

# UKRAINE:

WORKING WITH THE PAST

FOR A PEACEFUL FUTURE

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The publication is devoted to the world experience of more than 50 truth commissions on different continents and the possibilities of using this experience for Ukraine. For countries emerging from a state of armed conflict or liberating themselves from authoritarian regimes, the creation of such commissions, which are officially approved temporary extrajudicial investigative bodies and act directly during the transitional period, is given a relatively short period for collecting testimony, conducting investigations of human rights violations, studying materials and public hearings before they complete their work and publish a final report with recommendations.

The study was conducted by experts of the CivilM + platform Ilya Nuzov (International Federation of Human Rights, Paris) and Oleg Martynenko (Ukrainian Helsinki Human Rights Union, Kyiv).

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# 1. INTRODUCTION

Beginning with the Nuremberg Trials and increasingly after the change of authoritarian regimes or the end of wars in Africa, Latin America and Eastern Europe in the 1970s — 1990s, the institutional elaboration of the events of a repressive past has become established in state practice.

Be that South Africa after the end of apartheid in the early 1990s, Balkan countries after the dissolution of Yugoslavia and interethnic armed conflicts, or the Baltic countries after the fall of the totalitarian Soviet Union, the recourse of post-conflict and post-authoritarian countries to the instruments of “transitional justice” to overcome the consequences of the crimes of previous regimes has become the norm today.

Like many other countries, Ukraine has its “complicated past”. The young democracy has not yet overcome the consequences of the Soviet Union’s dissolution, when a part of its territory was annexed by Russia and an armed conflict broke out in the east of the country, which continues even now. Therefore, Ukraine was not spared from the “chain reaction of justice”.<sup>1</sup> Over the last decade, the processes of transitional justice concerning the mass violations of human rights committed during the Soviet period, the Revolution of Dignity (Euromaidan) and the war in the East of Ukraine, have only gained momentum.

Of all the mechanisms of transitional justice, Ukraine has so far made the most of criminal prosecutions and institutional reforms, especially in the area of improving the judicial system. At the time of writing, Ukraine has opened more than 30,000 criminal cases concerning the armed conflict and the occupation of Crimea. Important reforms are already outlined regarding compensation for victims of the military conflict.

However, the study of mass violations of human rights is not systematic and not comprehensive. It is mostly targeted at more recent violations, and

focuses on criminal prosecution, emphasizing the role of the Russian Federation in the armed conflict. Although the draft law “On the principles of state policy of the transitional period” developed by the Ministry of Reintegration of Temporarily Occupied Territories lays the foundations for further discussion on the processes of transitional justice, it largely entrenches this approach.<sup>2</sup>

According to the theory of transitional justice and the requirements of international law, not only the events of the recent past require rethinking and a legal response. The obligations of states in the field of the “right to the truth” and guarantees of non-repetition of violations state that it is not enough to provide justice for victims of armed conflict if the causes of the conflict are not identified and eliminated during the reconciliation process.<sup>3</sup>

An unprocessed past, especially in the field of historical memory, may give rise to divisions in society in the future, especially when external forces have an interest in this. Undoubtedly, the actions of the Russian Federation have played an important role in inciting and maintaining the conflict in Donbas. However, the lack of a full and timely de-Sovietization of Ukraine in the early 1990s may have served to consolidate a neo-Soviet identity in the eastern part of the country, which created fertile ground for Russian propaganda, denial of democratic values and local resistance to the Maidan. Failure to recognize the participation of Ukrainian nationalists in the massacres of the civilian population during the Second World War was also perceived ambiguously by a significant part of the population.<sup>4</sup>

<sup>1</sup> Kathryn Sikink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics* (The Norton Series in World Politics), (New York: W.W. Norton & Co. Inc., 2011).

<sup>2</sup> European Commission for Democracy Through Law (Venice Commission), Opinion, “On the Draft Law ‘On the Principles of State Policy of the Transitional Period’”, 18 October 2021, p. 10.

<sup>3</sup> How Transitional Justice can Help Peace in Ukraine? Report, ICTJ, August 20, 2021, pp. 16–17.

<sup>4</sup> [http://ratinggroup.ua/en/research/ukraine/otnoshenie\\_k\\_otdelnym\\_istoricheskim\\_lichnostyam\\_i\\_processu\\_dekommunizacii\\_v\\_ukraine.html](http://ratinggroup.ua/en/research/ukraine/otnoshenie_k_otdelnym_istoricheskim_lichnostyam_i_processu_dekommunizacii_v_ukraine.html)

The opening of archives and the creation of the Institute of National Remembrance made it easier to access information about those and other tragic pages of the country's history, but the tendentious interpretation of historical events through the laws on decommunization, as well as a lack of attention to the historical sources of the conflict, can fuel hostilities of the warring parties. In turn, the continuation of hostilities in the east of the country does not allow us to seriously talk about national reconciliation, the reintegration of the occupied territories and about a sustainable peace.

Since criminal justice focuses on individual responsibility, it is superficial in researching the role and responsibility of collectives, including states, in inciting the conflicts and violence. A deeper and broader study of the causes and consequences of conflict could be an important element of the overarching form of responsibility that is needed for inclusive peacebuilding.<sup>5</sup> For these purposes, it is recommended to supplement criminal liability with an investigation of the broader historical context. This is especially important in countries where historical narratives play an important role in fueling conflict, such as in Ukraine. In such cases, an impartial investigation by a group of people on both sides who are deemed to have moral authority can help debunk some myths and uncover systematic causes of the conflict.<sup>6</sup>

For the countries emerging from a state of civil war or liberating themselves from authoritarian regimes, it is increasingly common to create truth commissions that act directly during the transition period.<sup>7</sup> These commissions — officially approved temporary extrajudicial investigative bodies — are given a relatively short period of time to collect evidence, conduct investigations, study materials and conduct public hearings before they complete their work and publish a final report with recommendations.

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<sup>5</sup> How Transitional Justice can Help Peace in Ukraine? Report, ICTJ, August 20, 2021, p. 16.

<sup>6</sup> Ibid.

<sup>7</sup> Rule of Law Tools in Post-Conflict States: Truth Commissions. HR/PUB/06/1, 2006.

The experience of past truth commissions shows that they can contribute to the recognition of victims, the provision of justice and redress for victims of reprisals, national and individual reconciliation, institutional reforms and the establishment of individual and collective responsibility for crimes, including in other states.

Reconciliation is a long-term goal that may not be achieved by the end of a commission's term, but establishing some degree of accepted truth can help reduce the mistrust, fear and hatred of militants. Such a process could help identify the driving forces behind an armed conflict by examining the sources of grievances and disagreements that drove citizens to fight. The process by which the historical roots of the conflict are analyzed can help reduce the amount of false information and excuses that each side can believe, thus promoting peaceful coexistence.

As shown in countries such as Germany, Poland, South Africa, Chile, Guatemala and Colombia, the commissions' recommendations can lay the foundation for the design and implementation of other transitional justice mechanisms, such as institutional reforms, prosecutions, reparations initiatives, and lustrations of the officials associated with the previous regime.

This review of truth commissions is intended to develop a concept for such an institution in Ukraine. The report is divided into four parts. After presenting the methodology, it summarizes the most problematic historical events from the history of Ukraine over the past hundred years that require elaboration with the tools of transitional justice. In the next part, the authors familiarize the reader with the basic normative requirements for establishing the truth for countries emerging from a repressive period in the field of international human rights and humanitarian law. The fourth part is devoted to a review of the practice of truth commissions. Guided by the experience of other countries and the requirements of international law, the authors also develop recommendations for the creation of a commission to establish truth and national reconciliation after the end of the armed conflict.

## 2. METHODOLOGY

For Ukraine, which has just begun to discover the concept and mechanisms of transitional justice, working with the past is a relatively new direction. The current successes of Ukrainian experts in the field of documenting gross violations of human rights and restoring historical memory are dictated mainly by the need to prosecute war criminals and counter aggressive propaganda. However, working with the past is not yet seen on a national level as a necessary element of institutional reforms, moral satisfaction for the victims of conflict, long-term peacebuilding processes and, in the long term, national reconciliation.

That is why the purpose of this work is to familiarize Ukrainian society with the international experience of countries that used working with the past to overcome the consequences of armed conflicts and authoritarian regimes. The main emphasis was placed on truth commissions, as the most institutionalized form that brings together the efforts of national authorities, civil society and international organizations.

This research was carried out as part of the work of the international platform Civil Minsk + (CivilM+) and was directed at the following tasks:

- to provide society with the authors' position on the periods of mass rights violations in Ukraine's modern history that are the subject of transitional justice in the field of truth;
- to analyze international norms requiring the establishment of the truth, including the individual and collective "right to truth";
- to analyze the practice of truth commissions working in Latin America, Africa, South-East Asia, Europe;
- to examine national legislation on fact-finding, access to archives and current policies on the implementation of transitional justice in Ukraine;
- to formulate the study's final conclusions for their subsequent discussion at the level of political institutions and authorities, in academic and expert communities, among the interested public and international organizations.

Logical-structural, historical, systemic and comparative methods were used to collect material in the course of desk research, including the analysis of primary and secondary legal sources. Content analysis and the method of legal hermeneutics were used in the analysis of regulatory legal acts that involve the interpretation of various sources of international law: conventions, customs, basic principles, resolutions, declarations, practice of international judicial institutions.

In the use of vocabulary about transitional justice, the authors were guided by the well-established terminology of the UN and other international organizations.

The authors conducted face-to-face semi-structured interviews with government officials and civil society representatives during the "CivilM+" platform's educational and advocacy campaign in 2020–2021. A separate collection of expert assessments was carried out during the mission of the International Federation for Human Rights (FIDH) in Ukraine on 25–30 October 2021. During the mission, meetings were held with the Ministry of Reintegration of Temporarily Occupied Territories of Ukraine, the Office of the Verkhovna Rada of Ukraine Commissioner for Human Rights, the Prosecutor General's Office of Ukraine, and with members of the Verkhovna Rada of Ukraine.

The information received made it possible to structure the material about more recent commissions that worked on the African and European continents, taking into account the aspects that are practically significant for Ukraine: legal regulation of the commissions' work, the formation of their mandate, composition and structure; the size of the budget and resources; shortcomings and successful innovations.

The authors would like to thank the CivilM+ platform, as well as all respondents and local partners who contributed their time, thought and enthusiasm to the preparation of the report.

## 3. CONTEXT — A BRIEF DESCRIPTION OF SYSTEMATIC HUMAN RIGHTS VIOLATIONS

Context — a brief description of systematic human rights violations and international crimes subject to transitional justice processes/collective rethinking by a truth/national reconciliation commission.

Despite the fact that the reference to the transitional period implies a limited time frame, the mechanisms of transitional justice are relevant for many years after the perpetration of massive violations, even after the formation of a stable democratic state. But transitional justice is not designed to deal with the consequences of unpunished crime throughout the country's history. According to experts, it can only be extended to those events of the past, the consequences of which, due to a real public interest or reasonable claim of private persons, still require a legal response.<sup>8</sup> There is interest in a legal response if at least one of the following criteria is satisfied:

- the offence reaches the level of an international crime to which no statute of limitations applies (invasion, war crimes, crimes against humanity, genocide);
- the person who can reasonably be suspected of committing the crime is alive;
- the victims or their close relatives are alive;
- the harm caused by the offence can be rectified; and
- the information regarding the offence remains secret.<sup>9</sup>

It is worth adding to this list those cases when heightened public interest in the past arises due to an active memory policy by the state, contributing to the formation of an emotional perception of older events.<sup>10</sup>

The authors of the report believe that in the modern history of Ukraine, there are three periods of massive violations, where one or more of the above criteria are applicable and which are still the subject of transitional justice in the field of truth.

### 3.1. VIOLATIONS IN THE PERIOD 1917–1991

The end of the First World War, the collapse of the Austro-Hungarian Empire and the bourgeois February Revolution in the Russian Empire made possible the proclamation of the Ukrainian People's Republic in 1917. At the same time, this began a long period when the mass death of civilians became a permanent attribute of the struggle between the totalitarian Soviet regime and the national liberation movement in the modern history of Ukraine.

The processes of the reunification of the eastern and western Ukrainian territories, the creation of their own authorities, finance and the army took place in 1917–1920 against the backdrop of opposition to the military and political aggression on the part of Bolshevik Russia. Having established its power on the third try in 1920, the Soviet system of government implemented two types of repressive policies.

The "Red Terror" used a military blockade, hostage-taking, family evictions and mass executions to destroy both real opponents of the Bolsheviks and random people. At this time, a system of forced labor and the first concentration camps were created in Ukraine, through which 25–30 thousand people passed in 1920–1921. The second type of repressive policy — "war communism" — included the forced nationalization of private property, the termination of goods-money relations, the forced confiscation of food from the peasantry, general labor service, and the militarization of society.<sup>11</sup>

<sup>8</sup> Nikolay Bobrinsky and Stanislav Dmitrievsky, "Between revenge and oblivion: the concept of transitional justice for Russia", (2021) <https://trjustice.ilpp.ru/introduction.html>

<sup>9</sup> *Ibid.*, p. 33.

<sup>10</sup> William A. Schabas, 'Time, Justice and Human Rights', in *Understanding the Age of Transitional Justice*, ed. Nanci Adler. (Rutgers University Press: New Brunswick) p. 43.

<sup>11</sup> Soviet Power in Ukraine in 1919–1920. "Military Communism" (in Ukrainian).

These events require a separate historical assessment, since they created the basis for subsequent offences on a greater scale in the history of Ukraine.

### The Holodomor

The 1930s were a deadly decade for the population living on the territory of today's Ukraine. The Stalinist collectivization of agriculture was carried out especially quickly and cruelly in Ukraine: by the end of 1931, 70% of the land had already been collectivized in the Ukrainian SSR.<sup>12</sup>

Between 1931 and 1933, Soviet Ukraine suffered severely from an artificial famine known as the Holodomor. Although the exact number of victims can never be determined, according to the latest estimates, around 3.3 million people died of hunger in 1932–1933.<sup>13</sup>

The scale of the Holodomor was the result of a specially pursued policy of the USSR leadership, the purpose of which was to “punish” the Ukrainian population for the failure of collectivization and the alleged conspiracies of Ukrainian nationalists to destroy the Soviet Union with the help of Poland. Although such threats are widely recognized today as non-existent in 1931–1933,<sup>14</sup> they structured the Stalinist economic and political measures in the Ukrainian SSR during this period. Indeed, the unusually good harvests of 1930 were used to ration grain quotas for the following year. In 1931, more than half of the intact harvest was removed from the Ukrainian SSR, including seed grain, which was used to fulfil unattainable quotas.<sup>15</sup> Alarming signals about famine among the peasants of Ukraine appeared in early 1932, but were not taken into account by Moscow.

On the contrary, in 1932, the punitive policy towards Ukraine intensified. Attempts by local party members to reduce quotas and warn of their consequences were systematically blocked, as, for example, in Kharkiv in July 1932 during a conversation between Ukrainian party members and Stalin's emis-

saries Molotov and Kaganovich.<sup>16</sup> On 7 August 1932, the decree “On the protection of property of state enterprises, collective farms and cooperatives and the strengthening of socialist property” introduced the death penalty for “theft of collective farm and cooperative property”.<sup>17</sup> With the proliferation of brigades visiting villages to collect any traces of food, there was an increase in systematic humiliation, violent attack and rape of civilians. This was followed by other measures, such as the introduction of a “meat tax” for collectives unable to meet quotas, and the creation of “black boards” that cut off these farms from access to other products of the economy.<sup>18</sup> Moreover, the peasants of Ukraine were forbidden to leave the republic, as stated in the directive of 22 January 1933.<sup>19</sup>

The massive famine caused by these laws led to the fact that in the spring of 1933 more than 10,000 people per day died in the Ukrainian SSR.<sup>20</sup> Despite the fact that the qualification of the Holodomor as genocide is controversial from the point of view of international law, many lawyers, starting with the inventor of the term “genocide” Raphael Lemkin, consider the Holodomor a genocide of the Ukrainian people, or at least a crime against humanity.<sup>21</sup>

### The Great Terror

Unlike the Holodomor, which mainly covered the territory of the Ukrainian SSR, the policy of the Great Terror of 1937–1938 struck the entire Soviet Union. However, Ukraine was unduly affected by the massive crimes committed during this period, in particular, during the anti-kulak and so-called “national” operations.

In the mid and late 1930s, the return of thousands of peasants, who had been deported less than ten years ago, from Soviet Asia to Soviet Europe (especially Ukraine) was used by Stalin and the head of the NKVD Yezhov as a motive to destroy the remaining “kulaks.” On 30 July 1937, Order 00447 “On operations

<http://www.litopys.com.ua/encyclopedia/narodzhennya-radyansko-derzhavi/radyans%60ka-vlada-v-ukrayini-v-1919-1920-pp-voennyi-komunizm/>

<sup>12</sup> Timothy Snyder, *Bloodlands. Europe between Hitler and Stalin* (New York: Basic Books, 2010), p. 33.

<sup>13</sup> *Ibid.*, p. 53.

<sup>14</sup> *Ibid.*, p. 37.

<sup>15</sup> *Ibid.*, p. 353.

<sup>16</sup> Yevgeniy Zakharov, *Can Holodomor 1932–1933 in Ukraine and Kuban be classified as genocide?* (Kharkiv “Human Rights Edition”, 2015) p. 35.

<sup>17</sup> *Ibid.*, p. 36.

<sup>18</sup> *Ibid.*, p. 38–40.

<sup>19</sup> *Ibid.*, p. 43.

<sup>20</sup> Snyder, *Bloodlands*, p. 47–49.

<sup>21</sup> Raphael Lemkin, “Soviet Genocide in the Ukraine.” New York Public Library, Reel 3, Box 2, Folder 16, pp. 1-8.

to repress former kulaks, criminals and other anti-Soviet elements" was issued, which was implemented using "troikas", which were ordered to ignore any standard legal procedures.<sup>22</sup> The unjustified nature of the arrests was especially characteristic of Ukraine, where innocent peasants were brought to some prisons to fulfil quotas, and torture was widely used to obtain false confessions.<sup>23</sup> In total, during the "kulak operation" in Ukraine, 70,868 people were shot, tens of thousands more were deported to Siberia and Central Asia.<sup>24</sup>

In 1937, the Great Terror also acquired a significant ethnic component, as several nations were accused of espionage and anti-Soviet plots. Among the "national operations", the largest number of casualties was caused by Order 00485 "On the complete elimination of the spy networks of the Polish military organization".<sup>25</sup> Since the Ukrainian SSR (along with the Belorussian SSR) was home to most of the Polish population of the Soviet Union,<sup>26</sup> that order particularly affected it. The use of "duos" made up of the head of the NKVD and the prosecutor whose sentences in practice were almost always approved and sometimes not revised by the central authorities in Moscow, made it possible to persecute Soviet citizens of Polish origin or people with only distant ties to elements of Polish culture or Poland.<sup>27</sup> In total, during the operation in the Ukrainian SSR, 47,327 people were shot, thousands of families were deported.<sup>28</sup> Beginning in December 1937, the "anti-Greek operation" also led to the deportation and murder of most of the Soviet Greeks, many of whom lived in the city of Mariupol.<sup>29</sup>

Finally, the Ukrainian party and state apparatus came under significant attack from the NKVD. Pres-

sure and arrests on educational and cultural institutions accused of being infiltrated by Ukrainian nationalists were accompanied by executions of members of the Ukrainian leadership.<sup>30</sup>

## Second World War

While the violations of human rights described above occurred in peacetime, World War II was the beginning of another period of crimes against the population inhabiting the present territory of Ukraine.

On 17 September 1939, as a result of the invasion of Eastern Poland by the Red Army, according to the secret protocol of the Molotov-Ribbentrop Pact, "Western Ukraine" and "Western Belarus" came under Soviet control. After the conquest by Soviet troops, over 15,000 Polish officers were taken to prisoner camps controlled by the NKVD, such as Starobelsk in the Ukrainian SSR.<sup>31</sup> Almost all the prisoners of war were shot the following spring, especially in the Katyn forest, in Mednoe in Kharkiv, as well as in Bykovna (near Kyiv).<sup>32</sup>

The incorporation of "Western Ukraine" into the USSR was also accompanied by several waves of arrests and murders of the local population. In February 1940, almost 140,000 Polish citizens were deported to Kazakhstan and Siberia in unequipped freight trains at very low temperatures.<sup>33</sup> In the following months, similar waves of deportation affected the population of Western Ukraine and Western Belarus, especially those who refused to accept Soviet citizenship (mainly Jewish refugees from Western Poland), as well as Ukrainians and Poles accused of anti-Soviet nationalism.<sup>34</sup>

On 22 June 1941, Nazi Germany attacked the Soviet Union during Operation Barbarossa, putting Ukraine at risk of the deadly Axis policies. The first consequence for the Ukrainian population was famine: after the capture of Kyiv on September 19, 1939,

<sup>22</sup> Timothy Snyder, *Bloodlands*, p. 81.

<sup>23</sup> Robert Conquest, *The Great Terror: A Reassessment* (London: Pimlico, 1992) pp. 260; 289.

<sup>24</sup> Timothy Snyder, *Bloodlands*, p. 84

<sup>25</sup> Nicola Vert, *La Terreur et le désarroi : Staline et son système*, Paris : Perrin, 2007, p. 290. Robert Conquest, *The Great Terror*, p. 272.

<sup>26</sup> James Morris, "The Polish Terror: Spy Mania and Ethnic Cleansing in the Great Terror," *Europe-Asia Studies*, vol. 56, No. (2004), URL: <https://www.jstor.org/stable/4147481>, p. 758.

<sup>27</sup> Nicola Vert, *La Terreur et le désarroi*, p. 293.

<sup>28</sup> Timothy Snyder, *Bloodlands* p. 99.

<sup>29</sup> Robert Conquest, *The Great Terror* p. 272.

<sup>30</sup> *Ibid*, p. 231–232.

<sup>31</sup> Timothy Snyder, *Bloodlands*, p. 125.

<sup>32</sup> *Ibid*, p. 136. See also: Yevgeniy Zakharov, *Legal qualification of the murder of Polish citizens in April-May 1940 as a crime of genocide*, URL: <https://khp.org/1605266089>

<sup>33</sup> Grzegorz Grichuk, "Victims 1939–1941: The Soviet Repression in Eastern Poland," in Elazar-Barkan, Elizabeth A. Cole and Cai Struve, ed., *Shared History — Divided Memory: Jews and Others in Soviet-Occupied Poland*, (Leipzig : Leipzig University-Verlag, 2007) p. 184.

<sup>34</sup> Timothy Snyder, *Bloodlands*, p. 151.

almost 50,000 of its inhabitants died of hunger.<sup>35</sup> The conquest of Ukraine by Army Group South also led to an unprecedented number of prisoners of war: by the end of 1941, 655,500 people were taken prisoner near Kyiv, of which about 200,000 people died in the camps.<sup>36</sup>

In addition, the German occupation of Ukraine was one of the central theaters of the Holocaust. In 1941, in connection with the new policy of solving the “Jewish question” by means of mass extermination, the number of Jewish deaths in Ukraine quadrupled from July to September 1941.<sup>37</sup> In Kyiv, 33,761 Jews were killed in less than two days near the city, at the place of execution “Babi Yar”.<sup>38</sup> Such mass executions were carried out in all major cities of Ukraine.

In the same way, the “Final Solution” was applied to the western regions of Ukraine, united in the administrative division “Reichskommissariat Ukraine”. In these regions, the OUN and the Ukrainian Insurgent Army (UPA) pursued a policy of ethnic cleansing in Volhynia (northwestern Ukraine) and Eastern Galicia, which had already begun in Eastern Poland in the 1930s, but peaked in 1943.<sup>39</sup> The OUN and UPA actively participated in the destruction of the local Jewish population.<sup>40</sup> Ethnic Poles, who made up about one-sixth of the local population, were also the main targets of the massacres, which killed an estimated 90,000 people.<sup>41</sup>

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<sup>35</sup> Karel C. Berkhoff, *Harvest of Despair: Life and Death in Ukraine Under Nazi Rule*, (Cambridge, Mass.: Harvard University Press, 2004) p. 184.

<sup>36</sup> *Ibid.*, p. 176

<sup>37</sup> A. I. Kruglov, *Encyclopedia of the Holocaust*, (Kyiv: Jewish Council of Ukraine, 2000) p. 275

<sup>38</sup> Timothy Snyder, *Bloodlands*, p. 202–203

<sup>39</sup> Andrey Portnov, “Bandera mythologies and their traps for Ukraine,” *Open Democracy*, 22 June 2016, URL : <https://www.opendemocracy.net/en/odr/bandera-mythologies-and-their-traps-for-ukraine/>

<sup>40</sup> John-Paul Himka, *Ukrainian Nationalists and the Holocaust: OUN and UPA’s Participation in the Destruction of Ukrainian Jewry, 1941–1944* (Columbia University Press: 2021).

<sup>41</sup> Andrey Portnov, “Clash of victimhoods : the Volhynia Massacre in Polish and Ukrainian memory,” *Open Democracy*, 16 November 2016, URL: <https://www.opendemocracy.net/en/odr/clash-of-victimhood-1943-volhynian-massacre-in-polish-and-ukrainian-culture/>; Pere Anders Rudling, “The OUN, the UPA and the Holocaust : A Study in the Manufacturing of Historical Myths,” in *The Carl Beck Papers in Russian and East European Studies*, 2011, URL:

Finally, after the conquest of the occupied territories by Soviet troops, mass deportations of the population, including those accused of collaborating with the Nazis, affected hundreds of thousands of civilians in Ukraine. Among them, more than 180,000 Crimean Tatars were deported in three days in March 1944.<sup>42</sup> The post-war policy of ethnic cleansing led to the forced resettlement of over 750,000 Poles and Jews from Soviet Ukraine to the new communist Poland,<sup>43</sup> and more than 200,000 Ukrainians were deported to the GULAG for “kinship or acquaintance” with Ukrainian nationalists.<sup>44</sup>

In general, the decades of the 1930s and 1940s were marked by numerous massive violations of human rights in the territories that are now part of Ukraine, and the death of several million of its inhabitants. Most of them were caused by the Soviet and Nazi policies of mass extermination of unwanted social, political and ethnic groups, at times with the support of the local population.

### 3.2. VIOLATIONS DURING 1991–2014

The period between the declaration of independence of Ukraine (24 August 1991) and the annexation of Crimea and the war in Donbas in 2014 was marked by numerous human rights violations by the Ukrainian government. Even though these two decades are in no way comparable in severity and scale to the millions of deaths of the 1930s and 1940s, they were characterized by systemic corruption and significant suppression of civil society, culminating in the repression of the Maidan protests in late 2013.

Post-Soviet Ukraine has been consistently influenced by disagreement surrounding a pro-Russian or pro-Western position. Nevertheless, political changes during this period did little to eradicate systemic corruption and the lack of the rule of law, which began under the presidential mandate of Leonid Kuchma (1994–2005) in the context of the large-scale privati-

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<sup>42</sup> Timothy Snyder, *Bloodlands* p. 330.

<sup>43</sup> *Ibid.*, p. 327.

<sup>44</sup> *Ibid.*, p. 328.

zation of the Ukrainian economy.<sup>45</sup> In 2000, the “Cassette Scandal” highlighted the extent of the government’s illegal crackdown on dissent in the wake of the murder of investigative journalist Georgy Gongadze. The 2004 Orange Revolution that brought pro-European President Viktor Yushchenko to power failed to resolve the structural problems and internal divisions in Ukraine.

