INTERNATIONAL GUIDELINES FOR THE CREATION AND OPERATION OF TRUTH COMMISSIONS: A PRELIMINARY PROPOSAL

PRISCILLA B. HAYNER*

I

INTRODUCTION

After nearly fifteen years of significant international attention to official commissions investigating past rights atrocities—and four years since such bodies have been known generically as “truth commissions” and have been studied comparatively—it is appropriate to take stock and consider general recommendations for the future.¹ All truth commissions are created on an ad hoc basis, usually set up in the midst of a political transition as a means to respond to the legacy of a horrific past. These commissions are intentionally short-lived, and neither mirror the courts nor a human rights ombudsman in their function and aims. By their very nature, truth commissions are quite pliable, and can be created in almost any shape or size, and to fit any number of agendas, depending on the circumstances and who holds the most influence over their design and operation. While there are good reasons for each to be shaped and empowered differently, there must be minimal standards for such a body to be considered a serious, good faith effort and respectful of those who will be affected by its work.

International guidelines, or minimal standards, could well be helpful to those crafting a truth commission. The crafters virtually always begin with no experience in ad hoc, official truth-seeking on great numbers of rights abuses, and may be genuinely unaware of the pitfalls that lie ahead. Guidelines could also, of course, facilitate appropriate international and national oversight by

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*Senior Fellow, World Policy Institute, New School for Social Research.
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those who take an interest in the government's rights policies.

The first detailed proposal for such guidelines was published in 1996 by the U.N. Subcommission for Prevention of Discrimination and Protection of Minorities, in the form of a draft "Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity." This set of principles outlines a right to the truth, recommends a universal standard for the protection and accessibility of documentary evidence, and calls for extrajudicial commissions of inquiry to be set up to establish the facts. It is not clear what states would be subject to these recommendations, although the recommendations appear to be very far-reaching.

This set of principles is both broad and fairly detailed, and is an important contribution to an otherwise still-fuzzy field. For example, the principles recommend the following: that members of a commission of inquiry be irremovable; that evidence resulting from commission investigations be safeguarded for later use by the courts; that naming perpetrators may be appropriate if certain guarantees are respected; that a commission's final report should always be public and widely disseminated; and that legislation or other measures should be enacted to oversee the storage and preservation of pertinent archives, to which the commission and courts should be given free access.

I would second many of the principles spelled out in this U.N. document, but I am troubled by others, particularly those arising out of one of the core presumptions that pervade the document. Specifically, I would question the stated assumption that establishing and publicizing details about past abuses will always reduce the likelihood of future abuses or conflict, and the resulting recommendation that there is a "duty to remember" that cannot be questioned.

The question of whether intensive truth-seeking should be a universal norm is still open for debate (which I will return to below). But I would submit that there is agreement on a more important point: that if official truth-seeking is undertaken, it must be undertaken in good faith and satisfy certain minimal requirements. It is here that guidelines could be very helpful.

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2. U.N. Subcommission for Prevention of Discrimination and Protection of Minorities, Annex II at 10, U.N. Doc. E/CN.4/Sub.2/1996/18 (1996) [hereinafter Draft Principles]. This set of principles is not final; it will be further revised by the U.N. Subcommission meeting in August 1997. As of publication, the final set of principles has not been officially released, although a draft of the final document is included as an appendix to this Symposium.

3. Id. at 11, 13-14, principles 6(b), 12-18.

4. Under the heading "The Duty to Remember," the Draft Principles state the following:

A People's knowledge of the history of their oppression is part of their heritage and, as such, shall be preserved by appropriate measures in fulfillment of the State's duty to remember. Such measures shall be aimed at preserving the collective memory from extinction and, in particular, at guarding against the development of revisionist and negationist arguments.

Id. at 10, principle 2.
II

Truth Commissions Growing in Number

Truth commissions have been multiplying rapidly around the world in recent years. Although each new commission is different from the others, all grow out of similar transitional dynamics and with the same general ends in mind: to confront, record, and acknowledge the truth about a past period of widespread rights abuses, with the hope of contributing to reconciliation, healing, and reform. A truth commission should be distinguished from a government human rights office set up to watch over current human rights abuses, and also from non-governmental projects documenting past abuses. A commission, officially sanctioned by the government (and the armed opposition, where relevant), focuses on documenting and investigating a pattern of abuses in the past, and sets down recommendations of how to prevent the recurrence of such practices in the future.

