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"Truth without Facts"

On the Erosion of the Fact-Finding Function of Truth Commissions

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The title of this chapter is meant partly as a provocation, partly as a description of the situation in which truth commissions increasingly find themselves. Trends in the development of the mandates of truth commissions, as I will show, have moved in the direction of significant thematic and functional expansion: truth commissions are now expected to tackle a significantly broader set of issues than their predecessors and to engage in a considerably larger and diverse set of functions. This, however, has come partly at the expense of their fact-finding function. In addition to demonstrating this fact, I would like to problematize it. The expansion of the mandate of truth commissions does not seem to have taken place on the basis of considerations of *functional adequacy*, of reflection of what entities of this sort are in a position to accomplish. Commissions therefore are increasingly faced with a mandate that includes functions that they have no means of satisfying. Fact-finding, ironically, was one function that truth commissions served adequately. Unless we are careful in the way we use the instrument, in particular, in the way their mandates are crafted, it may be that we are condemning truth commissions to a condition in which they will inevitably (but avoidably) fail to satisfy expectations.

* This chapter tracks closely but also elaborates upon material presented in my 2013 report to the Human Rights Council, A/HRC/24/42.

The Transformation of Human Rights Fact-Finding. Philip Alston and Sarah Knuckey.

After a few introductory remarks about the significance of truth commissions (Section I), the bulk of this chapter will describe and analyze the trends in the design of truth commission mandates beyond their original fact finding function (Section II). This will be followed by two short sections analyzing challenges that I will argue are also related to the expansion of commission mandates, namely, challenges relating to the selection of commissioners (Section III), and to the poor record of implementation of recommendations (Section IV).

I. Truth Commissions: Achievements and Current Challenges

Truth commissions have made significant contributions to transitional processes in many of the over 40 countries that have implemented them since the 1980s.[1] The contributions that successful truth commissions have made can be described in many different ways. These include:

- Truth commissions are a means of satisfying the right to truth, a right that has both individuals and collectivities as subjects, and that in terms of substance includes the right to know particulars such as the fate of loved ones and the identity of perpetrators, as well as more general facts such as the structures that enabled the violations, the contextual and situational factors that made the violations possible, and, at the broadest level, the root causes of the violations.[2]
- Successful truth commissions, especially as the trend emerged for them to organize public hearings, have provided a "platform" for victims to tell their stories. Even those commissions that did not organize public hearings have given voice to victims, often members of marginalized groups, contributing to empowering them, and thus, to establishing the notion that they are equal rights holders. This is a function that should not be underestimated. In many conflicts victims become "visible": they acquire a place in the public sphere only with the implementation of transitional justice measures, including truth commissions.
- Truth commissions have benefited not just victims but have made contributions to general social integration. Experiences in very diverse countries show that the process of integrating divided societies requires acknowledging atrocities as otherwise cycles of resentment and mistrust continue unabated.
- In the aftermath of massive and systemic violations, when there are often many institutions that need to be reformed, sharply competing priorities, and few sources of social trust, truth commissions have provided reliable information about the exercise of state power and of the behavior of different social agents, which has proven to be of use in reform processes aimed at guaranteeing the non-recurrence of violations.
- Truth commissions have made significant contributions, both direct and indirect, to the other measures that are a part of a comprehensive transitional justice policy, including prosecutions, reparations, and, as just mentioned, institutional reforms that aim at providing guarantees of non-recurrence.
- At the broadest level of generality, truth commissions, as the other elements of a comprehensive transitional justice policy, arguably aim at providing recognition to victims (not just as victims but as rights-bearers), fostering civic trust, and strengthening the rule of law.[3]

Truth commissions have made such contributions despite the fact that they are institutionally brittle. Their brittleness stems from the fact that they are temporary bodies (often created by executive decision rather than legislative action), and that they are "apolitical" (in the narrow, partisan sense, although not in the broader sense of politics understood as the domain in which issues of the public good are treated). Truth commissions have no preexisting political constituency, and they have shallower bureaucratic roots than some of the institutions whose work they review. Those that have been successful derive this power, to the extent that it makes sense to speak of their potential in these terms, from, among other factors:

- The moral standing of their members.
- The fact that that they are created in the wake of social turmoil or upheaval, when it is clear that at least some of the terms of a basic "social contract" stand in need of revision.
- The topics that they address, closely related to fundamental, basic rights.
- A sound methodology.
- Openness to civil society.
- Having taken what, broadly speaking can be called "a victim-centered," inclusive approach.

Of course, truth commissions are not stand-alone initiatives; the achievements just mentioned are not brought about by their reports alone. It is crucial to keep in mind that insight (what truth commission reports are primarily and on their own capable of delivering) is not the same as transformation. Hence the importance of reaffirming the need to strengthen the links between truth and the other elements of a comprehensive transitional justice policy, including prosecutions, reparations, and guarantees of non-recurrence—and more broadly, between transitional justice and other policy interventions with which it usually coexists but seldom connect, including development and security policies.[4]

Assuredly in part because of the perceived potential of truth commissions they have become a habitual response to the challenges posed by transitional situations and their legacies of human rights violations. The impetus to establish them has not waned. Indeed, as other transitional justice measures, truth commissions have become "normal" responses in both post-authoritarian *and* post-conflict transitions. Indeed, some countries have implemented transitional justice measures not just in the absence of a political transition, but while conflict is still ongoing.[5] Thus truth commissions are now frequently tasked with investigating serious violations of international humanitarian law in addition to gross human rights violations.[6]

Despite their great potential and their arguably significant accomplishments, truth commissions are currently facing significant challenges, manifested in various ways, including:

- The inability to meet the deadlines set forth in the mandates that create them.
- Controversies surrounding the aptness of particular appointments of commissioners, which pose serious problems for an institution that derives some of its potential from the moral authority of those who lead it.

- A worrisome trend toward the expansion of the mandate of truth commissions both thematically and in terms of functions, leading to questions about whether there is a single institutional form (despite the range of variations) that can have all the competencies required by such thematic and functional expansion.
- Abiding critiques about poor implementation of commission recommendations.

II. Trends in the Design of Truth Commission Mandates

The greatest challenge facing truth commissions today relates to the expansion of their mandates. By a "mandate" I refer to the foundational document of a truth commission (an executive decree, a legislative act, a peace agreement, or a UN Regulation), setting forth the functions, attributions, and responsibilities of the commission the document establishes. Often, especially in their preambles, the mandates also make reference to the objectives sought by the establishment of the commission. For analytical purposes, and in order to clarify what I mean by "the expansion of the mandates" of commissions, the following categories will be useful; the foundational documents of truth commissions typically define: (1) the temporal scope of the mandate, the period during which the violations that are the subject of the truth commission's actions must have occurred in order for them to be under the commission's purview; (2) the thematic mandate, the types of violations that the commission is authorized and/or obligated to address; (3) the functions of the commission, the actions it is supposed to undertake with a view to fulfilling (4) its objectives, or ends, as defined in the founding documents, and (5) the duration of a truth commission, that is, the period during which it will carry out its operations.[7] I would like to call attention to some observable tendencies.[8]

Temporal scope. Commissions are required to investigate violations that take place over widely different lengths of time. Although patterns of systematic abuse rarely emerge or end at sharply determined points in time, most commissions take recognized junctures such as the dates of coups or the initiation of conflict as starting points, and the cessation of conflict or the fall of an abusive regime as cutoff dates. There is no historical framing device that does not have an artifactual dimension and hence, the determination of the temporal scope of some commissions has been contentious. Choices about the temporal scope of a commission may signal a lack of impartiality if there are clear patterns in the distribution of violations that are excluded from the purview of the commission. In any case, because there are some limits to plausible periodizations—coups do take place on particular dates, the onset of conflict sometimes can be specified, and both can correlate closely with drastic changes in the human rights situation in a country—choices concerning the temporal scope of a commission are somewhat bounded. Having said this, the facts would seem to suggest an expansion of the temporal scope of commissions:[9]

