
Quality Control in Truth and Reconciliation Processes

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5.1. Introduction

This chapter seeks to address how the quality of post-conflict truth and reconciliation processes can be enhanced. It has become a widespread expectation that there will be a truth and reconciliation commission ('TRC') as part of transitions from armed conflict to peace, or from military to civilian rule.

In the past decade or two, along with the establishment of the various international criminal jurisdictions, truth-seeking commissions and other investigative bodies have flourished as a means of post-conflict justice, to investigate social problems, inquire into episodes of human rights violation, address international crimes, and provide recommendations for the rebuilding of peace and justice. Truth-seeking has become an important post-conflict objective in its own right, while criminal trials occur more often in conflicts where one side emerges victorious. Truth-seeking commissions have gained momentum alongside the global trend of democratisation after the Cold War, starting in Latin America by addressing the issue of disappearances of persons¹; continuing in Africa, for national reconciliation in South Africa; and finally in Asia, to deal with the serious violations of human rights following conflicts.² Up until now, more than

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¹ In 1982, Bolivia set up the National Commission of Inquiry into Disappearances, which is believed to be the first truth commission after the Cold War. See Priscilla B. Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity*, 2001, p. 14.

² In March 2005, the Presidents of Indonesian and East Timor signed an agreement to set up the Commission on Truth and Friendship ('CTF') to investigate human rights violations when East Timor voted for independence and to seek reconciliation between the two states. See Priyambudi Sulistiyanto, "Politics of Justice and Reconciliation in Post-Suharto Indonesia", in *Journal of Contemporary Asia*, 2007.

50 States in the world have utilised such methods to resolve social problems and to address human rights violations.

Such TRCs come with both political and material costs, since they engage victims and their traumatisations, expose violations, and generate incriminations. They may also destabilise a society and inadvertently undermine the rebuilding of peace. It is therefore essential that TRCs operate as professionally as possible. Increasing the awareness of quality control in the creation and operation of TRCs is of fundamental importance.

The theme of this anthology is relevant at every stage of the work of TRCs, including the definition of the mandate, selection of the composition of the commission, definition of standards of proof, creation of standard procedures of interview, management of resources, engagement of individuals and the public, and the production of the final report. This chapter seeks to address how the quality of post-conflict truth and reconciliation processes can be enhanced.

5.2. Definition and Mandate

Various investigative commissions may have different names, mandates, compositions, procedures, ways of engaging the public, and forms of final reports. In one international document defining fact-finding – the *Declaration on Fact-finding by the United Nations in the Field of the Maintenance of International Peace and Security* – it is stated that fact-finding under the auspices of the United Nations is:

[a]ny activity designed to obtain detailed knowledge of the relevant facts of any dispute or situation which the competent United Nations organs need in order to exercise effectively their functions in relation to the maintenance of international peace and security.³

This definition assumes the perspective of the United Nations and may not be detailed and specific enough to cover all situations. One scholar rightly recapitulates the term as follows:

[...] international fact-finding is deemed to refer to predominantly ad hoc investigative mechanisms tasked with ascer-

³ See Declaration on Fact-finding by the United Nations in the Field of the Maintenance of International Peace and Security, General Assembly Resolution, A/RES/46/59 (1991); United Nations Office of Legal Affairs, *Handbook on the Peaceful Settlement of Disputes between States*, 1992, pp. 24–33.

taining relevant facts and information relating to a situation of human right or humanitarian concern, by means of which it is determined whether or not the relevant international normative framework has been violated by states or non-state actors.⁴

From the above-mentioned definition, there might be some common characteristics for many of these investigative bodies. Firstly, they focus on past events instead of the present situation. Secondly, they may investigate a situation or a specific case, that is, look into a pattern of abuse over a set period of time. For instance, the National Commission for the Disappearance of Persons ('CONADEP') in Argentina was set up in 1983 by the President to uncover incidents of human rights violations that occurred from 1976 when the military took power, to 1983 when power returned to civilian rule.⁵ They may also look into a specific case. For example, Israel established the Commission of Inquiry into the Events at the Refugee Camps in Beirut in 1982 to investigate massacres of Palestinians from 16 to 18 September 1982.⁶ Thirdly, the investigating bodies are temporary or *ad hoc* mechanisms that complete their work by submitting a report to the relevant authority, which documents its findings and proposes recommendations for further action. Normally, the investigating bodies will function for one or two years or less. A few of them will last for five or six years. Some of them simply fade out because of political or financial predicaments. Fourthly, those investigating bodies are either officially authorised, or empowered by governments or international authorities, such as the United Nations. The advantage of governmental involvement or official backing is that this could help with the provision of resources and facilitate the inquiry. Strictly speaking, however, investigative bodies are normally non-governmental organisations, especially in situations where the government is involved as a party to the conflict. Fifthly, the formation of the body may be a part of a broader peace or rec-

