. On archives and other means of extending the life of a commission, the Special Rapporteur encourages:

(a) States to opt for archiving modalities that maximize access to all stakeholders, in compliance with the rights to privacy and personal security, convinced that the establishment of truth commission and national archives contribute in a substantial manner to realizing the right to truth and may further criminal prosecutions, reparation, and institutional and personnel reforms. Technological advances in archiving that allow for selected blocking of parts of documents should be utilized, and good practices gathered by expert bodies should be applied. The Special Rapporteur calls for the development of international standards on archiving and strongly supports such an initiative;

(b) Truth commissions, States and donors to plan, finance or otherwise support cultural interventions, including art exhibitions and memorials, which can contribute to providing recognition for victims, ensuring them a role in the public sphere, and generally foster a culture of rights.

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