

## **The Case for an International Truth and Reconciliation Commission**

### **Abstract**

The limitations of International Criminal Tribunals (ICTs) and national Truth & Reconciliation Commissions (TRCs) suggest the need for a new type of transitional justice mechanism. ICTs focus excessively on retributory justice, with an inflexible format that does not adapt to local circumstances. TRCs are much more flexible and locally responsive but suffer from under-funding, corruption, and accusations of local political partisanship. An International Truth and Reconciliation Commission (ITRC) would sponsor TRC formation and operations as well as post-commission activities. Its mission would be to preserve TRCs local connections while providing them additional local independence, moral authority and financial support. Specific ITRC functions will include negotiating TRC formation agreements with national governments; providing specialized staff to run administrative functions; and providing links with international donors. A successful ITRC may challenge and weaken national governments and even established transitional justice institutions like the International Criminal Court. But the limitations of the latter institutions and the promise of a more broad based and individually tailored approach to transitional justice that the ITRC represents makes this risk worth taking.

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## **I. Introduction and Context**

The central concerns of transitional justice are key issues for countries recovering from violent conflict. Currently, two types of institutions—international criminal courts/tribunals (ICTs) and nationally constituted Truth and Reconciliation Commissions (TRCs)<sup>1</sup>--are among the primary means of addressing these challenges. But both ICTs and nationally sponsored TRCs are constrained in their effectiveness. This paper proposes forming a new international organization—the International Truth and Reconciliation Commission (ITRC)--that addresses the weaknesses of both existing types of transitional justice institution. By providing international oversight for nationally sponsored TRCs, the ITRC would seek to maintain the flexible local focus of TRCs while increasing their local independence and moral authority and providing access to increased financial support.

International criminal tribunals like the International Criminal Court (ICC), International Criminal Tribunals for the former Yugoslavia and Rwanda (ICTY and ICTR respectively) and the Special Court for Sierra Leone (SCSL) are among the most well known transitional justice institutions. These organizations use retributive western courtroom models to respond to serious crimes committed by high-level perpetrators. They receive significant sponsorship from the international community and set precedents that go beyond specific traumas. Partly because of this sponsorship, ICTs are able to project an aura of independence and moral authority. But they are limited in the goals they can effectively advance, and their retributory model can sometimes harm

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<sup>1</sup> TRC is used throughout this text as shorthand for organizations dealing with Truth and/or Reconciliation. Originally, most bodies in this traditions were Truth Commissions, with Reconciliation a recent (and positive) addition to the title and function.

societal reconciliation. For example, courts often fail to give victims a full voice, encourage forgiveness or create impartial/accurate history.<sup>2</sup>

TRCs are more flexible than ICTs. They are also more nationally focused. As a consequence, TRCs can tailor their activities to the specifics of individual traumas. The South African TRC, for example, had separate bodies dealing with human rights (reconciliation), victim compensation and amnesty.<sup>3</sup> But this local connection also exposes nationally constituted TRCs to significant political pressures as well as (sometimes well supported) accusations of corruption—both of which can significantly reduce their effectiveness. As a result TRCs are often less well supported financially by the international community than ICTs are.<sup>4</sup>

The ITRC should be an international body sponsoring the creation and operation of individual national TRCs. It will also follow up after a national TRC concludes its activities. From one angle, the ITRC deemphasizes one feature that accounts for the TRCs' success—national focus. But it will preserve other strengths—flexibility and proximity to individual cultures—while importing some of the benefits associated with international tribunals: local independence, moral authority and better financial support. By focusing on less coercive activities than those conducted by the ICC, the ITRC may also entice broader participation by the United States in an international transitional justice institution. It could also form specific partnerships with the ICC to advance the goals of both organizations.

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<sup>2</sup> See, e.g., Hayner, *supra* note \_ at 88-100.

<sup>3</sup> RICHARD A. WILSON, THE POLITICS OF TRUTH AND RECONCILIATION IN SOUTH AFRICA 21 (2001).

<sup>4</sup> Compare, Hayner, *supra* note \_ at 223 and ICTR, GENERAL INFORMATION (2005), at <http://www.ictr.org/default.htm> (indicating that the annual budget of the ICTR was set at two hundred and thirty one million dollars).

An ITRC face predictable challenges. Its formation would threaten the primacy of ICTs retribution-focused, courtroom model of justice. Ideally, newly invigorated TRCs--better managed, more respected, better supported and addressing a broader range of transitional justice goals--would be an attractive alternative. The ITRC would also take powers away from national governments that might otherwise be in charge of sponsoring national TRCs. But the benefits that the ITRC could offer—which could include an increase in both quantity and quality of TRCs—are compelling enough to overcome these challenges.

This paper is divided into four sections. Section II discusses transitional justice in general as it is currently practiced today. Section III forms of the core of the proposal. Section IV outlines the benefits the ITRC could yield, and addresses major challenges. Section V concludes with longer-term reflections on the challenges facing the ITRC.

## **II. Strengths and Challenges of Existing Transitional Justice Institutions**

### **A. Current Approaches to Transitional Justice**

Both international criminal tribunals and TRCs aim to achieve important transitional justice goals. Leading theorists and institutions like Priscilla Hayner, Martha Minow and the International Center for Transitional Justice (ICTJ) has identified some of the most important. One of these is to serve as a means of punishing crimes and achieving retribution on behalf of national societies and individual victims. A second is to provide individual victims with voice, agency and compensation for their suffering. A third is to provide an accurate record of what actually happened during a societal trauma. All these tasks can aid (and sometimes harm) the process of societal reconciliation—which ideally prevents rights abuses from occurring again in future. ICTs and national TRCs, while both effective at advancing different transitional justice goals, differ sharply in those that they emphasize. Experts and communities differ in how they balance different transitional justice goals,<sup>5</sup> and the most effective transitional justice efforts will establish a mix of policies and institutions specific to individual countries/areas.

### **B. International Criminal Tribunals**

#### *1. Advantages*

ICTs are most effective at advancing punitive/retributory aspects of transitional justice. Punishing those responsible for massive human rights violations is often very important to victims and their families.<sup>6</sup> The severe penalties ICTs' impose can theoretically establish norms of conduct that deter future crimes the world over.<sup>7</sup> ICTs'

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<sup>5</sup> See, e.g., Hayner, *supra* note \_\_, at 11-12, 154; Minow, *supra* note \_\_, at 4-5.

<sup>6</sup> Minow at 135.

<sup>7</sup> See *id.* at 49-51.

specific focus can also help channel retributory desires away from lower-ranking individuals towards official bodies and those persons with greatest command responsibility. Assigning these entities blame for the actions of their subordinates can theoretically help with the reintegration of the latter back into society.<sup>8</sup>

Another advantage of ICTs is their relative independence and resulting efforts, real and ceremonial, to neutrally hear both sides' arguments. This approach can serve as an aspirational example to societies where this type of impartiality is rare. More immediately, efforts to preserve the rights of defendants (by providing defense counsel etc.)<sup>9</sup> can calm partisans' senses that they are being wronged when particular political or military leaders are convicted. By contrast, domestic political actors often easily hijack local proceedings—potentially alienating either supporters of defendants or their alleged victims. In Indonesia for example, every single one of the 18 Indonesians charged with crimes relating to violence in East Timor were acquitted, to the outrage of human rights troops.<sup>10</sup>

International Criminal Tribunals' relative independence (and the foreign involvement that guarantees this) can also help them avoid the corruption and nepotism that dog many developing countries. In Sierra Leone for example, the nationally sponsored TRC was harmed by constant, accurate rumors about corruption and loose accounting practices. The Special Court, operating at the same time, did not suffer from this problem.<sup>11</sup> While the ICTR's well-documented problems demonstrate that

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<sup>8</sup> *See, e.g., id.* at 26.

<sup>9</sup> *Id.* at 25.

<sup>10</sup> *Indonesian Wins Appeal Against Rights Verdict*, NY TIMES, Nov. 6, 2004 at A6.

