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## SHOULD THE TRUTH COMMISSION'S CASE BE IMPLEMENTED IN UKRAINE?

**Summary.** The article is devoted to the study of the peculiarities of the “right to truth” and the creation of truth commissions, their key characteristics and features. Truth commission can be defined as a structure set up to identify historical events related to human rights violations, which may include atrocities by the military / government / insurgents. Most often truth commissions are set up to find out what has happened, to establish the truth about past events, past human rights violations and, if necessary, to identify the reasons for this and to make recommendations not to repeat them. Truth commissions only investigate past human rights violations. Violations that are still ongoing must be responded to by an appropriate human rights monitoring body. Although the truth commission is not a judicial body, its work may take place in parallel with the activities of criminal justice bodies.

During the analysis of the material, the author investigated the characteristic features that are inherent in the truth commissions, including formality; the creation as the result of a state-sanctioned decision; temporality of activity (for example, the term of the Commission for former Yugoslavia was 3 years; for Kenya – 2 years); organization in order to study specific facts of human rights violations and the investigation of human rights violations for a limited period of time. The author analyzes the activities of 2 truth commissions formed after the relevant events in South Africa and Argentina.

In conclusion, the author explored the possibility of introducing a truth commission in Ukraine and outlined the possible mandate of such a commission, namely: to establish the facts of mass violations of human rights during the armed conflict in the Donbass territory; to collect testimonies of witnesses and victims of mass human rights violation; to assist in organizing compensation for victims of the armed conflict.

**Key words:** right to truth, truth commission, armed conflict, transitional justice, human rights, human rights violations.

**The need for research.** Transitional justice as one of the priority processes during (and especially after) an armed conflict or exit from a totalitarian regime provides one of the key rights of victims – the right to know the truth and right to establish the truth. Ukraine is now in a situation where the completion of the period of the transitional justice after the collapse of the USSR is not finished and its new “round” will be needed after ending of armed conflict in the Eastern Ukraine.

The Commission on Human Rights on its 61 session in 2005 finalized the Report on updated principles for the protection and promotion of human rights through action to combat impunity by which set that each person has the right to know who is responsible for the most brutal crimes in order to prevent repetition of such violations; what are the violations of human rights and humanitarian

law for awareness of events and preservation of general historical memory and what is the fate of victims of violations established by the results of the national legal procedures [1].

It seems that these principles have too general attitude towards the situation that still is in its active phase on the Eastern Ukraine. However, analyzing the information about crucial violations of human rights it should be noted that more than 35 thousand people are victims of the conflict among the civilian population, the Ukrainian military and members of armed groups (in accordance to the a Periodic Report on the situation in Ukraine of the Office of the High Commissioner of the United Nations Human Rights Organization) [2]. Moreover, such numbers speak not only about victims but also about the amount of information to be collected, checked, investigated and prosecuted.

As sooner Ukraine as a state recognizes the need to use all possible measures to investigate and prosecute conducted crimes, as sooner it accepts its positive responsibilities, as easier it will be to keep such valuable information and to reproduce the truth in the future.

One of the possibilities that are totally new for Ukraine is the experience that other countries received through the implementation of truth commission. Being one of the most corrupted, current Ukrainian judicial system is not able to cope with crimes that are taking place in the East of Ukraine. Knowing that the commission’s work does not include the research and investigation of the historical events still gives hope for faster research of truth and its acceptance by people (that is because the truth about different events conducted before and during Soviet regime has always been silent since the beginning of the 20th century).

**The main research question** of the research is to define why the work of truth commission should be used in Ukraine.

According to the main purpose of the work, **next objectives are pointed:**

- To analyze the concept “right to truth” and its international legal covering;
- To analyze characteristics process/procedure of implementing the truth commissions and perceptions of this institution by focusing on controversial and obscure points in general and particularly in different countries;
- To analyze the report of Commission of Truth and Reconciliation and follow the changes that this report caused regarding transitional justice in South Africa;
- To define and conclude pros and cons of implementation truth commission in Ukraine in order to resolve the situation that has been developed.

**Firstly, it's worth starting with the meaning of the concept “right to truth”.** The right to the truth has not yet been the object of a specific international convention. Some argue that the right

derives from other well-established rights in international human rights law, such as the right to a remedy, the right to receive and impart information, and the right to due process.