In 2010, the pro-Russian politician Viktor Yanukovich was elected as the fourth president of Ukraine. Reports from non-governmental organizations and international organizations indicated a lack of rule of law in the period 2010–2014. Corruption was considered a normality, and payment to officials in practice was often compulsory for receiving basic services.<sup>46</sup> Corruption was also widespread in the legal and judicial system, with reports showing links between the police establishment and organized crime, with little prosecution of criminal acts.<sup>47</sup> On the other hand, the growing repression of journalists and dissidents became systemic.<sup>48</sup> Shrinking space for civil society was accompanied by massive electoral fraud, such as the 2012 parliamentary elections, marked by bribery, intimidation of local officials and dishonest media coverage.<sup>49</sup>

In this context of impunity for gross violations of human rights, President Yanukovich’s refusal to sign the Association Agreement between Ukraine and Europe sparked massive protests on Independence Square in Kyiv on 21 November 2013. As the protests spread throughout the cities of Ukraine, the reaction of the authorities intensified, and the number of injured and even dead among the protesters increased.<sup>50</sup> The repressions peaked between 18 and 20 February, when 100 protesters were killed and hun-

dreds were injured due to violence by security forces.<sup>51</sup> Mass repression subsided after the agreement on new elections was reached on February 21 and Yanukovich was dismissed the next day.

Thus, the two decades between Ukraine’s independence and the revolution on the Maidan paved the way for a political crisis that continues today, and in 2014, the war in Donbas became the main focus of human rights violations.

### 3.3. VIOLATIONS IN THE PERIOD BETWEEN 2014 AND TODAY

Since 2014, there have been two main zones of human rights violations on the territory of Ukraine: the Crimean Peninsula, which is under Russian occupation, and two eastern regions, Donetsk and Luhansk, which are under the effective or general control of Russian-backed separatist forces.

The occupation of Crimea by the Russian Federation constitutes a crime of aggression and violation of the territorial integrity of Ukraine, which was carried out over several weeks in February — March 2014. Protests erupted in Simferopol following the flight of President Viktor Yanukovich in February. On the night of February 26–27, a coalition of local militias and armed men in military uniform seized official buildings and took control of the peninsula. The latter groups were later acknowledged as Russian military by the Russian government itself.<sup>52</sup> On 16 March, a referendum on the status of Crimea (the results of which, according to UN General Assembly resolution 68/262, would have been invalidated and irrelevant for changing the status of the peninsula) was used as a pretext for Russia’s recognition of Crimea as an independent state.<sup>53</sup> On 18 March, Russia officially announced the inclusion of Crimea in its territory and has maintained effective control over the region since.<sup>54</sup>

<sup>45</sup> J. A. Kazlas, *Corruption, Impunity, and Current Reforms in Ukraine*, ICTJ, August 2014, p. 2; 6, URL: [https://www.ictj.org/sites/default/files/ICTJ-Briefing-Ukraine-Assessment-2014\\_0.pdf](https://www.ictj.org/sites/default/files/ICTJ-Briefing-Ukraine-Assessment-2014_0.pdf)

<sup>46</sup> J. A. Kazlas, *Corruption, Impunity, and Current Reforms in Ukraine*, p. 6.

<sup>47</sup> *Ibid.*, p. 6.

<sup>48</sup> *Ibid.*, p. 13.

<sup>49</sup> OSCE Office for Democratic Institutions and Human Rights, *Parliamentary Elections in Ukraine 28 October 2012: Final Report of the Election Observation Mission*, 3 January 2013, URL: <https://www.osce.org/files/f/documents/3/c/98578.pdf>

<sup>50</sup> ICC, *Action Report on preliminary examination of situations in 2020*, 14 December 2020, §273, URL: <https://www.icc-cpi.int/itemsDocuments/2020-PE/2020-pe-report-ukr-rus.pdf>

<sup>51</sup> ICC, *Action Report on preliminary examination of situations in 2020*, §273.

<sup>52</sup> ICC, *Action Report on preliminary examination of situations in 2020*, §274.

<sup>53</sup> Robin Geiss, “Russia’s Annexation of Crimea: The Mills of International Law Grind Slowly but They Do Grind,” in *International Law Studies*, vol. 91, p. 429, URL: <https://digital-commons.usnwc.edu/cgi/viewcontent.cgi?article=1377&context=ils>

<sup>54</sup> ICC, *Action Report on preliminary examination of situations in 2020*, §274.

Since the Russian annexation, NGOs and international organizations have documented several types of human rights violations in Crimea. The integration of Crimea into the Russian legal and political system has led to violations of the civil and political rights of several categories of citizens. For example, the authorities' use of arbitrary arrest and unlawful detention, especially against human rights defenders, activists and dissidents, constitutes a violation of the right to freedom of expression and association. During the period of 2014–2019, OHCHR also recorded dozens of cases of enforced disappearances on the peninsula, as well as the ill-treatment of those arrested, including torture and sexual violence.<sup>55</sup> Inmates in penitentiary institutions, including those already in pre-annexation custody, were subjected to inhuman treatment in their cells, and some were deported to other penitentiary institutions in the Russian Federation.<sup>56</sup>

The suppression of civil society also manifests itself in the narrowing of the space for freedom of assembly, thought and expression. Along with the systematic harassment of independent journalists,<sup>57</sup> protesters face administrative harassment after being denied the right to peaceful assembly. Among the most vulnerable to persecution are Crimean Tatars,<sup>58</sup> members and leaders of churches that have not registered with Russian authorities (for example, members of the Ukrainian Greek Catholic Church),<sup>59</sup> members of the LGBT+ community,<sup>60</sup> and members of organizations related to Ukrainian culture.<sup>61</sup>

In parallel, political unrest spread to Donetsk and Luhansk oblasts, where the participation of Russian-backed separatist armed groups led to the escalation of the crisis into a situation of armed conflict. As of 2021, the war in Donbas had claimed the lives of more than 13,000 people, including about 3,000 civilians,<sup>62</sup>

and forced hundreds of thousands of peaceful civilians to flee to other regions of Ukraine and to Russia.<sup>63</sup> Most of the deaths occurred in 2014, and since then there have been gross violations of human rights on both sides against soldiers and civilians.

Already in early April 2014, armed men seized government facilities and state institutions in the Donetsk and Luhansk oblasts.<sup>64</sup> By mid-April, the Ukrainian government announced the beginning of the "anti-terrorist operation" against illegal armed formations of the so-called Donetsk and Luhansk People's Republics ("LPR" and "DPR"), and by May and June, hostilities escalated into intense fighting in densely populated areas, including large cities of Mariupol, Donetsk and Luhansk.<sup>65</sup> Ceasefire negotiations started in September, and on 19 September 2014, a memorandum on the cessation of hostilities was signed in Minsk; however, fighting soon resumed, with both sides increasing the use of heavy weapons in residential areas along the contact line.<sup>66</sup> Since the conclusion of the Minsk II Agreements in February 2015, the positions controlled by the Ukrainian forces and the separatists remained practically unchanged, while Russia provided support to the latter in the form of ammunition, weapons, military units and military personnel.<sup>67</sup>

Most civilian casualties were caused by indiscriminate shelling and bombing.<sup>68</sup> In 2014 and early 2015, attacks on civilians or residential areas were carried out from both sides. In many cases, no measures were taken to minimize civilian casualties and the destruction of civilian objects.<sup>69</sup> On 17 July 2014, over Donbas,

<sup>55</sup> UN General Assembly, Situation of human rights in the Autonomous Republic of Crimea and the city of Sevastopol, Ukraine, UN.doc A/74/276, URL: <https://undocs.org/en/A/74/276>, §§1–18.

<sup>56</sup> UN General Assembly, Situation of human rights in the Autonomous Republic of Crimea and the city of Sevastopol, Ukraine, §§20–27.

<sup>57</sup> *Ibid.*, §§37–39.

<sup>58</sup> *Ibid.*, §§42; 46; 48.

<sup>59</sup> *Ibid.*, §32.

<sup>60</sup> *Ibid.*, §43.

<sup>61</sup> *Ibid.*, §47.

<sup>62</sup> Fatu Bensuda, Presentation of the 2020 Annual Report on Preliminary Examination Activities, Office of the ICC Prosecutor, 15 December 2020, URL:

<https://www.icc-cpi.int/itemsDocuments/201216-otp-statement-report-pe.pdf>

<sup>63</sup> Yuriy Aseev, Yevgeniy Zakharov. Internally displaced persons, January 2020, Kharkiv Human Rights Group, URL: <https://khpg.org/1578656588>

<sup>64</sup> ICC, Action Report on preliminary examination of situations in 2020, §275.

<sup>65</sup> FIDH, Civilians caught in the crossfire, 2015, p. 9, [https://www.fidh.org/IMG/pdf/eastern\\_ukraine-ld.pdf](https://www.fidh.org/IMG/pdf/eastern_ukraine-ld.pdf)

<sup>66</sup> IPHR, Fighting Impunity in Eastern Ukraine, 2015, p. 17, <https://iphronline.org/wp-content/uploads/2016/05/Fighting-impunity-in-Eastern-Ukraine-October-2015.pdf>

<sup>67</sup> Kramer, "Weapons Tracing Study Implicates Russia in Ukraine Conflict," *The New York Times*, 3 November 2021; IPHR, Attacks on civilians and civilian infrastructure in eastern Ukraine, 2017, p. 14, <https://iphronline.org/wp-content/uploads/2017/12/ICC-RU-print.pdf>

<sup>68</sup> FIDH, Civilians caught in the crossfire, 2015.

<sup>69</sup> KHPG, Human rights in the territory controlled by the Government of Ukraine along the delimitation line and in

combatants of the so-called «LPR» and «DPR» shot down a passenger plane on flight MH17 from Amsterdam to Kuala Lumpur, using the Buk missile launcher belonging to the Kursk 53rd Air Defence Brigade of the Russian Armed Forces. All 298 people on board were killed.<sup>70</sup> In August 2014, cluster bombs were fired by a Ukrainian aircraft at a children's beach, a stadium and a school in Zugres (Donetsk region).<sup>71</sup> Since the contact line runs through densely populated areas, the parties to the conflict have also positioned themselves near protected objects such as schools or hospitals, in fact using them as human shields. For example, members of the separatist forces demanded that local residents allow them to use their roofs for shooting, like, for example, in Horlivka in July 2016.<sup>72</sup>

Another type of gross violation of human rights committed during the conflict includes unlawful arrest and detention, often accompanied by the use of torture and other inhuman treatment. In separatist-controlled regions, illegal arrests primarily concerned activists and journalists, but other civilians were also illegally detained, for example, in law enforcement buildings.<sup>73</sup> In government-controlled regions, volunteer battalions and SBU officers used a network of unofficial places of detention.<sup>74</sup> Most of the cases of torture of prisoners of war and civilians were committed by members of the separatist militias, including in the notorious Izolyatsia prison, while in many cases physical violence, electric shocks and other types of mutilation were used (for example, the cutting off of

body parts, the carving of a swastika on the back); in some extreme cases, detained volunteers were forced to dismember the bodies of their comrades executed with the help of Chechen soldiers, or tortured by skinning them.<sup>75</sup> While cases of torture and ill-treatment of prisoners of war and civilians in government-controlled areas are less numerous and more difficult to investigate, they have also been reported. Violations include torturing detainees to extract confessions, including using electric shocks and threats of sexual violence against family members.<sup>76</sup> In both camps, the conditions of detention were often incompatible with life and human dignity.<sup>77</sup>

Both sides are also accused of sexual violence against prisoners of war and civilians of both sexes, including rape and sexual mutilation. For example, members of the Tornado volunteer battalion (Ukrainian side) raped and tortured local civilians in the basement of a school in Lysychansk.<sup>78</sup> In separatist-controlled territories, people in detention, especially women, have been raped by members of armed groups, mainly in 2014 and 2015.<sup>79</sup> Other major crimes include extrajudicial killings and enforced disappearances of several thousand people during the conflict.<sup>80</sup>

Thus, overall, both sides have been involved in numerous widespread and systematic human rights violations against soldiers and civilians. Although most crimes were committed in the early months of the conflict, violations were reported in subsequent years on both sides of the contact line.<sup>81</sup>

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so-called Luhansk People's Republic and Donetsk People's Republic (2017), 18 September 2017, URL: <https://khpg.org/889>

<sup>70</sup> <https://www.bbc.com/russian/news-48682393>

<sup>71</sup> KHPG, Violent Crimes Committed During the Armed Conflict in Eastern Ukraine between 2014–2018, §5.2. URL: <https://khpg.org/en/1543997604>

<sup>72</sup> *Ibid.*, §5.3.

<sup>73</sup> *Ibid.*, §5.4.1.

<sup>74</sup> *Ibid.*, §5.4.2.

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<sup>75</sup> *Ibid.*, §5.5.2.

<sup>76</sup> *Ibid.*, §5.5.3.

<sup>77</sup> *Ibid.*, §5.7.

<sup>78</sup> *Ibid.*, §5.6.2.

<sup>79</sup> *Ibid.*, §5.6.3.

<sup>80</sup> *Ibid.*, §§5.1; 5.8.1.

<sup>81</sup> ICC, Action Report on preliminary examination of situations in 2020, §276.

## 4.A PRESENTATION OF INTERNATIONAL NORMS

A presentation of international norms requiring the establishment of truth, including the individual and collective “right to truth.”

Transitional justice is defined by UN institutions as “a set of processes and mechanisms associated with societal efforts to overcome the grave legacy of large-scale violations of the rule of law in the past in order to ensure accountability, fairness and reconciliation”.<sup>82</sup> Generally, “large-scale violations” are understood to mean serious — systematic or widespread — violations of human rights or humanitarian law, such as war crimes, crimes against humanity, aggression and genocide, or collectively international crimes. One of the main assumptions of transitional justice is that past crimes committed during armed conflict or a repressive regime must be properly addressed in order to build a democratic and peaceful society.<sup>83</sup>

The end of an armed conflict or a change in the political regime provides an opportunity to disclose the circumstances of violations, to bring the perpetrators to justice and to apply legal and fair punishment to them, to compensate for harm caused to victims, and to create guarantees of the non-repetition of crimes.<sup>84</sup>

The main transitional justice processes that meet these four requirements for victims of abuse and the rule of law include: prosecutions, fact-finding, in particular through the establishment of truth com-

missions, reparations, and institutional reform, such as through lustration. Some of the best transitional justice experiences show that states that look to more than one mechanism have the best chance of achieving justice for victims of crime while laying the foundation for national reconciliation, the rule of law and democratic institutions.<sup>85</sup>

For countries emerging from a state of civil war or liberating themselves from authoritarian regimes, the investigation, establishment and disclosure of facts about mass violations of human rights — the establishment of the truth — has become one of the main conditions for achieving justice, national reconciliation and the democratization of society.<sup>86</sup>

The right of people to know the truth about the fate of missing persons or to be informed about other past abuses has been confirmed by treaty bodies, international and domestic courts.<sup>87</sup>

It derives from three norms of international law: the right of victims of serious human rights violations and international humanitarian law to an effective remedy, an effective investigation into abuse, and access to information. Primary and secondary sources of international law create a range of obligations of states to investigate international crimes and human rights violations and to uncover the truth about these violations.

While there is no specific legal requirement for the establishment of truth commissions, in transitional justice processes, the establishment of a commission can be a means of fulfilling these obligations.

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<sup>82</sup> See: Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies. Report of the UN Secretary General. UN document S/2004/616. Para. 8.

<sup>83</sup> Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence “Memorialization processes in the context of serious violations of human rights and international humanitarian law: the fifth pillar of transitional justice,” A/HRC/45/45, 9 July 2020, para. 20.

<sup>84</sup> Diane Orentlicher, “Independent Study on Good Practices, Including Recommendations, to Help States Build Their National Capacities to Fight All Forms of Impunity,” (E/ CN.4/2004/88).

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<sup>85</sup> The rule of law and transitional justice in conflict and post-conflict societies. Report of the UN Secretary General. UN document S/2004/616. Clause 8.

<sup>86</sup> Diane Orentlicher, “Independent Study on Good Practices, Including Recommendations, to Help States Build Their National Capacities to Fight All Forms of Impunity,” (E/CN.4/2004/88).

<sup>87</sup> “Rule of law tools in post-conflict states: Truth Commissions. HR/PUB/06/1, 2006.

#### 4.1. INTERNATIONAL LAW — “HARD” LAW — CONVENTIONS AND CUSTOMS, INCLUDING THE CASE-LAW OF THE ECtHR

The right of victims of serious violations to an effective remedy was established in the first half of the 20th century and is now enshrined in the provisions of many fundamental documents on human rights and humanitarian law.<sup>88</sup> One of these means is the duty of the state to find or facilitate access to information on persons who have disappeared during armed conflicts or who have been subjected to enforced disappearance.

Already in 1977, the First Protocol to the Geneva Conventions secured for the families of victims the right to “know about the fate of their relatives” and the obligation of states to establish the whereabouts of the disappeared persons.<sup>89</sup> And by 2006, the International Convention for the Protection of All Persons from Enforced Disappearance reaffirmed the right of victims “to know the truth about the circumstances of an enforced disappearance, the progress and results of the investigation and the fate of the disappeared person”, as well as the obligation of states to take “appropriate measures to this end”.<sup>90</sup>

The duty to report violations is also reinforced by the procedural obligation to conduct effective investigations into serious human rights violations, such as killings and torture. Despite the fact that these “positive” obligations of states are not enshrined in the texts of international treaties, the right to disclose crimes and access the information about the results of investigations arose through the interpretation of the main provisions of the conventions of such treaty bodies as the European Court of Human Rights.

For example, within the framework of decisions on Article 2 on the right to life and Article 3 on the prohibition of torture, the ECtHR concluded in the *Association “21 December 1989” and Others v Romania*

case, that the importance of the investigation into the events of the Romanian Revolution of 1989 was not only the right of individual applicants to know the truth, but also “the importance for the Romanian society of knowing the truth about the events of December 1989”.<sup>91</sup>

In the *Janowiec v. Russia* case, regarding the Katyn massacre of Polish officers in 1940, the Grand Chamber of the ECHR ruled that Russia violated Article 38 by failing to provide a copy of the domestic proceedings to the families of the victims, citing national security interests, while noting that: “The government must balance the perceived need for protection of information with [...] the public interest in a transparent investigation [...] and the private interest of the victims” (§214).

In the *El Masri v Macedonia* ruling, where the authorities were accused of transferring the plaintiff to CIA officers, after which he was subjected to ill-treatment, the Court stated “the great importance of the present case not only for the applicant and his family, but also for other victims of similar crimes and the general public, who had a right to know what happened”.<sup>92</sup> The Court also stated that “the search for the truth is the objective purpose of the obligation to conduct an investigation and the rationale for the existence of appropriate requirements for the quality of the investigation (transparency, discretion, independence, access, disclosure of results and their confirmation). For society as a whole, the desire to establish the truth plays a role in building trust in public institutions”.<sup>93</sup>

#### 4.2. INTERNATIONAL LAW — “SOFT” LAW — BASIC PRINCIPLES, RESOLUTIONS, DECLARATIONS OF THE UN/OSCE

Today, the right to establish the truth is widely considered both an individual and a collective right, as evidenced by numerous normative documents of

<sup>88</sup> *Factory at Chorzów, Germany v. Poland*, Judgement, Permanent Court of International Justice, 1928; Universal Declaration of Human Rights, Article 8, European Convention on Human Rights, Article 13, Provisions of International Humanitarian Law — Hague Convention (IV), Article 3, Additional Protocol I to the Geneva Conventions, Article 91.

<sup>89</sup> Articles 32 and 33 of Additional Protocol I to the Geneva Conventions.

<sup>90</sup> Article 24, International Convention for the Protection of All Persons from Enforced Disappearance.

<sup>91</sup> *Association «21 December 1989» and Others v. Romania*, ECHR, 24 May 2011, para. 130. [https://hudoc.echr.coe.int/eng#{"itemid":\["001-104864"\]}](https://hudoc.echr.coe.int/eng#{).

<sup>92</sup> *El Masri v. 'the former Yugoslav Republic of Macedonia'*, ECHR, no. 39630/09, 13 December 2012, para. 191, [https://hudoc.echr.coe.int/fre#{"itemid":\["001-115621"\]}](https://hudoc.echr.coe.int/fre#{).

<sup>93</sup> *Ibid.*, §6.

the so-called “soft” law. For example, the right to truth is recognized in Human Rights Council Resolution 12/12 and UN General Assembly Resolution 68/165, which emphasize the importance of victims, families, and society in general knowing the truth about the past.<sup>94</sup>

The UN’s Updated Set of Principles to Protect and Promote Human Rights by Fighting Impunity (Principles on Fighting Impunity), drawn up by an independent expert based on countries’ practice, gives 12 principles to the right to information.<sup>95</sup> In particular, Principle 2 on the Inalienable Right of Truth states that:

Every people has the inalienable right to know the truth about past events concerning the perpetration of heinous crimes and about the circumstances and reasons that led, through massive or systematic violations, to the perpetration of those crimes. Full and effective exercise of the right to the truth provides a vital safeguard against the recurrence of violations.<sup>96</sup>

From the point of view of the collective right to truth, Principle 3 on the “Duty to Preserve Memory” is equally important, according to which:

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<sup>94</sup> Human Rights Council, Right to Truth, A/HRC/RES/12/12, 12 October 2009, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G09/165/99/PDF/G0916599.pdf?OpenElement>; United Nations General Assembly, Right to Truth, A/RES/68/165, 18 December 2013, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N13/449/35/PDF/N1344935.pdf?OpenElement>.

<sup>95</sup> Commission on Human Rights, “Report of the independent expert to update the set of principles to combat impunity, Diane Orentlicher”, E/CN.4/2005/102/Add.1, 8 February 2005.

<sup>96</sup> Ibid.

A people’s knowledge of the history of its oppression is part of its heritage and, as such, must be ensured by appropriate measures in fulfilment of the State’s duty to preserve archives and other evidence concerning violations of human rights and humanitarian law and to facilitate knowledge of those violations. Such measures shall be aimed at preserving the collective memory from extinction and, in particular, at guarding against the development of revisionist and negationist arguments.

At their best, truth commissions are able to provide an impartial historical explanation of the sources of violence and abuse that can go a long way towards overcoming false or revisionist perceptions of the past.<sup>97</sup>

With regard to the individual right to the truth, according to Principle 4, “Irrespective of any legal proceedings, victims and their families have the imprescriptible right to know the truth about the circumstances in which violations took place and, in the event of death or disappearance, the victims’ fate.”<sup>98</sup> The updated principles recommend that societies faced with massive human rights violations use non-judicial procedures that complement the role of the judiciary, such as truth commissions, in order to realize these rights.<sup>99</sup> Principle 6 suggests that truth commissions with strong investigative capabilities can help states fulfil these obligations.

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<sup>97</sup> Rule of Law Tools in Post-Conflict States: Truth Commissions. HR/PUB/06/1, 2006

<sup>98</sup> Commission on Human Rights, “Report of the independent expert to update the Set of principles to combat impunity, Diane Orentlicher”, E/CN.4/2005/102/Add.1, 8 February 2005.

<sup>99</sup> Ibid., Principle 5.

## 5. REVIEW OF THE PRACTICE OF TRUTH COMMISSIONS IN OTHER COUNTRIES

Beginning in Latin America in the 1980s, truth-seeking initiatives became an important component of transitional justice practice in many regions of the world in the 1990s and 2000s, including in the post-communist countries of Central and Eastern Europe such as the reunited Czech Republic and Germany, Poland, Estonia, Latvia, Lithuania, Romania, Moldova and the countries of the former Yugoslavia. The African commissions were the most numerous, and the South African model was perhaps the most monumental and significant commission for national reconciliation.

Over the past 30 years, more than 50 truth commissions, historical commissions, and other institutions have been created to investigate and establish the facts of massive violations of human rights and international humanitarian law.<sup>100</sup>

### WHY ARE TRUTH COMMISSIONS CREATED

Truth commissions are: special, autonomous and victim-centered commissions of inquiry set up by and empowered by the State to carry out two main purposes:

- 1) to investigate and report on the root causes and consequences of widespread and relatively recent manifestations of severe violence or repression that have taken place in the State during certain periods of violent rule or conflict, and
- 2) to make recommendations for their elimination and prevention in the future.<sup>101</sup>

<sup>100</sup> Report of the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, 'Memorialization processes in the context of serious violations of human rights and international humanitarian law: the fifth pillar of transitional justice, para. 42, A/HRC/45/45, 9 July 2020.

<sup>101</sup> Mark Freeman, *Truth Commissions and Procedural Fairness*, (CUP: 2006), p. 18.

In addition to these short-term goals, the process of creating a commission and conducting an investigation, as well as the final product of its work, a report with recommendations, can contribute to positive socio-political and institutional changes in society in the long term, namely: *a. recognition of victims, ensuring justice and compensation for victims of reprisals, b. reconciliation, c. institutional reforms and d. the establishment of individual and collective responsibility for crimes.*

### a. Victim recognition, justice and reparations for victims of serious human rights violations

As a formal victim-centered investigative body, a truth commission promotes victim recognition through the public disclosure of the truth. By their recommendations, the commissions are also able to restore the victims and their families in rights and return, or compensate, as far as possible, their material and moral losses as a result of massive violence.

In practical terms, a large amount of a truth commission's time and resources is devoted to collecting testimonies and other evidence from victims of reprisals or hostilities.<sup>102</sup> Many of the truth commissions also conduct public hearings, civil society work, work with archives and academic research, police investigations, data processing, analysis and exhumations.<sup>103</sup>

Public hearings provide a unique public platform for victims to share their experiences in a safe and constructive environment, and thus can serve as an acknowledgement of their suffering and human dignity. When broadcast on national television and radio, they can have an unmatched impact on public awareness of past abuse. In the best cases, they

<sup>102</sup> Ilya Nuzov and Mark Freeman 'Principle 6' in *The United Nations Principles to Combat Impunity: a Commentary*, ed. Frank Handelman and Thoman Unger (OUP: 2020), pp. 103–104.

<sup>103</sup> Ibid.

can generate widespread public debate and increase empathy for the victims. This, in turn, can facilitate recognition and reconciliation processes, helping to build public support for other transitional justice reforms.

Truth commissions can play an important role in investigating the whereabouts of missing persons during armed conflict or state repression.<sup>104</sup> Many of the earliest commissions arose after the fall of regimes that concealed or denied widespread enforced disappearances (Bolivia, Argentina, El Salvador, Chile).

In cases of particularly serious crimes, such as enforced disappearances, killings and torture, commissions have the authority to create and propose initiatives or institutions for reparations to victims of mass human rights violations (South Africa, Northern Ireland, Chile, Kenya, Sierra Leone, Liberia, Ghana, Morocco). As a rule, these institutions implemented the remission of illegal sentences, the return of property and monetary compensation to victims and their families, free legal and medical assistance and memorial initiatives.

## b. Reconciliation

Truth commissions can tackle incidents of violence and promote peacebuilding.<sup>105</sup> Due to these characteristics, commissions very often include reconciliation in the mandate and even the name of the institution (South Africa, Chile, Canada, Sierra Leone, Liberia, Ghana, Morocco, Timor-Leste), and their creation is discussed during peace negotiations (El Salvador, Guatemala, Colombia, Sierra Leone, Liberia).

The process of finding and establishing facts, as well as the calls in the commission's report to create a culture of tolerance for different political views, respect for democratic institutions and human rights, can defuse tensions between former enemies and lay the foundation for peaceful coexistence.<sup>106</sup> The South African experience shows that to the extent that the post-apartheid society has recognized the

facts uncovered and published by the commission, relations between its members have changed for the better.<sup>107</sup>

Reconciliation can be seen at both the individual and collective levels. On an individual basis, it means the perpetrators being forgiven by the victims personally or their relatives. The involvement of perpetrators in some commission hearings facilitates this process. Reconciliation at the collective level is expressed in the creation of social mechanisms and the development of practices for the coexistence of different groups, the peaceful overcoming of differences, and rallying around national identity and common values of society.<sup>108</sup>

Working within the framework of a truth commission, as well as drafting a historical narrative acceptable to all parties, contributes to the formation of a collective memory and identity around the officially established description and analysis of the country's history. The German and Baltic commissions paid particular attention to describing the institutional context of the crimes and condemning the communist regime.<sup>109</sup> These historic commissions, which have become permanent bodies in the Baltic States, differ from traditional interim institutions with investigative functions. The attention of the Baltic commissions to the issue of collaboration during the Holocaust was one of the conditions for their establishment.<sup>110</sup>

The UN Special Rapporteur on Transitional Justice focuses on memorialization processes for grave

<sup>104</sup> Ilya Nuzov and Mark Freeman, Principle 6, p. 104, para. 30.