<sup>11</sup> *Compare PROMISES AND PITFALLS supra note\_ and INTERNATIONAL CRISIS GROUP, SIERRA LEONE'S TRUTH AND RECONCILIATION COMMISSION: A FRESH START? 5-8 (2002) [hereinafter A FRESH START?].*

international tribunals are not always free from corruption,<sup>12</sup> international tribunals can use their prestige to protect themselves more effectively from nepotistic pressures and corruption. In addition to making them more effective in an immediate sense, the relatively independent/honest reputation of ICTs helps them attract donor support.<sup>13</sup> This can be parlayed into a self-supporting cycle of institutional improvement and additional donor support.

## 2. *The Western Courtroom Model's Excessive Focus on Retribution*

Despite the strengths of their retributive model, ICTs also suffer from a number of problems that reduce their effectiveness as transitional justice tools. The most glaring limitation of international tribunals is their exclusive use of retribution-focused courtroom adjudication.<sup>14</sup> Reliance on courtrooms to address societal disputes has been criticized even in a domestic, developed country context, as ignoring means of alternative dispute resolution. The latter are often seen as more flexible and ultimately more effective in dealing with a range of problems.<sup>15</sup> While appropriate in certain cases, ICTs retributive model is often not sufficient.

The problems posed by trial-type inflexibility are often magnified in the context of ICTs' use of a courtroom model. While trials' overarching purpose may be theatre,

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<sup>12</sup> INTERNATIONAL CRISIS GROUP, TRIBUNAL PENAL INTERNATIONAL POUR LE RWANDA: PRAGMATISME DE RIGEUR 13 (2003).

<sup>13</sup> In Sierra Leone for example, the TRC's complex mission, as opposed to the familiar judicial model of the Special Court, made the latter much more effective at securing funding. See A FRESH START, *supra* note \_ at 9. In addition, even sponsors who provided funds to the TRC were concerned about corruption and kept tight controls on these resources, limiting the TRC's flexibility. *Id.* at 8.

<sup>14</sup> See, e.g., *Statute of the International Criminal Tribunal for Rwanda*, available at <http://www.ictt.org/ENGLISH/basicdocs/statute.html>.

<sup>15</sup> See, e.g., Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 YALE L. J. 85 (2004); William K. Slate, II, *ADR Methods Can Streamline Mass Tort Actions*, NAT'L. L.J., Nov. 18, 1996, at D12.

scoring moral points or the like, their stated and immediate goal is to judge the accused.<sup>16</sup> On day-to-day level, ICTs aim to efficiently and fairly wade through the evidence against specific accused individuals rather than promote reconciliation, create a complete historical record, allow victims sufficient space to testify about the extent and impact of their injuries, or provide them with compensation. While these may be potential positive side effects of certain trials, they are impossible to prioritize or guarantee in a forum whose very existence is premised on judging a specific defendant.<sup>17</sup>

ICTs are limited in the scope of their activities by a historic trial structure that includes relatively inflexible safeguards and procedures. But this inflexibility is also a source of their prestige and moral authority. Any major format change would risk reducing their effectiveness<sup>18</sup> and undermining the international support they enjoy. ICTs are best viewed as a potentially useful transition justice tool, but one that is not sufficient in itself. Other mechanisms are better suited to achieving goals beyond retribution/deterrence.

### *3. Limitations of ICT-Based Retribution as a Transitional Justice Tool*

Even when they are not viewed as all-encompassing solutions, ICTs often face additional problems. The benefits of classical adjudication may be reduced in non-western contexts. An ICT's punitive focus can disrupt efforts at national reconciliation, and its inflexible procedures can be inadequate in the face of world-changing crimes like genocide. Even if these problems are overcome, the significant monetary cost of

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<sup>16</sup> As Hannah Arendt accurately underscored in the 1960s when commenting on the trial of Adolf Eichmann. HANNAH ARENDT, *EICHMANN IN JERUSALEM* 20 (1963). *See also*, Minow, *supra* note \_ at 46-47.

<sup>17</sup> *See, e.g.*, Minow, *supra* note \_ at 47.

<sup>18</sup> Martha Minow convincingly argues to serve the ultimate goals of retribution/deterrence—building moral order based on human rights—ICTS must be scrupulously fair—e.g. imbued with relatively inflexible procedural safeguards. *Id.* at 50.

courtroom procedures can also divert funding away from other needed transitional justice mechanisms.

ICTs' reliance on western courtroom procedures is comforting for western donors who pay for the institutions. The courtroom setting is a familiar one, and in western societies it symbolizes the imposition of law's order over the chaos of everyday life.<sup>19</sup> But the positive connotations of courtroom settings may not translate to citizens of developing countries who are not exposed to western courtroom models. Even if they have been so exposed, these models may either signify colonialism of the worst sort,<sup>20</sup> or resemble domestic tribunals that sport the external trappings of western courtrooms without possessing key intangibles like judicial independence.<sup>21</sup>

Beyond the specific problems inherent to translation of the trial format, its confrontational approach may actually be detrimental to efforts at reconciliation.<sup>22</sup> The adversary nature of a trial can often underscore divisions that caused civil conflicts and traumas in the first place. The focus of any trial court on the fate of a specific defendant makes it difficult to provide the context and nuance necessary for a balanced appreciation of a particular area's recent history.<sup>23</sup> More generally, understanding a conflict's history through the actions of defendants at war crimes trials can be among the most

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<sup>19</sup> Of course, even in western societies, minority communities and others who frequently appear as defendants may be less impressed by the majesty of the law. But representatives of these communities are unlikely to be on transitional justice funding committees.

<sup>20</sup> In many developing countries a western style court system was either introduced by the colonial power or designed in imitation of western courts. *See, e.g.*, John Gillespie, *Private Commercial Rights in Vietnam: A Comparative Analysis* 30 STAN. J. INT'L LAW 325, 239 (1994).

<sup>21</sup> *See, e.g.*, CENTRE FOR THE INDEPENDENCE OF JUDGES AND LAWYERS, NINTH ANNUAL REPORT ON ATTACKS ON JUSTICE (1999); INTERNATIONAL CRISIS GROUP, THE SPECIAL COURT FOR SIERRA LEONE: PROMISES AND PITFALLS FOR A "NEW MODEL" 20 (2003) [hereinafter PROMISES AND PITFALLS].

<sup>22</sup> *See* Minow, *supra* note \_ at 26.

<sup>23</sup> Minow, *supra* note \_ at 47.; Arendt, *supra* note \_ . at 19.

inflammatory of the multiple perspectives through which it is possible to view national traumas.

By punishing individual political leaders who often enjoy or enjoyed significant popular support, ICTs can also exacerbate existing tensions by creating public resentment, potentially turning defendants into martyr figures.<sup>24</sup> The all or nothing sense communicated by guilty verdicts and subsequent punishment leaves little room for nuanced understandings and political compromises. Though international tribunals judge partisans on all sides of the conflict<sup>25</sup> the resentment caused by individual trials can cause significant dissension in societies attempting to recover from trauma.<sup>26</sup> The fact that most international tribunals are located outside the areas they are judging (except for the Sierra Leone Special Court) can exacerbate these resentments even more.

Even assuming that courtroom adjudication can bring many benefits, the opportunity cost is not inconsequential. International tribunals are very expensive. The annual budget for the ICC is set at sixty-six million EUR (about eighty eight million US \$)<sup>27</sup>, while the ICTR's 2004-05 budget is set at two hundred thirty one million dollars.<sup>28</sup> These are sums that could be and often aren't spent on other types of transitional justice initiatives. The high costs of international tribunals drain limited international development/justice funds that might otherwise be directed towards activities that more effectively promote reconciliation and development.

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<sup>24</sup> Minow, *supra* note\_ at 45.

<sup>25</sup> See, e.g., Marlise Simons, *Kosovo Chief Surrendering to Hague Tribunal*, N.Y.TIMES, Mar. 9, 2005 at A14; Marlise Simons, *At Halfway Point in Milosevic Trial, Prosecutor is Confident*, N.Y.TIMES, Feb. 29, 2004 at A4.

