



United States Institute of Peace

TRANSITIONAL JUSTICE: Information Handbook
September 2008

INTRODUCTION

The tasks of promoting justice, compensation, and reconciliation after conflict are challenging and can take many years to achieve. But systematic abuses of human rights that are not adequately addressed are a source of social unrest and often contribute to renewed violence. It is therefore important to (re)establish the rule of law after periods of conflict or authoritarianism to build sustainable peace and well-functioning states. The process of acknowledging, prosecuting, compensating for and forgiving past crimes during a period of rebuilding after conflict is commonly referred to as “transitional justice.”

It is important to acknowledge that each post-conflict situation is unique, and requires different measures to address past wrongs. Comparative information about how other countries have approached similar post-conflict justice problems can, however, help to design and implement an effective transitional justice strategy. No matter what violence has occurred, similar questions arise in the wake of past atrocities: How can an emerging democracy peacefully integrate both the supporters and the victims of a former regime? How should it approach justice and reconciliation, war crimes, and the search for truth? Many countries face these difficult questions, and the answers can often have profound political, legal, psychological and economic consequences.

This handbook briefly illustrates approaches that have been employed in numerous countries to promote post-conflict transitional justice. Past experience demonstrates that transitional justice mechanisms work best if they are combined in a comprehensive strategy: Judicial measures like trials and legal reforms, and non-judicial measures like truth commissions and compensation schemes can and should complement each other. This guide also identifies some of the difficult choices that societies must make in their struggle to rebuild their society and their state while confronting the legacy of the past: whom to hold accountable, how victims may be satisfied, and how security and justice sector institutions can be reformed. The information in this handbook is only intended to be an overview, and each of the concepts and techniques are explored in much greater detail in the additional sources indicated in the appendix.

Goals of Transitional Justice

The basic challenge of transitional justice strategy is to effectively respond to past abuse in ways that:

- establish the truth about what happened and why
- acknowledge victims’ suffering

- hold perpetrators accountable
- compensate for past wrongs
- prevent future abuses
- promote social healing

It is clearly a difficult task; but several techniques have been developed in countries transitioning from war to peace that address each of these challenges. These include:

- criminal prosecutions
- truth commissions
- reparations and compensation programs
- systems for vetting abusive officials from public positions

Each of these mechanisms is explained in this guide along with its purpose, elements, risks, and rewards. Each may play an important part of an overall transitional justice plan, as determined by the specific circumstances of a conflict, the society seeking justice, and by popular priorities and demands.

I. FACTORS FOR DETERMINING APPROPRIATE TRANSITIONAL JUSTICE MECHANISMS

Determining which transitional justice mechanism or combination of mechanisms is appropriate for a given country depends on many factors and the unique circumstances of a period of abuse. Are crimes widespread, or focused on one region or ethnic group? Are many perpetrators responsible, or only a few? Were the crimes acts of the State, or those of insurgents, or both? Are the perpetrators still more or less in power, or has there been a clean transition to a new government? Does the state have sufficient resources to implement a justice mechanism? Are the courts credible? Can the state afford individual reparations?

Depending on the answers, certain options are more viable than others. The most important point is that a careful assessment must be done about the circumstances of the conflict and the positions and interests of the victims, leaders, and the general public before any transitional justice mechanism is decided. The best way to determine different groups' needs and positions is through thorough consultations and, ideally, public debate about different transitional justice options.

With that in mind, below are some factors that affect the utility of different transitional justice mechanisms. These are not concrete rules, but rather present different ways of looking at the issues.

- **Prosecutions** provide the most direct form of accountability, and work best when there are credible courts – national, international, or hybrid – available to hold trials. Because the number of potential defendants implicated in past abuses is often quite large, and prosecuting them all would generally be beyond the financial, human and political capacity of the state, the number of perpetrators who can be prosecuted is typically small. There must be strong political will to sustain prosecutions, which is often lacking when perpetrators or their political partners are still sharing power. Prosecutions take significant time and money to conclude, and only address the

crimes of individual defendants. But in many ways, successful prosecutions make the strongest statement against impunity and signal to victims that the new government is willing to make a clean break with an abusive past.

- **Truth Commissions** are suitable for analyzing widespread (and longstanding) patterns of abuse, or for cases in which atrocities -- whether committed in secret by the State or in remote areas -- are relatively unknown. The aim of a truth commission is to ascertain the facts and causes of systemic abuse in the most objective way possible, and not necessarily to directly punish individuals involved. As official investigative bodies, Truth Commissions require significant political will to implement, and generally are not effective unless the commissioners are truly independent of the parties to the conflict or abuse. Truth commissions are not simply closed academic inquiries, but serve as a way for all of society to explore exactly what kind of abuses occurred and why, and how to prevent their recurrence in the future, but in a non-criminal context. They should therefore be formed on the basis of extensive public consultations and often work best when their activities include significant public outreach and engagement.
- **Vetting** is the process of administratively excluding individuals strongly associated with past abuse from serving in public offices without full court proceedings. Vetting programs are designed to restore public trust in institutions by removing perpetrators from official positions, or preventing unqualified or abusive individuals from being appointed to government posts where they might corrupt the credibility and performance of a new regime. Vetting programs are useful in cases where abuses were committed by government officials, such as police and military officers, and judicial officials who remain in government posts even after violence has concluded. Vetting is an administrative rather than a judicial action, and therefore requires a lower standard of evidence to implement. Still, vetting must be conducted according to objective standards and fair procedures.
- **Reparations and Compensation** to victims of a conflict are often the most demanded recourse for past violence, but the most difficult to achieve – particularly when the government has few resources to give as compensation. For reparations to work effectively, victims must be identified, their injuries must be quantified (for example, what is appropriate compensation for the mother of a murdered child, or of a torture survivor?), and resources must be available to make some form of payment or in-kind service to the aggrieved party. Reparations may be tied to the work of a truth commission to make these assessments. Compensation may be symbolic (a memorial or an apology), or in-kind (such as free health or education benefits) as well as monetary – recognizing that no material payment can fully compensate for an emotional loss. Reparations are a powerful tool for helping victims to recover from conflict, but can also sow division when one group is favored for reparations over others who may deserve them.

