

PUNISHMENT, POSTGENOCIDE: FROM GUILT TO SHAME TO CIVIS IN RWANDA

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Following the 1994 Rwandan genocide, national and international trials set out to encourage national reconciliation, promote peace, punish perpetrators, foster a culture of human rights, and effect justice. In this Article, Professor Mark Drumbl questions the ability of these trials to achieve these goals and suggests they may in fact aggravate ethnic identity politics, thereby threatening Rwanda's long-term stability. He argues that the highly interdependent yet dualist nature of Rwandan society, together with the widespread level of participation in and victimization by the genocide, create a situation where accountability for the violence and the deterrence of future violence can be pursued more effectively through the restorative cultivation of shame, rather than through the retributive imposition of guilt. Although criminal sanction usually attaches to deviant conduct, participation in genocide in Rwanda was not particularly deviant, nor was it an individualized, pathological transgression. Professor Drumbl asks whether there might be times and places where collective wrongdoing needs to be exposed and not hidden by the law's preference for individual fault. Despite the concerns that ought to be emerging from the Rwandan experience, international lawyers continue to push—with significant degrees of success—for selective criminal prosecution as a preferred, and potentially exclusive, response to mass atrocity. In contrast, he suggests that creating presumptions in favor of criminal trials may preempt the supervening inquiry about the suitability of those trials to the afflicted society. Professor Drumbl concludes that policy responses to mass atrocity should be founded upon contextual inquiries, not driven by globalitarian or legalistic agendas, and should recognize the uniqueness of each incident of mass atrocity and the uniqueness of the reconstruction process that should follow, instead of flattening that uniqueness. This may lead to a preference for flexible, polycentric responses within and outside of what may be customarily identified by the West as the "law."

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Well I've been living next to you my friend

But what kind of friend are you?

—Supertramp, "Asylum," from *Crime of the Century* (1974)

INTRODUCTION

From April to July 1994, an estimated 800,000 people were murdered in an attempt to wipe out the Tutsi inhabitants of Rwanda.¹

¹ See Gérard Prunier, *The Rwanda Crisis: History of a Genocide* 261, 264-65 (rev. ed. 1997). This figure includes Tutsi victims, Hutu who opposed the genocide, and Hutu killed by an extraterritorially based Tutsi army that took control of Rwanda to end the genocide. It is difficult to estimate the number of victims, but the figure of 800,000 appears regularly in the literature. See, e.g., Letter from Kofi A. Annan, Secretary-General, United Nations, to the President of the Security Council, Annex: Report of the Independent Inquiry into the Actions of the United Nations During the 1994 Genocide in Rwanda 3, U.N. Doc. S/1999/1257 (Dec. 15, 1999) <http://www.un.org/News/ossg/rwanda_report.htm> (citing 800,000 killed); Philip Gourevitch, *We Wish to Inform You That Tomorrow We Will Be Killed with Our Families: Stories from Rwanda* 4 (1998) ("[O]f an original population of about seven and a half million, at least eight hundred thousand people were killed in just a

This death toll amounts to roughly ten percent of the Rwandan national population.² Although the majority Hutu group orchestrated the violence against the minority Tutsi group, between 10,000 and 30,000 Hutu also were slain.³ The Hutu government of Juvénal Habyarimana, which had ruled Rwanda since 1973, exploited and politicized the interethnic tensions that had been simmering since Rwandan independence in 1960.⁴ Habyarimana was assassinated on April 6, 1994; members of an even more extremist fringe of Habyarimana's political party then assumed power.⁵ The genocide erupted that same day (although it had been planned for months).⁶ The only entity that actively sought to stop the genocide was the Rwandese Patriotic Front (RPF), primarily composed of Tutsi who previously had

hundred days. Rwandans often speak of a million deaths, and they may be right."). For other estimates of the number of victims, see Daniel de Beer, *The Organic Law of 30 August 1996 on the Organization of the Prosecution of Offences Constituting the Crime of Genocide or Crimes Against Humanity: Commentary 6* (1997) (estimating one million killed); Alison Des Forges, Human Rights Watch, "Leave None to Tell the Story": Genocide in Rwanda 16 (1999) (estimating at least half million deaths); Bruce D. Jones, *Civil War, the Peace Process, and Genocide in Rwanda*, in *Civil Wars in Africa: Roots and Resolution* 53, 53 (Taisier M. Ali & Robert O. Matthews eds., 1999) (estimating up to one million deaths); Alex de Waal & Rakiya Omaar, *The Genocide in Rwanda and the International Response*, 94 *Current Hist.* 156, 156 (1995) (estimating number of deaths in Tutsi-Hutu conflicts from 1990 to 1994 at 750,000); Alan J. Kuperman, *Rwanda in Retrospect*, *Foreign Aff.*, Jan.-Feb. 2000, at 94, 101 (estimating 500,000 Tutsi and from 10,000 to over 100,000 Hutu killed). An official census has been launched recently in Rwanda in an effort to determine the precise number of victims. See *What's News*, *Wall St. J.*, July 19, 2000, at A1.

² See Gourevitch, *supra* note 1, at 4 ("Decimation means the killing of every tenth person in a population, and in the spring and early summer of 1994 a program of massacres decimated the Republic of Rwanda.").

³ See Prunier, *supra* note 1, at 265. Before the genocide, the Hutu comprised approximately 85% of Rwanda's population (estimated at seven to eight million), while the Tutsi comprised 14%. See Letter from Boutros Boutros-Ghali, Secretary-General, United Nations, to the President of the Security Council, U.N. Doc. S/1994/1125 annex ¶ 45 (Oct. 4, 1994); Madeline H. Morris, *The Trials of Concurrent Jurisdiction: The Case of Rwanda*, 7 *Duke J. Comp. & Int'l L.* 349, 350 (1997). These percentage distributions remain similar after the genocide due to the subsequent repatriation of Tutsi emigrés from Uganda. Also, many Hutu fled Rwanda, *supra*, at 352, to relocate in the Democratic Republic of Congo or farther abroad.

⁴ See Des Forges, *supra* note 1, at 3-5.

⁵ Human Rights Watch and journalist Gérard Prunier provide evidence that Habyarimana was assassinated by extremist Hutu within his own political party. See Human Rights Watch, *Playing the "Communal Card": Communal Violence and Human Rights* 1, 9 (1995) (finding that Habyarimana's airplane was downed by ground fire from positions near airport, and that this region was controlled by Rwandan army); Prunier, *supra* note 1, at 213-21 (arguing that most probable assassins of Habyarimana were desperate members of his own circle who feared dilution of Hutu power); see also Timothy Longman, *State, Civil Society, and Genocide in Rwanda*, in *State, Conflict, and Democracy in Africa* 339, 339 (Richard Joseph ed., 1999) (finding that Habyarimana's plane was "probably" shot down by Presidential Guard).

⁶ See Human Rights Watch, *supra* note 5, at 9.

fled to Uganda.⁷ These extraterritorially based Tutsi invaded Rwanda and ousted the genocidal regime, whose poorly trained and meagerly equipped armed forces were more interested in slaughtering Tutsi civilians than fighting any war.⁸ By July of 1994, a new regime, called the Government of National Unity (but led by the Tutsi-dominated RPF), took over power.⁹

Six years later, Rwanda finds itself in a stage of social and historical development, which this Article refers to as the "postgenocidal" stage, in which it seeks to come to terms with the violence and initiate a very complex healing process.¹⁰ Genocide survivors must find a way to coexist with those who perpetrated, encouraged, or did nothing to prevent the violence. New relationships must be fostered between these groups and the regimes that govern them. Survivors and aggressors also must coexist with third parties such as other nations and international organizations.

This Article begins with a seemingly straightforward proposition: Each genocide is unique. This uniqueness manifests itself in the differences of experiences of genocide survivors, the levels of social mobilization of aggressors, the public or secretive nature of the aggression, and the historical context from which the violence emerged. Although all genocides are among the "most serious crimes of concern to the international community as a whole,"¹¹ and although in each case genocide is a crime motivated by an "intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such,"¹² it remains that the madness that took hold of Nazi Germany is different from that in Armenia, that both of these tragedies are different from Rwanda's, and that all differ from other occurrences of mass atrocity. Acknowledging these differences has given rise to the

⁷ See Gourevitch, *supra* note 1, at 20.

⁸ See Longman, *supra* note 5, at 353 (noting that "with so much attention focused on internal 'enemies,' the Rwandan army was not capable of responding effectively to . . . the RPF . . . and was . . . routed").

⁹ See Morris, *supra* note 3, at 352.

¹⁰ The Rwandan violence has initiated debate on how to "deal with" a genocide retrospectively, including discussion about the appropriate level of judicial intervention by the international community. See, e.g., José E. Alvarez, *Crimes of States/Crimes of Hate: Lessons from Rwanda*, 24 *Yale J. Int'l L.* 365, 370 (1999) (arguing that international law "should mediate, but not dictate, forms of criminal accountability" following mass atrocity); William A. Schabas, *Justice, Democracy and Impunity in Post-Genocide Rwanda: Searching for Solutions to Impossible Problems*, 7 *Crim. L.F.* 523, 534 (1996) (arguing that prosecuting perpetrators of genocide is urgent priority and should be dealt with separately from rebuilding of Rwandan judicial system).

¹¹ Rome Statute of the International Criminal Court, Preamble, U.N. Doc. A/CONF.183/9* (1999) [hereinafter *Rome Statute*].

¹² *Id.* art. 6.

growth of the academic field of comparative genocide studies, predominantly populated by social scientists.¹³

This seemingly straightforward proposition leads to a second proposition with somewhat more complex ramifications for international lawyers: Given the important characteristics peculiar to each genocide and the differences among genocides, the modalities of securing accountability and encouraging healing should vary in each individual case. Consequently, there may be many policy responses to genocide, the efficacy of each depending on the situation at hand. Postgenocidal policy instruments, including those designed to promote the rule of law, therefore should be contextual.

The relevance of context to the construction of postgenocidal rule-of-law initiatives leads to a third proposition. This Article posits that the key variable that should determine policy responses to genocide is the social geography of the postgenocidal society. Key elements of social geography include the demographic composition, dynamic of group relationships, and political culture of the collectivity that exists after the genocide is ended. This third proposition has important implications for international lawyers. It means that trials and imprisonment will not be necessarily the methods of choice to rebuild the rule of law in postgenocidal societies. Rather, the importance to attach to trials, punishment, retribution, redistributive reparations, forgiveness, public inquiries, amnesties, truth commissions, lustration,¹⁴ reconciliation, and other approaches within the constellation of postgenocidal policies depends on the social geography of the postgenocidal society in question.¹⁵ Policymakers should not presume that

¹³ Examples of comparative genocide scholarship include the *Journal of Genocide Research* (Carfax Publishing, Mar. 1999) and the Montreal Institute for Genocide and Human Rights Studies (MIGS) (visited Oct. 4, 2000) <<http://www.migs.org>>. This scholarship is undertaken overwhelmingly by social scientists and humanities scholars, with only limited participation by international lawyers.

¹⁴ "Lustration is the disqualification and, where in office, the removal of certain categories of office-holders under the prior regime from certain public or private offices under the new regime." Herman Schwartz, Lustration in Eastern Europe, in 1 *Transitional Justice: How Emerging Democracies Reckon with Former Regimes* 461, 461 (Neil J. Kriz ed., 1995). Lustration among high-level officeholders is not an appropriate remedy for the Rwandan genocide as the current Tutsi-led regime ousted the genocidal regime and as there is no carryover of senior officials. There may be somewhat more carryover of local bureaucrats, leaders, administrative officers, and civil servants.

¹⁵ For a preliminary discussion of the thesis that social geographies ought to be the determinative factor affecting the content of postgenocidal rule-of-law initiatives, see Mark A. Drumbl, *Sclerosis: Retributive Justice and the Rwandan Genocide*, 2 *Punishment & Soc'y* 288 (2000). For advocates of the position that context should inform prosecutions and truth commissions after massive human rights abuses, see Martha Minow, *Between Vengeance and Forgiveness: Facing History After Genocide and Mass Violence* 132-33 (1998) (urging inquiry into "particular historical and political circumstances" before pursu-

they must limit themselves to a single option. They do not need to select either criminal trials or truth commissions or amnesties. Postgenocidal policies are not mutually exclusive. In fact, a singular focus on one method—whether trials or truth commissions—may yield suboptimal results. Rather, policymakers should be open to redressing genocidal violence through blended responses and an admixture of policies.

By exploring how social geographies may impact upon the effectiveness of trials and other rule-of-law devices, this Article aims to provide a road map for legal policymakers. This road map is especially important as the international community begins to address genocidal violence and ethnically based persecution in places such as Kosovo,¹⁶ East Timor,¹⁷ and Chechnya.¹⁸ Foremost, however, this Article addresses the Rwandan violence.

ing legal remedies); Alvarez, *supra* note 10, at 370 (“[I]nternational processes for criminal accountability need to encourage and adapt to local processes . . .”); Hans-Jörg Geiger, *Consequences of Past Human Rights Violations: The Significance of the Stasi Files for Dealing with the East German Past*, in *Confronting Past Injustices: Approaches to Amnesty, Punishment, Reparation and Restitution in South Africa and Germany* 41, 41 (M.R. Rwelamira & G. Werle eds., 1996) (arguing that it is more important to look for correct way to deal with human rights violations than it is to develop theoretical system); Neil Kritz, *Coming to Terms with Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights*, *Law & Contemp. Probs.*, Autumn 1996, at 127, 152 (arguing that there is “no uniform, mechanistic solution applicable to all cases” as each society must individually determine the approach “that will best help it achieve the optimal level of justice and reconciliation”); José Zalaquett, *Balancing Ethical Imperatives and Political Constraints: The Dilemma of New Democracies Confronting Past Human Rights Violations*, 43 *Hastings L.J.* 1425, 1431 (1992) (contending that there must be balance of political opportunities and constraints before human rights principles can be put into practice); Henry J. Steiner, *Introduction to Harvard Law Sch. Human Rights Program, Truth Commissions: A Comparative Assessment* (1997), available at <<http://www.law.harvard.edu/Programs/HRP/Publications/truth1.html>> (arguing there is no proper or uniform degree of collective memory in aftermath of human rights abuses).

This Article’s sociological approach differs from other contextual approaches to studying genocide. Some of these approaches look at the type of state governing the postgenocidal society (a political science approach, questioning whether the postgenocidal regime is a successor regime to the genocidal one, or is constituted by the same or similar individuals, and whether the successor regime emerged from political compromise or military victory), the penetration of international institutions and nongovernmental organizations (a neoinstitutionalist approach, inquiring whether such penetration can support legal intervention postgenocide), or the nature of the abuses (a harm-based approach, inquiring whether the abuses were committed publicly or in secret, or whether the atrocities were part of war with human rights violations committed by all sides). For an enumeration of these contextual inquiries, see Minow, *supra*, at 133-35 (making reference to sociological approach as one of six inquiries that can be made so as to determine appropriate policy response to genocidal violence, but failing to view inquiry as more or less determinative than others).

¹⁶ From March to early June 1999, armed forces of the Federal Republic of Yugoslavia (FRY) launched an ethnic cleansing campaign against ethnic Albanians in Kosovo. An estimated 10,000 ethnic Albanians were killed. See John Kifner, *Inquiry Estimates Serb*

Drive Killed 10,000 in Kosovo, N.Y. Times, July 18, 1999, § 1, at 1. Over one million Kosovar Albanians were displaced to Albania. See Mark A. Drumbl, *Legal Issues*, in *A Global Agenda: Issues Before the 54th General Assembly of the United Nations* 241 (John Tessitore & Susan Woolfson eds., 1999). After sustained NATO bombing, the FRY agreed to withdraw its military forces from Kosovo, and the region now remains under combined NATO/United Nations governance. See *id.* at 241. The repatriation of ethnic Albanians to Kosovo, in turn, has triggered an exodus of Serbs from the region. See *id.* at 242. There is also evidence of reprisal killings and other "continuing horrors" by Kosovar Albanian armed forces. See Steven Erlanger, *Monitors' Reports Provide Chronicle of Kosovo Terror*, N.Y. Times, Dec. 5, 1999, § 1, at 1. A recent report by the Human Rights Division of the Organization for Security and Cooperation in Europe concluded that many reprisal killings "have taken place under the nose and often under the eyes of NATO-led peacekeeping troops." *Id.*

¹⁷ On August 30, 1999, East Timor voted in favor of independence from Indonesia. Following this vote, militia forces massacred hundreds (possibly thousands) of East Timorese and engaged in a widespread campaign of property destruction. The Indonesian army supported many of the militia forces. After United Nations peacekeepers took control of the situation, international lawyers called for those responsible for this violence to face trial. The United National Transitional Administration in East Timor (UNTAET) established a commission of five East Timorese and two international legal experts to select judges and prosecutors for trials conducted at the national level. See Barbara Cross-ette, *Military Is Said to Prevent East Timor Refugees' Return*, N.Y. Times, Nov. 23, 1999, at A10. Indonesia has rejected the possibility of an international tribunal, insisting it can investigate and bring those responsible to justice. See Letter to the Secretary-General, United Nations General Assembly, 44th Sess., Agenda Item 96, at 2, U.N. Doc. A/54/727, S/2000/65 (2000). The United Nations has responded that it would not "compete" with domestic proceedings, but simply would "keep an eye on [them] to ensure that those responsible [are] brought to justice." Achara Ashayagachat, *Fair Trial Sought for KR Leaders*, Bangkok Post, Feb. 12, 2000, available in Lexis, News Library, Bngpst file. The Indonesian government has also indicated that some of the wrongdoing "should be referred to a South African-style truth commission." Rajiv Chandrasekaran, *Settling Accounts in Indonesia*, Wash. Post, Mar. 15, 2000, at A21. However, on August 18, 2000, the Indonesian People's Consultative Assembly voted to ban retroactive prosecution of military personnel for human rights abuses in East Timor. See Slobodan Lekic, *Indonesia's Military Gains Amnesty, Keeps Clout*, Ark. Democrat Gazette (Little Rock), Aug. 19, 2000, at 6A. This contradicts Indonesia's assurances to the United Nations that it will or is able to bring to justice those responsible for human rights violations in East Timor.

¹⁸ In the autumn of 1999, Russian armed forces launched an attack on the southern province of Chechnya. Separatist rebels effectively have controlled Chechnya since a 1994-96 conflict with the Russian government. See Yuri Bagrov, *Rebels Ambush Russian Troop Trucks*, Ark. Democrat Gazette (Little Rock), July 25, 2000, at 6A. These rebels have engaged in terrorist attacks throughout Russia and have made armed incursions into the neighboring Russian-ruled republic of Dagestan. See Michael R. Gordon, *Russia Trying to Block Route from Chechnya into Georgia*, N.Y. Times, Dec. 19, 1999, § 1, at 16. The Russian assault has seen attacks on civilians by Russian armed forces. See Michael Wines, *Chechen Refugee Convoy Machine-Gunned, Leaving 14 Dead*, N.Y. Times, Dec. 4, 1999, at A3 (stating that "[a]n automobile convoy of Chechen refugees heading for the western border was strafed with machine-gun fire today, apparently by Russian helicopters"). Foreign leaders quickly became concerned over the indiscriminate nature of some of these attacks on civilians. See *id.* ("The assault . . . underscored a new chorus of warnings . . . from both Western governments and leaders of former Soviet satellites . . . that Russia's effort to subdue separatist Islamic rebels is indiscriminately wiping out civilians."). In February 2000, Russian forces captured Grozny (the Chechen capital), purportedly drawing the armed conflict to a close, but widespread rebel attacks continue. See Celestine Bohlen,

Although it may seem straightforward to suggest that legal responses must be contextual because each genocide is different, the simplicity of this argument may have been lost on many international lawyers. In fact, this contextual approach to redressing genocidal violence diverges from the Kantian deontology of international criminal law.¹⁹ This deontological approach, which is *au courant* among international lawyers, posits that trials of selected individuals (preferably undertaken at the international level) constitute the favored and often exclusive remedy to respond to all situations of genocide and crimes against humanity.²⁰ Growing from its roots in the Nuremberg and To-

Rebel Ambush in Chechnya One of Worst for Russians, N.Y. Times, Apr. 2, 2000, § 1, at 9 (reporting bloody rebel ambush in late March 2000); Nick Wadhams, Russia at Low Point in Chechnya, Ark. Democrat Gazette (Little Rock), June 1, 2000, at 6A; see also Bagrov, *supra*, at 6A (reporting rebel ambush in July 2000). Continuous bombing has left Grozny in ruins. See Michael Wines, New Reports Back Claim of Attack on Chechen Refugee Convoy, N.Y. Times, Dec. 5, 1999, § 1, at 27 ("Reports on Friday indicated that continuous bombing had left in flames and ruins what little remains of Grozny."); see also Yuri Bagrov, Russians Brace for More Rebel Attacks, Ark. Democrat Gazette (Little Rock), July 7, 2000, at 7A (reporting that suicide bombings by rebels killed and wounded 121 soldiers). There are widespread reports of human rights abuses and ethnic persecution of Chechens by Russian forces. See Michael R. Gordon, Russian Official Trying to Ensure Rights in Chechnya, N.Y. Times, May 7, 2000, § 1, at 6. The United Nations High Commissioner for Human Rights is investigating these alleged abuses. See Bohlen, *supra*, at 9. The Russian government has opened criminal cases against 460 Russian troops in light of the Chechen violence, but human rights groups are skeptical of the willingness to prosecute. See Anna Dolgov, Pursuing Its Military Criminals, Russia Says, Ark. Democrat Gazette (Little Rock), June 22, 2000, at 7A.

¹⁹ Deontology is the science of duty. In its elemental form, deontology holds that conduct ought to be governed by certain immutable values or principles. As a result, "certain acts are morally obligatory regardless of their practical outcomes." Stephen Garret, Problems of Transitional Justice: The Politics and Principles of Memory (unpublished manuscript, on file with the *New York University Law Review*). Garret identifies Immanuel Kant as "the best-known spokesman for deontological ethics." *Id.* The Kantian deontology of criminal punishment insists that "even if society were at the verge of dissolution, it ha[s] the duty to punish the last offender." Carlos Santiago Nino, Radical Evil on Trial 112 (1996) (characterizing retributive justice stance). When applied to the aftermath of massive human rights abuses, the deontological approach requires punishment of those determined by criminal trials to be offenders. The deontological model sits comfortably with and finds a natural ally in the retributivist approach to criminal justice. The retributivist approach maintains that punishment is required to recognize evil, even evil that is undeterred by the threat of such punishment, and regardless of the effects of such punishment on offenders, victims, or society. See Andrew Von Hirsch, Doing Justice: The Choice of Punishments 49-52 (1976) (noting that desert, in addition to deterrence, is major reason for punishing wrongdoers).

²⁰ For advocacy of the deontological approach, see generally Antonio Cassese, On the Current Trends Towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law, 9 Eur. J. Int'l L. 2 (1998) (discussing obstacles to enforcement of international humanitarian law yet concluding justice can and must be done on international level); Antonio Cassese, Reflections on International Criminal Justice, 61 Mod. L. Rev. 1 (1998) (arguing that justice is better than revenge, forgetting, and amnesty, and that international justice is better than national justice); Catherine Cisse, An Assessment of the

kyo Tribunals,²¹ as well as the 1948 Genocide Convention,²² this deontological view currently blooms in the Rome Statute of the International Criminal Court (ICC),²³ in the ad hoc International Criminal Tribunals for the Former Yugoslavia (ICTY)²⁴ and Rwanda (ICTR),²⁵ and in attempts to develop an international tribunal for Cambodia.²⁶ The operationalization of the deontological view may

International Criminal Tribunal for Rwanda, in *The Legal Profession and the Protection of Human Rights in Africa* 97, 101 (Evelyn A. Ankumah & Edward K. Kwakwa eds., 1999) (arguing that international trials are better way to do justice after Rwandan genocide than domestic trials); Christopher C. Joyner, *Redressing Impunity for Human Rights Violations: The Universal Declaration and the Search for Accountability*, 26 *Denv. J. Int'l L. & Pol'y* 591 (1998) (criticizing notion of allowing impunity for serious violators of fundamental rights).

Also revealing are the recent comments of Justice Arbour, formerly Chief Prosecutor of the International Criminal Tribunal for the Former Yugoslavia (ICTY). See Statement by Justice Louise Arbour, Prosecutor ICTY, ICTY Press Release JL/PIU/404-E (May 27, 1999) <<http://www.un.org/icty/pressreal/p404-e.htm>> ("No credible, lasting peace can be built upon impunity and injustice. The refusal to bring war criminals to account would be an affront to those who obey the law, and a betrayal of those who rely on it for their life and security."). Judge Gabrielle Kirk McDonald, former President of the ICTY, in addressing the possibility of a truth commission for Bosnia and Herzegovina, concludes: "The judicial process is best equipped to test evidence regarding the commission of horrific crimes, as well as determining the causes of the conflict. The judges are unbiased, they do not have a stake in the conflict, they are best qualified to determine responsibility." Judge Gabrielle Kirk McDonald, President of the ICTY, Address to the U.N. General Assembly (Nov. 19, 1998) (transcript available at <<http://www.un.org/icty/pressreal/SPE981119.htm>>); see also Remarks Made by Judge Gabrielle Kirk McDonald, President of the International Criminal Tribunal for the Former Yugoslavia, to the Preparatory Commission for the International Criminal Court (July 30, 1999) (transcript available in ICTY Press Release JL/P.I.S/425-E <<http://www.un.org/icty/pressreal/p425-e.htm>>) [hereinafter Remarks by Judge McDonald] ("A properly functioning permanent court will be humanity's best chance yet to move out of its self-destructive cycle.").

²¹ See Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, 1547, 82 U.N.T.S. 279 (creating Nuremberg Tribunal); Charter of the International Military Tribunal for the Far East, as Amended, April 26, 1946, reprinted in *A Decade of American Foreign Policy Basic Documents 1941-1949*, at 433 (rev. ed. 1985) (creating Tokyo Tribunal).

²² See Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, art. 4, 78 U.N.T.S. 277, 280 [hereinafter Genocide Convention] ("[P]ersons committing genocide . . . shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.").

²³ See Rome Statute, *supra* note 11 (contemplating throughout that prosecution will be of individuals).

²⁴ See S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg. at 29, U.N. Doc. S/Res/827 (1993) [hereinafter Statute of the ICTY] (establishing international criminal tribunal for former Yugoslavia).

²⁵ See S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg. at 15, U.N. Doc. S/Res/955 (1994) [hereinafter Statute of the ICTR] (establishing international criminal tribunal for Rwanda).