<sup>26</sup> See, e.g., PROMISES AND PITFALLS *supra* note\_ at 5-7.

<sup>27</sup> Press Release, State Parties to International Criminal Court End Session by Approving 2005 Budget (2004).

<sup>28</sup> See ICTR, GENERAL INFORMATION (2005), at <http://www.ictt.org/default.htm>.

The high costs of running international tribunals also mean that the actual reach of these organizations is relatively limited. The Yugoslav ICT, after 12 years of operation has publicly indicted a total of 117 individuals.<sup>29</sup> The ICTR has indicted 64 individuals and tried 48, while the Sierra Leone Special Court has indicted 9 individuals.<sup>30</sup> While these efforts are still ongoing, it is clear from both their mandates<sup>31</sup> and their financial resources that they will try only a very limited selection of individuals.<sup>32</sup> This leaves large numbers of victims and perpetrators relatively untouched by courtroom processes, aside from any outreach activities<sup>33</sup> or media reports.

The limited reach of international criminal tribunals is related to a final shortcoming. Trial courts, developed to judge disputes on a domestic level, may not have the capacity to effectively judge crimes like genocide. Reducing crimes like genocide to courtroom recitations of facts and standard, individual criminal sentences, may end up diminishing their world-shaking tragedy.<sup>34</sup> Transitional justice mechanisms that focus on historical understanding and reconciliation may be a better response to crimes like genocide.

## C. Government Sponsored TRCs

### 1. TRC Advantages

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<sup>29</sup> See ICTY, ICTY AT A GLANCE (2005), at <http://www.un.org/icty/glance/index.htm>.

<sup>30</sup> NINTH ANNUAL REPORT OF ICTR, pg. 2; SPECIAL COURT FOR SIERRA LEONE, BASIC FACTS, (2005), available at <http://www.sc-sl.org/basicfactspamphlet.pdf>.

<sup>31</sup> See, e.g., *Statute of the Special Court for Sierra Leone*, Article 1, available at <http://www.sc-sl.org/scsl-statute.html>; PROMISES AND PITFALLS *supra* note \_ at 2-3.

<sup>32</sup> Minow, *supra* note \_ at 45.

<sup>33</sup> Even the limited outreach activities that are authorized are not always considered essential—the Management Committee of the Sierra Leone Special Court totally eliminated the Outreach department’s budget, “due to a perception that outreach was not an essential component of the Special Court”. HUMAN RIGHTS WATCH, BRINGING JUSTICE: THE SPECIAL COURT FOR SIERRA LEONE 34 (2004).

<sup>34</sup> For more discussion of this see, e.g., Minow, *supra* note \_ at 47 (discussing Hannah Arendt’s views on the limits of the law in the face of genocide).

TRCs greatest advantage is their ability to be flexible in the identity and number of transitional justice aims they address.<sup>35</sup> Thus, depending on local circumstances, TRCs can focus on victim voice/compensation, history writing and/or other reconciliation-focused activities. The most well known nationally sponsored TRC, in South Africa, focused on three primary functions: compiling a historical record, promoting reconciliation and granting amnesties to individuals who provided a full account of their actions.<sup>36</sup> While it is heavily criticized within South Africa,<sup>37</sup> this TRC is often held up as a model in other countries.<sup>38</sup> The relatively peaceful transition of South Africa from apartheid regime to functioning democratic state is one reason for this praise; but the flexibility and broad reach of the TRC is another. The South African TRC focused on promoting reconciliation and compiling an accurate historical record, rather than on punishing perpetrators. Even its Amnesty Committee, the most “judicial” part of the enterprise, focused on understanding the full extent of crimes committed rather than punishing individual perpetrators.<sup>39</sup>

Other TRCs have focused on different issues. Some of the Latin American Commissions, for example, focused almost exclusively on compiling accurate historical records.<sup>40</sup> The Sierra Leonean TRC was able to launch some reconciliation activities

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<sup>35</sup> Unlike ICTs, TRCs are not constrained by long-standing traditions regarding their form, making any negative consequences of innovation much less severe.

<sup>36</sup> See Wilson, *supra* note\_ at 21.

<sup>37</sup> See Hayner, *supra* note\_ at 42-44.

<sup>38</sup> Robert I. Rotberg, *Truth Commissions and the Provision of Truth, Justice and Reconciliation*, in TRUTH V. JUSTICE 5 (Robert I. Rotberg & Dennis Thompson eds., 2000).

<sup>39</sup> The Amnesty Committee, using the explicit threat of future prosecutions, was able to persuade at least some perpetrators to admit their crimes without using explicit punitive means. In this sense, the TRC is less efficient at using retribution, but can be a useful adjunct in a retribution process.

<sup>40</sup> See, e.g., Hayner, *supra* note\_ at 50-72.

based on local tribal traditions, rather than western models.<sup>41</sup> This form of respect for traditional cultures could significantly impact the effectiveness of any transitional justice institution—but is not available to ICTs like the ICC, whose structure requires use of “universal” norms and procedures imposed by their western origins.<sup>42</sup> These variances in TRC operation demonstrate that different national approaches are possible using the same general framework.

The additional flexibility that TRCs provide is actually cheaper than the services of ICTs, and can directly impact many more people. The various TRC committees in South Africa involved about twenty one thousand individuals directly,<sup>43</sup> and were sufficiently relevant to receive very wide television and radio coverage.<sup>44</sup> All of this was accomplished at a cost of about eighteen million US dollars a year,<sup>45</sup> significantly less than ICTs like the ICTY and ICTR. If they operate effectively, TRCs seem to offer much greater value for money than ICTs.

## 2. *Challenges to TRCs*

Accusations of local partisanship are the most significant challenge facing TRCs. Even the well-regarded South African Commission was subject to accusations of partisan behavior. The domination of South Africa by the ANC government made other parties suspicious of “special favors” being given to government parties.<sup>46</sup> Similarly, in Sierra Leone the TRC Executive Secretary was credibly accused of altering the final report to

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<sup>41</sup> See, e.g., Rosalind Shaw, *Project Summary: Forgive and Forget: Rethinking Memory in Sierra Leone's Truth and Reconciliation Commission* (2004), available at [http://www.usip.org/fellows/reports/2004/0429\\_shaw.html](http://www.usip.org/fellows/reports/2004/0429_shaw.html); Telephone Interview with International Center for Transitional Justice Official (April 30, 2005).

<sup>42</sup> See generally, Rome Statute of the International Criminal Court, July 17, 1998, UN Doc. A/CONF.183/9\*, available in <http://www.un.org/icc>, reprinted in 37 ILM 999 (1998).

<sup>43</sup> Hayner, *supra* note \_ at 42.

<sup>44</sup> *Id.* at 42.

<sup>45</sup> *Id.* at 41.

<sup>46</sup> See, e.g., ANTJIE KROG, COUNTRY OF MY SKULL 164-72 (2000); Minow, *supra* note \_ at 83.

remove accusations damaging to the government.<sup>47</sup> TRCs local origins and actors, as well as the absence of formal distancing mechanisms that apply in international criminal tribunal settings, make it harder to avoid these types of pressures and suspicions. Sponsorship by national governments exacerbates the problem even more by making one interested party directly involved in appointing and managing (at some level) the operations of the TRC.

The problems stemming from local involvement are not limited to the political pressures that governments are able to exercise. In certain cases, a lack of external monitoring can lead to corruption and nepotism that interferes with the TRC's primary mission. Especially if a national government sponsors the TRC, it can be harder to insulate the organization from broader societal problems. In Sierra Leone for example, the TRC's commissioners and staff were accused of petty personal corruption and larger scale mismanagement of funds.<sup>48</sup> This posed both operational challenges, given the TRCs very limited budget, and broader reputational concerns. Even in cases where corruption does not actually take place, an established local culture of corruption can lead to widespread suspicions of illegality, especially if no credible outside guarantee of honesty is provided.