II: CRIMINAL PROSECUTIONS

Criminal prosecutions are directed at individuals who bear personal responsibility for criminal offences committed during a period of conflict or abuse. Prosecuting perpetrators of mass crimes is an international legal obligation, and is often seen as a moral good as well as sending a strong social message that criminal acts will not be

tolerated in the future. Prosecutions also help to avoid lawless revenge and retaliation, and to maintain or restore the rule of law.

Key Factors for considering prosecutions

Prosecuting individuals who have committed past crimes is the most direct form of accountability possible. Prosecutions help to reaffirm legal order and encourage trust in public institutions.

However, prosecutions are often expensive, time consuming, and divisive, and no state will have adequate resources to prosecute all of the hundreds if not thousands of perpetrators who have committed crimes during a period of conflict.

To overcome these obstacles, prosecutions in the transitional justice context are often only conducted for the individuals most responsible for the most serious crimes. Not only are they considered more deserving of punishment than others, punishing the principal perpetrators can act as a deterrent for future abusers and signals an acknowledgment of the wrongdoing that occurred as an indication that impunity will not be tolerated in a new regime.

Legal requirements for prosecutions

International law establishes that states have a duty to prosecute the most serious international crimes, such as genocide, torture or violation of the laws of war.¹ Still, a court with specific and appropriate jurisdiction must be established for proper trials to be conducted. Prosecutions must be conducted in a fair and impartial manner that follows clearly established procedures, including the basic due process conditions enshrined in the International Covenant on Civil and Political Rights. Fair trials must also protect the accused person's right to a defense, including the right to a lawyer and the right to see and to rebut the evidence against them.

Political obstacles to prosecutions:

Prosecutions in post conflict or transitional societies often take place in fragile political contexts that present difficulties for establishing trials. Many times the perpetrators of past atrocities, or their sponsors, become part of a new government, and will be reluctant to promote prosecutions that may punish themselves or members of their own group or party. On the other hand, if one party to a conflict prevails and initiates prosecutions against members of the losing faction, the losers will claim that the trials are acts of revenge rather than justice. To overcome these risks, trials must be as independent, transparent, and objective as possible, following clear laws and fair procedures, administered by qualified legal professionals.

Capacity needed for fair trials:

Mass crimes such as crimes against humanity or genocide are difficult to investigate and more difficult to prove in a court of law. Prosecutors must investigate large patterns of abuse, which may involve many witnesses and forensic analyses, as well as establishing

¹ See, for example, the Convention on the Prevention and Punishment of the Crime of Genocide and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Geneva Conventions, and the Rome Statute of the ICC, incorporate genocide, crimes against humanity and war crimes into its domestic legal framework.

complex links between commanders who ordered crimes and the soldiers who carried them out.

Several conditions are necessary to ensure the necessary capacity and technical ability to investigate and prosecute systemic crimes, including:

- prosecutors need to have a clear understanding of the relevant law;
- experts must examine not only the law but also the historical, military and political details of the conflict;
- sophisticated trial management techniques must handle large amounts of complicated evidence;
- detailed rules of procedure and evidence must be able to handle a complicated trial.

In many countries recovering from conflict, local court systems are not well equipped to handle the size and complexity of prosecutions for mass crimes. Moreover, many domestic courts are seen as politically biased after periods of authoritarian rule and even if they have the technical capacity to take on complex cases, they are not seen as credible by one or more parties to the conflict.

In such cases, some countries have pursued a “hybrid” model of prosecution, whereby local courts, lawyers, and judges are assisted by international counterparts to assist with trials. International experts can bring both professional experience, knowledge of the evolving international jurisprudence on the subject and, as important, independence to legal proceedings. There are many different models of hybrid courts to prosecute past atrocities, including courts in East Timor, Sierra Leone, Cambodia, Bosnia and Lebanon. Each of these courts:

- are temporary in nature
- include local and international staff working side by side
- use a combination of national and international law.

Victims’ needs and their expectations need to be acknowledged:

Prosecutions mainly deal with the role of the accused. The official role of victims is limited to providing witness testimony in a formal – often unfamiliar - procedure. It is therefore crucial that victims understand the purposes and limitations of the formal trial procedures so that they do not feel ignored or manipulated by the process, and are not disappointed by false expectations of the outcome. More important, victims and witnesses who do participate in politically sensitive trials must be adequately protected so that they do not become victims of revenge from the accused, or suffer emotional or social harm as a result of the information they contribute.

Combining prosecutions with other transitional justice mechanisms:

Given the limited scope of prosecutions to individual perpetrators of the most serious crimes, it is often desirable to conduct trials in conjunction with other forms of transitional justice mechanisms that address victims’ needs more directly and address larger patterns of abuse. In this regard, a truth commission may work side by side to a tribunal, so that the two mechanisms can offer a more complete accounting of the causes and consequences of a conflict.

It is important that combined mechanisms' relationships are clearly defined so that they do not increase confusion, compete for the same information or evidence and that they do not discourage submissions to the truth mechanism for fear of subsequent prosecutions. In some countries, truth commissions have preceded prosecutions, gathering and preserving evidence while the technical capacity and political will for trials develops. In others, they have proceeded concurrently. In some places, truth commissions have referred cases and evidence to prosecutors; in others, they have been barred from doing so. And in some countries, only after individuals have been prosecuted has society moved to a broader truth commission process.

Also, as trials focus on the guilt and punishment of individual defendants but do not rehabilitate their victims, compensation schemes may also be important to begin to redeem victims and help them to recover from their loss.

Conclusion

Criminal justice is part of the response to massive human rights violations and works best if combined with other mechanisms of transitional justice. If domestic prosecutions are possible, they can signal a break with the past, foster renewed public trust in institutions and restore the dignity of victims. At the same time, prosecutions generally face many hurdles and require significant resources and a high commitment to fairness, transparency and public consultations. A clear prosecutorial strategy helps to make the best use of limited resources. The next chapter addresses how domestic capacity can be combined and complemented with international efforts.

