



# RECOMMENDING CHANGE

## TRUTH COMMISSION RECOMMENDATIONS

### ON INSTITUTIONAL REFORMS:

#### AN OVERVIEW

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# PREFACE



Reforming security sector institutions, to address and prevent human rights violations, plays a critical role in transitional justice processes. DCAF has therefore decided to publish this study, mapping the recommendations formulated by nine institutions set up to open transitional justice processes in different parts of the world.

The publication provides the reader with an overview of recommendations on institutional reforms and guarantees of non-repetition of human rights violations. Norms, principles and established good practices are introduced across all case studies, with further-reaching analysis of case specific issues. While delving into examples of the not too distant past, this study originated on the occasion of DCAF's engagement in a more recent transitional justice process, in Tunisia.

Since 2011 DCAF has been supporting Tunisian institutions in providing good governance, strengthening the rule of law and promoting human rights in the security and justice sector. This partnership falls within the scope of Tunisia's commitment to democratic transition. With transitional justice being a fundamental part of this process, a Truth and Dignity Commission (Instance de la Vérité et de Dignité) was established in December 2013 with the mandate to investigate human rights violations in Tunisia between 1955 and 2013 on one hand, and to propose practical recommendations related to institutional reforms on non-recurrence of these violations on the other hand. At the beginning of 2019, the Truth and Dignity Commission published its final report.

This international study was carried out to contribute to the completion of that final report. Specifically, this research addressed the request of the Truth and Dignity Commission to strengthen the capacity of its members in formulating recommendations on institutional reforms. The preliminary results of this study were presented and discussed with the Truth and Dignity Commission at a workshop in April 2018.

By addressing selected transitional justice processes in a comparative way, this international study is meant as a reference tool far beyond the Tunisian context. It presents principles and methods for policy-makers, practitioners and researchers to help shape transitional justice processes with the ultimate goal of justice, peace and reconciliation.

Our special gratitude goes to the authors of this publication, Howard Varney and Alexander Mayer-Rieckh, two leading experts on transitional justice, for the wealth of their experience shared, and their dedication along the process of research, presentation and editing. The publication was made possible through the continuous support of the DCAF Trust Fund for North Africa (TFNA) by its member states – Belgium, France, Germany, Luxembourg, The Netherlands and Switzerland.

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**“OUT OF THE EXPERIENCE OF AN  
EXTRAORDINARY HUMAN DISASTER THAT  
LASTED TOO LONG, MUST BE BORN A  
SOCIETY OF WHICH ALL HUMANITY WILL  
BE PROUD...”**

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Statement of **Nelson Mandela** at his inauguration as President, 10 May 1994,  
**Pretoria**

## I. INTRODUCTION

In recent times, societies emerging from conflict or authoritarian rule have turned to truth commissions, not only to seek answers to past violence and repression, but also as a means to formulate reforms aimed at preventing the recurrence of such strife. While early truth commissions were confined to recording the horrors of human rights violations, later commissions devoted considerable efforts to identifying the underlying or structural causes of conflict and making detailed recommendations to address those causes.

Whereas early truth commissions tended to make recommendations on criminal prosecutions, redress for victims and preservation of records, recent commissions have made increasingly elaborate recommendations regarding institutional, administrative, legislative and constitutional measures to reform the police, the army, intelligence services, the criminal justice system, the judiciary and public bodies, the exploitation of natural resources and more generally governance.<sup>1</sup>

The final reports of truth commissions in recent times have made hundreds of recommendations, many of which deal with the reforms of multiple institutions.<sup>2</sup>

The work of numerous commissions over many years on rebuilding societies free of serious human rights violations has produced an extensive collection of experiences and ideas. To date, such a collection has not been collated and analysed in a single place. This paper is based on a survey of the recommendations on institutional reforms by several truth commissions in different contexts. It is hoped that future advisory bodies, within and outside governments, will find this study helpful when developing policies aimed at preventing conflicts and mass atrocities.

Transitional justice is generally identified as ‘the full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice and achieve reconciliation’.<sup>3</sup> Depending on the cultural, social and political contexts, states emerging from conflicts, dictatorships or authoritarian regimes deal differently with their past.

The UN Principles to Combat Impunity list four state obligations in response to gross violations of human rights and serious violations of international humanitarian law: (i) prosecuting perpetrators, (ii) granting reparations to victims, (iii) seeking the truth about the violations and (iv) guaranteeing

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<sup>1</sup> Robinson and Varney, ‘Principle 12: Advisory Functions of the Commissions’, in F. Haldemann and T. Unger (eds), *The United Nations Principles to Combat Impunity: A Commentary* (2018) 144, at 144.

<sup>2</sup> See e.g. *Witness to Truth: Report of the Sierra Leone Truth and Reconciliation Commission*, Vol. 2, Ch. 3 – Recommendations available at [http://www.sierraleone-trc.org/index.php/view-report-text-vol-2/item/volume-two-chapter-three?category\\_id=20](http://www.sierraleone-trc.org/index.php/view-report-text-vol-2/item/volume-two-chapter-three?category_id=20) (last visited 16 February 2018) (hereinafter ‘Sierra Leonean TRC Final Report’), § 211-238.

<sup>3</sup> UNSC, Report of the Secretary General: *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, S/2004/616, 23 August 2004, § 8.



their non-recurrence through institutional reforms and other measures.<sup>4</sup> These four principles of transitional justice interact and enhance one another by providing channels for the fulfilment of the victims' rights: the right to justice, the right to the truth, the right to an effective remedy and the right not to endure again such violations. Truth commissions not only contribute to the right to the truth but also provide advice to heads of state, the executive, the legislature and other bodies to combat impunity and prevent recurrence. Through this advisory function,<sup>5</sup> truth commissions 'intersect with other measures aimed at combating impunity, including reparations, criminal prosecutions and institutional reforms'.<sup>6</sup>

Redressing structural causes of violations and reforming institutions, particularly in the security and justice sectors that were involved in serious abuses and which have the means to repeat them, is critical for effective prevention.<sup>7</sup> This is why truth commissions place so much emphasis on institutional reforms. However, effective prevention should not only focus on the institutional level but also embrace interventions in the cultural, societal and individual spheres.<sup>8</sup> Moreover, truth commissions may have to go beyond immediate structural deficiencies for effective prevention and address the socio-economic root causes of violations.<sup>9</sup>

Whereas recommendations focusing on criminal accountability and reparations have been studied at great length, the documentation on truth commission contains little comprehensive analysis of recommendations related to institutional reforms. This study aims to fill this gap by providing an overview and analysis of the recommendations of nine truth commissions on institutional reforms. Given the large number of these recommendations, it was not possible to consider and analyse all of them; they will however be summarized in a matrix presented in appendix to this study.

The objectives of this study are to critically discuss truth commission recommendations on institutional reforms, the extent to which they were effective and what can be done to make them more useful. In order to achieve these objectives, this study begins by identifying the norms and principles underpinning institutional reforms to prevent recurrence. It will then analyse the recommendations made by nine truth commissions on institutional reforms, followed by broad

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<sup>4</sup> ECOSOC-Commission on Human Rights (ECOSOC-CHR), *The Administration of Justice and the Human Rights of Detainees. Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political): Revised Final Report Prepared by Mr. L. Joinet*, UN Doc. E/CN.4/Sub.2/1997/20/Rev.1, 2 October 1997 (hereinafter 'Joinet Principles'); ECOSOC-CHR, *Impunity. Report of the Independent Expert to Update the Set of Principles to Combat Impunity*, Diane Orentlicher, Addendum: Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity, UN Doc. E/CN.4/2005/102/Add.1, 8 February 2005 (hereinafter 'Updated Principles to Combat Impunity').

<sup>5</sup> *Ibid.*, Principle 12.

<sup>6</sup> Robinson and Varney, *supra* note 1, at 144.

<sup>7</sup> Updated Principles to Combat Impunity, *supra* note 4, Principle 36; GA Res. 60/147: *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*, 21 March 2006, § 23 (hereinafter 'Basic Principles and Guidelines on Reparation').

<sup>8</sup> Human Rights Council (HRC), *Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence*, Pablo de Greiff, UN Doc. A/HRC/30/42, 7 September 2015, § 23 (hereinafter '2015 de Greiff Report').

<sup>9</sup> Chapter VII of this study describes how truth commissions may formulate useful recommendations in these other spheres.



observations on the impact of such recommendations. The study ends with suggestions on how to make good recommendations and to promote the implementation of recommendations.



## II. METHODOLOGY

This study analyses the recommendations on institutional reform of nine truth commissions. To categorise these recommendations, the study is based on the framework developed by Pablo de Greiff, former Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence.<sup>10</sup> According to De Greiff, prevention interventions should be undertaken in four spheres: at the institutional level, in the realm of civil society and in the sphere of “culture and personal dispositions.” The framework describes each sphere and develops a list of interventions that should be considered while designing prevention policies aimed at addressing serious violations of international human rights law or international humanitarian law. At the institutional level, which is the focus of this study, the framework highlights certain basic preconditions i.e. ‘security for all’ and ‘legal identity’ that must be met to enable all individuals to exercise their rights. It also states that an effective prevention policy ought to involve ratifying international human rights treaties to proactively promote rights. The framework further proposes specific legal and constitutional reform measures, particularly in the security and judicial sectors.<sup>11</sup> At the same time, De Greiff argues that “there is no such thing as a general non-recurrence policy.”<sup>12</sup>

The truth commissions analysed in this study were selected based on a variety of factors. They reflect the geographical diversity of truth commissions (Africa, Asia, Central and South America), the variety of their contexts (following conflict or regime change)<sup>13</sup> and their establishment pattern (participatory or exclusionary) as well as varying mandates (broad or rather narrow). All the commissions developed institutional reform recommendations in their final reports, which were released in different political circumstances. While some factors affected the content of recommendations on institutional reforms (such as the context, establishment pattern or mandate of a truth commission), other factors had an impact on the publication of the reports and the subsequent implementation of recommendations (such as the establishment pattern or the political circumstances in which the report was released).

Exclusionary processes refer to a top-down establishment pattern of a truth commission, either by a government or by an international organization.<sup>14</sup> Such an approach is less likely to mobilize civil society and societal support for the truth commission. By contrast, participatory processes refer to mechanisms that involve a range of political and social actors and are therefore more likely to

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<sup>10</sup> 2015 de Greiff Report, supra note 8.

<sup>11</sup> Ibid.

<sup>12</sup> HRC, Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff, UN Doc. A/HRC/24/42, 28 August 2013, § 27 (hereinafter ‘2013 de Greiff Report’).

<sup>13</sup> Regime Change: Chile, Kenya and South Africa; Conflict: Sierra Leone, El Salvador, Guatemala, Timor Leste; Political Violence: Kenya, Thailand.

<sup>14</sup> Participatory processes were favoured in South Africa, Guatemala, Timor Leste, Sierra Leone, Peru and Kenya, and exclusionary processes were employed in Chile and El Salvador.



engage civil society during and in the aftermath of the truth commission's work.<sup>15</sup> The following truth commissions were selected:

### ► AFRICA

- **South Africa:** *Truth and Reconciliation Commission* (1995) ('South African TRC');
- **Sierra Leone:** *Truth and Reconciliation Commission* (2002) ('Sierra Leonean TRC');
- **Kenya:** *Truth, Justice and Reconciliation Commission* (2009) ('Kenyan TJRC');

### ► SOUTH AMERICA

- **Chile:** *National Commission for Truth and Reconciliation* (1990) ('Chilean NCTR');
- **Peru:** *Truth and Reconciliation Commission in Peru* (2001) ('Peruvian TRC');

### ► CENTRAL AMERICA

- **El Salvador:** *Commission on the Truth for El Salvador* (1992) ('El Salvador CT');
- **Guatemala:** *Commission for Historical Clarification in Guatemala* (1997) ('Guatemalan CHC');

### ► ASIA

- **Timor Leste:** *Commission for Reception, Truth and Reconciliation in Timor Leste* (2002) ('Timor Leste CAVR');<sup>16</sup>
- **Thailand:** *Truth for Reconciliation Commission in Thailand* (2010) ('Thailand TRCT').

<sup>15</sup> On exclusionary and participatory processes see O. Bakiner, *Truth Commissions. Memory, Power and Legitimacy* (2016).

<sup>16</sup> Referred to by its Portuguese acronym CAVR: Comissão de Acolhimento, Verdade e Reconciliação de Timor Leste.



### III. INSTITUTIONAL REFORMS TO PREVENT RECURRENCE:

#### *Norms and Principles*

States are required to fulfil four obligations to combat impunity in transitions to democracy and/or peace: (i) prosecuting perpetrators, (ii) granting reparations to victims, (iii) seeking the truth about the violations and (iv) guaranteeing their non-recurrence. Institutional reforms fall in the realm of guarantees of non-recurrence, which is the least developed category of measures to combat impunity: 'The 1997 version of the Principles to Combat Impunity devote only six out of forty-two principles to guarantees of non-recurrence; the 2005 updated version of the Principles devote only four out of thirty-eight principles to this obligation'.<sup>17</sup> The transitional justice community has not devoted much attention to guarantees of non-recurrence and the term is sometimes misunderstood or inadequately interpreted. This term is frequently used by truth commissions but often without fully understanding what it entails. The following considerations aim to bring some clarity to the concept of guarantees of non-recurrence and their legal foundations.

#### A. Legal Foundations

The obligation to prevent the recurrence of gross violations of human rights and serious violations of international humanitarian law is based on various sources of international law. International human rights law requires states to both respect and ensure human rights.<sup>18</sup> This positive obligation encompasses a comprehensive duty to prevent violations of human rights, particularly the most serious violations such as genocide, war crimes and crimes against humanity.<sup>19</sup> The duty to ensure human rights implies not only an overall obligation to prevent undetermined future violations, but also a specific obligation to prevent the recurrence of violations that have already taken place.<sup>20</sup> More generally, a commitment to adhere to a right also implies making efforts to ensure that a violation of this right ceases and does not recur.<sup>21</sup>

The Convention on the Prevention and Punishment of the Crime of Genocide imposes an explicit obligation on the Contracting Parties to prevent genocide.<sup>22</sup> Further specific obligations to prevent

<sup>17</sup> Mayer-Rieckh, 'Guarantees of Non-Recurrence: An Approximation', 39 Human Rights Quarterly (HRQ) (2017) 416, at 416.

<sup>18</sup> See Art. 2, International Covenant on Civil and Political Rights 1966, 999 UNTS 171 (entered into force 23 March 1976) (hereinafter 'ICCPR').

<sup>19</sup> United Nations Human Rights Committee (UN-HRC), General Comment No. 31 [80] adopted on 29 March, CCPR/C/21/Rev.1/Add.13, 26 May 2004, § 7. See also Basic Principles and Guidelines on Reparation, supra note 7, § 1-3.

<sup>20</sup> General Comment No. 31 [80], *ibid.*, § 17.

<sup>21</sup> GA Res. 56/83, 28 January 2002, Responsibility of States for Internationally Wrongful Acts, at annex Art. 30. D. Shelton argues that the rule of law 'is the basis of the obligation to cease any conduct that is not in conformity with an international duty'; see Shelton, 'The United Nations Principles and Guidelines on Reparations: Context and Contents' in K. De Feyter et al (eds), *Out of the Ashes: Reparation for Victims of Gross and Systematic Human Rights Violations* (2005) 11, at 11-34.

<sup>22</sup> Art. 1, Convention on the Prevention and Punishment of the Crime of Genocide 1948, 78 UNTS 277 (entered into force on 12 January 1951): 'The Contracting Parties confirm that genocide (...) is a crime under international law which they undertake to prevent and to punish.'



violations are included in the Convention against Torture, which requires Contracting Parties to ‘take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction’.<sup>23</sup> The Convention for the Protection from Enforced Disappearance lists specific measures to be taken by the Contracting Parties to prevent enforced disappearance.<sup>24</sup> International humanitarian law requires the Contracting Parties not only to respect but also ‘to ensure respect’ for its rules in international and non-international conflicts.<sup>25</sup> Again, the duty to ensure respect contains obligations to prevent violations of humanitarian law, to halt ongoing violations and to avert their recurrence.<sup>26</sup>

The obligation to prevent recurrence is not only based on the overall duty to ensure human rights, but is also part of a proper understanding of reparations to which victims of gross violations of human rights and serious violations of international humanitarian law are entitled.<sup>27</sup> To be full and effective, reparations shall be provided in five forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non-recurrence.<sup>28</sup>

Preventing recurrence constitutes an obligation that is distinct from the other state obligations in the aftermath of serious violations.<sup>29</sup> Satisfying an obligation such as prosecuting those responsible for serious violations does not relieve a state of its duty to prevent recurrence.<sup>30</sup> Implementing just one type of transitional justice measure will not do justice in the wake of serious human rights violations: ‘an effective policy requires a multifaceted strategy, with each component playing a necessary but only partial role’.<sup>31</sup> The individual measures are more likely understood as justice measures if they are not implemented in isolation, but as part of a comprehensive transitional justice strategy, in which they can be mutually reinforcing to jointly affirm the validity of basic human rights norms.<sup>32</sup>

<sup>23</sup> Art. 2, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984, 1465 UNTS 85 (entered into force 26 June 1987).

<sup>24</sup> Arts. 22-23, International Convention for the Protection of All Persons from Enforced Disappearance 2006, 2716 UNTS 3 (entered into force 23 December 2010) (hereinafter ‘ICPPED’).

<sup>25</sup> Art. 1 Common to the four Geneva Conventions, Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) 1949, 75 UNTS 287; Art. 1(4), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) 1977, 1125 UNTS 609.

<sup>26</sup> For a detailed exploration of the duty to ensure respect see ICRC, Commentary on the First Geneva Convention (2016), Art. 1: Respect for the Convention available at <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=72239588AFA66200C1257F7D003670BD> (last visited 26 March 2017).

<sup>27</sup> Basic Principles and Guidelines on Reparation, supra note 7, § 11, § 23.

<sup>28</sup> Ibid.

<sup>29</sup> Updated Principles to Combat Impunity, supra note 4, Principle 37.

<sup>30</sup> ECOSOC-CHR, Report of the Independent Expert to Update the Set of Principles to Combat Impunity, Diane Orentlicher in Promotion and Protection of Human Rights: Impunity, U.N. Doc. E/CN.4/2005/102, 18 February 2005, § 16.

<sup>31</sup> ECOSOC-CHR, Independent Study on Best Practices, Including Recommendations, to Assist States in Strengthening Their Domestic Capacity to Combat All Aspects of Impunity, by Professor Diane Orentlicher in Promotion and Protection of Human Rights: Impunity, UN Doc. E/CN.4/2004/88, 27 February 2004, § 10 (hereinafter ‘Independent Study on Best Practices to Combat All Aspects of Impunity’).

<sup>32</sup> De Greiff, ‘Theorizing Transitional Justice’, in M. S. Williams, R. Nagy and J. Elster (eds), *Transitional Justice* (2012) 31, at 38-39.