⁴ Stephen Wilkinson, "Standards of Proof in International Humanitarian and Human Rights Fact-Finding and Inquiry Missions", in *Geneva Academy of International Humanitarian Law and Human Rights*.

⁵ Priscilla B. Hayner, "Fifth Truth Commission — 1974 to 1994: A Comparative Study", in *Human Rights Quarterly*, 1994, vol. 16, p. 558.

⁶ The Commission of Inquiry into the Events at the Refugee camps in Beirut, 1983: Final Report (Authorized Translation), reprinted in *Jerusalem Post*, 9 February 1983 (supplement) (hereinafter cited as 'Kahan Report'). The Report may also be found at 31 ILM 473 (May 1983).

conciliation agreement by all the parties in the conflicts, or it may be the product of actions by the executive branch of government. The latter situation has the benefit of enabling swift action to address human rights abuses.

In any case, fact-finding has become a very practical and useful way to settle disputes, both domestically and internationally. As the concept note of the 2013 LI Haopei Seminar noted, there are academic efforts underway to map and analyse the best practices of the plethora of international fact-finding commissions, which look into allegations of serious violations of international criminal law, humanitarian or human rights law. Regardless of what an investigative body is called, be it a ‘truth and reconciliation commission’ or an entity by any another name, its main purpose is to reach national reconciliation by inquiring into past crimes and addressing the violation of human rights. Some TRCs have listed specific tasks. For instance, the National Truth and Reconciliation Commission (‘CNVR’) in Chile was established in April 1990 with four primary tasks: to establish a complete picture of human rights violations that occurred between 11 September 1973 and 11 March 1990; to gather evidence that allows victims to be identified; to estimate reparations; and to recommend legal and administrative measures to prevent a repetition of similar abuse in the future.⁷

An investigative body should have a clear mandate for conducting the investigations in conformity with four principles: fairness, credibility, impartiality and independence. The mandate serves as a legal template for the investigation. Firstly, it specifies what the commission is to investigate, both in terms of the types of crimes and the time frame open to its investigation. Secondly, the mandate outlines how its work is to be conducted. Thirdly, in the interest of fairness, it sets up the protocol for conducting interviews, taking statements and admitting documents with clearly defined standards of proof. Fourthly, it provides its members with sufficient tools to do the work. Any means and practice to discover relevant information should be encouraged. The investigative body should be able to conduct its work independently and without outside interference. The mandate should clearly state whether or not the commission has the power to issue subpoena to compel witnesses or evidence to appear before it; whether it has search and seizure powers; and whether the recommen-

⁷ Mark Ensalaco, *Chile Under Pinochet: Recovering the Truth*, 2000.

dation of the commission is mandatory. Fifthly, it establishes the rules of procedure and guidelines for handling evidence. The mandate may specify whether or not the testimony will provide the basis for subsequent prosecution and reparations. The power to name names or grant amnesty is another issue to be considered in drafting the mandate. As a matter of fact, a TRC is not a judicial body that can make binding judgement or grant amnesty, but it could make recommendations for the judicial bodies to take necessary action if these are deemed necessary. To date, the South African TRC is the only one to have had the power to grant blank amnesty, but others may have power to recommend that the government grant amnesty to individuals. In the case of East Timor, in order to help low-level offenders reintegrate into the society, the Commission for Reception, Truth and Reconciliation has granted amnesty to some individuals who committed minor crimes.⁸