A final major problem facing TRCs when compared to ICTs is a relative lack of prestige.<sup>49</sup> In Sierra Leone for example, where a TRC and a Special Court operated simultaneously, the Special Court was accorded much more prestige and respect.<sup>50</sup> Part of this differential in respect may be due to the carefully stage-managed "majesty of the

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<sup>47</sup> Telephone Interview with International Center for Transitional Justice Official (April 30, 2005).

<sup>48</sup> *Id.*

<sup>49</sup> This was not the case in South Africa, where Archbishop Desmond Tutu's record as an anti-apartheid crusader was an important reason for the TRCs success. *See generally*, Krog, *supra* note \_.

<sup>50</sup> *See, e.g.*, A FRESH START?, *supra* note\_ at 10.

law”, that provides the actions of lawyers and the courts with a protective layer of gravitas.<sup>51</sup> But another reason is the relative independence, efficiency and perceived honesty that international criminal tribunals (excluding the ICTR) possess, partially deriving from the international sponsorship of these institutions.<sup>52</sup> While TRCs may have difficulty tapping into the cultivated and specific gravitas associated with courtroom settings, they could access the prestige associated with more extensive international sponsorship and support.<sup>53</sup>

Additional international involvement in the organization of tribunals can ameliorate each of the three main problems identified in this sub-section—government domination, corruption and a lack of respect. This involvement can also address a final challenge that nationally sponsored TRCs face: obtaining sufficient foreign sponsorship. TRCs problems with community respect and sub-standard management partially stem from a relative lack of resources. In Sierra Leone for example, the Special Court’s budget was

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<sup>51</sup> See, e.g., Sonnenfeldt, *supra* note \_ at 76.

<sup>52</sup> Compare A FRESH START?, *supra* note \_ at 8-9 (“Funding problems have dogged the TRC since its inception....the lack of funding has several reasons.... Donors do need confidence that a worthy cause is also an operational and effective one....The Special Court...gives the impression of being organized and competent in managing its task”) and PROMISES AND PITFALLS, *supra* note\_ at 20 (“UN Security Council Resolution 1470 (March 2003), which expressed ‘strong support’ for the Special Court and requested cooperation with it, ‘made a difference in the way we are perceived’, says the Registrar, Robin Vincent.”)

<sup>53</sup> More generally, TRCs also stand accused of certain additional failings. Many have been explicitly or implicitly associated with Christian institutions or individuals, and apply an “individual therapy” model that may be culturally inappropriate. They also offer fewer retributive options than court systems and their short duration may preclude long-term solutions to causes of violence. These issues are not directly addressed in this paper. However, it is worth noting that the Christian and individual therapy issues might be reduced through a strong international organization like the ITRC, that enshrined the idea of flexibility as a hallmark for TRCs (e.g. a flexibility to use non-individual therapy approaches). Whether to use religious representatives as leaders would probably be a function of individual TRCs operating agreements, discussed in Section IV *infra*. It is true that TRCs offer fewer retributive choices than courts (aside from shaming and potentially judging amnesty applications) but this can also be a positive role, as the discussion of punitive sanctions demonstrates—and the presence of a TRC does not prevent the formation of a court to play these punitive roles. Finally, in terms of providing long-term solutions to fundamental issues, writing histories and promoting reconciliation seem like a good start in addressing these problems. Compensation to victims may also play a positive role. In the context of an integrated attempt to address fundamental causes of violence, TRCs can play a positive, if not all-encompassing role. As is discussed in Section III *infra*, the ITRC may help TRCs extend their long-term impact by supervising post TRC activities on national/area levels.

more than twenty times that of the TRC.<sup>54</sup> Thus the TRC's corruption problems were compounded by an absolute lack of resources—reducing its ability to engage in reconciliation and history writing activities that could have made the organization more successful.<sup>55</sup> In addition, the finance differential with the Special Court contributed to perceptions of the TRC as the less powerful and effective of the two bodies.<sup>56</sup> International sponsorship could help break this deadlock through release of additional donor funds to support TRC activities.

The theoretical promise of TRCs makes it imperative to identify means of making these organizations more effective. The historical legitimacy of the courtroom model, and the current failures of TRCs, mean that ICTs receive more international attention and support—which leads to a problematic focus on retribution over other transitional justice goals. Internationalizing local TRCs, while not solving all of their problems, would be one step towards achieving a fuller panoply of transitional justice goals.<sup>57</sup>

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<sup>54</sup> Compare *A FRESH START?*, *supra* note \_ at 8 and *PROMISES AND PITFALLS*, *supra* note \_ at 15 n.91.

<sup>55</sup> Telephone Interview with International Center for Transitional Justice Official (April 30, 2005).

<sup>56</sup> See *A FRESH START?*, *supra* note \_ at 9-10.

<sup>57</sup> Providing increased international support to TRCs is not an unheard of idea. In the case of the Sierra Leone TRC for example, the International Crisis Group urged that the Office of the High Commissioner for Human Rights (OHCHR) play a substantial guidance role, including seconding officials to the TRC. *A FRESH START?*, *supra* note \_ at 10.

### **III. An ITRC Alternative**

#### **A. Fundamental Principles**

A major challenge for any new transitional justice body is preserving the advantages of ICTs and TRCs while avoiding their weaknesses. In some cases, it may not be possible to remove all weak links. The local ties that can make TRCs especially effective are also a major reason for their susceptibility to political pressure and corruption. Addressing these problems involves insulating TRCs from local pressures as much as possible while still maintaining their ability to flexibly integrate local customs. It is unlikely that this balance will be achieved without some compromise of either local links or moral credibility/respect.

The subsections below describe the parameters of one potential new transitional justice institution. The ITRC will attempt to vest the advantages that ICTs enjoy in TRCs. It will also encourage the formation of additional national TRCs. The most basic challenge for the new organization is balancing central control and local innovation. The proposed legal structure of the ITRC seeks to address this and other challenges. In addition to balancing local engagement and internationally sponsored independence, the ITRC will also need to focus on imparting other advantages associated with ICTs to TRCs: efficient administration; additional moral authority in and outside the areas within which they operate and improved access to western financial resources. Finally, the ITRC will need to carefully manage its relations with both national court systems and the ICC.

#### **B. Possible Structure**

### *1. Central Structures*

The ITRC's high level organization will be central to its chances of success. An international convention with broad international participation should establish the ITRC and its basic operational parameters. The convention will identify the main purposes of the ITRC as well as indicate particular roles that should be played by different parts of the organization.

The ITRC should be launched through an international treaty. Unlike the ICC, which needed to deal with issues of jurisdiction, this treaty would not be strictly necessary for the ITRC to operate. Nonetheless an international treaty (as opposed to starting as a sub-component of the United Nations or as an independent NGO) would bring several significant advantages. Most directly, the treaty could commit individual signers to specific levels of financial support. It could also be useful when national governments consider whether to accept the operations of a TRC—their countries being party to the ITRC treaty may make them more amenable to accepting the ITRC and its terms.<sup>58</sup> Finally a public declaration of support could serve as a powerful symbol of the international community's acceptance of TRC-type processes.<sup>59</sup>

Setting up the ITRC as a direct subsidiary organization of the UN would also have certain advantages: it might be easier to set up quickly, and would not require a time consuming effort to gain support from diverse countries (who might be wary of additional financial commitments). In addition, it might avoid having its mission diluted during negotiations by signing parties. But this route also brings significant

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<sup>58</sup> Though a country would not need to have signed the ITRC treaty in order for it to agree to an ITRC sponsored TRC.

<sup>59</sup> This acceptance would be particularly powerful if the United States could be induced to join. This type of support might be a first step in convincing the US government to provide additional assistance to multilateral organizations concerned with transitional justice.

disadvantages: no opportunity for the international community to concretely demonstrate their commitment by joining the ITRC organization; and exposure to UN politics and funding troubles. In addition, not having a firm basis in an international treaty may expose the ITRC to greater political pressures and problems after it begins operations, distracting from its central mission and detracting from its credibility.<sup>60</sup> Avoiding these problems justifies keeping the ITRC separate from the UN.