## ■ B. Institutional Reforms and other Prevention Measures

Among the four obligations listed in the Principles to Combat Impunity, the first three obligations refer to specific measures, while guarantees of non-recurrence relate to a function. That function is, more specifically, prevention, which can be achieved by an open-ended variety of measures.<sup>33</sup> Frequently proposed measures in the transitional justice literature to prevent recurrence include reforming state institutions - particularly security and justice institutions that were involved in serious abuses and have the means to repeat them - disbanding parastatal armed groups, demobilising non-state armed groups and reforming laws that contribute to impunity.<sup>34</sup>

Target institutions often belong to the security sector because they have access to coercive means (weapons and ammunition as well as logistical and operational capacities) and have expertise in using force and firearms, which facilitate committing serious human rights violations. This is particularly the case with 'system' crimes such as genocide, crimes against humanity and war crimes if committed on a large scale. In addition to a political context that facilitates and possibly encourages criminal conduct, system crimes require a degree of organization, resources and skills, and usually involve 'a division of labour between planners and executants'.<sup>35</sup> Efforts to effectively prevent recurrence of such crimes should therefore pay particular attention to perpetrators in security structures and systems, which include both state and non-state security actors. Preventing system crimes hence requires systemic reform.<sup>36</sup>

While this study focuses on the institutional sphere, an effective prevention policy cannot be limited to reforming laws and institutions. Dealing with the immediate structural reasons of violations without addressing its socio-economic root causes is often insufficient to quell future human rights violations. Pablo de Greiff, UN former Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence has developed a general framework for designing an actionable prevention policy.<sup>37</sup> The framework is intended to upstream prevention work, broaden its focus and contribute to overcoming the disaggregation of knowledge and resources on prevention. The general framework builds on the understanding that prevention in the aftermath of gross human rights violations and serious violations of international humanitarian law cannot be achieved through reform and development initiatives in the sphere of state institutions alone.

<sup>33</sup> 2015 de Greiff Report, supra note 8, § 23.

<sup>34</sup> Basic Principles and Guidelines on Reparation, supra note 7, § 23; Updated Principles to Combat Impunity, supra note 4, Principle 36.

<sup>35</sup> OHCHR, Rule of Law Tools for Post-Conflict States: Prosecution Initiatives (2006), at 11-17 available at <http://www.ohchr.org/Documents/Publications/RuleoflawProsecutionsen.pdf> (last visited 26 March 2018).

<sup>36</sup> de Greiff notes that 'transitional justice is interested not merely in correcting isolated, "token" abuses, but also in correcting systematic violations, which obviously requires systemic reform.' De Greiff, 'Articulating the Links Between Transitional Justice and Development: Justice and Social Integration', in P. de Greiff and R. Duthie (eds), *Transitional Justice and Development: Making Connections* (2009) 28, at 63.

<sup>37</sup> 2015 de Greiff Report, supra note 8.



It requires transformations in the societal sphere, particularly at the level of civil society, in the cultural sphere and in the sphere of individual dispositions.<sup>38</sup>

Initiatives in the societal sphere recognize the crucial preventive role of civil society and include measures to strengthen it and increase its autonomy. Beyond interventions in the institutional and societal spheres, a robust prevention agenda will also aim to address the cultural dimensions of violations, as well as the individual dispositions that incline people towards perpetrating violations.

The cultural and individual spheres are relatively resistant to change, but changes achieved in these spheres are also more difficult to reverse. Often, interventions in the cultural and individual spheres are politically less charged and may be easier to initiate than interventions in the institutional sphere. Initiatives in the cultural sphere involve, inter alia, interventions in the fields of education, arts and documentation.<sup>39</sup> Interventions in the sphere of individual dispositions include, for instance, trauma counselling and psychosocial support.<sup>40</sup>

The framework approach proposed by the Special Rapporteur facilitates a comprehensive and organised planning process for preventing recurrence. While the framework does not provide a policy blueprint, it offers a structure to identify the range of activities that are possible and critical for prevention in a specific context at a given time.

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<sup>38</sup> 2015 de Greiff Report, supra note 8; UNGA, Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence, UN Doc. A/72/523, 12 October 2017 (hereinafter '2017 UN Special Rapporteur's Report').

<sup>39</sup> See for example the National Vision project of the Sierra Leonean TRC available at: <http://www.sierraleonetrc.org/index.php/national-vision-for-sl> (last visited 16 December 2018).

<sup>40</sup> 2017 UN Special Rapporteur's Report, supra note 38, § 30 - 80.



## IV. OBSERVATIONS ON INSTITUTIONAL REFORM RECOMMENDATIONS

Truth commissions not only promote the right to the truth but also contribute, through their advisory function, to reparations, criminal prosecutions, institutional reforms and other measures to prevent recurrence. In addition, some truth commissions included recommendations on how to disseminate their findings and how to implement their recommendations. The advisory function has been an essential characteristic of almost all truth commissions to date.<sup>41</sup>

The institutional reforms recommended by truth commissions tend to reflect the complementary nature of transitional justice mechanisms. As a result and as discussed in more detail in this study, truth commissions have the potential to facilitate institutional reforms by overcoming a culture of denial and by building pressure on governments. This chapter summarises general observations on institutional reform recommendations by truth commissions.

### A. Importance of the Context

Quite commonly, institutional reforms to prevent recurrence of serious violations of international human rights law and international humanitarian law are agreed upon as part of peace agreements or regime change negotiations to bolster the legitimacy of the new government and its commitment to the rule of law. In addition, incoming governments introduce their own reforms often in the first few months or years of their administrations. Consequently, certain institutional reform measures are often already in place or rolled out before a truth commission begins to operate or while it works.<sup>42</sup> Truth commissions are therefore required to assess whether ongoing reforms will succeed in preventing recurrence or whether additional reforms are needed. Truth commissions often formulate their recommendations under very different political, social and economic circumstances. The content of their recommendations is also influenced by the scope of their mandates, their powers, their ability to engage freely and independently, as well as their members' personalities. As a result, the institutional reform recommendations of truth commissions vary greatly.

The content of truth commission recommendations, the follow-up mechanisms and the level of implementation depend heavily on the context in which the commissions operate. For instance, institutional reform recommendations vary considerably depending on whether they relate to a post-authoritarian or post-conflict context. Commissions in post-authoritarian contexts tend to

<sup>41</sup> Robinson and Varney, *supra* note 1, at 144-151.

<sup>42</sup> For instance, the truth commission in Guatemala found that racial injustice and discrimination were underlying causes of the conflict. It did, however, not make any recommendations in this regard but simply urged the implementation of the Agreement on Identity and Rights of Indigenous People (Guatemala Memory of Silence: Report of the Commission for Historical Clarification - Conclusions and Recommendations (February 1999), § 82 [numbering of paragraphs corresponds to numbering under Chapter - Recommendations] available at [https://www.aaas.org/sites/default/files/migrate/uploads/mos\\_en.pdf](https://www.aaas.org/sites/default/files/migrate/uploads/mos_en.pdf) (last visited 16 February 2018) (hereinafter 'Guatemalan CHC Final Report').



recommend the dismantling of ‘the securitized bureaucracies and over-sized security sectors previously responsible for sustaining authoritarian and totalitarian regimes’.<sup>43</sup> In contrast, truth commissions in the aftermath of conflict rather seek to build firm foundations for a stable democratic state. Regrettably, some truth commissions insufficiently consider context and copy-paste institutional reform recommendations developed by other commissions, particularly when they share similar mandates.

## B. Organising the Recommendations

Some truth commissions organised their reports by themes (e.g. protection of human rights, women, children, land etc.) and developed their recommendations around these themes including thematic recommendations relating to institutional reforms.<sup>44</sup> Other commissions developed chapters specifically devoted to institutional reforms.<sup>45</sup>

Generally, truth commissions formulate recommendations in direct response to their findings, which is preferable. Sometimes, truth commissions express recommendations that are not related to their findings. For instance, the Kenyan TJRC proposed the establishment of the Office of the Independent Inspector of Prisons and All Places of Detention without having discussed human rights violations in places of detention. The same truth commission found that the armed forces were responsible for serious violations but did not include any recommendations relating to the armed forces in its final report.

The recommendations of truth commissions can be either specific or general. In the past, truth commissions tended to formulate recommendations of a more general nature. Over time, commissions made more detailed findings resulting in more specific recommendations. By way of example, following repeated violations of rights of detainees by medical personnel, the South African TRC recommended that medical documentation should explicitly deal with torture. Moreover, the South African TRC recommended some vetting of medical personnel.

## C. Expanding Mandates

In recent years, the scope of truth commission mandates has significantly expanded in terms of both substance and functions.<sup>46</sup> The broadening of mandates has resulted in more complex and extensive analyses of events, which in turn has led to a significant expansion in both the length of commission reports and the number of recommendations included therein. For instance, the English

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<sup>43</sup> UNDP/DCAF, *Public Oversight of the Security Sector: A Handbook for Civil Society Organizations* (2008) available at [https://www.dcaf.ch/sites/default/files/publications/documents/CSO\\_Handbook.pdf](https://www.dcaf.ch/sites/default/files/publications/documents/CSO_Handbook.pdf) (last visited 14 October 2018), at 11.

<sup>44</sup> Examples include South Africa, Sierra Leone, Kenya and Thailand.

<sup>45</sup> Examples include the titles of the following chapters: ‘Institutional Reforms’ (Peru), ‘Suggestions in the Institutional and Legal Area to Assure that Human Rights Remain in Force’ (Chile), ‘Institutional Reforms to Prevent the Repetition of Such Acts’ (El Salvador), ‘Human Rights at Home: Promoting and Protecting Human Rights Through Effective Institutions’ (Timor Leste) and ‘Measures to Strengthen Democratic Process’ (Guatemala).

<sup>46</sup> ICTJ and Kofi Annan Foundation, *Challenging the Conventional: Can Truth Commissions Strengthen Peace Processes?* (2014) available at [www.ictj.org/publication/challenging-conventional-can-truth-commissions-strengthen-peace-processes](http://www.ictj.org/publication/challenging-conventional-can-truth-commissions-strengthen-peace-processes) (last visited 16 December 2018).



version of the El Salvador commission's final report is 202 pages long including about 15 pages of recommendations,<sup>47</sup> while the Peru commission's report is almost 8.000 pages long, including about 200 pages of recommendations.<sup>48</sup> The Sierra Leone commission compiled 108 pages of recommendations encompassing 118 topics under 17 subject headings.<sup>49</sup>

The mandates of truth commissions have widened beyond the traditional fact-finding function of clarifying individual cases and have become 'an undertaking to understand comprehensively root causes, circumstances, factors, context and motives of countrywide situations of repression and/or violence'.<sup>50</sup> Early truth commissions focused largely on violations of civil and political rights and their recommendations predominantly related to constitutional and legal reforms of the security sector and the justice system. More recent truth commissions have begun to formulate recommendations addressing the underlying causes of conflict, such as economic, ethnic or racial marginalization and discrimination (e.g. the commissions of Sierra Leone and Kenya).

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<sup>47</sup> USIP, *From Madness to Hope: The 12-year War in El Salvador - Report of the Commission on the Truth for El Salvador - 1993 (2001)* at 170 available at <https://www.usip.org/sites/default/files/file/ElSalvador-Report.pdf> (last visited 16 February 2018) (hereinafter 'El Salvador CT Final Report').

<sup>48</sup> USIP, *Truth Commission Peru 01* available <https://www.usip.org/publications/2001/07/truth-commission-peru-01> (last visited 13 October 2018); see also *Final Report of the Truth and Reconciliation Commission - Peru, Vol. IX (2003)* available at [https://www.usip.org/sites/default/files/file/resources/collections/commissions/Peru01-Report/Peru01-Report\\_Vol9.pdf](https://www.usip.org/sites/default/files/file/resources/collections/commissions/Peru01-Report/Peru01-Report_Vol9.pdf) (last visited 13 October 2018).

<sup>49</sup> Sierra Leone TRC Final Report, as cited in Robinson and Varney, *supra* note 1, at 145.

<sup>50</sup> 2015 de Greiff Report, *supra* note 8, § 40.



## V. INSTITUTIONAL REFORM RECOMMENDATIONS OF TRUTH COMMISSIONS

This study does not deal with recommendations related to criminal prosecutions or reparations, but provides an overview of the recommendations the nine commissions made in relation to institutional reforms. In this chapter, these recommendations are organized in six groups: security sector; vetting; legal and constitutional reforms; measures related to human rights; judicial reforms; and other institutional reforms.

### A. Security Sector

The security sector encompasses not only core security institutions (e.g. police, armed forces and intelligence services), but also security management and oversight bodies (e.g. ministries, public complaint mechanisms and civil society organizations), justice and rule of law actors (e.g. the judiciary, prisons and traditional justice systems), and non-statutory security forces (e.g. private security companies and non-state armed groups).<sup>51</sup> Security sector reform ('SSR') aims at enhancing the effectiveness and accountability of security institutions, operating under civilian control within a framework of the rule of law and human rights, in order to help ensure that people are safer.<sup>52</sup> The approach to SSR and its extent depends on the context in question. Security institutions in authoritarian states are often powerful, sophisticated and enjoy considerable resources and organizational capacity.<sup>53</sup> In post-conflict contexts, the state might not effectively control its entire territory, which makes it difficult to undertake reforms. Institutions will often be dysfunctional and might even collapse. Resources to sustain reforms might not be available and the proliferation of small arms is likely to increase criminality.

Truth commissions tend to focus on institutions and groups in the security sector that allowed, facilitated, promoted or committed violations. Such institutions generally include the armed forces, the police, intelligence services, penitentiary services as well as parastatal and non-state armed groups.<sup>54</sup>

<sup>51</sup> OECD, OECD DAC Handbook on Security System Reform: Supporting Security and Justice (Paris: OECD, 2007) as cited in Schnabel, 'Ideal Requirements versus Real Environments in Security Sector Reform', in H Born and A Schnabel (eds), DCAF, Security Sector Reform in Challenging Environments (2009), at 9.

<sup>52</sup> UNGA - UNSC, Securing States and Societies: Strengthening the United Nations Comprehensive Support to Security Sector Reform, Report of the Secretary-General, UN Doc. A/67/970-S/2013/480, 13 August 2013, § 8.

<sup>53</sup> Mayer-Rieckh, Guarantees of Non-Recurrence, supra note 17, at 435.

<sup>54</sup> Focus of this principle on parastatal groups drew mainly on the experiences from Latin America and El Salvador, however, other groups such as state and non-state armed groups should also be taken under consideration. See Duthie and Mayer-Rieckh, 'Principle 37. Disbandment of Parastatal Armed Forces / Demobilization and Social Reintegration of Children', in F. Haldemann and T. Unger (eds), The United Nations Principles to Combat Impunity: A Commentary (2018) 399, at 404; See also Updated Principles to Combat Impunity, supra note 4, Principle 37.



In light of this, truth commissions have recommended measures aimed at ‘disabling abusive capacities’ and strengthening accountability mechanisms within the security sector.<sup>55</sup>

## 1. General Recommendations Related to the Security Sector

Several truth commissions advocated a clear separation of powers between various types of security services and their operational autonomy from third party influence. The Peruvian TRC recommended that the National Police should be legally and constitutionally defined as a non-militarized civilian institution.<sup>56</sup> The Chilean NCTR stated that ‘under the rule of law the armed forces, security forces, and police are permanent state institutions which are independent of particular interests and struggles.’<sup>57</sup> It also required the intelligence services of the armed forces, the police and the General Bureau of Investigation to limit their activity to the proper field of each institution.<sup>58</sup> The Guatemalan CHC called for defined ‘structures, tasks and limits of civil and military intelligence, restricting the latter to exclusively military affairs’.<sup>59</sup> In their recommendations, most commissions argued that restoring internal order should fall exclusively within the competence of the police not the military.<sup>60</sup>

Whereas certain truth commissions formulated specific recommendations aimed at providing stronger accountability of security agencies (see subsection 2 below), some also developed broader statements to give general directions on SSR. The Chilean NCTR recommended that studies on the concept of national security be conducted to develop proposals on relevant changes in the Constitution and legislation.<sup>61</sup> In addition, the Chilean NCTR proposed criteria for a future debate on SSR, as ‘the successful implementation of such measures will basically depend on the degree to which they are accepted in the armed institutions themselves’.<sup>62</sup> Similarly, the Guatemalan CHC called for broad consultations on the development of a new military doctrine as well as a doctrine for civilian security institutions (e.g. National Civilian Police) to establish the principles of the relationship

<sup>55</sup> According to Mayer-Rieckh, the reasons why actors perpetrate serious human rights violations do not often relate to capacity deficits but to organizational and operational capacities that represent a catalyst for violations. Therefore, the prevention may require ‘disabling abusive capacities’ that enabled or facilitated the commission of serious crimes. On the other hand, the reforms in the security sector may require ‘building integrity capacities’. These are processes that strengthen accountability mechanisms and promote the inclusion of victims and other marginalised groups. Another prevention strategy consists in verbally or symbolically signalling a commitment to overcome the legacy of human rights violations and an endorsement of fundamental human rights norms. See Mayer-Rieckh, Guarantees of Non-Recurrence, supra note 17, at 436-37.

<sup>56</sup> Hatun Willakuy: Abbreviated Version of the Final Report of the Truth and Reconciliation Commission – Peru, at 306 available at [http://ictj.org/sites/default/files/ICTJ\\_Book\\_Peru\\_CVR\\_2014.pdf#page=311](http://ictj.org/sites/default/files/ICTJ_Book_Peru_CVR_2014.pdf#page=311) (last visited 16 February 2018) (hereinafter ‘Peruvian TRC Final Report’), at 306.

<sup>57</sup> The NCTR simply stated that an adequate mechanism of supervision over the intelligence services should be developed see USIP, Report of the Chilean National Commission on Truth and Reconciliation TRC Chile (19 February 1991) at 1092, available at <https://www.usip.org/sites/default/files/resources/collections/truth-commissions/Chile90-Report/Chile90-Report.pdf> (last visited 16 February 2018) (hereinafter ‘Chilean NCTR Final Report’).

<sup>58</sup> See e.g. *ibid.*, at 1096.

<sup>59</sup> Guatemalan CHC Final Report, supra note 42, § 58.

<sup>60</sup> Guatemalan CHC Final Report, *ibid.*, § 77-78; Peruvian TRC Final Report, supra note 56, at 306; Chilean NCTR Final Report, supra note 57, at 1097; Final Report of Truth for Reconciliation Commission of Thailand (TRCT) July 2010 – July 2012 (2012), at 292 available at <http://library.nhrcoth.org/ulib/document/Fulltext/FQ7939.pdf> (last visited 16 February 2018) (hereinafter ‘Thailand TRCT Final Report’); Truth and Reconciliation Commission of South Africa Report, Vol. V (October 1998) at 331-332 available at <http://www.justice.gov.za/trc/report/finalreport/Volume5.pdf> (last visited 16 February 2018) (hereinafter ‘TRC South Africa Final Report’).

<sup>61</sup> The Chilean NCTR simply stated that an adequate mechanism of supervision over the intelligence services should be developed see Chilean NCTR Final Report, supra note 57, at 1096.