<sup>105</sup> Martha Minow, *Between Vengeance and Forgiveness: Facing History after Genocide without Forgiveness* (Boston: Beacon Press, 1998).

<sup>106</sup> José Zalaquett, "Confronting Human Rights Violations Committed by Former Governments: Applicable Principles and Political Constraints," *Hamline Law Review* 13, 3 (1990): p. 623–655.

<sup>107</sup> James Gibson, *Overcoming Apartheid: Can Truth Reconcile a Divided Nation?* (New York: Russell Sage Foundation, 2004).

<sup>108</sup> Nikolai Epple, *An Inconvenient Past* (Moscow, NLO: 2020), p. 214.

<sup>109</sup> Andrew Beattie, "An Evolutionary Process: Contributions of the Bundestag Inquiries into East Germany to an Understanding of the Role of Truth Commissions," *International Journal of Transitional Justice* 3, 2 (2009): 229–249.

<sup>110</sup> Onur Bakiner, "Between Politics and History: The Baltic Truth Commissions in Global Perspective," in *Transitional Justice and the Former Soviet Union*. Edited by Cynthia M. Horne, Lavinia Stan. (Cambridge University Press: 2018) 438 p. P. 156.  
<https://books.google.com.ua/books?id=I4JIDwAAQBAJ&pg=PA14&lpg=PA14&dq=The+Baltic+Truth+Commissions+in+Global+Perspective&source=bl&ots=U1uiOdGqBw&sig=ACfU3U3J-dhQaD7j4ltpTshglxuroCT6kg&hl=ru&sa=X&ved=2ahUKewiCgbLgyfHzAhVClosKHRNyBowQ6AF6BAgLEAM#v=onepage&q=The%20Baltic%20Truth%20Commissions%20in%20Global%20Perspective&f=false>

violations of human rights and humanitarian law.<sup>111</sup> He notes that the processes of seeking truth and memorialization should contribute to the creation of “dialogical truth”, that is, conditions for dialogue in society about the sources and consequences of crime and violence and the establishment of direct and indirect responsibility. Such a process makes it possible to overcome the divided and irreconcilable visions of the past and narrows the circle of permissible deviations from the truth.<sup>112</sup>

At its best, the commission’s work can help the public to understand and recognize a contested or denied story. At worst, the process of public debate on problematic pages in history can help build “civic solidarity through dissent”<sup>113</sup>. Priscila Heiner, a leading expert on truth commissions, noted that the institution’s main goal is “to influence public perception and acceptance of the country’s past, not simply to fix problems.”<sup>114</sup>

### **c. Institutional reforms to ensure trust in institutions and non-repetition of violence**

Commissions often make specific recommendations for legal, institutional and socio-political reforms to prevent the recurrence of violations. Recommendations most often refer to institutional changes, for example, in the judiciary or the executive branch of government, but several commissions have recommended broader changes calling for the promotion of a political culture based on respect for human rights.

Several final reports from commissions called for lustrations or other forms of removal of offenders from power (El Salvador, Chad, Timor-Leste and Liberia). Several countries have established national human rights institutions (Chile and Sri Lanka). Others demanded reform of the judicial system (El Salvador, Sri Lanka, Liberia, Morocco) or the army, police and other security agencies (Chad, Guatemala, Nigeria, Sierra Leone, Liberia, Morocco). Some

countries focus on human rights education among the security forces (Chile) and the wider public (Uganda, Poland).

State practice shows that governments can formally accept the recommendations and publish the report of the commission, create institutions that implement the recommendations of the report and oversee its activities, including commissions and programs for reparations, such as commissions for rehabilitation (Chile, Brazil, Peru, Sierra Leone, Liberia, Morocco, Northern Ireland, Germany, Estonia), and reintegration programs for ex-combatants (Liberia, Sierra Leone, Timor-Leste). Sometimes a lack of political will to change makes it difficult to implement reforms.

### **d. Establishing individual and collective responsibility of individual institutions**

Truth commissions often have investigative powers, such as the power to call witnesses to testify, the ability to hold hearings, or determine accountability for human rights violations, even if only declaratively.

Most truth commissions do not overlap with the tasks of judicial institutions and do not duplicate them. However, commissions are increasingly receiving judicial powers, namely the ability to grant amnesty to the perpetrators of violations or financial compensation to victims. Several models, such as Argentina, have used victim testimonies in criminal trials.

Commissions can point to individual and institutional responsibility for international crimes and massive violations of human rights. Almost all commissions identify the institutions responsible for the violations, but only a few of them name the individual perpetrators of the crimes.<sup>115</sup>

Despite the limited legal mandate of commissions, their broader mandate to focus on the types, causes and consequences of political violence allows truth commissions to go much further in their investigations and conclusions than it is usually possible (or acceptable) in court. The breadth of objectives and flexibility of truth commissions are their strengths. For example, these commissions are usually able to define the full responsibility of the state and its various institutions that pursued or justified

<sup>111</sup> “Memorialization processes in the context of serious violations of human rights and international humanitarian law: the fifth pillar of transitional justice,” *supr.* no. 83, para. 21.

<sup>112</sup> *Ibid.*, §37.

<sup>113</sup> Mark Osiel, *Mass Atrocity, Collective Memory and the Law*, (Routledge: 1997).

<sup>114</sup> Priscilla Hayner, *Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions*, (Routledge, 2011), p. 11.

<sup>115</sup> Bakiner, *Between Politics and History*, p. 168.

repressive policies, including not only the military and the police, but also the judicial system itself.<sup>116</sup>

### *How are truth commissions created*

The decision to create a commission comes from a public policy process or debate about whether the country can benefit from the commission, what its formal legal mandate, budget and composition (commissioners and other positions) will be. Regarding all three dimensions, Principle 6 of the Principles on Overcoming Impunity underlines the importance of “broad consultation”, involving representatives of victims and discussions on the basis of equal participation of men and women.

Some of the earliest truth commission mandates were established by presidential decrees, without consultation with the public or victims.<sup>117</sup> The commissions in Haiti, Sri Lanka, Chad, Nepal and Uganda were created thanks to the actions of the president, while their terms of reference were hardly discussed by the public.<sup>118</sup> In practical terms, a presidential decree can be enacted faster than regular legislation and can mitigate the negative impact of a legislature dominated by political parties hostile to the truth that the commission may ultimately uncover. At the same time, the legislative process could potentially generate broader political support for the commission and, as such, lead to greater political legitimacy.

Today, most often truth commissions arise on the basis of legislation (for example, in Kenya, Colombia, Brazil, South Africa, Sierra Leone, Ghana, Poland).<sup>119</sup> One of the most famous commissions, the South African Truth and Reconciliation Commission, was created by an elected parliament following significant contributions from civil society, two international conferences on international transitional justice policies and hundreds of hours of public and private hearings.

Truth commissions will enjoy the greatest support if their members, and not just their mandates, are de-

termined through a consultative process. Such a process may include inviting civil society to nominate candidates and forming a representative selection committee (appointed by various sectors and community groups) to screen nominations and interview finalists, recommending the final composition of the committee to the nominating body.

South Africa set an important precedent through widespread public debate that accompanied both the elaboration of the truth commission’s terms of reference and the public process for the nomination and selection of its members. Influenced by this precedent in Sierra Leone, candidates were screened by the former armed opposition, the president, the religious community and human rights groups. In Togo, the president asked a number of civil society organizations to nominate their candidates, which led to the creation of a more independent body.<sup>120</sup> Likewise, a national consultative process led by a steering committee of representatives from human rights, women and other civil society groups helped clarify the terms of reference and composition of the Commission for Reception, Truth, and Reconciliation in Timor-Leste. In contrast, the members of the DRC Truth and Reconciliation Commission were appointed without prior consultation and were reputedly dependent on political loyalty to the parties to the peace process in the country.

The voices of women have not yet had a significant impact on the mandate or composition of truth commissions, whether in terms of the priority of women’s experiences during the investigation phase or in terms of the proportion of women among commissioners. The Truth and Reconciliation Commission of Peru established a dedicated gender unit, while commissions in South Africa, Haiti, Kenya, Liberia, Morocco, Sierra Leone, the Solomon Islands and Timor-Leste conducted special investigations into gender-based and sexual violence.<sup>121</sup>

Truth commissions are inherently flexible and can be tailored to the specific needs and circumstances of a country. While much can be learned from previous experiences in other parts of the world, it is important that any new truth commissions arise primarily through strategic planning and reflection based on local realities.

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<sup>116</sup> Hayner, *Unspeakable Truths*, 2011, p. 13.

<sup>117</sup> Ilya Nuzov and Mark Freeman, ‘Principle 6’ in *The United Nations Principles to Combat Impunity: a Commentary*, ed. Frank Handelman and Thomas Unger (OUP: 2020) pp. 100–101.

<sup>118</sup> *Ibid.*, §17.

<sup>119</sup> *Ibid.*, §20.

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<sup>120</sup> *Ibid.*

<sup>121</sup> Ilya Nuzov and Mark Freeman, *Principle 6*, p. 102, para. 22.

However, the ability of truth commissions can often be limited by overly broad mandates, political circumstances, financial capacity, public opinion about the commission, or material resources. Thus, the activities and objectives of truth commissions should be clearly defined.

### ***Truth commissions***

#### **Latin America**

Latin America has over 10 truth commissions and the first successful commissions were established there. The very first commission in Latin America was the Bolivian National Commission of Inquiry into Disappearances, founded in 1982. The Argentine Commission was established a year later.

Truth commissions in Latin America are generally large-scale and iconic institutions. They are often presented as the main initiatives to counter sometimes compromised political transitions, as an alternative or addition to criminal liability, while attracting significant public attention. An example of this is today's Colombian Commission with public hearings and almost daily broadcasts on television, Facebook and YouTube.<sup>122</sup> The phrase "Never again" would not be so significant if it was not popularized as the title of the report of the Argentine Commission. The report became a model for subsequent initiatives to gather facts and preserve the memory of crimes.

The Peruvian Truth Commission was the first in Latin America to organize a victim-oriented public hearing. In Ecuador, a number of commissioners were directly selected by NGOs, which contributed to its comparative success. And the Chilean Commission gave recommendations and impetus for the creation of an important institution for reimbursement (reparations and rehabilitation) for victims.

The newly founded Colombian Commission is as innovative as the South African model. It involves cooperation with two other institutions to compensate victims and establish individual and collective responsibility for crimes committed in the course of an internal conflict.

One of the main characteristics of the Latin American Commissions is their mandate to indicate both individual and institutional responsibilities. Commis-

sions in Peru and Paraguay have denounced authoritarian leaders Alberto Fujimori and Alfredo Stroessner, respectively. The El Salvador and Guatemala Commissions emphasized the responsibility of the entire judiciary, and in Peru, Guatemala and Ecuador, they also noted the involvement of the entire political class in the polarization of society. The Guatemalan Commission also pointed to external interference from the United States, which may be applicable to the Ukrainian context.

#### **Africa and South-East Asia**

On the African continent and South-East Asia, there are up to 20 truth commissions with varying levels of activity and results. It is obvious that the Truth Commissions of South Africa, Liberia, Sierra Leone, Ghana, Morocco and Timor-Leste that we have chosen, have different formation histories, different resources and relationships with national governments. However, it is their experience that is generally recognized by many post-conflict countries, and the proposed innovations deserve attention and creative rethinking in new conditions on other continents.

In the examples below, it can be seen that the South African Commission pioneered the application of traditional philosophies and local practices of reconciliation to address amnesty issues, which was then successfully developed by the commissions of Liberia, Sierra Leone and Timor-Leste. Their successful experiences of reintegration and healing, as well as of public hearings, have given future truth commissions a responsibility to seek methods that are best suited to local reconciliation practices.

The Sierra Leone and Liberia Commissions were the first to articulate the social reintegration of child soldiers and highlight the extent of gender-based violence committed during armed conflict. The experience of Ghana and Morocco is valuable in understanding that even with an authoritarian approach to the creation and management of truth commissions, meaningful results can be achieved with the full support of the authorities and the trust of the population.

#### **Europe**

The experience of the European continent is remarkable in many ways. Firstly, all institutions working in the field of establishing the truth and searching for ways of reconciliation are part of the state appa-

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<sup>122</sup> <https://www.justiceinfo.net/en/46412-how-colombia-truth-commission-navigated-pandemic-year.html>

ratus of the executive authorities, while the terms “truth” and “reconciliation” are practically not found in their names.

Secondly, it was government institutions that demonstrated success in working with historical truth, comparable, for example, with the best results of African truth commissions. This was facilitated by two factors: the presence of political will and the long-term evolution of national institutions, ensuring continuity in work, institutional memory and the presence of highly qualified national experts.

Thirdly, the main leitmotif in the organization of work was set by the experience of united Germany,

and not by the best practices of Latin America, Africa and Asia. This allowed them to form their own approaches, significantly expanding research and educational activities (Germany, Poland), or focusing on the investigation of crimes of the past (Czech Republic).

And finally, the unsuccessful experience of attempts to create truth commissions in post-conflict societies of the former Yugoslavia and Northern Ireland perfectly demonstrates to Ukraine the need to take into account the national mentality, the balance of political forces and the availability of resources when building effective work with the past.

# 6. BRIEF ANALYSIS OF NATIONAL FACT-FINDING/ACCESS TO ARCHIVES LEGISLATION AND CURRENT TRANSITIONAL JUSTICE POLICY IN UKRAINE

## 6.1. POWER OF AUTHORITIES IN FACT-FINDING

The broadest powers to gather information and establish facts in Ukraine are vested in the **judiciary** (at the stage of judicial review) and **law enforcement agencies**. Law enforcement agencies such as the National Police, the Security Service, the State Bureau of Investigation, the National Anti-Corruption Bureau, the Prosecutor General's Office (especially the Department of Oversight for criminal proceedings in relation to crimes committed in the context of the armed conflict and the Specialized Prosecutor's Office in the military and defence sphere).

All of them are vested with the full breadth of authority to document and verify information such as: time, place, method and other circumstances of the perpetration of a criminal offence; form of guilt, motive and purpose of committed actions; the type and size of the harm caused; circumstances characterizing the identity of the suspected (accused) persons.<sup>123</sup> This process is carried out in accordance with the Criminal Procedure Code of Ukraine with the help of overt and covert investigative (search) actions.

Thanks to such broad powers, Ukraine has registered more than 30 thousand crimes since the beginning of the Russian Federation's armed aggression (2014–2021). In 2021, more than 19,000 of them are under investigation. In total, more than 6,500 criminal proceedings have been sent to court, of which more than 500 were in 2021.<sup>124</sup>

<sup>123</sup> Article 91 of the CPC of Ukraine. [https://protocol.ua/ru/kriminalniy\\_protseualniy\\_kodeks\\_ukraini\\_stattya\\_91/](https://protocol.ua/ru/kriminalniy_protseualniy_kodeks_ukraini_stattya_91/)

<sup>124</sup> The Prosecutor General and the heads of the Ministry of Internal Affairs, the Security Service of Ukraine and the National Police agreed to create specialized units to investi-

Since July 2021, the heads of Ukraine's law enforcement agencies have initiated the creation of specialized units within the SBU and the National Police to investigate crimes committed in the context of an armed conflict. It is assumed that these units will work directly with the Department of Oversight (GPU) for criminal proceedings in relation to crimes committed in the context of the armed conflict.<sup>125</sup>

**The parliament's interim inquiry commissions** are the closest in terms of their powers to traditional truth commissions. Commissions have the right to receive information and materials from all legal entities, to seize them if necessary (except for those that are in private premises or are evidence in criminal proceedings). The commissions are empowered to summon and hear persons to obtain testimony or explanations and to involve experts and law enforcement officers in their work.

The grounds for the creation of commissions are reports of violations of the Constitution of Ukraine or laws of Ukraine by authorities and self-government bodies, public associations whose actions threaten the sovereignty, territorial integrity of Ukraine or its interests, as well as reports of massive violations of citizens' rights.<sup>126</sup>

gate crimes committed in the context of an armed conflict (Ukrainian). [https://www.gp.gov.ua/ua/news?\\_m=publications&t=rec&id=299644](https://www.gp.gov.ua/ua/news?_m=publications&t=rec&id=299644)

<sup>125</sup> The Prosecutor General and the heads of the Ministry of Internal Affairs, the Security Service of Ukraine and the National Police agreed to create specialized units to investigate crimes committed in the context of an armed conflict (Ukrainian). [https://www.gp.gov.ua/ua/news?\\_m=publications&t=rec&id=299644](https://www.gp.gov.ua/ua/news?_m=publications&t=rec&id=299644)

<sup>126</sup> Law of Ukraine "On temporary commissions of inquiry and temporary special commissions of the Verkhovna Rada of Ukraine" No. 400-IX of 19th december 2019. <https://zakon.rada.gov.ua/laws/show/400-20#Text>

**The Representative Office of the President of Ukraine in the Autonomous Republic of Crimea** currently carries out mainly monitoring functions, studying socio-economic and political processes, establishing facts of human rights violations in the temporarily occupied territory.<sup>127</sup>

Separate powers for the independent establishment of facts are vested in the **Office of the Human Rights Commissioner of the Verkhovna Rada (Ombudsman)**.

The Ombudsman of Ukraine has the right to send inquiries, invite the necessary persons to receive oral or written explanations from them; conduct an inspection of legal entities, send an employee of the Office to the scene of the incident with the right to use video, photo or audio recording.<sup>128</sup>

**The Ukrainian Institute of National Remembrance** in the field of establishing historical facts collects eyewitness testimony and forms databases on political repressions, the Ukrainian liberation movement, wars, victims of the Holodomor of 1932–1933, the mass famine of 1921–1923 and 1946–1947, and political repression, as well as regarding actions aimed at protecting the independence, sovereignty and territorial integrity of Ukraine.

The Institute has a National Commission for the Rehabilitation of Victims of Repression of the Totalitarian Communist Regime of 1917–1991, which has the right to: examine materials from archival criminal cases, hear explanations from the applicant and others, create permanent and temporary working bodies with the involvement of scientists, historians or other experts.<sup>129</sup>

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<sup>127</sup> Decree of the President of Ukraine “Issues of the Representation of the President of Ukraine in the Autonomous Republic of Crimea” dated October 17, 2019 No. 758/2019. <https://zakon.rada.gov.ua/laws/show/758/2019#Text>; Activity strategy of the Representative Office of the President of Ukraine in the Autonomous Republic of Crimea. Approved by the Decree of the President of Ukraine dated April 13, 2021 No. 160/2021. <https://www.president.gov.ua/documents/1602021-38653>

<sup>128</sup> Procedure for the implementation of proceedings by the Human Rights Commissioner of Verkhovna Rada of Ukraine. Order of the Human Rights Commissioner of Verkhovna Rada of Ukraine No. 18/02-13 of 12.08.2013. <https://ombudsman.gov.ua/ua/page/secretariat/docs/organizacijno-rozporjadchi-dokumenty/>.

<sup>129</sup> Regulation on the National Commission for Rehabilitation. Approved by order of the Ministry of Culture of Ukraine dated October 25, 2018. No. 926. <https://zakon.rada.gov.ua/laws/show/z1281-18#Text>

The Institute also has the Archive of National Memory, which provides for the searching, reception, acquisition, formation, registration and storage of relevant documents.<sup>130</sup>

**Ministry of Reintegration of Temporarily Occupied Territories of Ukraine** to a greater extent than other ministries, is empowered to collect, analyze and summarize information on the observance of human rights and the norms of international humanitarian law in the temporarily occupied territories of Ukraine, as well as adjacent territories. The Ministry monitors the impact of the armed aggression of the Russian Federation on the socio-economic development of the state and organizes the exchange of information with state authorities, local authorities, public associations.<sup>131</sup>

**Other authorities**, having on a practical level standard powers in the field of fact-finding, organize the collection and verification of information related to an armed conflict, depending on their field of activity.

Thus, the Ministry of Defence registers every case of shelling from the side of the temporarily occupied territories. The Ministry of Environmental Protection and Natural Resources carries out environmental monitoring and the state of the environment in the combat zone. The Ministry of Veterans Affairs maintains the Unified State Register of War Veterans, establishes the fact of injuries or other damage to health received during the armed conflict. The Ministry of Social Policy works to protect the rights of persons deported on ethnic grounds who returned to Ukraine, war veterans, victims of Nazi persecution, children of war and victims of political repression. The Ministry of Health of Ukraine has information on the scale of activities and financial costs associated with the medical, psychological and physical rehabilitation of military personnel.

Taking into account the different vectors of information related to the armed conflict, in 2021 the Ministry of Reintegration of Temporarily Occupied

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<sup>130</sup> Regulations on the sectoral state archive of the Ukrainian Institute of National Memory. Order of the Ministry of Culture of Ukraine, Ministry of Justice of Ukraine dated 7 February 2019. No. 91/372/5. <https://zakon.rada.gov.ua/laws/show/z0181-19#Text>.

<sup>131</sup> Some questions of the Ministry of reintegration of temporarily occupied territories. Resolution of the Cabinet of Ministers of Ukraine dated 8 June 2016 No. 376. <https://zakon.rada.gov.ua/laws/show/376-2016-%D0%BF#Text>

Territories took the initiative not only to create a national Documentation Centre, but also to form a state system for monitoring and documenting violations of human rights, international humanitarian law and other violations committed during the armed aggression of the Russian Federation. This system should include all the authorities of Ukraine, and, if desired, international and public organizations.<sup>132</sup>

## 6.2. REGULATION OF ACCESS TO ARCHIVES AND WORK WITH HISTORICAL REMEMBRANCE IN THE FIELD OF DECOMMUNIZATION

The early stage of decommunization is enshrined in the *Law of Ukraine "On the rehabilitation of victims of repression of the communist totalitarian regime of 1917–1991"* (1991)<sup>133</sup>, the purpose of which was the restoration of historical justice, compensation for harm to victims of repression and prevention of the repetition of crimes of totalitarian regimes. The law formulated the definition of "victims of repression" and recorded 23 forms of repression in the past (deprivation of life, freedom, forced placement in psychiatric institutions, deportation, confiscation, deprivation of rights, etc.). The citizens who became victims were provided with material compensation and social benefits, the central role in the provision of which was assigned to the National Commission for Rehabilitation, created by this law.

15 years later The Law of Ukraine *"On 1932–1933 Holodomor in Ukraine"*<sup>134</sup> (2006) became the next

step, as a recognition of the state's moral duty to the past and future generations of Ukrainians and the need to restore historical justice. The law condemned the criminal actions of the totalitarian regime of the USSR in organizing the Holodomor and recognized the Holodomor as an act of genocide of the Ukrainian people, which resulted in the destruction of millions of people, the destruction of the social foundations of the Ukrainian people, its age-old traditions, spiritual culture and ethnic identity. As guarantees of non-repetition, the law imposed on the state the obligation to provide conditions for conducting research, access to archival materials and to take measures to perpetuate the memory of the victims of the Holodomor in Ukraine.

The most active period of decommunization happened in 2015, after the events of the Revolution of Dignity (2014), when such laws were adopted as:

- Law of Ukraine "On the Condemnation of the Communist and National Socialist (Nazi) Totalitarian Regimes in Ukraine and the Prohibition of the Propaganda of Their Symbols" (2015)<sup>135</sup>
- Law of Ukraine "On the Legal Status and Honoring the Memory of the Fighters for the Independence of Ukraine in the XX century" (2015)<sup>136</sup>
- Law of Ukraine "On Perpetuating the Victory over Nazism in the Second World War of 1939–1945" (2015)<sup>137</sup>
- The texts of the laws are based on the use of PACE normative acts and elements of transitional justice (investigation of past crimes, the right to truth, memorialization, reconciliation), which brought the international community closer to understanding the processes taking place in Ukraine.

<sup>132</sup> An expert council has been created to develop proposals on the creation of a system for monitoring and documenting human rights violations in the temporarily occupied territory. Jul 21, 2021.

<https://minre.gov.ua/news/stvoreno-ekspertnu-radulya-napracuyannya-propozyciy-shchodo-stvorennya-systemy-monitoryngu-i>

<sup>133</sup> "On the rehabilitation of victims of repressions of the totalitarian communist regime of 1917–1991" Law of Ukraine dated April 17, 1991 No. 962-XII.

<https://zakon.rada.gov.ua/laws/show/962-12#Text>;

"On Amending Certain Legislative Acts of Ukraine Concerning Improving the Procedure for Rehabilitation of Victims of Repressions of the Totalitarian Communist Regime of 1917–1991" Law of Ukraine dated 13 March 2018 No. 2325-VIII.

<https://zakon.rada.gov.ua/laws/show/2325-19#Text>

<sup>134</sup> Law of Ukraine "On the Holodomor of 1932–1933 in Ukraine" dated 28 November 2006 No. 376-V.

<https://zakon.rada.gov.ua/laws/show/376-16#Text>

[https://edisciplinas.usp.br/pluginfile.php/4215774/mod\\_resource/content/0/Unspeakable%20Truths\\_%20Transitional%20Justice%20and%20the%20Challenge%20of%20Truth%20Commissions%20-%20Routledge%20%282010%29.pdf](https://edisciplinas.usp.br/pluginfile.php/4215774/mod_resource/content/0/Unspeakable%20Truths_%20Transitional%20Justice%20and%20the%20Challenge%20of%20Truth%20Commissions%20-%20Routledge%20%282010%29.pdf)

<sup>135</sup> The Law of Ukraine "On the Condemnation of the Communist and National Socialist (Nazi) Totalitarian Regimes in Ukraine and the Prohibition of the Promotion of Their Symbols" April 9, 2015 No. 317-VIII.

<https://zakon.rada.gov.ua/laws/show/317-19#Text>

<sup>136</sup> On the legal status and memory of the fighters for the independence of Ukraine in the XX century "Law of Ukraine No. 316-VIII of 09.04.2015.

<https://zakon.rada.gov.ua/laws/show/314-19#Text>

<sup>137</sup> Law of Ukraine "On perpetuating the victory over Nazism in World War II 1939–1945" No. 315-VIII of 09.04.2015.

<https://zakon.rada.gov.ua/laws/show/315-19#Text>

These laws determined the state policy in relation to the communist and national socialist (Nazi) totalitarian regimes as criminal, prohibiting their symbols and ensuring the openness of the archives of the repressive organs of the communist totalitarian regime for all.

At the same time as the laws restoring and preserving the memory of the fighters for the independence of Ukraine, the Day of Remembrance and Reconciliation (8 May) was established for the first time in Ukraine, which is designed to reconcile all who fought against a totalitarian regime.

It is worth mentioning separately the Law of Ukraine “On Access to the Archives of Repressive Agencies of Totalitarian Communist Regime of 1917–1991” (2015), adopted together with the above-mentioned ones.<sup>138</sup>

Without criticizing or overturning the conservative provisions for the National Archives Foundation<sup>139</sup>, this law proposed to use largely innovative approaches in working with the archives of a totalitarian regime.

The central element of the law was the prohibition on qualifying the archival materials of the repressive bodies as classified, confidential or proprietary information. At the same time, the law secured the right of everyone to free access to this archived information. The granted right is guaranteed by the maximum simplification of the procedure for obtaining information, the free choice of the form of access to it, as well as the obligation of the information managers to provide and disclose the archival information of the repressive authorities.

The state based its position on the fact that a better understanding of modern history can help prevent conflicts and enmity in society. Thus, the closed nature of the archives, according to the authors of the law, was one of the preconditions for the annexation of the Crimean Peninsula and the military conflict on the territory of Donetsk and Luhansk regions.

