

ICTJ Nepal
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Selecting Commissioners for Nepal's Truth and Reconciliation Commission

The importance of an independent, representative, and competent truth and reconciliation commission (TRC) to guarantee the rights of victims to truth, justice, and reparations should not be underestimated. Key recommendations in this regard are listed below.

- The selection committee should comprise people who have moral authority and who are respected by the various sectors of society.
- The nomination process for commissioners should be public, transparent, and inclusive.
- The selection committee should use the nomination process to stimulate a wide public debate about who would be successful candidates, as well as to deepen the understanding of the role of the TRC.
- The selection committee should establish clear procedures for vetting nominated candidates.
- Key criteria to be considered when nominating commissioners should at a minimum include plurality in representation, integrity, competence, ability to address the issues likely to be examined, and availability.

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Background

In July 2007, the Ministry of Peace and Reconstruction (MoPR) proposed legislation that would establish a TRC in Nepal. In light of the provisions of the draft TRC bill, this briefing note outlines certain considerations to be taken into account when selecting commissioners for Nepal's TRC. It is essential that the TRC is led by a chair and commissioners who have a good reputation for independence, integrity, and commitment to human rights, and who are not perceived to be potentially influenced by political factors. If the Nepalese people support the commissioners, then they will participate in TRC activities, provide information, and assist it. They will also have confidence in the integrity of the TRC's work and any recommendations that are included in its final report. If people feel the commissioners are not impartial, honest, and committed to the truth, the entire exercise is unlikely to succeed and will be a waste of time and resources.

One of the key points in the commissioner selection process is to include the public in the nomination process so they feel connected from the beginning. A committee of individuals of high integrity should undertake the selection, and they should do so by collecting nominations, short-listing, interviewing candidates, and discussing them. Clear criteria set out in the TRC legislation will be the basis for selecting commissioners. In order for those groups most affected by the conflict to feel confident about the work of the TRC, the choice of commissioners should reflect regional, ethnic, religious, and gender balance that is relevant to the conflict. The selected commissioners should collectively possess a range of relevant skills, particularly in relation to human rights issues. The chair and commissioners should have the personal profiles and capacity to be able to conduct an inclusive truth-seeking process that can facilitate public healing and national reconciliation.

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Section 4 Formation of the Commission:

- (1) The Government of Nepal shall form a Commission consisting of a maximum of seven members including the Chairperson and Member Secretary.
- (2) A Recommendation Committee shall be constituted as follows to recommend the appointment of the Chairperson and Members of the Commission:
 - (a) Chairperson of the Constituent Assembly (Chairperson);
 - (b) One member of the National Human Rights Commission as appointed by its Chairperson;
 - (c) One person designated by the Government of Nepal from among human rights activists, psychologists, women rights activists, legal experts, forensic experts, experts on conflict issues, sociologists or any other persons involved in the peace process (Member) . . .
- (4) The Committee as referred to in Sub-section (2) will determine its working procedures and publicize them.

Section 5 Qualification of the Chairperson and Members: The following persons shall be eligible for appointment to the post of Chairperson and Member:

- (a) Who is not a member of any political party or its sister organization;
- (b) Who has maintained a high moral character;
- (c) Who has worked in the field of human rights, peace, justice or conflict management; and
- (d) Who is at least 35 years old.

The Appointment of the Selection or Recommendation Committee

The draft TRC bill says the members of the selection committee, which the bill calls the recommendation committee should include the chair of the Constituent Assembly, a member of the National Human Rights Commission, and a member designated by the government who may be a human rights activist, an expert in legal, conflict, or forensic matters, a psychologist, or sociologist. In April 2010, legislators submitted amendments to the draft bill to address the composition of the recommendation committee. Proposals included adding at least one woman to it and replacing the chairperson of the Constituent Assembly with the chief justice of the Supreme Court.

Some legislators also proposed that victims be represented in some way on the committee, either by an individual or a member of an organization, provided the person had not been involved in the armed conflict.

The recommendation committee's mandate should be clearly defined. Once the commissioners for the TRC have been named, the recommendation committee's role is finished.

Process for Nominating and Selecting Commissioners

The selection process should be public and transparent, and strike the balance between inclusiveness and expeditiousness. In the most recent amendment process, legislators made proposals regarding the selection of the commissioners, such as adding a section that states, "Before making recommendations, the committee must decide upon a public selection process." Another proposal suggested replacing the language with "Before selecting members as per sub section 3, the Recommendation Committee must decide upon a public selection process."