5.3. Establishment and Composition

There are various ways to form a commission. If a TRC is set up immediately following a conflict, its establishment is likely to be regulated in the peace agreement signed by the parties to the conflict. Members of the commission are selected to represent the different sides of the conflict in equal numbers and a neutral person is selected by all sides. It is similar to the formation of an arbitration panel. In the case of Chile, the National Truth and Reconciliation Commission was composed of an even number of representatives from the left and the right.⁹ In Ecuador, the Truth and Justice Commission was made up of seven members; one was appointed by the Ministry of Government and Police, three were named by international human rights NGOs and three were from domestic NGOs.¹⁰

In most situations, the TRC is established by the government of the territorial state, which also appoints the commissioners. It is the most effective way to form a commission as it ensures the full support of the government, thereby implying that resources and facilities are more easily provided. However, the disadvantage is that the commission's impartiality

⁸ Wendy Lambourne, "Unfinished business: Justice and Reconciliation in East Timor", in *Centre for Peace and Conflict Studies of the University of Sydney's Peace Writes Newsletter*, December 2004.

⁹ Ensalaco, 2000, *supra* note 7.

¹⁰ Priscilla B. Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity*, 2001, p. 14.

and fairness might be put in doubt, particularly if the government has been involved in the investigated crimes. In some cases, we have seen that different branches of the government have been involved in the formation of the commission. In 1999, the Presidential Truth Commission on Suspicious Deaths in South Korea was established. The Commission is made up of 15 members, eight recommended by the Nations Assembly, four appointed by the President, and three nominated by the Chief Justice of the Supreme Court.¹¹

In some countries, the legislative body is able to establish an investigative body. The parliamentary basis of a commission will probably increase its legitimacy if the legislative body votes for well-respected members of society, such as religious leaders, artists, academics, and dignitaries from civil society and the legal community. Selecting commissioners who are broadly representative in ethnicity, religion, political views and gender, will provide the investigation with greater influence and legitimacy.

In some instances, an international organisation, such as the UN Security Council or the Office of the UN High Commissioner for Human Rights, is also able to establish an investigative body. Normally, the investigative body is established by adopting a resolution. There have been significant developments in international practice in this area since the Commission of Experts for the former Yugoslavia established, pursuant to the UN Security Council resolution 780 (1992), an institution which served as a model for later developments.¹² On 18 September 2004, the Security Council adopted resolution 1564 to establish the International Commission of Inquiry on Darfur, Sudan. Based on its report, the situation of Darfur was referred to the International Criminal Court by the Security Council.¹³

Foreign commissioners may also be considered as they are not involved in the conflicts and are generally regarded as impartial. However, the drawback of this approach is that they often do not fully understand the culture and specific situation of the country. Additionally, some sovereignty-inclined persons may not like foreigners to conduct these inves-

¹¹ Kuk Cho, "The Transitional Justice in Korea: Legally Coping with Past Wrongs After Democratization", in *Pacific Rim Law and Policy Journal*, 2007, vol. 16.

¹² S/RES/780 (1992), 8 October 1992.

¹³ S/RES/1564 (2004), 18 September 2004.

tigations and may consider the investigations to be a private affair that should be kept purely within domestic jurisdiction. For example, in the case of El Salvador, the polarised society and extensive involvement of both sides in the conflict, led to the United Nations playing a significant role in selecting commissioners for the True Commission. All the commissioners were foreign dignitaries and were named by the Secretary-General of the United Nations. This turned out to be one of the reasons why the report of the commission was criticised by all sides in El Salvador.¹⁴

No matter how a commission is formed, commissioners need to have the vision to shape policy and resolve ambiguities in the commission's mandate. They will set the tone of the investigation, both publicly and within the commission. A team of experts (including legal, medical, psychological and forensic experts) is needed to assist the commissioners. Effective management is important. Staff must be skilled and interviewers need to be sensitive and have the necessary techniques and experience to conduct the investigation. The TRC may also set up sub-committees to carry out different tasks. In the case of South Africa, the TRC set up three committees: the Human Rights Violation Committee conducted investigations; the Amnesty Committee reviewed applications from perpetrators of human rights violations; and the Reparation and Rehabilitation Committee produced recommendations related to measures for healing.¹⁵

5.4. Standards of Proof

In the field of international criminal justice, no indictment can be issued, and no trial can take place, without credible evidence. The prosecutors of the international tribunals are required to prove these crimes by a legal standard of proof 'beyond a reasonable doubt'. Justice Robert H. Jackson, the principal American prosecutor at the Nuremberg trials and an Associate Justice of the United States Supreme Court, famously stated that the aim of the prosecutors at Nuremberg was to "establish incredible events by credible evidence".¹⁶ He wished to set before the court the relevant

¹⁴ Paul Seils, "The Limits of Truth Commissions in the Search for Justice: An Analysis of the Truth Commission of El Salvador and Guatemala and Their Effect in Achieving Post-Conflict Justice", in M. Cherif Bassiouni (ed.), *Post-Conflict Justice*, 2002.

