



**UNIVERSITY of the  
WESTERN CAPE**

**LLM**

**TRANSNATIONAL CRIMINAL JUSTICE: AN INTERNATIONAL AND AFRICAN PERSPECTIVE**

**RESEARCH PAPER**

**THE CHALLENGES FACED BY TRUTH COMMISSIONS AS A RESULT OF THE SELECTION AND  
APPOINTMENT OF TRUTH COMMISSIONERS**



**Research Paper submitted in partial fulfilment of the requirement for the degree of  
Master of Laws (LLM) in Transnational Criminal Justice and Crime Prevention: An  
International and African Perspective**

**by**

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**Declaration**

I, **Patricia Muthoni Njuguna** declare that **The Challenges faced by Truth Commissions as a Result of the Selection and Appointment of Truth Commissioners** is my own work, that it has not been submitted for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged by complete references.

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## Acknowledgments

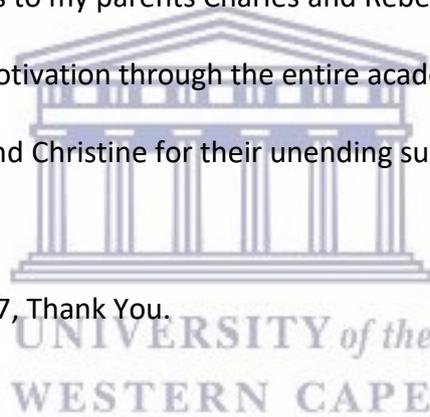
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To the TransCrim Class of 2017, Thank You.



## Dedication

To my beloved parents Charles and Rebecca Njuguna for the unconditional love and support which has added immeasurable value to all that I am.



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## Key Words

Truth Commission

Truth Commissioner

Selection

Appointment

Best Practices

Competing interests

Integrity

Impartial

Public participation

Consultative process

Representativeness



### List of Abbreviations

ACS:	American Colonization Society
AFRC:	Armed Forces Revolutionary Council
ANC:	African National Congress
CIVHR:	Commission of Inquiry into Violations of Human Rights
ECOWAS:	Economic Community of West African States
EU:	European Union
INPFL:	Independent National Patriotic Front of Liberia
KANU:	Kenya African National Union
LAP:	Liberia Action Party
LURD:	Liberians United for Reconciliation and Democracy
MODEL:	Movement for Democracy in Liberia
NARC:	National Rainbow Coalition
NGO:	Non-Governmental Organisations
NP:	National Party
NRM:	National Resistance Movement
NRA:	National Resistance Army
OAU:	Organisation of African Unity
RUF:	Revolutionary United Front

SATRC:	South Africa Truth and Reconciliation Commission
SLTRC:	Sierra Leone Truth and Reconciliation Commission
TRC:	Truth and Reconciliation Commission
TJRC:	Truth, Justice and Reconciliation Commission
UN:	United Nations
ULIMO	United Liberation Movement of Liberia for Democracy



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## CHAPTER ONE

### PROBLEM STATEMENT AND OVERVIEW OF STUDY

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#### 1.1 Problem Statement

As states continue to rapidly transition from conflict or autocracy to democracy, there has been need to address past gross human rights violations. To address these past egregious violations, transitioning countries often relied on immunities and prosecutions. However, prosecutions and amnesties presented several challenges that necessitated a recourse to truth and reconciliation commissions (hereafter TRCs). Since then, TRCs have evolved to be an essential accountability mechanism in transitional justice.<sup>1</sup>

Given the important role that TRCs play in transitioning countries, the composition of TRCs should be of credible character in the eye of the public. The selected and appointed truth commissioners (hereafter commissioners) play a key role in the truth-finding process and the importance of having a constraint-free and reliable work plan of selecting these commissioners cannot be overestimated. However, in practice the selection and appointment of the commissioners has proven to be a challenging exercise. There has been no standard practice used. Across the world the respective appointing authorities have had to consider different elements and adopt varying practices. These range from matters pertaining to gender, political profiles, nationality, educational qualifications, age, geographical origin, religion, language and class, among others. This divergence in approaches has led to unevenness in the workings of TRCs. Evidence of the difficulties TRCs face in the selection and appointment of commissioners can be identified by examining the

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<sup>1</sup> Freeman M (2006: xi).

different TRCs established over the years. The Guatemalan TRC, for example, had to grapple with the issue of the size of the commission, professionalism and expertise of its commissioners. Its having just three commissioners, unlike the South African TRC which had 17 commissioners, highlights the question as to what the appropriate size of the TRC should be. Should the commission be small enough to constitute a manageable group or should it be large enough to represent the society fairly? On the professionalism issue, there is no guideline as to what level of education a prospective commissioner should possess. TRCs have had to deal with the challenge of deciding whether their commissioners should be drawn from diverse disciplines such as law, history, economics etc. or whether they should be ordinary persons of good moral standings in society regardless of their educational background.

Another dilemma is who should appoint the commissioners. It is important that the appointing body be impartial or that the names put forward for appointment should be decided by an impartial body. However, over the years, TRC commissioners have been appointed differently. An appointing body can easily influence the workings of a TRC. It is presently being debated whether TRCs commissioners should be unilaterally/directly appointed or should be appointed through public participation. Noting the important role played by commissioners, their appointments should be seen to be transparent. However, this has not always been the case as some commissioners have been regarded as puppets of their appointing bodies. This impression eventually jeopardises the work of the commissioners as they lose their credibility and independence in the eyes of the public from the start.

Language barriers and illiteracy also pose a problem in the selection and appointment of commissioners. This is in relation to both the prospective commissioners and victims meant

to appear before the commissioners. With the Peruvian TRC, for example, the commissioners spoke Spanish as opposed to the victims who were overwhelmingly rural, uneducated and spoke only their indigenous language. This made the work of the commissioners impossible. The commissioners, who were intellectuals and professionals, were unable to comprehend the victims' stories nor understand their backgrounds.

More often than not, the victims and sometimes the perpetrators appearing before a TRC are from diverse races, tribes, and ethnicities. The sex and the age of the victims and perpetrators also differ. It is important that these victims and perpetrators relate to the TRCs as a whole and the commissioners especially. Therefore, the kind of commissioners appointed is key. For example, if only aged commissioners are appointed, this would send a wrong signal to young victims who would not consider themselves to be represented. If there are no women commissioners, female victims may feel not catered for and may even refuse to appear before the TRC. Faced with the need to balance all these competing interests, the selection and appointment procedure must consider all these factors.

The timing of commissioners' selection is important. It has always been good practice that commissioners are not appointed until a TRCs enabling law or decree has been issued. However, in the DRC and Liberia, commissioners were appointed before there was even an enabling law. This undermined the credibility of the TRC, given the absence of pre-existing eligibility criteria. Also, there were no prior consultations with civil society groups. Internal squabbles<sup>2</sup> among the hurriedly appointed commissioners undermined the TRC's image and

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<sup>2</sup> Research suggests that group cohesion is a vital element of success. Successful teams are characterized by interpersonal trust and mutual respect.

credibility.<sup>3</sup> Civil society was also very vocal throughout the truth finding process. To date, it is still not clear whether civil society should be a key participant in the selection process.

Commissioners may also be appointed by or in co-ordination with international<sup>4</sup> and national organisations such as the United Nations. Some commissions may be appointed by a mix of international and local figures, as was the case with Sierra Leonean TRC. Considering that most recent TRCs have a foreign commissioner(s) or act in co-ordination with the United Nations<sup>5</sup>, there is a need to address the challenge of having hybrid TRCs on this front too.

In his report to the General Assembly, the Special Rapporteur on The Promotion of Truth, Justice, Reparation and Guarantees of Non-occurrence detailed the need to have an effective and efficient selection and appointment of commissioners.<sup>6</sup> He opined that there was a need to have commissioners chosen through more relevant criteria that look beyond the generalities concerning reputation and impartiality. This clearly indicates that there is a need to identify selection challenges and establish best practices of appointments.

It is nevertheless submitted that the aspect of appointment and selection of commissioners has been largely overlooked by scholars. Little has been written on TRC commissioners-qualification, selection, responsibility, experiences and their impact. This is regrettable considering their significant contribution to the failure or success of TRCs. In a rare comparative study on interviews with former staff of TRCs, Quinn and Freeman conclude that, “perhaps the most important task for framers of TRCs is the appointment of the

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One of the commissioners was publicly accused by several witnesses of complicity in the earlier internal national conflict. Despite these mounting allegations, he refused to recuse himself. This led to investigations into the composition of the truth commission, which impeded its functionality. It also contributed to a lack of national and international confidence in the TRC.

<sup>4</sup> Freeman M (2006: 29).

<sup>5</sup> The El Salvadoran TRC had only foreigners as commissioners, while the Kenyan TRC had a mixture of local and international commissioners. The international commissioners in the Sierra Leonean TRC were appointed by the UN.

<sup>6</sup> de Greiff (2013: Par73).

commissioners...”<sup>7</sup> Likewise, Hayner notes as follows, “As the public face of the commission, the members’ personal and political authority is critical in dealing with defiant authorities and in persuading the public to trust and engage in the process.”<sup>8</sup> In countries such as Sierra Leone, Haiti and Kenya, commissioners’ inefficient leadership has even resulted into loss of donor funding and poor investigation of the truth.

TRCs are becoming more and more technically complex and their mandates more challenging, making the selection and appointment of commissioners’ subject to even more constraints and challenges. The traditional selection and appointment methods which have widely been used have mostly limited the capability of TRCs. There is need for a better understanding of the challenges faced by TRCs in as a result of the selection and appointment of commissioners and a greater need for a structured approach in identifying and remodelling the criteria to ensure challenge free appointments.

This paper will analyse the challenges faced by TRCs in the selection and appointment of commissioners. It will identify the tried and tested methods, pointing out, too, the problems and gaps associated with some of these methods currently in use. It will then propose best practices that can be adopted to address these challenges. Lastly, it will make recommendations on how TRCs can incorporate these best practices so as to ensure transparency, accountability and impartiality.

## **1.2. The Theoretical Basis of the Study**

The philosophical basis of this paper is that the selection and appointment process of commissioners is complex and delicate in practice. It requires that those selected to serve as commissioners fully understand how their choices will impact on the work of the

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<sup>7</sup> Quinn R J & Freeman M (2003:1128).

<sup>8</sup> Lanegran K (2015:5).

commission. Commissioners should always be selected in a transparent and credible manner as this is fundamental in building public confidence in the larger truth seeking process.

However, the process and procedure of selecting and appointing commissioners has been left to transitioning states. This has led to some problems cropping up, a fact that has undermined some TRCs. It is therefore, important that these challenges are identified, highlighted and addressed.

### **1.3. Research Question**

This study seeks to answer the following question:

- What are the challenges faced by TRCs as a result of the selection and appointment of commissioners?

To help in answering this question, the following auxiliary questions will be dealt with as well:

- What have been the general considerations that have played a role in the appointment of commissioners?
- Is there a direct link between the effectiveness of a TRC and its commissioners?
- Do the general considerations raise any problems and can they be effectively addressed?

### **1.4. Objectives of the Study**

This paper attempts to establish the factors that should be considered during the selection of and appointment of commissioners. By analysing five past TRCs for mistakes as well as successes, the paper aims to derive some basic principles and ideas that future establishments of TRCs could adopt in their selection and appointment processes.

### **1.5. Significance of the Study**

This study is undertaken with the expectation that it will add knowledge to the already scanty literature regarding the selection and appointment of commissioners. These lessons extracted from past experiences will hopefully have a wide application and be useful in guiding all future framers of TRCs and help them avoid errors of the past and build on future successes.

### **1.6. Limitations of Study**

This paper will not look at all the TRCs established in the world until now. The fact of the matter is that there have been more than 40 TRCs that have been established in the world to date. This study will focus on what have been the key challenges/problems that a number of TRCs have had to face in their workings. This study will limit itself to looking at five TRCs, namely, the Guatemalan TRC, South African TRC, Ugandan TRC, the Kenyan TRC and the Liberian TRC. The study focuses on these countries as they are from different geographical regions and they transcend culture and shared history.

### **1.7. Research Methodology**

This study will rely on a qualitative desktop research. It will focus on an analysis of the primary sources of information such as international legal instruments, national laws, reports. The researcher will use books, journals, reports and electronic sources as secondary sources of information.

### **1.8. Chapter Outline**

This paper is divided into four main chapters. Chapter one introduces the study by providing the research question, methodology, objectives and limitation of the study. Chapter two discusses the selection and appointment criteria in five select countries i.e. Kenya, Uganda,

Liberia, South Africa and Guatemala. The chapter then analyses and highlights the challenges resulting from the criteria adopted.

Chapter three discusses the best employable practices of selection and appointment of commissioners. The purpose of this chapter is to determine how commissioners should be appointed. The chapter pays special attention to the relative importance of the identified tried and tested methods of selection and appointment that produced positive results.

Chapter four is the final chapter of the paper. It draws together the main findings and the conclusion of the study and sets out the recommendations emanating from them.