- Argentina's National Commission on the Disappeared (CONADEP) was asked to investigate violations that occurred during a 7-year period;
- Chile's Truth and Reconciliation Commission (TRC) over almost 17 years;

- The Commission on Truth for El Salvador, 12 years;
- South Africa's Truth and Reconciliation Commission covered violations occurring over a 34-year-long period, the same as Guatemala's Commission for Historical Clarification (CEH);
- Peru's Truth and Reconciliation Commission was responsible for investigating violations during a 20.5-year-long period;
- Sierra Leone's Truth and Reconciliation Commission, 11 years;
- Commission for Reception, Truth and Reconciliation in East Timor (CAVR) 25.5 years;
- Morocco's Instance Equité et Réconciliation (IER), 43 years;
- Liberia's Truth and Reconciliation Commission, 24.5 years;
- Kenya's Truth, Justice, and Reconciliation Commission 44 years.

Even this sample suggests that there has been little reluctance to ask commissions to look into violations that occurred during periods lasting several decades.

Thematic mandates. During a period of repression or violence violations of rights of diverse kinds take place. Mandates determine which kinds of violations will be investigated by commissions. Here again a trend toward expansion is observable:

- Argentina's CONADEP was tasked with investigating disappearances (understood as kidnappings with no remains ever found).[10]
- Chile's TRC was made responsible for violations leading to death: "disappearance after arrest, executions, and torture leading to death committed by government agents or people in their service, as well as kidnappings and attempts on the life of persons carried out by private citizens for political reasons."[11]
- The Commission in El Salvador received a general mandate that did not specify particular categories of violations, but rather tasked it with investigating "the serious acts of violence . . . whose impact on society urgently demands that the public should know the truth."[12]
- The Act that established the TRC in South Africa tasked it with investigating "gross violations of human rights," which it then proceeded to define extensively, as follows: "'gross violation of human rights' means the violation of human rights through (a) the killing, abduction, torture or severe ill-treatment of any person; or (b) any attempt, conspiracy, incitement, instigation, command or procurement to commit an act referred to in paragraph (a), which emanated from conflicts of the past and which was committed during the period 1 March 1960 to the cut-off date within or outside the Republic, and the commission of which was advised, planned, directed, commanded or ordered, by any person acting with a political motive."[13]
- The thematic scope of the Peruvian TRC was defined by the mandate in terms of five categories (the last one being a sort of omnibus term to allow commissioners some flexibility as their work progressed): "The Truth Commission shall focus its work on the following acts, as long as they are imputable to terrorist organizations, State agents or paramilitary groups: a) Murders and abductions; b) Forced disappearances; c) Torture and other serious injuries; d) Violations of the collective rights of the country's Andean and native communities; e) Other crimes and serious violations of the rights of individuals."[14]

- The Act establishing Sierra Leone's TRC directs the commission thematically to "violations and abuses of human rights and international humanitarian law related to the armed conflict in Sierra Leone. . ."[15]
- United Nations Transitional Administration in East Timor (UNTAET)'s regulation establishing (then) East Timor's CAVR determines the thematic scope of the commission in terms of "human rights violations that have taken place in the contexts of the political conflicts in East Timor,"[16] but it also adopts a comprehensive definition of "human rights violations" meaning "(i) violations of international human rights standards; (ii) violations of international humanitarian law; and (iii) criminal acts."[17] Furthermore, the Regulation specifies what it means by each of the mentioned categories. It is worth emphasizing that the Regulation defines "violations of international law standards" by reference to, among others, the International Covenant on Cultural, Economic, and Social Rights, thereby including economic, social, and cultural rights within the Truth Commission's mandate.[18]
- The Act that established Liberia's TRC defines the thematic mandate of the commission by reference first to "human rights violations" by which it means both "(1) violations of international human rights standards, including, but not limited to, acts of torture, killing, abduction and severe ill-treatment of any person" as well as "(2) violations of international humanitarian law, including, but not limited to, crimes against humanity and war crimes." In a different article the Act further expands the thematic scope of the commission: "gross human rights violations and violations of international humanitarian law as well as abuses that occurred, including massacres, sexual violations, murder, extra-judicial killings and economic crimes, such as the exploitation of natural or public resources to perpetuate armed conflicts . . ."[19]
- Finally, in this acknowledgedly incomplete but not unrepresentative sample, there is no question that the Act establishing Kenya's TJRC constitutes the most expansive mandate from a thematic perspective of any commission. Indeed, the following is only a partial list of the violations and abuses the commission was directed to investigate: "violations and abuses of human rights and economic rights inflicted on persons by the State, public institutions and holders of public office, both serving and retired, between 12th December, 1963 and 28th February 2008." In unpacking these categories the Act mentions: "massacres, sexual violations, murder and extra-judicial killings. . . . abductions, disappearances, detentions, torture. . . . Ill-treatment and expropriation of property . . ." Specifying the violations of economic crimes, the Act directs the commission to inquire into "grand corruption and the exploitation of natural or public resources. . . . the irregular and illegal acquisition of public land. . . . economic marginalization of communities . . ." and generally, the "misuse of public institutions for political objectives." The Act also calls on the commission to inquire into the "causes of ethnic tensions."[20]

There is no question, then, that the list of themes truth commissions are expected to address has grown significantly in scope over time.

Functional Mandate. Much more consequential than the expansion in the temporal or the thematic dimensions of mandates has been the expansion of their functional mandate. The thematic element of the mandate determines the subject matter of the work of

a commission. It is still necessary to specify what it is that a commission is expected to do concerning that subject matter. This is what the functional part of a mandate does: it specifies the functions commissions are expected to play. On this dimension there has also been a notable expansion, with commissions being expected to satisfy increasingly complex functions.

At the most basic level, and closest to the theme of this volume, commissions were expected to play a *fact-finding function*. Thus, Article 1 of the decree that created Argentina's CONADEP establishes the commission with the aim of "clarifying [*esclarecer*] the facts regarding the disappearance of persons that took place in the country." As disappearances were such a prevalent violation in the contexts in which the earlier commissions were set up (and this phenomenon determined, as seen above, the thematic dimensions of some of the mandates), the other main function earlier commissions were expected to play was also related to this, namely, what may be called a *victim-tracing function*. This was seen to be crucial in countries in which people literally vanished and the authorities systematically denied knowing anything about their fate.[21]

It is difficult, however, to confront the immensity of violations of this sort and not be propositive. Although not part of the functions specified in its mandate, CONADEP, in its report, proposed judicial reform measures and economic assistance for the family members of victims. In this way, namely, *proprio motu*, the commission acquired two additional functions, *a victim-redress function*, and a *preventive function* (largely centered on institutional reform proposals). It is certainly worth remembering that all the recommendations of the commission on these two topics, redress and prevention, fit in a single page.[22] Much more important, however, is that in contrast to the first two functions (fact-finding and victim-tracing which could, in theory, be satisfied by a commission itself), the victim-redress and preventive functions, strictly speaking, are not powers of a commission but merely potentialities; commissions typically cannot reform institutions or provide reparations—CONADEP certainly could not; they could merely make recommendations about them.