²⁶ From 1975 to 1979, the Khmer Rouge massacred approximately 1.7 million Cambodians. See Drumbl, *supra* note 16, at 278. Many Khmer Rouge leaders fled into the countryside after losing power in 1979. In 1998, two senior Khmer Rouge leaders surren-

have resulted in a uniform approach to punishing perpetrators, to be

dered to Cambodian authorities. See *id.* at 278-79. These essentially voluntary surrenders reignited questions of accountability, with many calling for the former Khmer Rouge leaders to be charged with crimes against humanity. See Elizabeth Becker, U.N. Panel Urges Tribunal for Khmer Rouge Leaders, *N.Y. Times*, Mar. 2, 1999, at A8. Problems have arisen, however, in determining who should control the courtroom: Cambodia or the United Nations. For its part, the United Nations had proposed a tribunal consisting of five judges, three to be appointed internationally and two by the Cambodian government. See William Schabas, Comments at International Law Weekend, American Branch of the International Law Association at the House of the Association of the Bar of the City of New York (Nov. 5-6, 1999) (notes on file with the *New York University Law Review*). The tribunal would be located "somewhere in the Asia-Pacific region but not in Cambodia." Cambodia Says It Captured Last Fugitive Leader of Khmer Rouge, *N.Y. Times*, Mar. 7, 1999, § 1, at 13. Roughly 20 to 30 top Khmer leaders would be indicted. See *The Butcher Remains a Menace*, *Economist*, Mar. 13, 1999, at 52, 52. Lawyers and officials of the tribunal would be a mix of international appointees and Cambodian nationals, although the prosecutor would be appointed internationally. See Seth Mydans, *The Shape of Justice Is Undefined in Cambodia*, *N.Y. Times*, Dec. 5, 1999, § 1, at 4 ("The United Nations has demanded international control over a tribunal, with a foreign prosecutor and predominantly foreign judges."). The drafters of the proposal declined to recommend the creation of a truth commission. See Steven R. Ratner, *The United Nations Group of Experts for Cambodia*, 93 *Am. J. Int'l L.* 948, 951 (1999). Cambodia has rejected this proposal. It maintains that the international community's role should be limited to providing legal expertise, rather than taking control of the process. See Schabas, *supra*. Cambodia has been more receptive to a U.S. proposal in which the majority of judges would be Cambodian, but the foreign appointees designated by the international community would have veto power. See Mydans, *supra*, § 1, at 4. A stalemate has ensued, although both the United Nations and Cambodia have agreed to exert best efforts to reach a formal agreement and have made some progress in this regard. See *Despite U.N., Cambodia Moves to Try Khmer Rouge Leaders*, *N.Y. Times*, Jan. 7, 2000, at A4 (stating that "[Cambodia] has rejected calls for an international tribunal run entirely by the United Nations," and that "[t]he plan now calls for a handful of judges chosen by the United Nations to work alongside a majority of Cambodians"); Seth Mydans, *Cambodia: Advice on Khmer Rouge Trial*, *N.Y. Times*, Apr. 22, 2000, at A5 ("The government says it is considering a letter from Secretary General Kofi Annan of the United Nations that tries to end a stalemate over how to set up an international tribunal to try former leaders of the Khmer Rouge."); Seth Mydans, *Cambodia Agrees to Tribunal Setup for Khmer Rouge Trials*, *N.Y. Times*, Apr. 30, 2000, § 1, at 4 (stating that "both sides had agreed to 'exert best efforts to complete all the tasks necessary to be able to have a formal agreement by June 15'" (quoting U.S. Senator John Kerry)). In May 2000, the United Nations, in an effort to finalize an agreement, conceded to Cambodia the right to appoint one of two prosecutors, as well as a majority of judges. See Barbara Crossette, *Cambodian Will Prosecute Khmer Rouge*, *N.Y. Times*, May 25, 2000, at A12. If the two prosecutors cannot agree on an indictment, this latest proposal envisions that the five judges would act as arbitrators. See *id.* However, for an indictment to be quashed, four of the five judges would have to agree; if four judges do not oppose an indictment, it would proceed. See *id.* This proposal still needs approval by the Cambodian legislature. See *id.* In the interim, Cambodia has expressed its willingness to go ahead with its own prosecutions despite U.N. opposition. See *Khmer Rouge Men to Be Tried*, *Financial Times* (London) (Japan ed.), Dec. 23, 1999, at 1, available in Lexis, News Library, Fintme File. For the most part, however, many Khmer Rouge leaders remain at large, living freely under surrender deals negotiated with the Cambodian government. "Some medical experts . . . estimate that up to 30% of the [Cambodian] population still suffers from post-traumatic stress disorder." Rajiv Chandrasekaran, *Cambodians Want Justice but Fear Genocide Trials*, *Wash. Post*, Apr. 17, 2000, at A1.

applied regardless of the specific characteristics of the postgenocidal society. Context is therefore ignored. A telling example of this is the fact that, notwithstanding the tremendous differences between the Yugoslav and Rwandan violence, the international legal community responded to atrocity in Rwanda simply by using as boilerplate the Statute of the ICTY.²⁷

International lawyers have been successful in embedding the notion of justice in the discourse of a new, and perhaps more humanized, world order. However, is this a narrow justice limited to prosecutions, or a broader understanding of justice that includes reparations for victims, shaming for ambivalent bystanders, and apologies from aggressors? For lawyers, trained to equate justice with guilt or innocence in the courtroom, this is a particularly difficult question. This Article suggests that the deontological view has given rise to an imperative to implement criminal trials. This imperative may create a disconnect between the pursuit of trials and the consequences these trials have on local communities, national reconciliation, and international peace.²⁸ As journalist Philip Gourevitch poignantly concludes in his widely acclaimed work on Rwanda, "for all the fine sentiments inspired by the memory of Auschwitz, the problem remains that denouncing evil is a far cry from doing good."²⁹

Part I of this Article posits a typology of postgenocidal social geographies. Three "ideal-types" are proposed: (1) the homogenous postgenocidal society (where the victim group is eliminated from the polity and territory occupied by the aggressors), (2) the dualist postgenocidal society (where in the aftermath of genocide both victim and aggressor must live unavoidably side-by-side within the same nation-state, occupy the same territory, and share common public spaces), and (3) the pluralist postgenocidal society (where there are several

²⁷ See Gourevitch, *supra* note 1, at 252 (quoting Rwandan diplomat as stating: "But the Security Council just started writing 'Rwanda' under the name 'Yugoslavia' everywhere."); Makau Mutua, *Never Again: Questioning the Yugoslav and Rwanda Tribunals*, 11 *Temp. Int'l & Comp. L.J.* 167, 178 (1997) (noting that International Criminal Tribunal for Rwanda (ICTR) was "afterthought").

²⁸ Approaches to justice after massive human rights abuses that focus on the broad effects of trials and other policy interventions may be categorized as "consequentialist." Consequentialism deviates from the deontological approach. Consequentialism holds that "awareness of the consequences of one's actions seems a necessary if not sufficient condition for moral conduct." Mark Moore, *Realms of Obligation and Virtue, in Public Duties: The Moral Obligations of Government Officials* 3, 10 (Joel Fleishman et al. eds., 1981). Some scholars prefer to call this approach "preventionism." See Nino, *supra* note 19, at 142. Preventionism "looks to the principle of prudential protection of society. It rests on a principle that punishment is legitimate if it is carried out in an effective and economical way that prevents a greater evil to society than that involved in the punishment itself." *Id.*

²⁹ Gourevitch, *supra* note 1, at 170.

victim groups and/or several aggressor groups that must inhabit shared spaces). In a dualist or pluralist postgenocidal society, any policy decision undertaken to respond to past violence must be sensitive to its effects on the possibility of future violence. This Part then superimposes Rwanda upon this typology and argues that Rwanda is an example of a dualist postgenocidal society. In today's Rwanda (as has been the case throughout history), Hutu and Tutsi live geographically intermingled and in close economic interdependence. They share the same language, religion, and lifestyle. This commingling between Hutu and Tutsi operates in tandem with a second characteristic of Rwanda's postgenocidal society: the very high degree of public participation and complicity in the genocide.

Part II argues that dualist postgenocidal societies, even those with very high levels of public complicity, are well-suited to benefit from restorative justice approaches. In a restorative justice paradigm, criminal violence is viewed primarily as an injury to individuals and communities, and only secondarily as an injury to the state or international order. Under this paradigm, the purpose of legal intervention is to promote peace in local communities by repairing injury, encouraging atonement, promoting rehabilitation, and, eventually, facilitating reintegration. The restorative justice literature makes an important distinction between guilt and shame. Whereas guilt arises from externally imposed judgment, shame emerges from internal acknowledgment that what one did was blameworthy. Shame may be a particularly effective reintegrative device in the close-knit living patterns of dualist postgenocidal societies. Shame also may be effective in situations such as Rwanda's where there were such high levels of complicity. Whereas criminal trials are designed to expose and punish deviant behavior, restorative justice initiatives may be more effective in promoting accountability for mass violence that was not perceived as deviant at the time and may still not be universally perceived as deviant after the fact. Instead of permitting an accused to shield his or her personal accountability behind the finding of not-guilty (or, if guilt is found, behind the assumption that the court determining guilt is politically motivated, dispensing only victor's justice), restorative approaches oblige genocidal participants to face survivors and victims' families, see the effects of their acts, and make amends for the harms. This Part operationalizes the restorative justice paradigm by considering the implementation of a truth commission and reintegrative community-based mediation³⁰ in Rwanda.

³⁰ Called *gacaca* in Rwanda. See *infra* text accompanying notes 198-210 for a detailed discussion of *gacaca*.

Part III questions the push for criminal trials by international lawyers and Rwandan leaders and considers the limits of criminal trials to redress genocidal harms and hold perpetrators accountable. These limits particularly may be pronounced in highly complicitous, dualist postgenocidal societies. This Part then gives empirical and experiential validation to the dangers of extensive retributive justice on dualist postgenocidal societies through a case-study of the effects of genocide prosecutions on Rwanda's political culture.³¹ The RPF government has chosen to allocate responsibility for the genocide through widespread imprisonment and eventual adjudication. The international community, through parallel proceedings undertaken at the ICTR, thus far has heard nine cases, some of which are now in the appeals process; a total of forty-five individuals have been indicted.³² As a result, justice as implemented in Rwanda is limited to the courtroom and is not the broader sort of justice that includes restorative initiatives. The implementation of retributive justice in Rwanda, especially at the national level, has created a sclerotic situation. Approximately 125,000 individuals—roughly ten percent of the adult male Hutu population—are incarcerated in Rwandan jails designed to hold 15,000.³³ At the present rate of national trials, it would take hundreds of years to adjudge all of these detainees.³⁴ This Part argues that present policies with their dominant focus on criminal trials, adjudication, and imprisonment may do little to promote justice or national reconciliation, or to dissuade future bouts of ethnic violence in Rwanda.

Part IV posits that postgenocidal legal initiatives can play only a small role in promoting long-term peace in Rwanda, but can present significant impediments to the emergence of this peace. Political reforms are much more determinative of the long-term sustainability of

³¹ Much of this analysis is derived from my experiences as a public defender in Rwanda with the nongovernmental organization Legal Aid Rwanda. From February to July 1998, Legal Aid Rwanda interviewed 450 prisoners awaiting trial on genocide-related charges. The interviews took place in the central prison of Kigali, where these detainees were (and almost all still are) incarcerated pending trial. In some cases, petitions were filed that resulted in release. For a broader discussion of this public defender program, the modalities of the interviews, the questions asked of detainees, and a more detailed narrative of my experiences, see Mark A. Drumbl, *Rule of Law Amid Lawlessness: Counseling the Accused in Rwanda's Domestic Genocide Trials*, 29 Colum. Hum. Rts. L. Rev. 545 (1998).

³² See International Criminal Tribunal for Rwanda (visited Aug. 16, 2000) <<http://www.icttr.org>>.

³³ See Integrated Reg'l Info. Network for Cent. & E. Afr. (IRIN-CEA), United Nations Office for the Coordination of Humanitarian Affairs (UN OCHA), Update No. 509 (Sept. 24, 1998) <<http://www.reliefweb.int/IRIN/index.phtml>>; Drumbl, *supra* note 31, at 571; Morris, *supra* note 3, at 352.

³⁴ See James C. McKinley, Jr., *Massacre Trials in Rwanda Have Courts on Overload*, N.Y. Times, Nov. 2, 1997, § 1, at 3.

the Rwandan state. These reforms must begin with the identity politics of individual Rwandans. This Part argues that Rwandans must be encouraged to change political allegiance from the individual ethnic group to civil society,³⁵ which must be viewed as an association independent of the ethnic groups that coexist in civil society. The vehicle to permit this deliberate shift in the political manifestation of personal identity is the notion of *civis*.³⁶ Individuals must primarily self-identify as Rwandan citizens and only secondarily as Hutu or Tutsi. Personal identifications in favor of citizenship eventually give rise to civic nationalism as opposed to ethnic nationalism.³⁷ Civic nationalism can accommodate all ethnic groups by forging contracts between or among groups and, in the end, can give rise to consociational democracy.³⁸ Creation of civic nationalism, ethnic contracts, and a multiethnic consociational apparatus should be a primary policy goal of any dualist or pluralist postgenocidal society, because these structures may prevent the re-emergence of genocide.

Implementation of a restorative justice model may create more fertile ground for the emergence of a sense of civic identity. Conversely, an exaggerated focus on adversarial trials may be an ineffec-

³⁵ "[C]ivil society comprehends all associational activities of nongovernmental description, including churches, schools, places of employment, clubs, and other group affiliations." Peter J. Spiro, *The Citizenship Dilemma*, 51 *Stan. L. Rev.* 597, 625 (1999) (book review).

³⁶ *Civis* is a Latin word that primarily signifies "one who is vested with the freedom and privileges of a city." *Amy v. Smith*, 11 Ky. (1 Litt.) 326, 332 (1822). The notion of *civis* is flexible insofar as one could acquire its status without having to be born in a particular place or be of a certain ethnic, demographic, or linguistic group. See *id.* The modern conception of citizenship in the United States originates from Roman law. See *id.*; see also Douglas G. Smith, *Citizenship and the Fourteenth Amendment*, 34 *San Diego L. Rev.* 681, 749-52 (1997) (discussing interplay between *civis*, slavery, civic personality, and Roman law).

³⁷ See Liah Greenfeld, *Nationalism: Five Roads to Modernity* 11 (1992) (arguing that civic nationalism embraces all citizens of country as members of nation; ethnic nationalism accepts only members of ethnic group as constitutive of nation).

³⁸ Arend Lijphart developed the concept of consociational democracy. See Arend Lijphart, *Democracy in Plural Societies: A Comparative Exploration* (1977). Consociational democracy does not require one person to be given one vote. There may not be any individual voting at all. Instead, consociational democracy is a political structure that focuses on the importance of ethnic elites adhering to a power-sharing arrangement that equitably protects all groups. This potentially has four elements: (1) guaranteed joint exercise of governmental power, (2) proportional distribution of government funds and jobs, (3) autonomy on ethnic issues, and (4) minority veto on issues of basic importance to the ethnic group. See *id.* at 25. Once consociational democracy is entrenched in the political culture, the politicization of ethnicity may diminish and political alignments may be more inclined to operate along cross-cutting cleavages. At this point, a transition to true majority rule democracy may be possible. Consociationalism is not without its critics. See, e.g., Donald Horowitz, *Ethnic Groups in Conflict* (1985) (remarking that consociational theorists overlook situational complexities and intraethnic divisions).

tive (or even dangerous) policy device in dualist postgenocidal societies because it can weaken the meaning and content of citizenship in such societies, making the ethnic contract more difficult to develop. Current developments in Rwanda appear to substantiate this conclusion. The politics of ethnicity remain intractable in Rwanda, fueled in part by the extensive incapacitation of 125,000 detainees. So long as a sense of civic identity remains undeveloped, Rwanda will remain an ethnocracy, and the prospects for a consociational political culture, not to mention eventual majoritarian democracy with protection of individual and minority rights, are dim.

Part V returns to the deontological paradigm of international criminal law and explores how, as the discourse of human rights occupies a larger place in the agora of international politics, the perception that trials are the best way to promote these rights and deal with those who abuse them has propagated. A legal superstructure, including the ICC, the ICTY, and the ICTR, has been built with little attention to developing a criminology of mass violence or to theorizing a sentencing policy for perpetrators of such violence. In the end, this Part offers a warning to international lawyers that, owing to the importance of context in redressing genocide as well as crimes against humanity, an iconoclastic international preference in favor of trials applied without sensitivity to local social geographies may yield counterproductive or suboptimal results.

This Article concludes by suggesting to policymakers and international lawyers the importance of a paradigmatically blended response to mass atrocity in Rwanda. The praxis of this diversified approach would incorporate (1) trials for notorious murderers and the leaders of the genocide, (2) community-based reintegrative shamings for all other offenders, (3) a truth commission able to obtain, in some cases perhaps even by compulsion, testimony from Rwandans as well as international officials, (4) the creation of an international fund to facilitate compensation for the victims of the genocide, and (5) elite accommodation of Hutu and Tutsi in multiethnic government and institutions channeling cross-cutting political cleavages as a prelude to eventual democracy.

I

THE SOCIAL GEOGRAPHY OF GENOCIDE

A. *A Typology of Postgenocidal Societies*

Postgenocidal societies can take several forms. The typology of postgenocidal societies suggested here is neither exhaustive nor impermeable. Many postgenocidal societies may have elements of more

than one "type." In this sense, the categories of postgenocidal societies listed below are best understood as Weberian "ideal-types."³⁹

1. *The Homogenous Postgenocidal Society*

Here, the oppressor group has succeeded in "eliminating" the victim group. This can be accomplished by wiping this group out completely, as was the case with some First Nations Peoples in Latin America⁴⁰ and North America⁴¹ in the postcolonial period. In the aftermath of the Holocaust, Germany and Austria tended somewhat toward the ideal-type of a homogenous postgenocidal society.⁴² This ideal-type also can arise when the victim group is driven out of the society and thus is "cleansed" from the territory and polity of the oppressors. The homogenous postgenocidal society also can emerge when victim groups are pushed so far to the edges of society that they no longer truly occupy any public space, but only their sharply limited private realms. Such is the case with many aboriginal communities in Australia and Canada.⁴³

³⁹ See Max Weber, *The Methodology of the Social Sciences* 43 (Edward A. Schils & Henry A. Finch trans., The Free Press 1949) (explaining that "ideal-type" is analytical construct that has evolved into basic method for comparative study, helping investigator ascertain similarities as well as deviations in concrete cases).

⁴⁰ For a discussion of genocide in Latin America, see Ward Churchill, *A Little Matter of Genocide: Holocaust and Denial in the Americas 1492 to the Present* 97-122 (1997).

⁴¹ See *id.* at 129-252 (discussion of extermination of North American Indians). Much of this extermination was inflicted intentionally with a view to wiping out the Indian tribes. One method was the deliberate spread of disease. For example, Sir Jeffrey Amherst, commander-in-chief of the British forces in colonial America from 1754 to 1763, wrote the following to the commander of the garrison at Fort Pitt: "You will do well to try to inoculate the Indians by means of blankets as well as to try every other method that can serve to extirpate this exorable race." E. Wagner Stearn & Allen E. Stearn, *The Effect of Smallpox on the Destiny of the Amerindian* 44-45 (1945); see also Eileen Choffnes, *Germ Wars: The Environmental Legacy of Biological Weapons Testing* 7 (Dec. 1999) (unpublished manuscript, on file with the *New York University Law Review*) ("U.S. government agents were alleged to have deliberately infected the Plains Indians by giving them smallpox-laden trading blankets previously infected with the deadly disease, decimating the population.").

⁴² See Minow, *supra* note 15, at 133 (stating that:

The destruction of European Jewry during World War II produced a . . . circumstance of nations with none or very few of the victimized group left. The creation of Israel could be viewed as a kind of international reparation effort; the prosecutions at Nuremberg, and later, the Eichmann trial in Israel itself, became both memorials to the dead and justifications for the reparation of new nationhood.);

see also Gourevitch, *supra* note 1, at 251 ("The justice at Nuremberg was helpfully brought by foreign conquerors, and denazification in Germany was carried out in a context where the group that had been subjected to genocide would no longer be living side by side with the killers.").

⁴³ The marginalization of Aboriginal communities was often an effect of assimilationist policies. Aboriginals were given the choice of assimilating into White society. Any refusal to do so would require Aboriginals to live on geographically isolated reservations. For a

International (or successor regime) criminal trials may be necessary to promote accountability and collective atonement in homogenous postgenocidal societies. International criminal sanction also may be particularly appropriate for situations in which nationals of an independent state inflict atrocities against nationals of another independent state or against nationals of many independent states, as for example in the Nazi Holocaust. Ethnic cleansing against Kosovar Albanians, the subsequent exodus of Serbs from Kosovo to the Federal Republic of Yugoslavia, and the designation of semi-autonomous status for Kosovo eventually may result in the creation of two separate and ethnically homogenous societies.⁴⁴ In the end, although not constituting genocide per se, the situation in Kosovo may be comparable to that in homogenous postgenocidal societies. Given the absence of domestic accountability policies in Kosovo and the ability of perpetrators to seek refuge inside the increasingly ethnically homogenous public space in which they reside, international trials may be necessary to ascertain responsibility for the Kosovo violence.

2. *The Dualist Postgenocidal Society*

Here, the oppressor group does not succeed in "cleansing" its society of the presence of the victim group. Both groups continue to coexist within the same nation-state. In a dualist postgenocidal society, the oppressor group may control power, the victim group may control power, power may be shared among victims and aggressors, or a third group (e.g., foreign governments or armies) may control power. It is also important to consider whether the group that controls power is numerically superior or economically dominant. Another relevant consideration is the geographic dispersion of group members. Patterns of settlement can affect directly the type of solution necessary to accommodate both groups within the same nation-state. One possibility is the creation of independent substates or regions, so that ethnicity and territoriality may be linked.⁴⁵ In other sit-

discussion of the past practice in Australia of these policies and their effects, see Mark Gannage, *Law Comm'n of Can., An International Perspective: A Review and Analysis of Approaches to Addressing Past Institutional or Systemic Abuse in Selected Countries* 128-31 (1998).

⁴⁴ Although the United Nations intends on repatriating several hundred, possibly thousands, of Serbs and Roma to Kosovo, this is just a tiny fraction of the estimated 200,000 who fled Kosovo. See Carlotta Gall, *New Support to Help Serbs Return to Homes in Kosovo*, N.Y. Times, May 7, 2000, § 1, at 8. For a general discussion of human rights abuses in Kosovo, see *supra* note 16.

⁴⁵ For a provocative discussion of how the physical separation of ethnic groups (even those that are deeply intermingled) is the only solution to ethnic wars, see Chaim Kaufmann, *Possible and Impossible Solutions to Ethnic Civil Wars*, in *Nationalism and Ethnic Conflict* 265 (Michael E. Brown et al. eds., 1997). For a discussion of how ethnic

uations, such as Rwanda's, ethnic groups are not divided geographically, so the creation of administrative subunits or partitioned states linked to ethnicity essentially is infeasible. No territorial solution is possible without massive displacement and reordering, which would cause tremendous insecurity.

Rwanda can be studied as a dualist postgenocidal society in which the Tutsi, the minoritarian victim group that historically has exerted significant economic influence, controls power.⁴⁶ The fundamental paradox of a dualist postgenocidal society is that people who have suffered unimaginable horrors, in Kant's phrase, "cannot avoid living side by side"⁴⁷ and somehow share the common spaces of civil society with their brutalizers. If membership in civil society involves a duty to come to terms with those with whom we live "unavoidably side by side," then Rwanda constitutes the ultimate test of this duty.

Another important variable in dualist postgenocidal societies is the level of public involvement in the genocide, in particular: (1) the extent of public participation in the infliction of genocide and (2) the level of victimization among the targets of the genocide. In situations such as Rwanda's, with many aggressors—in the hundreds of thousands, perhaps as many as a million—and with many victims—approximately 800,000 murdered, with many more individuals subject to personal injury, sexual torture, loss of property, and forced migration—what postgenocidal public policy mechanisms can promote some sense of accountability?⁴⁸ Is it possible to try so many people?⁴⁹ If so, what sort of trials are these? If it is not possible to try all who were involved, is there a reasonable way for the postgenocidal society to select those it chooses to try? When there is such broad victimiza-

nationalism in countries with highly intermingled ethnic groups may lead more readily to genocide than in countries where groups are territorially based, see Michael E. Brown, *The Causes of Internal Conflict: An Overview*, in *Nationalism and Ethnic Conflict*, supra, at 3, 7; see also Kaufmann, supra, at 277 ("The severity of ethnic security dilemmas is greatest when demography is most intermixed, weakest when community settlements are most separate.").

⁴⁶ This is not to deny that a third ethnic group—the Twa—also plays a role in Rwandan society. As the Twa constitute less than one percent of the Rwandan population, this role is very limited. See Kuperman, supra note 1, at 95.

⁴⁷ Immanuel Kant, *The Metaphysics of Morals* 86 (Mary Gregor ed. & trans., Cambridge Univ. Press 1996).

⁴⁸ See discussion *infra* Part II.

⁴⁹ See Neil Kritz, *The Dilemmas of Transitional Justice*, in 2 *Transitional Justice*, supra note 14, at xxix, xxxiii (stating that:

In Rwanda . . . if the new government were to undertake prosecution of every person who participated in [the] heinous butchery . . . [this could create] a situation that would be wholly unmanageable and extremely destabilizing to the transition. Moving the nation forward toward both justice and reconciliation plainly precludes an absolutist approach to the chain of responsibility.).

tion, might it be more important to promote reparations to victims than accountability for offenders? Implementing policy responses, especially from distant foreign capitals, without these sorts of inquiries may lead to short-sighted, unproductive results.

In the end, the central question for dualist postgenocidal societies is what sorts of institutional structures can be designed to accommodate both groups, allocate responsibility for wrongdoing, and heal the scars of victims.⁵⁰ The success of these governance regimes is a key factor in determining whether the society remains postgenocidal or intergenocidal. Dualist postgenocidal societies always are overshadowed by the possibility that genocide may reoccur. As a result, rule-of-law initiatives in dualist postgenocidal societies should be particularly sensitive to the need to prevent future violence and not just punish past violence. Indeed, difficult situations may arise in which preventing future violence may require moderation in punishing past violence.⁵¹

3. *The Pluralist Postgenocidal Society*

Here, the oppressor group continues to coexist with a victim group and a third group; or there are several victims or oppressors who must coexist within the same territory or polity. Pluralist postgenocidal societies, like their dualist counterparts, need to be especially sensitive to the consequences of implementing the rule of law.⁵²

Recent examples of such pluralist situations have occurred not only subsequent to genocide, but also subsequent to ethnically or racially motivated crimes against humanity such as persecution or apartheid.⁵³ These latter examples are germane to the study of

⁵⁰ For a provocative discussion of how the pursuit of a democratic ideal and uncompromising justice in Rwanda from 1992 to 1994 may have induced the genocide, see Jack Snyder & Karen Ballentine, *Nationalism and the Marketplace of Ideas*, in *Nationalism and Ethnic Conflict*, supra note 45, at 61, 87-89.

⁵¹ For a broader discussion of how prosecutions for human rights violations should be grounded on a theory that emphasizes the preventive as opposed to the retributive, see generally Nino, supra note 19.

⁵² See Wilhelm Verwoerd, *Justice After Apartheid? Reflections on the South African TRC*, in *When Sorry Isn't Enough* 479, 479-82 (Roy L. Brooks ed., 1999) (arguing that amnesty granted by South Africa Truth and Reconciliation Commission (TRC) presents intense conflict with retributive justice, but that in context of fragile transition to stable democracy it may be right thing to do, especially when combined with public shaming and institutional restructuring).

⁵³ It is important, of course, to distinguish crimes against humanity from genocide. Genocide consists of killing or injuring committed with the intent to destroy, in whole or in part, a national, ethnic, racial, or religious group. See Genocide Convention, supra note 22, art. 2, 78 U.N.T.S. at 280. Crimes against humanity involve knowingly committing, "as part of a widespread or systematic attack directed against any civilian population," inter alia, murder, enslavement, extermination, deportation, torture, or persecution. See Rome

postgenocidal reconciliation insofar as the motivation behind the violence was not so much ideological (as, for example, in state-sponsored crimes against humanity in Chile and Argentina), as it was ethnic, religious, or racial hatred.⁵⁴

One example is Iraq, where violence among Kurds, Shiite Muslims, and Sunni Muslims is ongoing; there is evidence that the Sunni Muslim Iraqi leadership used biological weapons against the Kurdish population of northern Iraq.⁵⁵ Bosnia is another compelling example of a pluralist society recovering from mass atrocity. There, Serbs, Croats, and Muslims were involved in ethnically and religiously driven intergroup conflict. This conflict resulted in the perpetration of war crimes, crimes against humanity, and genocide.⁵⁶ Although the preponderance of the violence was directed by Serbs against Muslims, the docket of the ICTY includes cases of Croat violence against Muslims,

Statute, *supra* note 11, art. 7. Consequently, the principal difference between genocide and the independent crimes clustered as crimes against humanity is the mental element. Nonetheless, it appears there are variations between the *mens rea* requirements for various crimes against humanity. For example, it has been held that the *mens rea* requirement for persecution is higher than for "ordinary" crimes against humanity. See *Prosecutor v. Kupreskic*, Case No. IT-95-16, ¶¶ 634-36 (Int'l Crim. Trib. for Yugo. Jan. 14, 2000), available at <<http://www.un.org/icty/kupreskic/trialc2/judgement/index.htm>>. In fact, the ICTY has placed persecution on a continuum with genocide (remarking that the two crimes belong to the "same *genus*"), even though, ultimately, the *mens rea* requirement for persecution is lower than that for genocide. See *id.* at ¶ 636. This means that models of social reconstruction following persecution or crimes against humanity in which there is an element of ethnic, religious, or racial animus (e.g., South Africa) can serve properly as precedents to situations closer to the genocide end of the continuum.

⁵⁴ Ethnic conflicts differ from ideological conflicts. "Ethnic conflicts are disputes between communities which see themselves as having distinct heritages, over the power relationship between the communities" Kaufmann, *supra* note 45, at 267. Ideological conflicts, on the other hand, are "contests between factions within the same community over how that community should be governed." *Id.* Mass atrocity that is ideologically motivated may require different legal responses than mass atrocity that is ethnically motivated.

⁵⁵ See Ethan Bronner & Youssef M. Ibrahim, *Battles Joined—A Country at War, Both Abroad and at Home: A Tough New Goal in Iraq*, N.Y. Times, Dec. 20, 1998, § 4 (Week in Review), at 1; see also Andrew Cockburn & Patrick Cockburn, *Out of the Ashes: The Resurrection of Saddam Hussein* 12, 49, 92 (1999) (discussing Hussein's use of biological weapons against Kurds). Establishing an intent to wipe out this population would prove that the crime of genocide had been committed.

