

## When truth-seeking efforts face challenges of credibility

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When Prof. Makau Mutua [suggested](#) that the Liberian Truth and Reconciliation Commission (TRC) may have lessons for Kenya, he focused on the robust recommendations of the Commission. He did not explore another reason why Kenya might look to Liberia: the crisis of credibility that plagued the beginning of Liberia's TRC process. This essay argues that there are good reasons to take seriously the challenges to credibility, because they often denote a shortcoming in institutional legitimacy, itself thought to influence the effectiveness of transitional justice processes. The essay does not intend to suggest that credibility causes, or can be equated to, effectiveness; while credibility can be thought of as necessary, it is only one of a broad range of factors that affect the capacity of an institution to achieve the goals it pursues. Rather, this essay shows how TRC procedures in Liberia, the Democratic Republic of Congo (DRC) and Serbia affected the manner in which the institutions were perceived and draws some lessons for Kenya.

In Liberia, the Comprehensive Peace Agreement of 21 August 2003 recommended the establishment of a truth commission as one of the institutions of transition. Soon after, Gyude Bryant, the Chairman of the National Transitional Government (NTGL), appointed nine commissioners to a truth commission in January 2004 - before there was even a TRC Act. This immediately created a significant challenge to the credibility of the Commission, namely the lack of selection criteria for the commissioners, public consultation, or clarity regarding the Commission's goals. Civil society pointed out that the Commission "lacked set objectives, mandate, jurisdiction or legal status" ([TRC Report](#), Vol.2 p140, 8.1.1). Following a series of civil society consultations and workshops, a TRC Act was drafted and presented to the Chairman in August 2004. More pressure resulted in the Chairman forwarding the TRC Act to the Legislative Assembly in April 2005. After further lobbying by civil society, the TRC Act was finally signed into law on 10 June 2005. The TRC Act Section 9 (b) summarized the problem:

Recognizing that the Chairman...appointed commissioners before the enactment of legislation establishing the Commission...[and] affirming the need for the TRC process to be credible and legitimate and accepted by the nation...the Commissioners appointed by the Chairman...will be vetted.

Accordingly, the first set of commissioners appointed by Chairman Bryant were vetted in accordance with the guidelines of the Act to ensure that no member of the Commission would be "known or perceived as human rights violators or members of groups involved in human rights violations; and without prior conviction for a crime" (Section 11, Liberian [TRC Act](#)). Only two of the initial nine commissioners were retained by the new selection panel. Indeed, the initial chair of the initial Commission, Dr. Canon Burgess Carr, did not survive the vetting (TRC report, Vol.2, p142). The vacancies created allowed for seven new commissioners to be selected by a representative panel. It was this "second" TRC, inaugurated by President Ellen Sirleaf Johnson in January 2006 – two years after the "first" TRC - that delivered the [report](#) to which Prof. Mutua referred.

However, not all commissions with credibility challenges have recovered. Here, the examples of the DRC and Serbia are worth mentioning. Similar to Liberia's initial process, in the DRC, seven members of the TRC Bureau were appointed directly by the warring parties

following the peace agreement, before the TRC law was promulgated. The seven had formal relations to the groups implicated in the crimes of the war, thereby leading to civil society protest about the integrity of the Commission. According to some [observers](#), commissioner competence and human rights records were also questioned. The government eventually passed a TRC Law that appointed 13 additional commissioners (without removing the first set of commissioners), but this action did not change the negative perception of the Commission. Neither did the appointment of Reverend Jean-Luc Kuye-Ndondo as the president of the Commission: while he was a member of the church, he was presiding over an institution whose moral authority was in question, and besides, [some](#) thought he lacked the “stature and charisma needed to provide symbolic unity” to the DRC. Consequently, the TRC was criticized and marginalized, becoming by some [accounts](#) a “stinging failure”.