A truth commission can play an important role in a country’s transition out of a horrible past precisely because such a commission is an official, government-sanctioned process of acknowledging the extent of past events. If properly established and effectively run, such a commission can be used to begin processes of serious reform, reparation to victims, and other forms of accountability. Its official status may result in greater access to government information and documentation, greater security or protection in its investigations, more attention from the press and the international community, and wider distribution of its report.

Of course, there should always be concern that a truth-seeking body might be created with no coinciding commitment to institute real reform. While it may contribute to healing and help establish a historical record, a commission itself does not have the power to institute reforms or make policy changes. It must depend on the political will and interest of the government for its recommendations to be given force.

We should expect differences between commissions, as each country must shape a process out of its own historical, political, and cultural context. Unlike courts, which generally stand as permanent bodies, and about which there are many international norms regarding their appropriate structure, components, powers, and the minimal standards under which their proceedings should be undertaken, there are many aspects of truth commissions that will change from country to country. There is an accepted range of powers and mandates within which different commissions will fall. Some commissions are given subpoena powers, or even strong search and seizure powers, and hold public hearings in front of television cameras. Others hold all investigations and interviews of victims and witnesses behind closed doors, may not have the power to compel witnesses to testify, and release information to the public only through a final report. As well, commissions’ mandates will differ in relation to the types of abuses to be investigated, perhaps including acts by the armed opposition as well as government forces, for example, or perhaps limited to certain specific
practices such as disappearances. Such variations are a natural reflection of the differences in countries’ politics, political culture, history, and needs.

III

THE CAVEAT: RELIVING HORDORS IS NOT FOR EVERYONE

Must an obligation to investigate the truth be imposed at all costs? Are there conditions in which a truth commission might not be such a good idea? There are some countries, although few, which emerge from a horrid civil war or other period of intense violence with no interest in investigating the details of recent events. Where this reflects a broad consensus, a policy of reconciliation through silence, through trying to forget the past, should be acceptable and accepted by the international community. Some observers may question a policy of reconciliation based on forgetting, but it would be short-sighted to overrule such a consensus without a close look at the factors behind it. My research in Mozambique, for example, reveals a broad agreement that digging up the horrors of that war might only tear apart the measure of peace and reconciliation that has been achieved.5

But the position taken by many international rights advocates seems to prescribe truth-seeking unconditionally. As their starting point, scholars cite an emerging right to truth that is outlined in international conventions and reinforced by recent decisions in international fora.6 The draft U.N. principles described above reflect a common position taken on this issue:

Every society has the inalienable right to know the truth about past events and about the circumstances and reasons which led, through the consistent pattern of gross violations of human rights, to the perpetration of aberrant crimes. Full and effective exercise of the right to the truth is essential to avoid any recurrence of such acts in the future.7

I agree that there is a right to the truth. But should a society’s right to know the truth be turned into an unbending obligation? That is, if those persons most directly affected by the knowledge, the victims themselves, are not interested or not yet prepared to re-enter into these horrors, should they be obliged to do so? For a number of reasons—perhaps because support systems have not been set up, such as mechanisms to deal with re-awakened trauma, or because they have other urgent and pressing priorities, or because they fear that talking about the past will spark conflict anew—victims sometimes show no interest in focusing on their past suffering. Some communities have found other routes to reconciliation. The desire for an official truth-seeking process could also some-


times be a function of time, as institutions are strengthened and as the tensions that might spark conflict die down; countries might wait years or even decades before they are able to confront and honestly record some events. The assumption behind the argument that the future is always better if the past is exhumed—and done so immediately at the point of transition—is troublesome, and may lead to inappropriate recommendations.