## CHAPTER TWO

### A STUDY OF THE SELECTION OF COMMISSIONERS IN FIVE SELECT COUNTRIES

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#### 2.1 Introduction

The success of any TRC depends on the extent to which the selection of its commissioners represents the socio-political demographics of a country.<sup>9</sup> Factors such as gender, race, ethnicity and political views, credibility and the representation of societal interests, influence the way the society views and values the TRC.<sup>10</sup> As the leaders and drivers of the TRC mandate, commissioners represent the values of the TRC and their integrity is, therefore, essential if a TRC is to be deemed effective.

Most times, TRCs will be required to ask politically embarrassing questions and may be forced to make politically unpopular recommendations. TRCs are always supposed to be relentless in their pursuit of truth and accountability. They are required always to put the interest of the citizens first and seek to uphold human rights. They should not be biased or be seen to be politically aligned. It is, therefore, imperative that the commissioners are chosen, above all else, on the basis of their proven and enduring commitment to human rights and human dignity. In this section of the paper, I will discuss five truth commissions. I will look at the brief history of the factors leading to their establishment and also analyse the selection and appointment process of the commissioners and the challenges resulting from these appointments. In

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<sup>9</sup> Stan L & Nedelsky N (2013:100).

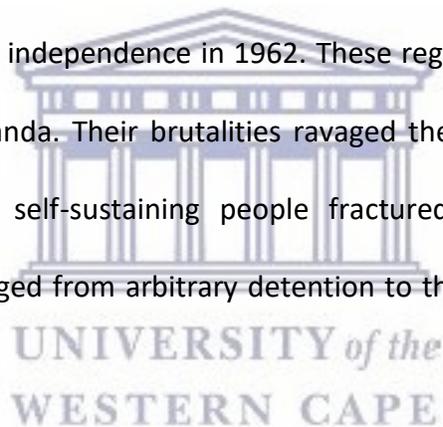
<sup>10</sup> Stan L & Nedelsky N (2013: 100).

selecting the case studies, I attempt to traverse the TRC spectrum, spanning Uganda, Kenya, and a sample of other African TRCs. The idea is to select examples from different geographic regions in an attempt to find commonalities that go beyond culture or shared history.

## **2.2 Uganda**

### **2.2.1 History of the Conflict**

Restoring political and social order is a pressing need in the aftermath of a long period of state-sponsored human rights violations. This need was real in Uganda from the mid-1960s onwards.<sup>11</sup> For nearly 30 years under Presidents Idi Amin and Milton Obote, series of autocratic regimes ruled Uganda since its independence in 1962. These regimes were responsible for the mind-numbing violence in Uganda. Their brutalities ravaged the Ugandan society, tearing its fabric apart, leaving a once self-sustaining people fractured economically, socially, and politically. The abuses had ranged from arbitrary detention to the mass slaughter and murder of people.



Following the change of government by Yoweri Museveni in 1986, he set about to rebuild the shattered nation. In his ten-point programme, he emphasised values such as upholding democracy, national unity and security, restoration and rehabilitation of social services, effective and accountable leadership, mixed economy and Pan-Africanism.<sup>12</sup>

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<sup>11</sup> Quinn R J (2013:19).

<sup>12</sup> Quinn R J (2003:19).

### 2.2.2. The Commission

Before the establishment of the TRC under Museveni's government, Uganda had had an early experience with mechanisms of transitional justice. The Idi Amin Commission of Inquiry into the Disappearance of People in Uganda since 25 January 1971 to 2 January 1975 is cited as the first TRC to ever be established.<sup>13</sup> However, this TRC was a sham and its work was frustrated by the Amin regime. He clearly had no intentions of abiding by the commission's recommendations. The TRC work was kept a secret and its report was never publicly disseminated. Its commissioners were harassed and forced into exile, with some who have never been seen since then.

In 1986, Museveni established the Commission of Inquiry into Violations of Human Rights (CIVHR) to address egregious human rights violations perpetrated by predecessor regimes. This commission was part of the Ten Point Programme designed to placate the concerns and fulfil the demands of the international community.<sup>14</sup> The role of the CIVHR was to inquire into "the causes and circumstances" surrounding mass murders, arbitrary arrests, the role of law enforcement agents and the state security agencies, and the injustices which had occurred between 1962 and January 1986 when Museveni and the National Resistance Movement (NRM) assumed power.

The TRC was also supposed to provide suggestions on ways to prevent the recurrence of the previous human rights violations. In addition, the CIVHR was required to determine the

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<sup>13</sup> Hayner P B (2002: 51).

<sup>14</sup> Stan L & Nedelsky N (2013: 110).

responsibility of the various state institutions in perpetrating and covering up the violations. The government committed to treat seriously the results and findings of CIVHR.

### **2.2.3. Selection of the Commissioners and Challenges**

CIVHR was a response to deal with 25 years' legacy of human rights abuse. Many of the TRC's appointees were imminent and patriotic human rights supporters while others were appointed because of their expertise in law. In every case, they were appointed on grounds of their specialised knowledge and/or experience garnered and not on the basis of their social origins. The commissioners did not undergo a rigorous nomination and selection process as was the experience in South Africa and Sierra Leone. The commissioners were appointed unilaterally by President Museveni himself.

Further, unlike the SATRC and SLTRC which had religious leaders as the chairs, the CIVHR chair, Justice Oder, was a Supreme Court judge. Six commissioners were appointed from diverse professions and with varying degrees of experiences. This combination was supposed to provide the TRC with the most efficient leadership. On face value, the commissioners appeared to be politically independent but in practice most of them were politically aligned.

Museveni appointed commissioners who were either his long-time friends or NRM's supporters as well as Uganda's leading legal scholars and practitioners. For example, John Nagenda, the famous exiled writer in the time of Amin and Museveni's best friend, was appointed a commissioner.<sup>15</sup> Although Museveni's government had ostensibly taken steps to ensure that the commission was independent and impartial, the public was sceptical, and with good reason.

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<sup>15</sup> Most of the commissioners were old time friends of President Museveni. They were being rewarded for their efforts, especially those that were with Museveni in the bush.

Even if not personally connected to the new government, almost all the commissioners came from the ranks of erstwhile persecuted persons, which in itself triggered the perception that they would be biased, viewing the truth from one side only.

Museveni's appointees left no doubt in the public's mind that they would serve to enable the government manipulate and suppress the truth seeking process. It is not a wonder that the commission did not gain acceptance nor did it fulfil its mandate. Public mistrust in its commissioners, coupled with other practical difficulties it had to contend with, severely impeded the effective running of the CIVHR. After eight years and countless hold-ups later, the commissioners released the TRCs report with a quiet whimper. Even today, the CIVHR report is not widely accessible within Uganda, let alone in the rest of the world.

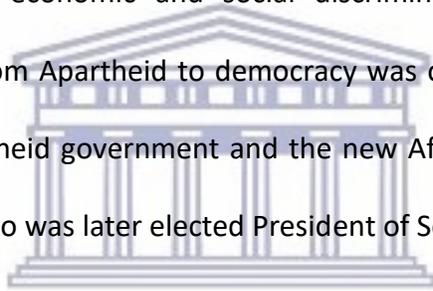
### **2.3. South Africa**

South Africa created its TRC during a period when the country was attempting to create a new post-apartheid society. Former perpetrators, oppressors and victims were trying to forge a way aimed at peaceful co-existence. South Africa is a comparatively a huge country with a very heterogonous population. Its history of racial discrimination and degree of population diversity makes it a useful case study in transitional justice.

#### **2.3.1. History of the Conflict**

From the time of the first European settlement at the Cape of Good Hope in the mid-17<sup>th</sup> Century until the demise of apartheid at the close of the 20<sup>th</sup> Century, South Africa was plagued by issues of racism and discrimination. Apartheid was a racial-based policy of segregation and

discrimination. Apartheid was a direct translation from Afrikaans to mean 'apartness.' It was officially enacted into policy in 1948 by the then newly elected Nationalist Party led by General Herzog. Apartheid was based on a policy of racial segregation, according to which the majority of the population, the black people, were subjected to irrational and unequal racial discriminatory treatment in all spheres of civic and political life. Apartheid was characterised by a raft of racially discriminatory laws, chief amongst which were the enactments that divided the population along racial lines. Apartheid lasted for nearly 50 years.<sup>16</sup> During this time the country suffered killings, killings, massacres, lengthy imprisonment without trial for political dissidents as well as severe economic and social discrimination against majority of its population.<sup>17</sup> The transition from Apartheid to democracy was obtained through a negotiated settlement between the Apartheid government and the new African National Congress (ANC) headed by Nelson Mandela, who was later elected President of South Africa.



The new ANC government had to find a way to deal with its horrifying past. In 1992, the idea to form a TRC was proposed. However, it was not until when Mandela became President in 1994 that serious negotiations started. The decision to have a TRC was premised on the understanding that South Africa could only move forward by confronting its painful past honestly.<sup>18</sup> However, during negotiations, the granting of amnesty to the human rights violators was contentious. While the government and military insisted on granting wrongdoers amnesty, victims and civil rights groups opposed this idea. In the end it was agreed that the amnesty granted would be subject to a specific set of conditions. No blanket amnesty would be granted.

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<sup>16</sup> Stanley E (2001: 525).

<sup>17</sup> Hayner P B (2002: 60).

<sup>18</sup> Sriman L C & Sriram S (2009: 137).

### **2.3.2. The South African Truth and Reconciliation Commission (SATRC)**

The Promotion of National Unity and Reconciliation Act 34 of 1995 established the SATRC. The SATRC's mandate was the most sophisticated and complex for any TRC to date. The Act also gave TRC the search and seizure powers, including the authority to subpoena witnesses. The SATRC also ran a sophisticated witness protection programme. It had a staff of over 300 persons, making it the most well-staffed TRC ever created. The commission investigated serious violations of human rights perpetrated in the period between 1960 and 1994.

### **2.3.3. Selection of the SATRC Commissioners and Challenges**

In early TRCs, commissioners were appointed unilaterally, with little or no external consultations.<sup>19</sup> South Africa adopted a transparent and consultative process instead. The commission was to represent the demographic profile of the population. The enabling law required the selection of 17 commissioners.<sup>20</sup> There were three options available for the selection.<sup>21</sup> These were:-

1. The President could come up with his own list of eligible persons and discuss it with the cabinet;
2. The President and the cabinet could compile a list of eligible persons together;
3. Nominees could be suggested by key stakeholders with the president and cabinet choosing from a short list.

In the interest of promoting democracy and transparency, the third option was chosen. This option would help keep at bay political controversy and simultaneously stimulate public

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<sup>19</sup> Stan L & Nedelsky N (2013: 100).

<sup>20</sup> The Promotion of National Unity and Reconciliation Act 34 of 1995.

<sup>21</sup> Graybill S L (2002: 3-4).

interest in the workings of the SATRC. A multinational selection panel with a representative membership was formed. As per the enabling law, the commissioners chosen were to be fit and proper persons, impartial and without a prominent political profile. Not more than two of the commissioners chosen were to be non-South Africans. A selection committee called for public nominations and received some 300 nominations.

Those nominated went through a rigorous democratic selection process. They were publicly interviewed by the selection committee, a process closely followed by the media. The committee narrowed the short list to 25 names from which President Nelson Mandela had to choose the 17. Those chosen were mostly educated but relatively unknown people. While the selection period took long enough to ensure public vetting of the candidates' credentials, it was equally short enough to maintain the momentum of the process. The president appointed the commissioners in consultations with the cabinet.

To provide geographical and political balance, President Mandela added two members who did not go through the full selection process. President Mandela focused more on representativeness and inclusivity rather than expertise of the persons chosen. Desmond Tutu was appointed as the chairman of the commission. He brought the religious dimension into the commission. His vision of forgiveness shaped the SATRC discourse in general and arguably provided the philosophical justification for the amnesty program.

Eight out of the 17 chosen commissioners were women. The commissioners comprised members of the legal profession, religious groups, the health sector and the NGO community. Many of the commissioners appointed were previously political activists against apartheid and

leaders in their respective communities. A member of the pro-apartheid government was also made a commissioner of the SATRC. It was felt that this was necessary as perpetrators needed someone they could trust in order to come forward to testify before the commission. Desmond Tutu, the chairperson, stated that people were nominated for the SATRC membership precisely because of their political affiliations and for them to resign and pretend that they were apolitical would be to engage in a misleading charade.<sup>22</sup> The SATRC is considered to have been model TRC, given the deep level thoughtfulness that accompanied its coming into being. Furthermore, the process of nomination was based on careful evaluation and vetting of the candidates' background, personal calibre, and public acceptability.

Overall, the SATRC didn't encounter any challenges as a result of the selection of its commissioners. Apart from the few who were opposed to the religious connotations of the TRCs, most South Africans found the SATRC credible, given that implementers of the mandate were people of good character who enjoyed public endorsement. This made the commission's work comparatively easier as many people were ready to co-operate and assist the TRC in fulfilling its mandate.

