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## Human Rights Council

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**Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development**

### **Written statement\* submitted by International Commission of Jurists, a non-governmental organization in special consultative status\***

The Secretary-General has received the following written statement which is circulated in accordance with Economic and Social Council resolution 1996/31.

[22 August 2013]

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\* This written statement is issued, unedited, in the language(s) received from the submitting non-governmental organization(s).

## **Minimum criteria for the use and operation of truth commissions**

The inalienable right to truth is a safeguard against recurrence of heinous crimes, including gross human rights violations and serious violations of international humanitarian law (IHL).

The right to truth has both a collective and individual nature. Collectively, society has a right to access the truth. Knowledge about the circumstances and reasons leading to such crimes is necessary for the proper functioning of democratic societies. Individual victims and their next of kin also have the right to know what happened.<sup>1</sup>

Those affected by the perpetration of these crimes must be able to seek and obtain effective remedies, as required by Article 2(3) of the International Convention on Civil and Political Rights (ICCPR) and reflected in Principle 2 of the Updated Impunity Principles.<sup>2</sup> The right to truth thus both facilitates and functions as a form of reparation.

International law and standards, and interpretative jurisprudence, clarify at least seven criteria that must be adhered to for truth commissions to serve as effective mechanisms that contribute to the respect of the right to truth. Giving examples of the use and operation of truth commissions in Nepal and Sri Lanka, the International Commission of Jurists (ICJ) briefly addresses the core elements of four of these criteria.<sup>3</sup>

### **1. Transparent appointment of impartial, independent commissioners**

Truth commissions “must be established through procedures that ensure their independence, impartiality and competence”.<sup>4</sup> To ensure independence, the selection process must be visible and transparent, involving public consultation; free from discrimination; and result in a plural, representative body. Commissioners must have integrity, appropriate expertise, and a demonstrated commitment to human rights and the rule of law. Removal and replacement of commissioners should be possible in case of incapacity, conflict of interest or misconduct.

Serious concerns have been expressed about the appointment process in Sri Lanka. For example, allegations of conflicts of interest have been voiced regarding the appointment of individuals who had served in senior government positions during the conflict, including Sri Lanka’s former representative to the UN in the final stages of the civil war.<sup>5</sup> Concerns also exist regarding the ethnic, religious and gender composition of the LLRC.

The Ordinance of the truth and reconciliation commission (TRC) in Nepal fails to provide detailed procedures for selection and appointment of commissioners. It also empowers the Government to appoint the Secretary of the Commission. These deficiencies and lack of transparency have frustrated early public engagement. It is feared that a consequent likelihood of public distrust of the process will ultimately lead to the failure of the TRC.

### **2. Mandate and scope**

Truth commissions with limited mandates are unable to function effectively. They should therefore function with broad mandates, to address all forms of violations of human rights and humanitarian law. They must adequately address the

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<sup>1</sup> *Bamaca Velasquez v. Guatemala*, IACtHR (2000), para. 197.

<sup>2</sup> Updated set of principles for the protection and promotion of human rights through action to combat impunity, E/CN.4/2005/102/Add.1 (2005).

<sup>3</sup> Added to these, but not considered further, are the requirements that truth commissions: have financial autonomy and adequate resources; can produce a public, comprehensive, impartial and historically accurate report of events; and are able to assure witness protection (see <http://www.icj.org/witness-protection-in-nepal-recommendations-from-international-best-practices/>).

<sup>4</sup> Updated Impunity Principles, Principle 7, above note 2.

<sup>5</sup> E.g., *Report of the Secretary-General’s Panel of Experts on Accountability in Sri Lanka* (2011), para. 306.

concerns of all victims and respect the rights of both victims and suspected perpetrators. Mandates should therefore include material, personal, temporal and territorial aspects.

In Nepal, the TRC's ability to inquire into "serious violations of human rights" is extremely limited under the Ordinance. It includes only those acts carried out "against the civilian population or unarmed persons in a systematic manner". This restricted scope could exclude almost all human rights violations and crimes committed during the conflict from the TRC's mandate.

The effects of a truth commission's limited mandate are evident in Sri Lanka. Due to its narrow scope, the LLRC had no explicit mandate to recommend investigation of allegations of war crimes or crimes against humanity. This led to the LLRC failing to adequately inquire into allegations of violations of IHL.