Realizing that new resources are needed to work with Soviet archives according to new, more open and democratic rules, by a resolution of the Cabinet

of Ministers of Ukraine in 2016, the *Branch of the State Archives* of the Ukrainian Institute of National Remembrance was created. It was this archive that was entrusted with the storage of documents of the National Archives Fund, containing archival information of the repressive bodies of the totalitarian communist regime of 1917–1991.<sup>140</sup>

### 6.3. CURRENT TRANSITIONAL JUSTICE POLICY

The introduction of the topic of transitional justice into the public discourse of Ukraine was preceded by a 4-year advocacy campaign of civil society (Ukrainian Helsinki Human Rights Union, academic institutions, international organizations). This campaign included conducting analytical studies, creating the first system for documenting war crimes, inviting international experts, participating in the development of draft laws to protect the rights of victims of armed conflict.

As a result, ensuring the implementation of the transitional justice system has been enshrined by the government as one of the strategic objectives (2020).<sup>141</sup> The development of a national model of transitional justice and the implementation of all its most important elements are also provided for in the presidential decrees on the National Strategy for Human Rights (2021) and the Strategy for the Deoccupation and Reintegration of the Temporarily Occupied Territory of the Autonomous Republic of Crimea and the City of Sevastopol (2021).<sup>142</sup>

<sup>138</sup> “On access to the archives of the repressive bodies of the totalitarian communist regime of 1917–1991” Law of Ukraine No. 316-VIII of 09.04.2015. <https://zakon.rada.gov.ua/laws/show/316-19#Text>

<sup>139</sup> Law of Ukraine “On the National Archival Fund and Archival Institutions” dated December 24, 1993 No. 3814-XII. <https://zakon.rada.gov.ua/laws/show/3814-12#Text>

<sup>140</sup> “On the creation of the sectoral state archive of the Ukrainian Institute of National Memory” Resolution of the Cabinet of Ministers of Ukraine dated 21 December 2016 No. 1000. <https://old.uinp.gov.ua/laws/postanova-pro-stvorennya-galuzevogo-derzhavnogo-arkhivu-ukrainskogo-institutu-natsionalnoi-pam->

<sup>141</sup> National Action Plan for the Implementation of UN Security Council Resolution 1325 “Women, Peace, Security” for the period up to 2025. Approved by the Order of the Cabinet of Ministers of Ukraine dated October 28, 2020 No. 1544-p. <https://zakon.rada.gov.ua/laws/show/1544-2020-%D1%80#Text>

<sup>142</sup> Decree of the President of Ukraine No. 119/2021 “On the National Strategy in the Sphere of Human Rights”. <https://www.president.gov.ua/documents/1192021-37537>; The strategy of de-occupation and reintegration of the temporarily occupied territory of the Autonomous Repub-

As of 2021, two important draft regulations on transitional justice are awaiting consideration and signing:

1. The Draft Presidential Decree on the Concept of State Policy for the Protection and Restoration of Human Rights and Fundamental Freedoms in the Conditions of an Armed Conflict on the Territory of Ukraine and Overcoming its Consequences. The draft was prepared back in 2019 by the Working Group on Reintegration of the Temporarily Occupied Territories (Commission on Legal Reform under the President of Ukraine) and is a framework document for the implementation of transitional justice in Ukraine.<sup>143</sup>

2. The Draft Law of Ukraine "On the Foundations of the State Policy of the Transition Period"<sup>144</sup>, developed by the Ministry for the Reintegration of Temporarily Occupied Territories of Ukraine. The bill proposes general framework approaches to the issues of criminal prosecution for crimes committed during an armed conflict, the application of amnesty, ensuring the right to truth, protecting the rights of victims of the conflict, memorialization, guarantees of non-repetition and dialogue processes.

3. The plan for the legislative work of the Ukrainian parliament for 2021 provides for the preparation

of two more bills: on the protection of the rights of civilians who have suffered as a result of the armed aggression of the Russian Federation and on responsibility for offences committed during the temporary occupation of the territory of Ukraine.<sup>145</sup>

So far, within the framework of criminal justice, the law "On amendments to certain legislative acts on the Enforcement of International Criminal and Humanitarian Law" (2021) has been adopted. An important point from the perspective of transitional justice is the introduction of the principle of universal jurisdiction over aggression, genocide, crimes against humanity and war crimes by this law.<sup>146</sup>

In August 2021, the General Prosecutor's Office of Ukraine established the International Council of Experts on Crimes Committed in the Context of Armed Conflict. The main purpose of the council is to attract international specialists, national experts and representatives of non-governmental human rights organizations to study the experience of investigating war crimes and crimes against humanity and develop national standards in this area. The council is also expected to provide support in the development of guidelines for the conduct of an investigation, specialized training programs, and advice on cooperation with the international criminal court.<sup>147</sup>

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lic of Crimea and the city of Sevastopol. Approved by the Decree of the President of Ukraine dated March 24, 2021 No. 117/2021.

<https://www.president.gov.ua/documents/1172021-37533>

<sup>143</sup> Oleksiy Danilov: It is necessary to accelerate as much as possible the implementation of the Concept of Transitional Justice in Ukraine with the obligatory involvement of representatives of the Crimean Tatar people in this work. 11.09.2020.

[https://www.rnbo.gov.ua/ua/Dialnist/4692.html?fbclid=IwAR2DQ4dPa\\_cDSLbBsnk1-Y8mZ3wh-V0yv38N-ul8uSiCZ4X8O-mtPyphmmhY](https://www.rnbo.gov.ua/ua/Dialnist/4692.html?fbclid=IwAR2DQ4dPa_cDSLbBsnk1-Y8mZ3wh-V0yv38N-ul8uSiCZ4X8O-mtPyphmmhY)

<sup>144</sup> The draft law «On the Foundations of State Policy for the Transition Period No. 5844 of 09.08.2021.

[https://w1.c1.rada.gov.ua/pls/zweb2/webproc4\\_1?pf3511=72625](https://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=72625)

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<sup>145</sup> On the Plan of legislative work of the Verkhovna Rada of Ukraine for 2021. Resolution of the Verkhovna Rada of Ukraine No. 1165-IX dated 02.02.2021.

<https://zakon.rada.gov.ua/laws/show/1165-20#Text>

<sup>146</sup> Law of Ukraine on Amendments to Certain Legislative Acts of Ukraine Concerning the Implementation of International Criminal and Humanitarian Law.

[https://w1.c1.rada.gov.ua/pls/zweb2/webproc4\\_1?pf3511=67804](https://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=67804)

<sup>147</sup> The Prosecutor General's Office hosted the first meeting of the International Council of Experts on Crimes Committed in the Context of Armed Conflict. 10.08.2021.

[https://www.gp.gov.ua/ua/news?\\_m=publications&\\_c=view&\\_t=rec&id=301653](https://www.gp.gov.ua/ua/news?_m=publications&_c=view&_t=rec&id=301653)

## 7. CONCLUSION AND RECOMMENDATIONS

The Truth Commission in Ukraine can become one of the important instruments for overcoming the consequences of the conflict. Such an institution could facilitate fact-finding through the documentation of violations, collection of evidence and public hearings with the participation of war-affected Ukrainians on both sides of the contact line. The process of creating, operating and writing the commission's report can also facilitate national dialogue about the causes and consequences of the conflict, and the formulation of intelligible and generally acceptable theses about controversial historical events of the past.<sup>148</sup>

Such an experience can contribute to the reconciliation of the warring parties and the reintegration of Ukrainian citizens living in the territories not controlled by Ukraine. A broad and open discussion within the country would also help restore "horizontal" and "vertical" trust: between citizens of Ukraine and citizens' trust in public institutions.

With its recommendations in the field of institutional reforms and reparations, the commission could also contribute to the recognition of victims and compensation for damage to victims of hostilities, as well as the establishment of individual and collective responsibility for crimes, including the Russian Federation.

The experience of the countries we examined gave us an understanding of the universal approaches necessary for the successful operation of truth commissions in Ukraine. Below we offer a list of general and specific recommendations for the creation of a Ukrainian model of the Truth and Reconciliation Commission. It must be emphasized that the creation of the commission should be contingent on the end of hostilities in the east of the country.

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<sup>148</sup> See, e.g. [http://ratinggroup.ua/en/research/ukraine/otnoshenie\\_k\\_otdelnym\\_istoricheskim\\_lichnostyam\\_i\\_processu\\_dekommunizacii\\_v\\_ukraine.html](http://ratinggroup.ua/en/research/ukraine/otnoshenie_k_otdelnym_istoricheskim_lichnostyam_i_processu_dekommunizacii_v_ukraine.html)

### A. GENERAL RECOMMENDATIONS

1. The creation of the commission should be preceded by a process of broad, public consultations with all social groups (including representatives of the conflicting parties) in an open, transparent and democratic process.

2. It is preferable to enshrine the need to create a truth commission in legislation, and in post-conflict states — in the texts of peace agreements.

3. The mandate of the commission should include the tasks of the commission to study the historical context and causes of the conflict, motives and patterns of behavior of criminals; the role of the state, or states, social institutions and political parties in committing gross violations of human rights; the impact of these violations on victims. The priorities in the work of the commission may be different and depend on local conditions, but they should all put the interests of victims of violations, their right to compensation for damage and rehabilitation as the top priority.

4. The composition of the commissions should be formed on the principles of professionalism, multiculturalism, inclusiveness and gender equality.

5. All stages of the commission's work should be based on active interaction with civil society and the media so that the voices of victims are heard and the decision-making process is transparent.

6. The criteria of objectivity and impartiality require that in establishing historical truth and conducting investigations, the attention of the commission should be focused on identifying institutions, structures and organizations responsible for committing gross violations of human rights. The identification of specific offenders, although important, is but a secondary task since it belongs to the field of criminal justice, where the commission can transfer the found evidence and evidence for further trial.

7. Considering that truth commissions are faced with the tasks of reconciliation, re-socialization of ex-combatants and possible amnesty, commissions

should be able to use restorative justice tools that best suit the mentality of the population and take into account the interests of the victims of violations.

8. The issues of reparations require the commission not only to identify victims and establish the damage caused, but also to develop a realistic wide range of measures (in addition to financial payments), which can be both individual and collective — symbolic gestures, memorialization, protection of historical heritage, support of local traditions, educational, medical and social services.

9. The commission, as a non-judicial mechanism, cannot solve all the fundamental problems that led to the conflict. But it should strive to clearly identify all the weaknesses in the work of the authorities that were the cause of gross violations of human rights, and refer the task of reforming public administration and developing political and socio-economic measures to avoid a recurrence of the conflict to the authorities.

10. The experience of the European continent demonstrates that the functions of truth commissions can be successfully performed by institutions that are part of the state apparatus of executive authorities. Their effectiveness is determined by a combination of factors: political will, the status granted, the mandate and budget for the implementation of activities such as documentation, memorialization, investigation and lustration processes, public education and applied scientific research. At the same time, the study of the past is possible without a large-scale collection of evidence, as was the case in Latin America and Africa.

11. Unlike traditional truth commissions, European institutions working to restore historical truth have shown an advantage in terms of research and education, with adequate government support, archival preservation and active media engagement. This approach has simultaneously demonstrated that establishing historical justice and dealing with the past can be successful in restorative justice, without widespread repression.

12. The European experience confirms the effectiveness of working with the past and historical remembrance, if it relies on network support for similar initiatives (Platform of European Memory and Conscience).

13. The unsuccessful experience of attempts to create truth commissions in post-conflict societies of

the former Yugoslavia and Northern Ireland perfectly demonstrates to Ukraine the need to take into account the national mentality, the balance of political forces and the availability of resources when building effective work with the past.

## **B. SPECIFIC RECOMMENDATIONS**

Ukraine has the necessary prerequisites for the subsequent development of transitional justice mechanisms: legislative practice in the field of investigating war crimes, ensuring the right to truth, providing compensation for damage to victims of an armed conflict; experience in lustration and security sector reform, educational and advocacy activities of non-governmental organizations, and the presence of large international organizations in the country.

14. For the effective use of the accumulated practices and resources, it is necessary to create an autonomous and independent body, preferably by a parliamentary act, on the basis of broad public discussions and work with sociologists.

15. Considering that the creation of a national model of transitional justice is only at the stage of discussion, the Ukrainian authorities need more active interaction with the international expert community to use more than 40 years of experience in the application of transitional justice in post-conflict countries, in order to carry out peacekeeping initiatives, including peace negotiations, even at the “hot conflict” stage, foreseeing the creation of a truth commission, institutional reforms, improving mechanisms for prosecuting war criminals, developing forms of social protection and restoring the rights of victims of conflict.

16. Consultations and public discussions can take place around the idea of establishing a truth commission, which can be implemented in at least two models. It should be stipulated that both models will require not only a significant increase in the budget, but also the correct formation of the mandate, the provision of national dialogue and a well-constructed information strategy.

17. The first model can be created as a temporary independent institution, modelled after the “standard” truth commissions. At the same time, members of the commission must represent both state structures (for example, the Ministry of Reintegration,

the Ukrainian Institute of National Remembrance) and civil society — national minorities, professional communities and religious communities, etc. After the expiration of the commission's work, the implementation of the recommendations prepared by it and the work with the past can evolve and be continued either by a specially created body (fund, agency, service, inspection), or by the Ukrainian Institute of National Remembrance, reformatted in terms of expanded powers, functions and budgetary resources.

18. The second model, taking into account the European experience, may from the very beginning take the form of a permanent authority, incorporated into the system of public administration. In Ukraine,

there are two institutions that can be considered as potential "points of growth" when creating such a body — temporary parliamentary commissions (modelled after Germany) and the Ukrainian Institute of National Remembrance (modelled after Poland). The first option of development requires the expansion of the powers of parliamentary commissions, a greater degree of their inclusiveness and transparency, the involvement of more experts in the provision of documentation and investigation processes. The second option requires development in such areas as work with voluminous and diverse databases in the process of documentation, education, and development of a network of regional offices.

# APPENDIX

## REVIEW OF TRUTH COMMISSIONS PRACTICES IN OTHER COUNTRIES

### LATIN AMERICA

#### *Argentina: National Commission on the Disappeared, 1983–1985 CONADEP*

A military junta came to power in Argentina in 1976 and ruled the country for the next seven years. Under the pretext of fighting terrorism and leftist opposition, the leaders of the junta launched a campaign of state terror in which 10,000 to 30,000 people disappeared without a trace and many were beaten and tortured in secret prisons scattered throughout the country.<sup>149</sup>

In 1982, the junta lost the war over the Falkland Islands, which were under the British protectorate, and amid massive public outrage, it was forced to agree to democratic elections, carrying out a controlled transfer of power under guarantees of immunity.<sup>150</sup> In October 1983, the newly minted President Raul Alfonsín issued a decree establishing the National Commission on the Disappeared (CONADEP). Alfonsín appointed ten members of the commission, which included cultural and artistic figures: its chairman was the famous writer Ernesto Sabato, the leaders of religious communities — a rabbi and a cardinal — and the president of the University of Buenos Aires.<sup>151</sup>

In the course of its work, the commission collected more than 7,000 crime reports and documented more than 8,960 individual cases of disappearances.<sup>152</sup> More than 1,500 people interviewed were former prisoners of the regime who helped describe the places of detention and methods of torture. The members of the commission themselves visited prisons with vic-

tims of repression and helped to identify 365 secret prisons.<sup>153</sup>

The commission pointed to the ideological polarization of society that led to the conflict, stressing that “terror by radical right and left” groups has laid violence in psychological and cultural traditions that have developed throughout national history.<sup>154</sup>

After 9 months of work, the report of the commission “Never Again” (Nunca Más) was handed over to the President of the country. The publication of a shortened version of the report by a private publishing house, in collaboration with the government, was a landmark event: tens of thousands of copies of the book were sold on the day of its release. One of the first truth commission reports in Latin America, the CONADEP report has become a bestseller and model for state responsibility for violence against its own citizens.<sup>155</sup>

The collected evidence served as an important evidence base for further use in criminal trials of members of the junta, which took place in Argentina until the 2010s.<sup>156</sup>

#### *Chile: National Commission for Truth and Reconciliation, 1990–1991*

In September 1973, General Augusto Pinochet carried out a coup d'état of the civilian government in Chile and ruled the country through violence and repression for the next 17 years.<sup>157</sup> Pinochet was accused

<sup>149</sup> Hayner, *Unspeakable Truths* (Routledge: 2001), p. 33.

<sup>150</sup> *Ibid.*

<sup>151</sup> Nikolai Eppele, *Inconvenient past* (NLO: 2020), p. 140.

<sup>152</sup> Hayner, *Unspeakable Truths*, p. 34.

<sup>153</sup> *Ibid.*

<sup>154</sup> Greg Grandin, “The Instruction of Great Catastrophe: Truth Commissions, National History, and State Formation in Argentina, Chile, and Guatemala”, *American Historical Review* 110:1 (2005), p. 49.

<sup>155</sup> Alejandro Baer and Natan Sznajder, *Memory and Forgetting in the Post-Holocaust Era: The Ethics of Never Again*. (London; New York: Routledge, 2016) p. 30.

<sup>156</sup> *Ibid.*, p. 34.

<sup>157</sup> Hayner, *Unspeakable Truths*, p. 36.

of numerous reprisals against opposition groups. Pinochet's dictatorship ended in 1989 when he agreed to hold an election and then lost to Patricio Aylwin by a slight margin. Shortly thereafter, President Aylwin established the Chilean National Commission for Truth and Reconciliation to investigate human rights violations that occurred during the Pinochet regime.<sup>158</sup>

Aylwin appointed 8 Commissioners, while deliberately choosing 4 Pinochet supporters and 4 oppositionists, thus enlisting the support of the entire commission, chaired by former Senator Raul Rettig.<sup>159</sup>

The Rettig Commission, as it later became known, was tasked with documenting the human rights violations that led to the death or disappearance of people during the years of military rule, from September 11, 1973 to March 11, 1990.<sup>160</sup> It is noteworthy that the mandate of the commission included abductions and assassination attempts carried out by private individuals, and torture and other violations that did not lead to death were beyond the powers of the commission.<sup>161</sup>

The limited mandate of the commission allowed it to effectively investigate all cases of disappearance identified by its staff, and cooperation with NGOs greatly facilitated access to witnesses and families of missing people.<sup>162</sup>

The commission's report, commonly known as the "Rettig Report", was published in February 1991. The final report of the commission documented 3,428 cases of disappearances, killings, torture and abductions, accompanied by short testimonies from victims. Over 95 percent of the human rights violations documented by the commission were committed by officials.<sup>163</sup> But the commission also examined crimes committed by radical left-wing armed groups. The report was fully approved by President Aylwin. Presenting the report to the people, he apologized to the victims and their families on behalf of the state. Augusto Pinochet and the leadership of the armed forces rejected the findings of the report.<sup>164</sup>

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<sup>158</sup> Supreme Decree No. 355 of April 25, 1990.

<sup>159</sup> Hayner, *Unspeakable Truths* p. 36.

<sup>160</sup> Supreme Decree No. 355 of April 25, 1990.

<sup>161</sup> *Ibid.*

<sup>162</sup> Hayner, *Unspeakable Truths* p. 37.

<sup>163</sup> Report of the Chilean National Truth and Reconciliation Commission, p. 14.

<sup>164</sup> Hayner, *Unspeakable Truths* p. 36.

Among significant innovations, the commission recommended the creation of the "National Corporation for Reparation and Reconciliation" to provide ongoing assistance to the families of the victims who gave testimony, as well as to further search for burial sites and to conduct exhumations and compensation for damage (reparations). The report suggested that the reparations should include symbolic measures, as well as significant legal, financial, medical and administrative assistance to victims. The commission also recommended the adoption of human rights legislation, the establishing of an Ombudsman office and the strengthening of civilian authority in Chilean society and the judiciary.<sup>165</sup>

Chile's reform efforts were initially hampered by institutions loyal to former President Pinochet, in particular the military, legislature and judiciary.<sup>166</sup> Attacks by armed left-wing groups on right-wing politicians, including the assassination of right-wing leader Jaime Guzman shortly after the report was published, have suspended planned reconciliation initiatives based on the report's findings.<sup>167</sup>

On 12 August 2003, Chilean President Ricardo Lagos appointed the second commission, the National Commission on Political Imprisonment and Torture, also known as the Valeh Commission, to document additional abuses, including torture, committed during the military dictatorship. The Valeh Commission released its report in November 2004. The commission's report was significant if only because it pointed to the historical causes of civil conflict and offences.<sup>168</sup>

In the end, the process initiated by the commissions gave sufficient impetus to start implementing government reforms.<sup>169</sup> In 2005, following a lengthy constitutional reform process, amendments were made to allow the president to remove military commanders. The National Security Council, a military-dominated body, was stripped of all but advisory powers.<sup>170</sup>

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<sup>165</sup> *Ibid.*

<sup>166</sup> *Ibid.*

<sup>167</sup> <https://www.usip.org/publications/1990/05/truth-commission-chile-90>.

<sup>168</sup> Onur Bakiner, *Between Politics and History*, p. 164.

<sup>169</sup> <https://www.usip.org/publications/1990/05/truth-commission-chile-90>.

<sup>170</sup> *Ibid.*

**Guatemala: Historical Clarification Commission,  
1997–1999**

The civil war in Guatemala between the anti-communist government and the armed left opposition represented by the Guatemalan National Revolutionary Unity (URNG) lasted for more than thirty years and led to the death and disappearance of more than 200,000 people.<sup>171</sup>

An interesting fact is that the creation of the commission preceded the conclusion of the final peace treaty. The commission was created on June 23, 1994 as part of an agreement between the Government of Guatemala and the URNG, signed with the mediation of the United Nations, and the signing of the final peace agreement took place only in 1996.<sup>172</sup>

The mandate of the commission was to identify human rights violations related to the armed conflict, as well as to foster tolerance and to preserve the memory of victims.<sup>173</sup>

Unusual in the Guatemalan Commission was the selection of commissioners: according to the agreement on the establishment of the commission, the Chairman was appointed by the UN Secretary General, a foreign expert was supposed to take that position, and the remaining two members of the commission, Guatemalans, were chosen by the Chairman with the consent of both parties. One of the two local candidates had to be a person of “impeccable reputation”, and the other had to be selected from a list proposed by Guatemalan professors. Thus, the German professor of international law Christian Tomuschat was selected by the UN Secretary General, and the latter, in turn, appointed Otilia Lax de Coty, a researcher of Mayan civilization, and a lawyer, Edgar Alfredo Balcells Trojo.<sup>174</sup>

The commission’s staff, at times up to two hundred people, included both Guatemalans and non-Guatemalans in the secretariat and 14 field offices, headed exclusively by non-citizens.<sup>175</sup>

The commission demanded that the archives of the US government be declassified, with the help of a local non-governmental organization, in order to establish the role of external interference, and also used archives collected and provided by the NGO.<sup>176</sup>

In total, the commission conducted 7,200 interviews with 11,000 victims entered into the database containing information from the US government, among others. The commission presented its final report *Guatemala: Remembrance of Silence (Guatemala: Memoria del Silencio)* on 25 February 1999.<sup>177</sup> It found that repressive methods were used by government agencies, in particular the judiciary, and were not exclusively abuses by the military. The report stated that in the four regions most affected by the violence, “State agents committed acts of genocide against Mayan groups”<sup>178</sup>. At the same time, the commission criticized the role of the United States in unleashing and inciting the conflict, and also described the impact of the Cold War on the political mood in the country and pointed out the responsibility of political elites in creating an atmosphere of violence and hatred due to poor leadership of the country and systematic discrimination in relation to national minorities.<sup>179</sup>

The commission was not allowed to name the perpetrators or call for prosecution in its report. Reparation measures were recommended, such as the erection of monuments, the dedication of parks or buildings to victims of violations, restitution of Mayan property, and financial assistance for exhumations.<sup>180</sup>

Colombian Truth, Coexistence and Non-Repetition Commission: 2018 — current.

In September 2016, the Colombian government and representatives of the Revolutionary Armed Forces of Colombia (FARC) signed a definitive peace agreement ending 52 years of armed conflict that killed at least 260,000 Colombians.<sup>181</sup>

The peace agreement established a transitional justice mechanism known as the Comprehensive Sys-

<sup>171</sup> Hayner, *Unspeakable Truths*, p. 45.

<sup>172</sup> <https://www.usip.org/publications/1997/02/truth-commission-guatemala>.

<sup>173</sup> Agreement on the establishment of the Commission to clarify past human rights violations and acts of violence that have caused the Guatemalan population to suffer (PDF-95KB), June 23, 1994.

<sup>174</sup> Hayner, *Unspeakable Truths*, p. 47.

<sup>175</sup> *Ibid.*

<sup>176</sup> *Ibid.*

<sup>177</sup> <https://www.usip.org/publications/1997/02/truth-commission-guatemala>

<sup>178</sup> Final Report, English version, §122.

<sup>179</sup> Bakiner, p. 166.

<sup>180</sup> <https://www.usip.org/publications/1997/02/truth-commission-guatemala>

<sup>181</sup> <https://www.aljazeera.com/news/2013/7/25/report-says-220000-died-in-colombia-conflict>

tem of Truth, Justice, Reparation and Non-Repetition to protect the rights of victims.<sup>182</sup> As part of the national effort to implement this unique system, several bodies have been established, including the Truth, Coexistence and Non-Repetition Commission (Truth Commission), the Special Peace Jurisdiction and the Missing Persons Trace Team.<sup>183</sup>

The government created the truth commission through legislation and structured its work through presidential decree. According to the decree, the truth commission was to operate for three years after an additional six months of institutional preparation.<sup>184</sup>

The truth commission began its work on 28 November 2018 to prepare a report with recommendations that will lay the foundation for reconciliation and a stable, lasting peace. According to the peace agreements, the main tasks of the commission are: to investigate and explain the causes of the outbreak of an armed conflict, to promote the recognition of individual and collective victims and the voluntary acceptance of responsibility in order to prevent a recurrence of the conflict, and to promote a tolerant, respectful and democratic coexistence in the country based on dignity and rights of the victims.<sup>185</sup>

The commission seeks to bring together the historical narrative of the conflict in Colombia and, most importantly, to give voice to the thousands of victims whose suffering has remained silent until now. The commission was the first to place gender at the centre of its mandate. By December, the commission had heard from 5,243 victims and 10,755 people in formats such as one-to-one interviews, collective testimony and hearings with titles such as “meetings for the truth” and “dialogues for non-repetition”.<sup>186</sup> Currently, its key priority is to collect thousands of testimonies from all walks of life in Colombian society

in order to try to compile a complete picture of what happened and why.

As early as the end of 2021, the commission will publish its report, but its findings and databases cannot be used in prosecutions. The administration of justice and the provision of legal benefits to former FARC members will be handled by the Special Jurisdiction for Peace. It includes the Judicial Collegium for Amnesty and Pardon, the Judicial Collegium for the Recognition of Truth, Responsibility and Establishment of Facts and Behavior, and the Judicial Collegium for determining the legal situation. The entire system operates on the basis of the carrot-and-stick principle: if criminals confess what they have done, tell the truth and accept responsibility, they will either be eligible for amnesty if their crime is of a political nature (as defined in the peace agreement), or be subject to alternative sentences such as community service. In cases where criminals do not tell the truth or take responsibility, they face more serious and harsh penalties, including imprisonment. This comprehensive system is commendable for its victim-centered restorative approach and focus on the right to truth.

## AFRICA AND SOUTH-EAST ASIA

### *South Africa: Truth and Reconciliation Commission, 1995–2002*

#### Reasons for creation

Forty-five years of apartheid and over thirty years of armed confrontation between the state and the African National Congress (1960–1994) resulted in mass killings, torture, lengthy prison sentences of activists, economic and social discrimination. The need to record and recognize politically motivated crimes committed in order to defend or fight to abolish apartheid led to the creation of the Truth and Reconciliation Commission in 1995.