## **2.4 Sierra Leone**

### **2.4.1 History of the Conflict**

The civil conflict in Sierra Leone began in 1991 with the Revolutionary United Front (hereafter RUF) raiding a town in the border with Liberia.<sup>23</sup> In the course of the conflict, the RUF with its

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<sup>22</sup> Graybill S L (2002: 4).

<sup>23</sup> Human N (2009: 51) and Schabas A W (2006: 22).

allies and opponents resorted to methods of the “utmost brutality”, including mutilation of civilians.<sup>24</sup>

The Lomé Peace Agreement, signed in Togo between the government of Sierra Leone and the RUF, was the formal beginning of the end of the conflict. The Lomé Agreement granted unconditional amnesty to all combatant for all crimes committed in the course of the war. National and International human rights institutions criticised the Agreement due to its having an amnesty clause. The Special Representative of the UN Secretary-General made a reservation against the amnesty provision on the ground that amnesty could not be granted for international crimes. Due to the international and national pressure exerted against the amnesty clause, the Lomé Agreement called for the establishment of a TRC.<sup>25</sup>

#### **2.4.2 The Sierra Leonean Truth and Reconciliation Commission (SLTRC)**

SLTRC was established following the recommendation of the Lomé Peace Agreement and the pressure from international community. The SLTRC was mandated to create an impartial historical record of the past violations and abuses of human rights and international humanitarian law related to the conflict in Sierra Leone. The TRC was also meant to address impunity, rehabilitation of the victims, promote healing, reconcile the nation and prevent a repetition of the civil war.<sup>26</sup> The SLTRC had powers to search, seize, subpoena, and with police assistance arrest and investigate.<sup>27</sup>

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<sup>24</sup> Schabas A W (2006: 22).

<sup>25</sup> Tejan-Cole A (1999: 241) and Hayner P B (2002: 70) and Sriram L C & Pillay S (2009: 140).

<sup>26</sup> Sriram L C & Pillay S (2009: 140).

<sup>27</sup> Sections 8 (a)-(g) of the TRC Act.

### 2.4.3. Commissioners Selection and Challenges

The Act establishing the TRC had a different approach in the selection of commissioners. As a selection co-ordinator, the special representative of the UN Secretary-General in Freetown was directed to call for nominations from the public. Meanwhile, a selection panel was to be formed with representatives appointed by the two parties of the former armed opposition, the President, the governmental human rights commission, the non-governmental interreligious council, and a coalition of human rights groups. This panel was to interview the persons shortlisted, rank them, comment on each, and submit the evaluations to the selection co-ordinator, who would select the final four candidates. The three international members of the TRC were to be selected by the UN High Commissioner for Human Rights. The President of Sierra Leone was to appoint the TRC commissioners from the list of recommended candidates.

The NGO community in Sierra Leone had pressed for the creation of a TRC and the public was involved through the nomination of commissioners. A panel then selected from those nominated and the government then approved the four national members.<sup>28</sup> Three international members were appointed by the UN. It was therefore a mixed panel of commissioners.

Just like the SATRC, the SLTRC had women on the panel as commissioners, one national and one an international.<sup>29</sup> Similarly, as was the case with the SATRC, there was a religious connection as the commission's chairman was a bishop. The commission was designed to be non-centralised but had limited success in achieving this in practice. In the eyes of the public, it

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<sup>28</sup> James- Allen P, Lahai SBS & O'Connell (2003: 123).

<sup>29</sup> James- Allen P, Lahai SBS & O'Connell J (2003: 24).

was felt that the commissioners were partisans to the government.<sup>30</sup> The commission's chairman, for instance, supported Sierra Leone's President Kabbah refusal to apologise for the war and even thanked the pro-government militia for defending the country.<sup>31</sup>

From the onset, the composition of the SLTRC was questioned by the public. The perception was that the commissioners were puppets of the ruling party and the international community.<sup>32</sup> The locals felt no connection with the process and the TRC as the international community through its commissioners and funding controlled the functions of the SLTRC and this made the key stakeholders not very willing to participate in the process.<sup>33</sup>

## 2.5 Liberia

### 2.5.1 History of the Conflict

The Liberian TRC was established in 2005 to address the gross human rights violations resulting from the civil war in the years 1989 to 2003. The first Liberian war was an internal conflict that spanned the years 1989 to 1997. Through a coup d'état, Samuel Doe overthrew the elected government in 1980. Charles Taylor, former government minister,<sup>34</sup> started an uprising in 1989 to topple Doe's government.<sup>35</sup>

Charles Taylor was a former supporter of Doe. In 1989, he formed an opposition army called National Patriotic Front of Liberia (NPFL) and kick started a multi-dimensional war against Doe's

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<sup>30</sup> Freeman M (2006: 30).

<sup>31</sup> Shaw R (2005: 5).

<sup>32</sup> Koffi Annan Foundation (2007: 8).

<sup>33</sup> Freeman M (2006: 30).

<sup>34</sup> Gberie L (2005:51).

<sup>35</sup> Peace Insight 'Liberia's Conflict Profile' <https://www.insightonconflict.org/conflicts/liberia/conflict-profile/> (Accessed 12 August 2017).

Armed Forces of Liberia and other armed groups and splinter militia. The need to control the country's natural resources particularly timber, iron ore and gold, was a key contributor to the conflict. In August 1995, an agreement was signed at a conference sponsored by Economic Community of West African States (ECOWAS) the United Nations (UN) and the United States (USA), the European Union (EU), and the Organisation of African Unity (OAU), where warring factions agreed to a demobilisation and disarmament of troops. This ended the first civil war. A UN monitored presidential election was held in 1996 and Charles Taylor won.

Due to the shaky foundation of the peace-building efforts after the first civil war,<sup>36</sup> it was not long before Liberia descended again into the abyss of war.<sup>37</sup> Liberia plunged into its second civil war in 1999.<sup>38</sup> The war commenced with attacks from the Liberian United for Reconciliation and Democracy (LURD) group. LURD was a composite of militia members involved in the first Liberian Civil War, defected members of Taylors' NPFL and capitalists with interests in the private accumulation of capital. Together with its surrogate organisation, Movement for Democracy on Liberia (MODEL), they launched armed attack against Taylor's regime. By 2003, MODEL, allegedly with backing from the Ivory Coast, damaged Taylor's control. The UN and US military intervention and the exiling of Charles Taylor to Nigeria ended the second civil in October 2003.

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<sup>36</sup> Kieh K G (2009: 7).

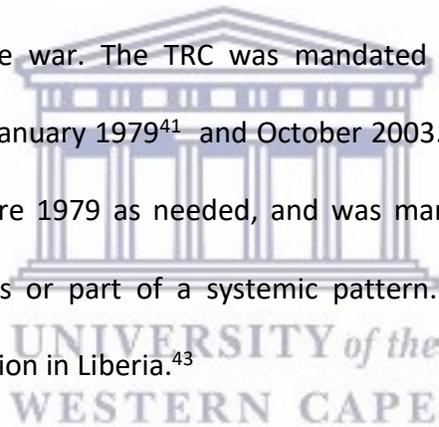
<sup>37</sup> Assefa H (2004: 6).

<sup>38</sup> Kieh K G (2009: 8).

The war was intense and involved child soldiers on all sides and extensive civilian casualties.<sup>39</sup> It also spread into neighbouring countries such as Guinea and Sierra Leone. The war claimed the lives of more than 250 000 people and left nearly 1.5 million displaced. The wars were characterised by gross human rights violations.

### **2.5.2. The Liberian Truth and Reconciliation Commission**

In 2003, after 14 years of civil war, Liberia's warring factions entered into a Comprehensive Peace Agreement (CPA) that called for the establishment of a TRC.<sup>40</sup> The CPA provided that the TRC would provide a forum for both victims and perpetrators of human rights violations to share their experiences of the war. The TRC was mandated to investigate violations that occurred the period between January 1979<sup>41</sup> and October 2003.<sup>42</sup> The Act stated that the TRC could explore the period before 1979 as needed, and was mandated to determine whether abuses were isolated incidents or part of a systemic pattern. This was meant to facilitate genuine healing and reconciliation in Liberia.<sup>43</sup>



### **2.5.3 Composition of the Commission and Challenges**

The composition of the TRC was to include nine commissioners, with no less than four women, representing the different segments of Liberian society. <sup>44</sup> They were to be selected from a shortlist of 15 names presented to the transitional government by an independent panel led by

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<sup>39</sup> BlackPast.Org 'Second Liberian Civil War (1999-2003)' [www.blackpast.org/qah/second-liberian-civil-war-1999-2003](http://www.blackpast.org/qah/second-liberian-civil-war-1999-2003) (Accessed 21 August 2017).

<sup>40</sup> Scully P (2016: 23).

<sup>41</sup> This was the final year of the Americo-Liberian rule.

<sup>42</sup> The inauguration of the National Transitional Government of Liberia.

<sup>43</sup> Long J W (2008:2).

<sup>44</sup> James-Allen P, Weah A & Goodfriend L (2010 :7).

ECOWAS. The Liberia TRC Act,<sup>45</sup> emphasised that the final TRC had to be impartial and consist of individuals from diverse professional and religious backgrounds.

In early 2004, the chairman of the NTGL appointed nine commissioners prior to the passage of the enabling act, raising questions about the credibility of the process.<sup>46</sup> In 2005, and with the passing of the Liberia's Truth and Reconciliation Commission Act, however, a public vetting and recruitment process took place. Accordingly, the first set of commissioners appointed by the chairman of NTGL were vetted in accordance with the guidelines of the act to ensure that no member of the TRC would be "known or perceived as a human rights violators or members of groups involved in human rights violations; and without prior conviction for a crime."<sup>47</sup>

Only two of the initial nine commissioners were retained by the new selection panel. The final composition of the TRC included a Liberian human rights activist and environmental lawyer, as its chair, four women and five men commissioners. The TRC Act also provided for a three-member International Technical Advisory Committee nominated by ECOWAS and the UN High Commissioner for Human Right resulting to a mixed model TRC.<sup>48</sup> None of the commissioners had previous experience working with TRCs or related transitional justice mechanisms.<sup>49</sup>

Given that the Liberian TRC act vested the commission with a broad mandate, it would be interesting to learn how the commissioners would implement this mandate given that, with the exception of the chairman, none of the other commissioners selected had any professional

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<sup>45</sup> Sec 11 of the TRC Act.

<sup>46</sup> James-Allen P, Weah A & Goodfriend L (2010 : 5).

<sup>47</sup> Final Report of the TRC of Liberia Volume II (2008–2009 :140).

<sup>48</sup> Enacted in 2005.

<sup>49</sup> Gberie (2008: 457).

experience in the preferred fields. The first appointment of the nine commissioners before the passing of the enabling act immediately created a significant challenge to the credibility of the TRC, namely the absence of an eligibility criteria for selection. Civil society pointed out that the TRC “lacked set objectives, a clear mandate, jurisdiction or legal status.”<sup>50</sup>

These reservations had an impact on the effectiveness of the TRC. Many Liberians still viewed the TRC as a sham and the commissioners as government puppets.<sup>51</sup> Following the vetting of the second set of commissioners, the TRC did to some extent recover from its negative public image. However, some Liberians still doubted the efficacy of the latter chosen commissioners and many key stakeholders refused to co-operate with the TRC.

## **2.6. Kenya**

### **2.6.1. History of the Conflict**

Kenya has a complex troubled past that is relevant to transitional justice and truth seeking. The first conflict period was when Kenya was fighting to gain its independence from colonial rule. During this period, there was a low-intensity insurgency war between 1952 and 1957 that sought to end British rule. In response, Britain declared a state of emergency and instituted a number of harsh measures. These resulted in numerous deaths, unlawful detentions, deportations etc. Both sides of the divide committed atrocities.<sup>52</sup> Credible allegations have

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<sup>50</sup> Final Report of the TRC of Liberia Volume II (2008–2009 :140).

<sup>51</sup> Saul J (2014: 21).

<sup>52</sup> Stan L & Nedelsky N (2013: 262).

been made that British officials were responsible for the widespread use of torture and other grave violations of human rights, including summary executions.<sup>53</sup>

The second period covers the rule of Jomo Kenyatta, the first president of an independent Kenya, who remained in office from 1963 until his death in 1978. Despite Kenya being a multiparty state, the Kenya African National Union (KANU), the ruling party at the time, monopolised political power. It used repressive means to retain its dominance. The third period was under the second president of Kenya, President Daniel Arap Moi. During his time in power, the government became more repressive, especially after the failed coup attempt in 1982.<sup>54</sup> Opposition parties were outlawed, a one-party state was instituted and dissenters were arrested, detained without trial and tortured.<sup>55</sup>

In the early 1990s, activists campaigning for democracy faced violent repression but the movement snowballed, causing the government to liberalise the multi-party system.<sup>56</sup> During this period of the struggle for political liberation, the ruling party, KANU, financed attacks on people, paid militia and armed groups to attack ethnic minorities, grabbed land, and destroyed people's dwellings, among other heinous atrocities. During this time, Kenya faced the gravest and most systematic abuses of human rights since its independence.<sup>57</sup>

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<sup>53</sup> Stan L & Nedelsky N (2013: 262).