<sup>62</sup> *Ibid.*, at 1094.



between society and security institutions within a democratic and pluralistic framework.<sup>63</sup> The Peruvian TRC and the Timor Leste CAVR also recommended the formulation of a national security policy.<sup>64</sup>

## 2. External Accountability

Truth commissions have made specific recommendations to strengthen accountability, governance and oversight in the security sector.<sup>65</sup> The truth commissions reviewed for the purpose of this study typically recommended democratic oversight over the security sector, complaints mechanisms, effective disciplinary procedures and the creation of strict rules on the use of force. The ability of civil society to operate freely and independently constituted yet another factor that should be guaranteed to ensure an accountable security sector. Accordingly, civil society should be able to monitor the activities of the security sector and the government without fear of being targeted.<sup>66</sup>

Democratic oversight refers to a set of legislative, institutional and functional measures that allow legislative, executive, judiciary, independent human rights institutions and civil society to hold security actors accountable for their actions.<sup>67</sup> Oversight mechanisms ensure the division of powers and functions between various organs of the state guaranteeing that the powers of the security services are balanced against the monitoring, reporting and control functions of the oversight institutions.

Some truth commissions included just a general statement indicating that civilian oversight over the security agencies or a specific agency must be developed. The Guatemalan CHC, for instance, stated that the army should be ‘subordinated to the political power, which emanates from the ballot box through the procedures established by the Constitution’.<sup>68</sup> Other truth commissions recommended that specific organs or bodies take on the responsibility for democratic oversight, whether they are state organs<sup>69</sup> or independent institutions. The Timor Leste CAVR emphasized that the state intelligence agencies must be controlled, held accountable and overseen by parliament which should also exercise effective oversight over the military and the police. It was recommended that the Minister of Interior be required to report regularly on the activities of the police to parliament.<sup>70</sup> In other examples, truth commissions recommended strengthening already existing state institutions.

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<sup>63</sup> Guatemalan CHC Final Report, supra note 42, § 60 and 73.

<sup>64</sup> Peruvian TRC Final Report, supra note 56, at 306; Chegal! The Final Report of the Commission for Reception, Truth and Reconciliation in Timor Leste, Volume 11: Recommendations (October 2005), at 19 available at <https://www.etan.org/etanpdf/2006/CAVR/11-Recommendations.pdf> (last visited 16 February 2018) (hereinafter ‘Timor Leste CAVR Final Report’).

<sup>65</sup> Mayer-Rieckh, Guarantees of Non-Recurrence, supra note 17, at 429; UNSG, Securing Peace and Development: The Role of the United Nations in Supporting Security Sector Reform: Report of the Secretary General, UN Doc. A/62/659-S/2008/39, 23 January 2008, § 15; OECD Handbook on SSR, supra note 51, at 21.

<sup>66</sup> Schnabel, supra note 51, at 6.

<sup>67</sup> UNDP/DCAF, Public Oversight of the Security Sector, supra note 43, at 7.

<sup>68</sup> Guatemalan CHC Final Report, supra note 42, § 60(d).

<sup>69</sup> Thailand TRCT Final Report, supra note 60, at 288; Guatemalan CHC Final Report, supra note 42, § 74.

<sup>70</sup> Timor Leste CAVR Final Report, supra note 64, at 19, 21-22.



The Peruvian TRC suggested detailed reforms within the existing National Intelligence Council.<sup>71</sup> The South African TRC recommended that ‘all members of the South African National Defence Forces (‘SANDF’) should not be entitled to engage in any covert activities not specifically authorised by the minister of defence’.<sup>72</sup>

Yet another way to ensure democratic oversight over security institutions is through budgetary and audit requirements. Regular audits of the military and intelligence services were recommended by the South African TRC.<sup>73</sup>

Some truth commissions suggested the establishment of independent oversight bodies. While the Thailand TRCT called for the establishment of an Army Inspector of the Cabinet (an Ombudsperson),<sup>74</sup> the Kenyan TJRC proposed setting up the Office of the Independent Inspector of Prisons and All Places of Detention.<sup>75</sup>

The second set of truth commission recommendations to contribute to a more accountable security sector relates to effective civilian complaint mechanisms. These mechanisms provide a direct channel for the public to report on abuses committed by security agencies. The South African TRC proposed the creation of an Independent Complaints Directorate (‘ICD’) that should be governed by legislation separate from the general police legislation and should be genuinely independent from the Ministry of Safety and Security. It further suggested that the ICD be vested with strong investigative powers, including a power to compel the South African Police Service (‘SAPS’) and others to comply with its investigative demands, including search and seizure.<sup>76</sup>

The Guatemalan CHC proposed the establishment of an internal control unit that would be accessible to both the public and the Human Rights Ombudsman. It was recommended that the unit should have investigation and sanction powers to handle both individual and institutional professional misconduct.<sup>77</sup> Some commissions recommended other independent complaint handling mechanisms. The Peruvian TRC proposed the establishment of the Military Ombudsperson Office to handle complaints, while the Timor Leste CAVR suggested that the Human Rights Ombudsperson Office (‘Provedor’) takes the lead in developing a special procedure for complaints against the police.<sup>78</sup>

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<sup>71</sup> Peruvian TRC Final Report, *supra* note 56, at 306.

<sup>72</sup> South African TRC, *supra* note 60, at 328-29.

<sup>73</sup> *Ibid.*, at 328-329.

<sup>74</sup> Thailand TRCT Final Report, *supra* note 60, at 288.

<sup>75</sup> See Report of the Truth, Justice and Reconciliation Commission, Vol. IV (May 2013) at 31, available at [http://knchr.org/Portals/0/Reports/TJRC\\_Volume\\_4.pdf](http://knchr.org/Portals/0/Reports/TJRC_Volume_4.pdf) (last visited 16 February 2018) (hereinafter ‘Kenyan TJRC Final Report’).

<sup>76</sup> *Ibid.*, at 330-331.

<sup>77</sup> Guatemalan CHC Final Report, *supra* note 42, § 64.

<sup>78</sup> Peruvian TRC Final Report, *supra* note 56, at 307; Timor Leste CAVR Final Report, *supra* note 64, at 21. The Provedor for Human Rights is akin to an Ombudsperson institution. The Guatemalan CHC proposed the creation of the oversight unit for internal control or inspection within the Police, see Guatemalan CHC Final Report, *supra* note 42, § 74.



The other truth commissions reviewed in this study did not propose specific reform measures for the police sector apart from the general recommendations that the police be independent and act with integrity. Given the circumstances of transitions, it appears that truth commissions in Southern and Central America, Sierra Leone and Thailand were more concerned with reforms within the military and treated these issues as a priority.

In Kenya on the other hand, reforms related to the police sector were introduced in parallel to the operations of the Kenyan TJRC. The latter recommended two measures aimed at reforming the police service, namely: the formulation of a Code of Conduct and Ethics for the National Police Service and the improvement of children desks at police stations.<sup>79</sup> It suggested rapid, effective and transparent implementation of ongoing reforms in the police sector.<sup>80</sup> Surprisingly, despite evidence for the Kenyan army's involvement in gross human rights violations, the Kenyan commission did not make any recommendations in this regard.<sup>81</sup>

A number of truth commissions included in their reports very general recommendations requiring security officers to act with integrity, professionalism and according to principles of human rights and the rule of law.<sup>82</sup> By way of example, the Timor Leste CAVR recommended that it should be the duty of 'the security apparatus to uphold human rights in compliance with the rule of law as laid down in the Constitution and legislation'.<sup>83</sup> The Sierra Leonean TRC adopted an interesting position on the issue. It found that the working conditions of police officers were dire, but stated that 'the Government hardly needs to be told of the deplorable conditions in the security services'. Accordingly, the Sierra Leonean TRC did not make any recommendations in this regard but simply saluted the police men and women, who despite difficult circumstances performed their duties with integrity and courage.<sup>84</sup> Its recommendation highlighted the principle that 'Sierra Leoneans have a right to security forces that are professional, disciplined and representative of all the people'.<sup>85</sup>

### 3. Discipline

Many TRCs proposed the reform or review of relevant codes of conduct and inclusion of specific provisions relating to disciplinary measures. In this regard, Thailand's TRCT explicitly stated that the Soldier Discipline Act should be modified to provide for disciplinary punishment of soldiers of all ranks and levels including generals.<sup>86</sup> The El Salvador CT emphasised that members of the armed

<sup>79</sup> Kenyan TJRC Final Report, *supra* note 75, at 31, 36 and 41.

<sup>80</sup> *Ibid.*, at 31.

<sup>81</sup> ICTJ, C Gitari Ndungú, *Lessons to Be Learned: An Analysis of the Final Report of Kenya's Truth, Justice and Reconciliation Commission* (2014), at 5 available at <https://www.ictj.org/sites/default/files/ICTJ-Briefing-Kenya-TJRC-2014.pdf> (last visited 14 October 2018).

<sup>82</sup> Timor Leste CAVR Final Report, *supra* note 64, at 19; South African TRC Final Report, *supra* note 60, at 331-35; Sierra Leonean TRC Final Report, *supra* note 2, § 206; Guatemalan CHC Final Report, *supra* note 42, § 61 and 73.

<sup>83</sup> Timor Leste CAVR Final Report, *supra* note 64, at 20.

<sup>84</sup> Sierra Leone TRC Final Report, *supra* note 2, § 206.

<sup>85</sup> *Ibid.*, § 199.

<sup>86</sup> Thailand TRCT Final Report, *supra* note 60, at 189; Other TRCs that proposed the review or reform in Code of Conducts: South African TRC Final Report, *supra* note



forces who committed abuses of power or violations of human rights and who have been discharged must not be readmitted into the armed forces.<sup>87</sup> The Timor Leste CAVR asked the armed forces and police services to develop strong enforceable policies which promote gender equality, outlaw sexual exploitation and violence against women and impose the strongest possible sanctions on security personnel guilty of such breaches.<sup>88</sup> Some truth commissions observed that the use of disciplinary measures should not exclude criminal accountability for committed crimes.<sup>89</sup> Accordingly, the Timor Leste CAVR outlined that police and military officers suspected of committing human rights violations should be prosecuted in the regular justice system and should not hide from justice behind disciplinary measures.<sup>90</sup>

Several truth commissions dealt with the so-called 'due obedience principle', which stipulates that superior orders must be obeyed with subordinates enjoying little or no discretion to refuse such orders. The principle was intended to ensure effective military operations, but is often abused by oppressive regimes to shield security officials from prosecution.<sup>91</sup> Several truth commissions specifically recommended the revision or repeal of due obedience provisions.<sup>92</sup> Today, it is generally accepted that this principle is not a defence to the serious crimes committed under international law, but some international tribunals consider it in mitigation of punishment.<sup>93</sup>

All truth commissions reviewed for the purpose of this study highlighted that excessive use of force by security agencies were a source of serious violations of international human rights or international humanitarian law. The Chilean NCTR proposed that a human rights institution be created 'for the express purpose of protecting ordinary people from abuses of power'.<sup>94</sup> The South African TRC recommended that public order policing be decentralised and integrated into the normal structures of the SAPS and that the tendency to centralise and militarise the public policy function

60, at 335; Kenyan TJRC Final Report, supra note 75, at 36; Chilean NCTR Final Report, supra note 57, at 1099-1100; Guatemalan CHC Final Report, supra note 42, § 54; Peruvian TRC Final Report, supra note 56, at 307.

<sup>87</sup> El Salvador CT Final Report, supra note 47, at 170.

<sup>88</sup> Timor Leste CAVR Final Report, supra note 64, at 13.

<sup>89</sup> El Salvador CT Final Report, supra note 47, at 170; Kenyan TJRC Final Report, supra note 75, at 36; Chilean NCTR Final Report, supra note 57, 1099-1100.

<sup>90</sup> Timor Leste CAVR Final Report, supra note 64, at 21.

<sup>91</sup> Examples of due obedience laws include the Argentinian Due Obedience Law (Law No. 23,521), passed in 1987, which granted automatic immunity from prosecution to all members of the military except top commanders. That law and the Full Stop Law of 1986 (Law No. 23,492), which set a 60-day deadline for the initiation of new prosecutions, were repealed by the Argentinian Congress in 1998, however, those repeals were interpreted as not having retrospective effect and cases of human rights violations committed under the military governments continued to be covered by them. In 2005 the Argentinian Supreme Court confirmed several lower court decisions that the laws were unconstitutional. See Human Rights Watch, Argentina: Amnesty Laws Struck Down: Supreme Court's Long-Awaited Ruling Allows Prosecution of 'Dirty War' Crimes (2005) available at <https://www.hrw.org/news/2005/06/14/argentina-amnesty-laws-struck-down> (last visited 15 March 2018); Amnesty International, The Full Stop and Due Obedience Laws and International Law (2003) available at <https://www.amnesty.org/en/documents/amr13/004/2003/en/> (last visited 15 March 2018).

<sup>92</sup> The Guatemalan CHC found that the reference to obedience being owed to whatever kind of order should be removed, Guatemala CHC Final Report, supra note 42, at § 56. See also: Chilean NCTR Final Report, supra note 57, at 1096; Peruvian TRC Final Report, supra note 56, at 306; El Salvador CT Final Report, supra note 47, at 170.

<sup>93</sup> Article 7(4), the Statute of the International Criminal Tribunal for the Former Yugoslavia adopted by the SC Res. 837, May 25, 1993, Article 6(4), the Statute of the International Criminal Tribunal for Rwanda adopted by the SC Res. 955, November 8, 1994, Article 6(4), the Special Court for Sierra Leone approved by SC Res.1315, August 14, 2000; Article 33(1)-(a) - (c) of the Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9, 17 July 1998 (entered into force 1 July 2002) as cited in Du Plessis, 'Principle 27: Restrictions on justifications related to due obedience, superior responsibility, and official status', in F. Haldemann and T. Unger (eds), The United Nations Principles to Combat Impunity: A Commentary (2018) 291, at 292-293.

<sup>94</sup> Chilean NCTR Final Report, supra note 57, § 4, at 1097-8. An establishment of a human rights institution, such as ombudsman, for the express purpose of protecting ordinary people from abuses of power.



be avoided in future. The South African TRC also suggested very detailed and practical measures, such as the provision of new equipment and apparel to police officers to improve their own safety and protection. The TRC concluded that the more protected police officers feel, the less likely they are to use force or act aggressively.<sup>95</sup> Thailand TRCT also called on the state to ensure that the use of force by any state agency must be conducted according to due process of law.<sup>96</sup>

Some truth commissions recommended special professional training on the use of force for officers, particularly those who dealt with public order policing.<sup>97</sup> Other truth commissions stated that the use of force should always be conducted in line with pre-established legal procedures and international standards. The Kenyan TJRC specifically recommended fast-tracking the development of standard operating procedures for the use of force by the police.<sup>98</sup> Lastly, truth commissions stressed the importance of follow-up procedures, such as a post-incident investigation in all cases where force was used<sup>99</sup> or an evaluation of officers taking part in public order policing.<sup>100</sup>

## 4. Training

Capacity building and training are considered critical to ensure the professionalization of security services and their integrity.<sup>101</sup> Most truth commissions recommended human rights training and proposed relevant changes in the curricula.<sup>102</sup> For instance, Thailand TRCT called on the state and government to ‘develop professional soldiers who are knowledgeable and capable of protecting the country, instilling in them a sense of democratic ideals, transparency and accountability according to the principles of good governance’.<sup>103</sup> The Timor Leste CAVR specifically asked the military not to conduct joint training exercises with foreign armed forces known for their poor human rights record.<sup>104</sup> It also encouraged members of the police and armed forces to join international peacekeeping operations in order to increase experience of international best practices.<sup>105</sup> The Sierra Leone and Timor Leste commissions included recommendations concerning special training in sexual and gender-based violence for police officers.<sup>106</sup>

<sup>95</sup> South African TRC Final Report, supra note 60, at 331.

<sup>96</sup> Thailand TRCT Final Report, supra note 60, at 272.

<sup>97</sup> South Africa TRC Final Report, supra note 60, § 71, at 331-332; Thailand TRCT Final Report, supra note 60, at 292.

<sup>98</sup> Kenya TRC Final Report, supra note 75, at 29.

<sup>99</sup> South Africa TRC Final Report, supra note 60, § 71, at 331-332.

<sup>100</sup> Ibid.

<sup>101</sup> Updated Principles to Combat Impunity, supra note 4, Principle 36(e).

<sup>102</sup> Chilean NCTR Final Report, supra note 57, at 1095; Timor Leste CAVR Final Report, supra note 64, at 22; Peruvian TRC Final Report, supra note 56, at 307; Guatemalan CHC Final Report, supra note 42, § 61-69; El Salvador CT Final Report, supra note 47, at 170; South African TRC Final Report, supra note 60, at 331-335; Sierra Leonean TRC Final Report, supra note 2, § 94-97. See also recommendations on public order policing by the Marikana Commission of Inquiry at pages 547 - 554 contained in the Report on Matters of Public, National and International Concern Arising out of the Tragic Incidents at the Lonmin Mine in Marikana, in the North West Province to the President, 31 March 2015 (South Africa), available at: <https://www.sahrc.org.za/home/21/files/marikana-report-1.pdf> (last visited on 15 March 2018); National Development Plan (South Africa), Ch. 12 - ‘Building safer communities’ available at: <http://www.nationalplanningcommission.org.za/Pages/NDP.aspx> (last visited on 15 March 2018).

<sup>103</sup> Thailand TRCT Final Report, supra note 60, at 288.

<sup>104</sup> Timor Leste CAVR Final Report, supra note 64, at 22.

<sup>105</sup> Ibid, at 21.

<sup>106</sup> Sierra Leone TRC Final Report, supra note 2, § 329; Timor Leste CAVR Final Report, supra note 64, at 21.



## 5. Structural Reforms within the Security Sector

In terms of disbanding perpetrator institutions, the Sierra Leone TRC explicitly stated that the army must be the only lawful military institution in Sierra Leone implying that all paramilitary and non-state armed groups must be dissolved. It specifically recommended that the Operational Support Division, a police unit responsible for serious human rights violations, should be disbanded.<sup>107</sup> The Timor Leste CAVR recommended not to allow for ‘civilian extensions of the military through the quasi-militarized or intelligence groups’.<sup>108</sup>

Sierra Leone’s TRC found that children were one of the most targeted groups during conflict and ‘that children were compelled to participate in the war as child soldiers and were forced to commit a range of atrocities’.<sup>109</sup> While the Sierra Leone TRC proposed a wide-range of measures aimed at improving the lives of children including enacting the Child Rights Bill, establishing recreation centres and regulating public and private orphanages,<sup>110</sup> it did not deal comprehensively with child soldiers. This is because the demobilization and reintegration of child soldiers in Sierra Leone took place in the framework of the disarmament, demobilization, and reintegration (‘DDR’) programme, which had been largely completed by the time the TRC was formulating its recommendations.<sup>111</sup> However, the truth commission identified a gap in the DDR framework namely that many female ex-combatants – including young girls – did not benefit from the DDR process. As a result, the Sierra Leone TRC called on the communities to continue accepting back former female combatants and called on the relevant stakeholders to provide them with skill development and rehabilitation programmes.<sup>112</sup>

Some truth commissions dealt with other aspects of internal security. The South African TRC recommended the establishment of an oversight mechanism and a code of conduct for private security companies.<sup>113</sup> The Timor Leste CAVR proposed that legislation regulating non-state security agencies, including private companies, be enacted. The commission further suggested that the law include a provision on mandatory training to be organised by the police with compulsory registration for private companies.<sup>114</sup>

In line with the concept of dismantling institutions that committed violations, the Guatemalan CHC recommended the abolition of the presidential General Staff structures.<sup>115</sup> The El Salvador CT did

<sup>107</sup> Sierra Leone TRC Final Report, supra note 2, § 199-203. This recommendation has not been implemented.