The subsequent history of truth commissions could be organized around the description of the complexification of these four functions, of the attribution to commissions of new ones, and also of the elision of the difference between functions and potentialities. This is not the place to tell that full history. I intend the preceding brief analysis as a way of establishing a baseline of sorts that makes the subsequent expansion of the mandates of commissions more apparent.

Even the fact-finding function of commissions has become significantly more complex. Argentina's 187/83 decree's bald description of CONADEP's task ("clarifying the facts regarding the disappearance of persons that took place in the country") came to be qualified in a telling way in Chile's Supreme Decree 355 (1990), according to which the task of the TRC is "to clarify in a *comprehensive manner* the truth about the most serious human rights violations committed in recent years in our country,"[23] and even more so in South Africa's Promotion of Unity and Reconciliation Act (1995), which declares that the TRC should establish "as *complete* a picture as possible of the *nature, causes and extent* of gross violations of human rights."[24] The decree establishing the truth commission in Peru (before becoming a truth *and reconciliation* commission, which obviously involves the attribution of

yet another function altogether) continued this process of expanding even the fact-finding function when it stated that one of the tasks of the commission was "to analyze the *political, social and cultural conditions*, as well as the *behaviors of society and State institutions* that contributed to the tragic situation of violence through which Peru has passed."[25] As if this was not enough to show the transformation of the fact-finding function of commissions, by 2005, when the Liberian National Transitional Legislative Assembly adopted the Act establishing the TRC, it described this function in the following terms: the TRC was to investigate "the *nature, causes and extent* of gross violations and abuses of human rights, including the *root causes, circumstances, factors, context, motives, and perspectives* which led to such violations."[26] Finally, there is no better illustration of the expansion of the fact-finding function of truth commissions than the Act establishing Kenya's TJRC, which, with respect to the already hugely expanded catalogue of violations mentioned above, describes the task of the commission in terms of "establishing an *accurate, complete and historical* record of violations and abuses of human rights and economic rights inflicted on persons by the State, public institutions and holders of public office, both serving and retired, . . . including (i) *antecedents, circumstances, factors and context of such violations;* (ii) *perspectives of the victims*; and (iii) *motives and perspectives of the persons responsible for commission of the violations*" as well as establishing "as complete a picture as possible of the causes, nature, and extent of the gross violations of human rights and economic rights" including again the same contextual factors and perspectives just mentioned. And this regarding only two of the broad categories of violations out of the many mentioned in the same Clause.[27]

I am not sure that the full length of the trajectory just described leaves truth commissions still in in the domain of fact-finding. It is obvious that long before the end of this path "fact-finding" is no longer about the clarification of *cases*, the fate of individual victims, and perhaps, when allowed and possible, the identities of those responsible for these violations—as fact-finding was initially understood. Rather, "fact-finding" became an effort to understand comprehensively root causes, circumstances, factors, context, and motives of countrywide situations of violence. This, of course, not unlike historical accounts, is much more than a mere collection of facts.

I would not like to lose the focus on the (ill) fate of fact-finding in truth commissions and will therefore merely describe the way in which the other functions of truth commissions have (for the most part) expanded, for of course they are not unrelated phenomena: a peculiarly finite institution in most dimensions will perforce need to spread resources, attention, and competencies from one function to others as its mandate grows. The following illustrates the trends concerning the other functions assigned to truth commissions.

Prevention. The expansion of the "fact-finding" function of truth commissions has been accompanied by an expansion (at least in theory) of their preventive function. This has not happened necessarily by design. Mandates are not more elaborate concerning concrete or specific preventive mechanisms (seldom are commission reports, either). Rather, wide-ranging analysis *seems* to invite similarly wide-ranging transformation proposals in the name of prevention. Thus commissions have made proposals for the transformation of various institutions including the judiciary, all security forces, education, media, civil registries, electoral systems, land tenure patterns, etc.

Victim-redress. The weak victim-redress function of some of the earlier truth commissions has strengthened over time and grown in complexity, and is now a staple of virtually all commissions. Most mandates establishing truth commissions require them to make recommendations concerning victim reparation, some of them specifically calling for complex programs[28]—that is, programs that distribute a variety of goods both symbolic and material (including cash payments and the provision of services), and both to individuals and communities. Truth commissions have obliged, often articulating comprehensive proposals such as those proposed by the Peruvian TRC,[29] the South African TRC,[30] and Timor Leste's CAVR,[31] among others. Given that reparations programs are usually long-term projects that outlast the life of a commission, and that the more complex the program the heavier its administrative load is, there are good reasons behind the continued trend not to make truth commissions responsible for the implementation of such programs.[32]

Victim-tracing. Perhaps the only original function of commissions that has not seen a comparable expansion is the victim-tracing function. In the design of commissions, as judged by their mandates, this function has not gained either increased prominence or elaboration. Because it is not that the need for it has waned, I find this fact puzzling. In most situations where truth commissions are implemented the fate of thousands of victims remains unclarified and thousands of bodies remain unidentified even when mass burial sites have been located. Furthermore, professional competence regarding exhumations and the identification of remains has grown significantly since truth commissions were first tried in the 1980s. Considering the contribution that technical exhumations can make to the truth and to justice processes, and moreover, the cross-cultural importance for families of victims, and even to entire communities, of giving proper burial to the deceased, it would be good to give the victim-tracing function of truth commissions renewed attention.[33] Although in situations with a large universe of victims truth commissions are unlikely to be able, on their own, to assume full responsibility for exhumations and the identification of remains, truth commissions in the past have played a useful role tracing victims, starting with the identification of burial sites.[34]

In addition to the four core traditional functions just mentioned, fact-finding, victim-tracing, redress, and prevention, truth commissions have often been attributed additional functions. The following list is far from exhaustive. It includes only some of the functions that seem to me to warrant commentary.

Contributing to prosecutorial efforts. Some mandates, contrary to the widespread assumption that establishing a truth commission involves a commitment to suspending prosecutions, have required commissions to contribute to prosecutorial efforts. This can be either by providing to prosecuting authorities information they gather (e.g., Argentina),[35] or, as in the case of the Peruvian TRC, by actively constructing cases to be presented to prosecuting authorities.[36] Thus, the view that all truth commissions have been created as substitutes for criminal justice and that providing amnesties is either one of their characteristic functions or their inevitable consequence is nothing more than a misperception.[37]

Reconciliation. The most prominent of the newer functions that have been attributed to truth commissions (some in their very name) relates to reconciliation. This to me represents as clear an example as any of the elision of the difference between functions and potentialities. Although at a high level of generality it is difficult to think about reconciliation in

the absence of truth, there is of course no linear pathway between truth and reconciliation. Including the term in the title of truth commissions may generate expectations that cannot be satisfied. Here it is worth recalling that it is a mistake to think that there are shortcuts to reconciliation. Social reconciliation is obviously a complex process that requires, in addition to truth, the implementation of justice, reparations, and guarantees of non-recurrence, among other interventions.[38]

Corruption. A novel feature of at least one commission-to-be is an arbitration function in relation to the settlement of individual cases of corruption. Tunisia has adopted a law creating a truth commission that would be in charge of settling, through arbitration, cases of corruption.[39] This is an entirely novel function for a truth commission. It will predictably bring an enormous administrative burden and also pose significant reputation and credibility risks. To settle individual corruption cases will require quasi-judicial procedures in order to guarantee minimal fairness in decisions; a huge workload is therefore to be expected. Furthermore, arbitration of such kinds of cases will involve a significant likelihood of defeating the expectations of the public, which is likely to have maximalist aspirations of recovery and punishment, while the main parties to arbitration need to strive for mutually acceptable outcomes only; hence the reputation and credibility risks. The very same truth commission mandated in many cases to be proactive with recommendations for prosecutions and vetting is also expected to act as an arbitration and settlement body. It is doubtful whether this combination of functions will work.[40]

The main conclusion I want to highlight from the foregoing analysis is that the mandate of commissions has expanded both thematically and functionally, and that this has come partly at the expense of fact-finding. To round off this part of the chapter, it is worth pointing out that the expansion of the mandate has not been accompanied by a similar expansion of the duration of the commissions, the period during which they must perform their (increasingly large and complicated) functions, as I will proceed to show.