<sup>54</sup> Stan L & Nedelsky N (2013: 262).

<sup>55</sup> The famous Nyayo Chambers bear the memory of this terrible period.

<sup>56</sup> Despite the return of multiparty system, Moi returned to power as a result of fraud, intimidation, Gerrymandering and other non-democratic practices facilitated by a divided opposition.

<sup>57</sup> Stan L & Nedelsky N (2013: 262).

The fourth period came in the wake of the horrific violence that followed the disputed 2007 presidential election results.<sup>58</sup> In a period of only two months, more than 1100 people died and at least 350 000 were forced to leave their homes, businesses and land because of their ethnicity and presumed political affiliation. This resulted in long-standing resentments and historical grievances and left communities so deeply divided that the violence threatened the stability of the nation and the ability to move forward together. Long considered an oasis of peace and stability, Kenya tottered on the brink of collapse. Why at all did it become necessary that as a nation Kenya should confront its past through the establishment of a TRC? The short answer to this question lies in the preamble to the Truth, Justice and Reconciliation Act, the legislation which established the Truth, Justice and Reconciliation Commission (TJRC')

### **2.6.2 The Kenyan Truth, Justice and Reconciliation Commission (TJRC)**

A follow-up of past abuses while former President Moi and his ruling party KANU remained in power was unimaginable. Attempts were made to look into gross human rights violations occasioned by the repressive regimes. However, despite finding a number of senior government officials responsible for large-scale political violence, ethnic cleansing and other grave crimes, the government neither followed up on the recommendations nor prosecuted the alleged perpetrators. Even with the election of Mwai Kibaki<sup>59</sup> and his National Rainbow Coalition (NARC Alliance) in 2002, nothing was done to address these past gross human rights violations. The main reason for this was that, despite the change in government, Kibaki still relied on the support of KANU members of parliament to stay in power after the NARC Alliance

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<sup>58</sup> Kariuki N (2014: 5).

<sup>59</sup> The third president of the Republic. He was believed to be the agent of change. However, when he came to power these hopes were dashed.

partially unravelled. This undermined efforts at holding members of the KANU regime and their henchmen accountable for crimes committed during its reign.

However, after the violence that followed the elections of 2007, the need for transitional justice arrangements could no longer be shelved. In an agreement signed between the warring factions, both sides committed themselves to the creation of a Truth, Justice and Reconciliation Commission (TJRC). It was mandated to look into human rights violations and economic crimes committed from December 1963 up until the time of the signature of the National Accord at the end of February 2008.<sup>60</sup>

The TJRC's broad mandate presented several challenges, especially with investigation of the economic crimes that created serious timing and methodological problems. The approach of taking individual statements and holding public hearings was not effective in dealing with economic crimes that involved the secret hoarding of money in foreign bank accounts. This demanded a different pool of investigators skilled in the area of economic crimes with international dimensions. Realising this challenge, the TJRC intentionally gave a wide berth to economic crimes.

### **2.6.3 Appointment of Commissioners and Challenges**

Part II, Section 10 of the TJRC Act stipulates a process for appointing commissioners. It provides that a total of nine commissioners would be selected. The Panel of Eminent African Personalities was required to select three non-citizens as part of the nine member Commission. All the commissioners needed to be well educated in diverse fields. Four of the commissioners

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<sup>60</sup> Kariuki N (2014: 10).

were required to have had “at least fifteen years’ experience in matters relating to human rights law;” five had to have knowledge of and experience in as diverse disciplines as forensic auditing, psycho-sociology, anthropology and social relations, conflict management, investigations, religion or gender issues. All had to be “impartial in the performance of the functions of the Commission.... [and] generally enjoy the confidence of the people of Kenya.”

As a whole, the TRC was required represent the Kenyan society wholly and be impartial in its collectivity. Furthermore, each commissioner had to be “of good character and integrity” and not to have “in any way been involved, implicated, linked or associated with human rights violations of any kind or in any matter which was to be investigated under the enabling law.”

This final requirement proved the most difficult to meet.

A selection panel of nine persons was to be formed with representatives from the legal, professional organisations and specific groups.<sup>61</sup> The selection panel was to act within a very tight time frame. Within two weeks of the implementation of the Act, the selection panel had to be formed and publically advertise for nominations for commissioners to be submitted during a three-week period. The selection panel had only seven days to consider the nominees and to submit to the National Assembly a ranked list of 15 eligible persons. The National Assembly would submit six names for appointment by the President. President Kibaki could appoint the chairperson from among the six. Overall, the Act required the National Assembly

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<sup>61</sup> Sec 9(1) (a-h) of the Kenyan TJRC Act.

and the President to “have regard to gender equity and regional balance” when nominating and appointing commissioners.<sup>62</sup>

An inclusive, consultative selection process was devised. The Kenya National Commission on Human Rights conducted workshops to familiarise the organisations required to participate in the selection panel with the TJRC legislation and the workings of TRCs in general.<sup>63</sup> A selection committee with the proscribed membership was formed following the coming into force of the Act in March 2009. The week after nominations closed was very hectic as the vetting process had to be rushed due to the strict timelines. The selection committee narrowed down the 250 people nominated to 15 candidates whose names it forwarded to the National Assembly. The Departmental Committee on Justice and Legal Affairs trimmed the list to nine.

The House of Assembly approved this list and passed it on to the President to select the final six. The commissioners were announced in late July 2009. President Kibaki appointed Bethwel Kiplagat chairman of the TJRC and six other commissioners. Two of these were women who worked in the field of human rights and one was a Muslim Sheikh. The Eminent Persons selected were foreigners from Zambia, Ethiopia and the United States. The TJRC was a mixed model TRC.

Religious leaders were left out of the list of presidential appointees, and thus unlike the SATRC and SLTRC, the commission lacked a connection to faith-based communities. The chairman of

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<sup>62</sup> Sec 10(4) of the Kenyan TJRC Act.

<sup>63</sup> International Centre for Transitional Justice-Kenya spokesperson, Interview, Nairobi, Kenya, June 23, 2011.

the commission was also a retired political figure, a fact that drew public criticism.<sup>64</sup> The international figures were unknown to Kenyans and it was felt as inappropriate for Ahmed Sheikh, as a retired military officer, to serve. Given the wide breath of the TJRC mandate, especially on economic crimes, some felt that the selection committee had neglected the need to have professionals in the field of economics and accounting as commissioners. However, foremost among the complaints was the public uproar against the appointment of Bethwel Kiplagat as a chairman. A selection process designed to engender the greatest possible legitimacy to the panel of commissioners had instead created a debacle.

The TJRC was from the onset crippled by internal wrangles and litigation against its chairperson. Local groups accused him of aiding and abetting the very human rights abuses that the TJRC sought to investigate.<sup>65</sup> Even though he was broadly respected for his conflict mediation role in several countries on the horn of Africa, numerous civil societies considered Kiplagat closely associated with some of the abuses of the Moi regime. Debates over the TJRC leadership overshadowed the commission's actual activities as some groups walked out of or boycotted its inaugural public meetings which began in early 2010.

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<sup>64</sup> Materu F S (2015: 149).

<sup>65</sup> Makabila S 'TJRC pledges to push on despite Criticisms' (2011)  
<https://www.standardmedia.co.ke/article/2000028523/tjrc-pledges-to-push-on-despite-criticism>  
(Accessed 2 June 2017).

The TJRC's moral standing and integrity suffered, making it difficult for the TJRC to convince Kenyans that it had the will to address the legacy of past human rights violations.<sup>66</sup> Even donors shielded away from funding TJRC due to the credibility crisis.

## 2.7 Conclusion

In this chapter, I have discussed the composition of TRCs established in five African countries. I have sought to analyse the selection and appointment criteria, point out the criteria adopted by different appointing bodies and also highlighted the challenges resulting from the criteria adopted. From the study, it is evident that the importance of TRC composition cannot be overlooked. Those who make up a commission can make or break it. There is no standard practice used in the selection of commissioners as different appointing bodies have had to consider different elements and adopt varying practices. It is clear that TRCs derive their credibility from the moral probity and expertise of commissioners.

The next chapter focuses on lessons learnt from the best employable practices of selection and appointment of commissioners. The purpose will be to determine how commissioners should be appointed. Particular attention will be given to tested methods of selection and appointment that have produced positive results.

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<sup>66</sup> Institute for Security Studies 'Can Kenya's Truth, Justice and Reconciliation Commission Deliver?' (2013) <https://oldsite.issafrica.org/iss-today/can-kenyas-truth-justice-and-reconciliation-commission-deliver> (Accessed 2 June 2017).

## CHAPTER THREE

### BEST PRACTICES IN THE SELECTION AND APPOINTMENT OF COMMISSIONERS

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#### 3.1 Introduction

More than any other single factor, the people selected as commissioners determine the TRC's ultimate success or failure. They may not be involved in the TRC's day- to-day administrative work, but they are directly involved in the TRC's key functions such as conducting investigations, shaping the commissions policies and report writing.<sup>1</sup> They are the public face of the TRC and their personal and moral authority is important when engaging with perpetrators, authorities and the public.<sup>2</sup> Some enabling laws emphasise this importance by placing provisions referring to commissioners at the beginning of the mandate.<sup>3</sup>

Once the enabling law has been enacted, the selection of commissioners is the next crucial step towards establishing the TRC. It is important that creators of TRCs determine at the outset a methodology for the selection of commissioners and staff members. The manner in which the TRC's commissioners are selected will influence public perceptions, workings as well as the TRC's ultimate findings.<sup>4</sup> Some of the factors which framers of TRCs could consider would include the desired political backgrounds and demographic of the commissioners and staff, the inclusion of international members, as well as the credibility and legitimacy of prospective commissioners.

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<sup>1</sup> Plessis M (2002: 14).

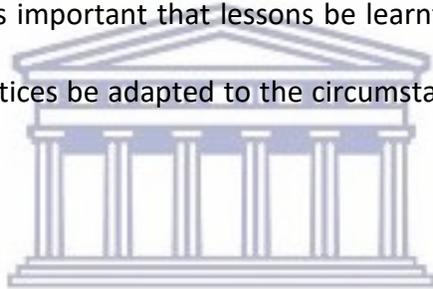
<sup>2</sup> Gonzalez E & Varney H (2013: 17).

<sup>3</sup> Gonzalez E (2013: 13).

<sup>4</sup> Kerr R & Mobekk E (2007: 132).

Commissioners should undergo a proper selection and appointment process that ensures that the independence and credibility of the TRC is maintained. This goal is achieved by - (i) having a transparent process of appointing commissioners; (ii) having legal guarantees ensuring that commissioners can be removed only on valid grounds; (iii) offering protection to the commissioners, during and after selection, against physical reprisals and (iv) ensuring the TRC enjoys financial, administrative, and operational autonomy.<sup>5</sup>

It is, however, important to note that there is no ideal TRC model and no model can be transferred from one conflict situation to another, for all situations differ politically, culturally and socially.<sup>6</sup> Nevertheless, it is important that lessons be learnt from the past experiences of other states and that best practices be adapted to the circumstances of a specific transitioning state.



### **3.2 Quantity versus Quality of Commissioners**

Most of the commissioners who served on Latin American TRCs were chosen on a 'quality basis' i.e. by looking at either their personal qualifications, moral leadership or prestige. More recently TRCS such as the SATRC have selected their commissioners on a 'quantity basis' i.e. in such a way as to reflect the country's geographic and demographic profile.

The SATRC consisted of 17 commissioners, making it the biggest TRC ever established as regards the number of commissioners. The commissioners represented the diversity in the South African society. The commission's composition was tilted more towards

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<sup>5</sup> Gonzalez E & Varney H (2013: 16).

<sup>6</sup> Posner B C (2008: 7).

representativeness and inclusivity than towards expertise. In addition, the commission balanced between partisan and non- partisan members to ensure impartiality of members.<sup>7</sup> By contrast, the Guatemalan TRC had three commissioners, one chosen by the UN and two professionals who were nationals of Guatemala. The framers of this TRC settled for a selection approach that was non-inclusive by focusing on the quality attributes of the commissioners rather who they represented.<sup>8</sup>

A large number of commissioners allows for representation of diverse perspectives and backgrounds with a view to avoiding bias.<sup>9</sup> It also makes it possible to match the task with sufficiently qualified people to complete it. The quality and quantity of candidates should be such that it accounts for the diverse experience of the population, and the candidates should be able to relate to and understand the abuses and violations that occurred. The work of a TRC is unique and difficult. Commissioners must have the intellectual and organisational abilities to manage all aspects of such an operation. There is always a need for a careful balance between expediency and representativeness.<sup>10</sup>

An inclusive approach which caters for both the quality and number of commissioners is preferable. Representatives of both victims and warring factions should be considered when selecting commissioners. This is because these are the people closest to the conflict and thus most familiar with the nature and scale of atrocities that might have taken place.

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<sup>7</sup> Cheng C (2015:2).

<sup>8</sup> Aviles M & Kalleklev M (2009:18).

