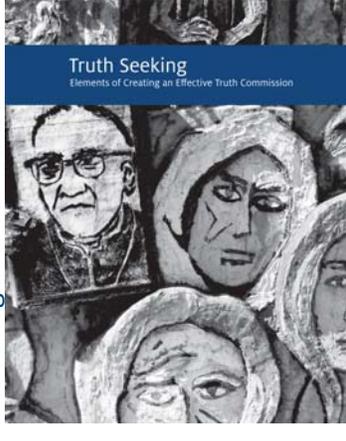


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## Chapter 3

### Ensuring the Legitimacy and Independence of a Truth Commission

**“It’s okay if they give us truth now, then the other things will follow. The first thing is finding out . . . .”**

Wife of disappeared man, Nepal

A perception of legitimacy is essential for a truth commission to be successful. The public's confidence that the commission is genuine will improve the willingness of victims, witnesses, and the public to participate, and facilitate access to information. Legitimacy can also protect the commission from political opponents invested in maintaining silence or denial about past abuse.

### **A Consultative Approach to Strengthening Legitimacy**

Whether created by executive or legislative action, most truth commissions have been formed with limited direct public participation. In some cases, this is justified by the need to act quickly during a political transition. However, expedience may come at the expense of a meaningful consultation with all interested parties and their involvement.

Under ideal conditions, the contours of a commission are developed through a consultative approach that includes open discussions between government, civil society, victims groups, and others who may be impacted by the work of the commission. Facilitating public participation not only demonstrates a commitment to legitimacy, it also helps lawmakers to understand the needs of victims. Submissions from experts and community representatives can be solicited orally, or in writing, or through workshops. State rights agencies, such as an ombudsman or human rights commissioners, often manage these consultations.

Above all, consultation with victims' groups should be a priority during the establishment of a truth commission. Without their involvement and trust, a truth commission cannot credibly address their specific needs. It is also important to consider that for indigenous peoples, and some other groups, "good faith" consultation on any policy that may affect their rights is part of the state's duty to obtain their "free, prior and informed consent."<sup>26</sup>

Consultation should continue during all phases of a truth commission's work, even when the commission was established quickly. Communication and dialogue with civil society, especially victims' groups, should be maintained throughout operations to allow for ongoing public feedback and assessment.

The South African Truth and Reconciliation Commission was formed after an extensive consultation process carried out by parliament, which included public discussions on draft legislation. Participation in the legislative debate helped to increase public interest and understanding of TRC-related policies when they were finally implemented.

Consultations can be effective and creative even in the absence of an adequate venue. In the aftermath of the Indonesian occupation of 1999, the United Nations organized dozens of community meetings under the leadership of Sergio Vieira de Mello in Timor-Leste. Consultations with indigenous communities helped the United Nations to develop a mandate for the truth commission that incorporated customary indigenous law to facilitate communal reconciliation.<sup>27</sup>

An example of a missed opportunity is the Truth and Reconciliation Commission of the Democratic Republic of Congo, which was established as a result of peace negotiations in 2002.<sup>28</sup> Commissioners were appointed even before the commission had a legal statute, and there was the wide perception that appointments were dependent on political affiliation to the parties represented at negotiations.

In Brazil, the National Truth Commission resulted from a 2008 demand from civil society at the National Conference on Human Rights.<sup>29</sup> The conference was the highest-level public deliberation on human rights held by the federal government, and its findings shaped the Third National Plan for Human Rights,<sup>30</sup> which pointed to the

26 United Nations Declaration on the Rights of Indigenous Peoples, General Assembly Resolution 61/295, 7 September 2007, A/RES/61/295. See Art. 19.

27 UNTAET Regulation No. 2001/10 on the Establishment of a Commission for Reception, Truth and Reconciliation in East Timor, UNTAET/REG/2001/10.

28 Truth and Reconciliation Commission of Democratic Republic of Congo (Commission Vérité et Réconciliation de la République Démocratique du Congo) created by Law No. 04/018, [www.leganet.cd/Legislation/DroitPenal/Loi01.18.30.07.2004.CVR.htm](http://www.leganet.cd/Legislation/DroitPenal/Loi01.18.30.07.2004.CVR.htm)

29 11th National Conference on Human Rights, Brasília, Brazil, December 15-18, 2008. [http://portal.mj.gov.br/sedh/11cndh/site/\\_index.html](http://portal.mj.gov.br/sedh/11cndh/site/_index.html)

30 Human Rights Ministry of Brazil. Third National Plan for Human Rights (Terceiro Programa Nacional de Direitos Humanos, PNDH-3), Decree n° 7.037/2009 and Updated by Decree n° 7.177/2010, <http://portal.mj.gov.br/sedh/pndh3/pndh3.pdf>

creation of a truth commission. Subsequently, the government established a working group, with representation from civil society. After several months of parliamentary debate, the bill passed with the support of all represented parties, and was sanctioned by the president in November 2011.<sup>31</sup> The extended dialogue that led to the creation of Brazil's truth commission and the broad support of different social sectors for the project are reflected in the strong political legitimacy and positive public opinion now enjoyed by the commission.