Duration. The duration of commissions has expanded, albeit within limits. Both the expansion and that this has found a "ceiling" are reasonable; on the one hand, it was quickly learned that giving a commission just a few months to perform complicated tasks was unfeasible; on the other hand, as mentioned before, it is equally unfeasible to prolong indefinitely the duration of a commission—without losing one of the characteristic contributions such an instrument can make, to signal the early commitment of a transitional regime to breaking with past abusive practices. The following data illustrates the expansion:[41]

- Argentina's CONADEP was given 9 months to complete its tasks;[42]
- Chile's TRC was given 6 months, with a possible 3-month extension;[43]
- The Commission on Truth for El Salvador was given 6 months;[44]
- South Africa's TRC, had a duration of 24 months with a 3 month extension;[45]
- Guatemala's CEH had a 6-month duration and a 6-month possible extension;[46]
- Sierra Leone's TRC had a 3-month preparatory period, 12 months of operations, and a 6-month possible extension;[47]
- Peru's TRC ended up having a 3-month preparatory period (eventually extended by 30 days), an 18-month duration, plus a 5-month extension.[48]

- Liberia's TRC was given a 3-month preparatory period, 2 years of operations, a 3-month wrap-up period, and a possible 3-month extension.[49]
- East Timor's CAVR was given 24 months to complete its operations, 2 months of preparation, and a 6-month possible extension.[50]
- Kenya's recent TJRC found it difficult to meet the time limits established in the Act that created it, namely, 2 years, a 3-month preparatory period, plus a 6-month extension.[51]

It is safe to conclude, then, that after early experiences with durations of less than 12 months, the pattern has become established to grant commissions 24–36 month durations.[52]

The foregoing is sufficient to illustrate some of the trends I am interested in highlighting here. Even leaving aside all the additional functions that have been attributed to truth commissions, which this chapter has not listed in full, it is clear that most of the elements of the mandate have suffered significant expansion. Truth commissions are expected to address an ever broader array of violations, occurring over longer periods of time, where the very meaning of "addressing" has shifted from clarification of cases to comprehensive analysis of whole contexts and underlying causes, motivating, in turn, the call for comprehensive reform proposals. Pulling together the tendencies reviewed here makes some of the challenges truth commissions are facing obvious: institutions that have usually been under-funded, that have been insufficiently staffed both in terms of magnitude and of the required combination of competencies, that by their very nature remain infrastructurally and politically weak, that are not given significantly more time than earlier commissions had, and whose authority depends to a great extent on the capacity of commissioners to vow for the seriousness of the investigations (rather than on their technical capacities concerning institutional design and other policy matters) are now expected to fulfill enormously more complex functions, as reflected in the expansive list of objectives assigned to them in their mandates. From this perspective, it should come as no surprise that commissions are finding it increasingly difficult to satisfy increasing expectations.

I have urged those responsible for the design and operation of truth commissions to exercise prudence to begin with, in the drafting of the mandate of commissions.[53] Prudence here means, primarily, heeding basic considerations of *functional adequacy*; commissions that are laden with objectives that they have no means to satisfy will predictably disappoint expectations. Truth commissions were important human rights instruments because they proved functionally adequate in satisfying their core functions, the fulfillment of which, in turn, was an important step in processes of transition. The more the bulk of a commission's work ventures into functions that strain both its capacities and its sources of authority and legitimacy—as would happen to *any* institution that is given infinite, non-satisfiable tasks—the more difficult it will be for the commission to demonstrate its effectiveness.

The challenges that arise for commissions from the expansion of their mandate are not the only ones affecting commissions nowadays. That list is long. In my report to the Human Rights Council I examine others. Here I will only mention two more in the belief that they are related to the tendency of commissions to veer away from their original fact-finding

mission: recent commissions have been afflicted by arguably misguided appointments. I will also say a few words, in closing, about the poor record of implementation of truth commission recommendations.

III. Challenges in Selecting Commissioners

Some recent commissions have been bedeviled by controversy and acrimony about the selection of particular commissioners. The nature of truth commissions (ad hoc, time-bound institutions with limited powers), the contexts in which they operate (invariably characterized by deep social fissures); the topics they deal with (extremes of human behavior), as well as their objectives (at the broadest level of generality, to contribute to social integration through the affirmation of certain basic norms) all suggest that the selection of commissioners is very important for their success. Indeed, it is not too much of an overstatement to say that the power of commissions derives to a large extent from the authority of commissioners, and therefore, that the success of commissions depends to a large extent on the character of the appointments.

No commission has faced more serious challenges in this respect than Kenya's Truth, Justice, and Reconciliation Commission, whose president was accused of having played a role in some of the incidents under investigation by the commission. This led to severe internal divisions and a protracted legal battle that affected the work of the commission (wasting scarce time, with the commission's clock ticking) and its subsequent overall credibility.[54] Kenya's commission, however, is not the only one that has encountered problems of this sort.[55]

Much can be said about the processes used thus far for the selection of commissioners. In the report to the council I establish a distinction between direct selection on the one hand, and consultative processes on the other.[56] Direct selection, usually by the same authority that establishes the commission's mandate and without a process of formal consultations, has been used in a large number of cases, such as in Argentina,[57] Chile,[58] Peru,[59] and Brazil.[60]

On the opposite side of the spectrum from the direct appointment of commissioners lie procedures that are *consultative* in nature by design. These models give a formal role in the selection process to a variety of stakeholders. With variations, this is the approach that has been adopted for the selection of commissioners by Sierra Leone,[61] Liberia,[62] and Kenya.[63] The model spins around the establishment of a selection panel with seats apportioned to the representatives of different stakeholders, including religious organizations, victims' groups, professional associations, NGOs or networks of NGOs, etc. The selection panel usually accepts submissions from the public, determines a short list of candidates, rank orders them, and passes on the recommendation to an appointing authority. In some countries public hearings with those short-listed are also required.

Obviously, this is not the place to do a thorough analysis of the costs and benefits of either direct or consultative methods of appointment. However, some observations are in order. First, there is no failsafe method of selection. Although the overwhelming majority of commissioners have made important contributions to the work of the commissions in which they have participated, neither method has proven to be immune from occasionally questionable appointments.

Second, there is no selection method that along with advantages does not involve some "costs." The model of direct appointment has the virtue of being expeditious and of allowing the appointing authority to exercise its judgment about suitability and competence unhindered (which, assuming a real commitment on the part of the appointing authority, is sometimes advantageous). However, there is nothing in this method of selection that checks for potential narrowness in the range of candidates considered by the appointing authority, a not insignificant potential drawback.