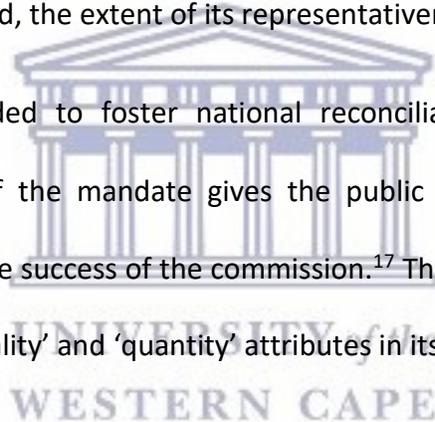
<sup>9</sup> Selection committees should consider the geographic origin, religion, language, class and ethnicity of candidates, among other factors.

<sup>10</sup> de Grieff P (2013: Par103).

Commissioners should preferably include professionals drawn from different disciplines<sup>11</sup> as cross disciplinary experience is important for the effectiveness of a TRC.<sup>12</sup>

It is also important to have an uneven number of commissioners appointed so as to ensure democratic decision making.<sup>13</sup> However, one of the largest drawbacks of a big commission is the time and energy that has to be dedicated to co-ordination and communication with the public.<sup>14</sup> In case of a trade-off between the number or the quality of commissioners, one should opt for quality.<sup>15</sup> If the commissioners produce a comprehensive and credible report, issues of whether or not they fully represented the different demographics of the society will become irrelevant. If the report is flawed, the extent of its representativeness will not redeem it.

However, as a TRC is intended to foster national reconciliation, having the public well represented by the drivers of the mandate gives the public a sense of ownership of the process,<sup>16</sup> which is crucial to the success of the commission.<sup>17</sup> The most successful commissions have included a mixture of 'quality' and 'quantity' attributes in its commissioners.<sup>18</sup>



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<sup>11</sup> For instance it is advisable to have commissioners who have a record of promoting human rights or serving the public interest. Other disciplines could include history, forensics, gender studies, social anthropology, psychology, medicine, religion and conflict resolution.

<sup>12</sup> Cheng C (2015: 4).

<sup>13</sup> Gonzalez E & Varney H (2013: 14).

<sup>14</sup> Design Structure 'Strategic Choices in the Design of Truth Commissions' (2012) <http://www.truthcommission.org/composition.htm> (Accessed 17 August 2017).

<sup>15</sup> Cheng C (2015: 4).

<sup>16</sup> Valji N (2006: 6).

<sup>17</sup> In Burundi, parliament took out a provision requiring the inclusion of representatives of religious groups, civil society and various professional categories from the final proposal of the enabling act. This led to a lot of uproar by the civil society and the international community and led to the TRC suffering from legitimacy problems.

<sup>18</sup> Amnesty International Burundi (2011: 7-8).

### 3.3 Nationality of Commissioners

When deciding on the nationality of prospective commissioners, most of the establishing authorities take the degree of divisiveness and distrust that prevails in a society into consideration.<sup>19</sup> For instance, where foreigners are included as commissioners, it is mostly because the available domestic personalities are regarded as untrustworthy by all sides to the earlier conflict, thus exposing them to potential personal danger by serving on a TRC.<sup>20</sup>

There has been no standard practice in determining the nationality of prospective commissioners, the reason being that there are a host of factors to consider beforehand. These may range from matters such as state sovereignty, security issues, available financial resources to name but a few. In the end, the establisher of the TRC would have to make a final choice as to whether the TRC will be exclusively national, exclusively international, or mixed. Each of these arrangements is discussed below.

#### 3.3.1 Exclusively International Commissioners

Exclusively international TRCs are rare. The standard justification for the use of purely international commissioners is normally the need for neutrality. It has been argued by some scholars that TRCs must be independent of all actors in a conflict in order to have the moral authority necessary to investigate.<sup>21</sup> After an extended period of fighting, El Salvador was too polarised to document its own history. As a result, the TRC commissioners in El Salvador were all foreigners. This addressed the polarisation problem between the Salvadoran leaders and

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<sup>19</sup> Design Structure 'Strategic Choices in the Design of Truth Commissions' (2012) <http://www.truthcommission.org/composition.htm> (Accessed 17 August 2017).

<sup>20</sup> Kritz J N (2004: 323).

<sup>21</sup> Popkin M and Roht- Arriaza N (1995:79).

opposition forces, but it did not promote reconciliation since it excluded Salvadorans from fully participating in the transition process.

Whereas most TRCs have consisted solely of nationals, El Salvador is the only country to date to have insisted on having only foreign commissioners and staff members. But this arrangement harboured both practical and symbolic problems. Practically, the commissioners simply were ignorant as to who, what and how to investigate. Symbolically, this circumstance eroded the TRC's legitimacy as the people of El Salvador did not feel a sense of ownership of the commission.

### **3.3.1.1 Advantages of Having an Exclusively International Commissioners**

It is believed that having foreign commissioners guarantees the TRC's neutrality as such commissioners are often independent of any ties with the host country.<sup>22</sup> These commissioners win the trust of the local community and get them to willingly and actively participate in the functions of the TRC.

Foreign commissioners are seen as a solution to polarised states trying to transition. Civil war leaves societies so divided<sup>23</sup> that they are unable to write their own common history. Foreign commissioners provide the legal and technical know-how required by transitioning societies while maintaining their neutrality and independence. Foreign commissioners often work under very hostile environments. Due to their status and importance, the transitioning states in which

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<sup>22</sup> Kritz J N (2004: 323).

<sup>23</sup> Walter F B (1999: 127).

these commissioners are located are always willing and ready to afford them more security than they would provide to their national counterparts.<sup>24</sup>

Foreign commissioners bring along the influence of the international community to the TRC. This, in turn, enhances and gives weight to the work of the commission. For example, in Guatemala, intense international attention prevented the truth seeking process from being derailed.<sup>25</sup> TRCs with international influence have the advantage of having enough funding at their disposal<sup>26</sup> as was the case in the Guatemalan TRC.<sup>27</sup> Additionally, the level of expertise will be higher,<sup>28</sup> as will be the ease of getting information about the conflict.<sup>29</sup> A report drawn up by an international commission is more likely to elicit the support of the international community that the recommendations made in the report be implemented.<sup>30</sup>

### 3.3.1.2 Disadvantages of Having an Exclusively International Commissioners

Despite the supposed objectivity built into an international investigation, the Salvadoran people still associated the TRC with the government in power. The foreign commission made logistical choices that alienated Salvadoran citizens, thus raising public reservations about the commission's neutrality.<sup>31</sup>

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<sup>24</sup> Hayner (2002: 244-245).

<sup>25</sup> Cheng C (2015: 9).

<sup>26</sup> Brahm E (2004: 1).

<sup>27</sup> Kerr R & Mobekk E (2007: 133).

<sup>28</sup> Having international commissioners makes it easier to source documents held by foreign governments and agencies and to draw on the wisdom and expertise of foreign experts.

<sup>29</sup> The El Salvadoran TRC obtained information from the US government, notably the Department of State, Department of Defence and Congressional sources.

<sup>30</sup> Buerghenthal T (2007: 221).

<sup>31</sup> The commission set up its offices in an up-market neighbourhood. During the civil war the upper class were said to be the greatest supporters of the military and death squads. The international commissioners may not have realised the expressive implications of their operational choices, but the Salvadoran actors did. People feared to go into such a neighbourhood as witness because of its association with the political right.

Unlike prosecutions, a TRCs is supposed to be a victim-based mechanisms. Unfortunately, most TRCs headed by foreign commissioners are not victim- based.<sup>32</sup> This is often because victims are not given a chance to give their testimony in public, and also the international community has the upper hand in deciding what should or should not be investigated. Most often they get it wrong as what they choose to investigate does not always reflect or resonate with the problems ailing the victims leading to the fabrication, distortion and mismanagement of the truth and history in general. The report produced by such a TRC will not be balanced as the functions of such a TRC are viewed as being foreign imposed.<sup>33</sup>

As with all transitional justice mechanisms, a TRC having sufficient resources is vital to ensure its successful implementation. Compared to other mechanisms, TRCs are not widely expensive undertakings and this is one of their many benefits.<sup>34</sup> But post conflict societies may not still have sufficient funds to conduct such a process.<sup>35</sup> This is because most transitioning states are normally rundown and broke.<sup>36</sup> As a result, they are forced to rely on foreign donors. When a commission has an international presence and interest, funding is often more forthcoming. Often, this funding is made available unconditionally. Most times however, these funded TRCs are compelled to satisfy the interest of donor governments' in order to ensure ongoing financial support.<sup>37</sup>

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<sup>32</sup> For instance the El Salvadoran TRC, the Sierra Leonean TRC, the Haiti TRC and the Guatemalan TRC.

<sup>33</sup> Schabas A W & Bernaz N (2011: 374).

<sup>34</sup> This is especially when set against the huge costs of international courts.

<sup>35</sup> Kerr R & Mobekk E (2007: 132).

<sup>36</sup> Some TRCs in countries such as such as Sierra Leone, Guatemala, Chad, Uganda, and the Philippines have been severely limited by financial constraints.

<sup>37</sup> Schabas A W (2008: 12).

Another disadvantage of having exclusively international commissioners is the ‘space ship’ phenomenon. This phenomenon can be explained as the ‘parachuting’ of foreigners to rescue the local community without understanding the contexts and dynamics in which they are operating.<sup>38</sup> Once the commission had completed its work and all the foreign commissioners have left, local actors are left to deal with the negative consequences of this phenomenon.<sup>39</sup> Reliance on these foreign commissioners and structures also fails to strengthen the structures of the transitioning country, or restore public faith in the ability of the government to play a leadership role in upholding human rights.

A country’s attitude toward the involvement of the international community in its internal affairs is crucial when determining whether or not to have international commissioners. This is because some countries view such involvement as an interference with their national sovereignty.<sup>40</sup> Foreign commissioners may also face a lot of hostility from governments that are under pressure to implement internationally ‘influenced’ peace agreements. In such circumstances, the government may not really care that these institutions are established and adequately funded. This can have devastating consequences for the TRC.<sup>41</sup>

Having foreign commissioners makes the financial burden of transitioning states even more unbearable. This is because the use of foreign commissioners is expensive. Foreign commissioners require maintainance, security, transport, housing, and allowances, to name but

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<sup>38</sup> Maley W (2009: 111).

<sup>39</sup> Selecting non-citizens as commissioners can undermine national ownership of the process, especially if they do not maintain a long-term presence in the country. For instance, in Sierra Leone, international commissioners were perceived as uncommitted because they spent too much time ‘hopping between global hotspots’. See also Cheng C (2015: 9).

<sup>40</sup> In Colombia, for example the preceding internal conflict was too complex to be covered by an international commission with no experience of the country.

<sup>41</sup> Sooka Y (2006: 311).

a few. A transitioning state is therefore forced to use the little money it has on the international experts instead of spending it to strengthen its institutions and rebuild its society.

### **3.3.2 Exclusively National Commissioners**

Just like the CIVHR and the SATRC, commissioners can all be local figures of the transitioning state. All the 17 members of the SATRC were nationals of South Africa and were chosen as representatives of the numerous ethnic and racial groupings present in South Africa.<sup>42</sup> The SATRC received much public support as it was viewed as impartial, inclusive and independent.<sup>43</sup> Similarly, in Uganda, all the commissioners appointed by the President Museveni were Ugandans. They were chosen because they were personally known to the appointing body which tainted the public image of the commission, as they were seen to be partial towards Museveni. Consequently, they lacked public support, hence the public's reluctance to testify before the commission. Despite the commission being comprised fully of Ugandan nationals it was ill-suited for its task because of its political partisanship.

#### **3.3.2.1 Advantages of Exclusively National Commissioners**

A number of advantages follow from having exclusively national commissioners. Most times local commissioners are clued up on the actual problems and issues being addressed by the TRC. This makes it easier for the commission to garner the support and participation of the community. The local community is made to feel a sense of ownership of the commission and the process. Local commissioners remain in the country after they have completed their work, enabling them to monitor the implementation of their recommendations closely. The

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<sup>42</sup> Other exclusively national TRCs include the Chilean TRC and the Argentinian TRC.

<sup>43</sup> [http://truth.wvl.wits.ac.za/cat\\_descr.php?cat=5](http://truth.wvl.wits.ac.za/cat_descr.php?cat=5) (Accessed 18 August 2017).

recommendations proposed by a national commission will be tailor-made to fit the needs of the society of which commissioners are part. The international community and foreign donors are always ready to fund states that are willing and ready to transition from conflict to democracy. Having local commissioners head such processes will attract direct foreign investment into the country.