### **Political and Operational Independence of the Commission**

Commissioners and their staff need to be able to conduct their work without interference. Truth commissions must only be subject to the national legal framework and their legal mandate. Commissioners and staff must exercise their powers without fear, favor, or prejudice. In practical terms, the independence of a commission is defined by its ability to apply its legal mandate free of actual or apparent pressure, unwarranted influence, or dependence on any other institution or person.

The following conditions are essential for the independence of a commission:

- A transparent process for the appointment of commissioners
- Legal guarantees that commissioners can only be removed for a just cause
- Protection of commissioners against threats or retaliation
- Financial, administrative, and operational autonomy

### **Risks of Political Dependence**

Truth commissions must avoid being subjected to allegations of bias, as this will negatively impact their effectiveness and render them less likely to successfully address the causes of the conflict under inquiry. In many parts of the world, civil society has a deep-rooted distrust of official inquiries because of a government history of using them to minimize or dismiss allegations of serious abuse.

People with questionable or dubious links to the subject matter under inquiry should not form part of a commission. A controversial example is Kenya, where insufficient scrutiny was given to the appointment of commissioners to the Truth, Justice and Reconciliation Commission (TJRC). Months after the TJRC began operations, its chair was alleged to have illegally acquired land and participated in other crimes. After he resigned, the TJRC lost much of its credibility. The ensuing litigation and internal disarray paralyzed the commission for over a year.

### **Financial and Operational Autonomy**

Independence is also promoted by granting commissions the authority to manage their budgets and fulfill their mandates without interference:

- *Financial autonomy*: Truth commissions should enjoy financial autonomy, maintaining control over all financial and budgetary decisions. Commissioners should be given a reasonable budget that they alone manage and the authority to raise additional funds.
- *Operational autonomy*: Commissioners should have the authority to interpret their written mandate, establish priorities and methods for their inquiry, and make staffing decisions. Government institutions should avoid interpreting the mandate of a commission or hiring staff in anticipation of commissioners' decision.

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<sup>31</sup> Supra note 21.

Financial and operational autonomy should be exercised within the strict standards of government transparency, good administrative practices, and applicable labor legislation. Relations with governmental institutions, such as auditors and treasury, should respect the commission's autonomy.

Commissions' internal administrative and human resource procedures must ensure that funds are used appropriately and that the rights of staff are respected. Publishing complete financial information can help the commission to gain public trust.

### **Guiding Principles for Maintaining the Independence of a Truth Commission**

Independence can generally be achieved if the following standards and principles are accepted:

- State agencies have a duty to respect the independence of the commission. They must assist and protect the commission to ensure its impartiality, dignity, accessibility, and effectiveness.
- An efficient, competent, and impartial inquiry depends on the financial security and organizational professionalism of a commission.
- Commissioners and their staff should not be (or be perceived as being) biased to a political faction. This includes those seconded from government agencies.
- Commissioners should work for the commission on a full-time basis.
- The commission should have sufficient funds to enable it to perform its functions to the highest standards and participate in determining its resourcing.
- Commissions should have properly trained staff and adequate facilities, and be fair, accessible, and responsive.

### **Selecting Commissioners**

Selecting commissioners is critical, as they will determine the policies, methods of investigation, and content of the final report. In some cases, they are directly involved in investigations or research. They are also the public face of the truth commission, and their personal and moral authority is essential when engaging with perpetrators, authorities, and the public.

Commissioners should be selected through a transparent and preferably consultative appointment process, with input from different sectors of society, especially from victims and other marginalized groups. In some commissions, the selection process starts with nominations from the public and the formation of a panel to review nominations, interview finalists, undergo public scrutiny, and recommend a shortlist of candidates to an appointing authority.

The timing of commissioner selection is also important. Commissioners should not be appointed until a truth commission's enabling law or decree has been issued. Past attempts to expedite the process by appointing commissioners swiftly, such as immediately following the conclusion of a peace agreement, have weakened the prospects for effective truth seeking.

Historically, commissioners are selected in two ways:

- Exclusively based on their personal qualifications, moral leadership, and prestige. Most commissions in Latin American have been constituted this way (similar to the "blue-ribbon panel" in the United States). This form of appointment is fast and may transfer the legitimacy and prestige of the individual to the commission. However, this must be balanced against the risk of appearing elitist, resulting in distrust and resentment.

- As representatives, at least symbolically, of certain constituencies, such as women, races, ethnicities, or religious groups. Most commissions outside of Latin America have followed this approach, to appease fears of discrimination and marginalization.

