

Eszter Kirs¹:

Contours of the mandate of truth commissions

There are different types of political transition which shall be followed by long-term consolidation and fundamental changes in the structure of institutions and also in mind of the population. The course of gradual democratisation, a negotiated settlement of internal armed conflict or an overthrow of a repressive military regime create a special situation of urgent need for essential changes in life of the affected state or states and their society. In order to achieve an efficient transitional period, several measures are necessary to be taken. The actors of the conflict, former victims and perpetrators shall be reconciled with each other so that further conflictive events do not occur. Real reconciliation needs also a deep psychological change which is not easy to facilitate. Calling to account first of all those persons who bear the greatest responsibility for the human rights abuses committed during the conflict period is inevitable as well as drawing an overall picture about past events and the official acknowledgement of sufferings of the victims. Beyond these steps of the consolidation process also reasonable reparation ensured to these victims and usually great changes in institutional structure shall be realised in order to achieve the result of real changes, peace and security for the society.

The present study is dedicated to one aspect of the extremely complex process of conflict resolution, namely to the question how the official acknowledgement of the truth can be facilitated by the special tool of truth commissions. After Priscilla B. Hayner the notion of truth commissions can be determined by four characteristics: first, it focuses on the past; second, it examines not only a singular event but creates an overall picture about abuses committed in a definite period of time; third, some sort of authority is ensured to the truth commission that makes it possible to have greater access to information and greater security to undertake sensitive investigations; and finally, the function of a truth commission is limited for a period of time which is closed with the submission of a final report including its findings that is usually made public.²

In the following chapters those elements of this notion are the subjects of attention that frame the mandate of truth commissions. Accordingly, the first central issue is the question how past events shall be examined by a commission and how shall be a balance ensured by investigating so many individual cases that can serve personal reconciliation of people and at the same time,

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² HAYNER, Priscilla B.: Past Truths, Present Dangers: The Role of Official Truth Seeking in Conflict Resolution and Prevention. In: *International Conflict Resolution after the Cold War*, Ed: Paul C. Stern and Daniel Druckman, National Academy Press, Washington, D. C. 2000, page 341

not only accomplishing separate analysis of these events but using the limited time well to create an overall picture of the past. In the focus of further analysis is the eventual role of truth commissions in criminal prosecutions and its relation with judicial bodies. Finally, the third chapter deals with the question how the identification of former perpetrators can affect the contribution of the commission to long-lasting reconciliation.

Revelation of individual and general truth

The duty of a truth commission to present an overall picture about past events plays an outstanding role related to its contribution to peace and consolidation. A state accepting its findings acknowledges the past officially and at the same time the political and legal responsibility that might flow from it. The findings of a commission cannot be handled like academic reports as they have such harsh consequences. Therefore, the objectivity of the examination of facts and their interpretation shall be ensured to the largest possible extent.

It is not the duty of a truth commission to examine every single case, as it can be also impossible within the time limit of its mandate. On the other hand, reliable picture of the past cannot be drawn without factual evidences and sufficiently representative samples, and either the victim's role in reconciliation cannot be forgotten. They cannot be expected to get over past abuses without ensuring them an accurate record about the events that occurred to them and without reparation for their sufferings that can be determined only by examining their case in a sufficiently detailed way.

Each situation shall be examined separately as specific circumstances of the concrete cases can differ to such a large extent that totally different approach is necessary. Accordingly, the mandate of different commissions can cover examination of different aspects of the truth. In case of long armed conflicts ended by negotiations which have to touch numerous problematic aspects of a complex situation, the commission can be expected to analyze past events in their complexity. For instance, the 1991 Chapultepec Peace Agreement defined the mandate of the El Salvador Commission on the Truth that it should investigate serious acts of violence committed after 1980 which had such a harsh impact on society that the public urgently needed to know the truth.³ It is a very general mandate that ensured a broad space for the commission to decide what kind of concrete cases it intends to examine. In the course of its relatively short (8-9 months) function it presented 22,000 cases of disappeared, killed, tortured or kidnapped persons dealing with different sorts of crimes committed during the civil war.⁴ Although in general, human rights organizations were satisfied with the findings and work of the commission, it was also criticized not having touched some significant problems such as the cases of death squads. At the same time, it must be mentioned that the mandate of a commission can be determined in a broad and general way, but the commission cannot be expected to analyze all the relevant cases. This task can be given eventually to follow-up commissions which can finish the work of the truth commission on the level of individual truth after it finished its function on the level of general truth.