In terms of good practices, the following outlines a number of considerations.

Consultation and Outreach

As a general guideline, truth commissions have greater credibility if their members are perceived as fully independent, that is, if no constituency directly mandates a commissioner. The nomination and appointment phase benefits from simplicity and transparency. In addition, "to ensure public confidence in a truth commission, civil society's input into the selection of commissioners is recommended."¹ Thus, basic principles underpinning the selection process should include inclusiveness and community outreach. For example, civil society organizations, nongovernmental organizations involved in promoting and protecting human rights, and groups oriented toward victims, women, and marginalized people and communities within the country should fully participate in the selection and appointment process. This should be transparent, effective, and should have enough resources to ensure that these groups are properly consulted.

Nomination

Practices that have worked well include people nominating themselves or organizations nominating individuals.

Good candidates should be well respected in society and/or have been nominated by credible organizations. The process of nomination should be simple and accessible.

- A nomination form should be made available that includes the full name and other identifying features of the person making the nomination and the nominee (e.g. date of birth and/or address); a section to explain why the nominee would be a good commissioner; and a section where the nominee can acknowledge his or her willingness to be considered.
- While a form is recommended, certain contexts may require flexibility. In such cases, the selection committee should consider being open to nominations that provide all essential information but are not on an official form, i.e. provide a nomination form but do not require it. Some people may not have access to such forms, and they should not be penalized for this.

¹ Diane Orentlicher, *Independent Study on Best Practices, Including Recommendations, to Assist States in Strengthening their Domestic Capacity to Combat All Aspects of Impunity*, UN doc. E/CN.4/2004/88 (Feb. 27, 2004), para. 19 (a). The study says, "More generally, civil society organizations, including but not limited to human rights NGOs, should play a role in designing a commission's terms of reference; be consulted concerning policy recommendations; and be recognized as a potential source of information for the commission."

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- Because gathering signatures in support of particular nominees is likely to be problematic, it is not recommended because it could potentially politicize the issue.
- Likewise, any voting to select who will be nominated could be problematic. The commissioners, once appointed, are meant to be independent and to command a certain amount of moral authority of wide social appeal rather than to represent a certain constituency.
- A public awareness initiative that reaches local communities, uses media effectively, and encourages officials to meet with religious and civil society groups can help the process gain public approval.
- The selection committee will have to decide whether it publishes the names of those nominated at the close of the nomination period and whether it will seek public feedback for a limited period of time (as was done in Timor-Leste). Publishing names allows for a very transparent process, which can gain the public's confidence and set the tone for the commission. Despite the risks of raising controversy, the selection committee can say it sought the public's views and gave everybody a chance to have their views considered during the decision-making process. This approach is consistent with principles of inclusion, consultation, and transparency.
- The selection committee should vote on members in private; the public does not need to know who voted for whom.

Vetting

The committee should establish clear procedures for vetting nominated candidates.

- *Create a list of qualified candidates* – From the total set of nominations received, it is useful to draw up a short list based on the criteria stipulated in the relevant legislation, taking into account things such as the individual's reputation for integrity and objectivity, as well as his or her ability to work together with others and to build consensus. If the selection committee thinks that some elements in the record of an individual could harm the reputation of the commission as an objective, apolitical body, the nominee should not be included in the short list. It may be difficult to undertake effective due diligence on such issues. Thus, candidates should be asked to provide any information that could indicate either a conflict of interest or the perception of such because of views expressed, publications made, political, personal or business affiliations. This would have the added benefit of making it easier to remove a candidate if they failed to disclose such information.
- *Create a short list* – The selection committee should refine the list of qualified candidates and develop a short list of those who should be interviewed. This should only include people who the committee feels are strong candidates and who could realistically be appointed.
- *Conduct interviews* – Contact these candidates to see if they are interested in the position and, if so, invite them to an interview. Prepare a set of essential questions for each person. Then in the interview, leave space for more general questions to be asked by the different committee members. After each interview, discuss the suitability of each candidate and document those discussions.
- *Reach consensus* – When all the interviews have been conducted, the selection committee meets until consensus is reached. It is recommended to identify the preferred candidates as well as a few others in order of merit so there is a clear idea of who could be offered the position if the preferred candidates do not accept.

