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Truth Commission as an Alternative Justice Delivery System

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ABSTRACT

In times of conflict, the people of the stricken nations suffer tremendously and the occurrence of widespread atrocities and gross violations of human rights are inevitable. Once the conflict is over, it is necessary that the marginalized and oppressed sections of the society are given access to the justice they deserve or the values that act as the foundation of society will erode and crumble. However, when the aggravations in question are so widespread, the traditional system of justice may not be adequate or competent enough to ensure that these victims are given the justice they deserve or that these people will not face further abuse at the hands of the authorities. In such situations, the system of transitional justice comes into play. This article endeavors to show how the goals of transitional justice is attained through truth commissions using examples of truth commissions set up in the past and how the truth commissions can be an effective system of alternative justice but ultimately fails before the efficiency of the criminal prosecution system.

Keywords: *Truth Commissions, criminal prosecution, transitional justice, alternative justice, international criminal law*

I. INTRODUCTION

The past three decades has seen an establishment of more than two dozen truth commissions for the purpose of investigating into human rights violations that may have occurred in the past.² Truth Commissions have often been lauded for giving victims a voice and providing an acknowledgement of their trials and tribulations. Apart from that they offer an authentic viewpoint of a disputed time period of the past and helps restore the moral underpinnings of the society. Additionally they also provide the State with recommendations for institutional and policy reforms which are aides to prevent further such abuses of human rights. The ultimate goal of the investigation is to contribute to a long term goal of reconciliation and

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² Truth Commission Digital Collection, United States Institute of Peace (2011), <https://www.usip.org/publications/2011/03/truth-commission-digital-collection> (last visited September 24, 2020).

peace.³ Finally the truth commission is also seen as a way to uphold the State's obligation of the people's "right to know". Despite such applauds, truth commissions have also been subject to harsh criticisms, the first and foremost of them being that they fail to mete out any sort of real punishment to the perpetrators. The proceedings of a truth commission are also known to have produced a varied reactions in individual victims with some of them being relieved of their burdens to others wounds being ripped open again causing more psychological trauma.⁴ Apart from these there are several other criticisms that shall be dealt with further along in the article.

Another important aspect of truth commission is that it is an important tool in the political issue known as transitional justice. Alongside special courts, like ad hoc tribunals, such as the International Criminal Tribunal for former Yugoslavia (ICTY), International Criminal tribunal for Rwanda (ICTR) and the International Criminal Court (Hague)⁵, truth commissions have become a field of intense interest in transitional justice research procedures.⁶ Truth commissions have a significantly different way of operating compared to judicial courts. Instead of "judicially proving individual responsibility of single perpetrators"⁷, truth commissions paint a larger picture of the violation of human rights, their structural, social, economic and political background. Instead of just declaring the perpetrator guilty, they aim at creating a historical narrative as well as providing guidelines and observations as to how to overcome it.

*"Truth commissions thus take part in the formation of a new collective identity by constructing an imagined moral community"*⁸

II. WHAT IS A TRUTH COMMISSION?

According to Freeman, a truth commission is

"An ad hoc, autonomous, and victim-centered commission of inquiry set up in and authorized by a state for the primary purposes of (1) investigating and reporting on the principal causes

³ ERIC WIEBELHAUS-BRAHM, *Truth Commissions and the Construction of History*, IN THE PALGRAVE HANDBOOK OF STATE-SPONSORED HISTORY AFTER 1945. 599-620 (Eds. Berber Bevernage and Nico Wouters, 2018)

⁴ D Mendeloff, *Truth-Seeking, Truth-Telling and Post Conflict Peacebuilding: Curb the Enthusiasm?* 63 INT. STUD. REV., 355-80 (2004)

⁵ RACHEL KERR & EIRIN MOBEKK, *PEACE AND JUSTICE: SEEKING ACCOUNTABILITY AFTER WAR* (Cambridge: Polity Press, 2007).

⁶ WILLIAM A. SCHABAS, *AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT* (Cambridge: Cambridge University Press, 2001).