⁵⁶ Regarding the genocidal nature of the Balkans violence, see Ruti Teitel, *Bringing the Messiah Through the Law, in Human Rights in Political Transitions: Gettysburg to Bosnia* 177, 184 (Carla Hesse & Robert Post eds., 1999) ("The distinctive patterns of Bosnian Serb ethnic cleansing, massacres, and systematic rapes displayed a genocidal intent to destroy ethnic and religious groups."); see also Letter from Boutros Boutros-Ghali, Secretary-General, United Nations, to the President of the Security Council, Annex: Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), at 37-43, ¶¶ 151-82, U.N. Doc. S/1994/674 (May 27, 1994) (surveying human rights abuses including mass murder, torture, and rape committed in region of Bosnia, and concluding that they would be found to constitute crimes against humanity and probably genocide).

Muslim violence against Serbs, and Croat violence against Serbs.⁵⁷ Today, Bosnia is still divided deeply, even though it is governed by an ethnically shared administrative state largely supported by aid from the West.⁵⁸ The conduct and treatment of the Roma (European Gypsies) in the Balkans also adds an additional pluralist element to these conflicts.⁵⁹ South Africa is another example of a pluralist society in which numerous groups were victims and, to varying extents, oppressors. The violence operated along racial, ideological, and ethnic lines.⁶⁰

B. Rwanda as a Highly Complicitous, Dualist Postgenocidal Society

Rwanda fits comfortably in the dualist category of the proposed typology of postgenocidal societies. In the Rwandan case, the dualist postgenocidal society's characteristic that victims and aggressors must live "unavoidably side by side," sharing public spaces and common neighborhoods, is particularly pronounced. A second important characteristic of Rwanda's postgenocidal society is the very high level of public participation and complicity in the genocide. How can this complicity be accounted for without upsetting the political balance between Hutu and Tutsi necessary for peace in Rwanda?

1. Ethnic Integration and Division

In Rwanda, all common spaces are shared by individuals who survived the genocide, who lost loved ones during the genocide, who sup-

⁵⁷ For a discussion of these cases, see Drumbl, *supra* note 16, at 262-72.

⁵⁸ See Jane Perlez, *Bosnia Has Achieved Peace but Not Unity, a Study Finds*, N.Y. Times, Oct. 31, 1999, § 1, at 12 (discussing divisiveness in postwar Bosnia).

⁵⁹ See, e.g., Erlanger, *supra* note 16, § 1, at 1 (describing perpetrators of violence in Kosovo as "police, army and various groups of paramilitaries, as well as local Serbs and, to a lesser extent, Gypsies, who were described as looting and removing dead bodies from the streets" (internal quotation marks omitted)). Now that many ethnic Albanians have returned to Kosovo, evidence is emerging of "continuing horrors carried out by Kosovo Albanians after the war. Those are often organized by the former Kosovo Liberation Army . . . and are generally aimed at non-Albanians [mostly Serbs and Roma] with the intention of driving them out of the province." *Id.*

⁶⁰ See Tina Rosenberg, *Confronting the Painful Past*, Afterword to Martin Meredith, *Coming to Terms: South Africa's Search for Truth* 325, 352 (1999). Today, as throughout South African history, political divisions among Black South Africans retain an important ethnic base. For example, the Inkatha Freedom Party is Zulu-based. See Richard L. Sklar, *African Politics: The Next Generation, in State, Conflict, and Democracy in Africa*, *supra* note 5, at 165, 168 (discussing mixed-ethnicity governments); see also Marina Ottaway, *Ethnic Politics in Africa: Change and Continuity, in State, Conflict, and Democracy in Africa*, *supra* note 5, at 299, 302 ("For many Zulus . . . ethnic identity has become all-important. In the elections of April 1994 . . . over two million adult South Africans showed that they identified themselves as Zulus by casting their vote for the Inkatha Freedom Party (IFP) and its Zulu nationalist platform.").

ported the genocide, and who actually inflicted the horrors.⁶¹ Propinquity postgenocide is not surprising given the extent of propinquity pregenocide. Tutsi and Hutu are deeply intermingled at a social level, often through intermarriage, mixed family lineages, and local clan groups.⁶² These relationships quickly became apparent to us when we began our work as public defenders in Rwanda.⁶³ Our interpreters (mostly Tutsi) regularly knew the prisoners (overwhelmingly Hutu) who were our clients.⁶⁴ They typically had made acquaintance in university, in the local *commune*, or through the families of spouses and relatives.⁶⁵

The Rwandan conflict is not a conflict between states nor, as may be the case in the former Yugoslavia, between historically distinct groups artificially lumped together into one nation-state.⁶⁶ This is civil unrest between two historically symbiotic groups. From an historical and anthropological perspective, ethnic cleavages in Rwanda are less pronounced than in other regions where genocidal violence has taken hold. In fact, "ethnographers and historians have lately come to agree that Hutus and Tutsis cannot properly be called distinct ethnic groups."⁶⁷ Both groups together comprise the Banyarwanda ("people of Rwandan extraction").⁶⁸ They speak the same language,

⁶¹ See Prunier, *supra* note 1, at 358 ("Many survivors are living today in Rwanda side by side with people whom they know have taken part in the genocide."); see also Gourevitch, *supra* note 1, at 302 (noting intermingling in tiny communities of people who slaughtered with those who survived slaughter).

⁶² See Ian Fisher, *If Only the Problem Were as Easy as Old Hatreds*, N.Y. Times, Jan. 2, 2000, § 4 (Week in Review), at 10 (discussing relations between Hutu and Tutsi both before and after European colonization).

⁶³ See Drumbl, *supra* note 31, at 619 n.271 (describing trial where mixed-race interpreter recognized Hutu defendant).

⁶⁴ See *id.*

⁶⁵ See *id.* (noting that defendant and interpreter went to university together).

⁶⁶ This is not to deny that tight linkages exist between ethnic groups in the former Yugoslavia, especially in Bosnia-Herzegovina/Republika Srpska. See, e.g., Michael P. Scharf, *Balkan Justice: The Story Behind the First International War Crimes Trial Since Nuremberg* 96 (1997) (discussing "fury of the neighbor-on-neighbor violence" as "one of the mysteries of the Bosnian conflict"). However, these linkages are not as tight as in Rwanda.

⁶⁷ Gourevitch, *supra* note 1, at 48. In the initial prosecutions at the ICTR, it was argued that the violence between Hutu and Tutsi could not amount to genocide as neither group was an "ethnic" group under the Statute of the ICTR (which incorporates the definition contained in the Genocide Convention). The ICTR dispelled this argument, holding that the shared characteristics between Hutu and Tutsi did not preclude the finding that the intentions of the Hutu regime were to wipe out the Tutsi, who were found to constitute an ethnic group per the definitions of the Genocide Convention. See *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, ¶ 116 (Int'l Crim. Trib. for Rwanda Sept. 2, 1998), available at <<http://www.un.org/ict/english/judgements/akayesu.html>>.

⁶⁸ See Prunier, *supra* note 1, at 400.

Kinyarwanda, without differences in dialect or vocabulary.⁶⁹ Similar personal names are given indifferently to Tutsi or Hutu.⁷⁰ Both groups share common religions.⁷¹ Even lifestyle choices, eating habits, music, art, and culture are deeply intertwined.⁷² Hutu and Tutsi “attended the same schools and churches, worked in the same offices, and drank in the same bars.”⁷³ They “celebrated the same heroes: even during the genocide, the killers and their intended victims sang of some of the same leaders from the Rwandan past.”⁷⁴

Historically, both groups were socially fluid, with intrasocietal divisions operating more along clan (*ubwoko*) lines than “ethnic” lines.⁷⁵ The *ubwoko* comprise Tutsi and Hutu together.⁷⁶ As Gourevitch notes, Hutu and Tutsi “intermarried, and lived intermingled, without territorial distinctions, on the same hills, sharing the same social and political culture.”⁷⁷ And the public spaces they share are very small. Rwanda is a tiny country (the size of Connecticut) whose population density is extremely high.⁷⁸ There is no possibility for a “Hutuland” or “Tutsiland” as there have never been separate dwelling patterns.⁷⁹

Notwithstanding the proximity and fluidity between Hutu and Tutsi, the propaganda of the Habyarimana government and its genocidal successor induced many Hutu to believe that the Tutsi were about to attack them, and that initiating a genocide was actually a preemptive strike.⁸⁰ More insidious is the fact that many Hutu also came to believe that the Tutsi were “interlopers” from northern Africa,⁸¹ ex-

⁶⁹ See *id.* at 400-07 (providing glossary of Rwandan terms).

⁷⁰ See *id.*

⁷¹ See Des Forges, *supra* note 1, at 31; Gourevitch, *supra* note 1, at 47; Prunier, *supra* note 1, at 15.

⁷² Cf. Drumbi, *supra* note 31, at 561 (noting that Hutu and Tutsi lived side by side).

⁷³ Des Forges, *supra* note 1, at 4.

⁷⁴ *Id.* at 31.

⁷⁵ See *id.*; Prunier, *supra* note 1, at 15, 370.

⁷⁶ See Prunier, *supra* note 1, at 15, 370.

⁷⁷ Gourevitch, *supra* note 1, at 47.

⁷⁸ See Prunier, *supra* note 1, at 1, 4 (stating that Rwanda’s area is 26,338 square kilometers while its population in 1989 was 7,128,000 and growing rapidly).

⁷⁹ See *id.* at 5, 249. This eliminates the merits of partition of territory as a solution to the ethnic violence. By way of contrast, it is interesting to note that a political solution proffered for the mass violence in the former Yugoslavia is the creation of separate ethnically based territories; the Rambouillet Peace Accords address the plight of the Kosovar Albanians by creating an autonomous Republic of Kosovo, and the Dayton Accords create political subdivisions within Bosnia and Herzegovina along Serb, Croat, and Muslim lines. This simply is not an option in Rwanda because of the geographical intermingling of the Hutu and Tutsi.

⁸⁰ See Des Forges, *supra* note 1, at 256-57.

⁸¹ See Human Rights Watch, *supra* note 5, at 7 (reporting how Hutu were incited to send Tutsi back to northern Africa through rivers that fed into Nile). Propaganda, which

isting “outside the human race.”⁸² But most of these beliefs were recent. After all, “until . . . 1959 there had never been systematic political violence recorded between Hutus and Tutsis—anywhere.”⁸³ But by 1993 this propaganda succeeded in creating a ferocious acrimony between Hutu and Tutsi. This acrimony was deeper and more bitter than anything previously known.⁸⁴ It gave rise to a situation where Hutu and Tutsi viewed each other as oppositional ethnic groups and “the idea of a collective national identity was steadily laid to waste.”⁸⁵

Ultimately, it was this construction of ethnicity that lay at the root of the violence.⁸⁶ Blame for this construction lies not only with the Habyarimana regime and its genocidal successor. A good part of the charged nature of the constructs of Hutu and Tutsi can be traced to the colonial era. Belgian colonizers in particular were fascinated with the purported physical differences between Tutsi and Hutu.⁸⁷ The Belgians believed these apparent physical distinctions represented anthropological differences related to group ancestry.⁸⁸ From this grew the constructed nature of ethnicity in Rwanda. The construction was consolidated by the introduction in 1933 of mandatory

convinced so many Hutu that the violence was part of a just war, had to be particularly intense as “shattering bonds between Hutu and Tutsi was not easy.” Des Forges, *supra* note 1, at 4.

⁸² David Chandler, *Voices from S-21: Terror and History in Pol Pot's Secret Prison* 146, 151 (1999) (using this phrase to describe perceptions Nazi and Cambodian jailers had of their prisoners and concluding that people are more ready to inflict egregious human rights abuses on others once people think of others as subhuman, nonhuman, or animal). So long as there is “otherness,” there is a pronounced human capacity to injure. See generally Elaine Scarry, *The Difficulty of Imagining Other Persons*, in *Human Rights in Political Transitions*, *supra* note 56, at 277 (connecting willingness to hurt foreigners with difficulty of fully imagining others).

⁸³ Gourevitch, *supra* note 1, at 59. This is an important fact to bear in mind “the next time you hear a story like the one that ran on the front page of *The New York Times* in October of 1997, reporting on the age-old animosity between the Tutsi and Hutu ethnic groups.” *Id.* (internal quotation marks omitted); see also Prunier, *supra* note 1, at 39 (“[T]here is no trace in [Rwanda's] precolonial history of systematic violence between Tutsi and Hutu as such.”).

⁸⁴ In fact, Longman reports that, in interviews conducted as recently as the early 1990s, “most ordinary Hutu . . . felt no innate hatred of their Tutsi neighbors.” Longman, *supra* note 5, at 351. This changed very quickly.

⁸⁵ Gourevitch, *supra* note 1, at 57-58.

⁸⁶ See *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, ¶¶ 81-83 (Int'l Crim. Trib. for Rwanda Sept. 2, 1998), available at <<http://www.un.org/ict/english/judgements/akayesu.html>> (taking judicial notice that notions of ethnicity can be constructed).

⁸⁷ See Prunier, *supra* note 1, at 5-9 (quoting Belgian and other European colonists' descriptions of physical differences between Tutsi and Hutu); see also Fisher, *supra* note 62, at 10 (“European colonists . . . imposed their own ideas about race and superiority, and tended to put one group officially in power over the others. They preferred the Tutsi, who were viewed as taller, thinner, smarter (and thus more like the Europeans).”).

⁸⁸ See Des Forges, *supra* note 1, at 36.

“‘ethnic’ identity cards,” which each Rwandan was obliged to carry.⁸⁹ These cards made the lines between Tutsi and Hutu official and impenetrable.⁹⁰ The Government of National Unity finally abolished the identity cards, but the ethnic categories remain: In fact, Hutu and Tutsi today continue to view themselves, and each other, as ethnic groups.⁹¹ The vigorous implementation of criminal prosecutions in postgenocidal Rwanda, together with the ethnocratic nature of the RPF government, contribute to the perpetuation of the importance of ethnicity.

2. *Broad Complicity*

The Rwandan genocide was organized by the Rwandan government, supported by local authorities, and undertaken by ordinary Rwandan men and women. The violence did not arise out of anarchic chaos. Nor did it emerge from a general breakdown of norms governing group and individual behavior.⁹² The violence, in fact, was largely driven by a shared social norm: “The government, and an astounding number of its subjects, imagined that by exterminating the Tutsi people they could make the world a better place, and the mass killing had followed.”⁹³ While they killed, the assailants often chanted:

Our enemy is one
We know him
It is the Tutsi.⁹⁴

These killings were not depersonalized through physical distance or the use of technology. Victims were butchered with machetes

⁸⁹ See Gourevitch, *supra* note 1, at 56-57; Human Rights Watch, *supra* note 5, at 1-2 (describing system of identity cards).

⁹⁰ See Alain Destexhe, *Rwanda and Genocide in the Twentieth Century* 39-47 (Alison Marschner trans., N.Y. Univ. Press 1995) (detailing imposition of identity categories and concluding that identity cards were basic instrument of genocide). In the early days of colonialism, the Belgians favored the Tutsi, elevating them to important positions within the colonial state. Closer to the time of independence, the Belgians promoted Hutu to important positions, ostensibly to prepare the nation for the majority-based democratic society that would emerge after independence.

⁹¹ See Gourevitch, *supra* note 1, at 223 (“But even without identity cards . . . [i]n the aftermath of the genocide, the ethnic categories had become more meaningful and more charged than ever before.”).

⁹² Cf. Emile Durkheim, *Suicide: A Study in Sociology* 209 (George Simpson ed., John A. Spaulding & George Simpson trans., The Free Press 1951) (noting in analysis of suicide that “[w]hen society is strongly integrated, it holds individuals under its control”). Durkheim called this breakdown of norms *anomie*.

⁹³ Gourevitch, *supra* note 1, at 6.

⁹⁴ Des Forges, *supra* note 1, at 203; see also *id.* at 260 (noting that Hutu would “return[] from raids in Kibuye singing that the only enemy was the Tutsi”).

(*panga*), sticks, tools, and large clubs studded with nails (*masu*).⁹⁵ This meant that the slaughters were “not in any way clean or surgical. The use of machetes often resulted in a long and painful agony”⁹⁶ For the aggressors, the killings were labor-intensive, exhausting work.⁹⁷ Notwithstanding the “low-tech” nature of the massacres, “[t]he dead of Rwanda accumulated at nearly three times the rate of Jewish dead during the Holocaust. It was the most efficient mass killing since the atomic bombings of Hiroshima and Nagasaki.”⁹⁸ In this sense, the genocide was well organized, coordinated, and administered; it was anything but spontaneous and random.⁹⁹

So many people were killed principally because there were so many killers. Significant numbers of Rwandans perpetrated the bloodbath:

To capture the uniqueness of the Rwandan crime, one must imagine that nearly the entirety of the German population participated in the liquidation of the Jews, or that the Russian masses responded to Stalin’s war against the kulaks, armed themselves with picks and shovels and massacred the kulaks in village after village, instead of merely watching them being herded off to their eventual extermination.¹⁰⁰

Individual involvement with the genocide occurred at six levels: (1) zealous participation, (2) “following orders”, (3) participation under duress, (4) aiding and abetting, (5) passive acquiescence, and (6) active opposition. The Rwandan genocide is notable for the fact that the ranks of categories (1), (4) and (5) were particularly numerous. As for category (1), hundreds of thousands of Hutu participated in the massacres,¹⁰¹ often with great zeal. Prunier estimates that the daily killing rate in the Rwandan genocide was five times higher than in the Nazi Holocaust.¹⁰² The most eager participants included the

⁹⁵ See Morris, *supra* note 3, at 350.

⁹⁶ Prunier, *supra* note 1, at 255.

⁹⁷ See Aryeh Neier, *Rethinking Truth, Justice, and Guilt After Bosnia and Rwanda*, in *Human Rights in Political Transitions*, *supra* note 56, at 39, 48 (describing vast numbers and gruesome nature of killings).

⁹⁸ Gourevitch, *supra* note 1, at 4. “That’s three hundred and thirty-three and a third murders an hour—or five and a half lives terminated every minute.” *Id.* at 133. Of course, to these numbers have to be added the “uncounted legions who were maimed but did not die of their wounds, and the systematic and serial rape of Tutsi women,” *id.*, in order to fully grasp the numbers of aggressive participants and victims in the genocide.

⁹⁹ See *id.* at 95 (noting well-ordered nature of genocide).

¹⁰⁰ Wole Soyinka, *Hearts of Darkness*, *N.Y. Times*, Oct. 4, 1998, § 7 (Book Review), at 11.

¹⁰¹ See Michael P. Scharf, *The Case for a Permanent International Truth Commission*, 7 *Duke J. Comp. & Int’l L.* 375, 399 n.131 (1997).

¹⁰² Prunier, *supra* note 1, at 261. Under the Nazi regime, there was evidence that complicity was sufficiently extensive so as to cloud judgment about what was right and wrong.

armed forces, local police (*gendarmes*), civil servants, local authorities, professional groups such as physicians and teachers, and the *Interahamwe* and *Impuzamugambi* militias.¹⁰³ Though voluntary, recruitment into the militias was pursued enthusiastically by many young Rwandan males.¹⁰⁴ During the genocide some 50,000 individuals were active militia members.¹⁰⁵ Teachers were particularly involved in the genocidal effort. "Schools could not be places of refuge [because] Hutu teachers commonly denounced their Tutsi pupils to the militia or even directly killed them themselves."¹⁰⁶ All things considered, however, "the main agents of the genocide were the ordinary peasants themselves. This is . . . borne out by the majority of the survivors' stories."¹⁰⁷

The extent to which many Hutu peasants may have been coerced into participating in the genocide, and the extent to which many local officials, militia, and police were simply following orders, is difficult to ascertain precisely. Some reports coming from Rwanda underscore that coercion was in fact commonplace.¹⁰⁸ Other reports are more muted regarding the existence of coercion. Gourevitch, for example,

See Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* 26-27 (Penguin Books 1994) (1964) ("The[] case rested on the assumption that the defendant, like all 'normal persons,' must have been aware of the criminal nature of his acts, and Eichmann was indeed normal insofar as he was 'no exception within the Nazi regime.' However, under the conditions of the Third Reich only 'exceptions' could be expected to react 'normally.'"). One but can imagine how warped the sense of right and wrong was in genocidal Rwanda.

¹⁰³ See Des Forges, *supra* note 1, at 223-48; Prunier, *supra* note 1, at 242-48, 254. As for civil servants, Prunier notes that their participation in the genocide will cause "immense problems for any future government which has to run a country where almost the entire local civil service should be charged with crimes against humanity." *Id.* at 244-45.

¹⁰⁴ See Des Forges, *supra* note 1, at 519-20; Prunier, *supra* note 1, at 243-44.

¹⁰⁵ See Prunier, *supra* note 1, at 243.

¹⁰⁶ *Id.* at 254.

¹⁰⁷ *Id.* at 247; see also Des Forges, *supra* note 1, at 8 ("[A]fter the military had launched attacks with devastating effect on masses of unarmed Tutsi . . . civilian assailants, armed with such weapons as machetes, hammers, and clubs, finished the slaughter.").

¹⁰⁸ See Des Forges, *supra* note 1, at 2, 11, 221 (emphasizing that many participants were recruited for genocidal cause by threats, incentives, coercion, and intimidation); see also Kuperman, *supra* note 1, at 96, 111, 114 (discussing coercion and bribery of politicians and soldiers). Even though Human Rights Watch emphasizes the importance of coercion, it also concludes that "the killers . . . were people who chose to do evil They attacked Tutsi frequently and until the very end, without doubt or remorse. Many made their victims suffer horribly and enjoyed doing so." Des Forges, *supra* note 1, at 2. In fact, although Human Rights Watch seeks to exonerate the collective, most of the background information it carefully provides appears to substantiate the point that there was broad collective complicity among Hutu in the genocide. Part of the reason Human Rights Watch may try to diminish wide-scale involvement in the genocide notwithstanding the evidence is that it may be motivated ideologically by precisely such a goal. See *id.* at 736 ("Establishing the responsibility of *individual* Hutu is also the only way to diminish the ascription of *collective* guilt to all Hutu.").

interviewed a genocide aggressor who blamed his and others' involvement in the genocide on the state's command to "kill or be killed."¹⁰⁹ Yet, this individual "could not recall any specific cases of Hutus who had been executed simply for declining to kill."¹¹⁰ Perhaps what induced so many individuals to participate was not coercion, but rather genuine support of the idea that the Tutsi had to be eliminated, together with the pursuit of solidarity with others in attaining this goal. This belief that one was doing right by killing might explain why so many of the killings were so brutal.¹¹¹ It might also explain the frequent commission even by ordinary Rwandans of torture and mutilation,¹¹² sexual assault,¹¹³ infanticide,¹¹⁴ and disfigurement of corpses.¹¹⁵ When so much of the violence is extremely gratuitous and obscenely brutal, is there any conclusion but that the participants and the witnesses thereto were supportive of the cause?

Only few Hutu actively opposed the extirpation of the Tutsi. Many of the 10,000 to 30,000 Hutu who were massacred during the genocide were killed not because they opposed the genocide per se, but because they were political opponents of the genocidal regime who challenged the grip of that regime on power without necessarily contesting its anti-Tutsi fanaticism.¹¹⁶ By and large, the campaign against the Tutsi was a "strong bond" among the Hutu political parties.¹¹⁷ Rwanda is truly a situation where "it took a brave man indeed

¹⁰⁹ Gourevitch, *supra* note 1, at 307.

¹¹⁰ *Id.*

¹¹¹ For case studies of such incidents, see Human Rights Watch/Africa et al., *Shattered Lives: Sexual Violence During the Rwandan Genocide and Its Aftermath* 42-68 (1996); see also Prunier, *supra* note 1, at 255-57 (describing types of brutal acts committed).

¹¹² See Des Forges, *supra* note 1, at 215 ("Assailants sometimes mutilated women in the course of a rape or before killing them. They cut off breasts, punctured the vagina with spears, arrows, or pointed sticks, or cut off or disfigured body parts . . ."); *id.* at 216 (discussing torture); Prunier, *supra* note 1, at 256 ("Mutilations were common, with breasts and penises often being chopped off.").

¹¹³ See Prunier, *supra* note 1, at 256 ("Sexual abuse of women was common and they were often brutally killed after being raped.").

¹¹⁴ See *id.* ("[B]abies were often smashed against a rock or thrown alive into pit latrines."); see also Des Forges, *supra* note 1, at 216 (recounting instance of infanticide).

¹¹⁵ See No End in Sight, *Economist*, Apr. 23, 1994, at 44, 44 ("At many massacre sites, corpses, many of them those of children, have been methodically dismembered and the body parts stacked neatly in separate piles."). In the trial of Albert Musema (a Hutu businessman) at the ICTR, evidence was adduced that Musema murdered a pregnant woman while remarking that he "wanted to see what the womb of a Tutsi woman looked like." *Internews, ICTR/Genocide Trial of Tea Factory Director Began Monday* (Jan. 25, 1998) (on file with the *New York University Law Review*).

¹¹⁶ See Drumbl, *supra* note 31, at 560, 579 (noting that many Hutu opponents did not contest anti-Tutsi policies).

¹¹⁷ Des Forges, *supra* note 1, at 13; see also Kuperman, *supra* note 1, at 112 (noting severe ethnic polarization due to propaganda).

to abandon solidarity with the crowd and refuse to go along.”¹¹⁸ It may be that there was little courage in Rwanda simply because most people were not actually opposed to the genocide.¹¹⁹ To the contrary, many people may have believed that killing the Tutsi was a civic duty—in other words, nothing less than the right thing to do.¹²⁰ Human Rights Watch reports:

Survivors and other witnesses from many parts of Rwanda speak of the killers as approaching the destruction of the crowds at a church, hospital, or hilltop [as] a piece of work to be kept at until finished. One compared killers to government workers putting in a day at the office; another likened them to farmers spending a day at labor. In case after case, killers quit at day’s end, to go home and feast on food and drink they had pillaged or been given, ready to come back the next morning, rested and fit for “work.” . . . If killers were too tired to complete the “work” on any given day, they assured the Tutsi that they would come back.¹²¹

In addition to those who could be categorized as zealous participants, many Hutu notified authorities of the location of Tutsi and dissident Hutu and, consequently, participated as accomplices in the killings. Detailed lists of the addresses and location of Tutsi residents were prepared.¹²² This information facilitated the rapidity and scale of the genocide and permitted killers to know which Tutsi had fled their homes.¹²³ Escapees were then hunted in fields, woods, and groves.¹²⁴ Many Hutu also manned barricades that were set up throughout the country to prevent Tutsi from escaping their home communities.¹²⁵ Others also pillaged, stole, ransacked, and appropriated property from homes in which Tutsi had been killed or from

¹¹⁸ Prunier, *supra* note 1, at 246.

¹¹⁹ Although some Tutsi were “saved” through Hutu intervention, many of these “saved” Tutsi were not spared because of intellectual or structural opposition to genocide, but rather because of idiosyncratic convenience. See Gourevitch, *supra* note 1, at 130 (stating that:

Many people who participated in the killing—as public officials, as soldiers or militia members, or as ordinary citizen butchers—also protected some Tutsis, whether out of personal sympathy or for financial or sexual profit. It was not uncommon for a man or a woman who regularly went forth to kill to keep a few favorite Tutsis hidden in his or her home.).

¹²⁰ For a description of slaughter as civic duty in Butare *préfecture*, see Des Forges, *supra* note 1, at 515.

¹²¹ *Id.* at 212.

¹²² See Prunier, *supra* note 1, at 246 (describing systematic cataloguing of Tutsi residents slated for death).

¹²³ See, e.g., Des Forges, *supra* note 1, at 472 (recounting how systematic slaughter in one town was so facilitated).

¹²⁴ See *id.* at 325, 545-53 (providing examples); see also Longman, *supra* note 5, at 353 (discussing effort to seek out and kill every last Tutsi).

¹²⁵ See Des Forges, *supra* note 1, at 520 (providing examples).

which they had fled.¹²⁶ Categories (1) and (4) combined (constituting direct and indirect supporters of the genocide) cover perhaps as many as a million individuals.¹²⁷ This is a mind-boggling number in a country whose population was estimated at between seven and eight million.¹²⁸ The indirect or direct participation of so many people in the Rwandan genocide blurs the line between guilt and innocence. Gourevitch records the following statement from a Zairean priest commenting on Tutsi-Hutu violence: "Everybody in the village was an accomplice, by silence or by looting, and it is impossible to divide the responsibility . . . [O]ne can't say all of them are guilty, but to sort it out is impossible."¹²⁹

An even larger number of people acquiesced in the face of genocide. In Rwanda, the killings were committed publicly and were known to all.¹³⁰ They "did not take place at out-of-the-way sites . . . [but] throughout the country: in virtually every village and in almost every urban neighborhood."¹³¹ As Prunier notes,

[M]any thousands of bodies [began] appearing in a very short time. In Kigali . . . teams had to be organised to pick them up for fear of infection. Given the magnitude of the task, they had to resort to using garbage trucks and by mid-May some 60,000 bodies had been picked up and summarily buried. In the hills, the bodies of victims often remained where they had fallen . . . and were often piled to a height of four or five feet. . . . Some rivers . . . were filled with bodies and this in the end seriously polluted Lake Victoria . . .¹³²

The public nature of the atrocity demonstrates how a very large group of Rwandans was silent—and in a sense complicit—in the face of and with full knowledge of the genocide.¹³³ One reason there was such broad complicity is because organized elements of Rwandan civil society, including large associational groups such as religious, medical,

¹²⁶ See Prunier, *supra* note 1, at 248; see also Des Forges, *supra* note 1, at 11, 261 (discussing participation of poor in killings and lootings); Prunier, *supra* note 1, at 4, 248 (attributing greed and economic survival as one of motives for both killings and subsequent looting).