III: TRUTH COMMISSIONS

1. What is a Truth Commission?

Truth commissions are official investigative bodies comprised of independent experts that are responsible for investigating and reporting on patterns of human rights abuses over a certain period of time in a particular country or in relation to a particular conflict. Truth commissions allow victims, their relatives and perpetrators to give evidence of human rights abuses, providing an official forum for their accounts.

Key characteristics. Truth commissions generally:

- are created by official law or decree with wide powers of investigation;
- exist for a designated period of time (typically 6 months - 2 years);
- have a specific mandate identifying the acts and time period to be investigated;
- examine not just individual acts, but patterns of abuse and the institutional and societal factors that facilitated their occurrence;
- are led by a diverse group of independent experts (typically 3 - 9 individuals);
- adopt formal rules of procedure to conduct investigations;
- interview witnesses, conduct site visits, and hold hearings; and
- produce and disseminate a final report, including conclusions and recommendations on how to prevent future abuses.

The main objectives of truth commissions is to officially acknowledge past abuses, recognize the suffering of victims, identify patterns of violence and more specific acts of wrongdoing, and make recommendations to prevent a recurrence of violence in the future. Truth commissions may also identify individuals responsible for acts of violence and even recommend cases for prosecution. However, truth commissions cannot be expected to find the ultimate truth for all individual cases. Truth commissions are therefore usually only one of many mechanisms of transitional justice and should be part of a larger strategy to build sustainable peace and a political order respecting the human rights of all. Trials, reparations and reforms may also be part of a complete program of justice and reconciliation.

2. Why establish a truth commission?

Truth commissions are established to uncover the facts about broad patterns of abuse to better understand and acknowledge the scope of atrocities committed, and to address changes that need to be made to prevent future abuse. They are different than criminal investigations in that they are focused on both victims and perpetrators – discovering what abuses were committed against whom and why – rather than a prosecutor’s focus on individual perpetrators who committed specific crimes. Some of the main reasons to establish a truth commission include:

a. To establish the facts about violations of the past -- Victims and societies have an internationally recognized right to know the truth about the past.² The first step to fulfill the right to an effective remedy, guaranteed in international law, is a credible and objective investigation of abuses.

b. To acknowledge past abuses, a contested or denied history -- Truth commissions make it more difficult to deny that abuses occurred, and help to signal a formal break with an abusive past. In some cases, the facts and nature of abuses has been hidden from the public; in others, each group’s version of the truth is limited to its own victimization, denying the reality of abuses committed against others. Objective investigations can help a society to acknowledge (if it’s the case) that there were victims and perpetrators on more than one side. They can help society confront and address the legacy of its troubled history in a comprehensive way and understand what, how and why abuses occurred.

c. To restore victims’ dignity and to respond to some of their concrete needs -- Truth commissions provide a public forum for victims by allowing and assisting them to find and tell the truth. Official recognition of past abuse can be an important form of healing for victims who want they suffering to be acknowledged and their voices to be heard. Truth commissions can also address and appreciate victims’ needs, such as their need to clarify the legal status of disappeared relatives in order to gain access to social benefits, etc.

d. To prevent future abuses by recommending reparations or institutional reforms and by reaffirming social norms -- By initiating and informing public debate, truth commissions can reaffirm common social norms and commit to a democratic order that respects the human rights of all. Past truth commissions have suggested ways to rebuild

² “Irrespective of any legal proceedings, victims and their families have the imprescriptible right to know the truth about the circumstances in which violations took place and, in the event of death or disappearance, the victims’ fate.” Principle 4 of the *Updated the Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, available at <http://www2.ohchr.org/english/bodies/chr/sessions/61/lisdocs.htm> (accessed July 8, 2008).

a political and economic order that makes future abuses less likely. They may recommend legal and institutional reforms. The vast amount of data that they collect allows them to outline institutional weaknesses that may have contributed to past abuses and to prescribe priorities of reform. They are also well suited to design the general outline of a reparations program.

e. To promote accountability and justice -- Truth commissions and prosecutions are complementary mechanisms: truth commissions focus on the patterns of abuses, whereas prosecutions assign individual criminal responsibility. Truth commissions can help make justice prevail but they do not exonerate the state from its obligation to conduct judicial investigations in courts. However, a truth commission may foster an environment that facilitates criminal prosecutions, vetting processes or other forms of accountability, and can establish and preserve evidence that can be used in the pursuit of criminal accountability.

f. To reconcile the society -- Some truth commissions were specifically set up to foster reconciliation, but the relationship between truth and reconciliation is often unclear. Reconciliation is normally a very long and complex process. Truth commissions do not guarantee reconciliation, nor can they impose forgiveness by individuals. But on a societal level, reconciliation may indeed be facilitated by attempts to find the truth and by stimulating deliberations on how to face the future. By engaging all of society in an examination of what happened, truth commissions can open the public dialogue on these difficult issues that is generally needed for reconciliation to follow.

3. Why do some countries decide not to establish a truth commission?

Truth commissions are not appropriate for all situations and there may be sound reasons not to create one, or to delay its establishment. There are several concerns associated with a truth commission:

- Fear that sensitive investigations may stir renewed violence or harm a demobilization and disarmament program;
- Security risks for commissioners, victims and/or witnesses, especially if a conflict is ongoing;
- A lack of political interest or a lack of pressure from civil society;
- Politicians may have an interest in a truth commission only to delegitimize their opponents or to delegate responsibility for difficult tasks, or to avoid pursuing criminal prosecutions;
- Insufficient capacity: implementing countries may lack needed resources
- Victims may prefer alternative mechanisms to promote reconciliation.

To make the decision whether or not a truth commission should be established, broad consultations with victims and civil society should be held. If critical resources, political will, or impartiality are lacking, it may be better not to convene a truth commission at all, rather than to initiate a process that will not be able to fulfill its goals.

Features and Activities of Truth Commissions

If a commission is to be established, many strategic decisions need to be taken. To design the most appropriate design for a given context, it is advisable to involve relevant stakeholders and civil society and to seek the cooperation of institutions with expertise from past truth commissions. This section briefly presents common features and activities of truth commissions.