⁷ Wiebelhaus-Brahm, *Supra* at 2

⁸ TANYA GOODMAN, *Performing A "New" Nation: The Role Of The TRC In South Africa*, IN SOCIAL PERFORMANCE: SYMBOLIC ACTION, CULTURAL PRAGMATICS AND RITUAL, 176 (Eds. Jeffrey C. Alexander, Bernhard Giesen, & Jason L. Mast, Cambridge: Cambridge University Press, 2006)

and consequences of broad and relatively recent patterns of severe violence or repression that occurred in the state during determinate periods of abusive rule or conflict, and (2) making recommendations for their redress and future prevention.”⁹

There are certain elements in the definition that need to be taken note of:

Firstly, the focus of a Truth Commission is always on the events that have occurred in the past. Second, the objective is to investigate into the repeated instances of aggravated acts of violence, human rights abuse, crimes against humanity and violation of international humanitarian law over a fixed time period. Thirdly, the existence of truth commissions is temporary. Their tenure does not usually extend beyond two years within which a report containing the findings and recommendations is published. Fourthly, truth commissions are official state organizations - “theoretically, this results in unrestricted information access, increased security, and the guarantee that the reports of the truth commissions will be taken into serious consideration”.¹⁰

A report by the United Nations stated that:

*“Truth commissions have the potential to be of great benefit in helping post-conflict societies establish the facts about past human rights violations, foster accountability, preserve evidence, identify perpetrators, and recommend reparations and institutional reforms. They can also provide a public platform for the victims to address the nation directly with their personal stories and they can facilitate public debate as to how to come to terms with the past.”*¹¹

III. TRACING THE TRUTH COMMISSIONS IN THE PAST

The very first official truth commission had been established in Bolivia in the year 1982. It was the result of an inspiration received from an unofficial enquiry that the archdiocese of Sao Paulo had commanded in Brazil to investigate into the disappearance of civilians under military dictatorship in 1979. The Bolivian Truth Commission never ended up submitting any final report to the government. The first truth commission to perform its function by handing in a fully prepared final report was the Truth Commission of Argentina which was held in 1983.¹² In 1985 another Truth Commission was set up in Latin America in Uruguay by their

⁹ MARK FREEMAN, TRUTH COMMISSIONS AND PROCEDURAL FAIRNESS 18 (Cambridge University Press, 2006)

¹⁰ *Ibid* at 18

¹¹ U. N. Secretary General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General*, UN Doc. S/2004/616 (August 23, 2004).

¹² ROBERT ROTBERG & DENNIS THOMPSON, TRUTH VERSUS JUSTICE: THE MORALITY OF TRUTH COMMISSIONS, (Princeton University Press, 2000)

Parliament and it too was tasked with the investigation of disappearances of persons. In the continent of Africa, the first truth commission was established in Uganda following the regimes of Idi Amin and Milton Obote (1986) which published its final report in 1994.¹³ The “Nepalese Commission of Inquiry to Locate the Persons Disappeared during the Panchayat Period” has also been assimilated into the truth commission collection. Like its earlier Latin American and African counterparts, the Nepalese Commission was established to look into the disappeared person cases under the Panchayat Regime (1961-1990).

In 1990, the “Chilean *Comisión Nacional de Verdad y Reconciliación*” or the “Chilean National Truth and Reconciliation Commission”¹⁴ was established by a presidential decree by President Patricio Aylwin. It was the first truth commission to incorporate the words “truth” and “reconciliation” into the name. During the tenure of this commission, Chile was still not in a stable condition from a political viewpoint because General Augusto Pinochet was still the superior commander of all the military forces. To reduce bias and to “foster public as well as political acceptance” Aylwin appointed equal number of commissioners among supporters and opponents of the Pinochet Regime. Unlike the earlier truth commissions, this Truth Commission was tasked not only with looking into the disappearance of civilians, it was tasked with preparing a report on why and how the country succumbed to military dictatorship.¹⁵ In 1991, a UN brokered peace agreement was signed by the El Salvador Government and the guerrilla organisation “*Frente Farabundo Martí para la Liberación Nacional*” (FMLN) whereby they agreed to the establishment of a truth commission to investigate into violence in El Salvador. Here too to promote impartiality international third party members were appointed as commissioners.¹⁶ For the first time ever the United Nations took part in the establishment of a truth commission. “Their engagement shows that already in the early 1990s an international awareness of this particular practice of coming to terms with the past had emerged. The references to the Argentine and the Chilean example underline that national transitional justice practices had been recognized as being transferable to other countries in transition to democracy. Truth commissions became thought of as a viable solution to assist peaceful and democratic consolidation.”¹⁷ In 1992 the “*Enquête-*