¹²⁷ See Gourevitch, *supra* note 1, at 244 (citing statement by Paul Kagame, Vice-President of Rwanda and Minister of Defense).

¹²⁸ See Neier, *supra* note 97, at 48.

¹²⁹ Gourevitch, *supra* note 1, at 279 (commenting on ongoing Hutu-Tutsi violence in eastern Congo but referring back to accountability for Rwandan genocide).

¹³⁰ See Des Forges, *supra* note 1, at 770 (discussing broad advertisement of killings).

¹³¹ Neier, *supra* note 97, at 48.

¹³² Prunier, *supra* note 1, at 255 (footnotes omitted); see also Des Forges, *supra* note 1, at 485 (commenting on fact that in Butare *préfecture* largest numbers of Tutsi were killed in massacres at churches, public buildings, and other gathering places).

¹³³ See Drumbi, *supra* note 15, at 289-90 (discussing complicity and genocide). This raises a broader, and more difficult, question: At what point does complicity become indirect participation?

and business organizations, actively supported the genocide.¹³⁴ These groups had been coopted by the Habyarimana regime, which became increasingly corporatist¹³⁵ in the early 1990s. Through this process of coopting these groups, the regime began to prioritize the politics of ethnic dominance over the social, occupational, or other interests (which crossed ethnic lines) they were created to champion.¹³⁶ This, in turn, allowed the violence to expand and become a normal part of life in Rwanda at the time it was committed. Gourevitch gives a poignant account of the normalization of brutality in his discussion of the allegations against Elizaphan Ntakirutimana, a Rwandan pastor indicted by the ICTR on charges of genocide:

Mr. Ntakirutimana is a member of Rwanda's Hutu majority, and he is charged with helping to organize and carry out the massacre in 1994 of as many as 2,000 of his fellow Christians at Mugonero, simply because they were members of the Tutsi minority.

This was what passed for a normal event in Rwanda in that time. . . .

The killing at Mugonero began about 9 A.M. The Tutsis had come to the church seeking refuge. According to the United Nations indictment, many had come at the urging of Mr. Ntakirutimana. After nearly 12 hours of killing, only a few Tutsis were still alive. At that point, a survivor later told me, the killers began firing tear gas. "People who were still alive cried," he explained. "That way the attackers knew where people were, and they could kill them directly."¹³⁷

¹³⁴ However, some smaller interest groups, specifically women's groups and human rights groups, resisted participation in the genocide. See Longman, *supra* note 5, at 354 ("[H]uman rights groups, IWACU, women's groups, and others remained multiethnic and refused to support the anti-Tutsi hysteria.").

¹³⁵ Corporatism is a political science term that refers to a state policy of controlling sectors of civil society through its political and administrative apparatus. See, e.g., Nino, *supra* note 19, at 45 (analyzing corporatist trend in Latin America). Groups may be accorded privileges by the state in return for the state's assumption of control over their activities. See *id.* at 48.

¹³⁶ See Longman, *supra* note 5, at 345-46 ("The parties did not attempt to appeal to the sectoral interests that served as the organizing principles of civil society Instead, they appealed to people largely on the basis of regional and ethnic identities."). A major challenge for postgenocidal Rwanda is the development of a strong civil society and associational democracy whose institutions can resist ethnic coopting by the state. See *infra* Part IV.

¹³⁷ Philip Gourevitch, *The Psychology of Slaughter*, N.Y. Times, Mar. 7, 1999, § 4 (Week in Review), at 15. Pastor Ntakirutimana is the former head of the Seventh Day Adventist Church in Rwanda. He was arrested in the United States in 1996. Ntakirutimana has used the U.S. courts vigorously to contest his extradition to the ICTR. He was initially successful before a magistrate. See *In re Surrender of Ntakirutimana*, 988 F. Supp. 1038, 1039 (S.D. Tex. 1997). This decision was reversed by a United States District Court judge. See *In re Surrender of Ntakirutimana*, 1998 U.S. Dist. Lexis 22173, at *2 (S.D. Tex. Aug. 5, 1998). On August 5, 1999, the Fifth Circuit Court of Appeals affirmed the District Court and held that Ntakirutimana could be surrendered to the ICTR, notwithstanding the fact

In conclusion, the broad public participation in the Rwandan violence renders criminality, guilt, and deviance difficult and awkward terms. How can normalcy be punished? More important, how can a return to the normalcy of mass atrocity be prevented?

that the United States has not executed a formal extradition treaty with the ICTR. See *Ntakirutimana v. Reno*, 184 F.3d 419, 430 (5th Cir. 1999). The Fifth Circuit based its decision on the enactment by Congress in 1996 of Public Law 104-06, designed to implement a 1995 agreement by the President to transfer indictees to the ICTR. See *id.* at 424-27. On January 24, 2000, the United States Supreme Court denied *Ntakirutimana's* petition for certiorari. See *Ntakirutimana v. Reno*, 120 S. Ct. 977 (2000); see also ICTR Press Briefing (Jan. 27, 2000) <<http://www.icttr.org/ENGLISH/PRESSREL/Brief200000127.htm>>. Secretary of State Madeleine Albright authorized *Ntakirutimana's* transfer, and he entered the custody of the ICTR on March 24, 2000. See ICTR/INFO 9-2-225en (Mar. 25, 2000) <<http://www.icttr.org/ENGLISH/PRESSREL.225.htm>>.

The *Ntakirutimana* case represents the first time the United States has been asked to surrender an individual to either of the ad hoc international criminal tribunals. See Nathan Koppel, Court OKs Rwandan's Extradition, *Tex. Law.*, Aug. 16, 1999, at 1. The *Ntakirutimana* decision demonstrates a significant lack of knowledge of Rwandan society on the part of the judges. For example, Fifth Circuit Judge Garza, writing on behalf of the majority affirming *Ntakirutimana's* surrender, incorrectly described Hutu and Tutsi as "tribes." *Ntakirutimana*, 184 F.3d at 421. An unfamiliarity with the social context from which the Rwandan violence emerged may lead to incorrect assumptions and paternalistic incredulity about the nature of charges brought against individuals allegedly responsible for the violence. Fifth Circuit Judge Parker's concurring decision in *Ntakirutimana* is an example. Writing separately so as "to invite the Secretary [of State] to closely scrutinize the underlying evidence as she makes her [surrender] decision," Judge Parker remarked: "The evidence supporting the request is highly suspect," because witness affidavits describing *Ntakirutimana's* activities have "all the earmarks of a campaign of tribal retribution." *Id.* at 430. Based on this simplistic and misapprehended understanding of the Rwandan conflict, Judge Parker concluded:

It defies logic . . . that a man who has served his church faithfully for many years, who has never been accused of any law infraction, who has for his long life been a man of peace, and who is married to a Tutsi would somehow suddenly become a man of violence and commit the atrocities for which he stands accused. . . .

. . . [B]ased on all the information in this record, viewed from the perspective of a judge who has served fifteen years on the trial bench and five years on the court of appeals, . . . I am persuaded that it is more likely than not that *Ntakirutimana* is actually innocent.

Id. at 431. The question arises whether such substantive pronouncements as to the culpability of an individual are appropriate at a surrender hearing. More germane to this Article, however, is the fact that these statements show how difficult it is for many individuals outside Rwanda to conceptualize the broad level of complicity in the genocide and the extent of the brutality. Violence within interethnic families was not uncommon. See Prunier, *supra* note 1, at 358; see also Des Forges, *supra* note 1, at 296 (concluding that Hutu husbands killed their Tutsi wives).

II

RESTORATIVE JUSTICE FOR RADICAL EVIL

Mass violence constitutes what Carlos Santiago Nino, citing Kant, calls "radical evil."¹³⁸ "Radical evil" amounts to violence in situations where acting violently is simply not deviant. Nino observes that "the kind of collective behavior that leads to radical evil would not have materialized unless carried out with a high degree of conviction on the part of those who participated in it."¹³⁹ When this conviction is broadly shared, it loses its deviance no matter how pronounced its ugliness.

The Rwandan genocide is an example of "radical evil." Journalist Philip Gourevitch asks and then eerily concludes: "[W]hat if . . . murder and rape become the rule?"¹⁴⁰ "During the genocide, the work of the killers was not regarded as a crime in Rwanda; it was effectively the law of the land . . ."¹⁴¹

Nino insightfully points "to the difficulty of responding to radical evil with the ordinary measures that are usually applied to common criminals."¹⁴² In fact, "radical evil" poses a major challenge to the criminal law, which is predicated upon punishing only deviant behavior. Yet, domestic and international legal responses to the Rwandan genocide are based entirely on "ordinary measures" for "common criminals."

A. *Shame*

Will punishment and retribution prevent "radical evil" from occurring or reoccurring? The answer to this question turns on whether potential perpetrators of "radical evil" will be dissuaded from committing barbarities simply by the threat of criminal sanction. The deterrent value of punishment derives from the utilitarian retributivist notion that if people fear punishment they rationally will choose not to act criminally.¹⁴³ Professor Dianne Martin's work suggests that we should not be particularly optimistic about the deterrent effect of punishment; in fact, she argues that punitive criminal justice does little to

¹³⁸ Nino, *supra* note 19, at vii ("'[R]adical evil' [refers to] offenses against human dignity so widespread, persistent, and organized that normal moral assessment seems inappropriate.").

¹³⁹ *Id.* at ix.

¹⁴⁰ Gourevitch, *supra* note 1, at 34.

¹⁴¹ *Id.* at 123.

¹⁴² Nino, *supra* note 19, at viii.

¹⁴³ See John Braithwaite, *Crime, Shame and Reintegration* 131 (1989) ("Punishment presumes human beings to be rational actors who weigh the benefits of noncompliance against the probability and costs of punishment.").

deter personal violence.¹⁴⁴ Martin notes that “a theory of rational choice is largely irrelevant to acts motivated by non-rational impulses,” especially given the reality that the policing machinery of the retributive state produces low apprehension rates.¹⁴⁵ Although Martin writes in the domestic context, her arguments are readily applicable to international crimes such as genocide. Societies engulfed by mass political violence are not particularly conducive to rational behavior or fears of eventual apprehension. How can we expect individuals to make a rational choice calculus when they are surrounded by hysteria, social chaos, panic, coercion, prejudice, and a government that is exhorting mass violence?¹⁴⁶ Layered on top of the irrational context in which mass violence operates is the reality that an individual’s decision to act violently may not be perceived as a legal or even a moral wrong.¹⁴⁷ When taken together, these two factors support the conclusion that choices to participate in mass violence well may be

¹⁴⁴ See Dianne L. Martin, *Retribution Revisited: A Reconsideration of Feminist Criminal Law Reform Strategies*, 36 *Osgoode Hall L.J.* 151, 162 (1998). The argument that punishment deters violence is espoused by utilitarian retributivists.

¹⁴⁵ *Id.*

¹⁴⁶ Yet the ICTR and the ICTY seek to achieve this goal of utilitarian deterrence. See William Schabas, *Sentencing by International Tribunals: A Human Rights Approach*, 7 *Duke J. Comp. & Int’l L.* 461, 498 (1997) (stating that:

[R]eferring implicitly to the notion of deterrence, the Security Council affirmed its conviction that the work of the two tribunals “will contribute to ensuring that such violations are halted.” The effective prosecution and punishment of offenders is therefore intended to deter others from committing the same crimes, and perhaps to convince those already engaged in such behavior that they should stop.

(footnote omitted) (quoting Statute of the ICTY, *supra* note 24)). The judgments of the ICTR reveal the importance the tribunal accords to deterrence. See *Prosecutor v. Rutaganda*, Case No. ICTR-96-3, ¶ 475 (Int’l Crim. Trib. for Rwanda Dec. 6, 1999) <<http://www.ictr.org/>> (stating that:

[T]he penalties imposed on accused persons found guilty by the Tribunal must be directed, . . . at deterrence, namely to dissuade for ever [sic], others who may be tempted in the future to perpetrate such atrocities by showing them that the international community shall not tolerate the serious violations of international humanitarian law and human rights.);

accord *Prosecutor v. Musema*, Case No. ICTR-96-13-T, ¶ 986 (Int’l Crim. Trib. for Rwanda Jan. 27, 2000) <<http://www.ictr.org/>> (same). As for the ICTY, it has held that “deterrence is probably the most important factor in the assessment of appropriate sentences for violations of international humanitarian law.” *Prosecutor v. Delalic*, Case No. IT-96-21-T, ¶ 1234 (Int’l Crim. Trib. for Yugoslavia Nov. 16, 1998) <<http://www.un.org/icty/>>; see also *Prosecutor v. Kupreskic*, Case No. IT-95-16-T, ¶ 838 (Int’l Crim. Trib. for Yugoslavia Jan. 14, 2000) <<http://www.un.org/icty/>> (“[R]etribution and deterrence are the main purposes to be considered when imposing sentences . . . before the International Tribunal.”).

¹⁴⁷ Notwithstanding the language of deontology, one cannot (and should not) disaggregate the criminal conduct from the social situation that gave rise to it. In fact, a more nuanced perspective on human motivation or compulsion for acting criminally can fashion a better remedy. See generally Barbara Hudson, *Doing Justice to Difference* (unpublished manuscript, abstract on file with the *New York University Law Review*). This nuanced

only slightly, if at all, deterred by the prospect of eventual prosecution—especially if undertaken by some distant international tribunal. If those committing the barbarities do not expect to lose power to the victims (or to third parties such as international authorities), they may not take the threat of penal sanction very seriously.¹⁴⁸ After all, criminologists long have advised that the uncertainty of sanction is more determinative than the severity of sanction in influencing behavior.¹⁴⁹

It is not only utilitarian retributivism that may be applied awkwardly to “radical evil.” Deontological retributivism may also be inapposite. The deontological retributivist argues that punishment is required to recognize evil, even evil that may not be deterred by the threat of such punishment, and that punishment is to be meted out regardless of the effects on offenders, victims, communities, or society.¹⁵⁰ Even if the importance of recognizing evil is conceded, the deontological argument’s assumption that criminal punishment is the only (or best) way to recognize evil remains open to questioning. The South African experience eloquently attests to the fact that there are other mechanisms to achieve this goal. In today’s South Africa, is there any question that the architects of apartheid and the bureaucrats who enforced it acted evilly? Has the Truth and Reconciliation Commission not unearthed this embarrassing cancer? When evil is exposed outside the criminal justice system, it is not only recognized by the public, but even may become acknowledged by those who inflicted it in the first place.¹⁵¹ Observers of retributivist criminal justice note that perpetrators tend to posture defensively for the benefit of the trial: This leads to denying involvement, disputing wrongdoing, and ignoring harm.¹⁵² Moreover, simply because an act is punished after a trial does not mean that the offender or society as a whole will perceive that act as evil. In many cases, especially when the prosecution

perspective dovetails with the “social theory of culpability” developed by critical penologists.

¹⁴⁸ See Minow, *supra* note 15, at 50 (“Individuals who commit atrocities on the scale of genocide are unlikely to behave as ‘rational actors,’ deterred by the risk of punishment.”).

¹⁴⁹ See Braithwaite, *supra* note 143, at 69 (“[There is] reasonable support for an association between the certainty of criminal punishment and offending, but little support for the association between crime and the severity of punishment.” (footnotes omitted)).

¹⁵⁰ See Von Hirsch, *supra* note 19.

¹⁵¹ See Albie Sachs, Lecture at Columbia University School of Law (Apr. 13, 1999) (notes on file with the *New York University Law Review*).

¹⁵² See *id.*; see also Kent Roach, *Due Process and Victims’ Rights: The New Law and Politics of Criminal Justice* 248 (1999). Roach’s review of research regarding complaints of police misconduct found that “[l]egalistic hearings and the threat of disciplinary charges encouraged officers to deny responsibility, avoid shame, and play the martyr.” *Id.* (citations omitted).

is perceived as politically motivated, criminal punishment can yield sympathy, empathy, or even support for the defendant.

Given the limitations of the retributive model to recognize radical evil and deter massive human rights abuses, is there another model that may offer more promise? In criminological theory, the restorative justice paradigm is often proffered as the principal alternative to retributive justice.¹⁵³ Criminologists Joe Hudson and Burt Galaway posit three elements as fundamental to restorative justice:

First, crime is viewed primarily as a conflict between individuals that results in injuries to victims, communities, and the offenders themselves, and only secondarily as a violation against the state [or the international community]. Second, the aim of the criminal justice process should be to create peace in communities by reconciling the parties and repairing the injuries caused by the dispute. Third, the criminal justice process should facilitate active participation by victims, offenders, and their communities in order to find solutions to the conflict.¹⁵⁴

The second aim Hudson and Galaway ascribe to restorative justice—the creation of peace and reconciliation in the community—is where the restorative justice paradigm principally diverges from retributive deontology. In his study *Crime, Shame and Reintegration*, Professor John Braithwaite argues through theory and empirical research that community peace and reconciliation more effectively can be established by instilling shame in offenders than by imposing guilt on offenders.¹⁵⁵ Guilt is, of course, intrinsic to the retributive justice model and the criminal trial. Guilt arises by virtue of judicial fiat, and many of those whose guilt externally has been imposed actually do not feel guilty. But the marriage of guilt and the criminal law is a recent phenomenon. In fact, Braithwaite begins his analysis by noting that it is only in the last century that the concept of guilt has overtaken shame as the linchpin of the criminal law. Braithwaite notes that “in the New Testament the word *guilt* does not appear, while *shame* is repeatedly referred to; [that] Shakespeare uses shame about nine times as often as guilt,” and that “novels like Tolstoy’s *Anna Karenina* . . . remind us of how the concept of shame . . . was once a

¹⁵³ For an elucidation of the principles of restorative justice, see Nils Christie, *Conflict as Property*, 17 *Brit. J. Criminology* 1 (1977) (arguing that conflicts should be property of people involved).

¹⁵⁴ Joe Hudson & Burt Galaway, *An Introduction to Restorative Justice*, in *Law in Society* 332, 333 (Nick Larsen & Brian Burtch eds., 1999); see also Minow, *supra* note 15, at 91 (“Unlike punishment, which imposes a penalty or injury for a violation, restorative justice seeks to repair the injustice, to make up for it, and to effect corrective changes in the record, in relationships, and in future behavior.”).

¹⁵⁵ See Braithwaite, *supra* note 143, at 71-75.

commanding concept.”¹⁵⁶ Shame amounts to internal acknowledgment of responsibility—a consciousness of one’s own impropriety—and is accompanied with feelings of regret, blameworthiness, and sometimes even disgrace. Toni Massaro finds that

[S]hame involves the whole self in a way that other, closely related experiences do not; for example, many emotion theorists view guilt as a more calibrated, less global experience than shame. . . . [S]hame is activated by a disturbed sense of oneself that is, if only briefly, *all-encompassing* in ways that these other phenomena are not.¹⁵⁷

There are four main reasons why shame began to play a more limited role as a tool of social control. Ultimately, these led to a “systematic uncoupling of punishment and public shaming.”¹⁵⁸ The first of these reasons is the emergence of psychoanalytic theory (principally the work of Freud), which popularized the relevance of guilt to human activity.¹⁵⁹ Second, the rise of the penitentiary as a device to house criminals grew out of the idea that it was best for inmates to be separated from society, with plenty of time alone to think about their wrongdoing, so that they could make private penance.¹⁶⁰ Incarceration in a penitentiary only could be justified when based on a trial and, since repentance was different from guilt or innocence (and since repentance could only come after guilt), the finding of guilt at trial ended the public’s involvement in the matter. The expansion of cities and the increased mobility of the citizenry provided a third reason for criminologists to distance themselves from the use of shame. Criminologists argued that “in a modern, anonymous, urban society, shame sanctions cannot possibly work. . . . There is no point in shaming offenders who can instantly slip into the back streets”¹⁶¹ Fourth, during the Victorian era ordinary citizens became disgusted with excessive shame sanctions “whose main purpose [was] the ritualized humiliation of the offender.”¹⁶² These sanctions included the pillory, the stocks, the ducking stool, and branding.¹⁶³

¹⁵⁶ Id. at viii.

¹⁵⁷ Toni Massaro, Show (Some) Emotions, in *The Passions of Law* 80, 87 (Susan A. Bandes ed., 1999) (footnotes omitted).

¹⁵⁸ Braithwaite, *supra* note 143, at 59.

¹⁵⁹ See id. at viii.

¹⁶⁰ See James Q. Whitman, What Is Wrong with Inflicting Shame Sanctions?, 107 *Yale L.J.* 1055, 1081 (1998) (“The penitentiary movement conceived of and presented itself as an enlightened, Christian alternative to the older system of shame sanctions, one that would replace the primitive order of public display and shame with a modern order of isolation and guilt.”). “[T]here is a tradeoff between shame and guilt and . . . it is better for the penal system to instill the latter than the former.” Id. at 1079.

¹⁶¹ Id. at 1063.

¹⁶² Id. at 1056.

¹⁶³ See id. at 1055.

Given the checkered history of shame sanctions, it is no wonder that many contemporary scholars are uncomfortable with them.¹⁶⁴ But shame sanctions are very different than internalized shaming. At its core, shaming encompasses "all social processes of expressing disapproval which have the intention or effect of invoking remorse in the person being shamed and/or condemnation by others who become aware of the shaming. . . . Shaming . . . sets out to moralize with the offender to communicate reasons for the evil of her actions."¹⁶⁵ Through shaming, the criminal realizes the "lower esteem the offense has produced in the eyes of external referents like parents and neighbors."¹⁶⁶ In the case of serious crimes, victims and survivors must play a central role in the process, challenging those who inflicted wrongs upon them. Whereas shame sanctions lead to the humiliation and marginalization of the offender, internalized shaming leads to the reintegration of the offender. Braithwaite identifies the key distinction as between

[S]haming that is reintegrative and shaming that is disintegrative (stigmatization). Reintegrative shaming means that expressions of community disapproval, which may range from mild rebuke to degradation ceremonies, are followed by gestures of reacceptance into the community of law-abiding citizens.¹⁶⁷

Braithwaite's central thesis is that the two fundamental social conditions conducive to reintegrative shaming are communitarianism and interdependency.¹⁶⁸ "Individuals are more susceptible to shaming when they are enmeshed in multiple relationships of interdependency; societies shame more effectively when they are communitarian."¹⁶⁹ Interdependent societies "can deliver more than state shaming, they can also deliver shaming by neighbors and relatives . . . in a way that

¹⁶⁴ See Braithwaite, *supra* note 143, at viii ("[S]hame is perhaps uncomfortable for contemporary scholars to use in thinking about crime . . .").

¹⁶⁵ *Id.* at 100.

¹⁶⁶ *Id.* at 57.

¹⁶⁷ *Id.* at 55. Shaming sanctions without reintegration may create exclusionary humiliation and an absence of remorse. In fragile societies such as Rwanda, this may simply prolong ethnic hatred.

¹⁶⁸ See *id.* at 84. Braithwaite defines interdependency as "a condition of individuals. It means the extent to which individuals participate in networks wherein they are dependent on others to achieve valued ends" *Id.* at 98-100. Communitarianism, according to Braithwaite, is "a condition of societies." *Id.* at 100. "In communitarian societies individuals are densely enmeshed in interdependencies which have the special qualities of mutual help A communitarian culture rejects any pejorative connotation of dependency as threatening individual autonomy. Communitarian cultures . . . emphasize the need for mutuality of obligation in interdependency." *Id.* In the end, "societies in which individuals are subject to extensive interdependencies are more likely to be communitarian." *Id.* at 101.

¹⁶⁹ *Id.* at 14.

individualistic societies cannot.”¹⁷⁰ Braithwaite finds that the post-Victorian era has promoted individualism at the expense of interdependency and communitarianism. In reaching this conclusion, Braithwaite identifies some of the characteristics that demonstrate the existence of interdependency and communitarianism: “[T]he decline of communitarianism is much more than a product of ideology. It is a consequence of urbanization Industrialization and declining labor-intensiveness of agriculture in most parts of the world exacerbate this tendency further. An associated phenomenon is increasing residential mobility.”¹⁷¹ “Urbanization and high residential mobility are societal characteristics which undermine communitarianism.”¹⁷² “Anonymity becomes a characteristic of mobile urban communities; neighbors cease to be significant others, relatives become geographically separated, even school and church affiliations become more transient”¹⁷³ “[I]n communitarian societies . . . people are so much more involved in each others’ lives”¹⁷⁴

The key to the success of shaming is the audience to which it is directed.¹⁷⁵ As a result, “sanctions imposed by relatives, friends or a personally relevant collectivity have more effect . . . than sanctions imposed by a remote legal authority . . . because repute in the eyes of . . . acquaintances matters more to people than the opinions or actions of criminal justice officials.”¹⁷⁶ A trial in which a detainee faces an unknown prosecutor, at times behind closed doors, may produce little shame. In the case of a prosecution held in Tanzania at the ICTR, where the language of the trial may not be understandable to all Rwandans, where the proceedings may not be diffused in the media, where the court chambers are distant and hard to reach (and members of the local community often cannot afford to make the journey), and where the trials may be encumbered by foreign (and seemingly technical) procedures, the trial only may have negligible shaming effects.¹⁷⁷ Is it then surprising that human rights workers and international lawyers find such an absence of shame and remorse on

¹⁷⁰ Id. at 87.

¹⁷¹ Id. at 86.

¹⁷² Id. at 101.

¹⁷³ Id. at 86.

¹⁷⁴ Id. at 88; see also Whitman, *supra* note 160, at 1063 (discussing contention that “in a modern, anonymous, urban society, shame sanctions cannot possibly work”).

¹⁷⁵ See Braithwaite, *supra* note 143, at 55 (stressing importance of reintegration).

¹⁷⁶ Id. at 69. “Whereas an actual punishment will only be administered by one person or a limited number of criminal justice officials, the shaming associated with punishment may involve almost all of the members of a community.” Id. at 73.

¹⁷⁷ See Des Forges, *supra* note 1, at 746 (finding that ICTR is not communicating effectively principles of international justice to Rwandan people).

the part of those Rwandans who are facing or who have faced genocide charges?¹⁷⁸ If the finding of guilt is meaningless to those who perpetrated the violence, then the challenge arises to discover sanctions that are more meaningful for these perpetrators.

What might restorative justice mean for genocide? Braithwaite does not contemplate the extension of shame-based restorative justice to "radical evil." Yet Braithwaite's work provides a new lens through which to assess and approach the criminality of "radical evil." The merits Braithwaite sees in promoting shame over guilt may justify the inclusion of restorative justice mechanisms within the overarching framework of postgenocidal rule-of-law policies in Rwanda. At present, neither international nor domestic responses to this violence contemplate such a paradigmatically diversified approach. This leaves untapped the social characteristics of Rwandan society which, according to Braithwaite, would have the potential to support effective shame-based restorative justice mechanisms. These characteristics include Rwanda's rural nature, the interconnectedness of village life, the close-knit interdependencies of agrarian societies, the absence of anonymity, the lack of mobility of community members, and the amazingly high population density.¹⁷⁹

For the most part, the Rwandan killings took place in the local communities where both victim and aggressor resided.¹⁸⁰ The situation was truly one of neighbor killing neighbor.¹⁸¹ As a result, many aggressors are known to the surviving family members.¹⁸² Nor was violence within families uncommon. Prunier observes: "In some cases . . . a Hutu woman who has survived the killings of her Tutsi husband and her children might have to live with the knowledge that the murderers are her own Hutu relatives."¹⁸³

In Rwanda aggressors were not strangers to the victims; for the most part, both knew each other, often for decades.¹⁸⁴ This is quite unlike the relationship between guards and victims in the Nazi concentration camps, where there was no familiarity, no shared back-

¹⁷⁸ See discussion *infra* accompanying notes 328-39.

¹⁷⁹ See *supra* Part I.

¹⁸⁰ See, e.g., Des Forges, *supra* note 1, at 343 (providing specific examples).

¹⁸¹ See Prunier, *supra* note 1, at 249, 253; see also Drumbl, *supra* note 31, at 609 (finding that prisoners recognized approximately two-thirds of names of people they allegedly had killed, these generally being work colleagues or neighbors).

¹⁸² See Gourevitch, *supra* note 1, at 240 (describing one man's knowledge of his brother's killer).

¹⁸³ Prunier, *supra* note 1, at 358.