The reasons some countries have gravitated toward consultative processes are manifold. They include the aim to increase the representativeness of members of commissions, broaden the pool of candidates, strengthen popular "buy in"—the general (and valid) arguments that speak in favor of consultative procedures in many domains. Less examined however is one risk selection mechanisms with broad participation generate (in addition to the time it takes for them to operate)[64]: although there is much to be said about the desire to increase the representativeness of commissioners, and all other things being equal, it is correct to emphasize the importance of selecting commissioners which diverse groups can see as representing them within commissions, the risk is that selection panels of the sort that have become prevalent create incentives for overemphasizing "representativeness" as a criterion of selection.[65]

Emphasizing the "representativeness" of commissioners, either their capacity to act as "stand-ins" for particular groups, or the appeal of particular individuals to a multiplicity of groups, of course will not end up serving a commission well if it turns out that the records of at least some of these persons raise questions of conflict of interest given their connection with events or groups that the commission is likely to investigate, if their intergroup appeal is a function of the candidates' unwillingness to ever take strong stands, or if they simply lack the technical capacity to make real contributions to the commission on which they serve.

There is then, undoubtedly, an "inbuilt" incentive in the consultative method for emphasizing representativeness as a criterion of selection. However, the point I want to highlight in this chapter is that this incentive is likely to be strengthened by the expansion of commission mandates well beyond their fact-finding function: the more the mandate of a commission expands—that is, the more topics it is expected to address, and the more social functions the commission is expected to play—the more pressure there is likely to be to emphasize the salience of "representativeness" as a criterion for selecting its members. If commissions become something akin to "mini constituent assemblies" with appointed rather than elected members, predictably, it is not just that the number of stakeholders increase—as the range of issues and functions under the commission mandate expands—but that what is at stake for each of them increases in significance as well. In that case *everyone* wants to make sure of being represented at the table.

My interest in this chapter, again, is not simply to list various challenges facing truth commissions. Part of the point is to argue that these problems may be interconnected. In my view, commissions that are no longer fact-finding commissions but whose mandate spans across virtually the whole range of issues having to do with the structural dimensions of state authority (including issues of large-scale institutional design, the relationship between state

powers, administrative units of the state, regions, and indeed, peoples), and ever more frequently, with economic and distributive questions pertaining to models of production and ownership as well (land tenure, natural resource exploitation and disposition, etc.), in other words, commissions whose mandate in many ways overlap with eminently political exercises such as constituent assemblies, have a reasonable incentive for prioritizing representativeness as a criterion for selecting their members. From this perspective, it is not surprising that the trend toward the expansion of mandates has been accompanied by a trend in favor of emphasizing broad representation in commissions.

IV. The Record in Implementing Recommendations

The other problem affecting truth commissions these days has to do with the ambiguous record of implementation of their recommendations. The first thing that in fairness needs to be said about this topic is that a good number of these criticisms are misdirected, for truth commissions are only in exceptional cases and with respect to only of a few initiatives, implementing agencies. In fact, as temporary bodies, most truth commissions will have ceased to exist at the time of implementation of the majority of their recommendations.[66]

This is not the place to do a thorough analysis of the issue of implementation of recommendations either. In the report to the Human Rights Council I am critical of what I take to be a "short cut" to resolving the problem of poor implementation, namely, to declare ex ante the recommendations of a truth commission to be legally binding. It is not just that this, not surprisingly, has failed to work in the countries that have tried it (including Sierra Leone, and Liberia), but that the "solution" raises serious questions about the divisions of powers: commissions should not be able to order Parliament to enact certain laws, the executive to adopt certain policies, prosecutors to pursue particular cases, or courts to hear them.[67] Similarly, considering the far-reaching scope of the recommendations of the "typical" truth commission nowadays, a good part of those deal with issues that in democratic countries should arguably be the subject of political contestation.

Aside from this "quick fix" to the challenge of implementation I distinguish three institutional responses to the follow-up problem: (1) the creation of purpose-specific, stand-alone bodies, as witnessed in Chile[68] and proposed in Peru;[69] (2) the establishment of functional units within existing ministries, as observed in Argentina;[70] and (3) the assignment of follow-up responsibilities to independent human rights institutions, as seen in practice in Sierra Leone.[71]

Stand-alone official bodies have two main virtues: they can play a useful convening and coordinating role among specialized agencies and ministries, and, as autonomous bodies, they enjoy a certain degree of political independence. However, as agencies and ministries are not under their authority, in the face of recalcitrant attitudes, they prove to be feeble. Units within ministries, by contrast, can be effective implementers—but within their narrow domain of competencies, and provided political willingness exists. Finally, independent human rights bodies have more autonomy than stand-alone institutions and moral

authority unmatched by either stand-alone bodies or units within ministries. Nevertheless, they tend to have narrow competencies and even less power to direct than stand-alone specialized official institutions.

There is unlikely to be an "institutional fix" to the problem of lack of implementation of recommendations absent governmental commitment. Discussions about follow-up, however—such as there have been—have concentrated on institutional forms rather than on functions. The urgent issue is to find a means of strengthening the incentives governments have for implementation. Monitoring mechanisms, I have argued, cannot guarantee implementation, but can strengthen the incentives for implementation, and deserve much more attention than they have received.[72]

In dealing with the issue of the implementation of truth commission recommendations, I, again, do not mean to merely catalogue the challenges that commissions are facing today. This problem I also think is exacerbated by the expansion of the mandate of commissions beyond their original fact-finding functions. Even assuming a certain degree of political commitment to reforms, the sheer breadth of recommendations of recent truth commissions makes it unlikely that except in the very long run and under exceptionally auspicious circumstances the record of implementation will be positive.

Now, I do not necessarily think it follows from the considerations I make in the chapter that commissions should return to a narrow understanding of their function, and to exclude everything that does not relate to fact-finding (in the sense of the clarification of individual cases of human rights violations). However, all other things being equal (and some of them—such as limited duration, resource scarcity, limited competencies, and all the constraints that stem from being ad hoc bodies—do remain "equal" as I illustrate both here and in my 2013 report), finitude which, on its own, determines that there is a trade-off that is impossible to avoid altogether between fact-finding and other functions, coupled with considerations about *functional adequacy*, namely, analyses of what a given institutional formation is well designed to accomplish, do create, in my opinion, an obligation to be mindful of the costs of the expansion of the mandate of truth commissions and a presumption in favor of prudence in the design of mandates.

Notes

1. For a very useful overview, see Hayner, *Unspeakable Truths* (2011).
2. The right to truth is enshrined in a number of international instruments, of various kinds, notably the International Convention for the Protection of All Persons from Enforced Disappearance and the 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. The Human Rights Council has placed the right to truth in the context of contributions to end impunity (e.g., HRC Res. 12/12, 12 October 2009, at para. 1; HRC Res. 9/11, 24 September 2008, para. 1). Similar references have been made by OHCHR (e.g., ECOSOC, "Study on the Right to the Truth," U.N. Doc. E/CN.4/2006/91 (8 February 2006); HRC, "Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled 'Human Rights Council,"' U.N. Doc. A/HRC/5/7 (7 June 2007), both documents with further references), treaty bodies (e.g., CAT, "Consideration of reports submitted by States parties under article 19 of the Convention," U.N. Doc. CAT/C/COL/CO/4 (4 May 2010), at para. 27), and special procedures of the Council (e.g., HRC, "Report of the Working Group on Enforced or Involuntary Disappearances," U.N. Doc. A/HRC/16/48 (26 January 2011), at para. 39; HRC, "Framework principles for securing the

accountability of public officials for gross or systematic human rights violations committed in the course of States-sanctioned counter-terrorism initiatives," 'U.N. Doc. A/HRC/22/52 (17 April 2013), at paras. 23-26, 32-34; HRC, 'Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development,' U.N. Doc. A/HRC/7/3/Add.3 (1 October 2007), at para. 82; HRC, 'Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Mr. Frank La Rue,' U.N. Doc. A/HRC/14/23 (20 April 2010), at para. 34). At the regional level, the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights were at the forefront of developing jurisprudence on the right to truth of the victim, his or her next of kin, and the whole of society (see e.g. IACHR, "Annual Report, 1985-86," AS Doc. OEA/Ser.L/V/II.68, Doc. 8 rev. 1 (26 September 1986), at193; *Myrna Mack Chang* v. *Guatemala*, IACtHR (25 November 2013) (Merits, Reparations and Costs), at para. 274. The African Commission on Human and Peoples' Rights has recognized the right to truth as an aspect of the right to an effective remedy for a violation of the African Charter on Human and Peoples' Rights (see e.g. ACPHR, "The Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa," Principle C(b) (3)). The European Court of Human Rights acknowledged the right to truth not only for victims and their families but for the general public as well (see, e.g., *El-Masri* v. *the former Yugoslav Republic of Macedonia*, 39630/09, ECHR (13 December 2012), at para. 191).