<sup>108</sup> Timor Leste CAVR Final Report, supra note 64, at 21. See El Salvador CT Final Report Final Report, supra note 47, at 171.

<sup>109</sup> Sierra Leone TRC Final Report, supra note 2, § 378.

<sup>110</sup> Sierra Leone TRC Final Report, *ibid.*, § 380-410; For DDR Process in Sierra Leone see ICTJ, M. Gibril Sesay and M. Suma, Transitional Justice and DDR: The Case of Sierra Leone (2009) available at <https://www.ictj.org/sites/default/files/ICTJ-DDR-Sierra-Leone-CaseStudy-2009-English.pdf> last visited (16 February 2018).

<sup>111</sup> DDR Process in Sierra Leone, *Ibid.*

<sup>112</sup> Sierra Leone TRC Final Report, supra note 2, § 373-74.

<sup>113</sup> South African TRC Final Report, supra note 60, at 333.

<sup>114</sup> Timor Leste CAVR Final Report, supra note 64, at 22.

<sup>115</sup> Guatemalan CHC Final Report, supra note 42, § 58. The Presidential General Staff was a security apparatus operating from the presidency that for decades has been considered the major command centre for repression. See HRW, Human Rights in Guatemala during President De Leon Carpio’s First Year (1994), at 6 available at



not make recommendations to this effect, as the issue of disbanding paramilitary bodies was dealt with in the peace accords. However, it recommended that the armed forces' courts of honour give priority to the eradication of any relationship between members of the armed forces and disbanded paramilitary bodies or any other illegal armed groups.<sup>116</sup> Courts of honour were established under the peace accords as a mechanism of accountability, in addition to regular courts with jurisdiction over acts contrary to military honour.<sup>117</sup>

## 6. Penitentiary

Many truth commissions found that the conditions in detention centres and prisons, as well as the behaviour of prison and detention personnel were at the origin of considerable violations. The recommendations focused on the treatment of detainees and prisoners, disciplinary measures of detention, prison personnel and oversight mechanisms over penitentiary institutions.

To ensure humane treatment of detainees, the truth commissions in Chile, South Africa and Timor Leste recommended the following measures: rehabilitation programmes for prisoners so that they can return to a crime-free lifestyle and accessible health care for detainees and prisoners.<sup>118</sup> In particular, these truth commissions stressed that torture and other degrading and inhumane treatment in detention must be eliminated,<sup>119</sup> and that solitary confinement should stop or its practice modified.<sup>120</sup> The South African TRC further stressed that medical documentation by health professionals working with detainees and prisoners should specifically include sections dealing with complaints of torture or abuse.<sup>121</sup> This was a very context-specific measure aimed at addressing the practice by prison doctors during apartheid of ignoring evidence of torture. The Thailand TRCT requested the Thai government to apply relevant UN minimum standards for the treatment of prisoners.<sup>122</sup>

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<https://www.hrw.org/legacy/reports/pdfs/g/guatemala/guatemala946.pdf> (last visited 6 January 2018).

<sup>116</sup> El Salvador CT Final Report, supra note 47, at 170.

<sup>117</sup> N Roht-Arriaza, *Impunity and Human Rights in International Law and Practice* (1995) footnote 33, at 366.

<sup>118</sup> South Africa TRC Final Report, supra note 60, at 313-115, 333; Chilean NCTR Final Report, supra note 57, at 1100-1101; Timor Leste CAVR Final Report, supra note 64, at 7-8; Peruvian TRC Final Report, supra note 56, at 308.

<sup>119</sup> South Africa TRC Final Report, supra note 60, at 315; Chilean NCTR Final Report, supra note 57, at 1099-1100; Timor Leste CAVR Final Report, supra note 64, at 8.

<sup>120</sup> The TRC South Africa requested its elimination, South African TRC Final Report, supra note 60, at 315. The Timor Leste CAVR proposed development of the strict rules for the use of solitary confinement, Timor Leste CAVR Final Report, supra note 64, at 8. See also Chilean NCTR Final Report, supra note 57, at 1090.

<sup>121</sup> South Africa TRC Final Report, supra note 60, at 336-337.

<sup>122</sup> The Thailand TRCT Final Report, supra note 60, at 274 referred to the United Nations Standard Minimum Rules for the Treatment of Prisoners, 1955 and the United Nations Standard Minimum Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders, 2010 ("Bangkok Rules") available at: <https://www.penalreform.org/priorities/women-in-the-criminal-justice-system/bangkok-rules-2/> (last visited 16 March 2018).



The Chilean NCTR made several recommendations on the development of disciplinary mechanisms to hold offending prison officers accountable.<sup>123</sup> This commission also recommended that any torture, abusive treatment, disappearance or extrajudicial execution be investigated immediately, and any suspect suspended – pending a disciplinary investigation – and dismissed if found guilty.<sup>124</sup>

Some truth commissions recommended oversight mechanisms over penitentiary institutions such as the recommendation by the Kenyan TJRC to establish the Office of the Independent Inspector of Prisons and All Places of Detention in Kenya.<sup>125</sup> Surprisingly, the TJRC report did not draw much attention to gross human rights violations committed against detainees, which was prevalent in the country.<sup>126</sup> The Timor Leste CAVR recommended that all places of detention in Timor Leste be accessible to outside monitoring.<sup>127</sup>

## B. Vetting

### 1. General

Vetting in transitional settings generally refers to ‘a formal process for the identification and removal of individuals responsible for abuses, especially from police, prison services, the army and the judiciary’.<sup>128</sup> Vetting ought to be undertaken in compliance with due process and human rights.<sup>129</sup> While vetting is commonly employed in transitional settings, its scope and shape vary considerably from one context to another.<sup>130</sup>

In times of transition, vetting assumes considerable importance. Assessing the suitability of holding or assuming an official position in such times includes a focus on adherence to appropriate human rights standards. Vetting must be distinguished from a purge. Whereas vetting involves a case-by-case assessment of individual suitability based on an evaluation of actual conduct, a purge often implies exclusion based simply upon membership or association.<sup>131</sup> While a purge can have disastrous consequences for a country,<sup>132</sup> effective and human rights-based vetting can help to rebuild institutions, make them more effective and restore the trust of citizens.

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<sup>123</sup> Chilean NCTR Final Report, supra note 57, at 1099-1100.

<sup>124</sup> *Ibid.*, at 1099-1100.

<sup>125</sup> Kenyan TJRC Final Report, supra note 75, at 31.

<sup>126</sup> Gitari, Lessons to be Learned, supra note 81, at 5.

<sup>127</sup> Timor Leste CAVR Final Report, supra note 64, at 7.

<sup>128</sup> UN Doc. S/2004/616, supra note 3, § 52.

<sup>129</sup> 2015 de Greiff Report, supra note 8.

<sup>130</sup> Mayer-Rieckh and Duthie, ‘Principle 36: Reform of State Institutions’, in F. Haldemann and T. Unger (eds), *The United Nations Principles to Combat Impunity: A Commentary* (2018) 392, at 395.

<sup>131</sup> See OECD Handbook on SSR, supra note 51; ICTJ and UNDP, *Vetting of Public Employees in Post-Conflict Settings: Operational Guidelines* (2006) available at <https://www.ictj.org/sites/default/files/ICTJ-UNDP-Global-Vetting-Operational-Guidelines-2006-English.pdf> (last visited 26 March 2018); OHCHR, *Rule of Law Tools for Post-Conflict States: Vetting: An Operational Framework* (2006) available at: <http://www.ohchr.org/Documents/Publications/RuleoflawVettingen.pdf> (last visited 16 March 2018).

<sup>132</sup> For example, the de-Baathification process undertaken in Iraq after Saddam Hussein’s regime was deposed was so politicized and broadly construed, it resulted in the destabilization and collapse of the entire system of governance. See ICTJ, M. Sissons and A. Al-Saiedi, *A bitter legacy: Lessons of De-Baathification in Iraq* (2013) available at <https://www.ictj.org/sites/default/files/ICTJ-Report-Iraq-De-Baathification-2013-ENG.pdf> (last visited 26 March 2018).



Vetting can address a possible ‘impunity gap’<sup>133</sup> and if applied early enough it can constitute an ‘enabling factor’ for other transitional justice mechanisms as it might increase their efficiency.<sup>134</sup> Secondly, vetting may help to dismantle criminal networks, which have the potential to destabilize the transition.<sup>135</sup> Lastly, vetting has a preventive function ‘not necessarily because the sanctions it metes out (...) are sufficient to deter individuals, but because it dismantles networks of criminal activity’.<sup>136</sup> However, there might also be problematic outcomes such as the creation of a capacity deficit, mass unemployment of former public servants who may turn to criminal activity or misuse of vetting for political ends.<sup>137</sup> A vetting programme must take into consideration potential political resistance, institutional capacity and level of know-how, available resources and cost implications,<sup>138</sup> and the rights of individuals if their names are disclosed.<sup>139</sup> As demonstrated in this chapter, only three of the selected truth commissions – El Salvador, Guatemala and Kenya – made vetting recommendations.

## 2. South Africa and Sierra Leone – *The Choice against Vetting*

Truth commissions in South Africa and Sierra Leone did not recommend vetting, which probably reflected the negotiated compromises reached in those countries.<sup>140</sup> In the case of South Africa, the decision against vetting was already made in 1990 as part of the political negotiations.<sup>141</sup> It was decided that a so-called ‘sunset clause’ be included in the Constitution to provide for a functioning government of national unity for five years, to protect the pensions of civil servants, to ensure representation of the National Party in Cabinet and to guarantee that a National Party member would be deputy president until 1999.<sup>142</sup> It is against this background that the South African TRC decided not to include vetting in its recommendations. The Commission also feared that vetting had a potential to disturb the transition and hamper the reconciliation process.

While the South African TRC did not recommend vetting in general, it nevertheless proposed a context-specific vetting of district surgeons responsible for health care in police stations and prisons, who often turned a blind eye to torture of detainees or prisoners. The TRC proposed an audit of these professionals in order to ensure that those who participated in or colluded with human rights

<sup>133</sup> UNGA, Report of the Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Recurrence: Note by UNSG 2015, UN Doc. A/70/438, 21 October 2015, § 19 (hereinafter ‘2015 UN Special Rapporteur’s Report’).

<sup>134</sup> *Ibid.*, § 20.

<sup>135</sup> *Ibid.*, § 21.

<sup>136</sup> *Ibid.*, § 23.

<sup>137</sup> Horne, ‘Transitional Justice: Vetting and Lustration’, in C. Lawther, L. Moffett and D. Jacobs (Eds), *Research Handbook on Transitional Justice* (2017) 424, at 429.

<sup>138</sup> Mayer-Rieckh and Duthie, Principle 36, *supra* note 130, at 395-396.

<sup>139</sup> Regarding the naming of individuals and procedural fairness, see generally M. Freeman, *Truth commissions and Procedural Fairness* (2006).

<sup>140</sup> South Africa TRC Final Report, *supra* note 60, § 17-19, at 310-311; Sierra Leone TRC Final Report, *supra* note 2, § 259-262.

<sup>141</sup> Klaaren, ‘Institutional Transformation and the Choice Against Vetting in South Africa’s Transition’, in A. Mayer-Rieckh and P. De-Greiff (eds), *Justice as Prevention: Vetting Public Employees in Transitional Societies* (2007) 146, at 154-156.

<sup>142</sup> IOL, ‘Sunset clauses’ have lapsed (2012) available at <https://www.iol.co.za/news/politics/sunset-clauses-have-lapsed-1358390> (last visited 19 October 2018).



violations in the past would no longer work in detention centres.<sup>143</sup> The TRC specified that the measures should not entail their removal from practice.

In Sierra Leone, the truth commission believed that vetting was not possible for practical reasons as it was concerned that in the context of a fragile transition it could be divisive and abused for political ends.<sup>144</sup> In particular, the truth commission feared that the country was not prepared for such a sophisticated process and that due process rights may not be observed. However, the Sierra Leone TRC stressed that public sector entities must monitor the conduct of their employees, within and outside the workplace, to determine their fitness for duty and recommended that those who revert to miscreant behaviour be dealt with firmly according to fair labour rules.<sup>145</sup>

### 3. El Salvador - *Comprehensive Vetting Framework*

A comprehensive set of recommendations on vetting the armed forces, the police, the civil service and the judiciary was developed by the El Salvador CT.<sup>146</sup> Recommendations included dismissal and discharge from posts and disqualification from holding public office for a period of ten years. These sanctions would be taken against civil service officials and judges named in the report, who 'acting in their professional capacity covered up serious acts of violence or failed to discharge their responsibilities in the investigation of such acts'.<sup>147</sup> Members of the armed forces named in the report should face the same measures if found to be implicated in the perpetration of violations.<sup>148</sup> In addition, the El Salvador CT recommended that any person implicated in the perpetration of acts of violence described in the report should be excluded from holding any public office and 'should be disqualified permanently from any activity related to public security or national defence'.<sup>149</sup>

With regard to vetting the judiciary, the El Salvador CT recommended that 'only those judges who, according to a rigorous evaluation made by the National Council of the Judiciary, have demonstrated judicial aptitude, efficiency and concern for human rights and offer every guarantee of independence, judicial discretion, honesty and impartiality in their actions may remain in the career judicial service'.<sup>150</sup> The El Salvador CT also urged the incumbent Supreme Court judges to resign in order to pave the way for new appointments.<sup>151</sup>

<sup>143</sup> South Africa TRC Final Report, supra note 60, at 336.

<sup>144</sup> Sierra Leone TRC Final Report, supra note 2, §2.61.

<sup>145</sup> Ibid., § 262.

<sup>146</sup> Buergenthal, 'The United Nations Truth Commission for El Salvador', 27 Vanderbilt Journal of International Law (VJIL) (1994) 497, at 538; Osler Hampson, 'Assessing the Results of the Peace Process', in M. S. Studemeister (ed), El Salvador: Implementation of the Peace Accords (2001) 47, at 47 available at <https://www.usip.org/sites/default/files/pwks38.pdf> (last visited 26 March 2018); Ensalaco, 'Truth Commissions for Chile and El Salvador: A Report and Assessment', 16 HRQ (1994) 656, at 664-65.

<sup>147</sup> El Salvador CT Final Report, supra note 47, § B and § C at 166.

<sup>148</sup> Ibid., § A at 166.

<sup>149</sup> Ibid., § C at 166.

<sup>150</sup> Ibid., at 167-168.

<sup>151</sup> Ibid., § D(a) at 167.



## 4. Guatemala – *Limited Vetting Recommendations*

The Guatemalan CHC requested the Directorate of the National Civilian Police, under the supervision of the Ministry of the Interior, to ‘ensure the removal from the police of those elements who have acted, or act, against its doctrine of public service’.<sup>152</sup> The Guatemalan CHC further recommended that the public service doctrine should include respect for human rights, democracy and the rule of law.<sup>153</sup> Moreover, the Guatemalan CHC proposed to remove the military personnel involved in human rights violations from educational functions in the army training centres.<sup>154</sup>

## 5. Kenya – *Limited Vetting Recommendations*

The TJRC in Kenya made limited recommendations on vetting. Despite having identified a number of alleged perpetrators from the security services, the Kenyan TJRC only recommended that security officers implicated in the Bulla Karatasi and Wagalla Massacres be barred from public office or any other position of public authority.<sup>155</sup> It should be noted that the vetting of judges<sup>156</sup> was mandated in the new constitution of 2010 and the vetting of the police was stipulated by law.<sup>157</sup> Both vetting processes commenced in parallel with the operations of the Kenyan TRC.

## C. Legal and Constitutional Reforms

Legal reforms typically cut across institutional interventions in general as many reform measures require a level of legislative enactment or adjustment. In transitional settings, ‘legislative frameworks often show the accumulated signs of neglect and political distortion, contain discriminatory elements and rarely reflect the requirements of international human rights and criminal law standards’.<sup>158</sup> Truth commissions can draw attention to constitutional and legal structures that facilitated or allowed violations, and recommend legislative and constitutional reforms.<sup>159</sup>

<sup>152</sup> Guatemalan CHC Final Report, *supra* note 42, § 64 and 74.

<sup>153</sup> *Ibid.*, § 64 and 73.

<sup>154</sup> *Ibid.*, § 62 and 64.

<sup>155</sup> Kenyan TJRC Final Report, *supra* note 75, at 23.

<sup>156</sup> See generally Wikipedia, Kenya Judges and Magistrates Vetting Board available at [https://en.wikipedia.org/wiki/Kenya\\_Judges\\_and\\_Magistrates\\_Vetting\\_Board](https://en.wikipedia.org/wiki/Kenya_Judges_and_Magistrates_Vetting_Board) (last visited 18 March 2018). See also, The Conversation, Kenya’s new Chief Justice must press on with cleaning up the judiciary (2016) available at <https://theconversation.com/kenyas-new-chief-justice-must-press-on-with-cleaning-up-the-judiciary-66372> (last visited 18 March 2018).

<sup>157</sup> In terms of Agenda No. 4 of the National Dialogue and Reconciliation Agreement (established to resolve the 2007-08 post-election violence) the National Police Service Commission (NPSC) was mandated in 2011 to vet all 80,000 police officers. See also NPSC, Vetting Panel available at <http://www.npsc.go.ke/index.php/vetting-panel> (last visited 18 March 2018) and ICTJ, C. Gitari Ndungú, Failure to Reform: A Critique of Police Vetting in Kenya (2011) available at <https://www.ictj.org/sites/default/files/ICTJ-Briefing-Kenya-PoliceVetting-2017.pdf> (last visited 18 March 2018).

<sup>158</sup> UN Doc. S/2004/616, *supra* note 3, at 10.

<sup>159</sup> TJDI, V. Arnould and C. Lekha Sriram, Pathways of Impact: How Transitional Justice Affects Democratic Institution-Building, Policy Paper 1 (2014) at 6 available at <http://www.egmontinstitute.be/content/uploads/2014/10/TJDI-Policy-Paper-Pathways-of-Impact1.pdf?type=pdf> (last visited 16 February 2018).

## 1. Legal Reforms

The incorporation of international crimes into the domestic legal system not only helps to reflect the seriousness of the crimes but also solves issues around non-retroactivity and statutes of limitations. The NCTR in Chile recommended the inclusion of enforced disappearance as a crime against humanity, the establishment and definition of the crime of genocide and the assignment of corresponding penalties.<sup>160</sup> The Chilean NCTR also addressed the question of prescription recommending legal reform which would suspend the period of prescription in circumstances in which no judicial remedy or legal action was possible.<sup>161</sup> The truth commissions in El Salvador and Timor Leste did not refer to specific crimes, but made general statements urging the domestication of crimes against humanity and war crimes and called upon their governments to give due consideration to crimes committed with the direct or indirect support of the state.<sup>162</sup> The truth commissions in Sierra Leone and Thailand urged harmonisation of national law with the Rome Statute.<sup>163</sup> The extent to which these measures were dealt with by truth commissions depended on the legal regime in force at the time when truth commissions formulated their recommendations.