In the long-term, the ICC and the ITRC may wish to formalize any cooperation they establish, either through a separate formal agreement between institutions or by setting up a new umbrella transitional justice institution that encompasses both the ICC and ITRC. But any formalization of cooperation between the two institutions should occur after they actually function. This delay should ensure that the actual operational characteristics of both institutions are taken into account in any resulting agreement.

An ITRC treaty will also need to identify the types of issues TRCs can address and the roles they could play. This will almost inevitably be a source of controversy and negotiation, but any agreement should at least include establishing historical truth; assisting with societal reconciliation; deciding compensation claims; and helping to determine amnesty applications.<sup>61</sup> This list should be made neither exclusive nor required. Instead, it should be left to the ITRC secretariat, in negotiations with individual national/regional partners, to establish the exact scope of individual TRC operations. These should be left very flexible, to allow a focus on the individual challenges facing

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<sup>60</sup> This danger seems more immediate than any jockeying at treaty negotiations. Given the ITRCs dependence on national government approval, it may not face the same kind of restrictions that limited the ICCs scope.

<sup>61</sup> E.g. the main foci of the South African TRC effort.

specific countries.<sup>62</sup> Nonetheless, the treaty should underscore the fact that the ITRC will not function as a trial court or assign penalties. This will be important in both differentiating the ITRC from other transitional justice institutions and providing it with the credibility to approach parties that are suspicious of international courts and their jurisdiction (a group that includes the United States government).

Any treaty establishing the ITRC should identify those functions that will be served by the organization's central headquarters and those performed by individual TRCs. Making this division of labor explicit will help convince individual governments to refrain from attempting to negotiate separate "deals" that stop the ITRC from implementing general policies it deems appropriate. Instead, the ITRC can simply point to the legal context on which it began as explanation for a refusal to negotiate. These centralized efforts should probably cover a number of different activities--including centralized policy formation, staff assignments, liaisons with national governments and NGOs/IOs (for funding and operational purposes), sponsoring research into TRCs running/impact and even assisting with certain functions like centralized purchasing (to reduce costs of items like office furniture for individual TRCs). The central headquarters itself might be based in a city with other international organizations working on important issues of transitional justice—The Hague for example. Alternatively, it could be based in a city not associated with international law and/or international legal tribunals—in order to underscore that TRCs serve separate functions from the institutions.

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<sup>62</sup> This flexibility will allow appropriate incorporation (or non-incorporation) of potentially controversial figures like religious leaders, whose appropriate role may differ in different areas.

One of the most important functions for the ITRC headquarters will be centralized policy formation. The ITRC headquarters can help shield individual TRCs from government pressures by establishing clear and undeviating policies on important issues like nepotism, corruption and waste of donor resources. These centralized policies can guarantee that individual donor contributions are not wasted, and shield TRCs from internal accusations of corruption and favoritism that undermine their work.

In addition to promoting centralized policy formation, the ITRC headquarters should also train and develop a core group of staff members with experience in a wide variety of settings. While individual TRCs should generally employ local staff with experience in particular regions, these centralized staff can help provide institutional memory about the different ways in which TRCs function most effectively, as well how to best implement central policies applicable to all TRCs the ITRC sponsors.

A third function that a centralized ITRC headquarters should play is liaising with national governments and other transnational institutions to coordinate funding and operational support for individual TRCs. This coordinating function will be especially important when both the ITRC and ICC are focusing on the same conflict, and should allow the institutions to avoid disrupting the other's work. The ITRC will also be in an excellent position to lobby for additional donations to TRCs and understand which entities are most likely to donate to particular projects. The ITRC can help guarantee these donors an effective deployment of their resources through its control of the operational features of the ITRCs.

In addition to creating specific policies and relationships, the ITRC headquarters should also serve as an important center for academic research on TRCs and their

function. By encouraging academics and others to use its records and by sponsoring research into TRCs, the ITRC can help keep itself close to the best academic thinking about the function of TRCs and innovative ways in which they may be able to function. One potential resource to help create this atmosphere would be a centralized archive with copies of documents and other products created by individual TRCs.

A final, more mundane function is helping to control costs at individual TRCs through policies of centralized purchasing. This type of activity may help to lower the operating costs of individual institutions, allowing for additional activities on the part of TRCs and perhaps encouraging additional donations by demonstrating good value for donor cash.

## *2. Local Structures*

ITRC headquarters will play a leading role in setting up, supporting and building on the activities of national TRCs. The credibility and financial planning assistance that the ITRC provides to TRCs it sponsors should help convince individual governments to accept ITRC involvement in their countries, even if this makes individual TRCs more independent and less amenable to pressure by these governments. Eventually, the ITRC may be influential enough that international donors refuse to recognize TRCs that don't meet ITRC standards. The multilateral governance of the ITRC should help it to respond to accusations of being a front for western colonialist tendencies.

The first stage in a local effort by the ITRC will involve setting up an individual TRC organization. This will involve discussions with the national government and civil society actors—talks that might be initiated by either the ITRC or other societal actors depending on circumstances. If ITRC representatives are satisfied that the country (or

region/area—there is no specific a priori reason to reject a multinational or sub-national TRC) is an appropriate location for a TRC, they will attempt to sign an operating agreement with the national government concerned. Any such agreement will need approval from individual areas' civil society representatives—opposition parties, press and other groups. The agreement will help identify the specific aims of the TRC—such as historical record creation, amnesty adjudication and the like—as well as the operating procedures for the TRC and the role of the ITRC and its representatives.

The actual running of the TRC will be a second stage in this process. The ITRC will almost always<sup>63</sup> employ individuals from the area concerned, especially in roles relating to the actual hearing of cases. Thus individuals like TRC commissioners who hear amnesty applications or adjudicate reconciliation efforts, and investigators who help determine a historical record, will often be drawn almost entirely from national populations (though foreign representation may also be allowed). At the same time, the professional staff of the TRC—who deal with issues like human resources, finances and the like—will be supervised by ITRC employees who have been trained and are paid by the ITRC. These individuals will help ensure that the TRC operates in an efficient, honest manner and is at least partially shielded from efforts to corrupt the process. The ITRC representatives will also retain the ability to fire individual TRC employees (including national commissioners) who contravene specific TRC regulations. These powers will help to maintain the status of the TRC and its reputation both within its operational area and with international donors.

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<sup>63</sup> In some cases, as with the El Salvador TRC, it may be determined that a purely foreign staff is more appropriate, *see* Hayner, *supra* note\_ at 219-20, but this would be a drastic step to take.

A final local role for the ITRC will be after the cessation of a national TRC's activities. The ITRC and its representatives/employees will assist in the dissemination of any TRC findings and also in the coordination of follow up reconciliation, truth-seeking and legal activities. It could also help supervise or assist with the distribution of any long-term compensation payments awarded by the TRC, allowing victims to bypass fragile and often corrupt national governments. The ITRC's continuing presence will make it easier to ensure that the achievements of TRCs are not lost once they cease to operate. It will also make it easier to study the impact of TRCs more generally.

One of the important principles the ITRC will need to respect in its local operations is adaptability. Though its staff will enforce general policies on issues like nepotism and bribery, they will also need to encourage flexibility in responses to the individual issues TRCs face. Rather than importing operational models wholesale from previous TRCs, international staff will need to work with local experts to help devise approaches and rituals that respect and incorporate elements of local culture. This flexibility will be crucial to the eventual success of individual TRCs.

### *3. Coordination with Court Systems*

In creating multiple local TRC organizations, the ITRC will need to coordinate effectively with both national court systems and the ICC. Local TRCs will be much more successful if their activities support and complement the activities of court based justice efforts. By establishing strong guidelines and monitoring cooperation, the ITRC can help ensure that the coordination between court systems and local TRCs is mutually beneficial.