### 3.3.2.2 Disadvantages of Having Exclusively National Commissioners

Having an exclusively national TRC has its challenges too. Transitional governments often lack the necessary political will to effect change. These local commissioners have to work with and under such governments.<sup>44</sup> This lack of political will can be tragic as it makes the work of national commissioners difficult and at times impossible.<sup>45</sup>

The independence of a TRC is not only measured by the caliber of its commissioners. Even the most respected national commissioners cannot protect themselves against being underfunded. Transitioning states have been known to use finances to control the functions of TRCs. This manipulation often happens in TRCs that have no international funding or representation, placing them under the mercy of the local government. Such a commissions will be forced to make unfavourable decisions so as to continue getting funding from the government.<sup>46</sup> Exclusively international TRCs on the other hand enjoy financial autonomy and are able to operate in a non-manipulative environment. Transitional states cannot afford to pay for the

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<sup>44</sup> EASPD 'Lack of Political Will and Fear of Change: The Main Barriers to Inclusive Education' <http://www.easpd.eu/en/content/lack-political-will-and-fear-change-main-barriers-inclusive-education> (Accessed 20 August 2017).

<sup>45</sup> EASPD 'Lack of Political Will and Fear of Change: The Main Barriers to Inclusive Education' <http://www.easpd.eu/en/content/lack-political-will-and-fear-change-main-barriers-inclusive-education> (Accessed 20 August 2017).

<sup>46</sup> Quinn R J (2010: 64).

costs of transition. This is because national resources have been embezzled by foregoing dictators and their henchmen. The transitioning state thus has to rely on foreign funding to sustain the work of the TRC.

### **3.3.3 Local Figures and International Members as Commissioners**

A TRC may also be mixed, meaning that the TRC consists of both nationals and foreigners, for example, the Guatemalan CEH and Sierra Leonean TRC. The Guatemalan TRC, for example, consisted of a German law professor, who chaired and co-ordinated the commission, and two Guatemalan nationals. The Kenyan TRC had three foreign commissioners in addition to the local figures. In mixed panel, TRCs both local and foreign commissioners work together as equals to implement the mandate. None exercises authority over the other.

#### **3.3.3.1 Advantages of Having Local and International Commissioners**

Mixed TRCs are preferred because the foreign members are able to rely on their national members for understanding of the historical, political and social background of the conflict. Mixed TRCs allow national and international experts to complement each other.<sup>47</sup> National commissioners can also be trained by their international counterparts on international standards of human rights and research methodology, which is a useful skill that can be used in the future.<sup>48</sup> The commission members and the commission as a whole enjoy operational independence, which encourages local communities to trust the commission and work with it.

A mixed TRC enjoys the benefit of receiving both national and international backing and funding. The international community has the interest of its international commissioners at

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<sup>47</sup> Hayner P B (2002: 220).

<sup>48</sup> Hayner P B (2002: 220).

heart and has an interest in ensuring that their work is unencumbered by security problems and hurdles such as poor infrastructure. Furthermore, given the international dimension of the commission's composition, a mixed commission knows that it is working under the watchful eye of the international community, which places a high premium on impartiality.<sup>49</sup>

### 3.3.3.2 Disadvantages of Having Local and International Commissioners

Like a commission consisting solely of local figures, a mixed commission also has its weaknesses. Unless the national members in a mixed TRC are seen by the population at large as non-partisan and trustworthy, the commission will have difficulties interviewing and gathering information it needs to prepare a truly balanced and credible report. Rivalry between national and foreign commissioners is also a common occurrence. According to Hayner, the most problematic bit about having a mixed commission is the issue of staff tension. This mostly originates from the salary variances between national and international employees who are doing the same work. There is no easy solution to this problem, but it should be recognised as a potential source of bitterness.<sup>50</sup>

### 3.3.4 Summary

So what is the best method of selection, mixed, international or national? This question cannot be answered in the abstract since the answer will depend on the individual country and its political climate.<sup>51</sup> This study has established that having an exclusively foreign commission hinders the facilitation of a functional and participatory democracy. Participatory democracy

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<sup>49</sup> In the Kenyan situation, there was lack of political will by the government under which the commission was established. However the presence of the international community, through the international commissioners on the TJRCs panel, pressure to perform and establish the real truth was placed on the TJRC and the commission had to work and fulfill its mandate as expected.

<sup>50</sup> Hayner P B (2002: 299).

<sup>51</sup> Buergenthal T (2007: 221).

requires the active participation of all citizens of a transitioning state. International bodies and persons can provide crucial assistance as donors or observers but they should never become substitutes for local participation.

On the other hand, having local commissioners implement the mandate of a TRC makes the work of such a TRC easier. The public tend to support the commissioners and are willing to participate in the TRC's work. The recommendations of such a commission are also easily implementable as they are tailor-made to the needs of the society. On the flip side, local commissioners can also be drawn from government supporters, especially where the president is the appointing body. Such pro-government commissioners pander to the whims of the government. This can lead to shoddy investigations that do not reflect the real nature of the prior internal conflict to which the incumbent government was then a party. Having a TRC composed solely of national commissioners thus also has its drawbacks.

Given the discussion above on the pros and cons of each arrangement, it is submitted that a mixed TRC model is best. This is because it is a good mix of the exclusively international and national model. It represents both sides of the divide equally.

In a mixed model, there is a balance between foreign knowledge and local traditions, and, a balance between the help from foreign experts and the development of national capacities.<sup>52</sup> Having a mixed model as the best practice is not only a matter of respect for local values and

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<sup>52</sup> Ewald U & Turkovic K (2004: 266).

traditions, but also a way of seeking to have a transitional mechanism that is practical and sustainable. Mixed TRCs legitimise the process and provide a unifying force.<sup>53</sup>

### 3.4 Methods of Selection

There are two methods of selection: one is the direct selection also known as unilateral selection and the other is the participatory or consultative selection. In the course of time, establishers of truth commissions have shielded away from direct or unilateral appointments. They now seem to lean towards a more structured and participatory process of selection and appointment.<sup>54</sup> This is because a consultative approach strengthens the legitimacy of TRC.<sup>55</sup> These two methods of selections are discussed in detail below.

#### 3.4.1 Direct Selection

This is the when the commissioners are appointed with limited direct public participation. Direct selection of commissioners has been used in commissions in Argentina, Chile, Peru, Brazil and Uganda. Direct selection relies on the good judgment of the appointing authority without consulting civil society or the public at large.<sup>56</sup> The main justification given for the use of this mode of selection is the need to act quickly during a transition.<sup>57</sup> Unfortunately, this is normally at the expense of meaningful consultations with all interested stake holders.

Over time, creators of TRCs leaned towards adopting a more participatory and inclusive approach. Recently, vice president, Jejomar Binay of Manila, Philippines opposed law makers'

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<sup>53</sup> US Department of State (2016:3).  
<sup>54</sup> Sakin J (1998: 231).  
<sup>55</sup> Gonzalez E & Varney H (2013: 15).  
<sup>56</sup> Hayner P B (2002: 260).  
<sup>57</sup> Gonzalez E & Varney H (2013: 17).

proposal to have President Benigno Aquino III appoint members of the Mamasapano TRC, saying that this will undermine the body's independence.<sup>58</sup> He stated that there was need to ensure that the investigating body is seen as independent from the onset. He proposed that a search committee be established. This committee was to be made up of persons who are not partial to the government or any political organisation and would guarantee that the commissioners are chosen through a legitimate, impartial and independent process.<sup>59</sup>

In Burundi, when vice president Pierre Nkurunziza took it upon himself to appoint TRC commissioners, he encountered strong public resistance. Civil society groups boycotted the vote, stating that the current leaders wanted to promote impunity.<sup>60</sup> They were of the view that the commission members appointed by the vice president would be mere government puppets. It was also their view that such a commission would be biased from the onset and the people of Burundi would never know the truth about past crimes.<sup>61</sup> Burundi human rights activists wanted a mixed commission selected through a public participatory process. However, the enabling law stipulated that the commissioners be solely Burundians.<sup>62</sup> The human rights NGOs urged the international community to pressurise Nkurunziza to appoint a fair and impartial TRC.

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<sup>58</sup> Rappler 'Binay: Aquino Should Not Appoint Truth Body Members' (2015) [www.rappler.com/nation/82762-binay-aquino-truth-commission-pnp-saf](http://www.rappler.com/nation/82762-binay-aquino-truth-commission-pnp-saf) (Accessed 24 August 2017).

<sup>59</sup> Cheng C (2015: 5).

<sup>60</sup> Rugirirza E 'Burundi Truth Commission: A Diversionary Tactic, Critics Say' (2016) <http://www.justiceinfo.net/en/justice-reconciliation/26370-burundi-truth-commission-%E2%80%9Ca-diversionary-tactic%E2%80%9D,-say-critics.html> (Accessed 22 August 2017).

<sup>61</sup> [www.reuters.com/article/us-burundi-politics-idUBREAHOE020140418](http://www.reuters.com/article/us-burundi-politics-idUBREAHOE020140418) (Accessed 26 August 2017).

<sup>62</sup> Vandeginste S (2012: 355).

Unilateral appointments do not necessarily result in unsuitable appointees as this selection method has a number of advantages.<sup>63</sup> Persons selected through this method are often well known to the appointing body. As a result, the appointing body is able to easily appoint professionals and experts in the necessary fields. Another advantage is on the important aspect of group dynamics.<sup>64</sup> A team must be able to work together. A TRC will not be successful unless there is group cohesion among its commissioners and the staff as a whole. Since group dynamics cannot be predicted in advance, direct selection provides the necessary group dynamics required to run a TRC successfully. This is because commissioners appointed through direct selection are often known to each other and are able to trust and mutually respect each other.<sup>65</sup> This makes their working easy as they do not have to develop working relationships seeing that it already exist.

The cons of direct selection include the lack of independence and credibility of selected persons, a good example being the commissioners appointed to the Ugandan CIVHR. These commissioners were long-time friends of the appointing body. This way they worked to push forward the interests of the ruling party and not to establish the truth. Direct selection thus harbours the danger that the commission will be perceived by the public as biased and not deserving of public support.<sup>66</sup> For instance, the Argentinian TRC comprised of 12 nationals

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<sup>63</sup> Freeman M (2016: 198).

<sup>64</sup> Cheng C (2015: 4).

<sup>65</sup> Duhigg C 'What Google Learned from its Quest to Build the Perfect Team' (2016) <https://www.nytimes.com/2016/02/28/maqazine/what-qoogle-learned-from-its-quest-to-build-the-perfect-team.html> (Accessed 10 September 2017).

<sup>66</sup> In Serbia, the TRC project was not able to recover from its credibility challenges. The Yugoslav TRC was seen to be aimed at appeasing the United States. The TRC was neither consultative nor inclusive as most of the 19 appointed commissioners were 'mostly nationalist conservative academics.' Only two were from the ethnic minority and the civil society was under represented. This, among other several of its

named by the president. The appointees were highly criticised by human rights groups given that some of them had either participated directly or lent public recognition to the military rulers. The commissioners appointed through this criterion receive very little public co-operation. Unilateral appointments attract public mistrust in the objectivity and independence of the commission.<sup>67</sup>

### 3.4.2 The Consultative/Public Participation Approach

Under ideal conditions, commissioners should be selected through a participatory process that involves the government, civil society, victim groups and all other key stakeholders.<sup>68</sup>

Consulting such stakeholders not only indicates a commitment to give the commission legitimacy, but also helps the lawmakers understand the matters that need to be addressed by the commission. In Peru,<sup>69</sup> it became necessary, for example, to decide on how indigenous groups would be represented on the commission.<sup>70</sup> Soliciting public involvement in the process of creating a commission or providing a mechanism to engage the public from the early stages has been demonstrated to be of critical importance to the success of a TRC.

In the participatory or consultative model of selection, there is usually an independent selection panel consisting of the main stakeholders.<sup>71</sup> The panel calls for and accepts submissions and

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problems, led to the disbandment in 2003. The observers in Serbia concluded that the commission brand was utterly devalued.

<sup>67</sup> Battison A & Teo C (2017: 1).

<sup>68</sup> ICTJ 'In Search of the Truth: Creating an Effective Truth Commission'  
<https://www.ictj.org/sites/default/files/subsites/in-search-of-truth/> (Accessed 17 October 2017).

<sup>69</sup> Hayner P B (2004: 24).

<sup>70</sup> United Nations Declaration on the Rights of Indigenous Peoples General (2007).

<sup>71</sup> Alston P & Knuckey S (2015: 292).

nominations of prospective candidates made to it.<sup>72</sup> The candidates are vetted by this selection panel and in some instances, the public participates in the interviews of the finalists. The selection panel then determines a shortlist of candidates consisting of persons who have shown probity, proven integrity, impartiality and represent the diverse key stakeholders and have the required professional backgrounds. The panel then recommends the list of names to the appointing authority.<sup>73</sup>

This latter approach was used in South Africa, Sierra Leone, Liberia, Timor Leste and Kenya. South Africa was the first country to initiate public involvement in the selection of commissioners. All population groups participated, including representatives from all major political parties, trade unions and civil society.<sup>74</sup> The commissioners eventually chosen had diverse professional background and spanned the political spectrum.<sup>75</sup> In Brazil, the creation of the National TRC began with a working group established by the government and which included representatives from civil society groups. The extensive dialogue that led to the selection of the commissioners helped generate broad public support for the TRC among different sectors of society.<sup>76</sup>

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<sup>72</sup> The selection panel in Timor-Leste called for public nominations, and consulted widely with the civil society organisations and the political parties. It gave considerable attention to diversity issues including regional and gender representation.