Recommendations related to amnesties have been made by four of the selected truth commissions, which excluded blanket amnesties but allowed for individual amnesties as long as they were accompanied by other measures.<sup>164</sup> For instance, the Chilean NCTR requested that laws be drafted to prevent crimes from being amnestied without prior and proper investigation. It further emphasized that any amnesty must be individually granted.<sup>165</sup> However, these recommendations had no impact since the commission did not recommend the repeal of the 1978 Amnesty Law. Thailand's TRCT stressed that any amnesty provision must be compatible with international law and the victims' rights to truth, justice and an effective remedy. It further stressed that amnesty must not be blanket or self-imposed.<sup>166</sup>

Generally, truth commissions recommended that States ensure the compliance of their laws with their obligations under international human rights law.<sup>167</sup> Some truth commissions called for the repeal or reform of specific security and emergency laws that sought to legitimize execution without trial,<sup>168</sup> as well as terrorism-related legislation.<sup>169</sup>

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<sup>160</sup> Chilean NCTR Final Report, supra note 57, at 1080, 1102, 1103.

<sup>161</sup> Ibid., at 1103.

<sup>162</sup> Timor Leste CAVR Final Report, supra note 64, at 16; El Salvador CT Final Report, supra note 47, at 174.

<sup>163</sup> The TRC in Sierra Leone urged the government to work towards the harmonisation of the national laws with the provisions of the ICC Rome Statute in regard to the evidentiary burden, rules of procedure and evidence in respect of crimes of sexual violence, Sierra Leone TRC Final Report, supra note 2, § 334. See also Thailand TRCT Final Report, supra note 60, at 270.

<sup>164</sup> South Africa TRC Final Report, supra note 60, at 309; Chilean NCTR Final Report, supra note 57, at 1103; Thailand TRCT Final Report, supra note 60, at 269-70. The Timor Leste CAVR was against any amnesty for crimes against humanity and war crimes committed in Timor Leste, which involved sexual violence against women and girls, Timor Leste CAVR Final Report, supra note 64, at 13. See also Sierra Leone TRC Final Report, supra note 2, § 480 - 481.

<sup>165</sup> Chilean NCTR Final Report, supra note 57, at 1103.

<sup>166</sup> Thailand TRCT Final Report, supra note 60, at 269-70.

<sup>167</sup> 2015 de Greiff Report, supra note 8, §51.

<sup>168</sup> Chilean NCTR Final Report, supra note 57, at 1087. See also Thailand TRCT Final Report, supra note 60, at 278.

<sup>169</sup> Thailand TRCT Final Report, supra note 60, at 20, footnote 28. Interestingly, at 291-292 the Thailand TRCT with regard to certain other security laws only urged their careful application, especially at the time of political demonstrations.



Several truth commissions included recommendations covering detention in emergency and often proposed highly context-specific measures. The Sierra Leonean TRC made extensive recommendations to regulate the use of emergency powers in accordance with international standards and in particular, proposed measures to protect the rights of detainees during emergencies.<sup>170</sup> The Sierra Leonean TRC also called for halting the practice of so-called ‘safe custody detention’ and the release of all prisoners so detained.<sup>171</sup> The commission found that the government had been abusing emergency powers to detain opposition soldiers and to imprison them in ‘safe custody detention’ for years without a trial.<sup>172</sup>

The El Salvadorian TC proposed a review of laws dealing with administrative detention. The commission called for the limitation of detention to specific periods and demanded that detention be imposed by courts only and not by administrative authorities.<sup>173</sup> Other truth commissions stressed the non-derogable character of certain rights during emergencies, including the prohibition of torture,<sup>174</sup> and urged respect for judicial oversight of emergency measures.<sup>175</sup> The truth commissions in South Africa and Kenya also opposed indemnity legislation protecting police and other security actors from prosecution or civil claims for illegal state actions.<sup>176</sup> Thailand’s TRCT urged respect for the rights of those who deliver humanitarian assistance.<sup>177</sup>

## 2. Constitutional Reforms

Most truth commissions reviewed in this study recommended constitutional amendments or revisions on a range of subject matters. In many instances truth commissions specifically referred to constitutional reform as the most suitable method for the implementation of recommendations. Some truth commissions did not explicitly refer to constitutional amendments, but the type of recommendations points to constitutional changes as the most effective means of implementation. Truth commissions frequently made recommendations in relation to bills of rights.<sup>178</sup> Some truth commissions called upon governments to enact policies to close the gap between advantaged and disadvantaged groups.<sup>179</sup> Others called for more context-specific measures. The South African TRC urged stakeholders to take all possible measures to eliminate racism,<sup>180</sup> while the commissions in

<sup>170</sup> Sierra Leone TRC Final Report, supra note 2, § 64-74.

<sup>171</sup> Sierra Leone TRC Final Report, *ibid.*, § 59-63; Thailand TRCT Final Report, supra note 60, at 19, footnote 24 and 25; Chilean NCTR Final Report, supra note 57, at 1099-1100.

<sup>172</sup> G Anders and O Zenker, *Transition and Justice: Negotiating the Terms of New Beginnings in Africa* (2014), at 144.

<sup>173</sup> El Salvador TC Final Report, supra note 47, at 173.

<sup>174</sup> South Africa TRC Final Report, supra note 60, at 307; Sierra Leone TRC Final Report, supra note 2, § 65-75; Kenyan TJRC Final Report, supra note 75, at 31.

<sup>175</sup> Sierra Leone TRC Final Report, supra note 2, § 68; Peruvian TRC Final Report, supra note 56, at 308.

<sup>176</sup> South Africa TRC Final Report, supra note 60, at 307; Kenyan TJRC Final Report, supra note 75, at 14.

<sup>177</sup> Thailand TRCT Final Report, supra note 60, at 294-296.

<sup>178</sup> Updated Principles to Combat Impunity, supra note 4, Principle 35.

<sup>179</sup> South Africa TRC Final Report, supra note 60, at 308; Kenyan TJRC Final Report, supra note 75, at 47; Timor Leste CAVR Final Report, supra note 64, at 7; Thailand TRCT Final Report, supra note 60, at 279.

<sup>180</sup> South Africa TRC Final Report, supra note 60, at 308.



Guatemala and Peru recommended non-discriminatory policies to empower indigenous people.<sup>181</sup>

The truth commissions in Sierra Leone and Timor Leste included comprehensive recommendations aimed at promoting gender equality.<sup>182</sup> The Sierra Leonean TRC made far reaching recommendations aimed at addressing structural inequalities and injustice in relation to electoral reform,<sup>183</sup> the role of Parliament,<sup>184</sup> administrative action,<sup>185</sup> the role of the chieftaincy,<sup>186</sup> effective service delivery, decentralisation and local government.<sup>187</sup>

The extent to which truth commissions considered constitutional reforms in their recommendations was closely dependent on the prevailing political and legal context. In South Africa and Kenya, where constitutional reforms had already been introduced or implemented in parallel to the operation of the truth commissions, few constitutional recommendations were made. The 2010 Constitution of Kenya required the establishment of a Commission for the Implementation of the Constitution to monitor, facilitate and oversee the development of legislation and administrative processes to conduct the constitutional reforms imposed by the National Dialogue and Reconciliation Agreement.<sup>188</sup>

In countries such as Sierra Leone and Chile, in which the constitutions needed serious revision, references to constitutional reforms were more frequent. The TRC in Sierra Leone recommended that Parliament consider the adoption of a new Constitution, employing a consultative and participatory process.<sup>189</sup> The Chilean NCTR requested the re-examination of the constitution to ensure its compliance with international human rights law.<sup>190</sup> As for the case of Thailand, the TRC explicitly ruled out the possibility of a constitutional revision due to the unfavourable political context.<sup>191</sup>

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<sup>181</sup> Guatemalan CHC Final Report, supra note 42, § 81; Peruvian TRC Final Report, supra note 56, at 305.

<sup>182</sup> The TRC urged the repeal of discriminatory provisions, enactment of legislation preventing domestic violence and development of measures ensuring an equal access to politics, resources and services, TRC Sierra Leone Final Report, supra note 2, § 321, § 328, § 333, § 342, § 371. See also Timor Leste CAVR Final Report, supra note 64, at 13.

<sup>183</sup> Sierra Leone TRC Final Report, supra note 2, § 232-239.

<sup>184</sup> Ibid., § 240-243.

<sup>185</sup> Ibid., § 244-247.

<sup>186</sup> Ibid., § 256-258.

<sup>187</sup> Ibid., § 248-255.

<sup>188</sup> Art. 262 read with the Sixth Schedule (Transitional and Consequential Provisions) of the Constitution of Kenya, 2010 available at: <http://www.kenyalaw.org/lex/actview.xql?actid=Const2010> (last visited 19 March 2018). The Commission for the Implementation of the Constitution Act can be viewed at: [http://kenyalaw.org/kl/leadadmin/pdfdownloads/Acts/CommissionfortheImplementationoftheConstitution\\_No9of2010.pdf](http://kenyalaw.org/kl/leadadmin/pdfdownloads/Acts/CommissionfortheImplementationoftheConstitution_No9of2010.pdf) (last visited 19 March 2018). The Constitution required legislation to be enacted to govern the subject matters specified in the Fifth Schedule within required time periods. See the Constitution of Kenya, 2010 Fifth Schedule – the Legislation to Be Enacted by Parliament available at <http://www.klrc.go.ke/index.php/constitution-of-kenya/168-schedules-schedules/fifth-schedule-legislation-to-be-enacted-by-parliament/449-5-legislation-to-be-enacted-by-parliament> (last visited 6 January 2019). This schedule set out a range of required reforms, including measures dealing with the judiciary, police, land, natural resources, the environment, devolved government, public participation and gender balance and diversity.

<sup>189</sup> See also The Bloomgist, Sierra Leone Constitutional Review Goes Up in Smoke – and the Masses Lost Again (2017) available at: <https://bloomgist.com/2017/12/17/sierra-leone-constitutional-review-goes-up-in-smoke-and-the-masses-lost-again/> (last visited 19 March 2018).

<sup>190</sup> Chilean NCTR Final Report, supra note 57, at 1080.

<sup>191</sup> Thailand TRCT Final Report, supra note 60, at 281.



## D. Measures Related to Human Rights

Several truth commissions recommended measures to foster the observance of human rights. Such recommendations can be grouped into three clusters. A first cluster of recommendations aims at ensuring that everyone has a 'legal identity', which is a prerequisite for the enjoyment of most fundamental human rights. A second group of recommendations proposes the ratification of international treaties or domestication of international instruments. A third group of recommendations deals with the observance of human rights through monitoring, reporting and independent complaint mechanisms.

According to many truth commissions, discrimination, structural inequality and marginalization are root causes of violations.<sup>192</sup> Many people are deprived of legal identity due to discrimination and inequality, inadequate legislation, state policies aimed at restricting access to a legal identity for certain groups of individuals or inaccessibility of legal identity services. The lack of legal identity not only exacerbates exclusion and marginalisation of individuals or communities, but also deprives individuals of their rights and prevents them from accessing state services.<sup>193</sup> For these reasons, addressing shortcomings in 'the access to legal identity' constitutes a measure that can help to guarantee non-recurrence of violations. Moreover, by generating statistical data, legal registration allows a government to better plan, implement and monitor service provision.<sup>194</sup> The right to legal identity has also been recognized under international law.<sup>195</sup>

The Sierra Leonean TRC denounced the citizenship law as being racist and sexist and recommended that citizenship be acquired by birth, descent or naturalisation.<sup>196</sup> The TRC went further and called for a new culture of equitable citizenship in Sierra Leone to promote a new patriotism and loyalty to Sierra Leone. It stipulated that a renewed citizenship would require 'a new culture of mutual respect, understanding and tolerance by Sierra Leoneans for all Sierra Leoneans and other peoples'.<sup>197</sup>

The Kenyan TJRC recommended that the government remove obstacles faced by Nubian and Somali people from acquiring citizenship.<sup>198</sup> In Guatemala, where discriminatory policies constituted an underlying cause of the armed confrontation, the Guatemalan CHC recommended the prompt implementation of the Agreement on Identity and Rights of Indigenous People in order to protect the rights of indigenous people.<sup>199</sup> In addition to outlining the need for addressing the lack of identity

<sup>192</sup> E.g. Guatemalan CHC, Peruvian TRC, Kenyan TJRC and the Sierra Leonean TRC.

<sup>193</sup> 2015 de Greiff Report, supra note 8, § 39.

<sup>194</sup> Ibid.

<sup>195</sup> Art. 24, ICCPR, supra note 18; Art. 25, ICPPED, supra note 24; Arts. 7-8, Convention on the Rights of the Child 1989, 1577 UNTS 3; Art. 6, African [Banjul] Charter on Human and Peoples' Rights 1982, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58.

<sup>196</sup> Sierra Leone TRC Final Report, supra note 2, § 82-86.

<sup>197</sup> Ibid., § 87.

<sup>198</sup> Kenyan TJRC Final Report, supra note 75, at 47.

<sup>199</sup> Guatemalan CHC Final Report, supra note 42, § 41.



papers and expunging police and criminal records, the Peruvian TRC recommended providing legal advice and exemption from the payment of fees. It also recommended that those affected by the actions or omissions of the state during the conflict be granted full and effective civil and political rights through legal restoration of those rights.<sup>200</sup>

The ratification of international human rights treaties can reinforce a non-recurrence policy by providing tools for the promotion and protection of human rights. Human rights treaties can be used by civil society for advocacy and by courts to give effect to human rights. Treaties can also provide individual complaint mechanisms for victims at the international level. Such mechanisms place international pressure on governments to comply with their human rights obligations. Most truth commissions recommended accession or ratification of specific international treaties,<sup>201</sup> while others recommended the review of declared reservations.<sup>202</sup> Some truth commissions made a general call for the prompt ratification of all international human rights treaties so far not ratified.<sup>203</sup>

The Sierra Leonean TRC recommended that international human rights law should be directly applicable in the courts of Sierra Leone,<sup>204</sup> in addition to calling for the enactment of relevant domestic legislation such as the child rights act.<sup>205</sup> Similar recommendations were made by the truth commissions in Kenya and Timor Leste.<sup>206</sup> The Chilean NCTR requested the government to ensure that Chile complies with both treaty and customary international law and repeals all laws contrary to or incompatible with their provisions.<sup>207</sup>

According to several truth commissions, the creation of independent and impartial oversight bodies to monitor state institutions contributes to good governance and observance of human rights. The South African TRC proposed setting up human rights bureaus within ministries.<sup>208</sup> The Peruvian TRC recommended the establishment of a human rights defence system in the form of specialized agencies within the police, the judiciary and the Public Ministry.<sup>209</sup> The truth commissions in South Africa, Sierra Leone, Timor Leste and Thailand recommended human rights mainstreaming in the fields of professional training, foreign affairs and judicial activity.<sup>210</sup>

<sup>200</sup> Peruvian TRC Final Report, supra note 56, at 310.

<sup>201</sup> South Africa TRC Final Report, supra note 60, at 348; Sierra Leone TRC Final Report, supra note 2, § 443-444, 462; Kenyan TJRC Final Report, supra note 75, at 10, 29, 47; Chilean NCTR Final Report, supra note 57, at 1078; El Salvador CT Final Report, supra note 47, at 174; Guatemalan CHC Final Report, supra note 42, § 39; Timor Leste CAVR Final Report, supra note 64, at 39.

<sup>202</sup> Chilean NCTR Final Report, supra note 57, at 1078.

<sup>203</sup> Sierra Leone TRC Final Report, supra note 2, § 117; NCTR Final Report, supra note 57, at 1078.

<sup>204</sup> Sierra Leone TRC Final Report, supra note 2, § 120-127.

<sup>205</sup> Ibid., §127, 340, 404. See also Kenyan TJRC Final Report, supra note 75, at 56; Timor Leste CAVR Final Report, supra note 64, at 13-15.

<sup>206</sup> Sierra Leone TRC Final Report, supra note 2, § 127, 340, 404. See similar provisions by other TRCs: Kenyan TJRC Final Report, supra note 75, at 56; Timor Leste CAVR Final Report, supra note 64, at 13-15; South Africa TRC Final Report, supra note 60, at 348; Chilean NCTR Final Report, supra note 57, at 1079.

<sup>207</sup> Chilean NCTR Final Report, supra note 57, at 1079.

<sup>208</sup> South Africa TRC Final Report, supra note 60, at 311.

<sup>209</sup> Peruvian TRC Final Report, supra note 56, at 305.

<sup>210</sup> South Africa TRC Final Report, supra note 60, § 94-97, at 311; Chilean NCTR Final Report, supra note 57, at 1077-1081; Timor Leste CAVR Final Report, supra note 64, at 6; Thailand TRC Final Report, supra note 60, at 272-273. The TRC Sierra Leone provided detailed measures concerning the role of judiciary in protecting and advancing human rights, see Sierra Leone TRC Final Report, supra note 2, § 104-106.



Truth commissions also recommended the establishment of human rights commissions or called for an improved resourcing and stronger guarantees of independence for already existing agencies.<sup>211</sup> The Sierra Leonean TRC demanded the creation of a human rights commission with powers to receive and address individual complaints,<sup>212</sup> while the Kenyan TJRC urged the creation of the Office of the Special Rapporteur on Sexual Violence.<sup>213</sup>

Truth commissions made several recommendations in relation to freedom of expression, such as the repeal or modification of defamation laws<sup>214</sup> and the right to information.<sup>215</sup> Upholding freedom of expression promotes a vibrant democracy and the right to information allows the public to monitor the activities of the state as well as to hold it accountable for abuses of power. The TRC in South Africa called for the repeal of section 205 of the Criminal Procedure Act, which compelled the media to disclose its sources.<sup>216</sup>

## E. Judicial Reforms

All truth commissions reviewed in this study found that judiciary officials were to varying degrees implicated in serious human rights violations or failed to address or stop such violations. All recommended measures aimed at strengthening judicial independence, eradicating the prevailing culture of impunity and restoring dignity and public trust in their judiciaries. The truth commissions typically recommended the measures set out below.

### 1. Administration of Justice

Under international law, victims of human rights violations have a right to an affective remedy, which procedurally relates to a victim's right to a thorough investigation and in appropriate cases to have a fair trial by an independent and impartial court.<sup>217</sup> Moreover, individuals who have been arrested, detained or accused of committing crimes have rights to habeas corpus, due process, presumption of innocence and legal representation.<sup>218</sup>

A number of truth commissions called for reforms of legal aid systems through the establishment of public defenders offices in the main centres of the country<sup>219</sup> and other structural changes

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<sup>211</sup> TRC in South Africa recommended the increase of resources for independent bodies such as the Public Protector, South African TRC Final Report, supra note 60, at 311. See also El Salvador CT Final Report, supra note 47, at 173; Timor Leste CAVR Final Report, supra note 64, at 18.

<sup>212</sup> Sierra Leone TRC Final Report, supra note 2, § 98-103; Chilean NCTR Final Report, supra note 57, at 1097-1098.

<sup>213</sup> Kenyan TJRC Final Report, supra note 75, at 36.

<sup>214</sup> Sierra Leone TRC Final Report, supra note 2, § 78-79; Timor Leste CAVR Final Report, supra note 64, at 10; Thailand TRCT Final Report, supra note 60, at 283-284 and 19-20, footnote 27.