### 3. Availability of reparations

Reparation includes compensation, restitution, rehabilitation, measures of satisfaction and guarantees of non-recurrence. It is essential to comprehensively satisfy the right to truth. As the Human Rights Committee has recognised, "the obligation [under international law] to provide an effective remedy... is not discharged" without reparation.<sup>6</sup>

Truth commissions must therefore have explicit procedures giving effect to victims' rights to access to effective remedies.

In the case of Sri Lanka, the few recommendations of the LLRC that had regard to compensation only concerned the methodology to be applied in the provision of reparations, without specifying who should receive them. Such omissions have resulted in the public perception of an ineffective process unable to deliver redress.

Reasonable fears exist that a similar consequence will occur in Nepal. While the mandate of the TRC allows for investigations of *some* acts involving serious human rights violations, the limited mandate and the fact that torture, enforced disappearance and crimes against humanity are not adequately criminalised under Nepali law, will likely result in absence of the full truth about the range of violations and in impunity. Thus it is unlikely that the TRC will lead to full satisfaction. Additionally, the Ordinance does not include a specific mandate to make recommendations to guarantee non-recurrence.

### 4. The duty to investigate, prosecute and punish

While truth commissions are useful as part of a comprehensive post-conflict strategy, they are not substitutes for courts. Criminal courts must retain jurisdiction to establish individual criminal responsibility. The duty to investigate, prosecute and punish consists of two complementary State obligations: the general obligation to carry out a serious investigation with a clear objective<sup>7</sup> and the right to truth as a measure of satisfaction.<sup>8</sup> This requirement must include prompt, independent and effective investigation of acts involving gross violations of human rights or serious violations of IHL, alongside prosecution and punishment where appropriate.<sup>9</sup> Appropriate bodies must be able to investigate and prosecute alleged perpetrators on the basis of information disclosed during the operation of truth commissions, even if such information is not capable of itself being used as admissible evidence.

Crimes against humanity, genocide, war crimes and other crimes under international law must not be subject to statutes of limitations, immunities, amnesties or pardons.<sup>10</sup>

<sup>6</sup> Human Rights Committee General Comment 31, para. 16.

<sup>7</sup> *Velasquez-Rodriguez*, IACtHR (29 July 1988), paras. 174-177.

<sup>8</sup> A/RES/60/147, Principle 22(b) and (f).

<sup>9</sup> *Ibid.*

<sup>10</sup> Rome Statute, Articles 27-29; and E/CN.4/RES/2005/81, para. 4.

A truth process that includes or permits amnesties, immunities or pardons or statutes of limitation for such crimes frustrates the obligation to investigate and prosecute, facilitate impunity and violates international law.<sup>11</sup>

Regrettably in Nepal, TRC Commissioners may recommend the granting of amnesties for all violations within its mandate.<sup>12</sup> In Sri Lanka, witnesses are granted criminal and civil immunity with respect to evidence they present to the LLRC, practically guaranteeing amnesty for admitted crimes.<sup>13</sup>

**Call for action:**

The ICJ calls on the members of the Human Rights Council, collectively and individually, to ensure that the establishment of truth commissions fully complies with the internationally recognized right of victims and society to know the truth. This requires:

- Truth commissions to be given a mandate that reflects the relevant material, personal, temporal and territorial aspects of the conflict or situation.
- Safeguards of independence such that the selection of commissioners is undertaken through a non-discriminatory, inclusive, transparent process, involving public consultation; ensures appointment of a representative body based on candidates' expertise, integrity, moral authority and demonstrated commitment to human rights and the rule of law; and removability in the case of incapacity, death, conflict of interest or misconduct.
- Explicit procedures giving effect to victims' rights to access to effective remedies and reparation, including appropriate compensation, restitution, rehabilitation and measures of satisfaction.
- The operation of truth commissions in compliance with the State's obligation to investigate, prosecute and punish acts involving gross human rights violations and serious violations of IHL, excluding the possibility of granting amnesties or other measures that result in impunity for individuals responsible for serious crimes under international law.

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<sup>11</sup>Updated Impunity Principles, Principle 24, above note 2, Human Rights Committee General Comment 30, para. 18 and General Comment 20, para. 15; E/CN.4/RES/2005/81, para. 3; See, ICJ Practitioners' Guide No 2 (2006), Chapter IX, at <http://www.icj.org/the-right-to-a-remedy-and-to-reparation-for-gross-human-rights-violations>.

<sup>12</sup> Commission on Investigation of Disappeared Persons, Truth and Reconciliation Ordinance – 2069 (2013), section 29(4).

<sup>13</sup> Commission of Inquiry Act (Sri Lanka), section 14.