

## TRUTH COMMISSIONS and PROCEDURAL FAIRNESS

This is the first law book devoted entirely to the subject of truth commissions. The book sets forth standards of procedural fairness aimed at protecting the rights and interests of those who come into contact with truth commissions – primarily victims and their families, witnesses, and perpetrators. The aim of the book is to provide recommended criteria of procedural fairness for five possible components of a truth commission’s mandate: the taking of statements, the use of subpoenas, the exercise of powers of search and seizure, the holding of victim-centered public hearings, and the publication of findings of individual responsibility in a final report (sometimes called the issue of “naming names”). The book draws on the experience of past and present truth commissions, analogous national and multilateral investigative bodies, and international and comparative standards of procedural fairness.

Mark Freeman is an international lawyer, author, and lecturer specializing in human rights and transitional justice. He is co-author of the first comprehensive Canadian textbook on international human rights law, as well as a companion volume of texts, cases, and materials. He has conducted missions to more than a dozen countries to provide advice and training on the establishment and operation of truth commissions and other transitional justice mechanisms. He currently heads the Brussels office of the International Center for Transitional Justice.

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**... for truth is truth  
to the end of reckoning.**

– WILLIAM SHAKESPEARE,  
*MEASURE FOR MEASURE*

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## Foreword

Transitional justice has become a feature of the past three decades. It is a consequence of the significant number of nations that have struggled to make the transition from war to peace or from oppression and discrimination to forms of democratic government. The challenge facing such societies is the manner in which they should treat past serious human rights violations. The perpetrators seek blanket amnesties and the victims seek prosecution of the former leaders.

It is tempting in that context to forget the past in favor of building a new and better future. It is the line of least resistance. It is also a recipe for future disaster. Where past human rights violations are ignored and the victims forgotten, there is a cancer in such a society that remains dormant and available for use or abuse by some or other future despotic, nationalistic leader. Examples are there for the choosing – the Balkans, Rwanda, the Middle East.

More enlightened leaders have sought a third way between national amnesia and criminal prosecutions – the establishment of a truth commission. In Chapter 1 of this work there is an excellent and concise history of truth commissions and an explanation of their relationship to courts and other forms of official and nonofficial truth-seeking mechanisms.

One of the challenges facing a truth commission is the fairness of its proceedings. It is all too easy to allow it to be used as a political platform to castigate the former regime. It is a complex and sensitive process to assure victims they will receive protection and respect for their dignity when they testify. It is no



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exaggeration to state that the success or failure of a truth commission will crucially depend upon the fairness of its proceedings.

This study could not be timelier. It would have been a great resource for the leaders of earlier truth commissions as they went about their work. I have no doubt that it will be regarded in that way by those still to come.

This book, however, has a wider relevance. It contains a thorough overview of the international law of procedural fairness that applies not only to truth commissions but also to other forms of nonjudicial inquiry. It has become evident that many international organizations fail to observe procedural fairness – whether committees of the United Nations that make decisions affecting the lives of many thousands of persons or committees of investigation set up by other international or regional organizations. There are many domestic committees of investigation that also fail to observe rules of fairness. I have in mind investigations set up by national legislatures and especially in the United States where congressional committees conduct scores of investigations annually. This book should be made compulsory reading for those who conduct such investigations and the members of their staff.

The author does not pontificate, yet makes no concessions on matters of principle. He is well aware of and takes into account the practical and pragmatic problems faced by truth commissions. I have in mind questions such as the appropriate burden of proof, the admissibility of evidence, and notice to those who might be adversely affected by evidence or the findings. There are a host of other practical issues that are treated with thoroughness and thoughtfulness.

I recommend this book to anyone who has an interest in transitional justice and, in particular, truth commissions. I also believe *Truth Commissions and Procedural Fairness* will be a useful and insightful work for lawyers, legislators, and members of the public who have an interest in the fairness of institutions that continue to multiply and affect the daily lives of millions of people around the world.

Richard J. Goldstone

## Preface

Since the Nuremberg trials and even more so since the end of the Cold War, formal mechanisms to address human rights abuses have increased dramatically, both in number and variety. Today there are, for example, a permanent International Criminal Court, two *ad hoc* international criminal tribunals (the International Criminal Tribunals for the former Yugoslavia and for Rwanda), and several mixed national-international criminal tribunals. There are three regional human rights courts: the European and Inter-American Courts of Human Rights, and the African Court on Human and Peoples' Rights. There is also a multitude of quasi-judicial and nonjudicial human rights mechanisms, including seven UN treaty bodies and two regional human rights commissions.

Most contemporary mechanisms for the vindication of human rights follow well-established rules of procedure. International criminal tribunals, for example, abide by internationally recognized standards of a "fair trial." Regional human rights courts and commissions have followed essentially the same rules of procedure for, in some cases, more than three decades. Yet there are a number of human rights mechanisms for which rules of procedure remain *ad hoc* and vague. This book constitutes a systematic attempt at outlining fair procedures for one such mechanism: the truth commission.