Criteria for Eligibility of Commissioners

In the April 2010 amendments, some legislators included a proposal to increase the number of women in the commission from two to at least three.² Another amendment suggested replacing the requirement that there “be representation of at least two women” with “allowing 50 percent participation of women in the total membership of the commission.” Still another proposal was to replace “two women” with “one woman and one Madhesi.”

The Revised Impunity Principles states that commissioners should be both competent and impartial, and members should have experience in the field of human rights and, if relevant, humanitarian law.³ It further states, “In determining membership, concerted efforts should be made to ensure adequate representation of women as well as of other appropriate groups whose members have been especially vulnerable to human rights violations.”⁴ Some criteria to be considered in the nomination of commissioners are:

a. Representation: A diverse group of commissioners will be better situated to reach

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Section 6. Disqualification for the position of Chairperson and Member: The following persons shall be deemed ineligible for appointment to the post of Chairperson and member:

- (a) Who is not a Nepali citizen;
- (b) Who has been involved in the armed conflict;
- (c) Who has been convicted by a court for a criminal offence involving moral turpitude;
- (d) Who has been punished in offences regarding gross violations of human rights;
- (e) Who has been found to have violated human rights by the National Human Rights Commission; and
- (f) Who is insane

out to victims and witnesses, as well as to raise the concerns of different sectors of the population. Taken as a whole, it is beneficial if the group is rooted in different sections of society, particularly those directly related to the conflict including caste, geography, gender, ethnicity, and religious affiliation. People nominating individuals should keep in mind that the selection committee will seek to strike these balances.

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Article 4(3) The Recommendation Committee as referred to in sub section (2) shall make recommendations on who should be appointed as the Chairperson and Members of the Commission. Recommended persons shall be from amongst human rights activists, psychologists, legal experts, forensic experts, conflict experts, sociologists or persons who have become eminent through their work in the peace process. At least two of the recommended persons must be women.

b. Competence and Capacity: The commission will benefit if commissioners have expertise on some of the issues likely to be examined and the group as a whole has a balance of this expertise. Some areas that might be considered are human rights law; the

² Draft TRC bill, sec. 4(3).

³ Diane Orentlicher, *Report of the Independent Expert to Update the Set of Principles to Combat Impunity, Addendum, Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity* (referred to as “*The Revised Impunity Principles*”), UN doc. E/CN.4/2005/102/Add.1 (Feb. 8, 2005), principle 7(a).

⁴ *Ibid.*, 7(c).

country's history; culture and traditional practices; and drafting/writing skills (related to final report process). The tension that is sometimes faced is that having standing within the community and being largely representative of the broader population may not be compatible with the capacity and experience required to serve as a commissioner. If this is not resolved in the nomination process, hiring technical experts who will hire the commission's staff when it is operational can address this tension.

c. Integrity: The commission will benefit by having commissioners with impeccable reputations and wide respect throughout society. Usually characteristics such as integrity, impartiality, compassion, and wisdom are needed to balance the many objectives of a truth commission and reach out to many sectors of society.

d. Personal availability: The commission will benefit from having commissioners who are able to work rigorously and can dedicate themselves full-time to the position.

Time Period

As noted, the selection process should strike a balance between inclusiveness and expeditiousness. The current TRC bill does not mention any time period for selecting commissioners. Any time period depends very much on the country context. However, it should be long enough to ensure a proper public vetting of candidates' credentials, but short enough not to lose the momentum. A suggested time period for Nepal would be three months for presentation of the candidates and subsequent short-listing. The vetting and appointment process should take three more months.

ANNEX: SELECTED CASE STUDIES

1. South Africa:

Creating the Selection Panel:

In the case of South Africa, those who were establishing the commission realized that there was a risk that the political parties would be competing to control it. Therefore, they decided it would be more constructive to let political leaders be involved in the process. So the selection panel was created accordingly.

- Each of the four main national parties was able to appoint one representative to serve on the selection panel.
- The president, Nelson Mandela, appointed four nonpartisan, independent people to the panel. These included two church leaders, one human rights lawyer, and one representative of the trade union federation.
- The decision to divide the selection panel membership evenly between political parties and civil society was intended to make the panel balanced and fair.
- President Mandela's legal advisor was the panel's chair.

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Once the panel was established, it began the process of recruiting commissioners. A call for nominations was advertised in the media.