¹⁸⁴ See *supra* Part I; see also Neier, *supra* note 97, at 48 ("In a country where the population was thoroughly intermingled, every surviving adult Rwandan must have known many of those who were killed and many of the killers.").

ground, no knowledge of each other in any context other than the camp.¹⁸⁵ Observers of the Cambodian death prisons also report that, unlike in Rwanda, the victims meant nothing “personally” to the aggressor guards.¹⁸⁶ In both of these cases, there is no shared community to which victim and aggressor can return and in which the aggressor can atone (or be shamed into atoning) for the violence. Restorative justice initiatives therefore may be ineffectual and the only way to promote any accountability may be through trials.

In Rwanda, returning an aggressor to the local community to face shaming is likely to mean that the aggressor must face the approbation of a neighbor’s family or even his or her own family. It may entail facing people whom the aggressor injured, maimed, raped, or robbed. By their very nature, dualist postgenocidal societies always will house both victims and survivors. As a result, it is possible to return an aggressor to an environment where survivors of his or her aggression still live. In addition, local communities contain more than just victims and aggressors. They also include those who were ambivalent about the violence and those who were disgusted by it. They include those who actively or covertly opposed the genocide.¹⁸⁷ And they include some who themselves may feel shame over what happened and the part they played in it. All of these people may constitute a powerful audience of meaningful acquaintances that effectively may deter recidivism.¹⁸⁸ But the effects of reintegrative shaming also can go beyond the specific deterrence of the person shamed. Reintegrative shaming can promote general deterrence and moral education.¹⁸⁹

Taking perpetrators back to the local community may help them see with their own eyes the effects of their actions. This can humanize or render more tangible the injuries that were inflicted. Humanizing the harms can help break even broad levels of social complicity. This complicity can mask itself, and can in fact be perpetuated, within the contours of the “not-guilty” or “only guilty because of a politically motivated trial” finding that can result from exclusive use of the re-

¹⁸⁵ For a discussion of the bureaucratized, sanitized, and essentially anonymous nature of the Nazi Holocaust, see Neier, *supra* note 97, at 47.

¹⁸⁶ See Chandler, *supra* note 82, at 146 (comparing Cambodian guards to Nazi guards).

¹⁸⁷ See Human Rights Watch, *supra* note 5, at 17 (noting that some Hutu sheltered and saved Tutsi).

¹⁸⁸ See Braithwaite, *supra* note 143, at 81 (arguing that strong relationships are critical to deterrence). Of course, not all persons will react equally or similarly to reintegrative shaming. One can never be sure that all individuals will experience shame when subject to reintegrative shaming sanctions. These problems have given rise to criticism of shame-based justice initiatives that seek to construct community based norms. For a discussion of the challenges faced by legal reforms that assume that public officials can manipulate certain emotions to produce predictable behavior results, see Massaro, *supra* note 157, at 104.

¹⁸⁹ See Braithwaite, *supra* note 143, at 120.

tributive justice model. After all, it is undeniable that, in Rwanda, hundreds of thousands of people were killed by the hands of hundreds of thousands of aggressors. As a result, it only may be through hundreds of thousands of localized reintegrations that the bonds of complicity and denial can be eroded. Hundreds of thousands of local reintegrations will create hundreds of thousands of opportunities to have shared conversations, public discussion, and debate over what actually happened. Hundreds of thousands of local stories then will be told. The telling of these stories may trigger the internalization in the offender of an understanding, as well as an acknowledgment, of the evil that was inflicted. Systemic shaming among Hutu involved in the genocide (whether directly, indirectly, or tacitly) can purge the conditions precedent to genocidal evil which, in turn, can mitigate the possibilities of a second genocide. Shame may help create conditions within people (such as internalized accountability) and among people (by strengthening community and civil society) that, when aggregated, may attenuate future ethnic conflict.

Even within the difficult context of genocide, reintegrative shaming may fulfill a moral educative function. These localized shamings may inform younger and future generations of Rwandans why the genocide occurred. Should this generation inquire why there was little protest against the genocide and, even more poignantly, why there was such volunteerism, enthusiasm, and cruelty among individuals in performing their assigned and self-appointed tasks,¹⁹⁰ then all Rwandans present during the 1994 genocide can face up to shaming in the eyes of the people who perhaps mean the most to them.¹⁹¹

This is not to say that the shaming process necessarily will be automatic, easy, or always capable of redefining the social norm that had been so encouraging of genocide. But it might well be more effective than criminal trials in achieving this redefinition. When aggressors can see the hurt for themselves instead of denying it in the splendid insularity of prison, can hear the words of survivors, and can look at mass graves instead of jail walls, perhaps then their consciences will become troubled. As Braithwaite remarks, "shaming is needed when conscience fails."¹⁹² This is an apt description of the 1994 Rwandan violence: a failing of conscience on the part of the complicit masses.

¹⁹⁰ See generally Daniel Jonah Goldhagen, *Hitler's Willing Executioners: Ordinary Germans and the Holocaust* (1997) (investigating genocidal conduct of many "ordinary Germans" during Holocaust).

¹⁹¹ For a discussion of the importance of education about genocide, see Minow, *supra* note 15, at 144-45.

¹⁹² Braithwaite, *supra* note 143, at 73. "[R]eintegrative shaming is superior even to stigmatization for conscience-building" *Id.* at 102.

The people who massacred, or who facilitated the massacres, were not all psychopaths. Some were, and these individuals may be beyond the power of shaming and restorative justice.¹⁹³ But most were not psychopathic. In fact, extrapolating from those prisoners we interviewed, most would be fairly unexceptional, ordinary people. They can be shamed. And the shame they could be made to feel could run deeper than any externally imposed guilt.¹⁹⁴ Justice Albie Sachs notes how shame-based remedies, even remedies as simple as giving a dignified burial to the remains of victims (or participating in a commemorative reburial) can be more penetrating than sitting in a jail cell.¹⁹⁵ It is the public nature of shaming, as contrasted with the private nature of incarceration, that gives it its power.¹⁹⁶

B. Transforming Rwanda, Postgenocide

If restorative justice were pursued in the wake of genocide, to what types of structures would it give rise? What would restorative justice look like in a postgenocidal society such as Rwanda?

1. Reintegration through Gacaca

Reintegrative proceedings would dovetail nicely with the Rwandan government's present statutory organization of the genocide trials. The Organic Law (the legislation implemented domestically by the RPF for the purposes of prosecuting genocide-related offences) places accused persons into one of four categories.¹⁹⁷ The most seri-

¹⁹³ See *id.* at 73 (noting that psychopaths cannot be conditioned by punishment).

¹⁹⁴ See *id.* at 69.

¹⁹⁵ See Sachs, *supra* note 151. Investigators and peacekeepers in Kosovo report that many people simply wish to have mass graves exhumed, victims identified, and proper burials undertaken. See Kifner, *supra* note 16, at 1. One individual who uncovered his father simply wanted to be photographed with him. See *id.* Involving aggressors in these burials could have significant shaming effects. For a discussion of the importance of mass reburial ceremonies to transitional justice in Rwanda, see Gourevitch, *supra* note 1, at 250-51.

¹⁹⁶ The possibility of return to local communities worried prisoners awaiting genocide trials. Cf. Drumb, *supra* note 31, at 573, 604-09 (describing risk of retaliation and attitudes of prisoners). For some, this was linked to a belief that they would face physical reprisal. See Samantha Power, *Rwanda Postcard* (unpublished manuscript, on file with the *New York University Law Review*). But for most prisoners, the impression we had as interviewing lawyers was that their principal fear was of leaving the sheltered life in the prison and having to face up to what they actually did.

¹⁹⁷ Domestic genocide trials in Rwanda follow the procedures established by the Organic Law on the Organization of Prosecutions for Offenses Constituting the Crime of Genocide or Crimes Against Humanity Committed Since October 1, 1990, Law No. 08/96 (Aug. 30, 1996) [hereinafter Organic Law]. The Organic Law creates four categories of offender according to the gravity of the offenses allegedly committed. Category 1 covers the most serious offenses: notorious murders, planning and executing the genocide, and sexual torture. A conviction of a Category 1 offense ordinarily draws the death penalty.

ous offenders are slotted into Category 1, which covers the leaders and planners of the genocide. Trials may remain the best option for these offenders: In the case of such individuals, reintegrative shaming may be of diminished effect given that their crimes were not localized, but were often undertaken nationally, through administrative decision, and without knowledge of the precise identity of the victims. Thus, reintegrative shaming principally would apply to detainees charged with lesser offenses. These lesser offenses range from theft (Category 4) to assault (Category 3) to manslaughter and murder (Category 2). The true test of the limits of reintegrative shaming will arise in the ability of Category 2 perpetrators to be shamed and of local communities to reintegrate (and devise adequate sanctions for) those perpetrators. Might survivors see reintegrative shaming for a murderer as an inappropriate sanction?

Precedent for localized reintegrative shaming may exist within Rwandan culture. For centuries, civil disputes have been resolved through extrajudicial dispute resolution, called *gacaca*. *Gacaca* is a grass-roots process in which members of local communities settle interpersonal differences through the election of sages and leaders who endeavor to bring the disputants together in the pursuit of communal justice.¹⁹⁸ Based on the theories posited by this Article, several aspects of *gacaca* may foretell success in promoting reconciliation. "Judging" is undertaken by members of the very communities in which the crimes took place—this helps empower victims, involve bystanders, and possibly rebuild these fragmented communities.¹⁹⁹ The discussions are held publicly and are accessible to all community members.²⁰⁰ For those found responsible for wrongdoing, *gacaca*

Broadly speaking, Category 2 covers intentional homicides, Category 3 serious assaults (and potentially manslaughter, although this remains unclear for the moment), and Category 4 property crimes. Although incarceration is not prescribed as a penalty for a Category 4 conviction, many individuals accused only of Category 4 offenses have spent nearly five years in jail awaiting trial. See Drumbl, *supra* note 31, at 630.

¹⁹⁸ See Drumbl, *supra* note 15, at 292 (describing *gacaca* process); see also Ian Fisher, Massacres of '94: Rwanda Seeks Justice in Villages, N.Y. Times, Apr. 21, 1999, at A1 (describing Rwandan government proposal to use *gacaca* to deal with perpetrators of genocide).

¹⁹⁹ Proceedings conducted locally well may be more meaningful to affected communities than those conducted internationally. See Alvarez, *supra* note 10, at 403-16, 450, 482-83 (exploring relationship between international and national justice in Rwanda). Superimposed upon this Article's thesis that the singular pursuit of trials does not constitute an effective policy response in dualist postgenocidal societies, Alvarez's conclusions suggest that the disconnect between trials and reconciliation is greater when trials are pursued internationally as opposed to nationally.

²⁰⁰ See Assembly Appraises Progress Made by War Crimes Tribunals; Judges Describe Obstacles, U.N. Press Release GA/9652 (Nov. 8, 1999) [hereinafter War Crimes Tribunals], available at <<http://www.un.org/News/Press>>.

tribunals could consider more flexible remedies such as community service, apologies,²⁰¹ rituals, and public shaming. "*Gacaca* also might provide a particularly appropriate forum for questions of victims' compensation."²⁰² Processes based on local culture and regional practice may create a greater sense of familiarity among victims than the potentially alienating procedure of trials. Repeated *gacaca* hearings all over Rwanda could weave together an historical narrative that is still sufficiently localized so as to include details of experiences and losses at the community level.

On the other hand, *gacaca* may be difficult to apply to genocide because it traditionally has been used to "adjudicate small property disputes and petty theft."²⁰³ However, application of *gacaca* to murder is not without precedent. Historically, in the case of a murder, "the family of the victim would be allowed to symbolically end the killer's life by taking him in front of the community and pretending to kill him. However, the killer would walk away—humiliated but unharmed."²⁰⁴

Evaluating the ability of *gacaca* to serve as a conduit for postgenocidal reintegrative shaming is topical given the intention of the

²⁰¹ See Alvarez, *supra* note 10, at 409 (arguing that there is evidence that public apologies strengthen victim mollification). Alvarez points out that whereas the Organic Law, through the Confession Procedure, at least encourages apologies and contrition (although for the most part this Procedure has been unsuccessful), the sentencing procedures of the ICTR do little to promote remorse. See *id.*; see also Louis Begley, *Many Ghosts, Much Guilt*, N.Y. Times, Dec. 12, 1998, at A21 (stating that postwar formal apologies have positive effects on both those tendering apologies and those receiving them).

²⁰² Women's Human Rights in Conflict Situations (Int'l Ctr. for Hum. Rts. & Democratic Dev., Montreal, Que.), Aug. 1999 [hereinafter Women's Human Rights] <<http://www.ichrdd.ca/111/english/commdoc/publications/women/bulletin/vol3no2e.html>>.

²⁰³ Rwanda Tradition May Rule Prosecution, Ark. Democrat-Gazette (Little Rock), Oct. 9, 1999, at 11A; see also Fisher, *supra* note 198, at A1 (stating that *gacaca* "refers to the grass that village elders once sat on as they mediated the disputes of rural life in Rwanda"). *Gacaca* worries some international human rights lawyers. There is fear that *gacaca* proceedings will not respect adequately the civil rights of the accused. See *id.* ("There is a kind of ethnic tension which is persistent in the population . . . [a]nd as far as they are unable to overcome this, it will be difficult for them to be fair." (quoting Aloys Habmana, Director of Rwandan League for the Protection and Defense of Human Rights)); see also Des Forges, *supra* note 1, at 761 (arguing that *gacaca* raises questions of due process for accused). Of course, many of those who would be brought before a *gacaca* tribunal would be those in Category 4 (for which the Organic Law does not prescribe imprisonment as a sanction) or Category 3 (for which an average sentence would come to approximately five years). See Organic Law, *supra* note 197. As a result, the most immediate alternative for those who likely would be the first to appear at a *gacaca* hearing is continuing to wait in jail to face trial for an offense whose sentence they probably already would have served simply by waiting for the trial.

²⁰⁴ Rwanda Tradition May Rule Prosecution, *supra* note 203, at 11A (identifying Tharcisse Karugarama, Vice President of Rwanda's Supreme Court, as a supporter of possibilities of *gacaca* in Rwanda, even for murder arising out of genocide).

Rwandan government to experiment with *gacaca* to address intermediate and less serious crimes committed during the genocide.²⁰⁵ It is anticipated that 9000 to 10,000 *gacaca* panels will be set up throughout Rwanda during the year 2000.²⁰⁶ Under the government proposal, *gacaca* panels would be presided over by "locally elected and respected members of the community."²⁰⁷ However, parties would have the right to appeal their *gacaca* verdicts to a superior court.²⁰⁸ This deviation from the traditional use of *gacaca* reflects the continued vitality of the trial model in Rwanda. Since the *gacaca* process is subject to judicial review, *gacaca* tribunals will have the incentive to be as "judicial" as possible in order to minimize the tendency (and ability) of superior courts to overrule them.²⁰⁹ As a result, the government's *gacaca* proposal really would not represent much of a paradigm shift from guilt towards shame. In fact, under this proposal, *gacaca* simply might become another layer in the implementation of the trial model. If so, *gacaca* may not prove to be the means to attain what the Rwandan government identifies as one of its main purposes, namely to "speed[] reconciliation between Hutu and Tutsi."²¹⁰ In order for *gacaca* to tap what this Article suggests are the unique possibilities of restorative justice for Rwanda, it will be important to focus the proceeding on provoking atonement in the perpetrator and on empowering the survivors.

In the end, reintegrative shaming and extrajudicial mediation have the additional benefit of fortifying Hudson and Galaway's third

²⁰⁵ The *gacaca* proposal would involve transferring genocide cases falling within Categories 3 and 4, and possibly even Category 2, of the Organic Law. See Report on the Situation of Human Rights in Rwanda Submitted by the Special Representative, Mr. Michel Moussalli, Pursuant to Resolution 1998/69, ¶ 49, at 14, U.N. Doc. E/CN.4/1999/33 (1999) [hereinafter Report on Human Rights in Rwanda]; see also IRIN-CEA, UN OCHA, Update No. 636 (Mar. 24, 1999) <<http://www.reliefweb.int/IRIN/index.phtml>>; Rwanda Tradition May Rule Prosecution, supra note 203, at 11A (estimating *gacaca* proposal to be approved by June 2000). Once *gacaca* becomes implemented in Rwanda, there will be important opportunities for empirical research as to its effectiveness (which could shed more light on the ability of community-based restorative justice to respond to mass atrocity more generally).

²⁰⁶ See Nina Bang-Jensen, Comments at International Law Weekend, supra note 26 (notes on file with the *New York University Law Review*); see also IRIN-CEA, UN OCHA, Update No. 834 (Jan. 6, 2000) <<http://www.reliefweb.int/IRIN/index.phtml>>.

²⁰⁷ Report on Human Rights in Rwanda, supra note 205, ¶ 49, at 14.

²⁰⁸ See Women's Human Rights, supra note 202; see also IRIN-CEA, UN OCHA, Update No. 642 (Apr. 1, 1999) <<http://www.reliefweb.int/IRIN/index.phtml>>.

²⁰⁹ Notwithstanding the possibilities of appeal, the *gacaca* proposal does not contemplate a role for lawyers.

²¹⁰ Fisher, supra note 198, at A1. The United Nations High Commissioner for Human Rights Special Representative in Rwanda similarly has described *gacaca* as an "instrument of reconciliation" and "a form of consensual justice which brings the people together." Report on Human Rights in Rwanda, supra note 205, ¶ 50, at 14.

principle of the restorative justice model, active participation by victims and their communities.²¹¹ The process of reintegration after shaming may help to consolidate community. This is the unique potential of reintegrative initiatives pursued under the restorative justice paradigm. Ultimately, these initiatives might be able to lay the groundwork for civil society and community empowerment in Rwanda.

2. *A Truth Commission*

Professor Martha Minow, in her recent book *Between Vengeance and Forgiveness*, favorably explores the usefulness of public inquiries and truth commissions as mechanisms for promoting shame following mass atrocity.²¹² She urges the pursuit of these restorative mechanisms when the project of reconstituting a new national community is—as it should be in dualist postgenocidal societies—an important priority.²¹³ Truth commissions and public inquiries may do well at rooting out the structural and societal causes of genocide, promoting collective accountability, and thereby minimizing future interethnic violence.

Kent Roach unpacks the notion of accountability as operating on three levels: literal accountability (“a process in which individuals are forced to account for their actions”); organizational accountability (“a process where organizations are called to account for events and policy failures”); and social accountability (“a complex process that depends on social recognition of the problem being investigated and subsequent demands by the interested public that individuals, organizations and society account for their response to the problem”).²¹⁴ Roach’s review of public inquiries²¹⁵ reveals that their unique institu-

²¹¹ See *supra* text accompanying note 154.

²¹² See Minow, *supra* note 15, at 87-88 (stating that truth commissions are well-suited to meet goals for societal responses to collective violence).

²¹³ See *id.* at 133 (stating that truth commissions should be utilized to pursue efforts at nationbuilding and reconstituting new national community).

²¹⁴ Kent Roach, Canadian Public Inquiries and Accountability, in *Accountability for Criminal Justice: Selected Essays* 268, 269-70 (Philip C. Stenning ed., 1995).

²¹⁵ Roach explored the effectiveness of three Canadian public inquiries in promoting accountability. These three inquiries related to (1) illegal activities by members of the Royal Canadian Mounted Police (the McDonald Commission), (2) the wrongful conviction of Donald Marshall, Jr., and (3) aboriginal justice in the province of Manitoba. See *id.* at 269. The Manitoba Aboriginal justice inquiry was “more concerned with promoting social accountability for the treatment of Aboriginal people and viewed even individual misconduct as a symptom of larger social and political problems.” *Id.* at 289. The “‘social function’ of the Manitoba inquiry was crucial.” *Id.* at 288 (citation omitted). In the end, however, there was a definite trickle-down effect, as social accountability may encourage “people [to] begin to question their own attitudes and behaviour and those of others.” *Id.* at 288.

tional features allow them to hold organizations and society accountable in ways that courts cannot.²¹⁶ Given that the Rwandan genocide was carried out by individuals, yet stemmed from the heart of the community, it seems particularly important for accountability to be pursued at the organizational and social level.

Truth commissions have the information gathering benefits of public inquiries. They also share the ability of public inquiries to uncloak organizational accountability. To these benefits they add victim participation and offender testimony, thereby augmenting public involvement. Michael Scharf remarks that under a truth commission,

National reconciliation and individual rehabilitation are facilitated by acknowledging the suffering of victims and their families, helping to resolve uncertain cases, and allowing victims to tell their story, thus serving a therapeutic purpose for an entire country, and imparting to the citizenry a sense of dignity and empowerment that could help them move beyond the pain of the past.²¹⁷

Any discussion of truth commissions is incomplete without reference to South Africa. The South Africa Truth and Reconciliation Commission (TRC) is anomalous among truth commissions. Its powers to compel testimony, to stimulate participation in exchange for amnesty, and to link victim testimony to subsequent reparations distinguish the TRC from other truth commissions.²¹⁸ Although certainly not without its criticisms and controversies,²¹⁹ the overall evaluation of the TRC has been a positive one.²²⁰

²¹⁶ See *id.* at 273 (“[M]ost courts continue to put individuals, not organizations, on trial. They stress individual responsibility for wrongs and not the structural shortcomings of institutions, even if only organizational reform can prevent similar wrongs in the future.”).

²¹⁷ Scharf, *supra* note 101, at 379. Michael Scharf ascribes four primary purposes to truth commissions: “(1) to establish an historic record; (2) to obtain justice for the victims; (3) to facilitate national reconciliation; and (4) to deter future violations and abuses.” *Id.*

²¹⁸ See Neil J. Kritz, Book Review, 93 *Am. J. Int’l L.* 983, 986 (1999) (arguing that TRC is “anomalous”).

²¹⁹ See Anthea Jeffery, *The Truth About the Truth Commission* 80-82, 118-19, 125-26 (1999) (finding that thousands of killings still remain unexplained, that TRC failed to verify evidence, and that TRC was not fully transparent in its operations); Emily H. McCarthy, *Will the Amnesty Process Foster Reconciliation Among South Africans?*, in *When Sorry Isn’t Enough*, *supra* note 52, at 487-88, 490 (“While the [TRC] is doing a formidable job of uncovering the truth about the apartheid-era crimes, it is having far less success in promoting reconciliation.”); Meredith, *supra* note 60, at 314-15, 318-19 (finding that 72% of whites and 62% of blacks in South Africa felt TRC made race relations worse); Patricia J. Campbell, *The Truth and Reconciliation Commission (TRC): Human Rights and State Transitions: The South Africa Model* 26-30 (unpublished manuscript, on file with the *New York University Law Review*) (concluding that TRC has not altered apartheid-era perception that law has no legitimacy).

²²⁰ See Meredith, *supra* note 60, at 319 (noting that approximately 80% of blacks in South Africa “felt that as a result of the TRC’s work people in South Africa would now live together more harmoniously”); South Africa’s Stinging Truths, *N.Y. Times*, Nov. 1,

Sachs identifies as one of the great strengths of the TRC the fact that it was designed by South Africans, grew out of South African history, and responded to the specificity of South African needs.²²¹ The entire process was therefore very sensitive to context. The notion of *ubuntu*—the recognition of the humanity in everyone—pervades the TRC and permits a balanced approach to creating knowledge and then encouraging acknowledgment.²²² Sachs remarks that facilitating people to come forward to tell their stories in a supportive atmosphere prevents the internalization of suffering and resentment.²²³ In South Africa, decisions to award reparations (notwithstanding delays in actual payments), the dignification of mourning, and the creation of commemorative public spaces also have helped the healing process.²²⁴ The fact that the aggressors in their testimony fully corroborated so many victim stories lends these stories an undeniability that contrasts with the systemic denials that can result from the adversarial trial system. According to Sachs, the acknowledgment that results creates the roots for a long-term shared national project.²²⁵ Shame over

1998, § 4 (Week in Review), at 14 (editorial) (praising TRC's work); see also Peter N. Bouckhaert, *The Negotiated Revolution: South Africa's Transition to a Multiracial Democracy*, 33 *Stan. J. Int'l L.* 375 (1997) (arguing that South Africa's transition from security state based on racial dominance into vibrant multiracial democracy ranks as one of greatest political achievements of this century); Arthur Chaskalson, *The Transition to Democracy in South Africa*, 29 *N.Y.U. J. Int'l Law & Pol.* 285 (1997) (discussing transition from apartheid to democracy in South Africa, relying on information revealed by TRC); Phenyò Keiseng Rakate, *Facing the Apartheid Beast in the Eye: The Report of the South African Truth and Reconciliation Commission*, *Africa Legal Aid*, July-Sept. 1999, at 11, 12 ("[T]he South African Truth and Reconciliation Commission is probably one of the success stories of domestic truth commissions."); Jeremy Sarkin, *The Trials and Tribulations of South Africa's Truth and Reconciliation Commission*, 12 *S. Afr. J. Hum. Rts.* 617 (1996) (examining origins of and challenges to TRC); Karen Cavanaugh, Note, *Emerging South Africa: Human Rights Responses in the Post-Apartheid Era*, 5 *Cardozo J. Int'l & Comp. L.* 291, 332 (1997) (arguing that formation of TRC "may go a long way in helping heal the wounds of the people of South Africa"). The TRC began its public hearings in April 1996, finished on July 31, 1998, and released its final report on October 29, 1998 (although it will still deal with some amnesty applications and reparations issues). See Gannage, *supra* note 43, at 97 n.340. The report was published on October 29, 1998. See Truth & Reconciliation Comm'n, *Truth and Reconciliation Commission of South Africa Report* (int'l ed. 1998). For a helpful survey of the mechanics of the TRC, see Gerhard Erasmus & Nadine Fourie, *The International Criminal Tribunal for Rwanda: Are All Issues Addressed? How Does It Compare to South Africa's Truth and Reconciliation Commission?*, 321 *Int'l Rev. Red Cross* 705, 711-15 (1997).

²²¹ See Sachs, *supra* note 151.

²²² See 1 Truth & Reconciliation Comm'n, *supra* note 220, at 125-31; see also Naomi Roht-Arriaza, *Introduction to Impunity and Human Rights in International Law and Practice* 3, 8 (Naomi Roht-Arriaza ed., 1995) (characterizing difference between unofficial and official recognition of atrocity as difference between knowledge and acknowledgment).

²²³ See Sachs, *supra* note 151.

²²⁴ See *id.*

²²⁵ See *id.*

apartheid in South Africa is much more prevalent than shame over genocide in Rwanda.²²⁶

Instead of permitting an accused to shield his or her personal responsibility behind a finding of not guilty (or, if guilt is found, behind the assumption that the court is politically motivated), truth commissions can oblige genocidal participants to face the suffering that they have caused and discuss their participation therein. Truth commissions well may be a very potent tool in situations like the one in Rwanda, where so many people were participants in so many different ways. Plus, the dialogue coming out of a truth commission may lead to proposals for political and associational structures that can help mitigate the reoccurrence of such violence.

Minow suggests that truth commissions and public inquiries may be more effective than trials at establishing an incontrovertible historical record of what actually happened during the period of mass atrocity.²²⁷ She explores how truth commissions may respond to the popular and embedded nature of mass atrocity by offering individual therapy, solidarity with other survivors, a dramaturgical recovery system, and, in the end, group catharsis.²²⁸ Truth commissions may deconstruct "otherness" and identify why it was constructed in the first place. The focus on retributive justice in Rwanda may have resulted in little attention being paid to mental health issues. This leaves unaddressed the important need to treat depression in postgenocidal Rwanda: Prunier finds that Rwanda is populated by the *bapfuye buhagazi* (the "walking dead").²²⁹

Despite the public nature of the genocidal violence, there is very little generally accepted truth in Rwanda as to what exactly happened from April to July 1994.²³⁰ In this regard, a truth commission could

²²⁶ See *id.*; see also Roy L. Brooks, *The Age of Apology*, in *When Sorry Isn't Enough*, *supra* note 52, at 3, 10 ("A great deal of remorse exists in South Africa . . .").

²²⁷ See Minow, *supra* note 15, at 47, 58-59, 78.

²²⁸ See *id.* at 61-79 (pointing out important parallels between truth commissions and therapeutic process of treating posttraumatic stress disorder); *id.* at 57 (stating that truth commissions are better able than trials to achieve "goal of healing individuals and society after the trauma of mass atrocity"); see also Charles Maier, *Comments at Harvard Law Sch. Human Rights Program*, *supra* note 15 (identifying truth commission as "therapeutic, dramaturgical recovery system"). One important question is whether the micro treatment of individual victims of post-traumatic stress disorder can aggregate to catharsis on a macro level. Can the sum exceed the parts? Can individual 'healing away' amount to overarching 'political therapy'? Or are truth commissions subject to the same selectivity critiques as trials—namely only certain individuals come forward so only certain truths are told?

²²⁹ See Prunier, *supra* note 1, at 327; see also Gourevitch, *supra* note 1, at 228 (noting that depression is epidemic in Rwanda).