There are explicit treaty references to the right to know certain facts, including in instruments such as the Additional Protocol I to the Geneva Conventions [3] and the International Convention for the Protection of all Persons from Enforced Disappearances (ICCPED) [4], both of which establish the right of relatives of the missing or disappeared to learn the fate and whereabouts of their loved ones.

Most specifically, in an important development, the ICCPED confirms the right to the truth as an enforceable right in itself [4]. The treaty guarantees victims the right to know the truth regarding the circumstances of enforced disappearances, the progress and results of investigations, and the fate of disappeared persons. It sets out the obligations to provide restitution and guarantees of non-repetition.

Many UN resolutions and reports by independent experts contain explicit statements on the right to the truth. Following resolutions by the Human Rights Council, the UN General Assembly emphasized that the international community should “endeavor to recognize the right of victims of gross violations of human rights, and their families, and society as a whole to know the truth to the fullest extent practicable [5].”

However, there are certain regional and national courts that confirmed the enforceability of this right within their jurisdictions.

The Inter-American Commission of Human Rights and the Inter-American Court of Human Rights have confirmed that the right to truth is established by the American Convention on Human Rights [6], under provisions covering the right to a fair trial, freedom of thought and expression, and the right to judicial protection. In a series of cases, the Inter-American Court on Human Rights has upheld the right to the truth of victims, their next of kin, and society as a whole. The court has held that:

- The state is obliged to provide victims’ families with the truth about circumstances surrounding crimes [7].
- The outcome of all proceedings must be divulged to the public for “society to know the truth [8].”
- Society has the right to know the truth regarding crimes to prevent them in the future [9].
- Amnesty laws impeding the investigation of the facts about gross human rights violations and the establishment of responsibilities are not permitted under international human rights law [10].

Some national courts have also affirmed the right to the truth. In Argentina, the Supreme Court held in “*Simón*” that amnesty laws shielding perpetrators of crimes against humanity were unconstitutional [11]. In Peru, the Constitutional Tribunal in “*Villegas Namuche*” recognized the right to the truth as a “fundamental right” directly protected by the constitution [12]. In Colombia, the Constitutional Court in the case of “*Gustavo Gallón Giraldo y Otros*” stated that even the priority of contributing to the demobilization of illegal armed groups did not extinguish the state’s obligation to seek the truth regarding the disappeared [13]. In South Africa, the Constitutional Court in “*McBride*” upheld the rights of victims, the media, and public to speak the truth about crimes, even if they were not the object of an amnesty [14]. In this case, the court held that truth telling was the moral basis of a transition from the injustices of apartheid to democracy and constitutionalism.

### What are Truth Commissions and what are their objectives

Truth commissions are official, nonjudicial bodies of a limited duration established to determine the facts, causes, and consequences of past human rights violations [15]. By giving special attention to testimonies, they provide victims with recognition, often after prolonged periods of social stigmatization and skepticism. Truth commissions can contribute to prosecutions and reparations through their findings and recommendations, assist divided societies to overcome a culture of silence and distrust, and help to identify institutional reforms needed to prevent new violations.

The objectives of a truth commissions are outlined in the legal instrument that established it, often a law or some form of executive decree. These may be expressed in different ways, reflecting the priorities or circumstances of each country. Three objectives are fundamental:

1. Truth commissions should establish the facts about violent events that remain disputed or denied. Some commissions have limited their work to clarifying the factual circumstances of abuses, but most have also analyzed the facts to determine the historical and social contexts that gave rise to them, and whether further or criminal investigation is appropriate.
2. Truth commissions should protect, acknowledge, and empower victims and survivors. Commissions establish a relationship with victims and survivors not only as informers, but also as rights-holders, partners, and as people whose experiences deserve recognition.
3. Truth commissions should inform policy and encourage change in the behavior of groups and institutions, thus contributing to social and political transformation. The final recommendations of a truth commission try to identify and address the causes of abuse and violations in order to prevent their recurrence. Closely related to this objective, some commissions consider reconciliation between former rival communities to be of primary importance [16, p. 9].

Truth commissions are typically created during periods of political change, such as after the fall of an authoritarian regime or at the end of an armed conflict. A truth commission can be seen as a break from a violent past and a restoration of society’s moral foundation, deserving the highest level of recognition and support.