- Any South African could nominate a commissioner. However, such a nomination had to have organizational backing to demonstrate that the nominee was supported by civil society.
- The goal was to find people of integrity who could inspire trust. They also were looking for people who were not too closely aligned with political parties to ensure the independence of the commissioner to the greatest degree possible.
- Once the call for nominations was closed, the selection panel met to discuss the criteria for commissioners. The panel was looking for different things, but overall the members wanted to find people who could understand what people had suffered, yet were not too traumatized by their own experiences.
- The panel received more than 300 nominations. This initial list was published and circulated to various media outlets.
- Each panelist was asked to review the applications and provide a list of about 50 to 60 candidates they would support.
- There was also quite a bit of information available about each candidate. This included a CV, letter of endorsement from the nominator, and a statement of motivation from the candidate.
- The process took into consideration multiple nominations of the same person (for example, the eventual chair, Archbishop Desmond Tutu, received numerous nominations).
- The panel had staff to compile and summarize information, arrange interviews, and get people together.
- The process used a numerical system to rate the candidates after looking at their overall qualities and using criteria agreed on by the panel. The tabulation of this information led to a list of the top 50, who were selected for interviews.

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- The panel then reviewed the applications and narrowed the candidates to a pool of 50 people to interview.

One panelist said, “The real genius of this process was that initially the representatives of different political parties were blocking each other to the point that they were finding themselves checkmated. Once they saw that they were not going to get their own person on the commission, they began looking for people who would be unbiased. The nonparty people then began to have a lot more influence.”

- The list of 50 candidates was then published in the newspapers so the public could review it and send in any comments or concerns about specific nominees.

Some people raised objections publicly in the media, and others sent in their concerns to the TRC secretariat that oversaw this process.

Interviews:

- The interviews took the form of public hearings, though deliberations on nominees were private. The public interviews were held to generate public comments and to ensure that candidates did not have some hidden agenda.
- The panel had a set of questions to ask candidates to help discern if they possessed the necessary qualities. For example, they might ask what a candidate would do if the truth they uncovered would be damaging to a political party to get a sense of their commitment to the truth over political expediency.
- A member of the selection panel said, “I think it is absolutely critical to have public interviews. . . . In general people are not easily convinced that a truth commission is not just another political ploy. Therefore, the interview process should be as transparent as possible.”
- After the interview process was concluded, the selection panel narrowed down the list to 25 people they recommended as commissioners. This list was then sent to President Mandela who chose the final 17 commissioners.
- Mandela added two people who were not on the short list of candidates to ensure a balance.
- A panelist commented, “At the end of the day, there was a compromise that had to be made. It was clear that we would not put an apartheid apparatchik on the commission. But we did search for a representative of the Afrikaner community who had acted with a fair degree of integrity, because for the perpetrators to come forward, we felt that it was important to have at least one person who they could relate to.”
- The most difficult part was making a list that was balanced in terms of gender, race, geography, profession, etc.
- Judges may not be the best people to chair TRCs since a truth commission is not about the law. A panelist of South Africa’s commission warned, “If our truth commission had been chaired by a judge, it would have collapsed within weeks.” Although judges usually chair commissions of inquiry—notably in Great Britain—they may bring to the position a methodology suited to the exhaustive proof standards of a court of law and probably inappropriate for a commission mandated to conduct historical explanations, recognition of victims, and recommendations of policy, as well as to make factual findings.

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- The entire selection process took three months and was aided by a quick consensus early on about the criteria for judging nominees.⁵