3. See de Greiff, "Theorizing Transitional Justice," in Williams, Elster, and Nagy (eds.) *Nomos* vol. LI (2012), at 43–44.
4. See ibid.; see generally de Greiff, "Articulating the Links between Transitional Justice and Development: Justice and Social Integration," in de Greiff and Duthie (eds.), *Transitional Justice and Development: Making Connections* (2009); de Greiff, "Transitional Justice, Security, and Development" (2011) (unpublished background paper written for the World Bank's "World Development Report 2011: Conflict, Security, and Development").
5. For the "normalization" of transitional justice measures, cf. de Greiff, "Some Thoughts on the Development and Present State of Transitional Justice," 5 *Zeitschrift für Menschenrechte/Journal for Human Rights* 98 (2011).
6. See e.g. United Nations Transitional Administration in East Timor, "Regulation No. 2001/10 on the Establishment of a Commission for Reception, Truth and Reconciliation in East Timor," UNTAET/REG/2001/10 (13 July 2001), sec 1(c) and 1(e). Act to Establish the Truth and Reconciliation Commission of Liberia (TRC Act of Liberia) (12 May 2005), Arts. II, IV.
7. Mandates frequently include other elements; the specifications of the powers of the commission, and, as seen above, the specification of selection and appointment procedures, or the names of appointees, among other things. For purposes of this section of the report, the elements included in the text are sufficient. Obviously the mere inclusion of a given set of elements in a legal document does not guarantee that they cohere with one another sufficiently. For instance, there is a frequent dissonance between the duration of a commission and the goals attributed to it.
8. Hastening to add that as tendencies, "outliers" can be identified regarding most of them, and that the rate and even the direction of expansion are often not linear.
9. For full references to the mandates of commissions see HRC, "Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff," U.N. Doc. A/HRC/24/42 (28 August 2013); see also the useful tables in Hayner, *Unspeakable Truths* (2011) 268–273.
10. Comisión Nacional sobre la Desaparición de Personas (CONADEP) (Argentina), Decreto 187/83 (15 December 1983).
11. Patricio Aylwin, President of Chile, Decreto Supremo 355 (25 April 1990), Art. 9.
12. Comisión de Verdad para El Salvador, "Mexico Peace Agreement—Provisions Creating the Commissions on Truth" (27 April 1991), Art. 2.
13. Promotion of National Unity and Reconciliation Act 95-34 (South Africa) (26 July 1995), ch. 1, Definitions.
14. Valentín Paniagua, Interim President of Perú, Decreto Supremo 065-2001-PCM (4 June 2001), Art. 2.
15. The Truth and Reconciliation Commission Act 2000, *Supplement to the Sierra Leone Gazette Vol. CXXXI, No. 9* (10 February 2000), Part III, 6.1.
16. United Nations Transitional Administration in East Timor, "Regulation No. 2001/10 on the Establishment of a Commission for Reception, Truth and Reconciliation in East Timor," UNTAET/REG/2001/10 (13 July 2001), sec 1(c).

17. Ibid. sec 1(b), 1(e).
18. Ibid. sec 1(e), in conjunction with United Nations Transitional Administration in East Timor, "Regulation No. 1999/1 on the Authority of the Transitional Administration in East Timor," UNTAET/REG/1999/1 (27 November 1999), sec. 2.
19. See Act to Establish the Truth and Reconciliation Commission of Liberia (TRC Act of Liberia) (12 May 2005), Arts. II and IV.
20. The Truth, Justice and Reconciliation Commission Act 2008 of Kenya (TJRC Act of Kenya) (28 November 2008), Part II, Arts. 5(a), 5(c), 6(a).
21. In the case of Argentina the victim-tracing function included the search for missing children. Thus the decree also assigns to the commission the task of "determining the location of children removed from the custody of their parents or guardians under the alleged reason of suppressing terrorism." Comisión Nacional sobre la Desaparición de Personas (CONADEP) (Argentina), Decreto 187/83 (15 December 1983) Art. 2(c).
22. Comisión Nacional sobre la Desaparición de Personas (CONADEP) (Argentina), "Nunca Más" (1984), ch. 6.
23. Patricio Aylwin, President of Chile, Decreto Supremo 355 (25 April 1990), Art. 1. (this and subsequent emphases in this paragraph added).
24. Promotion of National Unity and Reconciliation Act 95-34 (South Africa) (26 July 1995), para. 1. In a revealing example of the diffusion of knowledge, which sometimes takes the form of a "cut and paste" exercise, this phrase recurs in the mandates of many subsequent commissions.
25. Valentín Paniagua, Interim President of Perú, Decreto Supremo 065-2001-PCM (4 June 2001), Art. 2(a).
26. Act to Establish the Truth and Reconciliation Commission of Liberia (TRC Act of Liberia) (12 May 2005), Art. VII, Sec 26(a)(ii).
27. The Truth, Justice and Reconciliation Commission Act 2008 of Kenya (TJRC Act of Kenya) (28 November 2008), Part II, Clause 5.
28. For the notion of complexity in reparations programs as well as detailed information and analysis of reparations programs see generally de Greiff (ed.), *The Handbook of Reparations* (2006).
29. See Comisión de la Verdad y Reconciliación (Perú), "Informe Final" (2003), vol. IX. Only parts of the comprehensive reparations program have been implemented.
30. Truth and Reconciliation Commission of South Africa, "Final Report" (1998), vol. 5, at 170-195. The reparations proposals were rejected by the government, which implemented a significantly more modest program. See e.g. Colvin, "Overview of the Reparations Program in South Africa," in de Greiff (ed.), *The Handbook of Reparations* (2006).
31. Commission for Reception, Truth and Reconciliation in East Timor (CAVR), "Chega! Final Report of the Commission for Reception, Truth and Reconciliation in East Timor (CAVR)" (2005), part 11, ch. 12.
32. The overwhelming majority of truth commissions have not been called to implement reparations programs, but merely to make recommendations concerning their design. The exception to this is Morocco's Equity and Reconciliation Commission (IER), which indeed implemented a good part of the individual reparations program it designed. The IER distributed one-off compensation benefits to victims or their families, which they received with a letter explaining the rationale for the compensation, that is, the rights the commission considered had been violated in each instance. Furthermore, during its existence the IER provided medical attention to some victims. There were nevertheless elements of the individual reparations program that the IER could perforce not implement, such as long-term health benefits and "social reintegration" programs (including job reintegration). The community reparations dimension of the overall reparations program proposed by the commissions is still being implemented. Some truth commissions such as South Africa's TRC and Timor Leste's CAVR implemented "urgent interim reparations programs." Bucking the trend, at least two countries, Tunisia and Burundi, are presently considering draft laws creating truth commissions with the responsibility to implement, and not merely to recommend, reparations programs.
33. Perhaps no country illustrates better the importance of exhumations in its own terms than Spain. See e.g. Ferrandiz, "Exhuming the Defeated: Civil War Mass Graves in 21st Century Spain," 40 *American Ethnologist* (2013) 38.
34. Cf. Peru's TRC devoted significant attention to recommendations concerning exhumations. See Comisión de la Verdad y Reconciliación (Perú), "Informe Final" (2003), vol. IX, ch. 2, sec 3.