In Serbia, the TRC project faced credibility challenges from which it never recovered. In March 2001, President Kostunica instituted the Yugoslav TRC. The TRC was announced a day before the US was due to certify continuation of financial support, and was therefore seen by [some](#) as aimed at appeasing the US. The Commission was lacking on many fronts. First, it was neither consultative nor inclusive: of the initial 19 members appointed, there were “mostly nationalist conservative academics” (Subotic 2007: 96), only two were ethnic minorities, and other civil society groups were under-represented. Second, its mandate was seen as an attempt to attribute blame for the war rather than an attempt to grapple with the consequences for victims. Further, the Commission sought to shed light on a broader Yugoslav crisis from an ethnic Serbian perspective. Consequently, some commissioners resigned from the TRC, further affecting the credibility of the exercise. The TRC could not even organize a public hearing on the Srebrenica massacre. It was disbanded in 2003 when the office of the federal presidency was abolished. The conclusion of observers is that in Serbia, the truth commission “brand” is “utterly devalued” (Subotic 2007: 98).

There are significant differences between Kenya and the other TRC projects mentioned above: while Musila points out [here](#) that in Kenya there was minimal consultation with NGOs during the drafting of the TJRC Bill, the law nonetheless seemed to contain reasonable procedures for commissioner selection. Section 9 of the Kenyan TJRC Act provided for a selection committee that was constituted by then Justice Minister Martha Karua, and it consisted of nine individuals: seven representatives from different social groups and two representatives from a list of six Kenya-based religious organizations. The role of the selection committee was to nominate the persons for the Commission, in accordance with given selection criteria. The committee selected 15 names in [April](#) 2008, from whom the president appointed six commissioners. However, upon the appointment of the commissioners on 22 July 2009 under the guidance of Ambassador Bethuel Kiplagat, prominent survivors past state violence protested, citing Kiplagat’s prominent role in the Moi regime. They launched a law-suit against him. In this context, some [observers](#) called for the deputy Chair, Ms Betty Murungi, to resign lest she tarnish her reputation.

Given the detailed nature of the selection process, how could controversial individuals have been picked to the Commission? One answer may lie in a minor change in the criteria for Kenyans to serve on the Commission. While an earlier version of the Bill stated in Section 10(5)(c) that commissioners must not have been “involved, implicated, linked or associated with the perpetrators or supporters of the acts, crimes or conduct under investigation”, the final TJRC Act states that the commissioners must not have been “involved, implicated,

linked or associated with human rights violations of any kind”. With this change, it was possible for possible actors *associated* with “perpetrators or supporters” of human rights violations within in the Kanu regime to become commissioners. Another reason why controversial commissioners were picked despite a seemingly rigorous selection process may be simply mathematical: the nature of real compromise required for 9 individuals to select 15 names can be negligible.

Perhaps a bigger challenge to the TJRC has been the vilification of its mandate, as “reconciliation” is increasingly seen as a dirty term, synonymous with “impunity”. While these terms have flexible, politically-contextual meanings, the current negative perception of the TJRC may stem in part from the possibility that the opportunity cost of the Commission is significantly higher in 2009 than it was in 2003, when Kenyans initially advocated for the TJRC: in 2003, the alternative to the TJRC was the continuation of the status quo. In 2009, in light of the Waki report and the subsequent public debate, the alternative to the TJRC is seen as prosecutions. This higher cost makes compromise harder to accept. Consequently, erstwhile advocates of the TJRC such as the National Council of Churches of Kenya (NCCCK) [state](#) that they “shall neither recognize [the TJRC’s] work nor engage with it when it commences its proceedings unless the cabinet reverses its decision[to expand the TJRC’s mandate and representation] and either refers the matter to the International Criminal Court at The Hague or establishes a credible and effective local tribunal.”