Establishing a truth commission: Truth commissions can be established by the executive branch of government (by a decree), by the legislative branch or by an agreement between the government and armed opposition, sometimes followed by subsequent legislation.

The mandate of the truth commission: A truth commission's mandate provides the framework of its subsequent work. It should be tailored to meet the specific needs and circumstances of the country and it should be drafted through a consultative and transparent process.

The following is a limited list of elements commonly contained in the mandate of a truth commission, including its:

- objectives
- legal authority to interview witnesses and collect testimony, including in some cases the power to compel such testimony
- types of violations the commission will investigate
- time period to be investigated
- time granted to the commission to complete its work
- authority to issue recommendations

The composition of the commission and its staff: Selecting the commissioners and staff will impact whether the commission is seen as a legitimate body. Much depends not only on Commissioners' individual qualifications and backgrounds, but also on the procedure through which they are selected. Based on best practices:

- A Commission's mandate should be established before Commissioners are selected. It should outline the process of selection and it should list the characteristics of ideal commissioners.
- Among other criteria, commissioners should be competent, impartial, and independent. In some cases, commissioners are chosen primarily because of their known integrity and standing in society.
- The commission should be a diverse representation of the society and should be gender balanced.
- The commission can be composed of national citizens, internationals or both. Internationals often help to lend a sense of impartiality to a commission.
- A secretariat, and sometimes regional offices, will have to be established to ensure the commission can complete its work in a professional, comprehensive and timely fashion. Field offices help to ensure that victims have access to the commission.

Consultations and public outreach:

- A transparent and consultative process will not only help to inspire public confidence, it will ensure that the commission does not miss the most important part of truth and will also attract more domestic and international support.
- Significant time should be calculated to receive public input on the mandate.³
- It is critically important to foster meaningful relationships with civil society and the media. The relationship with local NGOs can be very fruitful but should not be taken for granted. For instance, local NGOs may provide training, access to

³ Because of the benefits from broad public consultations, peace negotiators should not be too prescriptive when including provisions of a truth commission in a peace agreement.

their information, introductions to local communities, and they may be a significant partner in lobbying the government. They are also often an important source of collected evidence for the commission, and can play a valuable role in facilitating victim and general public participation in the truth commission process.

Hearings and Statement-taking: statement-takers are often the only direct contact victims have with the commission. They need to be well-prepared for their challenging job, since they will need to respect and listen to victims' accounts while at the same time completing the technical requirements of the data collection process. They should ensure that statements are collected in a supportive and safe environment. Increasingly, truth commissions have also conducted *public hearings*. Countries such as Timor-Leste have opted for community-based sessions to involve local communities. In some countries, selected hearing have provided an opportunity to examine the role of various sectors – such as the media, the educational system, religious leadership, the legal and medical professions, etc. – not in directly committing grave human rights abuses, but in helping to make them possible through their actions and inactions. The publicity reduces the possibilities of denying past abuses and increases the visibility of the commission. But considerations of security, resources and due process should be taken into account.

Research and investigation: research and investigation can link individual case investigations with thematic research. These activities often need considerable resources and expertise. The more powers a commission has, the more robust their investigative capacities should be. Several past truth commissions have used sophisticated information management systems to manage and record the information from its investigations. These tools can identify patterns of abuses and may provide an accurate analysis and estimates of the total number of victims. Database systems, however, are resource intensive and require coders and professional statisticians. More broadly, commission research staff may include historians, anthropologists, investigators, legal analysts, and other specializations as appropriate.

Victim and witness support mechanisms: truth commissions often deal with sensitive issues. Every effort should be made to avoid re-traumatizing victims. Their views must be taken into account to devise effective protection mechanisms. In addition, states have specific responsibilities in relation to child victims and victims of sexual violence.

Final report: reports are often the most visible legacy of the commission and they can affect how the public understands its national history. Final reports include the facts and patterns of abuse as determined by the commission, analysis of responsibility, information on the victims;⁴ recommendations for steps to deal with the legacy of the abuses. Past truth commissions have issued short summaries of their final reports, newspapers have sometimes published series of excerpts and some commissions designed special versions for children and students. Artistic means have also been used in a powerful ways.⁵ Victims should always get a copy of the commission's report.

Truth Commissions: Common Challenges and Suggestions to Address them

⁴ Some truth commissions have included in their final report a list of all victims identified, or even a brief account of the facts of the case of each victim.

⁵ For instance, the Peruvian commission issued a book containing powerful photographs documenting the period under investigation. An exhibition was later held in the national museum. Jeremías Gamboa and others, *Yuyanapaq = Para Recordar: Relato Visual Del Conflicto Armado Interno En El Perú, 1980-2000* (Lima: Comisión de la Verdad y Reconciliación: Fondo Editorial de la Pontificia Universidad Católica del Perú, 2003).

The truth commission may be subject to intimidation and political pressure: In many post-conflict transitions, the “truth” may be inconvenient for many people in power. This may lead to destruction of evidence or preventing access to files, along with intimidation of witnesses and victims. In addition, perpetrators and their political allies may try to pressure the commission to adopt a biased approach to the facts, exploring the abuses of certain individuals and facts but not others.

To help alleviate these challenges, those establishing a truth commission may seek the support of a broad base through public consultations, select as commission members respected leaders with proven integrity, and ensure credible security to support the process. It also helps to provide real penalties for interference with the commission’s work.

Accused perpetrators might demand amnesty: In order to secure the meaningful cooperation of accused perpetrators, it is sometimes thought that offering amnesty in exchange for such cooperation might lead to the revelation of the truth. While the “truth for amnesty” formula was used in South Africa, it was backed by a credible threat of prosecution of those who did not apply for amnesty or did not present the entire truth in their amnesty application.

Amnesty for the most serious international crimes – such as genocide, crimes against humanity, and torture -- is prohibited by international law. Even with amnesty for so-called lesser crimes, in the absence of a real threat of prosecution, accused perpetrators will not feel compelled to cooperate with the truth commission. Because the post-conflict environment in which a truth commission functions, however, is often characterized by a weak justice system, the conditions for a successful “truth for amnesty” approach are seldom met. If amnesty for lesser abuses is offered, it is advisable to offer it only to individuals who have cooperated by giving specific, truthful information and not to an entire group of potential perpetrators. Victims should be notified and have a right to challenge the amnesty decision before a judicial authority. Consideration may also be given to making amnesty conditional on the perpetrator performing an appropriate act of remorse and restitution.