#### Preconditions

- discussion of the idea to create a truth commission in South Africa included in the political and public agenda since 1992;
- holding two international conferences on the experience of applying transitional justice in other countries;
- a broad process of national consultations, hundreds of hours of parliamentary debate, public

<sup>182</sup> Acuerdo Final para la Terminación del Conflicto y la Construcción de una Paz Estable y Duradera, available at: <https://www.jep.gov.co/Normativa/Paginas/Acuerdo-Final.aspx>

<sup>183</sup> Ibid.

<sup>184</sup> Decree Law 588 of 2017.

<sup>185</sup> ICJ Report: “Colombia: The Special Jurisdiction for Peace, Analysis One Year and a Half After its Entry into Operation”, available at: <https://www.icj.org/wp-content/uploads/2020/05/Colombia-Jurisd-para-la-paz-PUBLICATIONS-Reports-Fact-finding-mission-report-2019-ENG.pdf>

<sup>186</sup> <https://www.justiceinfo.net/en/44027-political-tussle-over-truth-and-memory-in-colombia.html>

discussions of the draft law on the creation of a commission, which led to an increase in the level of awareness, involvement and confidence of the population in the actions of the government;<sup>187</sup>

- the adoption of the Promotion of National Unity and Reconciliation Act in 1995, providing for the creation and operating procedures of the commission, which signified broad political support for and the institutional strength of the commission.<sup>188</sup>

### Mandate

The commission's mandate remains one of the most complex and comprehensive of all truth commissions to date.

The commission was conceived as one of several instruments (see, for example, *Land Claims Court, Constitutional Court, Human Rights Commission, Commission for Gender Equality, National Youth Commission*), aimed at advancing the state from a society divided by apartheid to democracy and the recognition of human rights.

The main goal of the commission was to establish the most complete picture of the reasons, nature and extent of gross violations of human rights committed between 1 March 1960 and 10 May 1994. At the same time, it was necessary to study the previous stages, circumstances, factors and context of such violations, as well as the motives of the individuals responsible for committing violations. The founders of the commission were convinced that truthful reporting of gross violations of human rights in the past and public recognition of injustice helps restore the dignity of victims, and provides criminals with an opportunity to come to terms with their past and ultimately contribute to reconciliation and national unity.<sup>189</sup>

Other objectives of the commission's work included:

- the assistance (facilitation) of the announcement of amnesty to persons who had fully dis-

closed all relevant facts concerning the actions related to a political purpose;

- establishing and communicating facts about the fate or whereabouts of victims, restoring the human and civil dignity of such victims by giving them the opportunity to present their own testimonies of the violations they suffered from, developing recommendations on compensation for victims;
- preparation of the most complete report on the activities and conclusions of the commission, with recommendations on measures to prevent future violations of human rights.<sup>190</sup>

The functions of the commission were to achieve its objectives, and to this end, the commission facilitated, initiated or coordinated investigations:

- of gross violations of human rights, including violations that have been part of a systematic practice of abuse;
- of the nature, causes and extent of gross violations of human rights, including prior events, circumstances, factors, context, motives and perspectives that led to such violations;
- regarding the identity of all persons, authorities, institutions and organizations involved in such violations;
- whether such violations were the result of deliberate planning by the state or any of its organs, or by any political organization, liberation movement, other group or person;
- regarding liability (political or otherwise) for any such violation;

To carry out these goals and functions, the commission's mandate provided it with carefully balanced investigative powers: to conduct public hearings, collect information and seize evidence, conduct a search of premises, call witnesses and adopt a program to protect them, grant individual amnesty.

### Election of the members of the commission

South Africa was the first country to appoint commissioners based on the opinion of an independent selection panel and public interviews with the finalists. The selection group (which also included human rights defenders), having received documents from

<sup>187</sup> Hayner, *Unspeakable Truths*, p. 27.

<sup>188</sup> Promotion of National Unity and Reconciliation Act 34 of 1995. Chapter 2 «Truth and Reconciliation Commission» (ss. 2–11), <https://www.justice.gov.za/legislation/acts/1995-034.pdf>

<sup>189</sup> Truth and Reconciliation Commission of South Africa Report. Volume 1, p. 48–49, <https://www.justice.gov.za/trc/report/finalreport/Vol-ume%201.pdf>

<sup>190</sup> Truth and Reconciliation Commission of South Africa Report. Volume 1, p. 55, <https://www.justice.gov.za/trc/report/finalreport/Vol-ume%201.pdf>

300 candidates, admitted only fifty of them to the next stage (interview). Interviews were conducted publicly and closely monitored by the media. A list of 25 successfully interviewed candidates was sent to the President, who appointed 17 commissioners, 5 of them women. Adhering to a gender perspective was particularly important given the public demand to have women surveyed exclusively by women commissioners.<sup>191</sup>

### Structure

In accordance with the law, the work of the commission was divided between 3 interconnected committees:

1. The Committee on Human Rights Violations was responsible for collecting statements from victims and witnesses and recording the extent of gross human rights violations;

2. The Committee on Amnesty considered individual amnesty applications;

3. The Committee on Reparation and Rehabilitation developed recommendations on the reparations program.

The activity of the committees was strengthened by the creation of the separate Investigating Unit and the commission's right to create subcommittees if necessary.<sup>192</sup>

### Resources

The commission was allocated a budget of \$45 million for the first 2.5 years. This allowed the opening of four regional offices and hiring more than three hundred employees.

### Results

1. For three years, the commission collected testimonies from more than 21,290 people, 2,000 of whom also appeared at public hearings. The commission found that more than 19,050 people were victims of gross human rights violations. Another 2,975 victims were identified based on the materials in applications for amnesty.

<sup>191</sup> Truth Seeking: Elements of Creating an Effective Truth Commission. Ed. Eduardo González and Howard Varney, 2013, 71 p. — P. 18. <https://www.ictj.org/sites/default/files/ICTJ-Book-Truth-Seeking-2013-English.pdf>

<sup>192</sup> Promotion of National Unity and Reconciliation Act 34 of 1995, <https://www.justice.gov.za/legislation/acts/1995-034.pdf>

2. The commission received 7,115 applications for amnesty, of which 4,500 were rejected mainly on the grounds that the crimes reported were not politically motivated. Subsequently, 1167 people were amnestied and 145 people. Received a partial amnesty, although the real number of credible applications was, according to experts, about 2500.<sup>193</sup>

3. The commission held special hearings on the involvement of key societal institutions in abuses: the legal and religious communities, the business, health, media, prison and military sectors.

4. Separate hearings dealt with the use of chemical and biological weapons against opponents of apartheid, compulsory military service, political party politics, and how violence affected young people and women.

5. The commission compiled a list of victims who were eligible for reparations and developed an initial reparations program.

6. Former President F.W. de Klerk appeared before the commission and reiterated his apology for the suffering caused by apartheid.

7. The results of the commission are published in seven volumes. The first came out in 1998, the seventh in 2003, six years after the start of the commission's work.

8. As the successor of the commission, the Institute for Justice and Reconciliation (IJR), <https://www.ijr.org.za/about-us/>) was created in 2000. The institute helps build a just and inclusive society based on the lessons learned from South Africa's transition from apartheid to democracy. The main areas of the Institute's activities are problems of political reconciliation, social and economic justice and the post-conflict stability of society.

### Publicity and transparency of work

The South African experience is one of the first successful examples of a truth commission's intense partnership with the media: most newspapers published daily articles on the Commission's work; four hours of hearings were broadcast live on national radio every day. A Sunday night TV Show on the Com-

<sup>193</sup> Jeremy Sarkin, *Carrots and Sticks: The TRC and the South African Amnesty Process* (Antwerp: Intersentia, 2004) pp. 107–115. [https://books.google.ge/books?id=xc\\_3qbj7ID0C&printsec=copyright#v=onepage&q&f=false](https://books.google.ge/books?id=xc_3qbj7ID0C&printsec=copyright#v=onepage&q&f=false)

mission's Special Report became the most watched news program in the country.<sup>194</sup>

Meetings of the commission were scheduled in various cities of South Africa in order to collect the largest number of interested participants. Thus, public hearings on the amnesty were held on 2,548 incidents. They took place over 1,888 days at 267 locations across the country, with 1,538 translators translating over 11,680 hours.<sup>195</sup>

### Flaws

1. The commission was sharply criticized by human rights organizations for the insufficient use of "coercive" powers: summoning to court, conducting a search, seizing the necessary evidence and materials. This criticism concerned the commission's indecisive actions against the headquarters of the South African Defence Forces, the Minister of the Interior, the Office of the African National Congress (ANC) and the President of the Freedom Party, who sabotaged the commission's requests for information.<sup>196</sup>

2. A critical situation was when the Amnesty Committee, having considered the case behind closed doors and refused to explain its decision, granted amnesty to thirty-seven ANC leaders who had confessed to gross violations of human rights. In response, the commission requested a judicial review and the committee's decision was overturned by the High Court.

3. The publication of the final report of the commission was entrusted to a private academic publisher who operated in a market environment, resulting in a limited edition and expensive printing.<sup>197</sup>

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<sup>194</sup> Truth Seeking: Elements of Creating an Effective Truth Commission. Ed. Eduardo González and Howard Varney, 2013, 71 p., <https://www.ictj.org/sites/default/files/ICTJ-Book-Truth-Seeking-2013-English.pdf>

<sup>195</sup> Jeremy Sarkin, *Carrots and Sticks: The TRC and the South African Amnesty Process*. (Antwerp: Intersentia, 2004) p. 108. [https://books.google.ge/books?id=xc\\_3qbj7ID0C&printsec=copyright#v=onepage&q&f=false](https://books.google.ge/books?id=xc_3qbj7ID0C&printsec=copyright#v=onepage&q&f=false)

<sup>196</sup> Kader Asmal, "Victims, Survivors and Citizens: Human Rights, Reparations and Reconciliation," *South African Journal on Human Rights* Vol. 8, no. 4 (1992): 491–511. <https://www.tandfonline.com/doi/abs/10.1080/02587203.1992.11827877>

<sup>197</sup> Truth Seeking: Elements of Creating an Effective Truth Commission. Ed. Eduardo González and Howard Varney, 2013, 71 p., <https://www.ictj.org/sites/default/files/ICTJ-Book-Truth-Seeking-2013-English.pdf>

### Innovations

The Commission's biggest innovation and the most controversial of its powers was its right to grant individual amnesty for politically motivated crimes. At the same time, no apologies or signs of remorse were required for the amnesty. Any crimes committed for personal gain, due to personal ill will or malice were not subject to amnesty.

Unlike the Latin American truth commissions, the South African commission had the power to summon people to meetings, compel witnesses or criminals to provide evidence, search premises and seize necessary materials. This led to a more thorough internal investigation and direct questioning of witnesses, including those who were implicated in the violations but did not apply for amnesty.

The commission was the first to create a witness protection program. This enhanced its investigative capabilities and allowed witnesses to provide information that they feared might endanger them.<sup>198</sup>

The commission allowed victims to participate in the granting of amnesty when the perpetrators confessed to their crimes. Although that step was controversial, the commission also encouraged several cases of direct contact between victim groups and offenders in an attempt to foster dialogue and understanding.<sup>199</sup>

Using the principles of the African philosophy of Ubuntu, the commission proposed the possibilities of a conciliatory approach within the framework of restorative justice as no less effective than the mechanisms of traditional retributive (punitive) justice. To understand the process of reconciliation, the commission proposed to establish in the course of its work 4 types of truth:

Factual or forensic truth. This kind of truth is understood as legal or scientific knowledge about a subject. This type of truth includes recorded facts about what happened.

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<sup>198</sup> Truth and Reconciliation Commission of South Africa Report. Volume 1, p. 54, <https://www.justice.gov.za/trc/report/finalreport/Volume%201.pdf>

<sup>199</sup> Truth Seeking: Elements of Creating an Effective Truth Commission. Ed. Eduardo González and Howard Varney, 2013, 71 p., <https://www.ictj.org/sites/default/files/ICTJ-Book-Truth-Seeking-2013-English.pdf>

- Personal or narrative truth. This kind of truth allows victims and perpetrators to tell what they think is true. Reconciliation occurs when an individual truth is revealed that explains why a particular person acted in a certain way.
- Social or 'dialogue' truth originates in the exchange of opinions by representatives of various social groups, in the course of discussions and disputes. Admitting a dispute provides an opportunity to test the strength of people's opinions and facts.
- Healing and restorative truth. Although any truth introduces an inevitable division ("we-they", "right-wrong", "guilty-not guilty"), it should lead to the subsequent building of new relationships. Thus, restorative truth is about those commonalities that allow different groups and people to build a vision of a common future, which does not allow open wounds to remain unhealed.<sup>200</sup>

The commission focused not only on victims, but also on the reconstruction of historical truth, playing a key role in proving the illegality of apartheid, decriminalizing the resistance movement, recognizing the impartial facts of crimes committed on both sides. Historical truth became the moral basis for the transition to democracy and constitutionalism, social and political cooperation, and moral condemnation of the past allowed the creation of new moral standards for the future.<sup>201</sup>

### ***Sierra Leone: Truth and Reconciliation Commission, 2002–2004***

#### **Reasons for creation**

The need to give a historical assessment of the armed conflict (1991–2002) between the forces of the government and the United Revolutionary Front with the participation of military contingents of other

states (Nigeria, Liberia) and rebel groups. The conflict resulted in 70,000 deaths, hundreds of thousands of victims of violent crimes and 2.6 million displaced persons.<sup>202</sup>

#### **Preconditions**

- the presence of a UN peacekeeping mission (UNAMSIL, 1999–2006);
- several conferences in Sierra Leone and beyond on the Truth Commission Act and Compensation Mechanisms for Victims of Conflict;
- support for the idea of establishing the commission by key politicians and fixing it in the text of the peace agreement;
- establishment of the Commission's Working Group under the auspices of the National Forum for Human Rights (September 1999);
- the Office of the United Nations High Commissioner for Human Rights (OHCHR) held consultations with civil society, representatives of the government and the Revolutionary United Front (formerly armed opposition);
- development of a draft law on the commission by OHCHR experts as technical assistance;
- finalization and unanimous adoption by Parliament of the Truth and Reconciliation Commission Act (2000).<sup>203</sup>

#### **Mandate**

The Commission's mandate was set out in the Lomé Peace Agreement in exclusively moral but legally imprecise language: "to fight impunity", "to break the vicious circle of violence", "to provide a forum for victims and human rights violators to tell their stories", "to receive a clear picture of the past".

The same legally imprecise style was inherited by the law, which defined the following functions of the commission: to create an impartial historical account of violations of human rights and international humanitarian law during the armed conflict (1991–1999); to fight impunity; to respond to the needs of

<sup>200</sup> Truth and Reconciliation Commission of South Africa Report. Volume 1, p. 110–114, <https://www.justice.gov.za/trc/report/finalreport/Volume%201.pdf>

<sup>201</sup> Truth Seeking: Elements of Creating an Effective Truth Commission. Ed. Eduardo González and Howard Varney, 2013, 71 p., <https://www.ictj.org/sites/default/files/ICTJ-Book-Truth-Seeking-2013-English.pdf>; Gutmann, A. and Thompson, D. (eds), Truth vs Justice: The Morality of Truth Commissions. Princeton University Press, N.J., 2000. 344 p.

<sup>202</sup> Case study. Sierra Leone in "Evaluation of UNDP Support to Conflict-Affected Countries". New York: UNDP. 2006. 117 p. <http://web.undp.org/evaluation/documents/thematic/conflict/SierraLeone.pdf>

<sup>203</sup> Sierra Leone TRC Reports. Vol. 1. P. 49–51. <https://www.sierraleonetr.org/index.php/view-the-final-report/download-table-of-contents>

victims; promote healing and reconciliation; prevent the recurrence of past violations and abuses. At the same time, the law did not prioritize these goals and did not specify how the commission should achieve these goals.<sup>204</sup> The law only gave the commission the power to issue subpoenas to testify.

The vagueness of the mandate also applies to the wording. Investigations into human rights violations, for example, do not specify exactly what types of violations in the context of war should be addressed by the commission.

### Election of the Commission members

Created following the example of South Africa, on the basis of the law, the Sierra Leone Commission was formed with one particularity — with the participation of the UN and the appointment of foreign experts as commissioners. The latter were appointed to build confidence in the commission's work, minimize suspicions of bias, and conduct comparative examination. The composition of the commission included 4 national representatives and 3 international experts.

A selection panel was established to select national candidates, headed by the Special Representative of the UN Secretary General in Sierra Leone. The 6-member panel included representatives of the President, the Armed Forces Revolutionary Council, the Inter-Religious Council, the National Forum for Human Rights and the National Commission for Democracy and Human Rights. Of the 65 candidates selected by the panel after public interviews, four of them were recommended to the President for appointment.

Three more international experts, after discussion of their candidacies by the panel, were recommended by the UN High Commissioner for Human Rights. The commission's decision was approved by the country's President in 2002.<sup>205</sup>

### Structure

In accordance with the law, the commission had the status of a fully independent body. However, it

was later decided that the commission would be administered as an OHCHR project. This was not a very good decision, since the commission needed independence in making operational decisions.<sup>206</sup>

The work of the commission was supported by a secretariat consisting of 4 departments: Legal and Reconciliation; Administration and Programming; Information Management; Public information and education.<sup>207</sup>

### Resources

The planned budget of the commission (\$10 million) was cut in half (\$4.7 million) and consisted mainly of funds from international donors. The lack of budget limited the number of staff (240 people), therefore, to receive applications, the commission attracted employees of local human rights NGOs, having previously trained them.<sup>208</sup>

In the early stages, the commission did not have minimum standards for hiring, so about a third of the hired staff were found to be unqualified or were fired.<sup>209</sup>

### Results

1. The commission received a total of 7706 applications, more than 10% of which were received directly from criminals, with many admitting in detail to their actions. About 200 written documents were received from NGOs, national or international organizations.<sup>210</sup>

<sup>204</sup> Elena Naughton. SIERRA LEONE: CASE STUDY (p. 34–41). In *Challenging the Conventional: Can Truth Commissions Strengthen Peace Processes?* — International Center for Transitional Justice and the Kofi Annan Foundation. 2016. — 86 p., P. 36. [https://www.ictj.org/sites/default/files/ICTJ\\_TruthCommPeace\\_English\\_2016.pdf](https://www.ictj.org/sites/default/files/ICTJ_TruthCommPeace_English_2016.pdf)

<sup>205</sup> Sierra Leone TRC Reports. Vol. 1. P. 53. <https://www.sierraleonetr.org/index.php/view-the-final-report/download-table-of-contents>

<sup>206</sup> Hayner, *Unspeakable Truths*, pp. 58–60.

<sup>207</sup> Sierra Leone TRC Reports. Vol. 1. P. 64. <https://www.sierraleonetr.org/index.php/view-the-final-report/download-table-of-contents>

<sup>208</sup> Hayner, *Unspeakable Truths*, pp. 58–60. [https://edisciplinas.usp.br/pluginfile.php/4215774/mod\\_resource/content/0/Unspeakable%20Truths\\_%20Transitional%20Justice%20and%20the%20Challenge%20of%20Truth%20Commissions%20%20-Routledge%20%282010%29.pdf](https://edisciplinas.usp.br/pluginfile.php/4215774/mod_resource/content/0/Unspeakable%20Truths_%20Transitional%20Justice%20and%20the%20Challenge%20of%20Truth%20Commissions%20%20-Routledge%20%282010%29.pdf); Sierra Leone TRC Reports. Vol. 1. <https://www.sierraleonetr.org/index.php/view-the-final-report/download-table-of-contents>

<sup>209</sup> Elena Naughton. Sierra Leone: Case study (p. 34–41). In *Challenging the Conventional: Can Truth Commissions Strengthen Peace Processes?* — International Center for Transitional Justice and the Kofi Annan Foundation. 2016. — 86 p., P. 38. [https://www.ictj.org/sites/default/files/ICTJ\\_TruthCommPeace\\_English\\_2016.pdf](https://www.ictj.org/sites/default/files/ICTJ_TruthCommPeace_English_2016.pdf)

<sup>210</sup> Mohamed Gibril Sesay, Mohamed Suma, "Transitional Justice and DDR: The Case of Sierra Leone". International Center for Transitional Justice, June 2009. 40 p., P. 17. [https://www.researchgate.net/publication/268368949\\_Transitional\\_Justice\\_and\\_DDR\\_the\\_Case\\_of\\_Sierra\\_Leone](https://www.researchgate.net/publication/268368949_Transitional_Justice_and_DDR_the_Case_of_Sierra_Leone)

40,242 crimes were recorded, 113 mass graves were discovered.<sup>211</sup>

2. Over the course of 5 months, the commission held more than 500 individual hearings (open and closed) across the country, dedicated to the experience of victims and ex-combatants and to significant events of the conflict. Testimony from 450 witnesses was obtained and documented.

3. President Ahmad Tejan Kabbah testified at the final hearing in Freetown but refused to apologize for state abuses.

4. Major political parties, military and police officials publicly apologized for the role they played before and during the conflict.

5. The commission's report included four volumes (2004) and an hour-long video summary indicating that the main causes of the war were "rampant greed, corruption and nepotism" together with the government's complete lack of responsibility over the years.<sup>212</sup>

6. The commission made over 220 recommendations to the government regarding the protection of human rights, the fight against corruption, the reform of the security sector, and the improvement of the democratic participation of youth and women.<sup>213</sup> The government had to provide public reports on the implementation of the recommendations on a quarterly basis.

7. The UN Peacebuilding Fund (2006) disbursed \$3 million for a reparations program, following the commission's recommendations.

### Publicity and transparency of the work

OHCHR provided a grant to the International Human Rights Law Group to launch a public awareness campaign on the commission's work. The campaign,

in cooperation with NGOs, involved cooperation with the media (radio, television), producing songs, dramas and posters.

Some NGOs (National Forum for Human Rights, National Commission for Democracy and Human Rights) received separate financial support to conduct information programs about the commission<sup>214</sup>.

Working actively with human rights organizations, the commission facilitated the creation of a civil society network to monitor how the government responds to the commission's recommendations. The network directly contacted the authorities, received reports from them on the implementation of the commission's recommendations, thereby exercising public control.

The commission developed a child-friendly version of its report for schools (2004).

Thanks to this approach, the work of the commission began to be supported from the very beginning by ex-combatants from all sides, which in turn increased the overall level of trust in it.<sup>215</sup>

### Flaws

1. The government prepared a "white paper" evaluating the commission's report and its broad recommendations, and civil society developed a consolidated bill (2005) covering aspects requiring legislative action. However, the "white paper" did not pay sufficient attention to the implementation of the commission's recommendations, and the draft law was not adopted. Therefore, in 2008, the commission's recommendations were characterized as "suspended at the stage of partial implementation".<sup>216</sup>

2. The practice of public hearings contradicted the local community's concept of healing and reconciliation, which was based mainly on mechanisms of social oblivion. The commission's desire to speak

<sup>211</sup> Elena Naughton. SIERRA LEONE: CASE STUDY (p. 34–41). In *Challenging the Conventional: Can Truth Commissions Strengthen Peace Processes?* — International Center for Transitional Justice and the Kofi Annan Foundation. 2016. — 86 p. [https://www.ictj.org/sites/default/files/ICTJ\\_TruthComPeace\\_English\\_2016.pdf](https://www.ictj.org/sites/default/files/ICTJ_TruthComPeace_English_2016.pdf)

<sup>212</sup> *Witness to Truth: Final Report of the Sierra Leone Truth and Reconciliation Commission*, 2004. <https://www.sierraleonetr.org/index.php/view-the-final-report/download-table-of-contents>

<sup>213</sup> Mohamed Gibril Sesay, Mohamed Suma, "Transitional Justice and DDR: The Case of Sierra Leone". International Center for Transitional Justice, June 2009. 40 p., P. 17. [https://www.researchgate.net/publication/268368949\\_Transitional\\_Justice\\_and\\_DDR\\_the\\_Case\\_of\\_Sierra\\_Leone](https://www.researchgate.net/publication/268368949_Transitional_Justice_and_DDR_the_Case_of_Sierra_Leone)

<sup>214</sup> Sierra Leone TRC Reports. Vol. 1. P. 52. <https://www.sierraleonetr.org/index.php/view-the-final-report/download-table-of-contents>

<sup>215</sup> Post-conflict Reintegration Initiative for Development and Empowerment (PRIDE), "Ex-Combatant Views of the Truth and Reconciliation Commission and the Special Court in Sierra Leone," September 12, 2002. <http://www.rscsl.org/Documents/pride2002.pdf>

<sup>216</sup> Hayner, *Unspeakable Truths*. p. 60. [https://edisciplinas.usp.br/pluginfile.php/4215774/mod\\_resource/content/0/Unspeakable%20Truths\\_%20Transitional%20Justice%20and%20the%20Challenge%20of%20Truth%20Commissions%20%20-Routledge%20%282010%29.pdf](https://edisciplinas.usp.br/pluginfile.php/4215774/mod_resource/content/0/Unspeakable%20Truths_%20Transitional%20Justice%20and%20the%20Challenge%20of%20Truth%20Commissions%20%20-Routledge%20%282010%29.pdf)

publicly about the past disrupted local practices of reintegration and healing, which made it imperative for future truth commissions to seek methods that were more consistent with local reconciliation practices.<sup>217</sup>

### Innovations

The commission involved local leaders in African culture's traditional "reconciliation ceremonies," in which those who confessed to crimes went through a "cleansing ritual" to be accepted by their communities. Reconciliation ceremonies were also held at the end of some of the weekly hearings, when victims and perpetrators were in direct contact for extended periods.<sup>218</sup>

The commission focused on victims of sexual violence and children who were either victims or perpetrators.

### *Liberia: Truth and Reconciliation Commission, 2006–2009*

#### Reasons for creation

Two civil wars (1989–1997, 1999–2003) led to the death of approximately 250,000 people and the forced displacement of about 1.5 million civilians. The fighting was accompanied by numerous instances of war crimes committed by both government forces and two armed opposition groups. Since 2003, there have been more than 101,000 ex-combatants in the country.

#### Preconditions

- consolidation of the article on the establishment of the commission (2003) in the text of the peace agreement simultaneously with the request to the international community to provide the necessary financial and technical support for the activities of the commission;

- active participation of civil society in the development of the law on the commission;
- presence in the country of UN peacekeeping missions (UNMIL) and the Economic Community of West African States (ECOWAS).