Most common, that truth commissions are established by an executive or legislative branch of government. The form chosen depends on the institutional and political realities in each country, with both approaches having advantages and disadvantages:

- In most constitutions, executive decisions, like presidential decrees, have less strength than formal legislation. Decrees are often succinct documents with limited reach, unable to empower commissions with the investigative powers typical of parliamentary inquiries. Depending on the context of a transition, the executive may have less political support than the legislature. In some countries, executive decrees can be as strong and legitimate as parliamentary legislation, and they may be faster and less contrived than legislative processes. Examples of successful truth commissions created by executive action include most Latin American commissions, Morocco, and Timor-Leste (under UN administration).

- Establishment by the legislature may reflect broader political support and institutional strength. However, the legislative process can be slow and is often subject to unpredictable negotiations that could affect the integrity of a commission’s mandate. Most African commissions, including South Africa’s, were established by parliamentary action [16, p.10].

Canada is the only case of a truth commission created from a judicial process [17]. Established to address the forced assimilation of indigenous children, it was the result of a court-mediated negotiation between Canadian civil society, churches, and the government, which concluded in a comprehensive settlement, including material compensation to survivors and memorialization initiatives.

#### **Key Characteristics of a Truth Commission**

– *Complementarity to criminal justice*: Truth commissions are not judicial inquiries. They do not establish individual criminal responsibility for specific crimes, determine punishment, or use the standards of due process applicable in a court of law. If they gather evidence useful for a criminal investigation, their inquiries may precede or complement the work of a court of law. While courts of law usually focus on the facts of an individual case, which are proven by exacting standards of evidence, truth commissions complement that approach by establishing the social and historical context of violations and large-scale patterns behind massive numbers of cases. Their analysis can help to uncover the logic and strategy behind abuses, helping to establish moral or political responsibility.

– *Focus on gross violations of human rights*: Historically, truth commissions have focused their investigations on the rights protecting a person's physical and mental integrity and other serious crimes, such as torture, enforced disappearance, extrajudicial killings, forced displacement, and sexual violence. Over time, their roles have expanded. Recent commissions have investigated more serious abuses, such as crimes against humanity and war crimes. Some have also looked at economic crimes and corruption as part of broader patterns of authoritarian abuse and violence.

– *Period of investigation*: Unlike parliamentary commissions of inquiry, common in many countries, which tend to focus on single issues or the circumstances of a specific event, truth commissions typically cover longer periods of abuse, sometimes decades. This allows truth commissions an opportunity to identify historical patterns of violence and systemic violations.

– *Large amounts of evidence*: Because of their broad focus, both in terms of violations and time period, commissions may gather massive information from direct witnesses, archives, and other sources. The Truth and Reconciliation Commission of Peru gathered 17,000 testimonies during its two-year tenure, and South Africa's Truth and Reconciliation Commission collected over 22,000 testimonies in three years. Such large amounts of data allow commissions to incorporate different methodological approaches, like statistical analysis, in their work.

– *Victim-centered approach*: Victims and survivors are primary sources of information for truth commissions, and many commissions have a legal mandate to ensure the well-being of victims. Many have developed services for victims, such as emergency help, psychological support, security, and legal aid. The Truth, Reception and Reconciliation Commission of East Timor employed specialized staff to grant emergency funds and help displaced people to return to their homes [16, pp. 10].

#### **Most successful examples of truth commissions: South Africa and Argentina**

##### South Africa

The Truth and Reconciliation Commission was created to investigate gross human rights violations that were perpetrated during the period of the Apartheid regime from 1960 to 1994,

including abductions, killings, torture. Its mandate covered both violation by both the state and the liberation movements and allowed the commission to hold special hearings focused on specific sectors, institutions, and individuals. Controversially the TRC was empowered to grant amnesty to perpetrators who confessed their crimes truthfully and completely to the commission [18].

The TRC took the testimony of approximately 21,000 victims; and 2,000 of them appeared at public hearings. The commission received 7,112 amnesty applications. Amnesty was granted in 849 cases and refused in 5,392 cases, while other applications were withdrawn. The TRC made detailed recommendations for a reparations program including financial, symbolic and community reparations. The commission proposed that each victim or family should receive approximately \$3,500 USD each year for six years [18].

The commission further recommended that South Africa's society and political system should be reformed to include faith communities, businesses, the judiciary, prisons, the armed forces, health sector, media and educational institutions in a reconciliation process.

##### Argentina

National Commission on the Disappeared (*Comisión Nacional sobre la Desaparición de Personas*, CONADEP) was created with an aim to investigate the disappearances of people between 1976 and 1983 and uncover the facts involved in those cases, including the locations of the bodies [19].