In the great majority of cases, however, there are some groups or sectors of society that do very much want the full truth revealed, and others whose interests are better served either by silence or by allowing only a narrow portion of the truth to be revealed. It is in these circumstances where continued denial is likely to result in a simmering conflict and hinder attempts to promote societal healing.

For those in the international community watching these transitions from afar with an interest in combating impunity and solidifying peace, this presents a bit of a dilemma. It is not obvious, nor is there a simple test, to determine where a truth commission should be prescribed, and where a government should be encouraged, or even pushed, to confront the pains of the victims in its society. There is a need for further thought on how these dynamics might be measured or gauged. For now, we can only cite examples such as Mozambique and, perhaps, Cambodia where, despite some nudging from the outside, there appears to be little interest in delving into the details of the past. Both cases are complex; I leave the details to be explored elsewhere.

There is another difficulty around the right to the truth: Where there have been massive numbers of atrocities, obtaining the full truth on an individual level may simply be impossible. Regardless of international norms, states rarely have the resources and ability to investigate all individual cases, even where clear evidence and witnesses exist, which is often the case. Thus, while a case-by-case individual truth is usually demanded by victims (and expected by most of those who give testimony), and individualized truth is called for by those suggesting international norms, usually only a global truth, a description

8. This is not to dispute the benefits of undertaking investigations at the point of transition, as is done in so many countries. But in some circumstances, this may not be possible or may not best suit the interests of a country.

9. The case of Cambodia presents an interesting example of how non-national players sometimes push a country to confront its past. The main project in Cambodia to document the Khmer Rouge crimes of the 1970s is through a U.S.-funded organization, growing out of an initiative of the U.S. government (originally funded through the Cambodia Genocide Justice Act, Pub. L. No. 103-236, 108 Stat. 486 (1994), to fund the investigation of Khmer Rouge atrocities). But, for a host of reasons, it is still not clear how much interest there is from Cambodians in this work. On the other side, there are cases where a government has had trouble obtaining international financial support for truth-seeking initiatives, because the international community providing it with aid believes that other development priorities are more important. Malawi may be such a case.

10. The Draft Principles state, “Irrespective of any legal proceedings, the families of victims shall have the right to know the truth about the fate of their relatives. In cases of enforced disappearance or of abduction of children, this right shall be imprescriptible.” Draft Principles, supra note 2, at 10, principle 3. Elsewhere, José Zalaquett argues that “[t]he truth must be complete ... [including] what is the fate of the victims, individually, who gave the orders and who carried them out.” See José Zalaquett, Confronting Human Rights Violations Committed by Former Governments: Principles Applicable and Political Constraints, in State Crimes: Punishment or Pardon 30 (Aspen Institute,
of patterns, is possible. This fact is always a disappointment to the victims, who may have provided testimony with the hope that their own case would be solved.

IV

INTERNATIONAL GUIDELINES: A PRELIMINARY PROPOSAL

What might be considered minimal guidelines for the creation and operation of a truth commission? What minimal requirements should we expect a sponsoring government to satisfy? In addition to many of the specific principles outlined in the U.N. document, I would propose the following.

A. Public Participation in Crafting the Commission

Truth commissions are usually created through presidential decree or legislation, or agreed to in a negotiated peace settlement. There has typically been little direct public participation in the crafting of their terms of reference, due to the nature of a fast-paced transition, the limited communication or public participation in initial transitional policies, and the sense of urgency in establishing such a commission quickly. Despite these constraints, those considering such a commission should give much more attention to how the public, victim communities, and non-governmental organizations can voice their opinions and concerns as the terms of such a commission are shaped. Communication with these groups should be maintained during the work of the commission to allow public feedback on the methodology and impact of the commission’s work.