Coordinating with national court systems will require flexible guidelines given the diversity in both formal and actual function of different countries' court systems. Any local TRC agreement will need to spell out the interaction of the TRC and local courts, including the use of evidence from one institution by the other and the enforceability of agreements made in a TRC context (including amnesty and compensation procedures). In certain countries, well-run local TRCs can help inspire or even sponsor changes in local court systems to make them more efficient and fairer to all parties.

Local court systems will vary significantly in both their institutional design and actual operation. The exact interaction between these systems and local TRCs will thus be specific to the country involved. But in all cases, the parameters of this cooperation should be spelled out in the initial agreement with a local government when a TRC is set up. This will ensure that the operations of both the TRC and local courts are not unduly affected by the institutions' concurrent operation.

One of the most important issues that agreements with national governments will need to cover involves the use of evidence from TRCs and the legal status of any amnesty/compensation decisions by the TRC. The specific terms of this agreement will greatly depend on the exact functions of the TRC. But in general, information volunteered by perpetrators as part of reconciliation processes and the like will probably need given special protection in order to encourage participation in TRC events.<sup>64</sup> Additionally, any amnesties issued by a local TRC committee will need to be recognized by local court systems in order to have any valid impact. These protections for

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<sup>64</sup> In Sierra Leone, perpetrators were reluctant to come before the TRC for fear of subsequent prosecution. Telephone Interview with International Center for Transitional Justice Official (April 30, 2005). . Given the unique reconciliation functions of the TRC, providing immunity to confessions made in carefully controlled circumstances will be appropriate, though there will probably be significant disagreements about what the parameters of these controlled circumstances are.

perpetrators may reduce the power and prestige of local court systems, making pre-arrangements essential.

Other types of interactions with local court systems will be more supportive of their role. For example, the compensation committees of local TRCs may rely on local court systems to help in enforcing payments—by either government or private entities (depending on the structure and scope of any local TRC compensation function). Additionally, the TRC may be able to provide training and support to local court systems in areas like victim support, reconciliation functions and even evidence and document management. Any cooperation/support in these areas could bring major benefits to local court systems and encourage cooperation with the TRC.

The ICC is the second institution with which cooperation agreements will be essential.<sup>65</sup> ICC cooperation will need to be negotiated on both global and national levels (and these agreements may also need to be extended to regional tribunals and courts like the ICTY, depending on a given local TRC's location). Ensuring that the two institutions don't undermine each others' efforts will be the most pressing challenge to both types of agreements. As discussed earlier in this paper, the relationship with the ICC may continue to evolve and even become more formalized. But any formalization of extensive linkages will occur after both institutions have become fully operational.

Agreements with the ICC on macro and national levels will need to focus on ensuring that neither institution compromises the operations of the other. The threat to TRC operations is most immediate—amnesty and reconciliation processes could be significantly disrupted if the ICC chooses to ignore any grants of amnesty or uses

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<sup>65</sup> This discussion focuses on the ICC, but its general principles could be applied to national ICTs like the ICTR as well.

information provided in confidential TRC processes. Additionally, the ITRC will need to ensure that all components of the ICC—including both prosecution and defense counsels—respect the parameters of local TRC operations. But ITRC action could also compromise ICC investigations, by reducing national support for court actions (especially when these clash with popular TRC processes). These potential problems make it important for both institutions to craft specific guidelines on effective coordination of their activities.

On a global level, the ICC and the ITRC should agree on specific guidelines that will govern the means and order by which the ICC and ITRC approach areas of conflict. In many cases, especially where the ITRC is playing an amnesty function, allowing ICC investigations after the TRC has completed its work may be most efficient. This will allow the ICC to respect any amnesty decisions made by the TRC, making cooperation with the latter more attractive than it might otherwise be. TRCs may also be better able to time their work if spared from the vagaries of courtroom procedure (e.g. defense counsel objections to TRC testimony etc.). In other cases however, it may be more appropriate for TRCs to play a role only after judicial investigations. In any case, the exact parameters of these timing decisions should be decided on a case-by-case basis. A semi-permanent committee composed of neutrals and representatives of both ITRC and ICC could evaluate individual cases, basing their decisions on a set of pre-determined factors. These might include the specifics of the situation, desires of local government/civil society, logistical/funding restraints/priorities of the two institutions and the nature of the trauma and its aftermath. The increased flexibility provided by this

case-specific evaluation is sufficient to outweigh the risk of conflict created by the absence of hard rules of priority.

A global ICC/ITRC agreement, in addition to putting in place procedures for managing approaches to specific conflicts, should also encourage more widespread dialogue. Ideally, it would set up frequent general consultations on institutional levels— involving both the Registry and centralized prosecutorial teams from the ICC.<sup>66</sup> This type of consultation may encourage broader cooperation and prevent acrimonious disputes from arising.

After any agreement about general approaches to conflicts is crafted, additional agreements should also be concluded between the ICC and local TRCs. These can provide additional local assurances about the integrity of specific reconciliation/amnesty processes. Local agreements can also take into account specific local concerns/interests. The danger for both ICC and local TRCs is that local factors make the other institutions unpopular, rendering any linkage perilous. But this may give both institutions an incentive to support each other's activities, and in any case the benefits of this type of agreement exceed any publicity costs.

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<sup>66</sup> Defense counsel are case specific, and thus more appropriately involved in local agreements.

## IV. Benefits and Challenges

### A. Benefits

The most quantifiable benefit of the ITRCs formation would be an increase in the number of TRCs that are formed. The presence of a recognized, well supported multilateral organization supporting and advocating for the creation of national TRCs would be a strong spur to governments and civil society groups in societies recovering from trauma. The ITRC's specific support of academic research on the good functioning of TRCs may also create additional awareness and support for their creation. These additional TRCs can help transitional societies in a way that provides maximum flexibility to take into account local needs while avoiding hijackings by local political figures. The beneficial impact of additional TRC formation assumes that the organizations actually are beneficial;<sup>67</sup> that any displacement of international judicial/retributive efforts and alternative fora for activities like writing history, encouraging reconciliation and adjudicating amnesty requests is an acceptable loss;<sup>68</sup> and that the ITRC will do a better job than national efforts at creating effective TRCs. But these conditions are met by the ITRC proposal, making the formation of additional TRCs a net positive.

A second benefit of the ITRCs formation will be that national TRCs become more independent, honest and efficient than those of the past. Run subject to the rules and supervision of the ITRC and its staff, individual TRCs are less likely to be "captured" by local interests foreign to the major purposes of the TRC. Pressures on individual TRCs

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<sup>67</sup> See analysis in section B *supra*.

<sup>68</sup> Section C.v. includes additional analysis of the impact this proposal could have on the ICC.

by local political leaders seeking to avoid/obtain certain types of hearings, amnesties or other “goods” will be less effective when subject to approval by international staff, and when the ITRC is able to condemn governments/individuals that engage in this conduct. Nepotism and corruption will also be reduced by the presence of foreign staff controlling access to funds and vetting individual hiring and expenditures. While these staff and guidelines will probably not be able to eliminate all political or corruption-promoting pressures/efforts, they should constitute a significant obstacle to them.

With the burdens of political compromises and corruption lightened, individual TRCs will also be able to attract additional donor support. The ITRC seal may help assure individual donors that their funds will be well spent and that the TRC is actually carrying out the functions that it claims to. Accusations concerning corruption and nepotism that often dog nationally sponsored TRCs<sup>69</sup> would be less frequent and less convincing in cases where the ITRC denies the charges. These benefits may help make ITRC restrictions and checks more amenable than they otherwise would be.

The benefits of ITRC sponsorship will not end with the conclusion of the TRC. Instead, the continuing existence of the ITRC will make it much simpler to run follow up projects to the TRC. These can range from the mundane, like assuring proper authorship and distribution of any reports the TRC writes, to more imaginative and unusual efforts like the sponsorship of artistic reactions to TRC reports. Currently, the disbanding of a TRC (usually having exhausted all financial resources devoted to it) often means that

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<sup>69</sup> See, e.g., A FRESH START?, *supra* note \_ at 5-8.

efforts to respond to and address the material the TRC created and unearthed are ad hoc and small scale.<sup>70</sup> Appropriate ITRC encouragement and support could change this.