¹⁵ Dorothy C. Shea, *The South African Truth Commission: The Politics of Reconciliation* Chapman and Ball, 2000.

¹⁶ Justice Jackson's Report to the President on Atrocities and War Crimes, 7 June 1945.

evidence “with such authenticity and in such detail that there can be no responsible denial of these crimes in the future and no tradition of martyrdom of the Nazi leaders can arise among informed people”.¹⁷

Although the standard to deal with evidence outside of criminal justice may not be as high as in international criminal tribunals; the fact remains that truth and reconciliation commissions, like international tribunals, flourish or fail depending on their ability to acquire evidence. Therefore some quality control for the admission of evidence must be in place. This is not only necessary to enhance the credibility of the truth commission itself, but also to secure the credibility of the evidence for possible use in future litigation before domestic or international criminal courts. According to their purpose and mandate, different TRCs may establish their own objective standards of proof. If the standard of proof is set too high, it will be very difficult to reach a conclusion. For instance, Geneva Call, a Geneva based non-governmental organisation, conducted a verification mission to the Philippines to assess whether an armed group had complied with the agreement reached for non-use of anti-personnel landmines. The mission adopted the standard of ‘beyond reasonable doubt’. As a result, it was unable to reach a definite conclusion.¹⁸ On the other hand, if the standard is set too low, the TRC may be burdened with piles of complaints, inviting ill-founded allegations.

In the ICTY and ICTR, the standard of proof varies at different stages of proceedings. At the investigation stage, the Prosecutor shall evaluate the information received or obtained and decide whether there is a “sufficient basis” to proceed.¹⁹ If the Prosecutor would like to submit the indictment to a judge for confirmation, he shall be satisfied that there is “sufficient evidence to provide reasonable grounds” for believing that a suspect has committed a crime within the jurisdiction of the Tribunal.²⁰ For a judge to confirm the indictment, he shall be satisfied that a *prima*

¹⁷ Quoted by Stephen G. Greyer, Associate Justice of US Supreme Court in the keynote address for the 1996 Days of Remembrance, “Crimes against Humanity, Nuremberg, 1946”, Capitol Rotunda, Washington D.C., 16 April 1996.

¹⁸ Wilkinson, *supra* note 4.

¹⁹ Article 18(1) of the Statute of the International Tribunal for the Former Yugoslavia, see Security Council Resolution 827 (1993).

²⁰ Rule 47(2) of the Rules of Procedure and Evidence of the ICTY. IT/32/Rev. 45, 8 December 2010.

facie case exists.²¹ When the Prosecutor concludes his case, the defence may submit a motion of ‘no case to answer’. The test to be applied at this stage is “whether there is evidence (if accepted) upon which a reasonable (trier) of fact could be satisfied beyond reasonable doubt of the guilt of the accused on the particular charge in question, not whether an accused’s guilt has been established beyond reasonable doubt”,²² which is the standard for the conviction after the hearing of all evidence by a trial chamber.

It is submitted that the first two standards lend themselves best as standards of proof in the work of TRCs. If the TRC seeks to include a particular accusation in its report or submit the case to the competent authority for prosecution, it may, to be on the safe side, adopt the *prima facie* standard after affording the accused the opportunity to defend him- or herself.

5.5. Standard Procedure of Interview

Interviews of victims and witnesses are the most important work of TRCs. This will consume most of the time, resources, manpower and energy of the commission. The CAVR of East Timor found through its fact-finding that between 84,000 and 183,000 people might have been killed. It also found 18,600 cases of disappearance and killings, 8,500 cases of torture, and thousands of cases of rape and sexual assault.²³ The interviews should follow a standard procedure. The victims may submit their statements before, during or after the interview. The statement should be relevant and reliable, accurate, and have probative value. Normally, the interview is not conducted in public and if necessary, pseudo names or other protective measures may be applied. It should be conducted on a voluntary basis, unless the commission issues a subpoena to compel a victim to tell his or her story. It is not uncommon that witnesses to such horrific crimes remain traumatised by their experience and are unwilling or unable to assist the investigators. They should therefore have access to medical and psychological counselling before or after the interview. They should also

²¹ Article 19(1) of the Statute of the International Tribunal for the Former Yugoslavia.