### Mandate

The 2003 peace agreement defined the commission as a forum for dealing with issues of impunity, providing an opportunity for both victims and perpetrators of human rights violations to share their experiences in order to gain a clear picture of what happened and thus foster genuine healing and reconciliation. At the same time, the commission should address the root causes of the crises in Liberia and recommend measures to rehabilitate victims of human rights violations.<sup>219</sup>

Accordingly, in the mandate, the main purpose of the commission was to promote national peace, security, unity and reconciliation by performing the following functions:

- investigation of gross violations of human rights and international humanitarian law, as well as abuses that occurred, including massacres, sexual violence, killings, extrajudicial killings and economic crimes (such as the exploitation of natural or state resources to sustain armed conflicts) committed during the period of 1979–2003;
- the establishing of the reasons, circumstances and context of such violations; identification of persons responsible for committing violations, their motives, as well as their influence on victims; establishing whether these violations were isolated or were systematic and deliberate;
- creation of the forum to address issues of impunity, as well as an opportunity for both victims and perpetrators of violations to share their experiences in order to create a clear picture of the past in order to achieve true healing and reconciliation;

<sup>217</sup> Rosalind Shaw, "Rethinking Truth and Reconciliation Commissions: Lessons from Sierra Leone," United States Institute of Peace, Special Report 130, February 2005. <https://www.usip.org/publications/2005/02/rethinking-truth-and-reconciliation-commissions-lessons-sierra-leone>

<sup>218</sup> Hayner, *Unspeakable Truths*, pp. 58–60. [https://edisciplinas.usp.br/pluginfile.php/4215774/mod\\_resource/content/0/Unspeakable%20Truths\\_%20Transitional%20Justice%20and%20the%20Challenge%20of%20Truth%20Commissions%20-%20Routledge%20%282010%29.pdf](https://edisciplinas.usp.br/pluginfile.php/4215774/mod_resource/content/0/Unspeakable%20Truths_%20Transitional%20Justice%20and%20the%20Challenge%20of%20Truth%20Commissions%20-%20Routledge%20%282010%29.pdf)

<sup>219</sup> Comprehensive Peace Agreement Between the Government of Liberia and the Liberians United for Reconciliation and Democracy (LURD) and the Movement for Democracy in Liberia (MODEL) and Political Parties Accra, August 18, 2003. Article XIII. [https://www.usip.org/sites/default/files/file/resources/collections/peace\\_agreements/liberia\\_08182003.pdf](https://www.usip.org/sites/default/files/file/resources/collections/peace_agreements/liberia_08182003.pdf)

- conducting a critical review of Liberia’s historical past to establish the historical background of the conflict and correct historical falsehood;
- adoption of specific mechanisms and procedures to take into account the experiences of women, children and vulnerable groups, with a focus on gender-based violations as well as the issue of child soldiers, giving them the opportunity to share their experiences.<sup>220</sup>

Unlike South Africa, the Liberian commission used only the right to summon the necessary witnesses to court, resorting to the powers of the Special Magistrate. It could only recommend the application of individual amnesty, except in cases where the case involved war crimes and gross violations of human rights.<sup>221</sup>

### Election of the members of the commission

The first composition of commissioners was appointed by the head of the transitional government in 2004 without transparent selection procedures and without extensive consultations, before the law on the commission itself was adopted (2005). This caused a violent reaction from civil society and the need for commissioners to go through the selection process provided for by the law. Only two of the original appointees remained in the final composition of the nine commissioners of the commission.

The selection committee consisted of representatives of political parties (2 persons), NGOs (3 persons), UN (1 person) and ECOWAS (1 person). Out of more than 150 nominees, the commission selected 9 commissioners: 4 women and 5 men (2 lawyers, 1 NGO expert, 3 religious leaders, a security specialist, a nurse, a journalist). Gender balance was predetermined by law.<sup>222</sup>

<sup>220</sup> Truth and Reconciliation Commission Act of Liberia. National Transitional Legislative Assembly, May 12, 2005. Article IV. <http://trcofliberia.org/about/trc-mandate.html>

<sup>221</sup> Truth And Reconciliation Commission Act of Liberia. National Transitional Legislative Assembly, May 12, 2005. Articles VII–VIII. <http://trcofliberia.org/about/trc-mandate.html>

<sup>222</sup> Truth and Reconciliation Commission. Volume II: Consolidated Final Report. The TRC of Liberia. 2009. 470 p. [http://www.trcofliberia.org/resources/reports/final/volume-two\\_layout-1.pdf](http://www.trcofliberia.org/resources/reports/final/volume-two_layout-1.pdf); Truth And Reconciliation Commission Act of Liberia. National Transitional Legislative Assembly, May 12, 2005. Article IV. <http://trcofliberia.org/about/trc-mandate.html>

### Structure

The work of the commission was supported by: the Secretariat, 13 committees — Gender Committee, Children’s Committee, Youth Committee, Media & Outreach Youth Committee, Economic Crimes, Religion, Traditional & Reconciliation, Civil Society Historical Review, Diaspora Program and Planning, People with Special Needs Governance; International Technical Advisory Committee; Inquiry Unit and Psycho-Social Unit.

A special magistrate was appointed by the president to carry out the commission’s functions such as issuing summons and warrants, conducting quasi-judicial investigations of contempt of court.<sup>223</sup>

### Resources

The commission’s budget was set at \$7.56 million, of which \$4.4 million came from the state budget, and the rest came from donors (United Nations Development Program, the European Union, the Open Society Institute of West Africa, Denmark, Sweden, United States). More than 400 national and international staff worked in the commission and 15 regional offices on a permanent or contract basis. The commission began its full-fledged work only in 2007 after receiving donor funds.

### Results

1. The commission documented more violations than any previous truth commission. It received applications from 20,560 Liberians, including those living abroad. With the assistance of the Californian NGO Benetech, the Commission was able to record stories of 93,322 victims, 163,615 violations (over 58,000 forced displacements, 28,000 murders, 6,000 rapes).<sup>224</sup>

<sup>223</sup> Truth and Reconciliation Commission. Volume II: Consolidated Final Report. The TRC of Liberia. 2009. 470 p., P. 35–39. [http://www.trcofliberia.org/resources/reports/final/volume-two\\_layout-1.pdf](http://www.trcofliberia.org/resources/reports/final/volume-two_layout-1.pdf)

<sup>224</sup> Truth and Reconciliation Commission. Volume II: Consolidated Final Report. The TRC of Liberia. 2009. 470 p. [http://www.trcofliberia.org/resources/reports/final/volume-two\\_layout-1.pdf](http://www.trcofliberia.org/resources/reports/final/volume-two_layout-1.pdf); Hayner, *Unspeakable Truths*, [https://edisciplinas.usp.br/pluginfile.php/4215774/mod\\_resource/content/0/Unspeakable%20Truths\\_%20Transitional%20Justice%20and%20the%20Challenge%20of%20Truth%20Commissions%20-%20Routledge%20%282010%29.pdf](https://edisciplinas.usp.br/pluginfile.php/4215774/mod_resource/content/0/Unspeakable%20Truths_%20Transitional%20Justice%20and%20the%20Challenge%20of%20Truth%20Commissions%20-%20Routledge%20%282010%29.pdf). Pp. 66–68.

2. The commission's final report was politically explosive — it named more than 150 people to be prosecuted, and dozens more who should be banned from holding public office for 30 years. Among them were the president and many prominent members of the political class known for their participation in the war.<sup>225</sup>

3. The commission recommended the establishment of the Extraordinary Criminal Court for Liberia and named individuals, corporations and institutions recommended for prosecution or further investigation.<sup>226</sup>

4. The commission stated that all parties to the conflict committed gender-based violence against women, recruited children to participate in acts of violence and are responsible for abuses, including war crimes and crimes against humanity.

5. At the same time, the commission recommended not to prosecute 38 people, including the former rebel General Butt Naked, who became a priest after the war, but said in a public hearing that he personally killed 20,000 people.<sup>227</sup> The reason for this recommendation was the active cooperation of the former combatants with the commission, their sincere confession and repentance.

6. The commission recommended an amnesty for child combatants and an amnesty for those who did not commit serious crimes, if the latter admit their mistakes and express remorse.<sup>228</sup>

7. The commission recommended the establishment of the Palava Hut National Forum as a complementary instrument of justice and national reconciliation based on traditional dispute resolution mechanisms.

8. The commission recommended the adoption of a reparations program worth about \$ 500 million over 30 years.<sup>229</sup>

### Publicity and transparency of work

In May 2006, as part of its official opening, the commission conducted training for 55 civil society representatives on communication issues, who, in turn, trained 1,124 volunteers to provide information support to the commission's work. At the same time, the commission held meetings with editors, reporters and other media workers to agree on the principles of cooperation and proper coverage of the commission's activities.

The commission, together with representatives of the media, developed and adopted a code of conduct governing media coverage of the commission's work, especially public hearings. Thanks to a friendly approach, the media had constant access to the commission, accompanying it in field meetings throughout the country.

### Flaws

1. The commission has been criticized for not being proactive enough in conducting detailed interviews with individuals accused of serious crimes. Therefore, in most of the hearings that were broadcast live, those widely known for their involvement in military abuses simply denied any wrongdoing.<sup>230</sup> In addition, inviting former military leaders to court led to the re-traumatization of the victims. The situation was so stressful for the victims in the courtroom that the hearing process was interrupted by participants and the public.<sup>231</sup>

2. The publication in the final report of the list of persons subject to lustration and prosecution for crimes during the war prompted protests from the

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<sup>225</sup> Hayner, *Unspeakable Truths*. [https://edisciplinas.usp.br/pluginfile.php/4215774/mod\\_resource/content/0/Unspeakable%20Truths\\_%20Transitional%20Justice%20and%20the%20Challenge%20of%20Truth%20Commissions%20%20-Routledge%20%282010%29.pdf](https://edisciplinas.usp.br/pluginfile.php/4215774/mod_resource/content/0/Unspeakable%20Truths_%20Transitional%20Justice%20and%20the%20Challenge%20of%20Truth%20Commissions%20%20-Routledge%20%282010%29.pdf). P. 66–68.

<sup>226</sup> Truth Commission: Liberia. February 20, 2006. <https://www.usip.org/publications/2006/02/truth-commission-liberia>

<sup>227</sup> War, Politics and Justice in West Africa: Essays 2003–2014. Sierra Leonean Writers Series. 2015. 324 p., P. 36. [https://books.google.com.ua/books?id=7AaeCgAAQBAJ&newbks=0&printsec=frontcover&pg=PA36&dq=%22Joshua+Blahyi%22&hl=en&redir\\_esc=y#v=onepage&q=%22Joshua%20Blahyi%22&f=false](https://books.google.com.ua/books?id=7AaeCgAAQBAJ&newbks=0&printsec=frontcover&pg=PA36&dq=%22Joshua+Blahyi%22&hl=en&redir_esc=y#v=onepage&q=%22Joshua%20Blahyi%22&f=false)

<sup>228</sup> Truth and Reconciliation Commission. Volume II: Consolidated Final Report. The TRC of Liberia. 2009. 470 p. [http://www.trcofliberia.org/resources/reports/final/volume-two\\_layout-1.pdf](http://www.trcofliberia.org/resources/reports/final/volume-two_layout-1.pdf)

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<sup>229</sup> Truth Commission: Liberia. February 20, 2006. <https://www.usip.org/publications/2006/02/truth-commission-liberia>

<sup>230</sup> Hayner, *Unspeakable Truths*, pp. 66–68. [https://edisciplinas.usp.br/pluginfile.php/4215774/mod\\_resource/content/0/Unspeakable%20Truths\\_%20Transitional%20Justice%20and%20the%20Challenge%20of%20Truth%20Commissions%20%20-Routledge%20%282010%29.pdf](https://edisciplinas.usp.br/pluginfile.php/4215774/mod_resource/content/0/Unspeakable%20Truths_%20Transitional%20Justice%20and%20the%20Challenge%20of%20Truth%20Commissions%20%20-Routledge%20%282010%29.pdf)

<sup>231</sup> Truth Seeking: Elements of Creating an Effective Truth Commission. Ed. Eduardo González and Howard Varney, 2013, 71 p., P. 38. <https://www.ictj.org/sites/default/files/ICTJ-Book-Truth-Seeking-2013-English.pdf>

field commanders of all former armed groups, who threatened to take up arms again. It also caused an extremely cautious attitude towards the report from the international community, including the UN.<sup>232</sup>

### Innovations

A unique experience of the commission was the collaboration with the Liberian diaspora in documenting the circumstances of the civil war. Outreach events took place in eleven cities in the United States, Ghana, Nigeria and Sierra Leone, which were home to significant numbers of Liberian refugees.<sup>233</sup> Minneapolis, USA, has hosted several public hearings since 2006 with Liberian commissioners, and has received over 1,600 applications from 5,000 Liberians living there.<sup>234</sup>

Unlike Sierra Leone, the Liberian commission was not only very active in dealing with former child soldiers, but was able to obtain testimony from 280 of them. In collaboration with UNICEF, at least 10,500 cases of war crimes and gross human rights violations perpetrated against children were documented.<sup>235</sup>

For the first time, the commission raised the problem of women and children as separate categories of victims of the war, and also made a special emphasis on the problem of re-socialization of child combatants (issues of amnesty, education, social programs). The commission also created the necessary conditions for women to publicly declare what happened and express their position.

As a complementary mechanism for reconciliation, the commission developed the National Palava Hut Program, which draws on Liberia's age-old tradi-

tions of restorative justice. The program builds on traditional approaches of dialogue and peacebuilding at the local community level through public repentance of perpetrators of crimes.<sup>236</sup>

### *Ghana: National Reconciliation Commission, 2002–2004*

#### Reasons for creation

Massive human rights violations, executions of political leaders, enforced disappearances, sexual violence, torture, illegal confiscation of property as a result of four military coups and periods of unconstitutional military rule (1966–1969, 1972–1979, 1981–1993) after gaining independence in 1957.

#### Preconditions

- declaration of a democratic course of development (1992) and replacement of the military regime with a democratic government (2000);
- conducting national and international consultations to define the mandate of the commission;
- adoption of the National Reconciliation Commission Act (2002), establishing the commission.

#### Mandate

The commission was called upon to promote national reconciliation among the peoples of the country by establishing accurate, complete and historical data on human rights violations.

The main functions of the commission were as follows: investigation of human rights violations; establishing whether these violations were planned by the state or officials; examining the broader context in which the violations occurred; identification of victims; development of recommendations for compensation for damage; educating the public and ensuring sufficient publicity of their work.<sup>237</sup>

The law instructed the commission to focus on periods of unconstitutional rule, but in practice, the commission did not distinguish between violations committed during civil or military rule, considering all applications.

<sup>232</sup> Hayner, *Unspeakable Truths*, pp. 66–68. [https://edisciplinas.usp.br/pluginfile.php/4215774/mod\\_resource/content/0/Unspeakable%20Truths\\_%20Transitional%20Justice%20and%20the%20Challenge%20of%20Truth%20Commissions%20%20-Routledge%20%282010%29.pdf](https://edisciplinas.usp.br/pluginfile.php/4215774/mod_resource/content/0/Unspeakable%20Truths_%20Transitional%20Justice%20and%20the%20Challenge%20of%20Truth%20Commissions%20%20-Routledge%20%282010%29.pdf).

<sup>233</sup> Truth Commission: Liberia. February 20, 2006. <https://www.usip.org/publications/2006/02/truth-commission-liberia>

<sup>234</sup> Hayner, *Unspeakable Truths* [https://edisciplinas.usp.br/pluginfile.php/4215774/mod\\_resource/content/0/Unspeakable%20Truths\\_%20Transitional%20Justice%20and%20the%20Challenge%20of%20Truth%20Commissions%20%20-Routledge%20%282010%29.pdf](https://edisciplinas.usp.br/pluginfile.php/4215774/mod_resource/content/0/Unspeakable%20Truths_%20Transitional%20Justice%20and%20the%20Challenge%20of%20Truth%20Commissions%20%20-Routledge%20%282010%29.pdf). P. 66–68.

<sup>235</sup> Truth and Reconciliation Commission. Final Report. Volume III. The TRC of Liberia. 2009. 117 p. P. 30. [http://www.trcofliberia.org/resources/reports/final/volume-three-2\\_layout-1.pdf](http://www.trcofliberia.org/resources/reports/final/volume-three-2_layout-1.pdf)

<sup>236</sup> Truth and Reconciliation Commission. Volume II: Consolidated Final Report. The TRC of Liberia. 2009. 470 p. [http://www.trcofliberia.org/resources/reports/final/volume-two\\_layout-1.pdf](http://www.trcofliberia.org/resources/reports/final/volume-two_layout-1.pdf)

<sup>237</sup> The National Reconciliation Commission Act, No. 611, 2002. <http://www.ghanareview.com/reconact.html>

The commission was empowered to summon citizens to court, search premises, seize materials and physical evidence.

The commission was given one year from the start of the hearing to complete its work with an additional period to complete its report.

### **Election of the members of the commission**

Unlike the commissions in South Africa and Sierra Leone, the members of the Ghana Commission were elected almost behind closed doors — by the president of the country after his consultations with the State Council. A civil society coalition provided the State Council with guidelines for the selection process, but they were ignored and members of the public were not admitted to the selection process. The appointed commissioners (three of whom were women) were from different groups of society: lawyers, academics, local leaders, religious groups, trade unions, the military.<sup>238</sup>

### **Structure**

The commission established six committees: for representatives of the legal profession, professional bodies other than legal, the press and student movements, security services, religious bodies and chiefs. Headquarters (Accra) and 4 regional offices employed 115 people.

### **Resources**

The projected \$5 million budget had to be cut to \$3 million due to limited financial support from supposed international sources. The government of Ghana provided \$2 million, the rest was provided by OSI (Open Society Initiative), USAID and the South African High Commission in Ghana.

### **Results**

1. The commission received over 4,200 statements from victims, of which about 70% were not investigated even superficially. However, at least 50% of the applicants were summoned to testify during public hearings.<sup>239</sup>

<sup>238</sup> Ghana's National Reconciliation Commission: A Comparative Assessment / Nahla Valji. ICTJ, 2006. 49 p. P. 7. [https://www.ictj.org/sites/default/files/ICTJ-Ghana-Reconciliation-Commission-2006-English\\_0.pdf](https://www.ictj.org/sites/default/files/ICTJ-Ghana-Reconciliation-Commission-2006-English_0.pdf)

<sup>239</sup> Ghana's National Reconciliation Commission: A Comparative Assessment / Nahla Valji. ICTJ, 2006. 49 p., P. 19. [https://www.ictj.org/sites/default/files/ICTJ-Ghana-Reconciliation-Commission-2006-English\\_0.pdf](https://www.ictj.org/sites/default/files/ICTJ-Ghana-Reconciliation-Commission-2006-English_0.pdf)

2. In early 2004, former President Rawlings was summoned and questioned by the commission about two pieces of evidence allegedly in his possession (video footage of executions, a recorded confession of a man convicted of the murder of three High Court judges and a military officer).

3. The commission found the military responsible for 66% of documented human rights violations.

4. The 5 volumes of the final report were sent to the president and published in 2005. The government accepted the report in full, apologized to all those affected and called on national institutions to study the report and begin to implement its recommendations.<sup>240</sup>

5. The commission recommended the following measures for reparations for victims: a public apology and memorialization; benefits for medical care and education, pensions, restitution of confiscated property, payments of \$120–\$3500 depending on the damage caused. Within a year, the government implemented a compensation program, allocating \$1.5 million in compensation for over 2,500 victims. About 2,000 people received between \$217 and \$3,300, although the criteria for inclusion and determination of the awards were ambiguous.

### **Publicity and transparency of work**

The hearings were broadcast on television and radio with testimonies from 1,866 victims or witnesses and 79 alleged perpetrators. Approximately 40 hearings were held behind closed doors for reasons of national security or witness protection.<sup>241</sup>

### **Flaws**

1. The commission was appointed after 10 years of announcing the country's transition from a military dictatorship to a democratic regime in 1992.

2. The commission has been criticized for its extensive use of cross-examination of victims and defendants, during which the commission did not dis-

<sup>240</sup> Hayner, *Unspeakable Truths*, [https://edisciplinas.usp.br/pluginfile.php/4215774/mod\\_resource/content/0/Unspeakable%20Truths\\_%20Transitional%20Justice%20and%20the%20Challenge%20of%20Truth%20Commissions%20%20-Routledge%20%282010%29.pdf](https://edisciplinas.usp.br/pluginfile.php/4215774/mod_resource/content/0/Unspeakable%20Truths_%20Transitional%20Justice%20and%20the%20Challenge%20of%20Truth%20Commissions%20%20-Routledge%20%282010%29.pdf)

<sup>241</sup> Hayner, *Unspeakable Truths*, P. 56. [https://edisciplinas.usp.br/pluginfile.php/4215774/mod\\_resource/content/0/Unspeakable%20Truths\\_%20Transitional%20Justice%20and%20the%20Challenge%20of%20Truth%20Commissions%20%20-Routledge%20%282010%29.pdf](https://edisciplinas.usp.br/pluginfile.php/4215774/mod_resource/content/0/Unspeakable%20Truths_%20Transitional%20Justice%20and%20the%20Challenge%20of%20Truth%20Commissions%20%20-Routledge%20%282010%29.pdf)

courage the aggressive manner of the defendants' lawyers. The negative result of this approach was not only the re-traumatization of the victims, but also the denial of accusations on the part of the accused. At the same time, the commission was criticized for the fact that during the interrogation of the former President Rawlings, he was asked very few narrowly focused questions.

3. One witness died of a heart attack while testifying at the hearing. Only then did the commission ensure that an ambulance was on standby at the hearing and installed a blood pressure monitoring system for witnesses before they could speak.<sup>242</sup>

4. Despite the information campaign, cases of rape and public corporal punishment were underrepresented in the statements of the victims.

5. The commission's recommendations on reforming the army, penitentiary system and police, as well as holding a popular referendum on amnesty, were practically frozen due to a lack of political will.<sup>243</sup>

### Innovations

The commission proposed one of the best ways to achieve the main goal of reparations (elimination of individual consequences of past violations) — through an individual assessment of the damage caused and the amount of damage. This approach was not seen in the work of truth commissions until 2004.<sup>244</sup>

### *Morocco: Equity and Reconciliation Commission, 2004–2006*

#### Reasons for creation

The presence of a repressive regime established by the previous kings of Morocco since gaining independence (1956): arbitrary imprisonment in places of deten-

tion, torture, forced expulsion of political opponents and human rights defenders. The presence of a large number of political prisoners and missing persons.

### Preconditions

- appointment by the king in 1999 of the Advisory Council for Human Rights (CCDH) to investigate reports of human rights violations and develop recommendations for bringing Moroccan law and practice in line with international standards;
- release of about 270 "missing persons" (1991) and over 400 political prisoners (1994), ratification of several international conventions on human rights (CAT, CEDAW, CRC);<sup>245</sup>
- the establishment by the king in 1999 of the Independent Arbitration Commission for the Compensation of Moral and Material Harm Suffered by Victims of Disappearance and Arbitrary Detention, and by their Beneficiaries, under the auspices of the CCDH. The commission received 5,127 applications for compensation, heard 8,000 people during 196 hearings. As a result, compensation was paid to the families of the missing persons: about \$100 million for almost 7,000 recipients;<sup>246</sup>
- advocacy campaign by human rights NGOs (since 1999) on the establishment of the commission;
- recommendation to the king on behalf of the CCDH (2003) to establish a truth commission.<sup>247</sup>

### Mandate

The commission was approved by Royal Decree No. 04/01/42, 10 April 2004. The main task of the commission was to investigate and document serious vio-

<sup>242</sup> Hayner, *Unspeakable Truths*. [https://edisciplinas.usp.br/pluginfile.php/4215774/mod\\_resource/content/0/Unspeakable%20Truths\\_%20Transitional%20Justice%20and%20the%20Challenge%20of%20Truth%20Commissions%20%20-Routledge%20%282010%29.pdf](https://edisciplinas.usp.br/pluginfile.php/4215774/mod_resource/content/0/Unspeakable%20Truths_%20Transitional%20Justice%20and%20the%20Challenge%20of%20Truth%20Commissions%20%20-Routledge%20%282010%29.pdf)

<sup>243</sup> Hayner, *Unspeakable Truths*. [https://edisciplinas.usp.br/pluginfile.php/4215774/mod\\_resource/content/0/Unspeakable%20Truths\\_%20Transitional%20Justice%20and%20the%20Challenge%20of%20Truth%20Commissions%20%20-Routledge%20%282010%29.pdf](https://edisciplinas.usp.br/pluginfile.php/4215774/mod_resource/content/0/Unspeakable%20Truths_%20Transitional%20Justice%20and%20the%20Challenge%20of%20Truth%20Commissions%20%20-Routledge%20%282010%29.pdf)

<sup>244</sup> Ghana's National Reconciliation Commission: A Comparative Assessment / Nahla Valji. ICTJ, 2006. 49 p. P. 23. [https://www.ictj.org/sites/default/files/ICTJ-Ghana-Reconciliation-Commission-2006-English\\_0.pdf](https://www.ictj.org/sites/default/files/ICTJ-Ghana-Reconciliation-Commission-2006-English_0.pdf)

<sup>245</sup> Morocco's Truth Commission Honoring. Past Victims during an Uncertain Present. Human Rights Watch November 2005. Volume 17, No. 11(E). 47 p. <https://www.hrw.org/sites/default/files/reports/morocco1105wcover.pdf>

<sup>246</sup> Morocco's Truth Commission Honoring. Past Victims during an Uncertain Present. Human Rights Watch November 2005. Volume 17, No. 11(E). 47 p. <https://www.hrw.org/sites/default/files/reports/morocco1105wcover.pdf>

<sup>247</sup> Hayner, *Unspeakable Truths*, pp. 42–45 [https://edisciplinas.usp.br/pluginfile.php/4215774/mod\\_resource/content/0/Unspeakable%20Truths\\_%20Transitional%20Justice%20and%20the%20Challenge%20of%20Truth%20Commissions%20%20-Routledge%20%282010%29.pdf](https://edisciplinas.usp.br/pluginfile.php/4215774/mod_resource/content/0/Unspeakable%20Truths_%20Transitional%20Justice%20and%20the%20Challenge%20of%20Truth%20Commissions%20%20-Routledge%20%282010%29.pdf)

lations (enforced disappearances and arbitrary detention) that occurred in 1956–1999. In addition, the tasks of the commission included: development of proposals for compensation for damage to victims and survivors, provision of legal recourse for victims, guarantees of non-repetition of abuses; compiling a historical chronology of the violations that occurred.<sup>248</sup>

The commission was supposed to provide recommendations to the king regarding monetary compensation, psychological and medical assistance to victims, their social reintegration, assistance in solving any problems related to administration, law, employment and property, and also recommend measures aimed at perpetuating human rights violations and guaranteeing non-recurrence of these violations.<sup>249</sup>

The commission was exclusively an advisory body, without any judicial or investigative powers, without the right to establish individual responsibility. At the same time, state bodies had a strict instruction on the need for cooperation and assistance in the work of the commission. The commission was subordinate to the king and he determined which recommendations to take into account.<sup>250</sup>

#### Election of the commission members

Civil society was given access to nominations, after which the king established the commission of 17 people, one of whom was a woman. The commission included scholars, prominent human rights defenders, including 6 former political prisoners. One of them, Mbarek Buderka, was sentenced to death in absentia. The most prominent human rights defender in the country, Driss Benzekri, who had been a political prisoner for 17 years, was appointed chairman.<sup>251</sup>

<sup>248</sup> Dahir approving Statutes of the Equity and Reconciliation Commission. Dahir No. 1.04.42 of the 19th of Safar 1425 (10 April 2004).

<https://www.usip.org/sites/default/files/file/resources/collections/commissions/Morocco-Charter.pdf>

<sup>249</sup> Morocco's Truth Commission Honoring. Past Victims during an Uncertain Present. Human Rights Watch November 2005. Volume 17, No. 11(E). 47 p.

<https://www.hrw.org/sites/default/files/reports/morocco1105wcover.pdf>

<sup>250</sup> Morocco's Truth Commission Honoring. Past Victims during an Uncertain Present. Human Rights Watch November 2005. Volume 17, No. 11(E). 47 p. — P. 18.

<https://www.hrw.org/sites/default/files/reports/morocco1105wcover.pdf>

<sup>251</sup> Morocco's Truth Commission Honoring. Past Victims during an Uncertain Present. Human Rights Watch November 2005. Volume 17, No. 11(E). 47 p. — P. 20–21.

#### Structure

The commission consisted of 3 groups: a study and research group — 3 people, a group on reparations — 7 commissioners, and a group in charge of investigations — 6 commissioners. A medical department (psychiatrist, nurse, social worker) was established to assist the victims.<sup>252</sup>

#### Resources

The budget was determined by the decision of the king. The staff of the commission reached 300 people.

#### Results

1. The commission established the fate of 742 people and the role of the state in political violence during the period under review.<sup>253</sup>

2. The commission investigated 16,861 cases and 9,779 victims were recommended to provide financial, medical and psychological assistance (9,280 of them — financial). By 2007, about 23,676 people. Received compensation for human rights violations. The archive of the commission has more than 20 thousand testimonies.<sup>254</sup>

3. As recommended by the commission, \$85 million was distributed within 18 months of its completion to 9,000 individual victims or their families.