A third benefit to the ITRCs post-TRC engagement will be additional opportunities to assess the successes and failures of individual initiatives sponsored by particular TRCs. Individual national innovations can be catalogued and evaluated for possible use in other contexts. While these efforts happen now, they are often ad hoc and uncoordinated.<sup>71</sup>

A final benefit to the ITRC will be additional multinational engagement on the part of countries, like the United States, that are currently suspicious of efforts to create international courts. The relatively non-legal, non-coercive nature of the TRCs should make membership and support of the ITRC much more palatable for these countries (ironically, they may be especially eager to participate as a way of avoiding the public opprobrium associated with a refusal to be party to the ICC...). This participation will be useful in terms of TRC formation in the short term. In the long term it could also be a step towards eventual reconciliation with the idea of international justice institutions like the ICC. Even major proponents of ICTs may support membership in the ITRC as a way of demonstrating the innocuous nature of international transitional justice efforts.

All of these improvements in the actual functioning of TRCs will help to improve their moral authority both internally and internationally. TRCs that are more respected will be able to function more effectively and attract more donor support, creating a

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<sup>70</sup> In Sierra Leone, for example, follow up efforts to the TRC were not centrally coordinated and had a hard time obtaining support. Telephone Interview with International Center for Transitional Justice Official (April 30, 2005). *See generally* Hayner, *supra* note \_ at 228-30.

<sup>71</sup> There is currently no central archive for all TRC materials. Instead there are various regional and local attempts to store archives, which are sometimes insufficient to protect the material. In South Africa, for example, key files disappeared. *More Truth Commission Files Disappear*, MAIL & GUARDIAN, Oct. 25, 2002.

virtuous self-reinforcing cycle. The intervention of the ITRC can in this sense be the spur for a much larger improvement in national TRC effectiveness at multiple levels.

## **B. Major Challenges**

The ITRC will most threaten two different groups: ICTs and national governments. It will almost inevitably weaken ICTs that remain independent of its jurisdiction. National governments will also be weakened by the ITRC's assumption of responsibility for institutions that have hitherto been mostly controlled by governments. International support for TRCs will make them more effective, but less likely to provide patronage and prestige to national governments.

Weakening some existing institutions is almost inevitable. The key consideration is whether the transfer of resources like to the ITRC will ultimately better advance the aims of transitional justice. By this criterion, the ITRC seems well placed to prevail. A flexible, locally-based but internationally supported approach would replace ICTs in cases where it worked better. Weakening of national governments might be more destabilizing, but even here, the potential benefits are significant enough to justify the tradeoff.<sup>72</sup>

### *1. International Criminal Courts/Tribunals*

The formation of the ITRC will provide a convincing alternative to international criminal trials in countries emerging from trauma and violence. While the ITRC will probably form TRCs in areas that would otherwise have had neither an international court nor a TRC, in other cases it will probably take the place of an ICC investigation or international criminal tribunal. It is not a foregone conclusion that the two types of

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<sup>72</sup> In cases where the international community is particularly concerned about government stability/credibility, it can provide additional support through non-TRC means. Individual operating agreements with governments can also be sensitive to particular needs of national governments.

efforts are incompatible. Indeed, the South African TRC, often considered one of the most successful,<sup>73</sup> conducted its amnesty hearings under the explicit expectation that it would be followed by criminal trials of those not granted amnesty.<sup>74</sup> In this sense, organizations like the ICC and the ITRC could come to cooperative agreements in particular circumstances—with the ICC, for example, agreeing to suspend indictments until the conclusion of a particular national TRC, and to respect decisions of its amnesty committee.<sup>75</sup> Other types of cooperation could also be possible, helping both institutions operate more effectively. Under this scenario, the ITRC could represent an improvement to the international community's transitional justice toolkit.

But even a decision to treat the ITRC and ICTs as alternative components of a single transitional justice toolkit represents a significant shift in the way that international criminal courts are conceived. Rather than constituting an ultimate international response to particular acts, organizations like the ICC would be demoted to the position of being one option in a toolkit of methods to address international conflict and national trauma. In cases where punitive/retributory needs were less important than broader goals like national reconciliation,<sup>76</sup> ICTs would often not be prioritized. This could represent a significant reduction in ICTs authority as institutions—which would reduce their chances of long-term survival. Thus, forming the ITRC would not be a costless exercise for all parties—the impact on international criminal courts/tribunals would almost certainly be negative.

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<sup>73</sup> Rotberg, *supra* note \_ at 5.

<sup>74</sup> Very few trials of those denied amnesty actually took place, due to a number of political and technical legal factors. See Hayner, *supra* note \_ at 43.

<sup>75</sup> See generally, Hayner, *supra* note \_ at 206-12.

<sup>76</sup> Which might be quite often—see Minow, *supra* note \_, at 26, 121-26.

Weakening the most effective transitional justice tools currently operating seems risky when considered in a vacuum. But in a context where the weakness derives directly from the international community's preference for more flexible tools that focus on non-retributory transitional justice goals, the change appears much less worrying. ICTs and domestic courts will still be able to serve as tools to channel retributory impulses, should these be deemed significant. But an affirmative choice to re-channel energy towards other goals, like victim compensation and voice, seems beneficial in the long run. In this sense, a successful ITRC's weakening of ICTs will be a hopeful rather than worrying sign.<sup>77</sup>

## 2. *National Governments*

The ITRC would reduce the influence of national governments over the formation and function of TRCs in areas they control. The impact of a reduction in national governments' power varies depending on the specific context of the area a TRC operates in. But in many developing countries, national governments are relatively weak and need much support in order to effectively assert their national authority. Presiding over even a semi-successful TRC can significantly contribute to a government's prestige, whereas a full exposé of their officers' crimes by a fully independent TRC can be very destabilizing. The ITRC may in many cases be able to negotiate appropriate publicity opportunities for national governments that ameliorate some of the harm inherent in independent TRCs. But the overall criticism of national governments' abilities will remain obvious, and any "deals" will need to be limited to avoid antagonizing government opponents.

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<sup>77</sup> More worrying would be a weakening of ICTs without a strong ITRC to take their place. But this weakening is unlikely unless the ITRC is successful.

The limitation on national government powers may give rise to resentment, non-cooperation and potential accusations of neocolonialism. The extent of these problems would vary depending on the level of governments' non-cooperation, and a skillful ITRC might be able to ameliorate many of the consequences by linking a successful TRC to a cooperative government—and encouraging foreign donors to reward cooperative governments. But the risks of government non-cooperation will certainly be greater for ITRC sponsored commissions as opposed to nationally sponsored TRCs.

In contrast to the weakening of ICTs, the weakening of national governments will often constitute an unambiguously negative impact of the ITRCs operation. But this negative impact can be mitigated by appropriate parallel actions by the ITRC and other governments, and in any case is not as significant as the very real benefits that a successful ITRC could bring. In particular, the ITRC's support of local court systems and of national stability through reconciliation may provide greater long-term benefits than any short-term gains from a national government's sharing in the glory of a less-effective TRC. In areas where national governments are particularly unstable, local TRCs could, where appropriate, provide specific publicity opportunities for them.<sup>78</sup> In other cases, where the international community is particularly interested in supporting a national government's stability, using means other than a TRC to provide prestige/support should also be considered. This last approach will ensure that the TRC is not distracted from its objective of advancing core transitional justice goals like victim compensation and empowerment.

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<sup>78</sup> These could include joint press conferences and the like. The details would obviously depend on the context of any TRC's operations, which theoretically might include investigations of government activity which make inappropriate any support for the government. But in these latter cases, allowing a flawed government to steal other institutions' glory is of questionable benefit anyway.

### C. Additional Specific Challenges

The ITRC faces a number of additional challenges. These include the level of financial support that would be required, potential disruptions to the ITRC's work and whether its formation is unnecessary given current efforts. Addressing these questions is crucial to justifying the ITRC's existence.