<sup>215</sup> South Africa TRC Final Report, supra note 60, at 341-342; Sierra Leone TRC Final Report, supra note 2, § 75-81, § 225-231; Kenyan TJRC Final Report, supra note 75, at 10; Timor Leste CAVR Final Report, supra note 64, at 9; Thailand TRCT Final Report, supra note 60, at 273.

<sup>216</sup> South Africa TRC Final Report, supra note 60, at 341.

<sup>217</sup> D. Shelton, Remedies in International Human Rights Law, (2nd ed., 2005), at 7. See also: ECtHR, M.S.S. v. Belgium and Greece, Judgment, January 21, 2011, No. 30696/09, § 288.

<sup>218</sup> E.g. Art.14, ICCPR, supra note 18.

<sup>219</sup> South Africa TRC Report, supra note 60, at 323-324; Sierra Leone TRC Report, supra note 2, § 164-69; Kenyan TJRC Final Report, supra note 75, at 9.



in the justice system, such as the separation of public defenders from the prosecution arm of a justice department.<sup>220</sup> The Sierra Leonean TRC recommended the creation of an efficient case flow management system as well as mechanisms for the proper scheduling of cases.<sup>221</sup> The truth commissions in Peru and Timor Leste proposed an increase in the number of judges.<sup>222</sup> Moreover, while some truth commissions urged better resourcing of legal aid schemes,<sup>223</sup> others recognized difficulties in obtaining more funding for this purpose and proposed alternative interventions instead.<sup>224</sup> Lastly, the Sierra Leonean TRC proposed extending constitutional jurisdiction to all the higher courts making up the judicature.<sup>225</sup>

Another set of measures proposed by truth commissions relates to substantive and procedural rights of persons subject to arrest, detention and accusation. Some truth commissions generally called on the government, the judiciary and relevant state agencies to respect and follow international standards of due process,<sup>226</sup> while others provided for more detailed interventions. The El Salvador CT included specific instructions on the improvement of remedies, such as habeas corpus and stressed that they must not be suspended even under states of emergency.<sup>227</sup>

## 2. Measures Aimed at Strengthening Judicial Independence

The truth commissions in Chile, El Salvador and Sierra Leone found that their respective judiciaries failed to stand up to tyranny or prevent repression and were complicit in violations of human rights. Therefore, these commissions made the most detailed recommendations relating to judicial independence.

These recommendations vary considerably depending on the political system in question and tend to ensure that concerns of job security do not influence judicial decision-making. In respect of judicial appointments, the Chilean NCTR proposed that the process of appointment must be the exclusive prerogative of a body composed of persons with a reputation for intellectual and moral integrity.<sup>228</sup> The Sierra Leonean TRC proposed that the representation on the Judicial and Legal Service Commission responsible for appointing judges be broadened with representation from

<sup>220</sup> South Africa TRC Final Report, supra note 60, at 323-24. Similarly, the TRC Sierra Leone recommended the separation of the offices of the Attorney General from the Minister of Justice, Sierra Leone TRC Final Report, supra note 2, § 154. See also Chilean Final Report, supra note 57, at 1092.

<sup>221</sup> Sierra Leone TRC Final Report, supra note 2, § 183.

<sup>222</sup> Timor Leste CAVR Final Report, supra note 64, at 17; Peruvian Final Report, supra note 56, at 305.

<sup>223</sup> Ibid.

<sup>224</sup> Other interventions include: engaging law students; establishing law clinics, TRC Sierra Leone Final Report, supra note 2, § 164-168; South Africa TRC Final Report, supra note 60, at 323-324. The Sierra Leone TRC advanced an idea of establishing the Legal Resources Centre run by private lawyers, which would litigate test cases before the courts, Sierra Leone TRC Final Report, supra note 2, § 176-177.

<sup>225</sup> Sierra Leone TRC Final Report, supra note 2, § 106.

<sup>226</sup> Thailand TRCT Final Report, supra note 60, at 275; Timor Leste CAVR Final Report, supra note 64, at 7; Peruvian TRC Final Report, supra note 56, at 308.

<sup>227</sup> El Salvador CT Final Report, supra note 47, at 173. See also Chilean NCTR Final Report, supra note 57, at 1005, 1080, 1088-89; TRC Sierra Leone Final Report, supra note 2, § 59, § 75.

<sup>228</sup> Chilean NCTR Final Report, supra note 57, at 1084. The El Salvador CT urged that the National Council of Judiciary, not the Supreme Court, should be responsible for appointing judges, El Salvador CT Final Report, supra note 47, at 171.



parliament and law teaching profession.<sup>229</sup> Moreover, truth commissions in Peru and Sierra Leone recommended extending the retirement age of judges and ceasing the practice of hiring retired judges on a contract basis.<sup>230</sup>

The Chilean NCTR made recommendations related to professional performance, code of conduct and evaluation of judges.<sup>231</sup> The Sierra Leonean TRC not only recommended a binding and enforceable code of conduct for judges and other legal professionals,<sup>232</sup> but also called for the establishment within the Judicial and Legal Service Commission of an independent disciplinary committee that would be responsible for investigating complaints against judges.<sup>233</sup>

Structural reforms included measures to ensure the separation of powers between the judiciary, executive and legislature and to define the relationship between various courts. In this regard, the El Salvador CT recommended a constitutional amendment to revise the role of the Supreme Court of Justice. In particular, it recommended that the court should not be the ‘administrative head of the judiciary’.<sup>234</sup> The Thailand TRCT proposed a clear division of power between the Constitutional Court and the Supreme Court.<sup>235</sup>

Structural changes within the judiciary are also closely linked to so-called ‘special courts’ such as military courts, special criminal courts or chambers established to try serious human rights violations,<sup>236</sup> as well as local or traditional justice mechanisms that for many constitute the only available form of justice.<sup>237</sup> The Kenyan TJRC called for the rapid establishment of an international crimes division within the judiciary to try the most serious crimes.<sup>238</sup>

The Chilean NCTR was particularly critical of the judiciary and particularly of its lack of independence and lack of supervision over the military courts. The Chilean NCTR found that out of about 8.700 writs of habeas corpus presented by the Committee for Peace and the Vicariate of Solidarity from 1973-1988, no more than ten were accepted.<sup>239</sup> It urged that the military justice system be strictly limited to military crimes.<sup>240</sup> The Peruvian TRC proposed the incorporation of military courts into the judiciary under the Supreme Court of Justice.<sup>241</sup>

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<sup>229</sup> Sierra Leone TRC Final Report, supra note 2, § 137-143.

<sup>230</sup> Ibid., § 144-147; Peruvian TRC Final Report, supra note 56, at 307.

<sup>231</sup> Chilean NCTR Final Report, supra note 57, at 1085.

<sup>232</sup> Sierra Leone TRC Final Report, supra note 2, § 150, § 175.

<sup>233</sup> Ibid., § 149. See also Chilean NCTR Final Report, supra note 57, at 1085; Peruvian TRC Final Report, supra note 56, at 307; Timor Leste CAVR Final Report, supra note 64, at 7.

<sup>234</sup> El Salvador CT Final Report, supra note 47, at 171.

<sup>235</sup> Thailand TRCT Final Report, supra note 60, at 272.

<sup>236</sup> Peruvian TRC Final Report, supra note 56, at 307-308; Timor Leste CAVR Final Report, supra note 64, at 25-26.

<sup>237</sup> Justice for the Poor, P. Dale, Barriers to Justice in Sierra Leone (2007) available at <http://documents.worldbank.org/curated/en/160721468028867793/pdf/436840BRI014P018ox0327368B01PUBLIC1.pdf> (last visited 26 March 2018).

<sup>238</sup> Kenyan TJRC Final Report, supra note 75, at 27.

<sup>239</sup> Chilean NCTR Final Report, supra note 57, at 1082.

<sup>240</sup> Ibid., at 1087.

<sup>241</sup> Peruvian TRC Final Report, supra note 56, at 307.



In terms of local justice, the South African TRC proposed an audit of courts of chiefs and headmen and the abolition of so-called ‘people’s courts’ operating in the townships that were established by local communities in response to ‘the perceived illegitimacy of the state-sanctioned court system.’<sup>242</sup> The CHC in Guatemala called for the integration of customary law into the mainstream legal system in a way that ensures a ‘respectful and harmonious relationship between the judicial system and the traditional forms of conflict resolution’, as long as it is consistent with the Constitution and international human rights treaties.<sup>243</sup> The Sierra Leonean TRC recommended that control over the local courts be transferred from the Ministry of Local Governance to the Judicial and Legal Services Commission.<sup>244</sup>

### 3. Training

Most of the selected truth commissions stated that well-designed professional judicial training contributes to building integrity, efficiency and judicial aptitude. More specifically, it would develop competencies in relation to international human rights and humanitarian law. Recommendations by truth commissions included both substantial aspects related to training curricula<sup>245</sup> and structural changes within the educational system.<sup>246</sup>

## F. Other Institutional Reforms

While the earlier truth commission mandates were narrower and focused on violations of civil and political rights (e.g. Chile or Guatemala), the mandates of more recent truth commissions were expanded to also include violations of social, economic and cultural rights (e.g. Kenya or Sierra Leone). Accordingly, the truth commissions in Kenya and Sierra Leone formulated recommendations that included measures aimed at addressing more underlying causes of violations such as discrimination against women, deeply rooted economic, ethnic and racial injustice or corruption.

### 1. Corruption

Corruption as a structural obstacle to the full enjoyment of people’s rights has gained considerable attention in recent years. The Office of the High Commissioner for Human Rights (‘OHCHR’) describes the impact of corruption as follows: ‘depending on the level, pervasiveness and form of corruption, corruption can have devastating impacts on the availability, quality and accessibility – on the basis of

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<sup>242</sup> South Africa TRC Final Report, supra note 60, at 327.

<sup>243</sup> Guatemalan CHC Final Report, supra note 42, § 50-51.

<sup>244</sup> Sierra Leone Final TRC Report, supra note 2, § 157-161.

<sup>245</sup> According to several truth commissions, judges should be taught human rights; international law and the learning methods should be adjusted accordingly in order to achieve the highest standards. See TRC South Africa Final Report, supra note 60, at 325; Chilean NCTR Final Report, supra note 57, at 1083; Peruvian TRC Final Report, supra note 56, at 307; Thailand TRCT Final Report, supra note 60, at 276.

<sup>246</sup> In this regard the South African TRC stressed that: a.) Training of magistrates to be undertaken separately from that of judges; b.) Training of judges to be conducted by judges together with academic institutions, rather than by the justice college, South Africa TRC Final Report, supra note 60, at 325. See also El Salvador CT Final Report, supra note 47, at 172; Timor Leste CAVR Final Report, supra note 64, at 17.



equality – of human rights-related goods and services'.<sup>247</sup> Accordingly, corruption disproportionately affects the poor and marginalized who are more dependent on the public service delivery system and cannot turn to private sector providers. Moreover, corruption is often 'a tool used to perpetuate authoritarian regimes, inter-group grievances, and recurrent conflict',<sup>248</sup> and has been pointed to by truth commissions as one of the underlining root causes of serious human rights violations.<sup>249</sup> Truth commissions typically have two objectives in addressing corruption. They namely aim at providing a detailed analysis of linkages between acts of corruption and human rights violations and they propose institutional reforms to overcome corruption.<sup>250</sup> Corruption occurs across virtually all institutions ranging from the security sector and the government sphere to business and industry.

The concept of 'good governance' has been defined as an 'exercise of authority through political and institutional processes that are transparent and accountable and encourage public participation'.<sup>251</sup> Applying good governance principles contributes to an effective fight against corruption. With the exceptions of Sierra Leone and Timor Leste, most truth commissions reviewed in this study did not address governance and corruption measures in detail.<sup>252</sup>

The TRC in Sierra Leone proposed the most wide-ranging and mutually reinforcing anti-corruption measures. This is explained by its key finding that 'endemic corruption was a central factor that produced the dire conditions that made civil war inevitable'.<sup>253</sup> The truth commissions in Sierra Leone and Timor Leste made a number of recommendations targeting public administration.<sup>254</sup>

The Sierra Leonean TRC called for the adoption of 'committed leadership' principles<sup>255</sup> and the enactment of a code of ethics for the senior members of the executive and others holding positions of public authority.<sup>256</sup> The Sierra Leonean TRC recommended disclosure of financial interests for senior public officials as well as clear and strict penalties for failure to comply.<sup>257</sup> It also urged the government to publicly announce all relevant amounts allocated to the provision of services and amenities.<sup>258</sup> The rationale being, that where the public is aware of what is allocated from the

<sup>247</sup> OHCHR, Corruption and Human Rights available at <https://www.ohchr.org/EN/Issues/CorruptionAndHR/Pages/CorruptionAndHRIndex.aspx> (last visited 17 October).

<sup>248</sup> ICTJ, J Cohen, Addressing Corruption Through Justice-Sensitive Security Sector Reform (2017), at 1 available at [https://www.ictj.org/sites/default/files/ICTJ\\_Cohen\\_Corruption\\_2017.pdf](https://www.ictj.org/sites/default/files/ICTJ_Cohen_Corruption_2017.pdf) (last visited 17 October 2018).

<sup>249</sup> E.g. Sierra Leonean TRC Final Report, supra note 2.

<sup>250</sup> Cohen, supra note 248, at 11.

<sup>251</sup> OHCHR, Good Governance Practices for the Protection of Human Rights (2007) at 2, available at <http://www.ohchr.org/Documents/Publications/GoodGovernance.pdf> (last visited 16 February 2018).

<sup>252</sup> South Africa TRC Final Report, supra note 60, at 309, 311, 331; Kenyan TJRC Final Report, supra note 75, at 56-57; Timor Leste CAVR Final Report, supra note 64, at 18-19; Thailand TRCT Final Report, supra note 60, at 277-278.

<sup>253</sup> Sierra Leone TRC Final Report, supra note 2, § 264.

<sup>254</sup> Ibid., § 207-261; § 216, § 220-222; Timor Leste CAVR Final Report, supra note 64, at 18.

<sup>255</sup> TRC Sierra Leone Final Report, supra note 2, § 211 - 216.

<sup>256</sup> Ibid., § 217-224.

<sup>257</sup> Ibid., § 273-274.

<sup>258</sup> Ibid., § 281-283.



public coffers for specific services and amenities it can engage in effective monitoring and scrutiny.<sup>259</sup> Moreover, since corruption transcends all institutions including law enforcement, the Sierra Leonean TRC suggested that the Anti-Corruption Commission be authorised to pursue its own prosecutions independently from other organs of the state.<sup>260</sup> The commission also recommended that officials dismissed for a breach of this code should be disqualified from holding any public office in the future.<sup>261</sup>

The fight against corruption will not be successful unless supported by information about on-going violations. As a consequence, the Sierra Leone TRC recommended that whistle-blowers must be protected.<sup>262</sup> The Kenyan TJRC urged government and parliament to domesticate the UN Convention against Corruption to ensure that acts of corruption are criminalised.<sup>263</sup> The truth commissions in Sierra Leone and Timor Leste stressed the importance of collaborative action by various stakeholders in the fight against corruption.<sup>264</sup> The Sierra Leone TRC called on government, business and civil society to form a united front against corruption and made specific recommendations for these sectors, including the donor community.<sup>265</sup>

## 2. Gender

The Sierra Leone TRC found that ‘women and girls were the deliberate targets of sexual violence and rape by all the armed groups during the conflict’ and ‘have continued to suffer historic structural inequality on account of their gender’, without these violations being properly addressed.<sup>266</sup> Similarly, the Guatemalan CHC found widespread practices of extreme sexual violence committed predominantly against the Mayan women during the conflict.<sup>267</sup> As opposed to the Sierra Leone TRC, the Guatemalan CHC however did not make any institutional reform recommendations related to the situation of women.

Based on its findings, the Sierra Leonean TRC formulated perhaps the most comprehensive recommendations aimed at addressing violence and discrimination against women and girls, many of which fall under the scope of institutional reforms. It devoted a whole section of its report to very specific recommendations aimed at addressing gender-based violations arising from armed conflict, domestic violence, sexual violence, sexual offences under customary law and discrimination against

<sup>259</sup> Ibid.

<sup>260</sup> Ibid., § 278-280. In Kenya the Ethics and Anti-Corruption Commission (EACC) was established in 2011 through the legislative process, for more information about the EACC see <http://www.eacc.go.ke/> (last visited 26 March 2018). The TRC recommended that the EACC finally begins or speeds up investigations in the grand corruption scandals mention in the report, Kenyan TJRC Final Report, supra note 75, at 57.

<sup>261</sup> Sierra Leone TRC Final Report, supra note 2, § 222.

<sup>262</sup> Ibid., § 284-287.

<sup>263</sup> Thailand TRCT Final Report, supra note 60, at 56.

<sup>264</sup> Sierra Leone TRC Final Report, supra note 2, § 288-303; Timor Leste CAVR Final Report, supra note 64, at 18-19.

<sup>265</sup> Sierra Leone TRC Final Report, supra note 2, § 288-303.

<sup>266</sup> Ibid., § 316-319.

<sup>267</sup> P. B. Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions* (2nd ed., 2011), at 87; Guatemalan CHC Final Report, supra note 42.



women. Recommendations included: (i) the promotion of women participation in politics and access to power; (ii) skills training and economic empowerment; (iii) education; (iv) access to justice; (v) HIV/ Aids preventions; and (vi) proposals to grant war-widows, female ex-combatants and elderly women reparations.<sup>268</sup> The commission also recommended the establishment of a gender commission.<sup>269</sup>

### 3. Institutional Reforms in Other Public Domains

Some truth commissions recommended legal reforms that were not exclusively concerned with the security sector or judiciary, but also included reforms of other public domains. In this regard, the Sierra Leonean TRC recommended changes in the labour laws for children and laws regulating adoption and orphanages, and requested the enactment of specific legislation to address domestic violence.<sup>270</sup>

The Peruvian TRC recommended broad measures aimed at improving the national education system and the establishment of the 'state agency or body to plan and implement policy related to indigenous and ethnic issues'.<sup>271</sup> The Guatemalan CHC did not recommend socio-economic institutional reform measures, despite having found that the root causes of violations were related to injustices deeply woven into the social and legal fabric.<sup>272</sup> This was probably because truth commissions in the 1990s were mostly focused on security sector reform.

The South African TRC recommended the establishment of an Independent Broadcasting Authority,<sup>273</sup> while the TRC in Sierra Leone proposed a number of institutional measures related to the exploitation of diamonds.<sup>274</sup>

<sup>268</sup> Sierra Leone TRC Final Report, supra note 2, § 316-376.

<sup>269</sup> Ibid., § 365-366.

<sup>270</sup> Sierra Leone TRC Final Report, supra note 2, § 328-329, 390, 392, 462-468.

<sup>271</sup> Peruvian TRC Final Report, supra note 56, at 305.

<sup>272</sup> In respect of addressing structural inequalities it is worth considering the reforms required by the Kenyan National Dialogue and Reconciliation Agreement. It included measures to address poverty, inequality and regional imbalances; unemployment among the youth; and measures to promote land reform. See the Kenya National Dialogue and Reconciliation: Statement of Principles on Long-term Issues and Solutions (2008) available at <https://peacemaker.un.org/kenya-statement-longtermissues2008> (last visited 19 March 2018).

<sup>273</sup> South African TRC Final Report, supra note 60, at 341-342.

<sup>274</sup> Sierra Leone TRC Final Report, supra note 2, § 443-450.