2. Sierra Leone:

- The TRC Act of 2000 provided a selection process for both national and international commissioners. It also included a schedule outlining the procedure for selecting nominees for the commission. This procedure provided for a consultative process that would take into account both national and international expertise. Nominations for the four national members could be made “by anyone within or outside Sierra Leone.”⁶
- The schedule also provided for a six-person “selection panel” comprising one representative each from the government, the Revolutionary United Front of Sierra Leone, the Armed Forces Revolutionary Council, National Forum for Human Rights, and the National Commission for Democracy and Human Rights.⁷ The special representative of the United Nations Secretary-General served as the selection coordinator to the panel. It did not hold public interviews. Some people are critical of this decision and of the panel that resulted, but it is not clear whether the lack of public exposure of the candidates would have changed the results. The Sierra Leonean selection panel had to choose some commissioners from Sierra Leone and some from outside. The Office of High Commissioner for Human Rights (OHCHR) in Geneva coordinated the nomination and selection of the international commissioners. Candidates were vetted and interviewed by OHCHR, and the selection coordinator submitted the list to the panel. The panel generally went along with OHCHR’s recommendations.
- Commissioners were required to work full-time, which affected selection.
- The selection panel used a list of 13 criteria and judged each candidate from 1 to 10 on each criterion. Then the scores were averaged, and candidates were ranked accordingly. All criteria were weighted equally.
- The 13 criteria were as follows:
 1. Ability to be impartial and objective with independence of mind
 2. Knowledge of the historical and political dynamics of Sierra Leone, including traditional forms of reconciliation
 3. Availability
 4. Public reputation
 5. Notable contributions to Sierra Leone (academic, legal, or other professional fields)
 6. Ability to work in a multicultural/international setting

⁵ This case study was written by then ICTJ program associate Virginie Ladisch in 2007 and edited by Lisa Magarrell. It included comments from Peter Storey, a member of the selection panel, and Paul van Zyl, the TRC’s executive secretary and then executive vice president of ICTJ.

⁶ The Truth and Reconciliation Act 2000, Schedule (Subsection (1) of section 3), Procedure for the Selection of Nominees for Appointment to the Commission, para. (a)(i).

⁷ Ibid., para. (a)(iii).

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7. Ability to analyze large amounts of information regarding issues of national interest
8. Maturity and experience relevant to the work of the TRC, including record of employment
9. Good state of health, and ability to work long hours and travel extensively
10. Some insight into and understanding of human rights issues
11. Understanding of the TRC and its role in Sierra Leone (Lomé Peace Accord and TRC Act)
12. Communication and management skills
13. Practical experience of the conflict⁸

3. Timor-Leste:

As required by the law establishing the Commission for Truth, Reception, and Reconciliation (CAVR), a selection panel was formed in 2001 to start the nomination process for national and regional commissioners. The panel was chaired by the head of the UN's transitional administration in Timor or his appointee. Members of the panel included:

- Two persons appointed each by four political parties that existed during the conflict
- A representative of Timor's NGO forum
- A representative of a women's network
- A representative of a youth network
- Two representatives of two victims associations for political prisoners and families of the disappeared
- A representative of the Catholic Church
- A representative of the UN's Human Rights Unit

A public campaign was launched, using newspapers, radio, television, posters, and local networks to inform the public about the commission's role. In Timor-Leste, this included meetings organized by the UN's presence in each district, as well as local NGOs. In West Timor, Indonesia, the selection panel relied on Indonesian humanitarian NGOs working with refugees and church-linked organizations to organize the consultation meetings. At the end of the process, 60 people were nominated to be national commissioners and 160 for regional commissioners.

According to the law, those nominated should be people with the following characteristics:

- Strong moral character, impartiality, and integrity
- Competent enough to deal with the CAVR's mandate

⁸ Case Studies, ICTJ, March 2009.

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- Do not have a high political profile; and
- Have a demonstrated commitment to human rights principles.

The panel was also required to give special consideration to the representation of a diversity of experiences and views, including attitudes toward the past political conflicts in East Timor, and regional and fair gender representation.

The panel interviewed a short list of candidates for national commissioners and made recommendations to the UN's transitional administrator. The transparent manner of selection and broad consultation were fundamentally important in giving people a sense of ownership. The law also said that the panel had to appoint one national commissioner whose political views represented Timorese who had supported integrating East Timor with Indonesia. This stimulated the selection panel to conduct a number of public meetings in West Timor, Indonesia, where tens of thousands of refugees were living in camps.

To be able to nominate individuals, the communities had to understand what these individuals were being nominated to do. As a result, the selection of the commissioners became an extensive outreach process covering the 13 districts in East Timor, as well as a consultation and nomination process with those still living in the camps in West Timor. The process of selection stimulated wide public debate about who would be a successful candidate, as well as input from the communities about truth, justice, and reconciliation. Most significantly, there was a genuine effort to engage pro-Indonesia elements in West Timor.⁹



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⁹ Patrick Burgess and Galuh Wandita, "Timor-Leste Truth Commission," (internal case study within *Making an Impact: Guidance on Designing Effective Outreach Programs for Transitional Justice*), ICTJ research project, May 2010.