³ MATTAROLLO, Rodolfo: Truth Commissions. In: *Post-Conflict Justice*. Ed: Cherif Bassiouni, Transnational Publishers, Ardsley, New York, 2002, page 310

⁴ HAYNER, Priscilla B.: Truth Commissions: a schematic overview. In: *International Review of the Red Cross*. Vol. 88 Nr. 862, International Committee of the Red Cross, Cambridge University Press, Cambridge, June 2006, page 309

Under different circumstances past events that shall be analyzed by the commission can be determined in a narrower way as well, either because of the limited time of function or the lack of financial resources which components might restrict besides the ability of the commission to accomplish the mission of presenting an overall picture of the past. Such a case was the one of Chile. The National Commission for Truth and Reconciliation was established in 1990 to investigate abuses resulting death or disappearance. (It was highly controversial that the mandate did not cover those cases of torture and other seriously violent acts that did not result death.) It worked for nine months and presented 3428 cases. The great difference between the number of elaborated cases before the El Salvador and the Chilean commission is visible. The main reason was that the Chilean commission preferred investigating each case thoroughly to drawing a general picture about the truth. The practical reason was that one of the main aims of the commission was to find the whereabouts of the disappeared persons. This main focus can be seen not only on the mandate of the commission but also on the fact that after the Rettig Commission ended its function, the government established a “National Corporation for Reparation and Reconciliation” to go on with the work of the commission investigating the unsolved cases, finding the whereabouts of disappeared victims and oversee reparations to victims.⁵

This kind of follow-up truth seeking bodies can be necessary also because of the fact that time limit of the function of truth commissions usually hinders it to reveal the details of all cases. Truth commissions are usually established for a period of one to three years. There are examples where there was no time limit determined for the work of the commission, but these cases are not good examples to follow if we consider the need of efficiency. It is well-illustrated by the examples of early commissions: in Bolivia after three years of work in 1984 and in the Philippines after one year in 1987 the commissions were dissolved without ever publishing a final report,⁶ so without completing their main task of presenting an overall picture of the past. On the other hand, when the question of how long the commission should perform its function, another dilemma arises: how to find the balance between the desire for a detailed report and an accurate case-analysis and the significance of presenting the final report as soon as possible so that it can contribute to consolidation in the most critical period of democratic changes.

⁵ HAYNER, Priscilla B.: Fifteen Truth Commissions – 1974 to 1994: A Comparative Study. In: *Human Rights Quarterly*. Vol 16 (1994), The Johns Hopkins University Press, 1994, page 621-622

⁶ *Id.* page 601-602

Relation between commission investigations and criminal prosecutions

The need for deep analysis of cases cannot be separated from the need for repression, and it is always a question whether any role should be given to a truth commission in criminal proceedings.

This question is not relevant in the case where amnesty is declared before the truth commission is set up. It also can happen that after the commission finished its work a blanket amnesty is granted to all the persons affected by its investigations, such as in El Salvador where a week after the Truth Commission published its report, general amnesty was declared. (Moreover, the military responded to the report with a long, written statement, presented by the Defence Minister on the national television, which qualified the acts of the commission as illegal.⁷ This kind of lack of political will for supporting the improvement of reconciliation obviously undermines the efficiency of the work of the commission.)

There are only a few examples where the proceedings before the truth commission were connected to criminal trials, such as in Bolivia and Argentina, where criminal trials could have been commenced as a result of truth commission investigations.⁸ Besides, special alternatives can also be considered, such as the example of Ethiopia where not a truth commission was expected to accomplish investigations that eventually could have been used by the criminal court, but on the contrary, the Special Prosecutor's Office was entrusted to publish a truth-commission-like report about the abuses committed during the Mengistu regime. However, finally the SPO dropped the plan of publishing the report as it decided to concentrate only on prosecutions.⁹

The question how to regulate the relation between truth commissions and criminal courts shall be decided always on a case by case basis as different circumstances require different solution, but the less optimal situation is where this issue is not regulated at all, such as in the case of Sierra Leone. The Act on the establishment of the Commission declared its absolute independence. Besides, the priority of the Special Court to the national judicial bodies ensured by its Statute could not apply to the Commission as it was not a judicial body. In this way, they were working totally separately from each other that led to the duplication of work, waste of time and financial resources. On the other hand, people themselves living in Sierra Leone were confused about the relation and separation of the two institutions. A short practical story about this kind of confusion: someone ordered a taxi told the driver he was going to the Special Court, and the driver took him to the office of the Commission.¹⁰

One of the most significant questions related to the co-operation of the two bodies was the regulation of exchange of information. Despite the theoretical independence, the government gave a narrow discretion power to the Court to ask information from the Commission. In this case three conditions must have been fulfilled: the information requested must have been specific, essential to a fair determination of the innocence of the accused and it could not

⁷ HAYNER, Priscilla B.: *supra* note 4 page 629

⁸ *Id.* page 604

⁹ HAYNER, Priscilla B.: *supra* note 1 page 348

¹⁰ TEJAN-COLE, Abdul: The Complementary and Conflicting Relationship between the Special Court for Sierra Leone and the Truth and Reconciliation Commission. In: *Yearbook of International Humanitarian Law*, Vol 5 (2005), T. M. C. Asser Press, The Hague, 2005 page 323

reasonably be obtained from any other source.¹¹ The problem was that it was not clarified who is entitled to determine whether these conditions were met.