35. Chile's TRC was barred from making attributions of responsibility—reserving that function to judicial authorities—but this did not prevent it, in accordance with its mandate, from referring evidence of criminality to courts. The Commission on Truth for El Salvador refrained from pushing for prosecutions, not because it did not find sufficient prima facie evidence of violations, nor because it thought prosecutions in any way undesirable, but because it did not trust Salvadoran courts at the time to be capable of carrying out fair trials. See e.g. United Nations Security Council, "From Madness to Hope: The 12-Year War in El Salvador: Report of the Commission on the Truth for El Salvador," UN Doc. S/25500 (1993), at 177.
36. The Peruvian TRC constructed 47 such cases. See Comisión de la Verdad y Reconciliación (Perú), "Informe Final" (2003), vol. VII, ch. 2. Progress on these cases, however, has been slow.
37. Most truth commissions have had no relationship with amnesties, or a more complicated one than commonly attributed to them. Even in the oft-mentioned South African model of "truth in exchange for amnesty," the amnesty to which those that provided testimony could apply was (1) conditional both on the crimes committed having been "political" and on full disclosure—on pains of prosecution—and (2) granted or denied by a subcommittee of the commission, which was independent from the one receiving the testimony. Indeed, most of those who provided testimony to the TRC had their applications for amnesty turned down. See Promotion of National Unity and Reconciliation Act 95-34 (South Africa) (26 July 1995), ch. 4. Subsequent prosecutions have been scant, however.
38. On this topic, see de Greiff, "The Role of Apologies in National Reconciliation Processes; On Making Trustworthy Institutions Trusted," in Gibney et al. (eds.), *The Age of Apology* (2007). Two draft laws creating truth commissions, in Burundi and Nepal, include victim-perpetrator pardon mechanisms. These misunderstand the nature of reconciliation, particularly if the mechanisms can be initiated absent a request from victims. In circumstances in which there are abiding significant asymmetries of power between perpetrators and victims, and in which victims have justified security concerns, forcing them to participate in procedures that bring them face to face with those that are presumably responsible for the violations they suffered imposes on them huge burdens and risks, and raises serious questions about the voluntary nature of the pardons that may flow from such procedures. Furthermore, social reconciliation cannot be reduced to one-to-one encounters. Gross human rights violations do not *only* constitute a violation of the right of each of the victims but additionally a violation of the very principle of the rule of law. Thinking that one-on-one pardons undo all the damage that gross human rights violations bring about fails to keep in mind this more systemic and structural dimension of violations.
39. Organic Law No. 53 of 2013 Establishing and Organizing Transitional Justice (Tunisia) (dated December 24, 2013, Published in the Official Gazette December 31, 2013). See HRC, "Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff: Mission to Tunisia (11-16 November 2012)," UN Doc A/HRC/24/42/Add.1 (30 July 2013), at paras. 38-39.
40. Instead of broadening the scope of truth commissions to deal with corruption, an undoubtedly important issue, an alternative would be to establish parallel specialized *but coordinated* commissions. Separate commissions would seem to respect the call for functional differentiation and specialization; the coordination (which may take the form of shared investigations, regular meetings, common strategies, etc.) would respect the fact that corruption and human rights violations are more often than not interrelated phenomena. See e.g. Andrieu, "Dealing with a 'New' Grievance: Should Anticorruption Be Part of the Transitional Justice Agenda?," 11 *J. Hum. R.* (2012) 537.
41. See Hayner, *Unspeakable Truths* (2011) 268–273.
42. Comisión Nacional sobre la Desaparición de Personas (CONADEP) (Argentina), Decreto 187/83 (15 December 1983), Art. 2(e).
43. Patricio Aylwin, President of Chile, Decreto Supremo 355 (25 April 1990), Art. 5.
44. Comisión de Verdad para El Salvador, "Mexico Peace Agreement—Provisions Creating the Commissions on Truth" (27 April 1991), Annex.
45. Not including the resolution of amnesty petitions, for which it took three-and-a-half more years. Promotion of National Unity and Reconciliation Act 95-34 (South Africa) (26 July 1995), ch. 7, 43.
46. UN GA, "Agreement on the establishment of the Commission to clarify past human rights violations and acts of violence that have caused the Guatemalan people to suffer," UN Doc A/48/954 Annex II (23 June 1994), at 14 "Installation and duration."

47. The Truth and Reconciliation Commission Act 2000, *Supplement to the Sierra Leone Gazette Vol. CXXXI, No. 9* (10 February 2000), Part II, 5. (This is one of the first mandates that specifies the tasks the commission was expected to do during its preparatory period. See Part II, 5.3. UNTAET's Regulation establishing Timor Leste's CAVR also specifies the tasks to be carried out by the commission in its preparatory phase. See United Nations Transitional Administration in East Timor, "Regulation No. 2001/10 on the Establishment of a Commission for Reception, Truth and Reconciliation in East Timor," UNTAET/REG/2001/10 (13 July 2001), Sec. 12. It lists 11 complex tasks—to be carried out in two months).
48. Valentín Paniagua, Interim President of Perú, Decreto Supremo 065-2001-PCM (4 June 2001), Art. 7 and third final provision, and Decreto Supremo No. 101-2001 JUS, Art. 3.
49. Act to Establish the Truth and Reconciliation Commission of Liberia (TRC Act of Liberia) (12 May 2005), Art. IV, Secs 5, 6.
50. United Nations Transitional Administration in East Timor, "Regulation No. 2001/10 on the Establishment of a Commission for Reception, Truth and Reconciliation in East Timor," UNTAET/REG/2001/10 (13 July 2001), Sec. 2.
51. The Truth, Justice and Reconciliation Commission Act 2008 of Kenya (TJRC Act of Kenya) (28 November 2008), Sec. 20.
52. Including preparatory periods, which by contrast have not changed much, still lasting typically two to three months.
53. See 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), paras. 51-52.
54. Amnesty International's Annual Report for 2011, sketches some of the problems: "The Truth, Justice and Reconciliation Commission (TJRC) established in the wake of the post-election violence started its operations. By the end of the year the TJRC was engaged in a country-wide process of taking statements from possible witnesses. However, its work was constrained by questions over the credibility of the chairperson and lack of funding. In April, the Commission vice-chair resigned, citing allegations that the chairperson had been involved in human rights violations and other issues that might be the subject of the TJRC's inquiry. Following a petition in April by eight of the nine TJRC Commissioners, in October the Chief Justice appointed a tribunal to investigate the issue. In November the TJRC chair stepped aside pending the tribunal's report, which was due within six months." Amnesty International, "Annual Report 2011" (2011): https://www.amnesty.org/en/region/kenya/report-2011. In April 2012 the Chair, Bethuel Kiplagat, was resinstated after the Minister of Justice "brokered a truce with warring commissioners." See Mayabe, "Kiplagat TJRC Foes Call a Truce," *Capital News* (12 April 2012): http://www.capitalfm.co.ke/news/2012/04/kiplagat-tjrc-foes-call-a-truce/. Needless to say, the credibility of the commission never fully recovered. Interestingly, the Commission's Report includes an account of these challenges. See Truth Justice and Reconciliation Commission of Kenya, "Report of the Truth, Justice, and Reconciliation Commission Volume 1" (2013) 124.
55. See e.g. Bosire, "When Truth-Seeking Efforts Face Challenges of Credibility," *African Arguments* (28 September 2009): http://africanarguments.org/2009/09/28/when-truth-seeking-efforts-face-challenges-of-credibility/.
56. As all classificatory efforts this one rests upon some simplification; the distinctions just mentioned should be thought as extremes of a continuum, with most actual models falling somewhere in-between.
57. Comisión Nacional sobre la Desaparición de Personas (CONADEP) (Argentina), Decreto 187/83 (15 December 1983). Confirming the point that most actual cases do not fall squarely on either side of the classificatory spectrum, the decree creates a 16-member commission, with 10 members appointed by the president and 6 additional members to be appointed by the two chambers of Congress "as direct representatives of the people and of the Provinces of the Nation" (3 each). The design thus involved not just the president but the legislative power in the selection of commissioners, even if in the simple manner of giving a certain number of positions to each (one of the two chambers refused to make its share of appointments. 12 men and 1 women were finally appointed).
58. In the Supreme Decree that established the National Truth and Reconciliation Commission of Chile, President Aylwin announced the names of the eight commissioners (six men, two women), designated its president, and even its executive secretary. Patricio Aylwin, President of Chile, Decreto Supremo 355, (25 April 1990).