The public may have unrealistic expectations: While some truth commissions have attempted to document the case of every victim, and have included a comprehensive list of victims in their final report, commissions operate under time constraints and the desire for an expeditious process imposes limits on the number of cases a commission can investigate. This can be very disappointing for victims and their families, who often seek specific truth about their personal case. Victims also often expect reparations, which truth commissions are neither mandated nor resourced to give. Being identified as a victim by the truth commission, however, may formally qualify such individuals for subsequent victim compensation without having to go through the process of re-proving their cases.

Public outreach that sets realistic expectations is vital. Local victim support groups, local NGOs, religious institutions or other organizations can play a valuable role in communicating this information and helping to establish those expectations. Recommendations regarding reparations may be included in the truth commission’s report.

The commission’s recommendations may not be implemented: Issuing comprehensive recommendations for reparations or reform is relatively easy for a truth commission.

Government implementation is hard. Even when a truth commission mandate requires that a government adopt its recommendations, there are often few resources available for the task, and political will may erode as time passes.

Mechanisms for follow-up should therefore be considered even before a truth commission is established. A successor body can be designated to monitor the implementation of the recommendations, to continue investigations and/or to preserve the archives. This can be an *ad hoc* body or an existing institution (such as a national human rights institution). Civil society should also be encouraged to monitor and follow-up the implementation of the commission's recommendations. A trust fund may also be created in advance to pay for the commission's most important recommendations.

Resources may be limited: Truth commissions are generally much cheaper than large-scale prosecutions. The average budget of recent truth commissions ranged between 5 and 10 million USD. Often, several hundred staff members need to be hired. If they contribute to prevent future abuses and violence, their costs may seem modest. However, raising the necessary funds can be challenging.

To avoid failure because of resource constraints, the national government should take the lead in financing the truth commission, in large part to signal its commitment to reform. But the international donor community will often contribute funds if it trusts the commission will be productive and fair. In addition, international partners can provide in-kind expertise, training or material support to improve the effectiveness of a commission.

Conclusion

Truth commissions can foster a common understanding and acknowledgement of an abusive past, and if they are effectively embedded in a comprehensive justice perspective, they can provide a foundation for building a strong and lasting peace. Carefully structuring and implementing a truth commission process is crucial to its having this positive impact.

IV: VETTING (Lustration): Reforming Government Institutions' Personnel

Vetting refers to the reform of an institution's personnel by removing or excluding abusive, corrupt or unqualified employees. Vetting programs focus particularly on reforming the police, prison services, the army and the judiciary because they are often responsible for past human rights abuses and are otherwise institutions that the public must rely on to prevent future abuse. In some countries, screening and excluding people based on evidence of their involvement in past abuses has also included candidates for elected office, school teachers, senior financial officials and others.

Key Characteristics of Vetting

Vetting is based on the assumption that fair and efficient public institutions are crucially important to prevent future human rights abuses. Vetting processes are therefore

undertaken to (re) establish public trust in institutions, increase their legitimacy and efficiency in delivering services to all citizens; and to signal the break with the abusive past.

Vetting is generally less expensive and less complex than large-scale criminal prosecutions, but still provides a form of individual accountability for those who were responsible for violations, or who should have prevented them but did not, and where undertaken, generally addresses a far larger number of cases than will be the subject of any criminal proceedings.

Vetting aims at excluding from certain positions of public office those who:

- are responsible for past human rights violations; or
- hold anti-constitutional views or are involved in terrorist groups or organized crime.

There are two basic forms of vetting processes:

- *Retrospective Review*: Current employees are screened to determine their suitability for public service. A reviewing panel has to receive adequate evidence to prove that a certain employee should be removed based on their implication in past abuses.
- *Prospective Appointment and Reappointment Review*: For relevant positions, current employees are required to re-apply for their positions and be vetted for possible involvement in past abuses, possibly in addition to a review of other qualifications, and new candidates for those positions must apply and be subject to the same vetting process. Reappointment procedures alleviate the stigma but are more intrusive than review procedures.

Based on either of these processes, individuals who are well qualified and have not contributed to abuses may receive a certificate that allows them to begin or continue employment. Others may be employed for a probation period. Those who are found to have played a significant role in past abuse may

- be excluded from a certain type of position;
- be banned from promotion or benefits or
- be banned from all types of public employment for a certain period of time.

In extreme circumstances, an individual may be permanently banned from all types of public employment.

The criteria for excluding someone from public office must always be established with a view to the context. These criteria should be transparent and as clearly defined as possible. Vetting should not be used to purge people on the basis of party affiliation, or else the vetting process itself can undermine respect for the rule of law by the new government. To be fair, vetting processes should assess individual conduct.

Vetting Processes: Common Challenges and Suggestions to Address them

Institutional reform is a difficult endeavor. Transitional or post-conflict societies face many challenges that affect vetting processes. These include:

- scarce resources
- weak state institutions
- an overstuffed and inefficient bureaucracy
- strong political resistance to reform
- a weak or incomplete legal framework
- nepotism and corruption in government appointments

In addition, vetting processes often face many practical obstacles:

- personnel records may not be available or they may have been falsified;
- it may be difficult to find non-corrupt and impartial persons to conduct the vetting;
- qualified replacement candidates of integrity may be hard to find;
- other complex aspects of institutional reform often need to be simultaneously pursued (such as oversight and disciplinary procedures, reform of the legal framework, changing symbols, infrastructural improvements, salaries, etc.)

When planning and implementing a vetting process, the following difficulties might arise. Useful strategies can be developed to cope with these potential challenges:

Abuse of power:

Those who control the vetting process have enormous influence over the lives of those who are screened. The careers and reputation of the employees can be severely affected.