²³⁰ But see Neier, *supra* note 97, at 43 (suggesting that because of public nature of violence, truth process in Rwanda would fail to make important contribution). Neier is correct in pointing out that the fact that the genocide was committed so publicly means many

help establish an historical narrative of what happened as well as why it happened;²³¹ after this record is established, Rwandan society then could be better positioned to render a moral evaluation of the genocide.²³² Inquiry by a truth commission, which could operate conjunc-

people knew about it. But reports from Rwanda reveal that there is little, if any, shared understanding as to the wrongfulness of the violence. There is an important difference between the genocide generally being known and the wrong of the genocide meaningfully being acknowledged.

²³¹ See José Zalaquett, Comments at Harvard Law Sch. Human Rights Program, *supra* note 15 (concluding that truth commissions "are most useful where broad sectors of society do not . . . acknowledge critical facts").

²³² So far, there has never been a truth commission in Rwanda with powers to compel testimony, order reparations, or promote offender reintegration. There have been investigations and inquiries, but these have not involved directly Rwandans in an organized, institutional process. This is not surprising since the purpose of these investigations was not to forge reconciliation or allocate reparations. In 1994, a commission of experts, established pursuant to Security Council Resolution 935, prepared a preliminary report on violations of international humanitarian law in Rwanda. See Letter from Boutros Boutros-Ghali, Secretary-General, United Nations, to the President of the Security Council, Annex: Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 935 (1994), U.N. Doc. S/1994/1405 (Dec. 9, 1994). The report of this commission of experts was a first step in the formation of the ICTR. See Scharf, *supra* note 101, at 378, 380 (noting that expert commissions in Rwanda and elsewhere have led to prosecutions). The United Nations High Commissioner for Human Rights established a "special investigations unit . . . to gather evidence that might otherwise have been lost or destroyed." Report of the High Commissioner for Human Rights on the Activities of the Human Rights Field Operation in Rwanda Submitted Pursuant to General Assembly Resolution 50/200, ¶ 15, at 5, U.N. Doc. E/CN.4/1996/111 (1996). A report by a French parliamentary commission cleared France of direct involvement, but "point[ed] to errors and shortcomings of French authorities . . . without forgetting the attitude of the international community." IRIN-CEA, UN OCHA, Update No. 567 (Dec. 15, 1998) <<http://www.reliefweb.int/IRIN/index.phtml>>. A Belgian Senate inquiry laid out policy errors on the part of the Belgian government but did not address the personal responsibility of decisionmakers. See Des Forges, *supra* note 1, at 768. The United Nations initiated an investigation into its activities before and during the Rwandan massacres. See IRIN-CEA, UN OCHA, Update No. 635 (Mar. 23, 1999) <<http://www.reliefweb.int/IRIN/index.phtml>>; IRIN-CEA, UN OCHA, Update No. 641 (Mar. 31, 1999) <<http://www.reliefweb.int/IRIN/index.phtml>>. This investigation drew to a close in December 1999 with the publication of a report extensively criticizing the United Nations, as well as then Under-Secretary-General Kofi Annan directly, for failing to respond to warnings about impending catastrophe in Rwanda delivered to the Secretariat immediately prior to the genocide. See Letter from Kofi A. Annan, *supra* note 1, Annex, at 3-82; see also Marcus Gee, UN Chief Takes Blame for Inaction on Genocide, *Globe & Mail* (Toronto), Dec. 17, 1999, at A1 (reporting Annan's apology after Rwandan report was published). A seven-member international panel, assembled by the Organization of African Unity, released a report recommending that the United States, France, and other nations that failed to stop or prevent the genocide pay reparations to Rwanda. See Barbara Crossette, Report Says U.S. and Others Allowed Rwanda Genocide: Panel Urges Reparations for 1994 Killings, *N.Y. Times*, July 8, 2000, at A4. On March 31, 1999, Human Rights Watch and the International Federation of Human Rights (Paris) released a comprehensive study concluding that the Rwandan genocide could have been stopped with tougher action from outside powers. See Des Forges, *supra* note 1, at 595. This study revealed that U.S., French, and Belgian authorities, as well as the United Nations, received dozens of warnings in the months before the genocide but failed to act

tively with *gacaca* proceedings, should involve Rwandan survivors and aggressors. It should also involve the international actors who enabled or facilitated the atrocities.²³³ Prominent on the list of those international actors are successor regimes to the colonial powers that introduced ethnicity as a destructive agent in Rwandan politics, current governments that supported the genocidal regime,²³⁴ and international organizations that stood idly by while atrocities were committed.²³⁵

effectively. See *id.* at 18-19. Of great interest is the study's finding that international legitimization of the genocidal government created a pretext for officials and citizens to follow orders and thereby hide from themselves and others the evil perpetrated during the genocide. See *id.* This study ended with the powerful conclusion that many more investigations of the Rwandan violence were necessary in order to "establish the historical record, to lay the groundwork for justice for Rwandans and accountability for all others who failed to respond to the bonds of our common humanity." *Id.* at 771.

²³³ Trials well may obscure the international community's involvement in the Rwandan genocide. For a discussion of the international community's unwillingness to stop the Rwandan genocide, see Des Forges, *supra* note 1, at 595-632; Gourevitch, *supra* note 1, at 150-61, 163-69. But see Kuperman, *supra* note 1, at 94-95 (arguing that intervention by international community would not have prevented much of Rwandan genocide). Revealingly, the ICTR's verdicts thus far have not really explored the international community's structural involvement (both passive and active) in the atrocities. Blame is deflected towards and pinned on Rwandans alone. See Alvarez, *supra* note 10, at 397-98. The international community's adumbration of the "trial model" may reveal its preference for focusing on individual guilt, as opposed to institutional accountability. After all, the international community may well be implicated in this institutional accountability, and may fear the exposure of this accountability through a searching public inquiry. In the end, "it does seem that the ICTR is doing more to assuage the guilt of the international community for not intervening earlier to stop the genocide than it is to promote a sense of justice for the Rwandan people." Wendy Lambourne, *The Pursuit of Justice and Reconciliation: Responding to Genocide in Cambodia and Rwanda* 14 (unpublished manuscript, on file with the *New York University Law Review*). By naming and blaming individuals, the international community may be absolving itself of responsibility for its own role in the genocide. "The history of prominent powers' involvement in Rwanda also raises disturbing questions about the motivations of prominent powers within the Security Council today. Continued French support for the ICTR may partly hinge on its belief that keeping Rwandan prosecutions 'in check' is consistent with French interests." Alvarez, *supra* note 10, at 442-43; see also Mutua, *supra* note 27, at 168 (positing that ICTR "served either to deflect responsibility or to assuage the consciences of states which were unwilling to take political and military measures to prevent or stop the . . . Rwandan genocide[]").

²³⁴ See Human Rights Watch, *supra* note 5, at 6 (stating that:

Heavily involved in supporting the Habyarimana government[,] . . . donor nations at first ignored evidence of its role in inciting and directing communal violence France continued to supply financial aid and to assist in arms sales to the government, even when massacres perpetrated by the authorities had been criticized within Rwanda and abroad. Egypt and South Africa also ignored the Rwandan record of human rights abuses and continued to sell arms to the government.).

²³⁵ For a stinging critique of the role of the United Nations and foreign peacekeepers in the Rwandan genocide, see Des Forges, *supra* note 1, at 595-701 (commenting that television coverage showed foreign peacekeepers standing by while Rwandans were slain right next to them). The United Nations is being sued for complicity in the Rwandan genocide

It is important that this truth commission have a broad mandate that looks well beyond the 1994 violence.²³⁶ This commission should discuss the human rights abuses during Habyarimana's consolidation of power, the conduct of the RPF in the aftermath of the genocide, the ongoing attacks of Hutu rebels, and the RPF government's response to this rebel activity.²³⁷ As for the conduct of the RPF in halting the genocide, human rights activists surmise that

In their drive for military victory and a halt to the genocide, the RPF killed thousands, including noncombatants as well as government troops and members of militia. As RPF soldiers sought to establish their control over the local population, they also killed civilians in numerous summary executions and in massacres. They may have slaughtered tens of thousands during the four months of combat from April to July.²³⁸

There has been extremely little accountability for any of the RPF abuses.²³⁹ Importing a mutuality to the truth-seeking and accountability process has been an important part of the South Africa TRC. Although rightfully focused on human rights abuses perpetrated by the apartheid regime, the TRC also has condemned the African National Congress for its use of torture in fighting that regime.²⁴⁰ Part of the TRC report also implicated the Inkatha Freedom Party and its leader. Mangosuthu Buthelezi, in gross human rights violations as well as collaboration with the apartheid government to attack political oppo-

by two Rwandan women, one of whom alleges that U.N. soldiers "supposed to be protecting her family were drinking and socialising with the Hutus while she and her children were tortured." IRIN-CEA, UN OCHA, Update No. 836 (Jan. 11, 2000) <<http://www.reliefweb.int/IRIN/index.phtml>>.

²³⁶ The temporal mandate of the ICTR is limited to the year 1994. See Statute of the ICTR, *supra* note 25, art. 1.

²³⁷ See John Prendergast & David Smock, U.S. Inst. of Peace, *Postgenocidal Reconstruction: Building Peace in Rwanda and Burundi* (1999) <<http://www.usip.org/oc/sr/sr990915/sr990915.html>> (noting that human rights groups pointed out that Rwandan government forces committed human rights abuses on large scale when fighting Hutu rebels and insurgents).

²³⁸ Des Forges, *supra* note 1, at 692; see also *id.* at 728 (noting that outside estimates place number of people killed by the Rwandese Patriotic Front (RPF) between 25,000 and 45,000). For more detailed discussion of RPF human rights abuses, see *id.* at 701-22. After the genocide ended, many Hutu (including perpetrators) fled to the Congo. See Prunier, *supra* note 1, at 312-13. See *id.* There is considerable evidence that the RPF, through armed incursions into the Congo, has slaughtered many Hutu allegedly responsible for the Rwandan genocide. See Ian Fisher & Norimitsu Onishi, *Many Armies Ravage Rich Land in the 'First World War' of Africa*, N.Y. Times, Feb. 6, 2000, § 1, at 1. The conduct of the RPF in the Congo also should be subject to the analysis of a truth commission.

²³⁹ There have only been a handful of national trials for RPF soldiers and commanders who committed abuses against civilians. See Des Forges, *supra* note 1, at 733-35 (discussing trials and abuses).

²⁴⁰ See 2 Truth & Reconciliation Comm'n, *supra* note 220, at 366.

nents.²⁴¹ Investigating all abuses during the apartheid era not only may have promoted the accuracy of the historical record, but also may have increased the legitimacy of the TRC as an element of the political settlement integral to the process of regime transformation.²⁴² The international community has failed to hold RPF soldiers who committed ethnically driven civilian massacres accountable, despite ongoing efforts to prosecute Hutu war criminals.²⁴³ This contributes to ethnic divide and mistrust. Creating a mutuality of shaming under the authority of a truth commission not only would make the historical record more accurate, it also might dissipate some of this mistrust. In this sense, a truth commission could be an important part of a negotiated power-sharing settlement between Rwanda's ethnic groups.

In order for local populations to remain fully informed, hearings should be held in public and documented in the local media.²⁴⁴ If the commission had powers to compel testimony and permit survivor participation it could become quite probing.²⁴⁵ Amnesties in exchange for confession or information could heighten the comprehensiveness of the historical record; however, any such amnesty should be accompanied by apologies, public yet reintegrative shaming, and compensation for victims so that the amnesty will not amount to an absolution or an exoneration.²⁴⁶ On the issue of compensation, the Rwandan genocide legislation permits individuals to file damage claims against

²⁴¹ See *id.* at 404, 457-69.

²⁴² See Rakate, *supra* note 220, at 11; see also Antjie Krog, *Country of My Skull* (1998) (commenting that underlying "truth" of TRC was politics and political settlement).

²⁴³ See Fisher, *supra* note 62, § 4 (Week in Review), at 10 (citing historian and Human Rights Watch consultant Alison Des Forges's comment that "international community could show evenhandedness [in Rwanda] not only by continuing to bring the Hutu killers to justice but by not ignoring abuses committed by the Tutsi leaders").

²⁴⁴ See Scharf, *supra* note 101, at 387 (citing advice from Alexander Boraine, Vice Chairperson of TRC, regarding benefits of transparency).

²⁴⁵ Compulsory powers for truth commissions constitute a controversial issue. The South Africa TRC had the power to conduct investigations (including searches and seizures), oblige production of documents, compel any person to appear and give evidence, and take sworn oaths or affirmations. See Gannage, *supra* note 43, at 113. The presence of these powers to compel participation distinguishes the South Africa TRC from truth commissions in other jurisdictions (for example, the Sabato Commission in Argentina). See *id.* at 126. These powers have allowed the South Africa TRC to "examine past abuse in a way that other commissions . . . never could." *Id.*

²⁴⁶ It must be underscored that there are significant differences between amnesty-for-peace deals, in which human rights violators effectively bargain away any responsibility for their actions, and, on the other hand, truth commissions, which hold such individuals accountable for their actions, although criminal sanction may not be the mechanism creating the accountability. It is also important not to overstate the frequency of the use of amnesties, which is often a concern of those advocating the implementation of criminal trials. For example, in South Africa, amnesty was only granted in approximately 200 of the 7000 applications. See Campbell, *supra* note 219; see also Gannage, *supra* note 43, at 114-15 (discussing requirements for disclosure to TRC by anyone who wishes to "earn" amnesty).

perpetrators.²⁴⁷ Very few claims actually have been filed thus far.²⁴⁸ Part of the reason is that no separate civil claims division of the Rwandan courts has been created.²⁴⁹ Nor is there any viable way to enforce a civil judgment.²⁵⁰ Another more important reason is that most aggressors are far too poor to pay. In this regard it might be useful for reintegrative shaming tribunals to be able to order community service as a reparative order. Alternately, a truth commission might be empowered to administer and allocate funds from international sources.²⁵¹ The provision of such funds is of particular, if not compelling, importance given that “[h]undreds of thousands have been left destitute by the genocide, including many of the 300,000 children who now live without adult protection in households headed by minors and many of the women now solely responsible for the well-being of their households.”²⁵²

The reparative aspects of the truth commission also can establish a basis for mutuality of wrongdoing, which can provide a more solid foundation for a consociational contract between Hutu and Tutsi. In the aftermath of genocide, many Tutsi possessed the homes of Hutu who had been incarcerated. There is a sense among many Hutu prisoners that the motivation for their denunciation is the possession of their real property.²⁵³ This, in turn, contributes to the ethnic mistrust endemic to Rwanda.

A truth commission could operate in tandem with trials on two fronts.²⁵⁴ First, as in South Africa, criminal prosecutions could be brought against those who fail to participate fully in the truth commission and against whom evidence of involvement in the genocide is

²⁴⁷ Organic Law, *supra* note 197, art. 30, § 1.

²⁴⁸ See Drumbl, *supra* note 31, at 597 (discussing lack of formal civil procedures).

²⁴⁹ See *id.*

²⁵⁰ See *id.* at 598.

²⁵¹ The El Salvadorean truth commission urged foreign governments to allocate one percent of their aid to El Salvador as compensation for the victims of the government's human rights abuses. See Scharf, *supra* note 101, at 392. In the Rwandan case, a moral basis for an international obligation to provide funds might lie in the international community's involvement in creating the conditions favorable to genocide through its subsequent inaction as the genocide was known to be impending. For a discussion of how reparative mechanisms can be conjoined with a truth commission directly, see Gannage, *supra* note 43, at 118-21 (explaining South African structure and recognizing that much of modalities of victims' compensation remain unresolved).

²⁵² Des Forges, *supra* note 1, at 760.

²⁵³ See discussion *infra* text accompanying note 445.

²⁵⁴ See Scharf, *supra* note 101, at 380 (“A truth commission can supplement prosecutions by establishing a more complete historical record of abuses, victims, and perpetrators. Such a record would be useful especially where the sheer number of perpetrators, such as in Rwanda where over 100,000 Hutus participated in the killing of a half million Tutsis, would render individual prosecution alone an insufficient response.”(footnote omitted)).

available. This could ensure some form of accountability for those who are simply beyond shaming. It also could create an incentive to disclose fully one's wrongdoing to the truth commission. Second, criminal prosecutions could be initiated against the leaders, coordinators, instigators, and planners of the genocide (referred to in this Article as "paradigmatic human rights abusers"). Diane Orentlicher postulates that symbolic trials of paradigmatic human rights abusers can serve to "vindicate the authority of the law and deter repetition."²⁵⁵ If these trials take place after the work of the truth commission is completed, then the problem of the entire nation relying on the trials to develop an historical narrative of the "truth" is avoided.²⁵⁶ Professor Michael Scharf lauds the effectiveness of such a proposal:

Through eventual "exemplary" prosecutions, especially of the most culpable perpetrators and the leaders responsible for planning or supervising their abuses, together with the publication of a comprehensive truth commission report, authorities can educate the population about what the law is, deter future violations, and ensure a sense of justice for the victims.²⁵⁷

True justice after a period of sustained political violence best may emerge from policy responses that blend restorative, reparative, and transformative initiatives with the prosecution of paradigmatic violations of human rights. In the end, blended solutions may promote all three strands of accountability identified by Roach.²⁵⁸ In a sense, recognizing the limits of trials to create national reconciliation is not so much a critique of trials per se than it is of those who propound trials as the exclusive, preferred, or all-encompassing way to respond to "radical evil."²⁵⁹ Those who foist upon genocide trials the potential (and unrealistic) goal of catalyzing internal change, eliminating impunity, and permitting victims to move forward²⁶⁰ just may be guilty of overstating their case. Yet, in the fragility of a dualist postgenocidal society, this overstatement may have dangerous repercussions. A mis-

²⁵⁵ Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 *Yale L.J.* 2537, 2598 (1991).

²⁵⁶ In addressing the possibility of a truth commission for Bosnia and Herzegovina, however, Judge Gabrielle Kirk McDonald, Former President of the ICTY, concluded that: [A] proposal to establish a truth and reconciliation commission, although arguably acceptable in principle, is premature. Before such a commission is put into place, every effort should be made to strengthen the existing mechanisms of justice, rather than creating a new structure which could further hinder our ability to bring peace with justice to Bosnia and Herzegovina.

Remarks by Judge McDonald, *supra* note 20.

²⁵⁷ Scharf, *supra* note 101, at 400.

²⁵⁸ See *supra* note 214 and accompanying text.

²⁵⁹ See *supra* note 19.

²⁶⁰ See *id.*

placed faith in the role of trials may undermine the social cohesion necessary to prevent the reoccurrence of "radical evil" in the future.

III

GUILT: THE LIMITS OF TRIALS

Many individuals, both Rwandans and foreigners, favor judicial intervention to prevent impunity for crimes against humanity and genocide.²⁶¹ These individuals underscore the fact that, in the wake of mass atrocity, trials may have significant declaratory value.²⁶² Trials

²⁶¹ See Des Forges, *supra* note 1, at 747 ("The guilty must be found guilty The proper prosecution of the genocide could permit the Rwandan state both to end impunity and to lay the foundation for the rule of law."); Human Rights Watch, *supra* note 5, at 14 (noting that:

Prompt and effective prosecution of the accused would break with the pattern of impunity that has constituted an element common to all prior massacres. Punishing the guilty would demonstrate that ruthless exploitation of communal tensions, up to and including the level of genocide, is not an acceptable strategy for securing political power and would offer some hope of interrupting the cycle of violence.);

Aryeh Neier, *War Crimes: Brutality, Genocide, Terror, and the Struggle for Justice* xii-xiii (1998) (articulating conviction that individual criminal trials, preferably held at international level, ensure that basic rules necessary for civil society to take hold cannot be disregarded without consequences, thereby consolidating social consensus); Prunier, *supra* note 1, at 341 ("All the various segments of the population need the ritual cleansing of a mass public trial."); *id.* at 354-55 (stating that:

The Europeans are shocked when they hear the Rwandese . . . ask for the trials to be held in Rwanda and for the death penalty to be used. But the Rwandese are right. The immensity of the crime cannot be dealt with through moderate versions of European criminal law made for radically different societies. . . . [O]nly the death of the real perpetrators will have sufficient symbolic weight to counterbalance the legacy of suffering and hatred They have to die. This is the only ritual through which the killers can be cleansed of their guilt and the survivors brought back to the community of the living.);

Schabas, *supra* note 10, at 534 ("[P]rosecuting the perpetrators of genocide is a most urgent priority. It is essential for the restoration of Rwandan society that the wheels of justice begin to turn with respect to the crimes committed during 1994."); Djiena Wembou, *The International Criminal Tribunal for Rwanda: Its Role in the African Context*, 321 *Int'l Rev. Red Cross* 685, 692 (1997) (stating that:

[T]he Tribunal [ICTR] will help to stem impunity in Africa because the sentences handed down will demonstrate to the political and military authorities and to the warlords that they may one day be tracked down, judged and punished for any violations of international humanitarian law they have committed in the context of an internal conflict.).

Morris and Scharf conclude that the ICTR was the international community's best option for responding to Rwandan genocide and discount three alternative options: (1) amnesty, (2) a truth commission, and (3) assisting in national proceedings. See Virginia Morris & Michael P. Scharf, *The International Criminal Tribunal for Rwanda* 691-97 (1998). Regarding Morris and Scharf's conclusion, the question arises why these options are presented as alternatives as opposed to complementary policy devices.

²⁶² See, e.g., Schabas, *supra* note 146, at 516 ("The declaratory value of criminal law is probably its most important contribution to the struggle against impunity. Society declares

may set standards, codify legal principles, and create precedent.²⁶³ They can “demonstrat[e] that no group is above the law and can instill respect for the rule of law.”²⁶⁴ Indeed, a trial may be needed to debunk the arrogance of dismissive leaders and channel the anger of the violated collectivity when no other redress has been taken and impunity may result.²⁶⁵ After all, some perpetrators are simply beyond being shamed and consequently may be immune from the effects of restorative justice initiatives. An example that springs to mind is that of Khmer Rouge leaders Nuon Chea and Khieu Samphan, who surrendered to Cambodian authorities in December 1998.²⁶⁶ Chea unremorsefully addressed the Cambodian people: “‘We are very sorry, not just for the human lives, but also animal lives that were lost in the war.’”²⁶⁷ Samphan added: “‘If we have to say who was wrong and who was right, etc., etc., we cannot have national reconciliation.’”²⁶⁸ Thus far, there has been little public atonement in Cambodia, although there has been significant wrangling between the U.N. and the Cambodian government as to who should control the process by which former Khmer Rouge leaders are held accountable.²⁶⁹

that certain specific kinds of behavior are wrong and anti-social. This process takes place publicly, and its conclusions add to the collective memory.”). If the declaratory value of the criminal trial is its most important contribution to the struggle against impunity, this may be cause for concern as it is unclear whether the “truths” contained in the declarations emerging from trials are the “truths” that a postgenocidal society may most need. See Sachs, *supra* note 151 (questioning usefulness of “microscopic” and “logical” truths created by trials for purposes of reconciliation following mass atrocity).

²⁶³ It is important not to overstate the ability of trials for occurrences of “radical evil” to create precedent. In her review of ICTY decisions, Professor Ruth Wedgwood notes how these decisions often adumbrate different and at times contradictory interpretations even of key legal principles such as the application of the “grave breaches” provisions of the Geneva Conventions. See Ruth Wedgwood, Comments at International Law Weekend, *supra* note 26 (notes on file with the *New York University Law Review*). Even if international tribunal decisions become consistent, Wedgwood outlines other concerns that may affect their precedential value. See *id.* For example, individual states can refuse to follow the pronouncements of international tribunals. See *id.* In fact, the politics of international affairs can never be fully disentangled from the emergence of international legal norms. See *id.* As a result, although international lawyers should welcome the emergence of these norms, there is need for restraint in speaking of “binding” international precedent or jurisprudence. See *id.*

²⁶⁴ Nino, *supra* note 19, at 187.

²⁶⁵ See Lawrence Weschler, *A Miracle, A Universe: Settling Accounts with Torturers* 246 (1990) (recounting how truth-telling processes can deprive military of its “strut”).

²⁶⁶ See Mydans, *supra* note 26 (speculating whether Chea and Samphan would be brought to trial).

²⁶⁷ Ker Munthit, *Defectors Ask Cambodia to Forget Its Bloody Past*, *Globe & Mail* (Toronto), Dec. 30, 1998, at A6.

²⁶⁸ *Id.*

²⁶⁹ See *supra* note 26; see also U.N. Power Demand Delays Justice, *Bangkok Post*, Apr. 18, 2000, at 10, available in 2000 WL 17645943 (editorial) (arguing that instead of helping

Trials also may be appropriate for situations in which successor regimes in ethnically homogenous societies have acquired power by virtue of elite accommodation with the abusive regime, and in which members of that abusive regime are given full amnesty. In such situations, international or foreign trials may be the only way to dislodge information about the atrocities.²⁷⁰ This may be especially important when the atrocities were committed in secret and by small numbers of perpetrators.²⁷¹ Reports coming out of Chile demonstrate that the initiation of extradition proceedings against General Pinochet to face torture charges in Spain, although ultimately unsuccessful, triggered dissemination of information and critical self-reflection by important elements of Chilean government, armed forces, and society.²⁷² Pinochet now faces a real threat of criminal prosecution within Chile.²⁷³

A. *Trials in Dualist Postgenocidal Societies*

Of what use are trials in promoting accountability and transition in dualist postgenocidal societies? One of the stronger arguments in favor of the trial's ability to promote these goals flows from Mark Osiel's notion that prosecutions create "civil dissensus," namely constructive conversations among citizens in which contentious questions

Phnom Penh officials to move forward, United Nations is insisting that "form is more important than content").

²⁷⁰ It is helpful here to return to Kaufmann's distinction between ideologically motivated atrocity and ethnically motivated atrocity. See Kaufmann, *supra* note 45, at 267. Kaufmann finds that the lines between ideological groups are simply not as polarized as those between ethnic groups. See *id.* As a result, many of the negative effects of trials on ethnic reconciliation may not occur in situations where trials are used to hold accountable human rights violators in ideological conflict.

²⁷¹ See Alvarez, *supra* note 10, at 399-400 (discussing differences between redressing "secret" government disappearances and open acts of violence).

²⁷² See Clifford Krauss, *Chilean Military Faces Reckoning for Its Dark Past*, N.Y. Times, Oct. 3, 1999, § 1, at 1 (reporting that Pinochet extradition has encouraged Chilean military to acknowledge its involvement in disappearances, torture, and murder of civilians). This self-reflection persists despite the fact that the U.K. decreed Pinochet unfit to stand trial (owing to his frail health), declined to extradite him to Spain, and returned him to Chile in early March 2000. See Clifford Krauss, *Pinochet, at Home in Chile: A Real Nowhere Man*, N.Y. Times, Mar. 5, 2000, § 1, at 12 (stating:

But when he returned home on Friday—benefiting from a British decision that he was too infirm to stand trial in Spain on charges of gross human rights violations during his 17 years in power—the 84-year-old was a shadow of his former self.

....

"Something incredible has happened They humiliated him and did what they wanted to him. And that is the reason this country has changed."

(quoting noted historian Armando de Ramoin)).

²⁷³ See Isabel Hilton, *Pinochet's Caravan Comes Back to Haunt Him*, Guardian (London), Aug. 10, 2000, at 18 (discussing decision by Chilean Supreme Court to strip Pinochet of his immunity from prosecution).

are deliberated and discussed.²⁷⁴ José Alvarez favorably applies the “civil dissensus” justification for criminal prosecutions to the Balkan and Rwandan conflicts.²⁷⁵ Alvarez argues that the point of “properly conducted” criminal trials is to “provoke socially desirable, if contentious, conversations in the hope that through honest discourse the guilty will eventually come to recognize that brutal killings are not morally ambiguous.”²⁷⁶ It is the act of deliberation itself that gives rise to the generation of a “measure of trust across ethnic differences.”²⁷⁷ In the end, “civil disagreements, channeled by the law, may, over time, generate respect among adversaries, even perhaps the kind of solidarity that Martin Luther King, Jr. attributed to ‘*agape*[,]’ . . . [which can be] one route to national reconciliation.”²⁷⁸

Assuming that it is the act of deliberation that generates national reconciliation, the question arises whether adversarial trials constitute the most effective vehicle for encouraging deliberation. If trials target a select few individuals (the approach of the ICTR), then they may be logistically feasible, but the deliberations may be too contained; if trials target a large number of individuals (the approach of the Rwandan domestic proceedings), then they may be infeasible logistically and result in massive incapacitation. In this latter situation, very limited deliberation ensues, as most defendants simply are not tried. Reintegrative shaming, on the other hand, may be better able to reap the benefits of localized deliberation and the resultant “civil dissensus” without the logistical costs, bipolarity, and denials often resulting from the trial process.

Another advantage of reintegrative shaming is that it does not permit the accused to seek shelter behind the plea bargain. Extensive implementation of a retributive justice paradigm may necessitate, as a matter of practicality, that the accused be able to plead guilty to a lesser charge. This has the apparent advantage of streamlining the ranks of accused by quickly processing some of their numbers. However, plea bargains have a limited capacity to inform the public and

²⁷⁴ See Mark Osiel, *Mass Atrocity, Collective Memory, and the Law* 36-47 (1997) (discussing ability of criminal trials to facilitate deliberation between otherwise reluctant participants).