²² Para. 9 of the Judgement of the Appeals Chamber on Karadžić’s Motion According to Rule 98*bis*, 11 July 2013, IT-95-5/18-AR98*bis*.1.

²³ “Chenga! (Enough!)”, Final Report of the Commission for Reception, Truth and Reconciliation in East Timor, 2006.

be informed of whether the evidence they give might be used in any future judicial proceedings. Collecting and preserving evidence in a manner consistent with trial standards could result in stronger contributions for future prosecutions. If that is the case, the evidence and document data preservation should be conducted in such a way as to be admissible in court proceedings.

5.6. Resources

A TRC needs adequate resources in order to carry out its mandate, which is crucial to conducting meaningful inquiries. For instance, resources are needed to recruit staff with the necessary skills and experience to conduct the investigations; and for all related field trips, interviews and trainings. Resources are also needed to assemble experts, provide the physical infrastructure for the commission's database and archives, and to draft the final report.

The majority of the resources of TRCs tend to come from governments. As post-conflict governments face many rebuilding needs, the TRCs must compete for funds. In some cases, donations from outside the country are also accepted. The amount of outside donations largely depends on the performance of the TRC. In the case of Haiti, foreign donors withdrew their support because of the malfunctioning of the Haitian National Commission for Truth and Justice ('CNVJ').²⁴ The commission should also have resources in place in anticipation of the secondary trauma that some staff may suffer as a result of hearing many harrowing stories.

In most cases, a lack of resources is the main reason why a TRC stops its work. On 18 March 1998, the newly elected President of the Philippines established the Presidential Committee on Human Rights to investigate human rights violations under the former President Ferdinand Marcos' rule. After functioning for only less than one year, the attempt was aborted, because of a shortage of staff and a lack of financial support from the Government, which was under the influence of the military.²⁵

²⁴ Audrey R. Chapman and Patrick Ball, "The Truth of Truth Commission: Comparative Lessons from Haiti, South Africa, and Guatemala", in *Human Rights Quarterly*, 2001, vol. 23.

²⁵ Priscilla B. Hayner, "Commissioning the Truth: Further Research Questions", in *Third World Quarterly*, 1996, vol. 17.

5.7. Engaging Individuals and the Public

It is essential to engage both individuals and the public in the process of truth seeking. Holding public hearings may be the most effective way to involve the whole society in the process, and to guarantee the transparency of the proceedings. Much information will be a matter of public record and awareness. Victims should have the choice of giving testimony in public or in camera. In order to void the risk of providing an open venue for unsubstantiated accusations, the public hearing should offer the opportunity for the defence to express his or her view and perspective of the events.

In some countries, traditional methods of community justice were employed.²⁶ In East Timor, the TRC (‘CAVR’) encouraged every village or community to conduct community-wide ceremonies, in which low-level offenders would confess their wrongdoings before the victims. In return for admitting their wrongdoings, offering reparations and committing to community service, and/or making a public apology, these offenders would receive amnesty. The whole community would take part in such ceremonies, so as to reach community reconciliation. The CAVR conducted 216 community reconciliation events involving 1,403 perpetrators.²⁷

In Rwanda, in order to seek truth, justice and reconciliation, Gacaca courts were set up to reconstruct what happened during the genocide, in order to expedite legal proceedings, facilitate the reconciliation of all Rwandans and build unity. Strictly speaking, Gacaca was a semi-judicial body. It involved both plaintiffs and witnesses in interactive court proceedings against alleged criminals who took part in the genocide. The defendants were brought to trial, which were held in public, where survivors and the victims’ families could confront the accused. The accused had the option to confess to their crimes or maintain their innocence. The villagers were involved in the process to a great extent, and could speak either for or against the defendant.²⁸

²⁶ “What is Traditional Justice?”, International Centre for Transitional Justice, available at <http://ictj.org/about/transitional-justice>, last accessed on 26 July 2013.