¹³ Truth Commission: Uganda 86, UNITED STATES INSTITUTE OF PEACE, (May 16, 1986) <http://www.usip.org/publications/truth-commission-uganda-86>,

¹⁴ *Decreto Supremo* no. 355’ on the establishment of the “*Comisión Nacional de Verdad y Reconciliación*”, (April 25 1990) [Translated using Google Translator]

¹⁵ *Ibid*

¹⁶ United Nations, The Commission on the Truth for El Salvador, *From Madness to Hope: the 12-year war in El Salvador: Report of the Commission on the Truth for El Salvador*, S/25500, 1993 (April 1, 1993)

¹⁷ ANNE K. KRUGER, FROM TRUTH TO RECONCILIATION: THE GLOBAL DIFFUSION OF TRUTH COMMISSIONS, (ed. Birgit Schwelling, Transcript Verlag, 2012)

Kommission zur Aufarbeitung von Geschichte und Folgen der SED-Diktatur in Deutschland” (Enquête Commission for the Inquiry into the History and Consequences of the Socialist Dictatorship in Germany) was established by the German Parliament and Germany became the first country to set up a truth commission even though trials had taken place there. “Like in other countries before, it was mandated to disclose the structural circumstances of the socialist dictatorship and the individual suffering of the victims in order to come to a clearer picture of the communist past, to acknowledge its victims and to strengthen a democratic political culture.”¹⁸

Till this date the ‘South African Truth and Reconciliation Commission’ (TRC) has been one of the most eminent truth commissions. Established by the Promotion of Reconciliation and National Unity Act of 26 July 1995 and chaired by Arch Bishop Desmond Tutu, TRC became the first truth commission to grant amnesty to the perpetrator in return of extensive confessions.¹⁹ Yet the underlying mission of the TRC was one which was very unique. It sought to promote reconciliation by achieving forgiveness. This brief and only partial overview of earlier truth commissions shows that despite different cultural, political, and societal backgrounds this transitional justice practice had become accepted as a favourable solution to the question of how to tackle systematic human rights, international humanitarian law and international customary law violations committed by a former regime or during a civil war.

IV. CRIMINAL PROSECUTION VERSUS TRUTH COMMISSIONS

Truth Commissions have been variously described as an alternative to criminal prosecution²⁰ in situation which render trials non-feasible for several reasons whether political or practical. Often perpetrators of the human rights are in a position of political superiority and remain powerful enough to evade prosecution. Amnesties, *de facto* or *de jure* may be granted to perpetrators. Additionally truth commissions provide a degree of technical expertise that is often required for the continued smooth existence and functioning of the State and to prevent the era of violence and discord from repeating. Lastly the courts that will do the prosecuting, themselves might have been complicit in the violations.²¹

Yet in all its practicality, truth commissions cannot be said to substitute criminal prosecution.

¹⁸ Andrew H. Beattie, *An Evolutionary Process: Contributions of the Bundestag’s Inquiries into East Germany to an Understanding of the Role of Truth Commissions*, 3 Int J Transit Justice, 229, (2009)

¹⁹ Kader Asmal, *Truth, Reconciliation and Justice: The South African Experience in Perspective*, 63, Mod. L. Rev., 1, no. 1, (2000)

²⁰ Geoff Dancy, et al., *The Turn to Truth: Trends in Truth Commission Experimentation*, 9 1 J. Hum. Rights, (2010)

²¹ Eric Weibelhaus-Brahm, *Supra* at 2

The Inter-American Commission on Human Rights has categorically stated that a truth commission does not serve the purpose of fulfilling the State's "obligation to compensate victims and punish perpetrators"²² Criminal prosecution and truth commissions are both post-conflict justice mechanisms, but both of them work on different principles and have different goals altogether. The purpose of a trial is to determine whether an individual is innocent or guilty of the specific alleged charges brought against him through prosecutors collecting admissible evidence against him. The rule is to maintain the perpetrator innocent until he is proven guilty. The victim's only role in partaking in the trial is to provide some testimony that shall add to the evidence. On the contrary the main focus of a truth commission is not to prove a person guilty or innocent but to focus on the role played by the institution of the state as well as the political, socio-economic and cultural factors that was the backdrop of the violation. "Some argue that being in a position of power to act upon one's ideological convictions is what leads individuals to commit human rights violations."²³ Hence prosecution is not favourable for preventing further such abuses from taking place, rather "reforming the institutional conditions" that allowed such violations to take place is more important. Also truth commissions are not adversarial in nature. They allow the victim to tell their entire story at their own pace according to their will.