This regulation served the so-called “conditional information sharing model”, but in practice the lack of concrete determination of conditions caused free exchange of information mainly towards the Special Court.¹² It was a significant obstacle related to the participation of ex-combatants to the reconciliation process. Many of them were afraid that their statements given to the Commission would be used against them, or after these statements they would be subpoenaed to the Special Court as a witness in the proceeding of their commanders whom they were still depended on.

Identification of former perpetrators and the possibility of victimization

Deciding about the question whether truth commissions should play a kind of subsidiary role beside judicial bodies another dilemma arises whether it shall publicly name individuals involved in the specific cases elaborated. Naming perpetrators can be equal as pronouncing them guilty. In this case guarantees of a due process shall be ensured which are not the same before a truth commission as those required by a judicial body. The El Salvador Commission made clear the degree of certainty related to evidences. It based its findings (1) on highly convincing evidence, (2) on substantial, very solid evidence or (3) on those evidences which were more to support the finding of the Commission than to contradict it.¹³ It is obvious that these requirements are not as strict as the guarantees ensured according to the presumption of innocence applicable before criminal courts. The dilemma is given whether it is a right decision to name names especially considering the eventual tragic “street-consequences” if the security of the affected persons is not ensured sufficiently.

Obviously, the decision is highly influenced by the fact whether there is a political will to publish names of former perpetrators that very often fails such as in the case of Chile as an example for negotiated transition to democracy, where those persons who held the greatest responsibility for past tragic events still occupied senior positions within the state apparatus.

Irrespectively of the reasons, not to name names raises the question how truth can be told without identifying the actors involved in past events. The El Salvador Commission clearly rejected the possibility of an “abstract” analysis stating:

“[...] the whole truth cannot be told without naming names. After all the Commission was not asked to write an academic report on El Salvador, it was asked to investigate and describe exceptionally important acts of violence and to recommend measures to prevent the repetition of such acts. [...] Not to name names would be to reinforce the very impunity to which the Parties instructed the Commission to put an end.”¹⁴

Although the opinion of the Commission is clear and understandable, the last sentence can be debated. Truth commissions are established not to solve all the problems and accomplish all the duties deriving from democratic changes and the need for reconciliation.

¹¹ *Id.* page 327

¹² PRIDE (Post-conflict Reintegration Initiative for Development and Empowerment): Ex-Combatant Views of the Truth and Reconciliation Commission and the Special Court in Sierra Leone. Freetown, 2002. www.ictj.org/downloads/PRIDE%20report.pdf page 18

¹³ MATTAROLLO, Rodolfo: *supra* note 2 page 318

¹⁴ MATTAROLLO, Rodolfo: *supra*.note 2 page 318

Besides, there is always a high risk of victimization. It shall be determined in each case who are the perpetrators and whose cases shall be examined by the commission. Although in most cases the offences committed by regular armed or security forces are more systematic in their nature, full truth cannot be revealed without dealing with crimes committed by members of resistance movements. In the case of South Africa the Truth and Reconciliation Commission declared as a fundamental principle of its work that it intends to reveal the acts committed by both sides. It emphasized in its Final Report that the idea of “just war” cannot entitle liberation movements to commit crimes:

“A venerable tradition hold that those who use force to overthrow or even to oppose an unjust system occupy the moral high ground over those who use force to sustain that same system... This does not mean that those who hold the moral high ground have carte blanche to the methods they use.”¹⁵

It was a noble aim of the Commission, however, it was often criticised for having prepared a visibly “ANC-influenced” report. The South African case is not unique that there was a risk of victimization. For instance, the Compensation Act based on the findings of the Peruvian Truth and Reconciliation Commission does not consider terrorists as victims even if they died as a result of criminal acts, even if they were tortured or disappeared. After the opinion of Salomón Lerner, who was the President of the Commission, although they handled these persons as victims, the people would not have been able to accept any reparation given to them.¹⁶

It is obvious that not only the political environment but also the opinion of the population can affect the work of a commission and the picture of past drawn by it. These circumstances and the personal interpretation of the commissioners leave its traces on the objectivity of the commission. Nevertheless, it cannot be forgotten that the truth revealing work of the commission is only one and rather a first and not the last step of the long process of facing the past and getting over it. It is a complex process and the work of the commissions is only one element in the “transitional machine”. Truth seeking, justice, ensuring reparation to the victims, a significant psychological change in mind of the affected social groups and democratic changes in the structure of institutions compose together the system of necessary measures that shall be taken in order to realise reconciliation.

¹⁵ Truth and Reconciliation Commission of South Africa Report, March 2003 Par. 54

¹⁶ SALMÓN, Elizabeth and GAILLARD, Philippe: Interview with Salomón Lerner. In: *International Review of the Red Cross*. Vol. 88 Nr. 862, International Committee of the Red Cross, Cambridge University Press, Cambridge, June 2006, page 232