A truth commission is an *ad hoc*, autonomous, and victim-centered commission of inquiry set up in and authorized by a state for the primary purposes of (1) investigating and reporting on the principal causes and consequences of broad and relatively recent patterns of severe violence or repression that

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occurred in the state during determinate periods of abusive rule or conflict, and (2) making recommendations for their redress and future prevention.

Particularly since the Truth and Reconciliation Commission in South Africa, the subject of truth commissions has attracted worldwide interest. Today it is widely believed that truth commissions can contribute not only to the clarification of contested historical events but also to criminal justice efforts, victim reparation, reform of dysfunctional public institutions, and national reconciliation. Remarkably, several truth commissions have done so. If it were otherwise, their general popularity among human rights activists would be difficult to explain. Yet truth commissions are only one tool among many available to help a society confront its past. Truth commissions, in fact, are part of the broader field of transitional justice, which focuses on the complex question of how states come to grips with a legacy of mass abuse.

Observers and sponsors of truth commissions have rarely taken a hard look at issues of procedural fairness for truth commissions. There are some exceptions. Priscilla Hayner, the leading authority on truth commissions, has examined fairness issues that arise for commissions that publish findings of individual responsibility in their final reports. The South African Truth and Reconciliation Commission's terms of reference were the result of extensive parliamentary and public debate on issues of fairness, and local courts rendered important judgments on questions of fair procedure that arose in the commission's course of operation. There have also been sporadic attempts at the UN Commission on Human Rights to codify a limited number of relevant procedural standards. But overall, there remains no sustained account of procedural fairness for truth commissions.

This book recognizes the fact that no two truth commissions – nor, for that matter, two political contexts – are identical. Some truth commissions are established by the executive branch of government, others by the legislature; some truth commissions run for less than a year, others for several years; some comprise three commissioners, others more than twenty; some hold public hearings, others only operate in private; some “name names,” others do not; some have subpoena and search and seizure powers, others lack them; some operate in contexts marked by serious and ongoing security threats, others operate in more settled environments. The world of truth commissions is, in short, marked by diversity. Yet the fact is that the similarities between truth commissions are far greater than the differences. As this book demonstrates, truth commissions resemble nothing so much as each other. For this reason, and despite the apparent diversity of models, it is possible to develop a set of guiding principles on procedural fairness for truth commissions.

My interest in developing fairness standards for truth commissions was borne of an appreciation for international fair trial standards, and a recognition that the world of trials was at least as diverse as the world of truth commissions.

There are criminal trials and civil trials; group trials and individual trials; full-length trials and summary trials; trials in common law jurisdictions and trials in civil law jurisdictions; trials in person and trials *in absentia*; trials by specialized tribunals and trials by ordinary tribunals; trials in public and trials *in camera*; trials by judge and trials by jury; and so forth. None of this diversity has led any serious scholar to suggest the futility or irrelevance of having international fair trial standards. The same goes for truth commissions. Those who create or run truth commissions require guidelines on fairness no less than those engaged in trial proceedings.

This book does not cover all aspects of a truth commission's mandate or operation. Instead, it offers recommended criteria of procedural fairness for five possible components of its work that bear directly on issues of procedural fairness: the taking of statements, the use of subpoena powers, the use of powers of search and seizure, the holding of public hearings, and the publication of findings of individual responsibility in a final report. In examining these functions, the book explores the notion of procedural fairness for persons who might be adversely impacted by them, but it gives equal attention to the procedural fairness interests of witnesses and of victims and their next-of-kin.

Certain of these five components arise more frequently than others. For example, every truth commission conducts some form of statement taking, but not all have wielded subpoena or search and seizure powers; some commissions have the power to make findings of individual responsibility, others do not; some hold public hearings, others do not. At the same time, it is rare for truth commission sponsors to bypass consideration of any of the five attributes. Moreover, truth commission mandates increasingly encompass most, and in some cases all, of these attributes, thus increasing the need for attention to issues of procedural fairness. Admittedly, the quality of the justice system in most transitional contexts tends to be low, making resort to the courts on procedural fairness violations unlikely when the commission is still in operation. But this is beside the point. Truth commissions, no less than courts, should apply high standards of procedural fairness for their own sake. No one would suggest that fair trial standards are irrelevant because they are difficult to discharge. The same logic should apply to truth commissions.