²⁷⁵ See Alvarez, *supra* note 10, at 469-72. For a more expansive discussion, see Jose E. Alvarez, *Rush to Closure: Lessons of the Tadić Judgment*, 96 Mich. L. Rev. 2031, 2082-108 (1998).

²⁷⁶ Alvarez, *supra* note 10, at 469.

²⁷⁷ *Id.* at 470.

²⁷⁸ *Id.* at 471-72. *Agape* is the Greek word rendered both as “love” and “charity,” which Martin Luther King, Jr. viewed as a basis for respect and common humanity even among enemies. See Martin Luther King, Jr., *An Experiment in Love*, in *A Testament of Hope: The Essential Writings of Martin Luther King, Jr.* 16, 19-20 (1986).

mollify victims.²⁷⁹ Offenders are not confronted by the community. "Their fate is sorted out technocratically, quietly, often in deals done between prosecutors and defense lawyers."²⁸⁰ What moral or other lesson does this teach the postgenocidal society?

Encouraging plea bargains is one goal of the Rwandan government. In fact, the Organic Law permits individuals to confess to offenses (which includes an apology to victims) and, in exchange, receive reduced sentences.²⁸¹ All confessions must be approved by the court.²⁸² Thus far, the Rwandan confession and plea bargain procedures have met with only limited success,²⁸³ in part because prisoners view the Rwandan judicial system as wholly illegitimate.²⁸⁴ They fear that the court will reject, rescind, or throw out their confession and then simply order them to serve the full sentence.²⁸⁵ More important, however, is the fact that the individuals who might confess are all incarcerated (often for five years already) while awaiting trial. Within

²⁷⁹ See generally Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 *Fordham L. Rev.* 2117 (1997) (arguing that increased prosecutorial control over charging, sentencing, and plea bargaining decisions has contributed to reducing role of formal adversarial adjudication in criminal justice system so that most criminal cases are adjudicated by bureaucratic, inquisitorial process centered in prosecutors' offices).

²⁸⁰ Braithwaite, *supra* note 143, at 181.

²⁸¹ See Organic Law, *supra* note 197, arts. 6, 9, 15, 16. The sentence reductions are as follows:

Category 1 offenses: No reduction from the ordinary sentence of death, unless the person confesses and pleads guilty prior to being charged or being named as a perpetrator by another detainee; in this latter (and somewhat exceptional) situation, the person shall be considered to be convicted of a Category 2 offense;

Category 2 offenses: What would ordinarily be a sentence of life imprisonment drops to a sentence of 7 to 15 years;

Category 3 offenses: Sentences drop to one-third of the sentence that normally would be imposed or to one-third of that sentence (if the confession is delivered prior to the individual being taken into custody);

Category 4 offenses: No reduction.

²⁸² See *id.* art. 6; art 11, § 3; art. 12.

²⁸³ See Des Forges, *supra* note 1, at 762 (determining that 8615 people had begun process of making confessions by end of 1998); see also IRIN-CEA, UN OCHA, Update No. 509 (Sept. 24, 1998) <<http://www.reliefweb.int/IRIN/index.phtml>> (reporting 31 guilty pleas that week). The Rwandan government claimed in November 1999 that 17,847 individuals had pleaded guilty, although only 1989 of these actually had been tried. See War Crimes Tribunals, *supra* note 200.

²⁸⁴ See Neil Boisen, U.S. Inst. of Peace, Focus Group Study Report: Knowledge, Attitudes and Practices Among Inmates of Rwandan Detention Facilities Accused of Crimes of Genocide 19 (1997) ("[Prisoners] have lost faith in the system of justice, because they see it as having been commandeered by illegitimate authorities who are perverting it for their own ends.").

²⁸⁵ See *id.* at 14 (finding that "[m]ost inmates knew of no successful case of someone who confessed who then received a reduction in sentence").

the prisons, a strong sense of group solidarity has emerged.²⁸⁶ This solidarity creates a wall of denial—no one admits to any involvement or responsibility during the genocide.²⁸⁷ In fact, making any such admission would be deviant and might trigger ostracism or even retaliation from other prisoners.²⁸⁸ Philip Gourevitch echoes similar findings in his work:

For months, government ministers had been traveling around the country, from prison to prison, distributing copies of the special genocide law, and explaining its offer of sentence reductions for the vast majority of prisoners, if they wished to confess. But prisoners refused to come forward. "It's deliberate sabotage," [Justice Minister Gerald] Gahima said. "Their leaders have them brainwashed. They still wish to maintain that there was no genocide in this country"²⁸⁹

The situation might be different were the confession procedure to be administered by localized reintegrative shaming proceedings or a truth commission. The most immediate advantage of such proceedings is that they could take prisoners away from jail house leaders and thereby weaken the silencing effects of group solidarity. Instead, the aggressors would face local communities. The interaction between aggressor and survivor would strip from the aggressor the denial that years of imprisonment have likely reinforced. Aggressors could not rely on the comfort of group solidarity to deny their involvement, nor to deny the heinousness of what happened between April and July 1994.

Even if significant numbers of perpetrators could actually proceed to public and accessible trials, this remains a risky way to achieve "civil dissensus." This risk is especially large when trials are pursued as the exclusive method to promote accountability after genocide. The risks of trials go beyond the traditional political realist concern that trials may destabilize transitional regimes.²⁹⁰ A more structural

²⁸⁶ See McKinley, *supra* note 34, § 1, at 3 ("Hutu solidarity is the message running among the inmates. 'The intelligentsia with whom the idea of genocide started are there in the prison and they guide the mood of the prisoners.'" (quoting Gerald Gahima, high-ranking Rwandan justice official)).

²⁸⁷ See Drumbl, *supra* note 31, at 607 (finding that prisoners felt confession procedure not to be useful since they had done nothing wrong). This solidarity is buttressed by the fact that prisoners perceive there to be many "innocent people" in jail. See Boisen, *supra* note 284, at 23.

²⁸⁸ See Drumbl, *supra* note 31, at 591 (describing lack of structure to facilitate confessions).

²⁸⁹ Gourevitch, *supra* note 1, at 346-47.

²⁹⁰ See Nino, *supra* note 19, at 128 (noting possibly destabilizing effects of prosecutions in political transitions). A particularly blunt airing of this concern has emerged in the debate surrounding accountability for Khmer Rouge atrocities in Cambodia. Prime Minis-

concern is the fact that the truths emerging from trials simply may not be the truths that transitional postgenocidal societies most need. Justice Albie Sachs identifies four types of "truth": microscopic truth, logical truth, experiential truth, and dialogic truth.²⁹¹ Courts create microscopic and logical truths: These emerge in carefully controlled situations (A v. B) and are based on a sequential proof of facts beyond a reasonable doubt. Public inquiries and truth commissions, on the other hand, create experiential and dialogic truths. These truths arise when people who have suffered harms come forth and tell their stories without the need to prove logically every step. Instead, according to Sachs, a phenomenological approach is used in that the expression of shared experiences by a broad array of participants creates an overarching historical narrative that can displace previous narratives that normalized the genocide.²⁹²

Why might microscopic and logical truths not be the truths most needed in the wake of mass atrocity? *Ab initio*, due process chal-

ter Hun Sen maintains that trials "would destroy the fragile fabric of [the] country and that revenge and retribution would return Cambodia to the dark ages." Cambodia Rejects Genocide Trials, BBC News (Feb. 25, 1999) <http://news.bbc.co.uk/hi/english/w...a-pacific/newsid_286000/286020.stm>. Analysts of the internecine conflict in Sierra Leone also demonstrate sensitivity to the political realist approach. See, e.g., David Rieff, *The Precarious Triumph of Human Rights*, N.Y. Times, Aug. 8, 1999, § 6 (Magazine), at 39 (stating that:

[T]he reality in Sierra Leone was that there could be no peace without a deal between the rebels and the Government. The guerrillas would not sign until Sankoh and other detained rebels were pardoned and set free. In the name of peace, the Government agreed not to prosecute—rightly, in my view.).

But see Barbara Crossette, *Zambian Criticizes Leadership of Sierra Leone Peacekeepers*, N.Y. Times, May 7, 2000, § 1, at 16 (describing how rebel forces continue to initiate conflict, well after deal was signed to accommodate Sierra Leone's political realities, and have taken hostage of hundreds of U.N. peacekeepers, leaving little recourse but international criminal law to promote any accountability or peace). Political realist concerns dissipated, and calls for criminal proceedings increased, after rebel leader Foday Sankoh was captured on May 17, 2000. See Alexandra Zavis, *Rebel Chief Seized; Sierra Leoneans Exult*, Ark. Democrat Gazette (Little Rock), May 18, 2000, at 6A. The U.N. Security Council has passed a resolution authorizing Secretary-General Kofi Annan "to negotiate an agreement with the Sierra Leonean government to create an independent special court to prosecute crimes against humanity, war crimes and other serious violations of both international humanitarian and Sierra Leonean laws." Edith M. Lederer, *U.N. Council OKs Court to Try Rebels*, Ark. Democrat Gazette (Little Rock), Aug. 15, 2000, at 7A. Although important details need to be resolved, it appears that the tribunal will sit in Sierra Leone and will be staffed jointly by foreign and local judges. See Chris McGreal, *Joint Court Likely for Sierra Leone Atrocities*, Guardian (U.K.), Aug. 12, 2000, at 19. This may represent a more sensitive approach to blending international and national actors in legal interventions following mass atrocity than the approach implemented by the United Nations in Rwanda.

²⁹¹ See Sachs, *supra* note 151. Sachs's understanding of "truth" follows the definition of truth adopted by the South Africa Truth and Reconciliation Commission. See 1 Truth & Reconciliation Comm'n, *supra* note 220, at 111-14 (1998).

²⁹² See Sachs, *supra* note 151.

lenges may be inevitable as soon as microscopic and logical truths are pursued. These may create conflicts between victims and aggressors. In dualist postgenocidal societies these conflicts may be especially problematic since victims and aggressors will be divided ethnically. As a result, these conflicts could weaken the development of national reconciliation. Institutions less dependant on procedural details (for example, *gacaca* initiatives promoting reintegrative shaming) may avoid some of this intergroup conflict.

In addition, during criminal trials, conflicts between victims and due process may be inevitable.²⁹³ In a dualist postgenocidal society, this places the afflicted ethnicity in conflict with the newly emerging regime. If such a regime is legitimately trying to move towards power sharing, elite accommodation, and consociational democracy, then such wrangling, by threatening the fragility of that new regime's legitimacy, may endanger the prospects for peace in the postgenocidal society.

Due process disputes also can place genocide victims and survivors in conflict with the international community. A recent example is the ICTR's November 3, 1999 decision to release genocide suspect Jean-Bosco Barayagwiza due to the passage of one and a half years from the time of his arrest to the time of his actually being charged.²⁹⁴ The ICTR held that this delay infringed Barayagwiza's human rights.²⁹⁵ Barayagwiza was a central figure in the genocide, during which he helped establish a radio station used to incite anti-Tutsi pogroms.²⁹⁶ His release prompted outrage in Rwanda, and resulted in the Rwandan government suspending its cooperation with the ICTR.²⁹⁷ It also encouraged four other detainees, including Colonel

²⁹³ For a discussion of how due process and the criminal sanction are less capable than other procedures of protecting minorities from discrimination, see Roach, *supra* note 152, at 246-48. In the specific case of war crimes trials in Canada, Roach finds that these trials "failed to punish any war criminal" and "produced symbolic and divisive battles between due process and victims' rights." *Id.* at 240.

²⁹⁴ See Ian Fisher, *Crisis Points Up Tough Choices for Tribunal on Rwanda*, N.Y. Times, Dec. 19, 1999, § 1, at 3 (highlighting difficulties faced by ICTR). Conflicts between victims, due process, and the international community also have arisen at the ICTY. See Remarks by Judge McDonald, *supra* note 20 (urging pursuit of expeditious trials to avoid due process challenges).

²⁹⁵ See Fisher, *supra* note 294, § 1, at 3.

²⁹⁶ See William A. Schabas, *Barayagwiza v. Prosecutor*, 94 Am. J. Int'l L. 563, 563-64 (2000).

²⁹⁷ Rwanda felt that the release was based "on a technicality." Rwanda Approves Visa for U.N. Prosecutor, N.Y. Times, Dec. 4, 1999, at A4. As a result, in late November 1999, Rwanda denied ICTR Prosecutor Carla Del Ponte an entry visa. See *id.*; see also War Crimes Tribunals, *supra* note 200 (reporting that Rwandan representative at United Nations stated that decision to release Barayagwiza "left his Government with no alternative but to register a vote of no confidence in it").

Théoneste Bagosora (considered to be the military organizer of the mass killings) to file similar challenges.²⁹⁸ The Barayagwiza release caused the chief prosecutor to take the unprecedented step of asking the ICTR to reconsider its decision to quash the indictment.²⁹⁹ On March 31, 2000, the ICTR revised its position, holding that the extent to which Barayagwiza's rights were infringed did not justify his release.³⁰⁰

The Barayagwiza affair demonstrates the potential for politicization in the relationship between Rwanda and the ICTR. It also demonstrates the extent to which the criminal process may create tensions between victims and due process for the accused, which, in the case of Rwanda, deepen the rift between Tutsi and Hutu. International institutions must be sensitive to the effects of what may be perceived as technical decisions on the nations they were created to assist. The ICTR's principal motivation in its initial decision to release Barayagwiza was the "'integrity of the tribunal'" and the "'[l]oss of public confidence'" that would have arisen from "'allowing [him] to stand trial in the face of such violations of his rights.'" ³⁰¹ What about the "loss of public confidence" in Rwanda due to this failure of the trial model and Barayagwiza's release? This desire to protect the international trial process was evident even in the judgment revisiting the release, in which the ICTR emphasized that the decision to sustain the indictment was not the product of political pressure.³⁰² These two sets of statements give rise to a deeper question: What is the primary purpose of the ICTR—to promote accountability for mass atrocity or to maximize its credibility in the eyes of the international community? What happens when there is dissonance between the pursuit of these two purposes?

²⁹⁸ See Fisher, *supra* note 294, § 1, at 3.

²⁹⁹ See *id.* Article 25 of the Statute of the ICTR allows the ICTR to review a decision "[w]here a new fact has been discovered which was not known at the time of the proceedings" and the fact "could have been a decisive factor in reaching the decision." Statute of the ICTR, *supra* note 25, art. 25. It was only after Prosecutor Del Ponte filed the request for reconsideration that the Rwandan government relented and issued her an entry visa on December 3, 1999. See Rwanda Approves Visa for U.N. Prosecutor, *supra* note 297, at A4. However, Rwanda's justice minister, Jean de Dieu Mucyo, is reported to have "implied . . . that the country's cooperation with the tribunal . . . hinge[s] on [Barayagwiza's] fate." *Id.*

³⁰⁰ See *Barayagwiza v. Prosecutor*, Case No. ICTR 97-19-AR72, ¶ 75 (Int'l Crim. Trib. for Rwanda Mar. 31, 2000) (prosecutor's request for review or reconsideration) <<http://www.icttr.org/>>.

³⁰¹ Fisher, *supra* note 294, § 1, at 3 (quoting Barayagwiza opinion).

³⁰² See *Barayagwiza*, ¶ 34; see also ICTR/INFO-9-2-226EN, Mar. 31, 2000 (citing ICTR Judge Nieto-Navia as stating that "in no circumstances would [political] considerations cause the Tribunal to compromise its judicial independence and integrity").

B. *Gridlock: The Normalization of Incapacitation in Rwanda*

In a prison the awe of public eye is lost, and the power of the law is spent; there are few fears, there are no blushes. The lewd inflame the lewd, the audacious harden the audacious.³⁰³

The Rwandan government has, as part of its domestic public policy, opted for extensive judicial prosecution and incarceration as the principal device to promote the rule of law, order, and, purportedly, national reconciliation in postgenocidal Rwanda.³⁰⁴ This policy has caused the domestic prison population to soar. In mid-1994 there were 10,000 prisoners; by 1999 there were approximately 125,000.³⁰⁵ "This number constitutes roughly 10% of the adult male Hutu population."³⁰⁶ As a result, Rwanda's prisons, designed to hold a maximum of 12,000 to 15,000 prisoners, are hopelessly overcrowded.³⁰⁷ Although most arrests took place in 1994 and 1995, thousands of Hutu continued to be arrested over the course of 1998 and 1999.³⁰⁸

This overflow of detainees is managed by a legal system afflicted with a scarcity of personnel and resources. Because of these scarcities numerous compromises have to be made, including limiting disclosure of the charges (and the facts upon which they are based) to defendants and curtailing the right to full answer and defense.³⁰⁹ In fact,

³⁰³ Samuel Johnson, *The Idler*, reprinted in 7 *The Works of Samuel Johnson* 153 (Arthur Murphy ed., London, Luke Hansard & Sons, 1810).

³⁰⁴ The official position of the Rwandan government, since 1994, has remained quite supportive of trials:

Paul Kagame, leader of the RPF and the Vice-President [of Rwanda], has reportedly argued that the prosecution of those responsible for crimes against humanity is urgently needed in order that the nation be reconciled. Similarly, Prime Minister Faustin Twagiramungu . . . also argued that only with trials and punishment of the guilty can true reconciliation (and ultimately peace) take hold.

Lambourne, *supra* note 233, at 13. "As General Kagame said, 'There can be no durable reconciliation as long as those who are responsible for the massacres in Rwanda are not properly tried.'" Prunier, *supra* note 1, at 342-43. In late 1999, the Rwandan government swore into the Rwandan bar 26 new prosecutors and 71 judicial defenders so as to "speed up trial proceedings." IRIN-CEA, UN OCHA, Update No. 831 (Dec. 29, 1999) <<http://www.reliefweb.int/IRIN/index.phtml>>. It is interesting to consider the extent to which these protrial national policies in Rwanda may have been influenced by the expansion of the trial model internationally and Rwanda's desire to be seen as conforming to the newly emerging norms of international criminal law.

³⁰⁵ See Irinwire, Sept. 9, 1999 (on file with the *New York University Law Review*). Of this total, approximately 4500 were minors aged between 14 and 18 years at the time of their arrest. See *id.*

³⁰⁶ Drumbl, *supra* note 31, at 571.

³⁰⁷ See Gourevitch, *supra* note 1, at 242 (claiming that Rwanda's prisons are designed to house only 12,000 individuals); see also text accompanying *supra* note 33.

³⁰⁸ See Women's Human Rights, *supra* note 202.

³⁰⁹ See Drumbl, *supra* note 31, at 617 (describing arbitrary methods of prosecution). The Rwandan proceedings may fall short of international due process standards. See In-

only 20,000 indictments have been issued for the 125,000 prisoners.³¹⁰ In addition to these infrastructure concerns,³¹¹ Rwanda historically has not had a well developed rule of law. In fact, Professor William Schabas candidly comments that “the Rwandan legal system has never been more than a corrupt caricature of justice.”³¹² Rwanda’s decision to place upon this very fragile system the rigors of adjudicating 125,000 cases of genocide and crimes against humanity creates a practice of open-ended imprisonment pending trial (or even pending indictment). The result is the normalization of the penal experience. Pervasive imprisonment results in the criminalization of politics in Rwanda.³¹³ The reification of the trial diverts attention from the need for political and institutional reform. This reification also may dissipate energy that could have been devoted to alternative forms of truth telling, such as truth commissions.

Although there have been improvements in the quality and rate of trials over the past two years, it remains that only 3700 out of more than 125,000 prisoners were adjudged from 1994 to January 2000.³¹⁴ On the one hand, Rwanda deserves recognition for the fact it has tried more genocide cases than any postgenocidal society ever in history.

ternational Covenant on Civil and Political Rights, Dec. 19, 1966, art. 14, 999 U.N.T.S. 171, 174-75 (outlining minimum due process guarantees for determination of criminal charges). Since 1995, the domestic Rwandan proceedings progressively have augmented their conformity with international due process standards. See Schabas, *supra* note 26. Nonetheless, it remains unclear how Rwanda can move towards a culture of human rights (which may provide the greatest bulwark against future genocides) unless the trials that are implemented to redress prior wrongs themselves fully comply with human rights standards. See Paul van Zyl, Comments at International Law Weekend, *supra* note 26 (notes on file with the *New York University Law Review*).

³¹⁰ See War Crimes Tribunals, *supra* note 200.

³¹¹ Standing alone, these infrastructure concerns jeopardize the ability of the trials to achieve justice or closure:

[T]rials should not be pursued where there is no chance for fairness or perception of fairness; where the tribunal is entirely subject to a particular nation’s self-interest; or where there are overwhelming disparities between the resources and will needed to undertake trials and the capacities of lawyers and judges, witnesses and offenders, actually in hand.

Minow, *supra* note 15, at 50.

³¹² Schabas, *supra* note 10, at 531.

³¹³ This, in turn, exposes justice to the criticism that it is no more than political justice. The questions whether imperfect justice is “better” than no justice, and when imperfect justice becomes (or is perceived as becoming) political justice, are contentious ones. See Schabas, *supra* note 26.

³¹⁴ See IRIN-CEA, UN OCHA, Update No. 834 (Jan. 6, 2000) <<http://www.reliefweb.int/IRIN/index.phtml>>. Statistics are difficult to obtain and at times contradictory. See, e.g., *Rwandans Sentenced in Genocide Trial*, Wash. Times, Apr. 2, 2000, at C13 (citing more conservative figure of 2500 prisoners tried, 300 of whom have been sentenced to death). In 1998, 2500 prisoners died in the prisons, largely of AIDS, tuberculosis, or typhoid. See Ian Fisher, *supra* note 198, at A1. Conditions in the prisons have been described as “deplorable.” See Women’s Human Rights, *supra* note 202.

On the other hand, the nagging question remains whether the pursuit of these trials is leading to justice in Rwanda. Three thousand seven hundred "completed" prosecutions in five and a half years means that the Rwandan legal system has pronounced upon the guilt or innocence of only three percent of all detainees. At this rate it would take hundreds of years to try everyone currently incarcerated.³¹⁵ Is this a system that truly can be said to be dispensing "justice"? The ICTR is not of much help in reducing the overall number of detainees: After spending \$200 million over five years of work, it has indicted forty-four individuals and has heard only nine cases.³¹⁶

Reports from inside Rwanda reveal the extent to which present policies, with their dominant focus on criminal trials, adjudication, and imprisonment, may do little to promote justice or national reconciliation or even dissuade future bouts of ethnic violence. If anything, these policies aggravate social division, procrastinate the determination of accountability, and sow mistrust. Prunier finds that "[e]thnic relations are based on mutual fear, lies, unspoken prejudices and continued stereotyping."³¹⁷ Neil Boisen remarks that, among Hutu, there is a "nearly universal and overwhelming sense of injustice."³¹⁸ Refusing to release unfairly detained persons³¹⁹ or persons detained for ex-

³¹⁵ See Drumbl, *supra* note 31, at 600 (estimating that 500 years would be needed). Of those who have gone to trial, approximately one-third are sentenced to death (22 individuals have been executed so far), one-third to life imprisonment, and the rest to finite terms of imprisonment. See *id.* at 549 & n.12. The acquittal rate is five percent. See *id.* In the initial years of the prosecutions, 54% of the detainees were unrepresented by counsel throughout the proceedings. See *id.* at 614. This percentage has decreased in recent years as defense counsel have become more widely available. However, what has not seen much improvement is disclosure by the prosecution of the charges to the accused. Of those detainees we interviewed who were awaiting trial, 40% knew all or some of the charges against them, 10% knew a file had been prepared as to their case, but were unaware of the contents thereof, and 50% knew neither whether any charges were pending nor whether a file even had been prepared. See *id.* at 605.

³¹⁶ See International Criminal Tribunal for Rwanda (visited Aug. 16, 2000) <<http://www.ictt.org>>; see also Prendergast & Smock, *supra* note 237. In 1999 alone, the ICTR received \$75 million in funding. See War Crimes Tribunals, *supra* note 200.

³¹⁷ Prunier, *supra* note 1, at 389.

³¹⁸ Boisen, *supra* note 284, at 17.

³¹⁹ Notwithstanding the broad levels of public participation in the Rwandan genocide, there is some evidence that a significant proportion of those currently detained in Rwanda's prisons may not have been involved in genocidal activities (whether directly or indirectly). See Des Forges, *supra* note 1, at 753-54 (citing reports that 20% of prisoners in Kigali, 15% in Ruhengeri, and 60% in Gitarama were either falsely accused or were at most guilty of Category 4 crimes, which do not carry punishment of prison sentence); Human Rights Watch, *supra* note 5, at 13 (discussing detention of innocent people and people against whom there was "no credible presumption of guilt"); Morris, *supra* note 3, at 352 ("There was no systematic collection of evidence . . ."). The ongoing detention of these individuals has created a perception in Rwanda that the criminal justice system is little more than politically motivated victor's justice. See Boisen, *supra* note 284, at 19.

cessive periods of time³²⁰ further perpetuates this mistrust. Specifically referring to the Rwandan proceedings, Minow concludes that “[r]ather than ending the cycles of revenge, the trials themselves were revenge.”³²¹ The lengthy, and seemingly endless, pretrial detentions are also unsatisfactory for genocide victims, as no accountability whatsoever arises for those who killed their loved ones.³²² In the end, this mistrust and frustration also makes it difficult for the politics of national reconciliation to bear fruit. In a conclusion apposite to the Rwandan context, Minow writes: “Nothing puts the instruments of justice more at risk in a society struggling for political legitimacy than prosecuting . . . perpetrators of human rights violations and failing to secure convictions or securing them unfairly.”³²³ “Prosecutions . . . may be viewed as obstacles to reconciliation and to nation building; prosecutions may solidify the resistance of a particular sector in the society to those projects while feeding a sense of being wronged and misjudged.”³²⁴

Attempts to implement an essentially unimplementable trial model in Rwanda have given rise to a gridlock that has hindered the development of a national historical narrative. In fact, genocide trials have not been very successful in producing the “truth” of what “happened” in Rwanda in 1994. Rwanda has not passed through what human rights lawyers call a “truth phase,” in which “[p]ublic acknowledgment of the truth and the restoration of collective memory” is established, thereby creating the possibility to proceed to a “justice phase.”³²⁵ In Rwanda exclusive attention on a narrow type of “justice” before passing through a “truth phase” may result in neither justice nor truth. The contrast with South Africa demonstrates how the claim that criminal prosecutions produce the truth may be misguided.³²⁶ One observer contrasts the “paucity of information about

More perniciously from the perspective of postgenocidal reconciliation, the nonexistence of procedural mechanisms to identify detainees who obviously had only peripheral involvement in the genocide gives all detainees a justification for insisting that they, too, are not guilty and are detained unfairly. See Drumbl, *supra* note 31, at 607 (discussing effects of “critical mass of innocence”).

³²⁰ See Drumbl, *supra* note 31, at 548-49 (noting that many prisoners, including some accused of minor offenses, had been detained for four years).

³²¹ Minow, *supra* note 15, at 124 (footnote omitted).

³²² See Drumbl, *supra* note 31, at 600.

³²³ Minow, *supra* note 15, at 126.

³²⁴ *Id.* at 128.

³²⁵ Gannage, *supra* note 43, at 29; see also Neier, *supra* note 97, at 39 (addressing relative importance of two phases).

³²⁶ Cf. Carrie Gustafson, *International Criminal Courts: Some Dissident Views on the Continuation of War by Penal Means*, 21 *Hous. J. Int'l L.* 51, 75 (1998) (suggesting that punitive strategies fail to achieve truth).

the 1994 genocide in Rwanda, generated by hundreds of criminal prosecutions" with the "wealth of information about apartheid South Africa, compiled through nonprosecutorial means."³²⁷

One reason trials in Rwanda have not been very successful in promoting a national historical narrative of the genocide is that they have failed to produce a sense of individual responsibility or blameworthiness among prisoners. The overwhelming majority of the prisoners we interviewed do not believe they did anything "wrong," or that anything really "wrong" happened in the summer of 1994 in Rwanda.³²⁸ Many detainees see themselves as prisoners of war, simply ending up on the losing side. In fact, the prisoners do not even call the events of April to July 1994 the "genocide," but, instead, refer to these events as "the war."³²⁹ Nearly every individual we interviewed had little faith in the RPF, the Government of National Unity, or the judicial system.³³⁰ The trials, or the prospect of facing trial, have failed to produce any shame among the prisoners. What has emerged is emphatic denial buttressed by the group solidarity that pervades the prison. But all cannot be innocent. Someone must be responsible. However, virtually all prisoners proclaimed, often very eloquently, their innocence.³³¹ Undoubtedly, some detainees are not guilty of their charges. But many others who actively participated in the genocide do not feel guilt, remorse, shame, or even a sense that what they did was in any way wrong.³³² Sadly, until this wrongdoing is recog-

³²⁷ *Id.* Notwithstanding the divergent experiences of Rwanda and South Africa, some proponents of the "trial model" remain steadfast in their convictions. See, e.g., Scharf, *supra* note 66, at 215 ("While there are various means to achieve an historic record of abuses after a war, the most authoritative rendering is possible only through the crucible of a trial that accords full due process."). Scharf observes that "truth commissions are a poor substitute for prosecutions. They do not have prosecutorial powers such as the power to subpoena witnesses or punish perjury, and they are viewed as one-sided since they do not provide those accused of abuses with the panoply of rights available to a criminal defendant." *Id.* at 215 n.*; compare with more welcoming approach toward truth commissions in Scharf, *supra* note 101, at 379-80.