4. An institutional mechanism was established to manage community reparations programs and \$2.57 million was disbursed to local communities.<sup>255</sup>

5. The commission recommended the reduction of the executive branch, the strengthening of the legislative and judicial branches, the reform of the security sector, changes in the criminal legislation, as well as the ratification of the ICC Charter.

<https://www.hrw.org/sites/default/files/reports/morocco1105wcover.pdf>

<sup>252</sup> Dahir approving Statutes of the Equity and Reconciliation Commission. Dahir No. 1.04.42 of the 19th of Safar 1425 (10 April 2004).

<https://www.usip.org/sites/default/files/file/resources/collections/commissions/Morocco-Charter.pdf>

<sup>253</sup> Truth Commission: Morocco. USIP, 2004.

<https://www.usip.org/publications/2004/12/truth-commission-morocco>

<sup>254</sup> Update: Transitional Justice in Africa: The Experience with Truth Commissions. By Charles Manga Fombad. 2017.

[https://www.nyulawglobal.org/globalex/Africa\\_Truth\\_Commissions1.html#Ghanav](https://www.nyulawglobal.org/globalex/Africa_Truth_Commissions1.html#Ghanav)

<sup>255</sup> Truth Commission: Morocco. USIP, 2004. <https://www.usip.org/publications/2004/12/truth-commission-morocco>

## Publicity and transparency of the work

A series of victim hearings were open and broadcast throughout the Arab region on Al Jazeera TV, which was unprecedented. At the same time, the commission's cooperation with NGOs and victims was distanced, prompting the Moroccan Human Rights Association to organize an alternative public hearing.<sup>256</sup>

## Flaws

1. In general, both the reports and the reparations process have been heavily criticized by human rights defenders and victims for restricting their right to information.

2. The final report of the commission said nothing about Western Sahara, which suffered the most from repression.<sup>257</sup>

## Innovations

It was the first truth commission in the Arab world, and the commission was led by a torture victim of the former regime.

Morocco has set a kind of record for the speed and efficiency with which the state implemented the commission's recommendations on compensation for damage.

## *Timor-Leste: Commission for Reception, Truth and Reconciliation 2002–2005*

### Reasons for creation

Indonesian occupation (1975–1999) of East Timor, during which between 102,800 and 183,000 people died, 84,200 of them from starvation and 18,600 people died a violent death. Following the 1999 independence referendum, local pro-Indonesian militia burned down many localities, killing about 1,400 people and forcibly displacing 250,000 people. to West Timor (Indonesia).<sup>258</sup>

## Preconditions

- the presence of the UN Transitional Administration in Timor-Leste (UNTAET, 1999);
- UN consultations with indigenous communities to develop a commission mandate that included traditional local reconciliation mechanisms;
- development of the order of the UN peacekeeping mission (UNTAET) on the establishment of the commission (2001).

## Mandate

The commission was charged with: investigating human rights violations committed in the context of the political conflict in Timor-Leste between 1974–1999; establishing the nature of the violations of human rights that took place and identifying the factors that could lead to such violations; identifying practices by state or non-state actors that need to be eliminated in order to prevent a recurrence of human rights violations in the future; submitting reports of human rights violations to the Prosecutor General's Office for prosecution when necessary; helping restore the human dignity of victims; promoting reconciliation; supporting the reintegration of individuals who have harmed their communities through criminal misconduct and other harmful acts by promoting community-based reconciliation mechanisms.

The commission had the authority to summon the necessary persons to the court, as well as to ask the court to instruct the police to search and inspect the premises, to seize the necessary materials and physical evidence.<sup>259</sup>

## Election of the commission members

The selection committee of 11 people was formed from representatives of political parties, religious leaders, NGOs and UNTAET. The election of candidates involved extensive consultations with civil society, respecting the principles of regional and gender representation. After that, the head of the provisional administration appointed 7 commissioners (five men and two women). Additionally, 29 regional commissioners were appointed in 6 districts (19 men and

<sup>256</sup> Hayner, *Unspeakable Truths*, pp. 42–45. [https://edisciplinas.usp.br/pluginfile.php/4215774/mod\\_resource/content/0/Unspeakable%20Truths\\_%20Transitional%20Justice%20and%20the%20Challenge%20of%20Truth%20Commissions%20-%20Routledge%20%282010%29.pdf](https://edisciplinas.usp.br/pluginfile.php/4215774/mod_resource/content/0/Unspeakable%20Truths_%20Transitional%20Justice%20and%20the%20Challenge%20of%20Truth%20Commissions%20-%20Routledge%20%282010%29.pdf)

<sup>257</sup> Update: Transitional Justice in Africa: The Experience with Truth Commissions. By Charles Manga Fombad. 2017. [https://www.nyulawglobal.org/globalex/Africa\\_Truth\\_Commissions1.html#Ghanav](https://www.nyulawglobal.org/globalex/Africa_Truth_Commissions1.html#Ghanav)

<sup>258</sup> Chegal! The Final Report of the Timor-Leste Commission for Reception, Truth and Reconciliation (CAVR). 2013. 3128 p. <http://chegareport.org/Chega%20All%20Volumes.pdf>

<sup>259</sup> UNTAET Regulation No. 2001/10. On the Establishment of a Commission for Reception, Truth and Reconciliation in East Timor, UNTAET/REG/2001/10. <https://peacekeeping.un.org/mission/past/etimor/untae-tr/Reg10e.pdf>

10 women).<sup>260</sup> A gender ratio (at least 30% women in positions) was enshrined in the mandate of the commission.

### Structure

The commission included 6 departments: Truth-Seeking; Reception and Victim Support; Community Reconciliation; Programme Support; Administration and Logistics; Finance. The archives department was created.

The total number of headquarter staff reached 124 people, and 154 people in regional offices.<sup>261</sup>

### Results

1. The commission collected 7,824 testimonies from 13 districts (almost 1% of the population) and conducted over 1,000 interviews.

2. The commission, together with the National Statistical Office, conducted a retrospective mortality survey and a cemetery census, which allowed an estimate of the total number of deaths due to political conflict.

3. The commission concluded that the Indonesian security forces committed human rights violations that amounted to crimes against humanity and war crimes in gravity, and that the grave violations were “massive, widespread and systematic”.

4. According to the commission, 85% of all violations were attributed to the Indonesian security forces and 10% were perpetrated by pro-independence forces, led by the Revolutionary Front for an Independent East Timor (FRETILIN).

5. The commission carried out an intensive research project focused on diagnosing women’s problems, which helped to successfully address the cases of women victims in public hearings.

6. The commission has developed a scheme for urgent reparations for victims who have sustained serious injuries from human rights violations. The number of such victims was 10% of all claimants for compensation.

7. The commission developed and implemented a unique Community Reconciliation Process that

had a positive impact and was based on traditional conflict resolution methods. In 217 hearings, 1,541 testimonies were accepted, and 1,371 minor offenders were re-admitted to local communities.

8. In addition to the 5-volume final report, the commission created a video version of the report, a public museum and a library.

### Publicity and transparency of work

The commission actively supported a weekly radio program about its work, *The Road to Peace*. The process of all thematic public hearings was actively covered by the media with the additional formation of video clips, which were later distributed in local communities.

### Flaws

Despite pressure from national and international observers, the government resisted the official publication of the report, and after publication, the report was not widely disseminated. The reluctance of political leaders to address the crimes of the past led to the fact that a parliamentary resolution on the implementation of the commission’s recommendations was considered only in 2009.<sup>262</sup>

### Innovations

In 2003, the commission established the Community Reconciliation Process (CRP). It was a new, previously untested mechanism for the reintegration of combatants who had committed minor crimes during the conflict. The basis of the project was the high likelihood of reaching an understanding between former police officers and their victims.<sup>263</sup>

The reconciliation process involved facilitated hearings in local communities that combined the practices of traditional justice, arbitration, mediation,

<sup>260</sup> Chega! The Final Report of the Timor-Leste Commission for Reception, Truth and Reconciliation (CAVR). 2013. 3128 p. <http://chegareport.org/Chega%20All%20Volumes.pdf>

<sup>261</sup> Chega! The Final Report of the Timor-Leste Commission for Reception, Truth and Reconciliation (CAVR). 2013. 3128 p. <http://chegareport.org/Chega%20All%20Volumes.pdf>

<sup>262</sup> Hayner, *Unspeakable Truths*. [https://edisciplinas.usp.br/pluginfile.php/4215774/mod\\_resource/content/0/Unspeakable%20Truths\\_%20Transitional%20Justice%20and%20the%20Challenge%20of%20Truth%20Commissions%20-%20Routledge%20%282010%29.pdf](https://edisciplinas.usp.br/pluginfile.php/4215774/mod_resource/content/0/Unspeakable%20Truths_%20Transitional%20Justice%20and%20the%20Challenge%20of%20Truth%20Commissions%20-%20Routledge%20%282010%29.pdf). P. 39–42.

<sup>263</sup> Eirin Mobekk, 2005, ‘Transitional Justice in Post-Conflict Societies — Approaches to Reconciliation’ in *After Intervention: Public Security Management in Post-Conflict Societies — From Intervention to Sustainable Local Ownership*, eds. Anja Ebnöther and Philipp Fluri, Geneva Centre for the Democratic Control of Armed Forces (DCAF), Geneva. 2005. 423 p. — P. 272. <https://www.dcaf.ch/sites/default/files/publications/documents/Comple.pdf>

civil and criminal law aspects. Hearings in conflict-affected communities were conducted by a panel of local leaders chaired by the regional commissioner of the commission and with the voluntary consent of former police officers guilty of crimes. The latter were obliged to fully admit their participation in the conflict. The victims and other members of the public were given the opportunity to ask questions and comment on the perpetrator's statement. Based on the results of the hearings, the collegium concluded an agreement according to which the perpetrator was obliged to perform certain actions: public works, restoration of destroyed buildings, payment of compensation to victims. In exchange, the culprit was re-admitted to the community.

At the start of each hearing, the Prosecutor General's Office confirmed that the case could be resolved through a reconciliation process and not through the courts. After the hearing, the reconciliation agreement was confirmed by a court decision. If the court approved such an agreement, and the perpetrator fulfilled his obligations, he was granted immunity from civil or criminal liability.

The program was very successful. 1,371 former policemen went through the reconciliation procedure.<sup>264</sup>

## EUROPE

### Germany

Commission of Inquiry on Working Through the History and the Consequences of the SED Dictatorship in Germany, 1992–1994.

Commission of Inquiry on Overcoming the Consequences of the SED Dictatorship in the Process of German Unity, 1995–1998.

#### Reasons for creation

The establishment of an authoritarian regime by the government of the German Democratic Republic (East Germany) in 1949–1989 under the leadership of the SED. Political and social elimination of opposition, repression of dissidents, forced collectivization, extensive violations of human rights as a result of an authoritarian regime.

<sup>264</sup> Chega! The Final Report of the Timor-Leste Commission for Reception, Truth and Reconciliation (CAVR). 2013. 3128 p. <http://chegareport.org/Chega%20All%20Volumes.pdf>

### Preconditions

- unification of Germany (1990);
- safety and availability of all archives of the GDR and SED;
- well-functioning system of parliamentary commissions of inquiry in FRG;
- social and political demand for the establishment of historical truth;
- consolidation of the status and mandate of the commission by a separate decision of the Bundestag.

### Mandate

**Mandate of the Commission (1992–1994)** included political-historical analysis and political-ethical assessment of the processes of 1945–1989:

- of the structures, strategies and practices of the SED, links of the SED with the authorities and the Ministry of State Security in particular;
- of structures and activities of the judiciary, police and state security;
- of human rights violations, militarization of society, forced collectivization, negligent use of natural resources;
- of the opportunities for material and moral restitution of victims of the regime;
- of the violations of international conventions and norms in the field of human rights, including political, psychological and psychosocial repression;
- of the role of ideology in education, culture, science, literature, sports, art; its impact on the distribution of privileges and career growth;
- of the role of the opposition movement and churches at different stages of an authoritarian regime;
- of the relations between West and East Germany, the influence of the USSR on the policy of the GDR.<sup>265</sup>

The functions of the commission included the development of recommendations to the government, conducting scientific expertise, public hearings and forums, organizing a dialogue with citizens, scientists, teachers and historians.

<sup>265</sup> Transitional Justice: How Emerging Democracies Reckon with Former Regimes, Vol. 3, Laws, Rulings, and Reports, page 216–219. <https://www.usip.org/sites/default/files/file/resources/collections/commissions/Germany92-Charter.pdf>

The commission did not have the right to call witnesses to court, and most of the former government officials who were invited to testify rejected the invitations, fearing that their testimony could be used against them in court.<sup>266</sup>

**Mandate of the Commission (1995–1998)** was identical with the only difference that the second Commission placed greater emphasis on the study of science and culture, as well as on the problems of discrimination against women during the dictatorship of the SED.

### Election of the commission members

The commission (1992–1994) included representatives of political parties on a proportional basis (17 people), as well as 11 experts from civil society. The commission was chaired by Rainer Eppelmann, a parliamentarian and former human rights activist from East Germany.<sup>267</sup>

The second commission (1995–1998) already included 36 people, selected and appointed by the parliament to work in 9 thematic groups of the commission.

### Structure and resources

The commissions were created as standard parliamentary inquiry commissions, with established forms of work and an allocated budget.

### Results

1. The commission (1992–1994) initiated research and produced over one hundred articles on a wide range of topics. The authors were predominantly academic historians who had access to the archives of the GDR authorities. The commission held numerous public hearings with the presentation of the prepared materials, and also heard testimonies from the victims.

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<sup>266</sup> Hayner, *Unspeakable Truths*, P. 52–53.  
[https://edisciplinas.usp.br/pluginfile.php/4215774/mod\\_resource/content/0/Unspeakable%20Truths\\_%20Transitional%20Justice%20and%20the%20Challenge%20of%20Truth%20Commissions%20%20-Routledge%20%282010%29.pdf](https://edisciplinas.usp.br/pluginfile.php/4215774/mod_resource/content/0/Unspeakable%20Truths_%20Transitional%20Justice%20and%20the%20Challenge%20of%20Truth%20Commissions%20%20-Routledge%20%282010%29.pdf)

<sup>267</sup> Hayner, *Unspeakable Truths*, pp. 52–53.  
[https://edisciplinas.usp.br/pluginfile.php/4215774/mod\\_resource/content/0/Unspeakable%20Truths\\_%20Transitional%20Justice%20and%20the%20Challenge%20of%20Truth%20Commissions%20%20-Routledge%20%282010%29.pdf](https://edisciplinas.usp.br/pluginfile.php/4215774/mod_resource/content/0/Unspeakable%20Truths_%20Transitional%20Justice%20and%20the%20Challenge%20of%20Truth%20Commissions%20%20-Routledge%20%282010%29.pdf)

2. An 18-volume report (1995) of more than 15,000 pages confirmed the long-term and repressive policy of the SED, while recommending at the same time a wide range of ways to form a common historical remembrance: the establishment of national holidays, memorials, documentation centres, exchange of information with other post-Soviet countries.

3. The commission proposed the creation of a permanent fund to implement recommendations and help victims of the authoritarian regime.

4. Following the commission's recommendations on the need to continue investigating the historical past, parliament in 1995 established the Commission of Inquiry on Overcoming the Consequences of the SED Dictatorship in the Process of German Unity. The new commission in its report (1998) expanded the scope and assessed the impact of the policy of German unification from 1990 to 1995.<sup>268</sup>

### *Results of the Commission of Inquiry into the Consequences of the SED Dictatorship in the Process of German Unity (1995–1998)*

On the recommendation of the commission, two foundations were created: the Foundation for the Study of the SED Dictatorship (Stiftung zur Aufarbeitung der SED-Diktatur, 1998) and Hohenschönhausen (2000). The first foundation continued the work started by the two commissions and helped, in particular, to prepare the law on compensation for victims of the SED. The second foundation works in the field of public education on the forms and consequences of political persecution.

### Flaws

The materials and conclusions of the commissions led, among other things, to a wider examination of employees who were agents of the Stasi or members of the SED. Subsequent layoffs of some of these employees sparked protests. At the same time, the victims of the regime openly criticized the commissions for the untimely and limited assistance that was provided to them by the state based on the commissions' investigations.

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<sup>268</sup> Hayner, *Unspeakable Truths*, pp. 52–53.  
[https://edisciplinas.usp.br/pluginfile.php/4215774/mod\\_resource/content/0/Unspeakable%20Truths\\_%20Transitional%20Justice%20and%20the%20Challenge%20of%20Truth%20Commissions%20%20-Routledge%20%282010%29.pdf](https://edisciplinas.usp.br/pluginfile.php/4215774/mod_resource/content/0/Unspeakable%20Truths_%20Transitional%20Justice%20and%20the%20Challenge%20of%20Truth%20Commissions%20%20-Routledge%20%282010%29.pdf)

## Innovations

1. The commissions were given a mandate to conduct extensive historical analysis, without the need to establish a list of perpetrators or individual responsibility for specific episodes of an authoritarian past. This was due to the presence of the open archives of the Stasi, which allowed each victim to get acquainted with the materials concerning himself and, if necessary, to seek justice and the punishment of those guilty in court. The FRG judicial system worked efficiently, and the authorities of the united Germany began the process of lustration.

2. The commissions thus focused on examining documentary evidence of the formation of an authoritarian regime and demonstrated that research into the past is possible without large-scale collection of evidence, as was the case in Latin America and Africa.

3. The approach chosen by the commissions was also aimed at society understanding the problems of the past and forming a common political culture of a united Germany. This made it possible to avoid the widespread use of repressive measures of criminal justice in solving social problems and, in fact, was one of the European forms of restorative justice.

### *Poland: since 1998 The Institute of National Remembrance — Commission for the Prosecution of Crimes against the Polish Nation*

#### Reasons for creation

The need to create an objective historical picture since independence (1917), as well as the investigation of crimes committed as a result of the Nazi and Soviet occupations, the Holocaust, mass deportations and the political repression of the Soviet period.

#### Preconditions

- creation of the Main Commission for the Investigation of Nazi Crimes in Poland (1945); it conducted more than 12 thousand investigations;
- beginning of democratic, post-Soviet government (1989);
- creation of the Main Commission for the Prosecution of Crimes against the Polish People (1991) with an expanded mandate to investigate crimes of the Soviet period;<sup>269</sup>

<sup>269</sup> Łukasz Jasiński, Justice and politics: the Central Commission for the Investigation of German/Hitlerite Crimes in

- parliamentary adoption of the law establishing the institute (1998).

#### Mandate

The mission of the institute is to research and popularize the modern history of Poland; investigation of crimes committed from November 8, 1917, during the Second World War and the communist period until July 31, 1990; protecting the reputation of the Republic of Poland and the Polish people.

The principles governing the work of the Institute of National Remembrance are as follows:

- preserving the memory of the huge number of victims, losses and damage suffered by the Polish people during the Second World War and after its end;
- patriotic traditions of the struggle of the Polish people against their occupiers, the Nazis and communists;
- duty to prosecute crimes against peace, crimes against humanity and war crimes;
- respect for the actions of Polish citizens in support of the independence of the Polish state and in defence of freedom and human dignity;
- the obligation of the state to provide compensation to all victims of the state that violated human rights, as an expression of the conviction that no illegal actions of the state against citizens may be classified or forgotten.<sup>270</sup>

The institute operates on a permanent basis, having the status of a state research institution responsible for educational issues, maintaining archives and having powers of investigation and lustration.

#### Election of the members of the institute

Recruitment on a permanent and temporary (contract) basis by filling vacant positions and passing a selection process.

#### Structure

The institute includes 8 main subdivisions:

1. The IPN Archive.

Poland between 1945 and 1989. (Gdańsk: Instytut Studiów Politycznych Polskiej Akademii Nauk, 2018). <https://isppan.waw.pl/wp-content/uploads/2017/01/summary.pdf>

<sup>270</sup> The Institute of National Remembrance, <https://ipn.gov.pl/en/about-the-institute/mission/2,Institute-of-National-Remembrance-Commission-for-the-Prosecution-of-Crimes-again.html>

2. The Chief Commission for the Prosecution of Crimes against the Polish Nation.
3. The National Education Office.
4. The Historical Research Office.
5. The Office of Search and Identification.
6. The Vetting Office.
7. The Office for Commemorating the Struggle and Martyrdom.
8. A publishing house.<sup>271</sup>

### Resources

In addition to the central office, the institute has 11 branches and 7 representative offices in other cities, in which 2,541 employees work, 2,228 of them have higher education (87%), including 7 people with the academic title of “professor”, 42 people with a doctorate degree (Dr. Habil.) and 235 people with an academic degree of Doctor of Philosophy (PhD). The expenditure budget in 2020 was 393 million 777 thousand zł (more than 105 million 854 thousand US dollars).<sup>272</sup>

### Results

1. The institute has collected archival resources about crimes of the past, which contain more than 91 km of files, 39 million photos, 840 thousand microfilms, 1900 films, 1100 audio recordings.<sup>273</sup>
2. The institute maintains a high level of investigations into past crimes. For example, in 2020, 1,822 preparatory proceedings were formed, of which 895 cases concerned communist crimes, 358 Nazi crimes and the rest — other crimes against peace, humanity or war crimes.<sup>274</sup>
3. Since December 2000, the institute has held 800 scientific conferences and extensive research in 4 topic areas: the security apparatus and civil resistance (with separate sub-projects devoted to political processes and prisoners of 1944–1956, Soviet repres-

sion and crimes against Polish citizens and martial law: view from twenty years later); war, occupation and the Polish underground; Poles and other nations (Ukrainians, Lithuanians, Germans, Belarusians, Jews, Roma) in 1939–1989; peasants, rural politicians and authorities in 1944–1989.

4. The institute has held 500 exhibitions, created 54 educational portals, developed 22 educational games for students and schoolchildren, implemented more than 200 educational projects, and prepared more than 2,800 publications. The institute publishes the scientific journal “Remembrance and Justice” and its newsletter for lay readers and youth, 12 thousand copies of which (out of 15 thousand copies) are distributed free of charge in secondary schools.<sup>275</sup>

5. The institute became one of the founders of the Platform of European Memory and Conscience, which brings together 62 public and private institutions from 20 countries — Sweden, Estonia, Latvia, Lithuania, Poland, Germany, Netherlands, Czech Republic, Slovakia, Hungary, Slovenia, Romania, Bulgaria, France, Ukraine, Moldova, Iceland, Albania, Canada and the USA — actively engaged in research, documentation, awareness raising and education about the totalitarian regimes that befell Europe in the 20th century.<sup>276</sup>

### Flaws

The institute, as a public research institution, has been criticized for its potential dependence on politics. Suspicions of loyalty to the authorities were also fueled by the size of the budget, which far exceeded the budgets of academic institutions.

Experts in the field of history criticize the institute for thematic uniformity, the monopolization of the sphere of history and national memory, the replacement of broad public discussions with the release of numerous publications, superficial methodology of individual projects.

### Innovations

The institute has demonstrated an effective combination of government political will, status, mandate and budget in the implementation of activities such as documentation, memorialization, investigation

<sup>271</sup> The Institute of National Remembrance, <https://ipn.gov.pl/en/about-the-institute/mission/2,Institute-of-National-Remembrance-Commission-for-the-Prosecution-of-Crimes-again.html>

<sup>272</sup> Informacje o działalności IPN w okresie 1 stycznia 2020 r. — 31 grudnia 2020 r. <https://ipn.gov.pl/pl/o-ipn/informacje-o-dzialalnosc/143381,w-okresie-1-stycznia-2020-r-31-grudnia-2020-r.html>

<sup>273</sup> The Institute of National Remembrance, <https://ipn.gov.pl/en/about-the-institute/mission/2,Institute-of-National-Remembrance-Commission-for-the-Prosecution-of-Crimes-again.html>

<sup>274</sup> Informacje o działalności IPN w okresie 1 stycznia 2020 r. — 31 grudnia 2020 r. <https://ipn.gov.pl/pl/o-ipn/informacje-o-dzialalnosc/143381,w-okresie-1-stycznia-2020-r-31-grudnia-2020-r.html>

<sup>275</sup> History shapes our identity. The IPN in figures. Warsaw, 2020. [https://ipn.gov.pl/ftp/brochure/brochure\\_ipn\\_figures.pdf](https://ipn.gov.pl/ftp/brochure/brochure_ipn_figures.pdf)

<sup>276</sup> The Platform of European Memory and Conscience. <https://www.memoryandconscience.eu/about-the-platform/about-the-platform/>

and lustration processes, public education and applied scientific research.

The institute, continuing the experience of the German truth commissions, attracted a much larger number of young scientists to investigations, strengthening the results of their work with broad educational and information support. This approach demonstrated, as in Germany, that establishing historical justice and dealing with the past can be successful in restorative justice, without widespread repression.

### ***Czech Republic:***

#### ***The Office of the Documentation and the Investigation of the Crimes of Communism***

##### **Preconditions**

- change of the authoritarian Soviet regime as a result of the Velvet Revolution (1989) and the beginning of democratic processes;
- recognition of victims of the communist regime at the legislative level (Act No. 119/1990 Coll. of 23 April 1990 about court rehabilitation; Act No. 87/1991 Coll. of 21 February 1991 about out-of-court rehabilitations; Act No. 480/1991 Coll. of 13 November 1991 about the period of the lack of freedom; Act No. 198/1993 Coll. of 9 July 1993 about the unlawful character of the communist regime and about the opposition to it; the Government Decree No. 165/1997 Coll. of 25 June 1997 about repayment of a single indemnification to reduce some injustices caused by the communist regime;<sup>277</sup>
- beginning of lustration processes (1991) and opening of state security archives (1996);<sup>278</sup>
- the merger of the Office of Documentation and Investigation of State Security (part of the Ministry of Internal Affairs) and the Resource Centre of the Unlawful Conduct of the Communist Regime (part of the Ministry of Justice), enshrined in the decision of the Minister of the Interior (1995).<sup>279</sup>

<sup>277</sup> The Office for the Documentation and the Investigation of the Crimes of Communism. Police of the Czech Republic. <https://www.policie.cz/clanek/the-office-for-the-documentation-and-the-investigation-of-the-crimes-of-communism-police-of-the-czech-republic.aspx>

<sup>278</sup> The Act No. 140/1996 Coll. of 26 April 1996 about opening of the State Security files

<sup>279</sup> Police of the Czech Republic. <https://www.policie.cz/clanek/urad-dokumentace-a-vysetrovani-zlocinu-komunismu-679905.aspx>

### **Mandate**

The main task of the office is to identify and prosecute crimes committed between 25 February 1948 and 29 December 1989, which were not finally resolved for political reasons during the Soviet regime in Czechoslovakia. The office collects and evaluates materials, information and documents proving the criminality of the communist regime and its repressive forces.

The office also carries out a study of the records of the archival and file services of Czechoslovakia regarding the conduct of checks by the Security Service of individuals.