To prevent the misuse of power in the vetting process:

- Officials reviewing employees and candidates must have the highest integrity. They should be representative of the population, have a clearly defined mandate and adhere to a code of ethics
- Usually, screening programs should not be administered from within institutions, but by a specially created mechanism, such as an independent, impartial commission.
- Vetting commission members should be irremovable during the vetting process except where they are found in violation of the integrity and neutrality standards to which they are expected to adhere. Arrangements for the security of vetting officials may also be necessary.

Fairness and Due Process:

A vetting procedure is not a criminal trial before a court of law. But the loss of one's job can be perceived as a "life sentence" if the procedure is not fair. Therefore a certain degree of due process is required:

- All employees should have the right to see the results of the investigation.
- The burden should be on the vetting body to prove (albeit to lower standard of

- proof than in a criminal trial) the information that disqualifies the employee or applicant.
- It must be possible to appeal to an independent body to ask for a review of an adverse decision.
 - As the retrospective review model involves singling out individuals and punishing them (through dismissal from their jobs) for their past activity, it may require providing the individual a higher level of due process protections. The prospective model will require vetting a larger number of cases, but since it treats all applicants and re-applicants equally in evaluating their qualifications for future employment, it may permit a somewhat lower standard of due process and more expedited review of cases.

Risk of removing too many needed employees:

Large-scale vetting processes can remove employees whose expertise is needed if the criteria are not carefully defined. Moreover, broad vetting processes risk creating a pool of discontented unemployed individuals who might undermine the transition and join unlawful activities. This is particularly problematic when the individuals are members of the police or military who may have weapons and the training to use them against civilians or the new government. To avoid these problems:

- Assess both the risks of removal as well as the pool of replacement candidates.
- Ensure the process is fair and transparent.
- Provide training or alternative livelihoods in other jobs for those removed from government institutions, and re-training as appropriate for those who remain.
- Consider appointment or re-appointment on for probationary period, during which time vetting officials can receive additional evidence and employees can be evaluated on the basis of their performance and adherence to the values of human rights and the rule of law.

Risks of political interference:

Vetting processes are extremely sensitive and determine which political leaders, former combatants, or members of ethnic, religious or political groups are disqualified for appointed or elected office. As a consequence, the likelihood of attempts at political interference, intimidation or bribery of vetting officials is high. Some steps to reduce this risk include the following:

- A formally negotiated mandate helps to alleviate this risk. If a peace agreement includes specific provisions requiring personnel reform, it places a clear obligation on the parties and can help to avoid long periods of uncertainty. Similarly, while some discretion must be left to vetting officials, the clarity of legislation establishing the process can reduce the potential for manipulation.
- Effective and transparent public information and consultations with civil society are essential to foster public trust and the sustainability of the efforts.
- If political will is weak, a well-coordinated internationalized process may offer necessary leverage and impartiality. But domestic leadership is in most instances preferable to a purely international process.
- Combining an institutional reform strategy with other transitional justice initiatives makes a strategy more effective and legitimate.

Conclusion

Vetting can be used to regain the population's trust in institutions and serves to prevent the recurrence of violence stemming from public institutions. If vetting is carefully planned, adequately resourced, mandated and overseen, it can contribute to improve the institutions' commitment to serve all citizens and to safeguard the rule of law.

V: REPARATIONS

Reparations are either payments or services given to victims of past abuse as compensation for the harm they or their loved ones have suffered during a period of conflict. International law recognizes that victims of systematic human rights abuses are entitled to prompt, adequate and effective reparation and states have a duty to provide comprehensive reparations. Reparations are intended to recognize and repair harm, restore victims' dignity and rebuild trust and solidarity among communities that have been torn apart by violence.

In post-conflict environments it is important to recognize that no payments can ever fully compensate for torture or killing, and the reality that many governments cannot afford large cash payments to thousands of victims. Reparations range from purely symbolic acts to mostly material benefits.

Among the different types of reparations are:

- *Restitution*: May include return of property or other measures to re-establish the situation before the violation was committed.
- *Compensation*: May include the payment of economically assessable damages, pensions, or smaller symbolic payments as an acknowledgment of one's victimization.
- *Rehabilitation*: May include medical and psychological care, establishment of rehabilitation centers, administrative rehabilitation (such as the dismissal of false charges or the restoration to a job from which one was dismissed for political reasons), legal and social services, and educational benefits.
- *Symbolic Measures*: May include State apologies, construction of memorials, re-naming of streets, establishment of commemoration days, dignified re-burials, and waivers for job training and educational fees.

Symbolic and material reparations are not mutually exclusive. Instead, they should complement each other:

- Symbols show respect and recognition. But alone, symbols may not be taken seriously and victims may demand at least some concrete material solutions.
- On the other hand, purely material measures can be perceived as a way of

buying victims' acquiescence in a weak overall transitional justice policy, in contrast not only with trials, truth commissions and vetting, but also with the many symbolic reparations noted above which are more societal in their impact.

Reparations can be directed at individuals or at communities, groups or regions.

- Individual reparations recognize the individual harm done to citizens but it is sometimes difficult to fairly identify all victims.
- Collective reparations avoid the need to categorize victims into different classes but they may fail to recognize the intimate nature of each crime. They may also benefit perpetrators and they can easily be confused with general development projects.

It is also possible to combine individual and collective reparations. In Timor- Leste, for example, war widows or victims of sexual violence received individual scholarships for their children. When mothers picked up their benefits, they would go to a community center where they could also receive health care and other services.

Reparations are most effective if they fit into a coherent overall plan of transitional justice including, for example, revelation of the truth or the removal of perpetrators from public institutions.