On a financial level the ITRC faces two questions—whether the cost of maintaining a central organization and supporting individual TRCs is value for money and whether it is politically possible to actually raise the necessary support. The preceding sections outline the specific benefits that TRCs provide and other institutions don't. Given the relatively modest cost of TRCs (which don't face onerous prison, lawyer and other types of costs)<sup>79</sup> they seem like a worthwhile investment.

This section has outlined the specific benefits that the ITRC will bring in terms of costs—reducing corruption/nepotism and increasing centralized purchasing. Assuming that TRCs are positive in general, the ITRC's major additional costs would involve running a headquarters and hiring international staff for posting to foreign locations. Individual national TRC's would develop their own budgets, though the ITRC would help with crafting and presenting fundraising strategies. Especially in the first years, when the number of individual TRCs sponsored would probably be more limited, the number of employees could be kept to no more than one hundred or so professionals, with appropriate support staff. Total support for this group might be equivalent to the support provided to the South African TRC—about eighteen million dollars per year. This would account for higher salaries and operating costs than the South African TRC

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<sup>79</sup> The annual budget of the South African TRC was about eighteen million dollars per year, Hainer *supra* note \_ at 223, and the total budget of the Sierra Leonean TRC was about two and a half million dollars per year, A FRESH START?, *supra* note \_ at 8.

faced—but the money would be spread over much more limited facilities and a smaller staff.<sup>80</sup> Compared to the cost of individual war crimes tribunals like the ICTR and ICTY, eighteen million dollars seems reasonable—providing a lot of transitional justice for relatively low cost. If national governments can be convinced of the utility of TRCs, they can probably be convinced to direct their transitional justice aid towards the ITRC and its local operations.<sup>81</sup>

A second potential challenge to the ITRC and national TRCs' work would be efforts to punish perpetrators through non-international court systems, using means like the United States' Torture Victims Protection Act (TVPA) or Belgium's recently restricted universal jurisdiction law.<sup>82</sup> These types of efforts (or even the threat of them), performed outside of coordinated domestic court/international court/ITRC actions, could disrupt the efforts of national TRCs to promote reconciliation and enforce amnesties. But while this threat is real, the overall scope would be limited to a few individuals in a few jurisdictions, at least based on current norms. If these extraterritorial efforts became more significant, some effort to change ITRC parties' laws to take into account TRC judgments might be needed. But the relatively limited current use of these laws makes taking immediate action unnecessary.<sup>83</sup>

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<sup>80</sup> For example, Amsterdam in the Netherlands ranked 26<sup>th</sup> most expensive city to live in, whereas Johannesburg South Africa ranked 126<sup>th</sup>. MERCER HUMAN RESOURCES CONSULTING, 2004 COST OF LIVING SURVEY (2005), available at <http://www.finfacts.ie/costofliving3.htm>.

<sup>81</sup> Ideally, the costs of the entire enterprise would gradually rise, as increased numbers of national TRCs made separate demands for resources. But this would only happen if the ITRC was effective in its mission, in which case funding TRCs would presumably be seen as a cost-effective and appropriate investment for international aid budgets.

<sup>82</sup> See, e.g., Weissbrodt, *supra* note \_ at 818-22; Glenn Frankel, *Belgian War Crimes Law Undone by Its Global Reach*, WASH. POST, Sept. 30, 2003 at A1.

<sup>83</sup> See, e.g., Comment, *The Torture Victims Protection Act: More Symbol than Substance*, 43 EMORY L. J. 1467 (1994).

A final issue is whether the ITRCs proposed activities are duplicative of current efforts by other organizations. International criminal courts or individual TRCs are complementary to the ITRCs mission. But NGOs like the International Center for Transitional Justice (ICTJ) are arguably already fulfilling part of the role this essay assigns to the ITRC. The ICTJ, for example, already provides some on the ground support to existing TRCs and those thinking of starting them.<sup>84</sup> These NGOs, and others like Human Rights Watch (HRW) and the International Conflict Group (ICG), also monitor the activities of TRCs and identify best practices.<sup>85</sup> The ICTJ even assists with certain post-TRC activities.<sup>86</sup>

It is certainly true that the ITRC would duplicate some of the activities that these organizations currently sponsor. But the global reach and solidity of the ITRC, as well as the credibility it would possess as an international organization rather than an unregulated NGO, would make it more effective. The participation of national governments in its foundation and funding might also make it more effective in mobilizing resources and serving as a universally accepted center of support. Unlike individual NGOs, the ITRC would also be accountable to its government members, providing additional credibility and making it harder to reject its advice. This credibility and international support would also help in centralizing important functions like TRC archives. Ideally, the ITRC would work with the NGOs, perhaps providing short-term contracts or creating other types of partnerships. In addition, NGOs could also monitor the work of the ITRC—identifying ways in which it could improve its operations. In short, the existence of the ICTJ and other organizations carrying out some of the functions of the ITRC is not an argument

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<sup>84</sup> See, e.g., ICTJ ANNUAL REPORT, *supra* note \_\_.

<sup>85</sup> See, e.g., A FRESH START?, *supra* note \_\_; HUMAN RIGHTS WATCH, THE JURY IS STILL OUT 4 (2002).

<sup>86</sup> Telephone Interview with International Center for Transitional Justice Official (April 30, 2005).

against its creation. These organizations actually provide evidence of the need for the ITRC's services and could serve as a source of ideas and support for the new organization.

## **V. Conclusion**

Any effort to set up an ITRC will inevitably face challenges not fully anticipated in this essay. The problems addressed by transitional justice institutions—national traumas like apartheid and civil war—are sufficiently complex as to defy simple solutions. Like nationally constituted TRCs or international criminal courts, the ITRC will be engaging in a balancing act. National engagement, international “neutrality” and the competing demands of different stakeholders in any transitional justice process can probably never be balanced to universal satisfaction. But the ITRC’s national/international structure should make it more effective at striking appropriate balances than the more limited transitional justice institutions that currently exist.

The most serious challenge facing the ITRC will be achieving an appropriate balance between national concerns and international standards. Theoretically, appropriate discussions and consensus building activities before area/national TRCs are created will help establish the bounds of a TRC’s operations, parameters that will help address specific operational questions. In practice, the ITRC will probably have mixed success in efforts to appropriately incorporate local ideas and preferences, especially at first. But the organization will gradually become better at conducting and incorporating local views into individual national TRCs. As the TRCs that do this would seem to have the best chance of succeeding, the ITRC should eventually be able to identify the techniques and employees best suited to eliciting and incorporating local views.

This essay has been relatively vague about the exact nature of the “flexible” activities individual TRCs will engage in. Presumably, they will be along the general lines of other successful TRCs, with functions including truth telling, possible amnesties and

compensation. But the ITRC's role as a center for research and academic debate may also help develop additional techniques and perspectives. In all cases, the specifics of local TRCs' operations should be tailored to individual national contexts.

In the long run, the exact impact of a successful ITRC on ICTs in general and the ICC in particular is unclear. It could be that the ITRC and the ICC work out a mutually reinforcing arrangement, with each supporting the others' activities. It is also possible that the ITRC and the ICC could maintain an uneasy co-existence, without providing much mutual support. Most explosively, the ITRC could displace the ICC entirely. On a fundamental level, TRCs can theoretically address many transitional justice challenges more flexibly and effectively than a courtroom model. Helping local TRCs reach their full theoretical potential could also lead to a re-examination of purely domestic legal approaches to national traumas.

If the ITRC does succeed in tailoring to local views while preserving international standards, its success may lead to a global re-evaluation of the courtroom justice model even in western domestic settings. The criticisms applied to international criminal tribunals—especially regarding the artificiality of legal formalism—are also applicable to the internal court systems of many western industrialized countries. It would be both ironic and welcome if an international organization set up to assist those regions most affected by mass violence and other traumas helps spark a legal revolution in those countries that perceive themselves as most stable.