The functions of the office include publishing and educational activities: distribution of publications of the office, organization of lectures, exhibitions and presentations in the media.<sup>280</sup>

### **Structure**

The office and its branch in Brno cover the whole territory of the Czech Republic. The directorate has the status of a criminal investigation unit within the police since 01 January 2002 in accordance with the Law on the Police of the Czech Republic No. 283/1991 Sb.<sup>281</sup> Staffing — 20 police officers and 12 uncertified officers.<sup>282</sup>

### **Results**

The office supports research in 44 topical areas, of which it is possible to name:

- Killing of persons on the Czechoslovak Borders During the Period of Lack of Freedom;
- Suppression of Riots by Means of Force;
- Retributive Prisoners Serving the 1st Administration of the Ministry of the Interior;
- The State Security vs. the Independent Initiatives;
- The State Security Penetration into Universities;
- Deportation of Czechoslovak Citizens to the Former USSR;

<sup>280</sup> Police of the Czech Republic. <https://www.policie.cz/clanek/urad-dokumentace-a-vysetrovani-zlocinu-komunismu-679905.aspx>

<sup>281</sup> Police of the Czech Republic. <https://www.policie.cz/clanek/urad-dokumentace-a-vysetrovani-zlocinu-komunismu-679905.aspx>

<sup>282</sup> Úřad vyšetřování a dokumentace zločinů komunismu.pdf. <https://cse.google.com/cse?cx=01548926536623571386%3Aa8ctlcxurg&q=rozpo%C4%8Det+%C3%9A%C5%99ad+dokumentace&ok.x=0&ok.y=0; Útvary Policie České republiky.pdf. www.policie.cz › soubor › utvary-policie-ceske-republiky-pdf>

- Soviet Advisors in Czechoslovakia;
- The Secret Service Support to the Italian Terrorists;
- The State Security Propaganda and Misrepresentation;
- Censorship in the Czechoslovak State Film and the Czechoslovak Television in the years 1948 and 1968.

### Transparency

The received materials and publications of the institute ("Securitas Imperii", "Testimonies") are available to the public through free publication and distribution (public libraries, high schools, universities). Institute staff are available to the media and lectures at universities.

### Federal Republic of Yugoslavia: Commission for Truth and Reconciliation, 2002–2003

#### Reasons for creation

Wars between the former republics of the SFRY (1991–1995), which resulted in ethnic cleansing, war crimes, and gross violations of international humanitarian law. At least 200,000 people were killed, about 2 million more people became temporarily displaced persons and refugees.

#### Preconditions

- commencement of ICTY war crimes investigation (1993);
- attempts to establish a truth and reconciliation commission in Bosnia and Herzegovina (1997);
- election of a new president of the Federal Republic of Yugoslavia (2000);
- destruction by the chief of the Serbian state security of 11,490 secret documents related to the crimes of the previous regime (2001);<sup>283</sup>
- establishment of the commission by presidential decree in March 2001.

#### Mandate

The mandate of the commission was limited to three tasks:

- to organize research and identify evidence of social, inter-ethnic and political conflicts (1980–

2000) that led to the war, and shed light on the causal relationships between these events;

- to inform domestic and international audiences about their work and results;
- to establish cooperation with similar commissions and bodies in neighboring and other countries to exchange work experience.<sup>284</sup>

After brief consultations on the mandate, the president allowed the commission to independently determine the conditions and forms of work. The commission stated that it would seek full cooperation with the ICTY and put forward the idea of holding regional hearings and receiving applications throughout the former Yugoslavia (Bosnia and Herzegovina, Kosovo, Slovenia, Croatia).

#### Election of the commission members

The president appointed 19 commissioners (including 4 women) from professional associations, NGOs, the Serbian Orthodox Church and ethnic minorities.<sup>285</sup>

#### Structure

The commission formed 3 groups to investigate: a) "major historical events in the period 1980–2000", b) "violations of human rights and violations of humanitarian law" and c) "impact of external factors".<sup>286</sup>

#### Resources

The commission was funded by the state, but had the right to accept private donations. The commission independently determined the amount and items of expenses. Due to financial and administrative problems, most of the commission's full-time positions were filled by staff temporarily seconded from the President's office. For this reason, the commission was perceived as too loyal to the president.

<sup>283</sup> A. Yevseev. "Working through the past": the complexity of forensic knowledge // International justice. 2017. No. 4 (24). P. 122–136.

<sup>284</sup> Dejan Ilic, "The Yugoslav Truth and Reconciliation Commission: Overcoming Cognitive Blocks." Eurozine, April 23, 2004. <https://www.eurozine.com/the-yugoslav-truth-and-reconciliation-commission/>

<sup>285</sup> Truth Commission: Serbia and Montenegro, Friday, February 1, 2002. <https://www.usip.org/publications/2002/02/truth-commission-serbia-and-montenegro>

<sup>286</sup> Dejan Ilic, "The Yugoslav Truth and Reconciliation Commission: Overcoming Cognitive Blocks." Eurozine, April 23, 2004. <https://www.eurozine.com/the-yugoslav-truth-and-reconciliation-commission/>

## Results

1. The commission held a roundtable “One Year Later” (2002) with a presentation of its work plans, where it was strongly criticized for its inaction and unwillingness to investigate the massive human rights violations committed by the Serbian military. Only after two years of its appointment, the commission announced the draft Program of Activities (2003).<sup>287</sup>

2. The commission took almost no steps in investigating past events such as collecting testimonies from victims, conducting interviews and hearings, preparing interim reports.<sup>288</sup>

3. In 2003, the Federal Republic of Yugoslavia was transformed into Serbia and Montenegro, and the commission ceased its work, as its mandate depended on that of the former president. The commission was not reinstated by the new government, and its official report was never presented.

4. In 2008, the commission’s bad experience prompted human rights defenders from the former republics of the SFRY to initiate the creation of the Regional Commission Tasked with Establishing the Facts about All Victims of War Crimes and Other Serious Human Rights Violations Committed on the Territory of the Former Yugoslavia from 1 January 1991 until 31 December 2001, RECOM. The formed Coalition in support of RECOM (more than 1800 NGOs, associations and individuals) developed the draft charter of RECOM (2010) and assembled in 2011–2018 more than 600 thousand signatures in support of the initiative. The politicians of the countries of the former Yugoslavia have so far limited themselves to stating the importance of such a civil society initiative.<sup>289</sup>

<sup>287</sup> Dejan Ilic “The Yugoslav Truth and Reconciliation Commission: Overcoming Cognitive Blocks.” Eurozine, April 23, 2004.  
<https://www.eurozine.com/the-yugoslav-truth-and-reconciliation-commission/>

<sup>288</sup> Hayner, *Unspeakable Truths*, pp. 252–253.  
[https://edisciplinas.usp.br/pluginfile.php/4215774/mod\\_resource/content/0/Unspeakable%20Truths\\_%20Transitional%20Justice%20and%20the%20Challenge%20of%20Truth%20Commissions%20%20-Routledge%20%282010%29.pdf](https://edisciplinas.usp.br/pluginfile.php/4215774/mod_resource/content/0/Unspeakable%20Truths_%20Transitional%20Justice%20and%20the%20Challenge%20of%20Truth%20Commissions%20%20-Routledge%20%282010%29.pdf)

<sup>289</sup> RECOM Development Process, May 2006 — August 2011.  
<https://documenta.hr/wp-content/uploads/2020/02/RECOM-Development-Process-Report-May-2006-August-2011.pdf>;  
Balkan Govts Dodge Signing Truth Commission Declaration. BALKAN TRANSITIONAL JUSTICE. July 10, 2018.  
<https://balkaninsight.com/2018/07/10/west-balkans-states-not-signing-recom-declaration-07-09-2018/>

## Publicity

It was assumed that the activities of the commission would be public and the commission would inform the public about the results of its work through regular the commissioners’ regular contact with the media, press conferences of the commission’s spokesperson, as well as through periodic reports.<sup>290</sup>

## Flaws

The commission could not start its work for 11 months due to lack of funding and logistics.

The government and the commission did not demonstrate the political will to objectively analyze the past, exacerbated by the lack of an open position with civil society and interaction with human rights NGOs.

## Northern Ireland

### Reasons for creation of the Truth Commission

More than 3,700 people were killed on both sides (1857 of them were civilians) and 40 thousand people were injured during the confrontation in Northern Ireland (1968–1998).<sup>291</sup> Despite the 1998 Belfast Peace Agreement and government investigations, several episodes of violence were not properly addressed. Investigative actions and criminal proceedings are decades behind.

### Preconditions

- the establishment of The Forum for Peace and Reconciliation by the Irish government (1994), provided for by the Downing Street Declaration (1993), a joint declaration of peace between the United Kingdom and the Republic of Ireland. The declaration provided for the renunciation of armed violence and the right of the citizens of Northern Ireland to independently determine whether to join Ireland or remain a part of Great Britain. The forum was intended as a platform with the participation

<sup>290</sup> Jelena Pejic, “The Yugoslav Truth and Reconciliation Commission: A Shaky Start.” *Fordham International Law Journal*, 25, (2001): 1-22.  
<https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1809&context=ilj>

<sup>291</sup> Ryan Gawn, “Still shackled by the Past: Truth and Recovery in Northern Ireland.” *The Peace and Conflict Review*.  
<http://www.review.upeace.org/index.cfm?opcion=0&ejemplar=13&entrada=72>

of all parties to the conflict to hold consultations and explore ways to establish lasting peace, stability and reconciliation based on an agreement;

- the establishment of a similar Forum of Northern Ireland (1996) as the centre of the peace process; and the conclusion of the Belfast Agreement (Good Friday Agreement, 1998). The Belfast Agreement contains a number of provisions that have a high potential to overcome the negative past: revising police and criminal justice procedures; a scheme for the release of persons convicted by special courts without a jury, which actually acted as an amnesty clause.<sup>292</sup>
- the establishment of the Victims' Commission (1997–1998) to explore possible ways to “acknowledge the pain and suffering experienced by victims of violence resulting from the unrest of the past 30 years, including those killed or injured in the service of society”. The commission's recommendations proposed a wide range of initiatives for moral satisfaction, memorialization, material compensation, social, medical and educational support for victims.<sup>293</sup>
- the resumption of the Forum for Peace and Reconciliation (2002–2003), which did not lead to a solution to the problems of a peaceful settlement, and the gradual closure of the forum (2010);<sup>294</sup>
- proposal to revive the forum as a truth and reconciliation commission (2011),<sup>295</sup> which is still in the discussion phase;<sup>296</sup>

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<sup>292</sup> Ryan Gawn, “Still shackled by the Past: Truth and Recovery in Northern Ireland”. *The Peace and Conflict Review*. <http://www.review.upeace.org/index.cfm?opcion=0&ejemplar=13&entrada=72>

<sup>293</sup> Kenneth Bloomfield We will remember them: Report of the Northern Ireland Victims Commissioner. Appendix 1: Suggestions Submitted to The Commission. (April 1998). <https://cain.ulster.ac.uk/issues/violence/victims1.htm#app1>

<sup>294</sup> «Written answers: Departmental Agencies». Dáil proceedings. KildareStreet.com. 19 January 2010. <https://www.kildarestreet.com/wrans/?id=2010-01-19.752.0#g755.0.r>

<sup>295</sup> Seanad Éireann debate — Wednesday, 26 Oct 2011. Vol. 211 No. 2. [https://www.oireachtas.ie/en/debates/debate/seanad/2011-10-26/3/#spk\\_25](https://www.oireachtas.ie/en/debates/debate/seanad/2011-10-26/3/#spk_25)

<sup>296</sup> Troubles proceedings: Mandela-style truth process may be set up. *The Guardian*, Wed 23 Oct. 2019 21.47 BST. <https://www.theguardian.com/uk-news/2019/oct/23/northern-ireland-troubles-proceedings-truth-process>

## Results

In 1998, the post of **Minister of Victims' Affairs** was introduced and under them the **Minster for Victims & Victims Liaison Unit** was created, which were entrusted with the implementation of the recommendations of the Commission on Victims (1998). In 1998–1999 they implemented the following initiatives<sup>297</sup>:

- Northern Ireland Memorial Fund (annual budget of £1 million);
- Family Trauma Center (£700,000 annual budget);
- Victim Support Grant Scheme (£225,000 for NGOs);
- Grant Scheme for Core Funding for Victim / Survivor Groups (£3 million over two years for Victim Service Groups and Organizations);
- Touchstone Advisory Group (to represent victims' interests and liaise with the government on victim policies);
- Pilot Study Scholarship Program (launched in January 1999, now closed and subject to revision).

More than J20m has been invested in initiatives to support survivors living in the UK since 1998.<sup>298</sup>

In 1999, the **Northern Ireland Human Rights Commission** was established, the mandate of which is to analyze legislation and the activities of government authorities, develop recommendations to the government on the protection of human rights, and raise awareness of the importance of human rights. It was also tasked with drafting a Bill of Rights to complement the European Convention on Human Rights, a draft of which was submitted in 2001. The latest draft of the Bill (2021) contains the government's responsibility to develop a mechanism for the protection of victims of conflict.<sup>299</sup> A Bill of Rights for Northern Ireland is still pending.

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<sup>297</sup> Christine Bell “Dealing with the past in Northern Ireland” in *Fordham International Law Journal* 26 (4), p. 2003. <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1894&context=ilj>

<sup>298</sup> Ryan Gawn, “Still shackled by the Past: Truth and Recovery in Northern Ireland”. *The Peace and Conflict Review*. <http://www.review.upeace.org/index.cfm?opcion=0&ejemplar=13&entrada=72>

<sup>299</sup> A Bill of Rights for Northern Ireland. Advice to the Secretary of State for Northern Ireland. Last Updated: Tuesday, 9 March 2021.

In June 2007, the Consultative Group on the Past was formed to explore approaches to working with the past in Northern Ireland in order to “find a way forward from the shadow of the past” and based on the key principle that the past should be viewed as a way to ensure a common and reconciled future for all. The group conducted the broadest possible public consultation process, processing 290 written submissions, 2,086 standard letters and thousands of opinions posted in a discussion forum on its website. Meetings were also held with 141 individual groups throughout Northern Ireland, the Republic of Ireland and the United Kingdom.<sup>300</sup>

The group’s report with 31 recommendations (2009) was accepted by the UK government for public comment and further consideration.<sup>301</sup>

One of the group’s most valuable developments is the proposal to the government for the creation of a Legacy Commission to deal with the past by combining reconciliation, justice and information recovery processes. The commission, established by law, may be chaired by an International Commissioner and two National Deputy Commissioners appointed by the governments of Great Britain and Ireland in consultation with the prime minister.

It was proposed to include in the commission’s mandate the promotion of peace and stability in Northern Ireland as the main goal. To achieve it, it was supposed to work in 4 directions: assistance to society in achieving a common future; analysis and investigation of historical events; information recovery; examining conflict-related or conflict-arising cases. Throughout the 5 years mandated, the commission must provide reports to the families of victims (on individual investigations), a public summary of these reports and the reports containing their conclusions on thematic areas. The proposed budget for the commission is approximately £170 million over 5 years and

an additional budget of £100 million to address identified community issues.

It was also expected that the commission, upon completion of its work, would call on the people of Northern Ireland, including political parties and any remaining militias, to sign a declaration that they will never again resort to politically motivated assassination and violence.<sup>302</sup>

In 2000, the **Victims Unit** was established under the Office of the First Minister of the Northern Ireland Assembly. Its purpose was “to raise awareness and coordinate activities on issues affecting victims within the decentralized administration and society at large”. First of all, in 2001, the Division considered the idea of creating a Victims’ Commissioner for Northern Ireland. The unit is responsible for the Commission for Victims and Survivors and the Victims and Survivors Service.<sup>303</sup>

Introduced on a temporary basis in 2005, the **Victims’ Commissioner** is now permanent to address issues related to services for victims, funding mechanisms for services and grants to victims and survivor groups, as well as individual victims.<sup>304</sup>

In May 2008, **the Commission for Victims and Survivors for Northern Ireland** was established by the Victims and Survivors Decree (2006). The commission (11 people) is a non-departmental executive body. Its main mission is to solve the problems of all victims and survivors of the conflict in Northern Ireland by offering the highest quality service, recognizing the legacy of the past and building a better future. In June 2010, the commission issued recommendations to the government on how to proceed with the past.<sup>305</sup>

**The Victims and Survivors Service**, 2009, is established as the body ensuring the implementation of the Strategy for Victims and Survivors (2009). The purpose of the service is to coordinate service delivery and funding to meet the needs of individual victims and survivors, ensuring that these services

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<https://nihrc.org/publication/detail/summary-advice-to-the-secretary-of-state-for-northern-ireland>

<sup>300</sup> Aoife Duffy “A Truth Commission for Northern Ireland?”. *International Journal of Transitional Justice*, Vol. 4, 2010, p. 26–46.

[https://www.researchgate.net/publication/249291865\\_A\\_Truth\\_Commission\\_for\\_Northern\\_Ireland](https://www.researchgate.net/publication/249291865_A_Truth_Commission_for_Northern_Ireland)

<sup>301</sup> Michael Potter, *Dealing with the Past*. Paper 129/10. NIAR 342-10. 22 September 2010. Research and Library Service. Briefing Paper.

<http://www.niassembly.gov.uk/globalassets/documents/raise/publications/2010/ofmdfm/12910.pdf>

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<sup>302</sup> Report of the Consultative Group on the Past. Executive Summary.

[https://cain.ulster.ac.uk/victims/docs/consultative\\_group/cgp\\_230109\\_report\\_sum.pdf](https://cain.ulster.ac.uk/victims/docs/consultative_group/cgp_230109_report_sum.pdf)

<sup>303</sup> The Executive Office website. <https://www.executiveoffice-ni.gov.uk/articles/victims-and-survivors>

<sup>304</sup> The Commission for Victims and Survivors. <https://www.cvsni.org/about-us/the-commissioner/>

<sup>305</sup> The Commission for Victims and Survivors. <https://www.cvsni.org/about-us/>

are delivered to appropriate standards. The service provides funding to individuals and organizations through two main programs — the Individual Needs Program and the Victims Support Program.<sup>306</sup>

According to the 2020 survey, there is growing support for a truth and reconciliation commission in Northern Ireland. A study by the University of Liverpool found that 45.7% of people agree or strongly agree that a commission should be created to deal with the past, up from 31.5% in 2017. With the removal of those who did not express an opinion, the share of those wishing to create a truth and reconciliation commission increased to 73.6%.<sup>307</sup>

### Problematic aspects

The Belfast Agreement did not contain a formal mechanism to deal with past abuses, in order, according to experts, not to jeopardize the reached ceasefire, while focusing on the problems of the present and the future. Some experts believe that the British government and Sinn Fein (an Irish political party) would not want to enter the process of investigating their past misconduct in order to restore the truth. This is politically disadvantageous to both sides: most of the killings were carried out by paramilitaries, who are unlikely to be able to provide accurate information about the documented deaths. The government, in turn, is not interested in investigating the deaths caused by the actions of the British military.<sup>308</sup>

Northern Ireland lacks an effective platform for dealing with the past. And the numerous initiatives proposed by the government do not enjoy the confidence of the Irish community, since, in its opinion, the government itself was a party to the conflict and therefore cannot be impartial.<sup>309</sup>

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<sup>306</sup> Victims and Survivors Service site.  
<https://www.victimsservice.org/publications-corporate-documents/>

<sup>307</sup> Gerry Moriarty, "Support for truth commission in North rising, according to survey". The Irish Times. Fri, Mar 6, 2020.  
<https://www.irishtimes.com/news/ireland/irish-news/support-for-truth-commission-in-north-rising-according-to-survey-1.4194282>

<sup>308</sup> Ryan Gawn, "Still shackled by the Past: Truth and Recovery in Northern Ireland". The Peace and Conflict Review.  
<http://www.review.upeace.org/index.cfm?opcion=0&ejemplar=13&entrada=72>

<sup>309</sup> Ryan Gawn, "Still shackled by the Past: Truth and Recovery in Northern Ireland". The Peace and Conflict Review.  
<http://www.review.upeace.org/index.cfm?opcion=0&ejemplar=13&entrada=72>

In addition, the example of South Africa suggested by several experts may not work in Northern Ireland for at least three reasons:

1. Unlike the ethnic conflict in South Africa, in Northern Ireland it is difficult to identify "victims", since all parties to the conflict at one time or another played the role of victim and perpetrator.

2. No leader in Northern Ireland advocated the process of reconciliation or played a conciliatory role like Nelson Mandela in South Africa. In addition, the basic values of restorative justice (reconciliation and forgiveness) are often understood by European society as such that they can be perceived only after the execution of punitive justice. In other words, for Europeans, forgiveness comes only when society holds the perpetrators accountable for their actions.

3. Northern Ireland gives priority to the Belfast Agreement, where the parties take on very specific and enforceable obligations, followed by actions that are quite understandable, predictable from the point of view of law and logic. Violation of each clause of the agreement also predictably leads to a set of responses. Against the background of this algorithm, the process of reconciliation does not look specific enough, understandable, with clear indicators, and therefore acceptable for society.<sup>310</sup>

### *Latvia, Lithuania, Estonia*

After the restoration of independence in 1991, the post-Soviet Baltic states created truth commissions, which received various names: the Commission of the Historians of Latvia, the International Commission for the Evaluation of the Crimes of the Nazi and Soviet Occupation Regimes in Lithuania, the Estonian International Commission for the Investigation of Crimes against Humanity, EICICH.

Established in 1998 by decisions of the presidents of the countries, the commissions had fairly similar mandate provisions:

- analysis of the repressive policies of the Soviet and Nazi occupation regimes (Latvia, Lithuania, Estonia);

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<sup>310</sup> Timothy J. White and Andrew P. Owsiak, "Truth and Reconciliation in the Northern Ireland Peace Process" Presented at the Annual Meeting of the International Studies Association-Midwest Hilton at the Ballpark, St. Louis, Missouri. November 9, 2013.  
[https://www.researchgate.net/publication/273380894\\_Truth\\_and\\_Reconciliation\\_in\\_the\\_Northern\\_Ireland\\_Peace\\_Process](https://www.researchgate.net/publication/273380894_Truth_and_Reconciliation_in_the_Northern_Ireland_Peace_Process)

- study of systematic violations of human rights, facts of crimes against humanity and genocide (Latvia, Estonia);
- stimulating the process of historical justice and understanding the origins of the crimes of the Nazi and Soviet occupation and their consequences for the states and societies of Europe (Lithuania);
- assistance in forming an objective official position on historical issues and communicating it to an external (European) audience (Lithuania, Estonia)<sup>311</sup>.

As can be seen, the main task of the commissions was to assess the negative experience associated with the Nazi occupation, the Holocaust and the period of the Soviet regime.

For this reason, the reassessment of historical memory, based mainly on materials from the state archives (as in due time in the Federal Republic of Germany), has emerged as the main direction of the commissions' work. The common status and mechanisms of formation, the provisions of the mandate allow experts to call these institutions as the Baltic Commissions.

A common feature is the fact that the Baltic Commissions, in contrast to the already accumulated world experience, paid almost no attention to the issues of reforms, reconciliation or non-legal means of restoring justice, leaving aside the study of individual stories of victims.

Working at the intersection of historical science, legal assessments of events and socio-political discourse, the Baltic Commissions are a new form of work with the past — something in between truth commissions and institutions of national memory.

At the same time, they did not replace the work of institutions involved in the preservation of archives, memorialization or restoration of historical memory. The commissions have tended to focus on public debate about the causes and meaning of collective suffering, rather than identifying specific perpetrators and victims.<sup>312</sup>

<sup>311</sup> Transitional Justice and Memory in the EU, website, <http://www.proyectos.cchs.csic.es/transitionaljustice/information-by-country>

<sup>312</sup> Onur Bakiner, "Between Politics and History: The Baltic Truth Commissions in Global Perspective," in *Transitional Justice and the Former Soviet Union*. Edited by Cynthia M. Horne, Lavinia Stan. (Cambridge University Press, 2018.) — 438 p. P. 170.

Of course, the commissions had their particularities.

**In Latvia**, for example, the commission included more than 30 national and international historians who formed 4 sub-commissions: "Crimes against humanity committed on the territory of Latvia in 1940–1941"; "Holocaust on the territory of Latvia 1944–1944"; "Crimes against humanity committed on the territory of Latvia during the German occupation 1941–1945"; "Crimes against humanity committed on the territory of Latvia during the second Soviet occupation 1944–1956."

By 2014, the commission had issued 27 volumes of the report "The Hidden and Forbidden History of Latvia under Soviet and Nazi Occupations 1940–1991", accompanying its work with press conferences, publications in the media, the release of monographs<sup>313</sup>. International experts stated that in this way, after the restoration of independence, Latvian historians moved on to the restoration of independent historiography<sup>314</sup>.

In 2005, the Cabinet of Ministers of Latvia created another institution — the Commission for Identifying the Number of Victims of the Communist Occupation and their Final Resting Places, Aggregating Information on Repressions and Deportations, and Calculating the Costs to the Latvian State and Its Inhabitants. The main task of the new commission was the preparation of the "White Book" summarizing the to-

<https://books.google.com.ua/books?id=I4JIDwAAQBAJ&pg=PA14&lpg=PA14&dq=The+Baltic+Truth+Commissions+in+Global+Perspective&source=bl&ots=U1uiOdGqBw&sig=ACfU3U3J-dhQaD7j4ltpTshglxuroCT6kg&hl=ru&sa=X&ved=2ahUKewiCgbLgyfHzAhVClosKHRNyBowQ6AF6BA&LEAM#v=onepage&q=The%20Baltic%20Truth%20Commissions%20in%20Global%20Perspective&f=false>

<sup>313</sup> Onur Bakiner, "Between Politics and History: The Baltic Truth Commissions in Global Perspective," in *Transitional Justice and the Former Soviet Union*. Edited by Cynthia M. Horne, Lavinia Stan. (Cambridge University Press, 2018.) — 438 p. P. 158.

<https://books.google.com.ua/books?id=I4JIDwAAQBAJ&pg=PA14&lpg=PA14&dq=The+Baltic+Truth+Commissions+in+Global+Perspective&source=bl&ots=U1uiOdGqBw&sig=ACfU3U3J-dhQaD7j4ltpTshglxuroCT6kg&hl=ru&sa=X&ved=2ahUKewiCgbLgyfHzAhVClosKHRNyBowQ6AF6BA&LEAM#v=onepage&q=The%20Baltic%20Truth%20Commissions%20in%20Global%20Perspective&f=false>

<sup>314</sup> Eva-Clarita Onken, "The politics of finding historical truth: reviewing Baltic history commissions and their work" *Journal of Baltic Studies*. Vol. 38, No. 1, March 2007, pp. 109–116. [https://www.researchgate.net/publication/249031177\\_The\\_politics\\_of\\_finding\\_historical\\_truth\\_Reviewing\\_Baltic\\_history\\_commissions\\_and\\_their\\_work](https://www.researchgate.net/publication/249031177_The_politics_of_finding_historical_truth_Reviewing_Baltic_history_commissions_and_their_work)

tal human and financial costs of the Latvian state and its people for the entire period during which Latvia was the Soviet Socialist Republic.<sup>315</sup>

**In Estonia,** the creation of the truth commission was preceded by the work of Estonian State Commission on Examination of the Policies of Repression, ESCEPR, formed by scientists and former political prisoners. In 2005, the commission issued a final report "The White Book: Losses Inflicted on the Estonian Nation by Occupation Regimes, 1940–1991".<sup>316</sup>

Established in 1998, the Estonian International Commission for the Investigation of Crimes Against

Humanity (EICIH) was the only Baltic Commission to be formed exclusively from international experts. Three reports prepared by 16 authors (1998–2007) are also the only ones where the names of specific criminals are indicated.

The report also reflects the role of local government, political police, as well as individual members of various police units in past crimes.

The work of the commission evolved and continued with the creation of the Memory Institute in 2008.

One of the important results of the work of the Baltic Commissions is the recognition of the crimes committed by the Stalinist regime against the Baltic peoples by both the European Union and the Council of Europe.

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<sup>315</sup> Transitional Justice and Memory in the EU, website, <http://www.proyectos.cchs.csic.es/transitionaljustice/information-by-country>

<sup>316</sup> The White Book: Losses Inflicted on the Estonian Nation by Occupation Regimes, 1940–1991. Estonian State Commission on Examination of the Policies of Repression. Ed.: Tiina Koitla. Republic of Estonia, 2005.

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[http://www.proyectos.cchs.csic.es/transitionaljustice/sites/default/files/maps/info/truth-commissions/estonia\\_the\\_white\\_book.pdf](http://www.proyectos.cchs.csic.es/transitionaljustice/sites/default/files/maps/info/truth-commissions/estonia_the_white_book.pdf)

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