Reparations Programs: Common Challenges and Suggestions to Address them

Despite the great need for reparations after a conflict, it is difficult to satisfy the demand. When planning reparations programs, strategies should be developed to deal with the challenges that are most likely to arise:

1. Beneficiaries need to be identified, and re-victimization must be avoided:

The number of victims is substantial after widespread human rights violations and it is challenging to decide what classes of victims can be treated equally. To implement an equitable reparations program:

- First, the type of violations need to be defined, and then different types of violations should be linked to appropriate forms of reparations.
- Sensitivity must be shown to victims to ensure they feel safe in disclosing what happened to them during a conflict, and do not relive painful memories only to find that no benefits are forthcoming, and also to ensure that proposed reparations respond to the needs of various groups of victims.
- The requirements to qualify as a beneficiary must be carefully chosen. For instance, requirements of medical records can exclude many victims with poor access to health care or psychological examinations can mean revisiting traumatic experiences. In addition, where an individual has already been formally identified as a victim by a State truth commission, that should be sufficient to qualify for subsequent reparations.
- The determination of victim status should be made on a neutral basis in

accordance with clearly articulated standards.

2. A reparations program may lack political support or resources:

Proposals for reparations programs mostly take place in contexts with weak institutions, scarce resources, a fragile political setting, and low levels of trust among citizens and between them and their institutions. On the other hand, victims have suffered harm for which even the best funded program will be inadequate and fail to bring loved ones back to life.

Devising a strategy from the outset can help to cope with these challenges:

- Political will must be fostered and sustained in order to realize a program that is perceived as legitimate and truly affects the quality of life of victims. A strong coalition, including victims groups and their allies both inside and outside the country, can help to promote and defend the program.
- Legitimacy is gained if the public understands the rationale and the limits of the program.
- International actors may help in creating a just and fair victim registry or provide other types of technical assistance in the design and implementation of the program.

3. Reparations can be perceived as a bribe to silence victims' demands for other forms of justice:

If well-designed, reparations are an acknowledgement of past violations and the state's responsibility for harm. However, if reparations are carried out in isolation from other mechanisms of justice, there is a serious risk that they may be perceived as a tool to buy victim's silence.

- Victims should not be forced to choose between reparations and the right to know the truth or the right to justice.
- Reparations isolated from other initiatives may allow increased denial of wrongdoings and may be counter-productive to the goal of sustainable peace. Reparations are most meaningful if they are accompanied with efforts to find the truth, institutional reforms and measures to hold perpetrators accountable. This may include arrangements through which perpetrators are obliged to contribute to a reparations fund.

4. The respective roles of truth commissions and reparations programs may be confusing to victims:

- Truth commissions can compile important information for the design of a reparations program and link truth-finding with reparations. The truth commission is the obvious place to decide what atrocities have been committed and by and against whom. A truth commission should, however, not be the agent of the reparations program. This may skew and overly complicate the

truth-finding process. A truth commission can recommend the general scheme of reparations but a different body should then administer the program and decide individual reparations cases.

- If a truth commission is currently planned, the drafters of its mandate should already consider the implications of the commission's mandate for the reparations program. It may be helpful to consult a reparations expert when drafting the commission's mandate.
- A reparations program may want to incorporate victims into the program who have not testified to the truth commission. Alternatively, providing information about one's case to the truth commission may be established as a requirement to qualify for a subsequent reparations program. As noted earlier, effective public information will be essential to inform victims and the public in general of the procedures and mandates of each body.

Conclusion

Where substantial and irreparable harm has been inflicted, even the best reparations program may fall short of victims' needs and expectations. But having no concrete reparations may undermine all other efforts of transitional justice. Because reparations have a direct effect on victims' daily lives, as well as on society, they have a significant potential to contribute to the building of sustainable peace.

ANNEX I: Further Reading

Suggestions for further reading on Prosecutions:

Kritz, Neil. "Progress and Humility: The Ongoing Search for Post-Conflict Justice," in *Post-Conflict Justice*, edited by M. Cherif Bassiouni (Transnational Publishers, 2002)

Kritz, Neil. "Where We Are and How We Got Here: An Overview of Developments in the Search for Justice and Reconciliation," in *The Legacy of Abuse: Confronting the Past, Facing the Future*, edited by Alice H. Henkin (The Aspen Institute; New York University School of Law, 2002).

UN. Office of the High Commissioner for Human Rights. *Rule-of-Law Tools for Post-Conflict States: Prosecution Initiatives*. New York; Geneva: UN, 2006,
<http://www.ohchr.org/Documents/Publications/RuleoflawProsecutionsen.pdf>

This publication sets out basic considerations on prosecution initiatives. The focus of this guidance is mainly on the strategic and technical challenges faced by domestic prosecutions. This 50 page brochure is available in Arabic, English, French and Spanish.

"TRIAL: Track Impunity Always." TRIAL. <http://www.trial-ch.org/http://www.trial-ch.org>

Track Impunity Always is a Swiss Association offering easy access to numerous criminal proceedings that took place (or are taking place) in national or international courts. The website contains short descriptions of the facts underlying the processes, abstracts of the legal proceedings and links to important documents (judgments, NGO reports, bibliographies, news articles, etc.).

International Center for Transitional Justice. "Prosecutions." ICTJ. <http://www.ictj.org/en/tj/781.html>

The ICTJ has long-standing experience in assisting countries pursuing accountability for past mass atrocity or human rights abuse. Its website contains introductions and resources on the different approaches of transitional justice.

Orentlicher, Diane. *Impunity: Report of the Independent Expert to Update the Set of Principles to Combat Impunity*. Geneva: UN, 2005, <http://www2.ohchr.org/english/bodies/chr/sessions/61/lisdocs.htm>

The report of the independent UN expert on combating impunity is available in English, French, Russian, Spanish, Chinese and Arabic.

United Nations. Office of the High Commissioner for Human Rights. *Rule-of-Law Tools for Post-Conflict States: Maximizing the Legacy of Hybrid Courts*. New York: United Nations, 2008, available at <http://www.ohchr.org/Documents/Publications/HybridCourts.pdf>

Maximizing the Legacy of Hybrid Courts explores how hybrid courts can receive the mandates and the political support required to be more effective in building capacity and bestowing an enduring legacy upon the justice system. This 52 page brochure is available in Arabic, English, French and Spanish.

Dickinson, L. A. "The Promise of Hybrid Courts." *AMERICAN JOURNAL OF INTERNATIONAL LAW* 97, (2003): 295-309.

This article preliminary assesses the potential strengths and weaknesses of hybrid courts. The author looks at the Kosovo, East Timor, and Sierra Leone courts, and suggests that such courts, while not perfect, hold considerable promise as a model.