The process of nomination and selection should combine evaluations of candidates' personal caliber and representation. The most successful commissions have combined the appointment of charismatic leaders and those of diverse background.

### Selection Criteria for Commissioners

Selection committees should consider the following factors in nominating and appointing commissioners:

- *Commission size:* The number of commissioners should be large enough to represent society fairly, but small enough to constitute a manageable and sustainable group. Most commissions have had 3–17 members. Although commissioners should be expected to work by consensus, an uneven number of commissioners should be appointed to ensure democratic decision-making (by vote).
- *Fair representation:* Appointments should be broadly representative of diverse perspectives and backgrounds in order to avoid bias (or the appearance of bias). Selection committees should consider the geographic origin, religion, language, class, and ethnicity of candidates, among other factors.
- *Human rights record:* Each commissioner must have an impeccable record, free of any involvement in criminal activity, particularly human rights violations or corruption. They should have a record of promoting human rights or serving the public interest. Commissioners should enjoy unquestionable public confidence and be considered above partisan politics.
- *Neutrality:* Prospective commissioners should be vetted to ensure that they have no questionable links to the subject matters or organizations under inquiry. While it is common for state personnel to be seconded to commissions of inquiry, this is normally done in a way that protects the commission's independence and integrity, for example, by temporarily suspending the appointee's former governmental position.
- *Gender:* It is important to incorporate gender-based criteria in the commissioner selection process. Female commissioners offer a supportive and affirming environment for the participation of female victims. For example, this was evident in the dynamics of public hearings held by the Ghana National Reconciliation Commission, where three of nine commissioners were women. Having female commissioners was also important in South Africa, where the Truth and Reconciliation Commission responded to requests to establish women-only hearings chaired by female commissioners.
- *Full-time commitment:* No commission can operate effectively on a part-time basis. National commissioners should be required to work full-time while serving on the commission and avoid other work or responsibilities. Foreign commissioners should work a minimum number of days per quarter and avoid any other work that could create a conflict of interest.
- *Expertise:* Recruitment of commissioners should include a search for professional expertise in a range of disciplines that could be useful. Such disciplines may include law, in particular human rights and constitutional law; history; economics; forensics; gender studies; social anthropology; psychology; medicine; religion; journalism; and conflict resolution.

### Good Practices for Appointing Commissioners

#### South Africa

The South African Truth and Reconciliation Commission was formed in 1995 to record and acknowledge crimes motivated by the political aims of protecting apartheid or fighting to abolish it.<sup>32</sup> Priscilla Hayner describes the commission's

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32 Mandate of the Truth and Reconciliation Commission in South Africa, "Promotion of National Unity and Reconciliation Act of 1995," July 19, 1995.

process of selecting commissioners: “The South African commission was the first to design a process based on an independent selection panel and public interviews of finalists. The empowering legislation indicated only that the commissioners should be ‘fit and proper persons who are impartial and who do not have a high political profile.’ A selection panel, including representatives of human rights organizations, called for nominations from the public. It received three hundred nominations, which it then trimmed to fifty people for interviews, which took place in public session and were closely followed by the press. It then forwarded a list of twenty-five to President Nelson Mandela for the final appointment of seventeen. To provide geographic and political balance, Mandela included two members who did not go through the full screening process.”<sup>33</sup>

### Sierra Leone

The law that created Sierra Leone’s truth commission was inspired by South Africa’s, with a significant variation: the appointment of foreign commissioners and the role of the United Nations.<sup>34</sup> According to Hayner: “The special representative of the UN secretary-general in Freetown was appointed as ‘selection coordinator,’ and a panel was formed (including members appointed by the former armed opposition, the president, the religious community, and human rights groups). The inclusion of the former armed opposition was important to gain its support for the process. This panel identified four national members based on public nominations and interviews. The UN high commissioner for human rights nominated three international members. Both national and international members were formally appointed by the president.”<sup>35</sup>

### Timor-Leste

The Commission for Reception, Truth and Reconciliation in East Timor was established by the UN Transitional Administration in East Timor (UNTAET), which appointed commissioners on the advice of a selection panel.<sup>36</sup> It included one member appointed by each of several civil society organizations and political parties. In calling for public nominations, the panel was required to consult broadly with civil society and give special consideration to diversity issues, including regional and gender representation.

### Hybrid Truth Commissions

Occasionally, both local and foreign persons are appointed as commissioners and senior staff members, in order to give the commission greater credibility and comparative expertise. These “hybrid commissions” are generally established to avoid (or minimize) suspicions of bias when local investigative skills and expertise may be lacking. Examples of such commissions include Sierra Leone, Guatemala, Solomon Islands, and Kenya. International candidates should still be subject to a vetting process.

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33 *Unspeakable Truths*, 212.

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

35 *Unspeakable Truths*, 212, citing the Sierra Leone Truth and Reconciliation Commission Act.

36 *Supra* note 27, Section 4.



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