<sup>73</sup> For instance, in Liberia, the government appointed selection panel comprised of political party members, civil society representatives, and representatives from the United Nations and the Economic Community of West African States (ECOWAS). The ECOWAS representative presided over the selection panel, which vetted candidates. Further, the selected commissioners to appeared before the legislature for confirmation hearings.

<sup>74</sup> Graybill L (2002: 150).

<sup>75</sup> Cushman T (2011: 503).

<sup>76</sup> ICTJ 'In Search of the Truth: Creating an Effective Truth Commission'  
<https://www.ictj.org/sites/default/files/subsites/in-search-of-truth/> (Accessed 17 October 2017).

It is important that the selection committee makes the public aware of the nomination process as this will broaden the pool of candidates. The selection committee must decide who can nominate candidates and who can be nominated as candidates.<sup>77</sup> It should stipulate the maximum number of candidates that can be nominated to avoid being flooded with names of people whose background has to be researched.<sup>78</sup> The time allocated for public consultation should be limited but not too short as to render the consultation a farce.<sup>79</sup> For instance, the Kenyan TJRC Act restricted the consultative process severely.<sup>80</sup> This resulted in appointed commissioners having not been properly vetted. The chairperson was later found to have allegedly committed human rights violations in the past.<sup>81</sup> Given the sufficient time allowed for public consultation in South Africa, the persons finally appointed as commissioners received wide public endorsement. The selection committee may wish to conduct both private and public interviews as this would improve public participation and transparency while at the same time ensuring that the candidates remain as candid as possible.<sup>82</sup>

It is also important that the members of the selection committees fully understand what impact their choice will have on the credibility of the TRC. The consultative method of appointment gives the notion of representative democracy which ensures that members of the public are

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<sup>77</sup> In Kenya (2008) and Liberia (2006) national organisations could nominate candidates. In Sierra Leone (2002) nominations were put forward by anyone within or outside Sierra Leone. International organisations such as the UN have appointed international commissioners in countries such as El Salvador (1992).

<sup>78</sup> Cheng C (2015: 5).

<sup>79</sup> de Grieff P (2013: FN 73).

<sup>80</sup> The Truth Justice and Reconciliation Act No. 6 of 2008.

<sup>81</sup> The selection process of the Kenyan TJRC was based on stringent requirements and even stricter time frames. Very little attention was paid to the individual record of each candidate and this resulted in a controversial appointment of Bethwel Kiplagat as the chairperson.

<sup>82</sup> Cheng C (2015: 8).

given an opportunity to take part in decisions that affect them.<sup>83</sup> Manipulation of commissioners appointed through a thorough consultative process is not easy. Most commissioners chosen through this process are well known to the public and would not want to jeopardise their moral standing in the community. In addition, since such commissioners are not aligned with either of the warring factions, governments or key stakeholders, their work is often independent of any external influences.

Participation of the victims, the perpetrators, government and other key stakeholders ensures that the TRC remains accountable. The public is able to keep in check the people it appointed. For instance the SATRC was always accountable due to the continued monitoring of the commissioners by the civil society. The 'public' nature of commissioner appointment and the conduct of proceedings became a benchmark for the work of all commissions in Africa.<sup>84</sup>

### **3.4.3 Interim Summary**

There is no failsafe method of selection.<sup>85</sup> None of the two methods has proven to be immune from occasionally questionable and inappropriate appointments. It is, however, beneficial if commissioners chosen are rooted in different sections of society, particularly those directly related to the conflict including but not limited to geography, gender, ethnicity and religious affiliations. Commissions that appoint their commissioners through the consultative approach enjoy more public confidence and participation when fulfilling its mandate.

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<sup>83</sup> Botha C (2017: 1).

<sup>84</sup> Sooka Y (2006: 312).

<sup>85</sup> Alston P & Knuckey S (2015: 292).

Although the unilateral or direct appointment is not without its merits,<sup>86</sup> it does not recommend itself as readily as appointment after public consultations.

### 3.5 Inclusion of Women in the Transition Process

Women and men experience conflict differently.<sup>87</sup> Women are more vulnerable and the physical vulnerability is expressed in their becoming victims of sexual abuse. During and after conflict women are expected to be the glue that holds together their fractured and hurting families, rebuild wrecked infrastructures, and contribute towards healing previously divided communities. Despite being on average more economically disadvantaged than men, women have consistently tried to be on the vanguard of the movement for peaceful resolution.<sup>88</sup> Regrettably, women are usually excluded from the post-conflict peace process, which is often regarded as the domain of men.

#### 3.5.1 The Gender Question in Truth Commissions

Gender matters are often neglected in the peace and transition process.<sup>89</sup> Few TRCs have fully and adequately addressed gender issues and particularly the impact of gross human rights abuse on women.<sup>90</sup> Historically, TRCs have failed many women. The Argentinian and Chilean TRCs did not regard gender as a critical factor in truth seeking. It was only later that Latin

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<sup>86</sup> In Chile, President Aylwin appointed eight people to serve in the TRC. He purposefully selected four members who were supporters of Pinochet, as well as four who had been in opposition thus avoiding any perception of bias in the TRCs work. This strategy was indeed effective as the final report received unanimous backing by all the eight members.

<sup>87</sup> World Bank (2006: 4).

<sup>88</sup> United Nations Division for the Advancement of Women (DAW) 'Equal Representation of Women and Men in Decision Making Processes with Particular Emphasis on Political Participation and Leadership' (2005) <http://www.un.org/womenwatch/daw/eqm/eql-men/FinalReport.pdf> (Accessed 2 September 2017).

<sup>89</sup> Reychler L & Paffenholz T (2001: 64).

<sup>90</sup> O'Connell H (1993: ii).

American TRCs included gender issues in the scope of their investigations. However, with time, women's role in post-conflict reconstruction has been increasingly recognized.<sup>91</sup> For instance, through the vigorous advocacy of the United Nations and some donor countries, women representatives were trained and given an opportunity to effectively participate in the peace-building process in Timor-Leste. By the time the Guatemalan TRC produced its final report, there was a shift to have more gender neutral TRCs. TRCs in South Africa, Sierra Leone, Haiti, Peru included women commissioners in their panels.<sup>92</sup> UN Resolution 1325 (2000) calls for strengthening women agency as peace makers and peace builders and including their participation in the peace process.<sup>93</sup>

Freeman emphasises on the need to ensure that men and women equally participate in the TRC deliberations.<sup>94</sup> The rationale for this position include:-

1. The justice argument<sup>95</sup>- women make up approximately half of the population in most countries and therefore their need for effective representation cannot be ignored.<sup>96</sup>
2. The experience argument<sup>97</sup>- women experience conflict and violence differently from men. It is important, therefore, that they are represented in discussions that result in policymaking.

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<sup>91</sup> United Nations Security Council Resolution 1325 (2000).

<sup>92</sup> The representation of women commissioners in these panels was as follows; Ghana 3 of 7, Liberia 4 of 9, Morocco 1 of 17, Peru 2 of 12, Sierra Leone 3 of 17, South Africa 7 of 17 and Timor-Leste 2 of 17.

<sup>93</sup> UNSC Resolution 1325 (2000).

<sup>94</sup> Freeman M (2006: 67).

<sup>95</sup> United Nations Division for the Advancement of Women (DAW) (2005: 8).

<sup>96</sup> <https://www.thestandard.co.zw/2017/03/19/kill-peace-commission-birth/> (Accessed 2 September 2017).

<sup>97</sup> O'Connell H (1993: ii); see also UN. DAW (2005: 8).

3. The interest argument<sup>98</sup>- men and women have different and conflicting interests. There is a need, therefore, to have women representatives to articulate the interests of women.<sup>99</sup>
4. Critical mass argument<sup>100</sup>- for women to effectively represent their interests they must first achieve certain levels of representation.<sup>101</sup>
5. The democracy argument<sup>102</sup>- the equal representation of women and men enhances democratisation of governance in transitional and consolidated democracies.

Establishers of TRCs appreciate that having women as part of the staff may make a TRC less alienating for female victims. This is because female commissioners create a supportive and affirming environment for female victims. For example, the SATRC female commissioners responded to calls from women groups by instituting women-only hearings chaired by the female commissioners to hear from women who wanted an all-female forum. In Sierra Leone, the SLTRC was assisted by the UN Development Fund for Women which provided technical advice and training for the TRC commissioners and staff. As a result, many women openly and willingly testified in the hearings. As a result, the TRC's final report was able to highlight cases of gender violence in detail.

Gender balance alone is not a sufficient indicator that a TRC will adequately address the plight of women.<sup>103</sup> In Ghana, despite having women as commissioners, gender issues were side-lined by the TRC. Matters were prioritised on the basis of power contests amongst commissioners. In

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<sup>98</sup> UN DAW (2005: 8).

<sup>99</sup> World Bank (2006:4).

<sup>100</sup> Childs S & Mona LK (2008: 726).

<sup>101</sup> UN DAW (2005: 9).

<sup>102</sup> Childs S & Mona LK (2008: 726).

<sup>103</sup> Cheng C (2015: 4).

the SATRC, gender issues were often treated as ‘add-on-factors’ than as matters that were integral to the thinking of the TRC.<sup>104</sup> A former female commissioner of the SATRC discussed how difficult it was for the female commissioners to convince their male counterparts about the importance of private hearings for women. The male dominated structure of the SATRC did not easily facilitate the collection of women stories and voices.<sup>105</sup>

It is important to distinguish between descriptive or numerical representation on the one hand and substantive representation on the other. Descriptive representation occurs when a chosen individual represents a group by virtue of sharing similar characteristics with the group, such as race, sex, ethnicity, age, or geographical area. The question of women achieving descriptive representation, therefore, is simply about counting the number of women in a political or, in this instance, a TRCs panel and not critically examining what these chosen representatives are actually saying.<sup>106</sup>

Substantive representation on the other hand seeks to advance a particular group’s policy preference and interest without necessarily being a member of the group or sharing any characteristics with the group.<sup>107</sup> The focus here is rather on what the representative is doing and saying and whether he or she is acting in the interests of the group. This type of representation goes beyond numbers. It is therefore, important that the issue not be about the number of women appointed as commissioners, but the quality. Women chosen as

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<sup>104</sup> Gurd T & Durham H (2005: 217).

<sup>105</sup> Fiona R (2003: 19).

<sup>106</sup> Karen C (2008: 3).

<sup>107</sup> Karen C (2008: 4).

representatives should be able to make significant and positive shifts in the status of women or in policy recommendations that address women's issues.

Whoever is charged with setting up a TRC should seek to adopt the substantive representation approach when addressing the issue of gender balance in TRCs. The important question always should be how the women members are going to make a difference to the lives of those they seek to represent and in the TRC process as a whole. In selecting and appointing commissioners, potential candidates (male and female) should be probed on their approach to gender issues. Women would thus be commissioners, not as tokens but as persons who are able and wield influence when it comes to formulating policy.

### **3.6 Choosing the Chairperson of a TRC**

Several TRCs have ran into serious problems due to bad and/or weak leadership. Any commission head must be a strong leader, capable of overseeing investigations, logistics, recruitment and management of a large and diverse staff.<sup>108</sup> In her study of TRCs, Hayner states that many TRCs have gotten into early trouble because of weak management, which leads to staff divisions, misdirected or a delayed start in conducting investigations and making findings.<sup>109</sup>

In addition to setting the TRCs overall direction and priorities, the chair often becomes the central public face of the commission. For this reason, his or her perceived independence and impartiality is especially important. In Sierra Leone this was a challenge for the creators of the

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<sup>108</sup> Cheng C (2015:4).

<sup>109</sup> Hayner P B (2011: 212).

TRC, notwithstanding a broadly consultative selection process.<sup>110</sup> The chairman gave the impression that he was too close to the ruling party. His support for the president when he refused to apologise caused public misgivings about his neutrality. On another occasion, the chairman even thanked the pro-government militia for having defended the country.<sup>111</sup> By doing this, he gave the impression that the TRC was a mere extension of the government.

The situation in Kenya was no different. The chairperson of the TJRC, Bethuel Kiplagat, had allegedly participated in government decisions that had resulted in gross human rights violations under the KANU regime. By appointing him chair of a commission that was purportedly expected to investigate the same violations, public confidence in the commission waned.<sup>112</sup> The chairperson of Ghana TRC attracted criticism for allegedly exhibiting bias in his treatment of witnesses. His attitude towards perceived supporters of Rawlings was problematic and validated assertions that the Ghana National Reconciliation Commission was a politically motivated witch-hunt.<sup>113</sup>

There was tension in Liberia when Jerome Verdier was appointed as chairman of the commission. He was a young, activist lawyer with little political and moral clout necessary to lead a body of such momentous import.<sup>114</sup> It was worrying whether a person with such little political and educational experience would be able to handle intense public attention and political pressure from all quarters.

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<sup>110</sup> International Crisis Group (2002:6).