The commission reported 8,960 disappearances during the 1976–1983 military rule. Disappearances, torture, secret detention, and the disposal of bodies in unknown sites were systematic practices. All of the disappeared people were killed, and the lack of information provided about these people was an intentional strategy by the government to prevent cohesiveness among survivors [19].

The repressive practices of the military were planned and ordered by the highest levels of military command, but then de-facto President General Reynaldo ordered the destruction of military documentation that could have proven responsibility within the chain-of-command.

The commission recommended establishing a reparations program for the families of the disappeared and continued prosecutions and follow-up investigations concerning persons who remain missing.

#### **Should the practice of truth commission be implemented in Ukraine?**

Taking into account main purpose and aims of the truth commission it is logically, that such a body has to be created in Ukraine in order to help “seeking truth” regarding all events that taking place in the eastern part of Ukraine.

The mandate for such possible commission can be the following:

- establishing the facts of mass violations of human rights during the armed conflict in the Donbass territory;
- collection and systematization of testimonies of witnesses and victims of mass human rights violations in the Donbass;
- assistance in organizing compensation for victims of the armed conflict in Donbass.
- providing recommendations on criminal prosecution or amnesty of specific persons guilty of mass violations of human rights during the armed conflict in the Donbass;
- promoting reconciliation between the citizens of Ukraine who supported the Armed Forces of Ukraine and those who supported

the actions of the Russian Federation and illegal armed groups in the Donbass.

Also it is possible to identify the reasons that led to the events in eastern Ukraine (aggression of the Russian Federation, occupation of Crimea, Revolution of Dignity in 2014, etc.) and to study of the course of the armed conflict in eastern Ukraine, and events related to mass violations of human rights, crimes against humanity (battles near Debaltseve, Ilovaik) and their documentation.

**Conclusions.** However, at the moment it is difficult to say when exactly such commission should start its work. Some human rights activists insist that the truth commission in Ukraine should start work without waiting for a permanent truce and a cessation of hostilities, other – that the truth commission should start working immediately after reaching a permanent truce and concluding an effective peace agreement. And finally – that the truth commission will only work effectively if it is established a few years after a lasting truce is reached and an effective peace agreement is reached.

In spite of everything and assessing the experience of the most famous truth commissions and their achievements, it can be concluded that such a body is vital as an additional mechanism for achieving peace and recovery after the conflict.

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#### Пташник І. Р. Чи можливо запровадити комісію з правди в Україні?

**Анотація.** Статтю присвячено вивченню особливостей «права на правду» та створення комісії з правди, їхніх ключових характеристик та особливостей. Комісія з правди може бути визначена як структура, створена з метою встановлення історичних подій, пов'язаних з порушенням прав людини, які можуть включати в себе злочини військових/урядовців/ повстанців. Найчастіше комісії правди створюються для з'ясування того, що сталося, встановлення правди про події в минулому, минулі порушення прав людини та за потреби, – для визначення причин, які до цього призвели, вироблення рекомендацій щодо їх неповторення. Комісії правди розслідують винятково порушення прав людини, які відбувались у минулому. На порушення, які ще тривають, має реагувати відповідний уповноважений орган, що стежить за дотриманням прав людини. Хоча комісія правди не є судовим органом, її робота може відбуватись паралельно з діяльністю органів кримінальної юстиції. Після конфлікту чи періоду авторитаризму запровадження комісії з правди є доцільним для забезпечення легшого переходу до демократії та миру.

У ході аналізу матеріалу автором досліджено характерні риси, які притаманні комісіям правди, серед яких офіційність, створення санкціонованим державою рішенням; тимчасовість діяльності (наприклад, строк діяльності Комісії з правди та примирення в колишній Югославії

становив 3 роки; Комісії з правди, справедливості та примирення Кенії – 2 роки); організація для вивчення конкретних фактів порушень прав людини та розслідування порушення прав людини в обмеженому часовому відрізку. Автором проаналізовано діяльність 2-х відомих комісій правди, утворених після відповідних подій у Південній Африці та Аргентині.

Як висновок, автором досліджено можливість запровадження комісії з правди в Україні та окреслено мож-

ливий мандат такої комісії, зокрема: встановлення фактів масових порушень прав людини під час збройного конфлікту на території Донбасу; участь у зборі показань свідків і жертв масових порушень прав людини та допомога в організації компенсації жертвам збройного конфлікту.

**Ключові слова:** право на правду, комісія правди, збройний конфлікт, перехідне правосуддя, права людини, порушення прав людини.