Also truth commissions may make recommendations as to the trial of perpetrators, but apart from naming them they commissions refrain from assigning individual responsibility. Nevertheless, truth commissions are in possession of various powers which are designed for encouraging the revelation of information with implications for criminal prosecution. "Some commissions, such as Liberia's Truth and Reconciliation Commission (TRC), could recommend amnesties for individuals who cooperated with its investigation. South Africa's TRC is unique in having the power to grant amnesty to perpetrators who provided a full account of their deeds and demonstrated that their crime was politically motivated. The TRC's judgment could not be legally challenged. Although critics charged that the criteria was subjective and unverifiable, the TRC crosschecked testimony against other statements. The fact that less than one-third of the 7,000 applicants were granted amnesty suggests the process was credible. Those who did not apply for or did not receive amnesty were theoretically at risk of prosecution. However, the South African government has not actively

²² *Consuelo et al. v. Argentina*, Case 10.147, 10.181, 10.240, 10.262, 10.309, 10.311 Inter-Am. Comm'n H.R., Report No. 28/92, OEA/Ser.L/V/II.83 Doc.¶ 50 (1993)

²³ J. Correa Sutil, 'Dealing with Past Human Rights Violations: The Chilean Case after Dictatorship', 67 *Notre Dame L. Rev.*, 1455, (1992)

pursued many criminal cases from the apartheid era.”²⁴

V. CONCLUSION

One of the best things about a truth commission is that it can be established fast at a comparatively lower cost. It is temporary in nature and has a limited mandate which can be tailored according to specific needs of the particular society where the commission is to be established. Also the proceedings of a truth commission are not bound by the rigidity that can be found in criminal procedure. Hence a truth commission is more flexible in hearing of a witness and evaluation of evidence.²⁵ Human rights literature mostly favors criminal prosecution as one of the if not “the best guarantee against human rights violations in the future”²⁶, the whole picture of the atrocities committed in the past cannot be captured by criminal proceedings alone. “The reason for a criminal trial is to judge the guilt of an individual upon the evidence presented with the result of either acquitting or convicting that individual. However, we are talking about crimes of a much larger scale than a murder case before a district court. Genocide, crimes against humanity, and serious human rights violations usually occur in a certain social climate of political oppression and racial prejudice toward minorities.”²⁷ A court cannot be tasked to give an account of the social, political, cultural, economic and historical background of the period of abuse. That task falls to the truth commission. Some of the advantages of a setting up a truth commission are:

- a. Building a historical record of the event and attempting to establish the truth
- b. Investigation into location of missing persons and hence providing closure
- c. Official recognition of the victim or survivor’s trials and tribulations
- d. It acts as a healing therapy where talking takes the form of a cathartic medium
- e. It aids in long term national and regional reconciliation.

But the very flexibility that is an asset to the structure of truth commissions is one of its foremost liabilities. Unlike a Court which has inherent powers, a truth commission is entirely dependent on political decision-makers to vest it with authority. political decision-makers that may not have an interest in establishing an independent and resourceful investigating commission. Authorities may deny access to information and confidential material. Potential witnesses before the commission may be reluctant to testify if they are not guaranteed

²⁴ Eric Weibelhaus-Brahm, *Supra* at 2

²⁵ Michael Ignatieff, *Digging up the Dead*, THE NEW YORKER, Nov. 10, 1997

²⁶ Diane Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2542 (1991).

²⁷ Angelika Schlunck, *Truth and Reconciliation Commission*, 4, ILSA J. Intl. & Comp. L., no. 2 (1998)

protection against alleged perpetrators or members of a violent and abusive former regime who regain political power. The takeaway from the entire article is that even though truth commission are useful for alternate justice delivery, it fails to match up to the efficiency and authority of criminal prosecution.