B. Time and Resources for Preparation and Set-Up

Many past truth commissions have suffered from the same problem: They have lost much time in administrative and logistical preparations, which have cut significantly into the limited period of time that each commission is given to undertake and complete all of its work. Essential organizational details such as renting an office, hiring staff, buying desks and computers, and adapting or creating a database program, as well as larger tasks such as raising funds and designing a public outreach program, can easily consume months of a commission’s time before it can even begin investigations. Out of an operational mandate of perhaps six months to two years, such delays can be disastrous and cause much consternation on the part of observers, especially victims and rights advocates, who may be frustrated at the commission’s slow start. Those establishing future commissions should avoid this major pitfall by mandating explicit

11. In contrast to other commissions to date, South Africa offers an example of extensive public participation in the creation of its Truth and Reconciliation Commission, including extensive parliamentary hearings on draft legislation and submissions of comment from many organizations and other interested parties.
set-up time, written into the terms of reference (which outlines a commission’s powers and structure), before the commission’s operational clock begins. During this time, resources, support, and international consultation should be provided, as needed, to assist in the commission’s preparations.

C. Flexible but Strong Mandate for Investigation

Each commission’s mandate should be appropriate to the situation or conflict at hand, and flexible enough to allow interpretation by the members of the commission. It is far preferred that a commission’s mandate does not list specific events to be investigated, instead using more general language to allow the commission to shape its investigations and report around the facts and patterns revealed. Language calling for investigation into “serious acts of violence which have impacted on society” or “gross violations of human rights, including violations which were part of a systematic pattern of abuse,”12 have given past commissions the leeway to judge which crimes, or which patterns of abuse, demand investigation and public explanation.

D. Political Backing and Operational Independence

Clear backing from the government is essential for such a commission to work with full authority. Explicit official support for its work can provide increased security, a higher public profile, and facilitate access to restricted or classified government documents. The government, and armed opposition, where relevant, should be expected to provide records to the commission pertinent to its investigations, including restricted documents. Officials or former officials with knowledge of the acts and events under investigation should be expected to provide information to the commission, either in public hearings or in private meetings.

Such support for a commission’s work should coincide with clear operational independence, necessary for the commission to undertake investigation into often politically sensitive topics. Once established, the commission should operate free of direct influence or control by the government, including in the interpreting of its written mandate (within any constraints that are indicated), in developing its operating methodology for research and public outreach, and in shaping its report and recommendations.

E. Appropriate Funding and Staffing

To the extent possible, full funding for the commission should be committed and available at the start of the commission’s work. This is particularly important if the commission is fully or largely funded by the government that is under investigation, so that the question of continued funding cannot be used, or be perceived to be used, as a point of leverage to influence the commission’s

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12. This approximates the language in the mandates of the El Salvador and South African truth commissions, respectively. See El Salvador Peace Accord, supra note 1, at 190; § 4(a)(i) of Promotion of National Unity and Reconciliation Act of 1995 (S. Afr.).
work. While circumstances and needs differ between countries, staff might include lawyers, human rights experts, computer specialists, criminal investigators, researchers, therapists or social workers, forensic specialists, historians, data entry staff, and security personnel.

F. Implementation of Recommendations

While there might be no prior commitment to implement the recommendation of a commission, there should be good faith that the government, and the opposition, where relevant, will give serious consideration to its recommendations and give credence to its findings.

G. The Role of the International Community

Responsibility for a successful commission does not lie solely in the hands of the sponsoring government. There are a number of important roles for the international community, including not only in oversight and funding, where needed, but also in providing information. Foreign governments often have extensive information in their files pertaining to specific cases or ongoing practices in the country under study, especially when these foreign governments actively supported either the government or the opposition during the years when abuses were common. The U.S. government is of course well known for its extensive documentation, spread throughout many of its agencies, which tracks events, persons, and patterns of human rights violations. The United States and other governments should be expected to cooperate fully with the efforts of a truth commission, particularly when a commission has submitted a direct request for information and documentation from their files. The record in this area, particularly by the U.S. government, has not been strong.

V

CONCLUSION

Past truth commissions have varied widely in structure, mandate, operating methodology, and end product. Such differences are an appropriate reflection of the needs, constraints, and political culture of each country, and similar differences are to be expected in future commissions, yet to be created. But allowing for variation does not diminish the importance of minimal standards, such that any official truth-seeking process is done in good faith, and results in an honest and unrestricted investigation.

The guidelines suggested here, taken in conjunction with many of the principles outlined in the U.N. proposal, could begin to give us leverage points with which to press for serious efforts in investigating the past.