59. Peru's Interim President Paniagua, two days after issuing the Supreme Decree establishing the Truth Commission (Valentín Paniagua, Interim President of Perú, Decreto Supremo 065-2001-PCM (4 June 2001)) issued a follow-up decree appointing its seven commissioners (Valentín Paniagua, Interim President of Perú, Decreto Supremo 330-2001-PCM (6 June 2001); six men, one woman). Once elected, President Toledo issued a decree changing the name of the commission to Truth and Reconciliation Commission (Alejandro Toledo, President of Perú, Decreto Supremo No. 101-2001-PCM (4 September 2001)) and the next day appointed five additional commissioners (Alejandro Toledo, President of Perú, Decreto Supremo 438-2001-PCM (5 September 2001); four men, one woman.
60. The law establishing the Truth Commission gave President Rousseff authority to appoint its seven members (Art. 2), which she did by decree on 10 May 2012 (five men, two women). Law No. 12.528 (Brazil) (18 November 2011); *Diario Official da Uniao* LIII, No. 91 (11 May 2012) (five men, two women appointed). Direct selection is not a Latin-American phenomenon, as demonstrated by the Moroccan case, where the commissioners of IER were appointed directly, through a Royal Dahir, by King Mohammed VI. Dahir No. 1.04.42 of the 19th of Safar 1425 (10 April 2004) (16 men, 1 woman appointed).
61. The Truth and Reconciliation Commission Act 2000, *Supplement to the Sierra Leone Gazette Vol. CXXXI, No. 9* (10 February 2000), Part 1.
62. Act to Establish the Truth and Reconciliation Commission of Liberia (TRC Act of Liberia) (12 May 2005), Art. V.
63. The Truth, Justice and Reconciliation Commission Act 2008 of Kenya (TJRC Act of Kenya) (28 November 2008), Clauses 9, 10, First Schedule. Lest anyone think that despite the geographical predominance of Africa in the adoption of this model it is a wholly African phenomenon, this was the model adopted for the selection of commissioners in East Timor.
64. It defeats part of the purpose of establishing consultative procedures to impose narrow deadlines on them. Cf. The Truth, Justice and Reconciliation Commission Act 2008 of Kenya (TJRC Act of Kenya) (28 November 2008), First Schedule.
65. Selection panels with broad representation are definitely more appropriate than the effort to guarantee representation through the outright apportioning of seats in the commission itself on the basis of criteria relating to ethnicity, political, or other type of affiliation. However, selection bodies that are designed to secure wide representation risk ending up with a composition such that panel members with technical expertise in the relevant topics (in this case expertise in core areas related to human rights) will be outnumbered by those who lack them. In such circumstances there are few reasons to expect such bodies to make their selections primarily on the basis of criteria of technical expertise. The fact that selection panels are not responsible for appointments but merely for recommendations also weakens the incentive they have to think about their selections in a way that would, at least *jointly*, cover the required technical competencies; they have no reason to think what a *group* of commissioners would look like from a technical perspective as the panels do not determine the composition of the commission as a whole.
66. Having said this, however, there is quite a bit that truth commissions could do in order to increase the chances that their recommendations will be taken seriously. Truth commissions have not been particularly "policy friendly," as revealed by the length of their reports alone: even if not linear, the expansion in length of truth commission reports has led to documents that virtually no policymaker will read in its entirety: the shortest report is that of the Commission on Truth for El Salvador, at 252 pages; CONADEP's report was fewer than 500 pages long; Chile's TRC more than 1100 pages; South Africa's TRC more than 4500; Peru's TRC almost 8000; Sierra Leone's TRC almost 1900; East Timor's CAVR more than 3200; Liberia's TRC almost 1400. More important than the length of their reports, of course, is that commissions have been generally uninterested in budgeting their proposals, to relate them to sectoral reform plans, or to engage in early discussions with different stakeholders about effective institutional reform plans. On these issues see HRC, "Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, Pablo de Greiff," U.N. Doc. A/HRC/24/42 (28 August 2013), at paras. 71-79.
67. The Liberian Supreme Court struck down Article 48 of the TRC Act that made it mandatory for the government to implement the Commission's recommendations. The Court concluded that the article usurped the powers of other branches of government. See *Williams v Minister of Justice, Attorney General, Independent National Human Rights Commission and Government of Liberia*, Supreme Court of the Republic of Liberia (21 January 2011): www.mediafire.com/?u1n6zkqoxl1zn3o.

68. Chile's Corporación Nacional de Reparación y Reconciliación is an example of a stand-alone institution created specifically to complete the fact-finding, victim-tracing, and the reparation functions described in the mandate of the TRC.
69. Peru's TRC recommended the establishment of a temporary interministerial working group and a permanent autonomous body (Consejo Nacional de Reconciliación) attached to the presidency of the council of ministers, which would have as its responsibilities coordinating national policies implementing the TRC's recommendations, and preparing draft bills that the executive could present to the legislature concerning four broad areas: reparations, historical memory, justice, and institutional reform; see Comisión de la Verdad y Reconciliación (Perú), "Informe Final" (2003), vol. IX, ch. 2, sec 4. This body, however, was never established.
70. In Argentina, responsibility for the implementation of the various reparation plans was eventually assigned to the Secretaría de Derechos Humanos within the Ministry of Justice, Security, and Human Rights.
71. Not by design but by default, in Sierra Leone, the Human Rights Commission—the establishment of which was one of the recommendations of the TRC—has assumed the role of a Follow-Up Committee envisaged by the Act; see The Truth and Reconciliation Commission Act 2000, *Supplement to the Sierra Leone Gazette Vol. CXXXI, No. 9*, (10 February 2000), part V.
72. A good model of a monitoring mechanism is the interactive "recommendations matrix" established by the Human Rights Commission of Sierra Leone—an institution the creation of which was recommended by the TRC—with the collaboration of the UN. Sierra Leone Truth and Reconciliation Commission, "Recommendations Matrix": http://www.sierraleonetrc.org/index.php/resources/recommendations-matrix.