Suggestions for further reading on Truth Commissions:

UN Office of the High Commissioner for Human Rights. *Rule-of-Law Tools for Post-Conflict States: Truth Commissions*. New York; Geneva: UN, 2006, <http://www.ohchr.org/Documents/Publications/RuleoflawTruthCommissionsen.pdf>

This practitioner resource outlines the basic principles involved in truth commissions and contains a number of best practice guidelines on the strategic and technical challenges of truth commissions.

Freeman, Mark and Priscilla B. Hayner. "Truth - Telling." In *Reconciliation After Violent Conflict: A Handbook*, edited by David Bloomfield and International Institute for Democracy and Electoral Assistance. Stockholm: International IDEA, 2003.

The chapter begins with a review of different conceptions of reconciliation. It then proceeds to discuss truth commissions and their contribution to reconciliation. It discusses pros and cons of truth commissions and various attributes, 18 pages.

International Center for Transitional Justice. *Truth Commissions and NGOs: The Essential Relationships, the "Frati Guidelines" for NGOs Engaging with Truth Commissions 2004*, <http://www.ictj.org/images/content/1/0/106.pdf>

This paper is directed at NGOs in countries where a truth commission is likely to be established. The guidelines are meant to encourage NGOs to initiate a society-wide dialogue about the need for a truth commission and to think creatively about what form that commission should take, given the particular historical and cultural context in which it will operate. Available in Arabic, English, French, and will soon be available in Spanish, 43 pages.

Orentlicher, Diane and UN. *Independent Expert to Updated the Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*. Geneva: UN, 2005, <http://www2.ohchr.org/english/bodies/chr/sessions/61/lisdocs.htm>

The report of the independent UN expert on combating impunity is available in English, French, Russian, Spanish, Chinese and Arabic.

Peterson, Trudy Huskamp. *Final Acts: A Guide to Preserving the Records of Truth Commissions*. Washington, D.C.; Baltimore: Woodrow Wilson Center Press; Johns Hopkins University Press, 2005, http://www.wilsoncenter.org/press/peterson_finalacts.pdf.

This study provides current and future commissions with a set of questions and suggestions how to preserve the records of truth commissions, 128 pages.

Websites:

Search for Common Ground and Harvard Program on Negotiation. "Strategic Choices in the Design of Truth Commissions." <http://www.truthcommission.org/>

This website contains an interactive matrix on five of the most successful and most studied truth commissions (Argentina, Chile, El Salvador, Guatemala, and South Africa). The material is organized around key issues that each commission had to confront and outlines strategic choices in the establishment of a truth commission.

The Center for the Study of Violence and Reconciliation. "Justice in Perspective: A Website on Truth, Justice and Reconciliation in Transition." <http://justiceinperspective.org.za/>

This website contains an overview of the transitional justice processes which have been, and are currently being, undertaken or explored by various countries.

United States Institute of Peace (USIP). Truth Commissions Digital Collection, <http://www.usip.org/library/truth.html>

This website describes the establishment, mandate, background, composition, and report of truth commissions. The website contains a number of decrees, legislative acts or peace agreements establishing truth commissions, as well as their final reports. Some examples of commissions of inquiry are also listed.

Suggestions for further reading on Vetting:

UN Office of the High Commissioner for Human Rights. *Rule-of-Law Tools for Post-Conflict States: Vetting: An Operational Framework*. New York; Geneva: UN, 2006.

This publication sets out an operational framework for vetting and institutional reform, 42 pages. It is available in Arabic, English, French and Spanish.

De Greiff, Pablo and Alexander Mayer-Rieckh. *Justice as Prevention: Vetting Public Employees in Transitional Societies*. New York: Social Science Research Council, 2007.

This is the first comprehensive study on vetting. The edited volume presents the results of a multiyear research project examining vetting processes in countries emerging from armed conflict and authoritarianism.

Geneva Centre for the Democratic Control of Armed Forces (DCAF). *Vetting and the Security Sector*. Geneva: 2006, <http://www.dcaf.ch/publications/kms/details.cfm?lng=en&id=25449&nav1=4> (accessed July 9, 2008).

This eight-page report covers the basic elements of vetting in the security sector and lists its main elements and challenges. The last page contains a chart outlining procedures for screening individuals for access to restricted information in Switzerland, Germany and Canada. The document is available in Albanian, Arabic, Azeri, Bosnian, Bulgarian, Croatian, English, French, Georgian, Indonesian, Macedonian, Portuguese, Romanian, Russian, Serbian, Spanish, Turkish and Ukrainian.

Suggestions for further reading on Reparations:

De Greiff, Pablo. *The Handbook of Reparations*. Oxford; New York: Oxford University Press, 2006.

This is the first comprehensive handbook about past experiences with massive reparations programs and normative guidance for future practice. It presents reparations programs around the world and thematic issues common in the design and implementation of reparations programs. It also contains international and national legal documents on reparations, 1045 pages.

United Nations. Office of the High Commissioner for Human Rights. *Rule-of-Law Tools for Post-Conflict States: Reparations Programmes*. New York: United Nations, 2008, <http://www.ohchr.org/Documents/Publications/ReparationsProgrammes.pdf> (accessed June 26, 2008).

This 50-page brochure is part of the United Nations High Commissioner for Human Rights (OHCHR) series on rule of law tools for post conflict states and reviews the relevant international law instruments on reparations, and raises the most difficult challenges that reparations programmes have faced in past experiences.

Magarrell, Lisa and International Center for Transitional Justice. *Reparations in Theory and Practice* ICTJ, 2007, <http://www.ictj.org/static/Reparations/0710.Reparations.pdf> (accessed June 26, 2008).

This is a short general paper on reparations to assist local actors in designing and implementing a reparations program, 16 pages.

UN. Commission on Human Rights (61st sess.: 2005: Geneva). "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." (2005), <http://www2.ohchr.org/english/law/remedy.htm> (accessed June 27, 2008).

The United Nations General Assembly adopted and proclaimed this resolution in 2005 to recognize that all victims of gross violations of human rights are entitled to reparations.