

TRUTH COMMISSIONS AND TRIBUNALS

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General considerations

Truth commissions and tribunals pursue many common objectives. Both do fact-finding. Both can advance victim reparations. Both can contribute to public debate and acknowledgement. Both are able to recognise and validate victim experiences. Both can be spaces for the attribution of responsibilities.

Depending on their design, truth commissions and tribunals may also have overlapping functions. Both tend to involve statement taking. Both may wield powers of investigation. Both tend to involve a mix of public and private hearings.

However, if tribunals had identical functions and advantages to truth commissions – or vice versa – the two types of mechanism would not exist. Among their chief differences (and complementarities) are the following:

Truth commissions	Tribunals
Primarily or exclusively non-judicial (provides greater flexibility in evidence)	Exclusively judicial (provides greater rigor in evidence)
Primary focus is victims (emphasising harm and displacing the focus away from perpetrators)	Primary focus is perpetrators (emphasising accountability above all else)
Primary purpose is truth recovery and public awareness (ensuring that broader truths and patterns are discussed and not crowded out by legalistic priorities)	Primary purpose is achieving legal truths and making determinations of criminal culpability (ensuring punishment for wrongdoing)
Final product is a non-binding report containing findings and recommendations (reframing public debate and identifying reforms for future)	Final product is a binding, written judgement (ensuring an enforceable result for past crime)

To choose only one of these mechanisms is unnecessarily to forego the additional, stabilising benefits the other could provide.

Even in the case of a super-empowered version (of either mechanism), the result would be unnecessarily negative. For example, a super-empowered judicial system expected to deliver the benefits of a tribunal *and* a truth commission (e.g. Justice and Peace) is more likely than not to end up overreaching, and thus disappointing on *both* fronts.

For identical reasons, a super-empowered truth commission expected to deliver dual benefits is more likely than not to fail. (NB: People often make the claim that South Africa attempted this, when in reality its truth commission operated *concurrently* with criminal prosecutions by the ordinary court system.)

Colombia-specific considerations

Hypothetically, there are three possible options for delivering truth and justice in the Colombian context:

1. A special tribunal (and/or ordinary court system) but no truth commission
2. A truth commission with the authority to act as a substitute for the courts
3. A truth commission and a special tribunal (and/or ordinary court system)

Of these, Option 1 is irrelevant as there is a joint commitment by the negotiating parties to the creation of a truth commission.

Option 2 is also irrelevant, because the government has made clear that it will never agree to such a model. Its many reasons (noted in various documents delivered to the FARC) include: unwavering public expectations of criminal trials, clear warnings by the ICC OTP of the need for judicial proceedings, unambiguous jurisprudence issued by the Inter-American system, the extreme risk of provoking the entire Colombian and international NGO sector into action against the model, the high likelihood of a decades-long legal battle affecting all combatant categories, and the impossibility of a non-judicial body's decisions having the effect of *cosa juzgada*.

As such, this leaves Option 3, namely: the operation of a truth commission *plus* a special tribunal (and/or parallel ordinary court system). This being the case, the only issues up for negotiation are (1) the respective mandates and powers of each mechanism, and (2) the interrelationship and sequencing of them. The issues are, of course, interdependent.

For the sake of brevity, we can describe the competing positions in the process as follows:

1. The Government believes that a non-judicial truth commission should begin operating only after a special prosecutor has selected a definitive set of individuals who will answer before a special tribunal for war-related crimes.
2. The FARC believes that any judicial action should be suspended until after the truth commission has concluded its work and made recommendations or binding decisions about who, if anyone, should receive special legal treatment (including pardons) for war-related crimes – on the understanding that undisclosed crimes could be the subject of future trials.

While there are pros and cons to any truth-and-justice relationship, the second has far fewer pros and far more cons. In my opinion, it is unviable for the following combination of reasons:

1. In the absence of any future guarantee of justice, it would be politically and/or legally impossible for the ordinary court system in Colombia to suspend (for a period of 4+ years) all of the existing sentences and investigations.
2. The ICC OTP (and selected foreign prosecutors) will feel provoked by what will inevitably seem an "impunity arrangement" and will thus bring cases against the armed forces (and possibly against the FARC). In this, they will be encouraged or supported by numerous Colombian and international NGOs.
3. The Inter-American system (especially, but not only, the Commission) will feel obligated to reject the model as an illegitimate and/or illegal attempt by the Colombian state to evade the minimal scope of its investigation and sanction obligations for serious violations.
4. The image and work of the truth commission will become "judicialised", with the result that some of its most distinctive advantages (greater latitude in evidentiary requirements, victim-centred focus, and attention to broader truths and patterns) will be degraded or lost.
5. By all indications, the public is unlikely to tolerate or support the possibility that *none* of the FARC leaders will face the court system, thus dooming the referendum (or failing that, dooming the sustainability of the accord at implementation stage).

6. Being the “only anti-impunity game in town” (given what may *not* transpire in justice afterward), the truth commission will feel obliged to take up the impossible burden of resolving individual cases of victimisation from a 50+ year conflict. This will prevent it from orienting its primary energies to the “biggest issues” and the “biggest cases”, and to the creation of interactive spaces that can contribute to peaceful co-existence.
7. By delaying the clarification of key actors’ basic legal security until the end of the commission’s operations (when a court could take up a previously undisclosed or unresolved case), the parties’ good-faith implementation of the accord will be at risk.

The first option – in which a special prosecutor would indict a definitive set of individuals before the truth commission begins its non-judicial operations – would help avoid all of these disadvantages (or at least make them far more manageable) because:

1. The ICC OTP, foreign prosecutors, and the Inter-American system would not feel provoked by a seeming “impunity deal”, as the front-end focus on criminal justice would “buy” early legitimacy for the peace process as a whole.
2. The public “thirst” for punishment would be satisfied at some basic level right off the bat.
3. The commission would be free of the “impunity gap-filling” burden that so frequently disrupts and distorts the mandates and activities of truth commissions.
4. The image and work of the truth commission would avoid “judicialisation”, thus ensuring a non-legalistic approach with victims, a safer space for perpetrators to come forward, and greater ability to focus on broader truths.
5. The quicker consolidation of legal security can produce a “calming” environment that will be necessary to facilitate good-faith implementation of the parties’ peace commitments (not least in the area of DDR).