<sup>111</sup> Shaw R (2005: 5).

<sup>112</sup> Gonzalez E (2014: 63).

<sup>113</sup> Valji N (2006: 9).

<sup>114</sup> Gberie L (2008: 456).

A chairperson has the duty to ensure that the other commissioners work in cohesion, seeing that commissioners can be elected from diverse backgrounds and personal attributes.<sup>115</sup> The chairperson should be a person who can attract national and international support for the TRC. For instance, Bishop Tutu's relative independence lent itself to his chairmanship being seen as removed from any political ideology and political party persuasion.<sup>116</sup> Donors openly cited admiration for the leadership of the SATRC as the motivation behind their huge support. Bishop Desmond Tutu was widely recognised for his stand against apartheid and moral fortitude. Desmond Tutu's international esteem was arguably second only to that of former-President Mandela's. The SATRC Vice-Chairperson, Dr. Alex Boraine, also enjoyed profound respect within the donor community. As a result of this he was able to effectively lead the TRC's campaign for donor funding.<sup>117</sup>

A chairperson should be a flexible person. By being flexible to new ideas and open minded enough to consider them, he or she sets a good example to the team and increases their willingness to perform excellently.<sup>118</sup> The chairperson should always raise the ethical plane high. This is because the team are a reflection of the chairperson and if he or she makes honest and ethical behaviour a key value, the team will follow suit.<sup>119</sup>

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<sup>115</sup> For example in Canada, the TRC could not carry out its mandate for more than a year due to the difference of opinion between the chairperson and the commissioners. These differences were made public, resulting in all the commission members resigning. New commissioners had to be appointed.

<sup>116</sup> Gibson LJ (2006: 418).

<sup>117</sup> McPherson D (2001: 1).

<sup>118</sup> Njoku C G & Anieke C C (2016: 36).

<sup>119</sup> Brad berry T '6 Things Leaders Do Differently' (2016)<https://www.forbes.com/sites/travisbradberry/2016/01/13/6-things-great-leaders-do-differently/#771698d156d0> (Accessed 18 October 2017).

There is no hard-and-fast rule on what the professional qualifications of a prospective chairperson should be. In Latin America, TRCs have been chaired by intellectuals, in South Africa by a cleric, and in Morocco by a former political prisoner. The rule of thumb, however, is that the chairperson should be a fit, independent, credible, legitimate and morally upright person who is fully up to the important task.

### **3.7 Credibility and Legitimacy of Commissioners**

In Liberia, after the signing of the Comprehensive Peace Agreement of 21 August 2003, the chairman of the National Transitional Government appointed nine commissioners in 2004, even before the enabling TRC Act was passed. This immediately created a serious challenge as to the credibility of the TRC. This is because there were no criteria laid down for the appointment of commissioners and there was no clarity on the matter of public consultations nor on the commissioners' tasks and commissions' goals.<sup>120</sup> When the TRC Act came into effect in 2005, the commissioners appointed earlier were vetted, which led to seven new commissioners being substituted for those who did not meet the requirements. As a result, the commission was able to redeem its credibility.<sup>121</sup>

The TRC in the Democratic Republic of Congo (DRC), Serbia, and most recently Zimbabwe were less lucky. In the DRC the first set of commissioners were appointed directly by the warring parties before the TRC law was enacted. This elicited public protests. However, even after the government passed the TRC Act, 13 more commissioners were appointed without removing the first set of commissioners. This action did not change the publics' negative perception about

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<sup>120</sup> Bosire K L (2008: 131).

<sup>121</sup> Bosire K L (2008: 132).

the TRC. Even appointing a clergyman as head of the commission did not help the TRC regain public confidence. The TRC was criticised and ostracised and considered a failure. In Peru,<sup>122</sup> the appointment of the President's national security advisor as a commissioner jolted the commission at the start, resulting in its credibility being questioned.

Commissioners should not be appointed in the absence of an enabling act.<sup>123</sup> This is because such commissioners and the TRCs on which they serve suffer a lack of credibility. Such TRCs do not function at all right from the start, or if they do, they do not perform as expected. Legitimacy lies in the belief that authorities and institutions are appropriate and just.<sup>124</sup> Credible institutions are often persuasive and easily succeed in getting citizens to accept their judgments and views. Given that legitimacy has a reciprocal relationship with effectiveness, there is need to ensure that credibility is maintained from the onset. Working with commissioners whose integrity is not in question helps a TRC have moral authority. The best practice is that those who work for the TRC are held up to the same standards as deemed appropriate by the creators of the TRC and by the people they are meant to serve.<sup>125</sup>

### **3.8 Tenure and Full-Time Commitment of Commissioners**

Commissioners can serve either full-time or part-time. Given that most TRCs are now incorporating public hearings into their work, the best practice would be to have commissioners serve on a full-time basis.<sup>126</sup> No commission can operate effectively on a part-

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<sup>122</sup> Hayner P B (2002: 260).

<sup>123</sup> UNHCR (2006: 13).

<sup>124</sup> Gibson L J (2009: 137).

<sup>125</sup> Bosire K L (2008) 133.

<sup>126</sup> UNHCR (2006: 14).

time basis.<sup>127</sup> Commissioners should be well remunerated so that they are able to work on a full time basis. Commissioners should not also be removed from office arbitrarily, rather, they must have a fixed term of tenure. This surety insulates them from pandering to political machinations out of fear of being arbitrarily removed from their position.

### **3.9 Mandates of TRCs**

When selecting commissioners, establishers should always pay close attention to the mandate of the TRC being established. This is because TRCs mandates vary. Some mandates seek to establish the truth on human rights violations of a political and civil nature, e.g. the SATRC. Others like the Kenyan, Sierra Leonean, Chadian, and Liberian TRCs can have an economic dimension to them. According to Sharp, the dominant script as to the scope of abuses has been an emphasis on the physical violence and civil and political rights violations. Social and economics right have often been pushed to the margins.<sup>128</sup>

As a result, previous TRCs had commissioners who were mostly human rights activists and lawyers, thus making these TRCS overly lawyerly and atomistic. Despite the change in script to include social and economic right into TRC mandates, establishers of TRC have failed to take this change into consideration when appointing commissioners. For instance, the Kenyan TJRC mandate was explicitly innovative and included a wide range of alleged economic injustices for investigations.<sup>129</sup> Given the complex nature of economic crimes, investigating such crimes calls for experts and investigators with skills to look into shoddy economic dealings. However, there

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<sup>127</sup> Gonzalez E & Varney H (2013: 18).

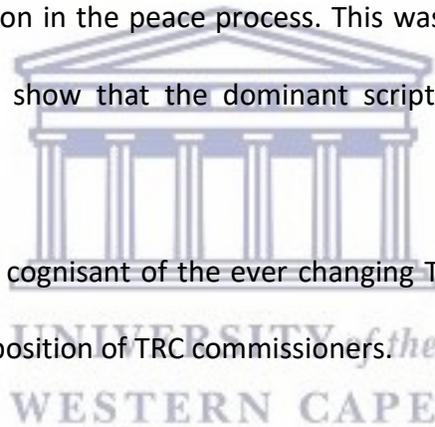
<sup>128</sup> Sharp N D (2014: 88).

<sup>129</sup> Langeran K (2015: 1).

was no sufficient effort on the part of the establishers to select and appoint such personnel. As a result, the TJRC lacked capacity to investigate effectively the wide-scale of economic crimes.<sup>130</sup>

Similarly, in Chad, the commissioners could not make sufficient sense of the maze of the presidents' national and international accounts. Due to lack of expertise, the commissioners could not link any of the large-scale economic crimes to the general poverty that plagued Chad.<sup>131</sup> The Chadian TRC lacked the expertise in forensic accounting that would have helped expose the economic crimes of the former regime. Additionally more mandates are recognising the place of women participation in the peace process. This was not the case in the early TRC mandates and goes ahead to show that the dominant script of TRCs mandates is indeed changing.

Establishers of TRCs should be cognisant of the ever changing TRCs mandates. These changes should be reflected in the composition of TRC commissioners.



### **3.10 Conclusion**

This chapter has highlighted the best practices that can be adopted in the selection and appointment of TRC commissioners. If taken into account, these best practices can help solve some of the challenges TRCs face as a result of commissioner selection. The creators of future TRCs should adapt the practices that best fit the circumstances of their respective countries. This will enable them select commissioners that are credible, efficient and effective.

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<sup>130</sup> Langeran K (2015: 14).

<sup>131</sup> Sharp N D (2014: 92).

## CHAPTER FOUR

### CONCLUSION AND RECOMMENDATIONS

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#### 4.1. Conclusion

The right to truth requires states in the aftermath of atrocities or after being liberated from despotic rule to establish mechanisms and procedures to uncover human rights atrocities perpetrated under by previous regimes. Such investigative mechanisms contribute to the fight against impunity and the strengthening of the rule of law. Since the 1970s the world has witnessed the creation of over 40 truth commissions, which have been the subject of much discussion and intense debate. TRCs have become increasingly popular as transitional justice mechanisms and there is no sign that this popularity is waning or will do so in the near future. Although TRCs are popular, they are not without flaws and they are far from perfect. This paper has argued that one aspect of TRCs that needs more attention and refinement is the selection and composition of the commission itself.

This paper has analysed the challenges faced by TRCs as a result of the selection and appointment of commissioners. The research begun by discussing the history leading to the establishment of TRCs in five select countries. It also examined the different selection criteria used to appoint commissioners and the practical problems associated with this process. It reviewed the best practices that should be adopted and discussed the different pros and cons of each best practice.

The study also found that this is a much under-researched area of TRCs. Individual states and establishers of TRCs have been left to select a suitable model for their national context. Further,

the legal framework pertaining to formation of TRCs has been often silent or non-comprehensive on the commissioners' selection criteria.

The study has also discussed the factors that can assist in the effectiveness of TRCs in relation to commissioners' selection. These factors include the need to have mixed commissioners, credibility and legitimacy, public participation in the selection process, adequate financial resources and political will. Additionally, the study found that the independence of TRCs is often guaranteed in the enabling acts. However, it would be misleading to assert that commissioners remain fully independent as claims of interference from executive are common.

This study establishes that TRCs derive their power to a large extent from the political and moral authority of its commissioners. Further, the study highlights that neither direct nor consultative procedures have prevented some questionable appointments. Appointment procedures that do not allow sufficient vetting of commissioners for integrity, credibility, independence, expertise and professionalism or those that prioritise the partisan political affiliation or ethnic identities of commissioners continue to generate significant challenges for the TRCs. Additionally, the study posits that more thought has been given to appointment procedures than to the underlying crucial criteria for selection.

One challenge encountered in researching the topic of this paper is the paucity of information. This has affected the extent of the reviewed literature and some of the findings the study has been able to establish. Further, reliance on the secondary methodologies of data collection has limited the quality and amount of information about this research. The study makes several

recommendations intending to significantly improve the work of the TRCs in the future, based on the findings and the conclusion of this paper.

#### **4.2 Recommendations**

In order to address the challenges faced by TRCs as a result of commissioner selection and appointment, the study makes the following recommendations:

- States should include selection criteria in the laws that establish TRCs.. This will mean that selection and appointment criteria are a binding legal obligation which cannot be overlooked.
- Countries intending to form TRCs in the future should establish independent selection committees. In discharging their legal obligations, this committees will ensure more accountability, openness, participation and attention is given to commissioners' moral aptitude and expertise.
- Government should provide adequate financial and material support to the appointed commissioners. This helps to avoid overreliance on foreign donors, which can in turn affect the independence and impartiality of commissioners.
- Having commissioners from diverse backgrounds, expertise and ability ensures equal representation of the country's population, guarantees domestic and international credibility and acceptance and enhances efficiency in the work of the TRCs.
- The general public and all key stakeholders should participate in the selection and appointment of the commissioners. Their participation can be in the form of giving their views regarding the people to be selected or appointed as commissioners or the views

of the people already proposed to be commissioners. Participation gives a sense of ownership of the TRCs to the public and the stakeholders.

- The centrality of victims should always be a priority for the framer of future TRC policies. Victims must always be the ones telling their story. No one should speak on their behalf of the victims and no one should keep them from speaking.
- Commissioners should have security of tenure for the duration of a TRC's work and they should be paid competitive salaries to minimise their susceptibility to outside influences.
- Commissioners' selection and appointment methods should not be set up in ways that over emphasise on society representativeness at the expense of professional competence.
- The study recommends the development of national guidelines on incompatibilities, conflict of interests and ethical standards for commissioners. The aim is to protect the commissioners from corruption and undue influence that might jeopardise the commissioners' independence. .
- Where TRCs select international commissioners, great efforts should be made to find those who understand the local cultures. The intention is to dispel the notion of having TRCs that are considered imposed on the local population and owned by foreigners. Although foreign commissioners guarantee the neutrality and impartiality of TRCs, their understanding of the local cultures and diversities enhances TRCs' performance as it reduces costs of interpreters and removes any notions of bias on the side population.

- It is important that women too are represented as commissioners as this helps to dispel the fear of women victims to testify before a TRC.



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