Some readers may note this book's omission of more controversial and atypical aspects of some recent truth commission mandates. For example, there is no in-depth analysis of the truth-for-amnesty procedure used by the South African Truth and Reconciliation Commission. Nor does the book examine the Timor-Leste Commission on Reception, Truth, and Reconciliation's power to formalize contracts of community service for perpetrators. Nor, finally, does it cover the compensation-granting power wielded by the Moroccan Commission on Fairness and Reconciliation. The primary reason for not examining these unique attributes here is their adjudicative character (*i.e.*, the fact that they

involve the settling of legal rights). The focus of this book is limited to the nonadjudicative aspects of truth commission work.

In light of the wide range of possible truth commission objectives, attributes, and budgets, and given the importance of local participation in any commission's conception, this book does not provide a blueprint for the design of an "ideal" truth commission. Rather, it aims to provide a practical reference tool for local sponsors, advocates, and members of truth commissions, as well as for international human rights scholars and practitioners. Some of the material in the book will be of most use at the "design stage" (*i.e.*, for sponsors and advocates of a truth commission prior to its establishment). Some will be of most use at the "implementation stage" (*i.e.*, for appointed commissioners and staff and for a commission's many external stakeholders). And some of it will be most relevant to the "postcommission" stage (*i.e.*, for governments and others dealing with implementation of the final report and any attendant legal challenges). All of it, however, will be relevant to persons who accept the importance of procedural fairness and who wish to depoliticize what is an inherently controversial public exercise.

A very diverse, if nonexhaustive, range of relevant mechanisms and sources was consulted in the research for this book. Particular attention was paid to the experiences of (1) past truth commissions; (2) analogous domestic, multilateral, and nongovernmental human rights investigations; and (3) relevant international human rights and criminal law standards. An effort was also made to consult legal sources from different legal traditions. Admittedly, however, the book has a common law bias corresponding to the legal education of its author. I hope that bias is overcome in part by the selection of sources: the truth commissions and the analogous bodies examined in the book operate in civil and common law countries alike, and the referenced international standards represent the closest approximation to "universal" standards.

One final remark by way of introduction. While its immediate topic is truth commissions, much of the book is also directly relevant to human rights investigations by analogous bodies such as nongovernmental organizations, Commonwealth commissions of inquiry, national human rights commissions, coroners, international commissions of inquiry, vetting bodies, and compensation commissions – many of which operate according to *ad hoc*, and not especially victim-sensitive, standards of procedural fairness. My discovery in writing this book was that truth commissions have as much to teach as to learn in relation to these and other investigative bodies.

The book comprises two principal parts. Part I provides an overview of the book's two main themes: truth commissions and procedural fairness. Part II examines the five previously noted possible components of a truth commission mandate. Each chapter in Part II consists of a detailed analysis of specific issues, followed by concrete recommendations. Although consistent themes emerge

throughout Part II, the chapters and sections are intentionally self-contained and can, for the most part, be read independently of one another. At the end of the book are three appendices. Appendix 1 is a table of past and present truth commissions and their key attributes. Appendix 2 consists of a small selection of primary materials on truth commissions. Appendix 3 contains a sampling of primary materials on analogous commissions of inquiry.

This work is current as of 1 January 2006 except where otherwise noted.

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As with any book, this one benefited immensely from the contributions of many individuals.

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## Abbreviations

ACHR	American Convention on Human Rights 1969
AfrCHPR	African Charter on Human and Peoples' Rights 1981
<i>AJIL</i>	<i>American Journal of International Law</i>
AmDR	American Declaration on the Rights and Duties of Man 1948
CAT	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women 1979
CERD	International Convention on the Elimination of All Forms of Racial Discrimination 1966
Charter	See "Mandate"
Commonwealth commission of inquiry	A commission of inquiry established in an English or Commonwealth jurisdiction pursuant to a statute generally entitled <i>Commissions of Inquiry Act</i> or <i>Tribunals of Inquiry Act</i>
CRC	Convention on the Rights of the Child 1989
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms 1950
ECOSOC	UN Economic and Social Council

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ETS	European Treaty Series
EU Charter of Rights	Part II (Charter of Fundamental Rights of the Union) of the draft Treaty establishing a Constitution for Europe 2004
EurSC	European Social Charter 1996
GA res.	UN General Assembly resolution
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights 1966
ICESCR	International Covenant on Economic, Social and Cultural Rights 1966
ICJ Rep	International Court of Justice Law Reports
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ILM	International Legal Materials
ILO	International Labour Organization
Mandate	The legal instrument(s) by which a truth commission is established and in which can be found its objectives, functions, and powers
<i>Mutatis mutandis</i>	“Making the necessary alterations”
NGO	Nongovernmental organization
OAS	Organization of American States
OAS TS	OAS Treaty Series
Rome Statute	Rome Statute of the International Criminal Court 1998
SC res.	UN Security Council resolution
Terms of reference	See “Mandate”
TRC	Truth and Reconciliation Commission
UDHR	Universal Declaration of Human Rights 1948
UN Charter	Charter of the United Nations 1945
UNTS	United Nations Treaty Series