## VI. IMPACT OF RECOMMENDATIONS ON INSTITUTIONAL REFORM

The actual impact of truth commission recommendations on institutional reforms is difficult to assess. While there have been attempts to develop a methodology for such assessments,<sup>275</sup> comprehensive studies are lacking. Determining the impact of truth commission recommendations poses considerable challenges because other causal processes may explain such reforms.<sup>276</sup> Certain post truth commission reforms are described in this section, but it cannot be definitely claimed that these were the direct products of the recommendations made. Nonetheless, there are examples where truth commissions appear to have had some positive impact on institutional reform, as in the cases of El Salvador and Sierra Leone.

### A. El Salvador

The 1993 report of the El Salvador CT endorsed the findings of the earlier Ad-Hoc Commission in relation to the vetting of members of the armed forces and placed considerable pressure on the president to implement them in full.<sup>277</sup> Shortly after the report of the truth commission was issued, 103 military officers were removed from active duty.<sup>278</sup> Some members of the armed forces were retired from active duty, others took leave with pay and retired later or were sent abroad on diplomatic posts.<sup>279</sup> However, a number of former military leaders, including those named by the truth commission, continued to be active in politics and business.<sup>280</sup> Moreover, the El Salvador CT recommendations on barring perpetrators from holding public office were considered problematic because they did not comply with constitutional guarantees dealing with political rights and could undermine the peace accord by disproportionately targeting guerrilla members.<sup>281</sup>

Progress in police reform, including the abolishment of certain problematic units and the creation of the National Civil Police Societies was attributed to the peace accords rather than the El Salvador CT.<sup>282</sup> However, the adjustments made to the criminal justice system in 1998, which provided greater protection of individual rights, may have been instigated by recommendations in the TRC report.<sup>283</sup>

<sup>275</sup> Brahm, 'Uncovering the Truth: Examining Truth Commission Success and Impact', 8 *International Studies Perspectives* (ISP) (2007) 16.

<sup>276</sup> Bakiner, *supra* note 15, at 92.

<sup>277</sup> In El Salvador, the 1992 peace accords called for the establishment of an Ad-Hoc Commission to vet members of the armed forces. The commission began to operate in 1992. See: Zamora and Holiday, 'The Struggle for Lasting Reform: Vetting Processes in El Salvador', in A. Mayer-Rieckh and P. De-Greiff (eds), *Justice as Prevention: Vetting Public Employees in Transitional Societies* (2007) 80, at 83 and 96.

<sup>278</sup> Osler Hampson, *supra* note 146, at 47; Ensalaco, *supra* note 146, at 664-65.

<sup>279</sup> Duthie, 'Introduction', in A. Mayer-Rieckh and P. de Greiff (eds), *Justice as Prevention: Vetting Public Employees in Transitional Societies* (2007) at 24 and 29 available at <http://www.ssrc.org/blogs/books/pdfs/vetting/978-0-9790772-1-0-introduction.pdf> (last visited 26 March 2018).

<sup>280</sup> Popkin, 'Building the Rule of Law in Post-War El Salvador', in M. S. Studemeister (ed), *El Salvador: Implementation of the Peace Accords* (2001), at 11 available at <http://www.usip.org/pubs/peaceworks/pwks38.pdf> (last visited 26 March 2018).

<sup>281</sup> Zamora and Holiday, *supra* note 277, at 104.

<sup>282</sup> ICTJ, B. Ivanisevic, *Comparative Study on the Impact of Truth Commissions* (2009), at 32-33.

<sup>283</sup> Popkin, *supra* note 280, at 17; Hayner, *supra* note 267, at 105; Douglas Kincaid, 'Demilitarization and Security in El Salvador and Guatemala: Convergences of Success and Crisis', 42 *Journal of Inter American Studies and World Affairs* (JIASWA) (2000) 39, at 46.



The judiciary resisted the recommendations of the El Salvador CT and the Supreme Court judges refused to step down. However, the commission's report exposed the dysfunctionality of the judicial system and ultimately new Supreme Court judges were appointed in 1994.<sup>284</sup> The judiciary became more independent and accessible,<sup>285</sup> but continued to be accused of corruption.<sup>286</sup> Regrettably, party affiliation continued to play a role in judicial appointments, including those of the Supreme Court judges and the Procurator for the Defence of Human Rights.<sup>287</sup> Reportedly, the military enjoyed less influence in governance matters, and its size, budget, and mandate have been significantly reduced since the report has been issued.<sup>288</sup>

## B. Sierra Leone

According to the United Nations, the Sierra Leonean TRC 'helped generate momentum for subsequent legislation that enhanced rights and security for women including by criminalizing domestic violence'.<sup>289</sup> As recommended by the truth commission in its 2004 report, the Human Rights Commission was established<sup>290</sup> and the Independent Anti-Corruption Commission was granted authority to prosecute its own cases.<sup>291</sup> For the first time, senior officials were convicted of corruption, including two cabinet ministers and a judge.<sup>292</sup> Some serious backlogs in the criminal courts have been addressed.<sup>293</sup>

Several recommended measures to reform the public service were implemented including the introduction of a binding code of conduct for civil servants and judges, disclosure of financial interests of public officials and protection for whistle blowers.<sup>294</sup> As urged by the Sierra Leone TRC, the President publicly apologized to women and girls for the appalling abuses they suffered during the conflict.<sup>295</sup> In addition, a number of laws recommended by the TRC were enacted such as a Child

<sup>284</sup> Zamora and Holiday, *supra* note 277, at 101.

<sup>285</sup> Staats et al., 'Measuring Judicial Performance in Latin America', 47 *Latin American Politics and Society* (LAPS) (2005) 70, at 90 as cited in Ivenisevic, *supra* note 282, at 28.

<sup>286</sup> Freedom House, *Freedom in the World 2006* (El Salvador), available at <http://www.freedomhouse.org/template.cfm?page=22&country=6957&year=2006&view=mo> (last visited 26 March 2018) as cited in Ivenisevic, *supra* note 282, at 28.

<sup>287</sup> Dodson and Jackson, 'Horizontal Accountability and the Rule of Law in Central America', in S. Mainwaring and C. Welna (eds), *Democratic Accountability in Latin America* (2003) at 235 as cited in Ivenisevic *supra* note 282, at 29.

<sup>288</sup> E. J. Wood, 'Challenges to Political Democracy in El Salvador', 25 August 2001 (paper prepared for the 2001 conference of the Latin American Studies Association, Washington D.C., September 5-8, 2001) at 31 available at <http://lasa.international.pitt.edu/Lasa2001/WoodElisabethJean.pdf> (last visited 16 February 2018) as cited in Ivenisevic, *supra* note 282, at 28; Ruhl, 'Curbing Central America's Militaries', 15 *Journal of Democracy* (JOD) (2004) 137, at 141-42.

<sup>289</sup> UNSC, Report of the Secretary General: The Rule of Law and Transitional Justice In Conflict and Post-Conflict Societies, UN Doc. S/2011/634, 12 October 2011, § 43, at 12.

<sup>290</sup> Bakiner, *supra* note 15, at 178.

<sup>291</sup> H. Varney, *The Rule of Law & Sustainable Development: The Post-2015 Development Agenda*, (AsianSIL Inter-Sessional Regional Conference 2015: The Rule of Law and Development Nexus: A New Deal for Asia? June 4 - 5, 2015 Bangkok, Thailand), at 3 available at [http://www.sierraleonetr.org/images/docs/201506\\_Howard\\_Varney\\_Rule\\_of\\_Law\\_Sustainable\\_Development\\_Asiansil\\_Inter.pdf](http://www.sierraleonetr.org/images/docs/201506_Howard_Varney_Rule_of_Law_Sustainable_Development_Asiansil_Inter.pdf) (last visited 16 February 2018).

<sup>292</sup> See The Anti-Corruption Commission (Sierra Leone), *Current ACC Convictions from 2000 to 2018* available at <https://www.anticorruption.gov.sl/slides/slide/current-acc-convictions-from-2000-to-2018-54> (last visited 6 January 2019).

<sup>293</sup> HRW, *World Report: Sierra Leone, Events of 2010* (2011) available at <https://www.hrw.org/world-report/2011/country-chapters/sierra-leone> (last visited 6 January 2019).

<sup>294</sup> See Recommendation Matrix of the TRC in Sierra Leone available at: <http://www.sierraleonetr.org/index.php/resources/recommendations-matrix> (last visited 16 February 2018). See also: The Economist (print edition), *Sierra Leone's corruption problem A mortal enemy: The government is having some rare success in trying to eradicate an old sore*, 19 November 2009.

<sup>295</sup> Recommendation Matrix of the TRC in Sierra Leone, *Ibid.*



Rights Act, Sexual Offences Act, Domestic Violence Act, Legal Aid Act and a Public Procurement Act, including the establishment of a monitoring body and a complaints review body.<sup>296</sup>

However, the response of the government to the proposals on constitutional reform have been disappointing.<sup>297</sup> The Constitutional Reform Committee formulated 138 recommendations, which were inspired by the TRC report. Of these 138 recommendations, only 33 were accepted by the government.<sup>298</sup> Although the TRC recommended that the local courts should not be supervised by the executive, those courts have not been placed under the supervision of the judiciary.<sup>299</sup> Disturbingly, the Anti-Corruption Commission secured only two convictions in 2014<sup>300</sup> and four in 2018.<sup>301</sup>

The Armed Forces have been depoliticized,<sup>302</sup> but parliamentary oversight over the security services remains weak.<sup>303</sup> While the Sierra Leone Police is still viewed as inefficient<sup>304</sup> and corrupt, albeit less than in the past,<sup>305</sup> the service has been credited with providing a secure environment for elections.<sup>306</sup> The election commission has been recognised for its responsible management of elections.<sup>307</sup> It should be noted that post TRC progress was made of a low base and is not necessarily irreversible since Sierra Leone's institutions remain in a fragile state.<sup>308</sup>

## C. Other Examples

In South Africa, in line with TRC recommendations, the Chief of the Armed Forces reports to the civilian Minister of Defence and Defence Intelligence is prohibited from collecting non-military intelligence.<sup>309</sup> Moreover, following recommendations by the TRC, the government addressed the imbalance in gender and racial composition of high court judges.<sup>310</sup>

<sup>296</sup> Varney, *The Rule of Law & Sustainable Development*, supra note at 291, at 3.

<sup>297</sup> Standard Times Press, C. Roy-Macaulay, *Sierra Leone Government Releases To Parliament White Paper On CRC Report* available at <http://standardtimespress.org/?p=7672> (last visited 16 February 2018).

<sup>298</sup> Sierra Leone News: *That White Paper on CRC Report* available at <https://awoko.org/2018/01/25/sierra-leone-news-that-white-paper-on-crc-report/> (last visited 26 March 2018); The Bloomgist, supra note 189.

<sup>299</sup> Recommendation Matrix of the TRC in Sierra Leone, supra note 294.

<sup>300</sup> Convictions by Anti-Corruption Commission (Sierra Leone), supra note 292.

<sup>301</sup> Ibid.

<sup>302</sup> Ginifer, 'The Challenge of the Security Sector and Security Reform Processes in Democratic Transitions: The Case of Sierra Leone', 13 *Democratization* (2006) 791, at 799-800; Klay Kieh Jr., 'State-building in Post-Civil War Sierra Leone', 4 *African and Asian Studies* (AAS) (2005), at 171.

<sup>303</sup> Ivanisevic, supra note 282, at 32-33. See also: HRW, *World Report 2009: Sierra Leone* available at <http://www.hrw.org/en/node/79252> (last visited 26 March 2018).

<sup>304</sup> Baker, 'Who Do People Turn to for Policing in Sierra Leone?' 23 *Journal of Contemporary African Studies* (JACS) (2005) 371, at 377.

<sup>305</sup> Ginifer, supra note 302, at 802-03; FRIDE, C. Castillejo, *Building Accountable Justice in Sierra Leone* (working paper) (2009) at 5, available at <http://www.fride.org/publication/561/building-accountable-justice-in-sierra-leone> (last visited 26 March 2018).

<sup>306</sup> International Crisis Group, *Sierra Leone: A New Era of Reform?* (2008), at 2, available at [http://www.crisisgroup.org/library/documents/africa/west\\_africa/143\\_sierra\\_leone\\_a\\_new\\_era\\_of\\_reform.pdf](http://www.crisisgroup.org/library/documents/africa/west_africa/143_sierra_leone_a_new_era_of_reform.pdf) (last visited 26 March 2018).

<sup>307</sup> Ibid., at 2; BBC News, W. Ross, *Democracy Wins in Sierra Leone's Polls* (2007) available at <http://news.bbc.co.uk/2/hi/africa/7000059.stm> (last visited 26 March 2018).

<sup>308</sup> Varney, *The Rule of Law & Sustainable Development*, supra note at 291, at 4.

<sup>309</sup> Berghof Research Center for Constructive Conflict Management, *Security Sector Reform in Developing and Transitional Countries* (2004) at 14 available at <http://www.wulf-herbert.de/Berghofdialogue2.pdf> (last visited 16 February 2018); Winkates, 'The Transformation of the South African National Defence Force: A Good Beginning', 26 *Armed Forces and Society* (AFS) (2004) 451, at 456.

<sup>310</sup> See P. Maduna (Minister of Justice and Constitutional Development), 'Address at the Banquet of the Judicial Officers' Symposium', 120 *South African Law Journal* (SALJ) (2003) at 665; Website Politicsweb, C. Lewis, *The Troubled State of South Africa's Judiciary*, October 15, 2008 available at <http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71619?oid=106544&sn=Detail> (last visited 16 February) as cited in Ivanisevic, supra note 282.



In Peru, in accordance with the TRC recommendations, the congress in 2004 passed laws that recognized the specific nature and legal status of displaced persons and introduced the status of ‘absence due to forced disappearance’.<sup>311</sup> In 2007, the Peruvian congress passed a law recommended by the TRC, which obliges members of the military to disobey orders that are contrary to human rights standards.<sup>312</sup> Following several attempts to reform the military justice system, a law was eventually adopted in 2006 but failed to introduce fundamental structural changes.<sup>313</sup>

In Chile, the ‘restricted’ nature of the transition allowed the military to retain most of its powers until 2005.<sup>314</sup> The creation of the office of the ombudsman for human rights was stalled.<sup>315</sup> The judiciary rejected the truth commission report and reforms were delayed until the late 1990s when new judges were elected to serve on the Constitutional Tribunal and the Supreme Court.<sup>316</sup>

In Guatemala, despite the truth commission recommendations, no vetting of the security sector ensued. While the notorious Mobile Military Police was disbanded, many of its members joined the new police service.<sup>317</sup> Moreover, the army’s strength was officially cut by one-third and its budget reduced, but it retained its powers to deal with internal order.<sup>318</sup>

The Thai TRCT was criticized for being partisan and turning a blind eye to abuses and excesses committed by the state.<sup>319</sup> Contrary to the recommendations of the truth commission in 2013,<sup>320</sup> the Emergency Decree on Public Administration in State of Emergency remained in place and other reforms aimed at amending the defamation laws that provided for heavy jail sentences for perceived insults to the monarchy, failed.<sup>321</sup> Lastly, attempts to push through a comprehensive amnesty bill helped trigger protests that culminated in a military coup d’état in 2014.<sup>322</sup>

<sup>311</sup> Gamarra, ‘Human Rights, Justice and Democratic Transition: Institutional Review’, in L. Magarrell and L. Filippini (eds), *The Legacy of Truth Criminal Justice in the Peruvian Transition* (2006), at 73.

<sup>312</sup> Freedom House, *Freedom in the World 2008 (Peru)* available at <https://freedomhouse.org/report/freedom-world/2008/peru> (last visited 16 February 2018).

<sup>313</sup> Gamarra, *supra* note 311, at 75-76.

<sup>314</sup> Barahona de Brito, ‘Truth, Justice, Memory, and Democratization in the Southern Cone’, in A. Barahona De Brito et al. (eds), *The Politics of Memory and Democratization* (2001), at 131-136; Economist, *Democratic at last*, 15 September 2005 available at <http://www.economist.com/node/4409107> (last visited 16 February 2018).

<sup>315</sup> Bakiner, *supra* note 15, at 133. The Ombudsman office is yet to be created. Chile remains the only country in the Latin America which lacks an institution of this kind. See Elmostrador, J. P. Díaz Fuenzalida, ‘¿Cuándo tendrá Chile un Ombudsman?’ (2016) available at <http://www.elmostrador.cl/noticias/opinion/2016/06/06/cuando-tendra-chile-un-ombudsman/> (last visited 26 March 2018). In February 2018 the President of Chile promulgated a law establishing the Office of the Ombudsman for Children, see ILO- Defensoras del Pueblo, Chile- Promulgan La Ley De Defensoria De Los Derechos De La Niñez (2018) available at <http://www.ilo-defensordelpueblo.org/noticias-blog/219-chile-promulgan-la-ley-de-defensoria-de-los-derechos-de-la-ni%C3%B1ez> (last visited 26 March 2018).

<sup>316</sup> Barahona de Brito, *supra* note 314, at 136.

<sup>317</sup> Roht-Arriaza, ‘Guatemala: Lessons for Transitional Justice’, in C. Lawther, L. Moffett and D. Jacobs (eds), *Research Handbook on Transitional Justice* (2017) 445, at 461-462.

<sup>318</sup> *Ibid.*, at 461-62; Ivanisevic, *supra* note 282, at 29.

<sup>319</sup> McCargo and Thabchumpon, ‘Wreck/Conciliation? The Politics of Truth Commissions in Thailand’, 14 *Journal of East Asian Studies (JEAS)* (2014) 377.

<sup>320</sup> Thailand TRCT Final Report, *supra* note 60, at 20.

<sup>321</sup> Amnesty International, *Annual Report 2013: Thailand* available at <https://www.amnestyusa.org/reports/annual-report-thailand-2013/> (last visited 16 February 2018).

<sup>322</sup> McCargo and Thabchumpon, *supra* note 319, at 396. The Thailand TRCT rejected a blank and self-imposed amnesty; however, it did not rule out other forms of amnesty appropriate in the context of the transition in Thailand (see TRCT Final Report, *supra* note 60, 5.2.8-5.2.12 at 269-271).



## VII. MAKING GOOD RECOMMENDATIONS

The findings and recommendations of a truth commission represent the ultimate deliverables of its work. Truth commissions are well-placed to draw up informed recommendations because following years of inquiry and research they possess extensive data and in-depth analysis about past violations, their direct and structural causes, as well as their impact on society. However, too often, truth commission recommendations are formulated hastily and merely constitute throwaway lines, which are not taken seriously by policy makers. Recommendations which are generic ‘off the shelf’ proposals tend to be unconnected to local context or to specific findings. Such recommendations are unlikely to strike a resonance amongst members of the public who in turn will not lobby for their implementation.

When formulating recommendations, truth commissions ought to cast a wide net. They should solicit submissions and proposals for recommendations from all interested persons and parties. This includes seeking such advice from victims and witnesses who provide statements or appear in hearing. Where appropriate, truth commissions should launch specific inquiries and convene special hearings for the purpose of soliciting data, information and expert advice on subject matters or themes upon which they wish to make recommendations. All received proposals should be carefully analysed and considered by the commission. Truth commissions should also scrutinize existing and planned programmes and measures to assess whether they will meet the needs of the public.