Is there a risk that the TJRC brand may become “utterly devalued” or a “stinging failure” in Kenya, as was the case in Serbia and the DRC? From the three cases above, it appears that truth commissions can succeed, underperform or fail depending on how credibility challenges are addressed. Further, these three contexts highlight that “credibility” is often used as a synonym of “legitimacy”. If a legitimate institution is one that, among other things, pursues the general interest as understood by citizens (rather than by power-holders) and whose authority is consented to by relevant constituencies (Beetham 1991), the Kenyan TJRC faces a legitimacy gap. And to the extent that legitimacy has a reciprocal relationship with effectiveness (of the institution in itself, outside any claims it may make about broader social impact and consequences), this gap ought to cause concern. Prominent Kenyan victims, whose cooperation is thought to be critical for the success of the TJRC, have publicly withdrawn support from the institution, and cast into doubt the ends it seeks. Such a withdrawal can affect the quality of collaboration the institution receives from such stakeholders, and can result in the institution expending more time and resources counteracting the effects legitimacy gaps, rather than on the difficult task of historical clarification. It is for this reason that the concerns about credibility should not be dismissed lightly.

Yet the official [response](#) to these challenges has been weak and uncertain, suggesting that the government hopes the questions will soon disappear. The government suggested (then discarded) a revision of the mandate of the TJRC. It also suggested expanding the number of commissioners, a suggestion that was broadly rejected because it was read as having ethnic implications. The latter proposal may have been useful: for instance, on the list of rejected potential commissioners were two clergymen – Archbishop Benjamin Nzimbi and Reverend Timothy Njoya. Given the centrality of Christianity in Kenyan life, the absence of religious representation in the Commission may be an oversight whose consequence has been the

Church's rejection of the TJRC. However, there has not been a comprehensive suggestion of how to address the matter of the credibility of the individuals already on the Commission. If the DRC has any lesson to offer the Kenya case, it is that leaving this issue unaddressed can undermine the TJRC's moral authority. Nor has any measure been taken to respond to the conflation in people's minds of reconciliation and impunity in the absence of prosecutions.

Before making recommendations of potential avenues for re-legitimation for the TJRC, it is important to note that while the basic argument of this essay is that it may be necessary for a commission to be credible in its initial set-up, it does not imply that such credibility is sufficient for the exercise to be successful in giving robust recommendations. Neither does it suggest that such robust recommendations actually make any difference for reconciliation, human rights and democracy (or other goals of transitional justice), as such an assertion would require an analysis of the interplay among broader political and social conditions beyond the scope of this essay.

Nonetheless, it is reasonable to think that identifying and addressing current and potential credibility challenges can increase support for the TJRC. If dissatisfaction about some TJRC office-holders is changing to disaffection towards the institution as a whole, a procedurally transparent replacement of those commissioners whose integrity is in real question may help the project regain its moral authority. While it is impossible for the Commission to please everyone, the language of reconciliation is often invoked in a moral register, and it would seem foundational that the TJRC's office-holders are held up to the same standards that the people it is created to serve deem appropriate. Procedurally, the TJRC selection committee has the authority under Section 9(2)(b) of the Act to "consider an application for the removal of the chairperson or a commissioner". To date, there are no reports of the selection committee convening to address these concerns expressed by sections of the population. However, if compelling reasons make a revision to the institutional infrastructure of the TJRC undesirable to policy makers (even after they take into account the potential costs of embarking on the institution without moral support), then alternative avenues should be explored through which to give the relevant constituencies opportunities to shape and "own" the TJRC process. As experts of Liberia point out, the "new" Liberian TRC had to endure further credibility challenges in the course of its work, including disputes over how to hold public hearings, disagreements over which victims would testify, and tense relationships between the commissioners and their advisors. The Kenyan TJRC can anticipate these potential future challenges to its credibility and establish appropriate participatory procedures. For instance, the TJRC could consult with victims on different ways to conduct public hearings, as models range from Ghana (formal court-room reproductions where perpetrators could cross-examine victims) to Peru (more informal sessions where victims could narrate their stories as they pleased). Finally, for Kenyans more broadly, the cost of supporting the TJRC may be perceived differently (and the flexible meaning of reconciliation adjusted accordingly) if other judicial measures are also implemented.

#### **Further Reading:**

Beetham, D. (1991). *The legitimation of power*. Macmillan.

Subotic, J. (2007). *Hijacked Justice: Domestic Use of International Norms*. University of Wisconsin--  
Madison.