²⁷ Lambourne, 2004, *supra* note 8.

²⁸ Eric Stover and Harvey Weinstein, *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity*, Cambridge University Press, Cambridge, 2004.

The commission should not overlook outreach efforts to educate the population about the investigation. Broadcasting on television or radio can provide a way to engage the entire country in the truth-seeking process. Otherwise, the public has only press releases and news leaks by which to be informed of the process.

5.8. Final Report

Public hearings cannot substitute for a final report that serves as a lasting reminder of past crimes and as an outline of further measures for redress and prevention. The TRC's final report is its legacy and is therefore one of the most crucial elements in the whole process. Normally, the final report will include, but is not limited to, the purpose and mandate of the commission, the composition of the commission, a description of its work and, finally, its findings and conclusions.

The key objective of the final report is to lay out, after investigation, what the truth of the event investigated is, and who was found to be responsible for the crimes. Depending on the TRC's mandate, the final report may name names or turn over to the government or judicial bodies the names of those suspected of culpability.²⁹ The TRC may grant amnesty to low-level offenders who committed minor crimes, but there should never be any blanket amnesty, especially for high-level offenders who committed serious crimes, in particular international crimes such as genocide, serious war crimes and crimes against humanity.³⁰

The report should also outline recommendations for the further redress and prevention of such crimes. One purpose of investigating past human rights abuses is to prevent them from occurring in the future. As such, the recommendation should concentrate on the establishment of the rule of law. The recommendation may propose possible prosecution, institutional reform, reparation, vetting and the joining of a specific international human rights convention. The final report might also recommend some symbolic or cultural measures, for example, waging a campaign to

²⁹ Jason S. Abrames and Priscilla B. Hayner, "Documenting, Acknowledging and Publishing the Truth", in M. Cherif Bassiouni (ed.), *Post-Conflict Justice*, 2002.

³⁰ Principle 1.8, The Chicago Principles on Post-Conflict Justice.

educate the public, setting up a memorial monument, or fixing a national memorial day.³¹

In Chile, the final report of the National Truth and Reconciliation Commission ('CNVR') criticised the military and police for common use of illegal imprisonment, torture and summary execution during the Pinochet rule. The report also called for the concept of 'national security', which had justified the military actions, to be revisited. The report stressed the importance of education and advocated human rights training for the military and police. The report recommended reducing the scope of military jurisdiction and reforming the Code of Military Justice, and also requested the Chilean Government to sign a few international human rights conventions. With regards to reparation, about 5,000 people (the families of those killed and disappeared) received some USD 5,000 per year. Other reparations include educational scholarships, free health services, and exemption from military service.

5.9. Conclusion

The quality control of international fact-finding is a very important element in ensuring the success and efficiency of truth and reconciliation commissions. As the concept note of the 2013 LI Haopei Seminar highlighted, increasing the awareness and understanding of quality control may enhance the value of international fact-finding to the victims of serious violations of international law and, indirectly, to the taxpayers who make it possible for governments to create and support such commissions. Active quality control can also contribute to the real independence of those involved in TRCs, and their assessment of allegations of serious violations of international criminal, humanitarian or human rights law. Focusing on the theme of quality control can help stakeholders to create better TRCs that contribute more effectively to truth-telling and reconciliation.

This theme is neutral and technocratic – it directs the analysis towards the professionalisation of the fact-finding done by TRCs. Such fact-finding falls outside the ambits of criminal justice (which is not the subject of this book) and international human rights fact-finding (described, *inter alia*, in Chapter 3 by Professor Martin Scheinin). But with the grow-

³¹ Mark Ensalaco, "Truth Commissions for Chile and El Salvador: A Report and Assessment", in *Human Rights Quarterly*, 1994, vol. 16.

ing expectation that truth and reconciliation processes will follow armed conflict or military rule, whether there are criminal investigations and trials or not, the professionalisation of such fact-work becomes increasingly important. Moreover, some TRCs entail political risks that can destabilise peace as much as criminal trials can. It is therefore essential that the quality of TRCs be enhanced to the extent possible. The collection of accumulated knowledge, insights and advice contained in this anthology should assist that process.