Good recommendations shall be designed according to the following guidelines:

### a. Recommendations should be adapted to context:

Socio-economic factors, conflict dynamics, structural architectures, power relations and other contextual conditions vary from one truth commission to the next. Accordingly, there can be no formulaic response to preventing serious violations from happening again. Rather than applying a toolbox approach, recommendations should be developed in response to the context in which the violations occurred. Before making a recommendation, a careful analysis needs to establish which violations took place, why they occurred, how they were implemented, what effects they had and how they can be best prevented in the future. In analysing the causes and effects of certain violations, significant attention must be paid to the perspectives of victims,<sup>323</sup> specifically of female and child victims.<sup>324</sup> Their perspectives provide insights into the causes and effects of violations, as well as what it takes to prevent them from recurring.<sup>325</sup>

<sup>323</sup> ECOSOC (UN Sub-Commission on the Promotion and Protection of Human Rights), Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms: final report / submitted by Theo van Boven, Special Rapporteur, UN Doc. E/CN.4/Sub.2/1993/8, 2 July 1993, § 133.

<sup>324</sup> Independent Study on Best Practices to Combat All Aspects of Impunity, supra note 31, § 9.

<sup>325</sup> Report of the Independent Expert to Update the Set of Principles to Combat Impunity, supra note 30, § 7.



**b. Recommendations should be feasible:**

The contexts in which truth commissions operate are often marked by a scarcity of resources, a shortfall of skills, a breakdown of institutions, and fierce competition over limited resources and skills. The implementation of good recommendations should be feasible in given circumstances. In making recommendations, truth commissions should carefully consider the resources, capacities and skills available to the government or implementing agency in question. However, this does not mean refraining from making recommendations that a government may not want to implement.

**c. Recommendations should be specific:**

Recommendations should start with identifying the problem, not the solution. This is best done by identifying the specific finding or issue to be addressed, giving a concrete example of the problem and indicating how it will be addressed. Recommendations that are persuasive and address specific problems are likely to resonate with stakeholders who may advocate and lobby for their implementation. Commonplace and vague recommendations are easily ignored. Where possible commissions should formulate simple, technical, quick-impact and low-cost solutions. Recommendations that are addressed to specific office holders and which have measurable short, medium or long-term goals will facilitate implementation and monitoring.<sup>326</sup>

**d. Recommendations should be focused:**

It is not the role of a truth commission to address every ill and shortcoming in society. Recommendations should be confined to addressing the objects set out in the legal mandate. It should avoid repeating recommendations made in earlier reports. Typically, a truth commission should focus on recommendations that serve to establish and safeguard those rights, principles and values that will prevent the same violations from reoccurring.<sup>327</sup>

**e. Recommendations should pay particular attention to methods and root causes:**

The in-depth analysis performed by truth commissions places them in a privileged position to identify the methods and means used to commit violations, as well as their structural and root causes. Truth commissions should make good use of this analysis and recommend measures to disable abusive institutions and address underlying causes. In doing so, truth commissions should consider various forms of violence, injustice and exclusion, and formulate recommendations that aim to build peaceful, just and inclusive societies, in accordance with the UN's Sustainable Development Goal 16.<sup>328</sup>

<sup>326</sup> Robinson and Varney, *supra* note 1, at 145.

<sup>327</sup> *Ibid.*, and See TRC Sierra Leone Final Report, *supra* note 2, § 13-15.

<sup>328</sup> Goal 16, Sustainable Development Goals available at: <https://sustainabledevelopment.un.org/sdg16> (last visited 1 January 2019); see also GA Res. A/RES/70/1: Transforming our world: the 2030 Agenda for Sustainable Development, 21 October 2015.



f. Recommendations should be prioritized:

Not all recommendations can be implemented at the same time. Some recommendations are more pressing or urgent than others. Truth commissions should rank recommendations in order of priority, which will depend on various factors. For instance, certain measures may be prioritised because they address socio-economic root causes and can prevent recurrence in the long term. Other measures may be a priority because they disable abusive structures, thereby ensuring quick impact and non-recurrence in the short term. Yet again other measures may be prioritised because they contain spoilers and enable other reforms or because they are politically acceptable.



## VIII. IMPLEMENTING RECOMMENDATIONS

Truth commissions should help policy makers give meaning to truth commission recommendations to facilitate their implementation. As mentioned above this can be done by organising and prioritising the recommendations.

The Sierra Leone TRC arranged its recommendations in three categories for implementation under the headings: “Imperative”, “Work Towards” and “Seriously Consider”..<sup>329</sup> Imperative recommendations were those recommendations that the commission advised to implement immediately or as soon as possible since such recommendations would establish significant rights and values. The implementation of these recommendations would require regular and close monitoring. As a practical measure, the TRC proposed that Parliament enact an ‘omnibus bill’ to address those imperative recommendations that may be implemented by mere repeal of existing legislation or amendment thereof. The ‘work towards’ category involved recommendations which required in-depth planning and the marshalling of resources. Since the government was expected to put in place the building blocks to make the ultimate fulfilment of such recommendation possible, no implementation time was defined apart from the indication ‘within a reasonable time period’.<sup>330</sup>

Whereas ‘good recommendations’ are more likely to be implemented, their ultimate implementation depends on a number of factors that are beyond the control of a truth commission such as political will and the level of civil society engagement.

### A. Can Recommendations Bind Governments?

Truth commission recommendations are, by definition, not binding. Truth commission laws in Kenya<sup>331</sup>, Sierra Leone<sup>332</sup> and Liberia<sup>333</sup> attempted to deal with this challenge by declaring their recommendations binding. However, in accordance with the principle of separation of powers that is set out in many constitutions, truth commission recommendations cannot bind the legislature, the executive or the judiciary. Commissions may not require the legislature to enact certain laws, nor can it impose policy choices on the executive or order prosecutors to prosecute certain cases. Typically, truth commissions may only offer advice and counsel to the different organs of state. In Kenya, the

<sup>329</sup> TRC Sierra Leone Final Report, supra note 2, § 119-121.

<sup>330</sup> Ibid.

<sup>331</sup> Sec. 50(2) of the Truth, Justice and Reconciliation Act, 2008 purports to make the implementation of all recommendations of the Commission mandatory: ‘All recommendations shall be implemented, and where the implementation of any recommendation has not been complied with, the National Assembly shall require the Minister to furnish it with reasons for non-implementation.’ See The Truth, Justice And Reconciliation Commission Act No.6 of 2008 (Kenya) available at [http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/TruthJusticeandReconciliationCommissionAct\\_.pdf](http://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/TruthJusticeandReconciliationCommissionAct_.pdf) (last visited 16 February 2018).

<sup>332</sup> Art. 17 of the Truth and Reconciliation Commission Act 2000 states that ‘the Government shall faithfully and timeously implement the recommendations of the report that are directed to state bodies and encourage or facilitate the implementation of any recommendations that may be directed to others (...)’. See The Truth and Reconciliation Act 2000 (Sierra Leone) available at [http://www.sierraleone.trc.org/downloads/legalresources/trc\\_act\\_2000.pdf](http://www.sierraleone.trc.org/downloads/legalresources/trc_act_2000.pdf) (last visited 16 February 2018).

<sup>333</sup> Sec. 48 of the Act to Establish the Truth and Reconciliation Commission of Liberia, 2005 states ‘All recommendations shall be implemented.’ See An Act to Establish the Truth and Reconciliation Commission (TRC) of Liberia, 10 June 2005, available at <https://www.refworld.org/docid/473c6b3d2.html> (last visited 6 January 2019).



binding nature of the TRC's recommendations was challenged in the High Court.<sup>334</sup> In Liberia, the Supreme Court set aside article 48 of the Truth and Reconciliation Act which made it mandatory for the government to implement the TRC's recommendations.<sup>335</sup> The Supreme Court ruled that the law appropriated the powers of other branches of government which was not authorized by the constitution.

## B. Holding Governments to Account

While governments cannot be forced to implement truth commission recommendations, they should nonetheless be held accountable for any failure to respond coherently to the findings and recommendations. International best practice demands that governments 'undertake to give due consideration' to the findings and recommendations of investigative reports into human rights violations.<sup>336</sup> The UN Commission on Human Rights issued a statement on the obligation of member states to promote truth-seeking tribunals and to prompt States 'to disseminate, implement, and monitor implementation of, the recommendations of non-judicial mechanisms such as truth and reconciliation commissions, and provide information regarding compliance with the decisions of judicial mechanisms'.<sup>337</sup>

Governments should be pressed to provide reasons when they decide not to implement truth commission recommendations. It is arguable that governments have a moral and legal obligation to provide reasons for a decision, but not to implement a specific recommendation.<sup>338</sup> Such a requirement invites the closest scrutiny of the government's approach to the recommendations. Truth commission laws ought to require governments to seriously and timeously respond to both findings and recommendations. Such responses should set out the recommendations which the government intends to implement; a high-level plan and strategy for their implementation, including proposed time frames and sources of funding; and the recommendations which the government does not intend to implement with due justification for this decision.

A truth commission could recommend that the national assembly of a country convene a special sitting within a specified number of days to consider and debate the recommendations. In Sierra Leone, the TRC Follow-Up Project persuaded the Clerk of Parliament to set aside one day in the parliamentary calendar on which no other business but the TRC report and recommendations would

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<sup>334</sup> Standard Digital, Two in court to block TJRC report from being tabled in Parliament (2013) available at: <https://www.standardmedia.co.ke/article/2000085436/two-in-court-to-block-tjrc-report-from-being-tabled-in-parliament> (last visited 1 January 2019); see also the Amicus Curiae Submissions of ICTJ in Constitutional Petition 286 of 2013 before the High Court of Kenya, § 7-15 available at <http://ictj.org/sites/default/files/ICTJ-Submissions-Amicus-HighCourt-Kenya-2013.pdf> (last visited 1 January 2019).

<sup>335</sup> Supreme Court of the Republic of Liberia, *Williams v Minister of Justice, Attorney General, Independent National Human Rights Commission and Government of Liberia*, 21 January 2011 available at [www.mediafire.com/?u1n6zkqox1zn3o](http://www.mediafire.com/?u1n6zkqox1zn3o) (last visited 1 January 2019).

<sup>336</sup> Updated Principles to Combat Impunity, *supra* note 4, Principles 12 and 19.

<sup>337</sup> UN Commission on Human Rights, Human Rights Resolution 2005/66: Right to the Truth, UN Doc. E/CN.4/RES/2005/66, 20 April 2005.

<sup>338</sup> The Kenyan Truth Justice and Reconciliation Act, 2008 required a failure or refusal to implement a recommendation to be explained to the National Assembly. See Sec. 50(2), Kenyan Truth Justice and Reconciliation Act, 2008, *supra* note 331.



be considered. An unprecedented Special Session of the Sierra Leone Parliament on the TRC Report and Recommendations was held on 14 November 2005.<sup>339</sup>

Since most countries emerging from conflict are under considerable resource constraints it is likely that the question of resources will be frequently invoked to justify why recommendations cannot be implemented. Where governments decline to implement recommendations because of a lack of resources, they should be required to demonstrate that the resources are not available and to articulate an action plan for resource mobilization.<sup>340</sup>

Governments should be required to periodically report on the status of implementation to parliament and the wider public. This would create a platform for civil society to mobilize and to hold the government accountable by, for example, preparing parallel 'shadow reports' on the implementation progress.

The performance of government and its agencies in the implementation of the recommendations should be closely monitored. Reports should be published at regular intervals and include an overview of the progress made so far, a discussion of what the government has failed to accomplish and recommendations for getting the process back on track.

Ultimately, it will be up to civil society to monitor government's performance in the implementation of recommendations and to push for more efficiency.<sup>341</sup> This may be best done by specialist non-governmental organizations and civil society groups which target the recommendations that have a direct impact on their programmes and constituencies. Activists can lobby government departments and legislative portfolio committees as well as individual members of the legislature. Innovative ways of monitoring include:

- a. Holding national consultative conferences to assess the implementation status of the recommendations and to develop strategies for their implementation.<sup>342</sup>
- b. Publishing periodic scorecards to assess and score the government's performance in implementing selected recommendations.<sup>343</sup>

<sup>339</sup> WITNESS, G. Simpson, WITNESS Final Report - January 2006: TRC Follow-up Project (Sierra Leone) (2006) available at: [http://www.sierraleonetr.com/images/docs/sl\\_trc\\_follow\\_up\\_final-report-jan06.pdf](http://www.sierraleonetr.com/images/docs/sl_trc_follow_up_final-report-jan06.pdf) (last visited 6 January 2019). See also: Amnesty International, Public Statement: Sierra Leone Government Urged to Implement the Recommendations of the Truth and Reconciliation Commission (TRC) (2005) available at <https://www.amnesty.org/download/Documents/80000/afr510122005en.pdf> (last visited 6 January 2019).

<sup>340</sup> See Sec. 20(5)(a) - (b) of the Constitution of Kenya, 2010 which state that it is the responsibility of the State to show that the resources are not available; and in allocating resources, the State shall give priority to ensuring the widest possible enjoyment of the right or fundamental freedom having regard to prevailing circumstances, including the vulnerability of particular groups or individuals.

<sup>341</sup> Simpson, TRC Follow-up Project (Sierra Leone), supra note 339. See also The Patriotic Vanguard, CD on TRC Recommendations to be launched Saturday (2007) available at <http://www.thepatrioticvanguard.com/cd-on-trc-recommendations-to-be-launched-saturday> (last visited 6 January 2019).

<sup>342</sup> E.g., two national consultative conferences organised by the Human Rights Commission and the UN Integrated Peace-building Office in Sierra Leone to consider the status of the TRC recommendations. See Recommendation Matrix of the TRC in Sierra Leone, supra note 294.

<sup>343</sup> An example is the Report Card system developed by the Public Affairs Centre, Bangalore, India. For more on the project and other community scorecard systems see The World Bank, Citizen Report Card and Community Score Card available at <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTSOCIALDEVELOPMENT/EXTPCENG/0,,contentMDK:20507680~pagePK:148956~piPK:216618~theSitePK:410306,00.html> (last visited 1 January 2019).



- c. Compiling an online matrix which monitors the implementation on an ongoing basis and posts updates on the developments along with observations and comments.<sup>344</sup>

## C. Follow-up Mechanisms

Some mandates of truth commissions contain provisions for follow-up mechanisms.<sup>345</sup> Typically, follow-up bodies are required to monitor or co-ordinate the implementation of recommendations or implement the recommendations. Such bodies are either stand-alone, located within government or within existing independent structures.<sup>346</sup>

In Sierra Leone where a follow-up body was mandated by law, no such entity was established. The TRC, recognizing the unlikelihood of establishing such a body, recommended that the national Human Rights Commission be tasked with follow-up and monitoring.<sup>347</sup> Chile's *Corporación Nacional de Reparación y Reconciliación* was an independent stand-alone body created to finalize outstanding truth seeking, locating victims and implementing the reparations programme.<sup>348</sup> In Peru, the TRC recommended the establishment of a temporary ad-hoc inter-ministerial working group and a permanent autonomous body, the *Consejo Nacional de Reconciliación*, in the council of ministers to develop policy for the implementation of the recommendations and draft bills on reparations, preservation of memory, justice and institutional reform.<sup>349</sup> However, the recommended body was never created.<sup>350</sup> In Argentina, the task of rolling out reparations was entrusted to the *Secretaría de Derechos Humanos* within the Ministry of Justice, Security, and Human Rights.<sup>351</sup>

Laws which require governments to establish implementation bodies recommended by a commission, regardless of the views of government and regardless of the feasibility of such a body, are unlikely to withstand constitutional scrutiny. The implementation of recommendations is best carried out by the entities and departments with the relevant constitutional and statutory authority. Ideally, the implementing entities need to be persuaded that the proposed measures are correct and necessary.

A standalone follow-up mechanism located outside of government will probably struggle to facilitate or coordinate the implementation of recommendations. Pablo de Greiff, former Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence noted that such bodies are hamstrung since 'agencies and ministries are not under their authority' and 'in the face

<sup>344</sup> Recommendation Matrix of the TRC in Sierra Leone, supra note 294.

<sup>345</sup> See Kenyan Truth Justice and Reconciliation Act, 2008, supra note 331, Sec. 48(2)(f) and 49(1).

<sup>346</sup> 2013 de Greiff Report, supra note 12, § 76.

<sup>347</sup> See Sierra Leone TRC Final Report, supra note 2, § 550.

<sup>348</sup> USIP, Truth Commission: Chile 90 available at <http://www.usip.org/publications/truth-commission-chile-90> (last visited 6 January 2019).

<sup>349</sup> Peruvian TRC Final Report, supra note 56, at 315.

<sup>350</sup> See the Peruvian TRC official website available at <http://www.cverdad.org.pe/ingles/pagina01.php> (last visited 6 January 2018).

<sup>351</sup> P. de Greiff, *The Handbook of Reparations* (2006), at 21 as cited in 2013 de Greiff Report, supra note 12, footnote 90.



of recalcitrant attitudes, they prove to be feeble'.<sup>352</sup> Government departments are likely to resist the coordination of their functions by an external ad hoc temporary body. Facilitation and coordination of government programmes should take place at the heart of government. Typically, this would be a cabinet or similar body, which must ultimately facilitate and coordinate the implementation of the recommendations through existing structures or another body of its choice.

Finally, a follow-up body should not be both implementer and monitor. Such a dual requirement would be legally and logically unsound. A monitoring body should not be involved in implementation, otherwise, it would be required to monitor itself.

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<sup>352</sup> 2013 de Greiff Report, *ibid.*, § 77.



# CONCLUSION

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Truth commissions have moved well beyond addressing violations of civil and political rights. It has been increasingly recognised that such violations are invariably manifestations of deeper underlying fault lines in society. These often involve structural socio-economic practises which result in entrenched and ongoing marginalisation and abuse of vulnerable groups. Since truth commissions are expected to help societies make a decisive break with the past, they have turned their attention to these complex matters. This explains why in Peru the truth commission recommended fundamental reforms of the educational system and in Sierra Leone recommendations were made in relation to access to natural resources.

Truth commissions are often criticised for the poor implementation record of their recommendations. While the criticism may be misplaced, since the responsibility for implementation lies elsewhere, commissions must nonetheless accept some blame for this poor record. Often too little time is devoted to researching and formulating recommendations which results in making generic and trivial proposals, likely to be ignored.

Recommendations of truth commissions inevitably encounter resistance from various quarters within and outside government. Nonetheless, where the recommendations resonate with society at large, they can act as an 'enabler' by exposing institutional responsibility and placing pressure on the political establishment to act. Recommendations which attract strong civil society support will have greater chances of a successful implementation.<sup>353</sup> Close monitoring and scrutiny of the implementation of recommendations can provide civil society with the means to hold government accountable.

Truth commissions should not be expected to provide blueprints for the building of perfect future societies. However, they are well placed to help facilitate the creation of more humane societies which uphold human dignity and respect the rule of law. Ultimately, truth commission recommendations have to stand for themselves. Those that speak to the needs of the people are likely to provide focal points around which civil society can mobilise. In so doing, policy makers are made aware of the political cost in not addressing issues pertinently raised by truth commissions.

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<sup>353</sup> Bakiner, *supra* note 15, at 149 and 183.