³²⁸ Based on interviews of prisoners in Kigali over the winter and spring of 1998. See generally Drumbl, *supra* note 31, at 604-09.

³²⁹ *Id.* at 607. Conflating the genocide with the war against the RPA contains faulty reasoning. See Gourevitch, *supra* note 1, at 98-99 ("[A]lthough the genocide coincided with the war, its organization and implementation were quite distinct from the war effort.").

³³⁰ See Drumbl, *supra* note 31, at 608. All of these institutions are viewed as Tutsi-dominated and operating only in the interest of the Tutsi, notwithstanding the occasional presence of some Hutu in the membership of each.

³³¹ See *id.* at 607.

³³² See *id.* This absence of remorse or contrition is not limited to those individuals we interviewed, most of whom are accused of lower-level offenses. For example, Alfred Musema, an influential businessman convicted by the ICTR of genocide and crimes against humanity, was found by the ICTR never to have shown remorse despite his having know-

nized, it will be difficult for Rwandan political culture to move beyond the (il)logic of ethnic violence. It was the unquestioned certainty of their innocence that struck me the most in my interviews with the prisoners. After nearly four years of imprisonment, only a tiny handful of prisoners actually admitted to me that they had participated in the genocide.³³³ And of this small group, an even smaller number sought any redemption. Jean-Paul Akayesu's statements at his own sentencing hearing before the ICTR were echoed by many of the detainees with whom we met, most of whom played a far humbler role in the genocidal regime: "Although the decision of my guilt has already been taken, I am sure in my heart that I am not guilty."³³⁴

Our experiences were shared by Philip Gourevitch, who reports that "[i]n [his] time in Rwanda, [he] had never encountered anyone who admitted to having taken part in the genocide."³³⁵ "In the prisons and the border camps, [he] couldn't find anyone who would even agree that there had been a genocide. There had been a civil war and, yes, some massacres, but nobody acknowledged seeing anything."³³⁶ In a similar vein, Gérard Prunier, in his interviews of Hutu refugees returning to Rwanda, found no atonement: "Most of them still either deny the genocide ever happened or even insist that they, the Hutu, were its victims."³³⁷ Neil Boisen, drawing from his fieldwork, attests to the existence of a "moral ambiguity" among the prisoners regard-

ingly and consciously participated in the atrocities. See *Prosecutor v. Musema*, Case No. ICTR-96-13, ¶¶ 991, 1008 (Int'l Crim. Trib. for Rwanda Mar. 17, 2000) <<http://www.ictr.org/ENGLISH/judgements/Musema/8.Sentencing.htm>>. There are some exceptions, however. Georges Ruggiu, a former journalist, pleaded guilty to genocide and asked the ICTR "for forgiveness and pardon and promised . . . to testify on the horrors of genocide in Rwanda." *Former Journalist Ruggiu Changes His Plea to Guilty*, ICTR Press Release ICTR/INFO-9-2-232.EN (May 15, 2000), available at <<http://www.ictr.org/ENGLISH/PRESSREL/232.htm>>.

³³³ See Drumbl, *supra* note 31, at 608.

³³⁴ IRIN-CEA, UN OCHA, Update No. 512 (Sept. 29, 1998) <<http://www.reliefweb.int/IRIN/index.shtml>>; see also Drumbl, *supra* note 31, at 607 (citing IRIN report).

³³⁵ Gourevitch, *supra* note 1, at 305.

³³⁶ *Id.* at 244.

³³⁷ Prunier, *supra* note 1, at 389. There is similar evidence of collective denial by large numbers of Serbs:

More fundamental and more pernicious was the denial that bubbled up in conversation this summer with well-educated young people in Belgrade. Almost without exception, they could not bring themselves to admit that atrocities had been committed in their name. Even as war-crimes investigators were digging up mass graves in Kosovo, they refused to concede what was obvious to the rest of the world: Serb forces had committed crimes against humanity on a scale and with an organized savagery that was grossly disproportionate to the threat posed by ethnic Albanians.

Blaine Harden, *The Milosevic Generation*, N.Y. Times, Aug. 29, 1999, § 6 (Magazine), at 33. This absence of regret in Serbia is similar to that in Rwanda (although the sullen denials of Serb collective involvement well may be a reaction to the NATO bombings).

ing the events of April to July 1994.³³⁸ So although there is plenty of talk either denying the event or denying one's role in it, there is very little talk about any individual regret, remorse, or responsibility.³³⁹ Those who are not charged face no criminal liability and, more importantly, no sense of moral responsibility; those who are charged face criminal liability but, owing to the perceived political animus of the charges, also feel no sense of moral responsibility. In simple terms, those whose guilt is pronounced by a court do not feel guilty.

How can such denial constitute a basis for a peaceful future? How can "never again" have any air of reality? In the end, the absence of individual shame, of a national historical narrative, and of truth-telling hinders Rwanda's ability to move past the politics of ethnic duality.

IV

BUILDING A RWANDAN CIVIS

Rwanda's future essentially boils down to a question of identity politics.³⁴⁰ Long-term peace in Rwanda may well hinge on the ability of Rwandans to change political allegiance from the individual ethnic group to civil society.³⁴¹ At this stage, it is important to remember that ethnic identities are not "cast in stone for ever."³⁴² They are not

³³⁸ See Boisen, *supra* note 284, at 25.

³³⁹ For a discussion of the distinction between "personal responsibility" and "guilt" among perpetrators of war crimes and persecution in the former Yugoslavia, see Aleksandar Fatić, *Reconciliation via the War Crimes Tribunal? 71-79* (2000) (exploring the limits and dangers of international war crimes tribunals as mechanisms for facilitating reconciliation after civil conflicts).

³⁴⁰ In a short passage directly (and ominously) applicable to this discussion on Rwanda, Jeremy Waldron concludes: "In the modern world . . . identity is anything but recreational. It is deadly serious politics—identity politics—and it is played out for high stakes and with serious ramifications not only for who ends up with what, but also for the terms on which the basic social settlement is framed." Jeremy Waldron, *Cultural Identity and Civic Responsibility* 5 (Jan. 21, 1999) (unpublished manuscript on file with the *New York University Law Review*).

³⁴¹ For a definition of civil society, see Spiro, *supra* note 35, at 625. Civil society is an entity composed of individuals yet independent of the ethnic groups with which those individuals may identify.

³⁴² Patrick Chabal & Jean-Pascal Daloz, *Africa Works: Disorder as Political Instrument* 56 (1999); see also Thomas M. Franck, *Clan and Superclan: Loyalty, Identity and Community in Law and Practice*, 90 *Am. J. Int'l L.* 359, 367 (1996) ("[W]e may discover that our identities have been much more mutable than we imagined. Distinctly different tribes or nations, for historic reasons and to different degrees, do sometimes merge their identities and submerge their origins, opting to become partly or entirely assimilated into a larger tribe/nation identity."); Donald Rothchild, *Ethnic Insecurity, Peace Agreements, and State Building*, in *State, Conflict, and Democracy in Africa*, *supra* note 5, at 319, 320 ("[E]thnicity can be dynamic, changeable, and of very recent origin. In Rwanda, for example, the hatreds based on claims of ethnic difference that were manifested in the early months of 1994 were anything but ancient.").

"essentialist attributes" but rather are "simply one of several components of identity."³⁴³ As Africanists Patrick Chabal and Jean-Pascal Daloz point out:

We need to conceptualize ethnicity as a dynamic, multi-faceted and interactive cluster of changeable self-validated attributes There are ways of defining oneself and others in accordance with a set of beliefs, values and subjective perceptions which are both eminently malleable and susceptible to change over time.³⁴⁴

The Rwandan experience substantiates these assertions. Hutu and Tutsi, fairly benign constructs until Rwandan independence, quickly changed (and were changed) to define political cleavages and foster enmity. Colonial introduction of ethnic identity cards, patronage based on ethnic group membership, and the European fascination with the anthropological origins of Hutu and Tutsi led to what Chabal and Daloz call the "invention of ethnicity."³⁴⁵ By this they do not mean that "[ethnic] affiliations did not exist prior to colonial rule but simply that they were reconstructed during that period according to the vagaries of the interaction between colonial rule and African accommodation."³⁴⁶

As a result, "[t]he identities that the colonial powers helped to crystallize were artificial and of recent origin, not natural and primordial."³⁴⁷ The malleability of these identities means that they can be reconstructed.³⁴⁸ In the case of Hutu and Tutsi, this process of trans-

³⁴³ Chabal & Daloz, *supra* note 342, at 58.

³⁴⁴ *Id.* at 56.

³⁴⁵ *Id.* at 57.

³⁴⁶ *Id.*

³⁴⁷ Ottaway, *supra* note 60, at 301. "The ethnic problems that African countries experience today must be understood as a modern phenomenon, a product of colonialism and of contemporary political struggles, not a leftover from a primitive past." *Id.* at 315.

³⁴⁸ Reconstructing ethnic and civic identities inevitably will trigger questions of assimilation. To what extent is the creation of a civic identity in Rwanda predicated on the assimilation of Hutu and Tutsi? Identity assimilation is a complex issue the exploration of which lies beyond the contours of this Article. What is clear, however, is that the creation of civic identity cannot be grounded on the subjugation of one ethnic group by another. The forcible inclusion of a minority or majority group into a civil society to which it bears no allegiance and in which it has no input is simply the inverse of the forcible exclusion of ethnic cleansing. As a side note, this Article's argument about fostering civic identity in Rwanda through the deemphasis of ethnic identity should not be uprooted and applied to Western democracies in an attempt to rebut multicultural politics. But see Alvarez, *supra* note 10, at 381 ("Political conservatives in the United States have argued that violence in Rwanda and the Balkans suggests the perils of encouraging, particularly through government policies, ethnic identity at the expense of a united national identity, as through government efforts that reportedly 'promote' ethnic self-identification, such as affirmative action programs."). The logic of consensus building in ethnically bipolar, dualist postgenocidal societies should not be superimposed upon societies such as the United States, where the concept of nationhood is already deeply embedded.

ferring allegiance from ethnicity to civil society will not be an easy one. In fact, it may seem simplistic to suggest that such a transfer ever can be accomplished given the viciousness of the genocidal violence, the horrors experienced by survivors, the current resentment felt by many Hutu, and the relatively short time period that has elapsed since that violence took place. But Chabal and Daloz provide a second important tool with which to explore the malleability of ethnicity in contemporary Rwanda. They distinguish, on the one hand, affective, personal, and emotional attachments to ethnicity from, on the other hand, the "political instrumentalization" of ethnicity.³⁴⁹ Immediately preceding and during the Rwandan genocide, the political instrumentalization of ethnicity was so focused and so pointed that Hutu were led to believe—and many actually believed—that they were doing good by killing Tutsi.³⁵⁰ The genocide was not about ethnic identity operating as a constitutive element of Rwandans' personal identity. Rather, the genocide was about ethnicity operating coercively as the unwavering, singular expression of good or evil, of "us" and "them." Diverting the political instrumentalization of ethnicity in Rwanda is more feasible than altering the affective components of ethnicity.

A. *Creating Citizenship*

The vehicle to facilitate this deliberate shift in the political manifestation of personal identity is the notion of *civis*, or citizenship.³⁵¹ In order for dualist and pluralist postgenocidal societies to coexist in peace, a critical mass of individuals eventually must change the principal instrumentalization of their political allegiance away from the ethnic (or racial or religious) group. In the case of Rwanda, this suggests that individuals must identify themselves politically as Rwandan citizens. This is not to say, however, that the development of these civic sentiments will eliminate ethnic identifications. Some sort of "dual attachment" may emerge.³⁵² As Professor Franck observes, "persons have often had multiple or compound identities,"³⁵³ as well as "layered and textured loyalties."³⁵⁴ However, in a dualist postgenocidal society, allegiances to civil society must trump ethnic allegiances, at least in the areas where persons act politically as opposed

³⁴⁹ See Chabal & Daloz, *supra* note 342, at 56.

³⁵⁰ See Gourevitch, *supra* note 1, at 6.

³⁵¹ For a definition of *civis*, see *supra* note 36.

³⁵² See Anthony D. Smith, *The Ethnic Origins of Nations* 149-52 (1986) (discussing dual attachment to both state and ethnic community that is common in complex societies).

³⁵³ See Franck, *supra* note 342, at 359.

³⁵⁴ See *id.* at 382.

to simply socially.³⁵⁵ Citizenship, which can be multicultural, multireligious, and multiethnic,³⁵⁶ somehow must evolve into the primary political status that Rwandans ascribe to themselves and to each other.

Citizenship is closely connected to what Jeremy Waldron calls a "duty of civic participation,"³⁵⁷ which is presently absent from Rwandan life.³⁵⁸ Societies that have this duty are comprised of individuals who participate in public life in ways that "pay[] proper attention to the interests, wishes, and opinions of all the inhabitants"³⁵⁹ so as to "come to terms with one another, and set up, maintain, and operate the legal frameworks that are necessary to secure peace, resolve conflicts, do justice, avoid great harms, and provide some basis for improving the conditions of life."³⁶⁰ Manifestations of the duty of civic participation are predicated on identity choices made in favor of civil society over ethnicity. Ultimately, it is citizenship that links community to state. In fact, "the development of the modern state implies the emergence of a notion of citizenship binding individuals directly to the state—above and beyond the more proximate ties of kinship, community or faction."³⁶¹

The ultimate tragedy of Rwanda may be the emptiness of the concept of "Rwandan" to many of its citizens. Hutu and Tutsi may have lost the ability to imagine each other, and themselves, as Rwandan. Although Rwandans live interdependently at the individual level, paradoxically they do not share a political commonality or joint sense of citizenship. What Irwin Stotzky calls the "logic of habitual social interactions"³⁶² is, in Rwanda, based on nonnegotiable, acrimonious, and oppositional ethnic-identity politics. This logic needs to be deconstructed and rebuilt. In order to launch this process of deconstruction, Rwanda must develop a "common framework for living," which means institutions, procedures, an administrative appara-

³⁵⁵ On the distinction between political and social action, see Aristotle's *Politics* and *Poetics* (Benjamin Jowett & Thomas Twining trans., Viking Press 1957).

³⁵⁶ See Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights* 6 (1995) (distinguishing multicultural societies composed of different nations from those composed of different ethnicities).

³⁵⁷ Waldron, *supra* note 340, at 1.

³⁵⁸ For a discussion of how the concept of citizenship may be absent from life in many African states, and how, as a result, members of these states have developed no sense of civic responsibility towards fellow citizens, see generally Jean-François Bayart et al., *The Criminalization of the State in Africa* (Stephen Ellis trans., 1999).

³⁵⁹ Waldron, *supra* note 340, at 1.

³⁶⁰ *Id.*

³⁶¹ Chabal & Daloz, *supra* note 342, at 6.

³⁶² Irwin P. Stotzky, *Establishing Deliberative Democracy: Moving from Misery to Poverty with Dignity*, 21 U. Ark. Little Rock L. Rev. 79, 103 (1998).

tus, and a positive law that are independent of ethnicity.³⁶³ A constitution also can be an important device in the creation of a "common framework for living."

Creating civic identity and a politically instrumentalized civil society in Rwanda is not unrealistic. In fact, Rwanda's history provides examples of the existence of both civic identity and an independent civil society. Common citizenship can be encouraged by reaching back to Rwandan civil society before colonial "discovery."³⁶⁴ Rwandan precolonial, and even early colonial, history may thus offer an "original position" in which Hutu and Tutsi lived together, shared values, and built institutions independent of ethnic identity.³⁶⁵ The social contract of precolonial society well may be what both Tutsi and Hutu would agree to today as the basic "rules of the game" were all group members to place themselves behind a veil of ignorance masking their ethnic identity.³⁶⁶ An example of this "original position" is found in Monsignor Louis de Lacger's history of Rwanda, which concludes:

One of the most surprising phenomena of Rwanda's human geography is surely the contrast between the plurality of races and the sentiment of national unity. The natives of this country genuinely have the feeling of forming but one people. . . . There are few people in Europe among whom one finds these three factors of national cohesion: one language, one faith, one law.³⁶⁷

According to Gourevitch, throughout history the supra-ethnic fealty was directed to the local "chiefs," called *Mwamis*.³⁶⁸ Some

³⁶³ Waldron, *supra* note 340, at 22 (exploring possibility of real dialogue between cultural groups).

³⁶⁴ For a description of the historical interconnectedness of Hutu and Tutsi, see discussion accompanying *supra* notes 61-79.

³⁶⁵ See John Rawls, *A Theory of Justice* 17 (1971) ("[T]he original position is the appropriate initial status quo which insures that the fundamental agreements reached in it are fair."). The existence of this "original position" helps rebut the argument that a postethnic or supra-ethnic Rwanda is impossible or utopian. Truth commissions may be well-suited to returning the center of political gravity to the "original position," whereas criminal trials instead may reinforce difference.

³⁶⁶ See *id.* at 17-22.

³⁶⁷ Gourevitch, *supra* note 1, at 54-55 (quoting Louis de Lacger, *Ruanda* (1961)) (internal quotation marks omitted). It is interesting to compare this sense of unity and interdependent cohabitation with journalistic accounts of the possibilities of multiethnic governance in Kosovo. "Multi-ethnicity isn't going to happen At best people will live side-by-side without killing each other. They never really lived together before. Why should they start now?" Steven Erlanger, *In Victory's Wake, a Battle of Bureaucrats*, *N.Y. Times*, Nov. 28, 1999, § 4 (Week in Review), at 5 (quoting Valerie Petignat Wright, 1 of 29 prefects appointed by the United Nations to run Kosovo's municipalities).

³⁶⁸ See Gourevitch, *supra* note 1, at 47. "Lacger marveled at the unity created by loyalty to the monarchy—'I would kill for my Mwami' was a popular chant" *Id.* at 54-55.

Mwamis were Hutu, some Tutsi.³⁶⁹ In addition, "Hutus and Tutsis fought together in the *Mwamis*' armies."³⁷⁰ Subrulers in the community included the *mutwale*, of which there were three types: the *mutwale wa buttaka* ("chief of the landholdings" (agricultural)), *mutwale wa ingabo* ("chief of men" (armies)), and the *mutwale wa igikingi* ("chief of the pastures" (grazing lands)).³⁷¹ Prunier finds that *mutwale* positions were shared among Hutu and Tutsi, with many Hutu occupying the *mutwale wa buttaka* position.³⁷² Local clan groups (*ubwoko*) did not polarize along ethnic lines and built a civil society independent of ethnicity. In fact, within these groups, Hutu-Tutsi lineages were both permeable and porous: "[T]hrough marriage and clientage, Hutus could become hereditary Tutsis, and Tutsis could become hereditary Hutus."³⁷³ As Gourevitch reports, "status and identity [were] determined by many other factors . . . clan, religion, clientage, military prowess, even individual industry"³⁷⁴ As a result, "[r]ulers of small states embedded in the larger nation, important lineage heads and some power-holders within the central state hierarchy exercised authority even though they were people who would today be called 'Hutu.'"³⁷⁵

This sense of unity has been lost.³⁷⁶ Rwandans now need to recreate these feelings of loyalty to a Rwandan civil society, to political associations, and eventually to the apparatus of the state.³⁷⁷ Instead of Hutu and Tutsi adumbrating competing claims of entitlement and injury, how can both work together in a mutually inclusive drive to promote Rwandan national interests? As difficult as it will be, and as painful for the Tutsi victims, the struggle should be one for integration, reconciliation, and atonement, not one for domination of a bipolar state. If not, the problem of "otherness" simply lingers.

³⁶⁹ See *id.* at 47.

³⁷⁰ *Id.*

³⁷¹ Prunier, *supra* note 1, at 11.

³⁷² See *id.* at 11-12.

³⁷³ Gourevitch, *supra* note 1, at 47.

³⁷⁴ *Id.* at 49.

³⁷⁵ Des Forges, *supra* note 1, at 33.

³⁷⁶ This loss well may have begun officially with Rwanda's first postindependence leader, Grégoire Kayibanda, who proclaimed in 1962 (the year of Rwandan independence) that Rwanda was "two nations in one state." Gourevitch, *supra* note 1, at 61-62 (contrasting Kayibanda's statement with Lacger's idea of Rwandan people unified by national sentiment).

³⁷⁷ Might such changes give rise to a Rwandan nationalism? The sowing of a new Rwandan civic nationalism will accomplish little if it reduces Hutu-Tutsi violence but instead substitutes Rwandan-Congolese, Rwandan-Burundian, or Rwandan-Tanzanian conflict. The manner in which this Rwandan civic identity is encouraged, developed, and constructed will have to be mindful of these dangers.

Hope for a shared understanding of citizenship principally rests with the youngest generation of Rwandans. Here there is some cause for optimism. Describing attacks on schools in September 1998, African Rights reports that some children refused to separate themselves into groups of Hutu and Tutsi when confronted by Hutu rebels and so, tragically, were slaughtered together.³⁷⁸ This was not an isolated phenomenon. Philip Gourevitch reports that, in April 1997,

During [an] attack on [a] school in Gisenyi, as in [an] earlier attack on [a] school in Kibuye, the students, teenage girls who had been roused from their sleep, were ordered to separate themselves—Hutus from Tutsis. But the students had refused. At both schools, the girls said they were simply Rwandans, so they were beaten and shot indiscriminately.

. . . [M]ightn't we all take some courage from the example of those brave Hutu girls who could have chosen to live, but chose instead to call themselves Rwandans?³⁷⁹

The development of a vibrant civil society in Rwanda can also refer to a second, and much more recent, "original position." This second "original position" is also much more tragic. Professor Timothy Longman reports how, from the late 1980s to 1993, Rwandan society blossomed with the creation of numerous associational groups.³⁸⁰ "Associations such as women's groups, rotating credit societies, farmers' cooperatives, and prayer meetings all created for the population alternatives to the patrimonial structures of power that had previously tied people to the state and organized support for the regime."³⁸¹ There was an "explosion in the number of newspapers and journals,"³⁸² which commentators viewed with unrealistic optimism as an important step in an eventual path to pluralist democracy. These groups emerged as a result of apparent power-sharing initiatives launched by President Habyarimana, which culminated in the signing of the Arusha Accords in 1993.³⁸³ The Arusha Accords purported to open the door to power-sharing by legalizing numerous opposition political parties and democratic elections.³⁸⁴ However, important elements of the Habyarimana regime feared democratization.³⁸⁵ To forestall a potential fall from power, these elements ex-

³⁷⁸ See IRIN-CEA, UN OCHA, Update No. 508 (Sept. 23, 1998) <<http://www.reliefweb.int/IRIN/index.phtml>>.

³⁷⁹ Gourevitch, *supra* note 1, at 353.

³⁸⁰ See Longman, *supra* note 5, at 341-45.

³⁸¹ *Id.* at 341.

³⁸² Snyder & Ballentine, *supra* note 50, at 87 (internal quotation marks omitted).

³⁸³ See Longman, *supra* note 5, at 351.

³⁸⁴ See Snyder & Ballentine, *supra* note 50, at 87.

³⁸⁵ See *id.* at 88.

exploited the political instrumentalization of ethnicity to neutralize the political force of these multiethnic associations.³⁸⁶ Tragically, the intense ethnic propaganda went beyond neutralizing these multiethnic associations. It also dissolved whatever power-sharing possibilities the Arusha Accords may have had. In the end, this propaganda also fomented the hatred that induced so many Rwandans to commit genocide.

What lessons can be learned from the devastating failures of this second "original position"? The reason the Habyarimana regime was able to coopt civil society was because it never lost its coercive nature, nor its unchecked monopoly on the exercise of power.³⁸⁷ Ethnic coercion also succeeded because many of the associations and political parties that were created were themselves based on ethnic loyalties.³⁸⁸ The relationships between political parties and ethnicity were particularly pronounced.³⁸⁹ In short, the civil society that emerged in the early 1990s never shed the influence of ethnicity in its political instrumentalization. The lesson to be learned from these tragedies is that strong associational institutions need to be (1) not based on ethnic loyalties and (2) accompanied by a state apparatus that does not permit the coercive instrumentalization of ethnic identity. The state apparatus must contain built-in safeguards to avoid becoming the oracle for ethnic nationalism or being manipulated by leaders to promote the politics of ethnicity.³⁹⁰ What also must occur is that associational groups must be given the power to act politically in their own right: There must be a continuity between civil society and political soci-

³⁸⁶ See *id.*

³⁸⁷ See Longman, *supra* note 5, at 340 (discussing regime's power and ability to eliminate challenges posed by civil groups).

³⁸⁸ See *id.* at 341, 344. Habyarimana's ability to undermine the development of civil society was strengthened by popular anger over the military campaigns the RPF had waged in eastern Rwanda since 1990. See *id.* at 350, 354. As Gourevitch notes, the RPF invasions created a "unifying specter of a common enemy. Following the logic of the state ideology—that identity equals politics and politics equals identity—all Tutsis were considered to be RPF 'accomplices.'" Gourevitch, *supra* note 1, at 83.

³⁸⁹ See Longman, *supra* note 5, at 346 (stating that:

The parties did not attempt to appeal to the sectoral interests that served as the organizing principles of civil society, such as farmers, women, and the urban poor. Instead, they appealed to people largely on the basis of . . . ethnic identities. . . . The parties did not represent the interests of civil society organizations, and civil society did not organize support for the parties. Political society was further limited by the fact that few of the leaders of women's, human rights, farmers', or other organizations in civil society became visibly involved in the new parties.).

³⁹⁰ See Rothchild, *supra* note 342, at 320 (noting that "statesmen and third-party actors must design appropriate structures that will help prevent the ethnic-based challenges").

ety.³⁹¹ Although it may be very difficult to disaggregate ethnicity from the allocation of power in Rwandan society, such a disaggregation may be essential to the welfare of both Hutu and Tutsi. It also may revitalize political culture by creating cross-cutting cleavages independent of the binary world of ethnic identity politics. This way, "members of different ethnic groups will share membership in other communities."³⁹²

B. Civic Nationalism and Ethnic Accommodation

Personal identifications with civil society and in favor of citizenship eventually give rise to civic nationalism, a term coined by Liah Greenfeld to refer to the political manifestations of identity in functional multiethnic states.³⁹³ Civic nationalism emerges when civil identity becomes politically instrumentalized through public life, shared institutions, and cross-cutting political parties. Civic nationalism embraces all citizens of a country as members of the nation; by contrast, ethnic nationalism, characteristic of the Habyarimana regime and, to a lesser extent, the RPF regime, accepts only the members of an ethnic group as constitutive of the nation.³⁹⁴ Under civic nationalism, what all citizens share is an allegiance to the civil society they inhabit and the institutions created by that civil society.³⁹⁵ When this civil society becomes attached to a state that encourages political participation in ways other than simply the manifestation of ethnicity, then a national identity other than ethnicity has been created.

Manifestations of civic nationalism are predicated on the accommodation of all ethnic groups. This can take the form of what Professor Franck calls a "compact," which is essentially a contract between groups.³⁹⁶ Political scientists David Lake and Donald Rothchild write:

Such contracts specify, among other things, the rights and responsibilities, political privileges, and access to resources of each group. These contracts may be formal constitutional agreements or simply

³⁹¹ See Longman, *supra* note 5, at 345-46 (describing how discontinuity stunted democratic reform in Rwanda).

³⁹² Spiro, *supra* note 35, at 637.

³⁹³ See Greenfeld, *supra* note 37, at 11 ("[N]ationalism may be . . . either 'civic,' that is, [membership is] identical with citizenship, or 'ethnic.'").

³⁹⁴ See *id.*

³⁹⁵ For a discussion of the important linkages between civic nationalism and institution building, see Jack Snyder, *Nationalism and the Crisis of the Post-Soviet State*, in *Ethnic Conflict and International Security* 79, 86 (Michael E. Brown ed., 1993) (arguing that civic nationalism based on citizenship rights "depends on a supporting framework of laws to guarantee those rights, as well as effective institutions to allow citizens to give voice to their views").

³⁹⁶ See Franck, *supra* note 342, at 368 (discussing how compact is basis for states based on civil society as opposed to ethnicity).

informal understandings between elites. Whatever their form, ethnic contracts channel politics in peaceful directions.

. . . [They] contain "safeguards" designed to render the agreement self-enforcing. They contain provisions or mechanisms to ensure that each side lives up to its commitments and feels secure that the other will do so as well. Typical safeguards include . . . power-sharing arrangements, electoral rules, or group vetoes that prevent one ethnic group from setting government policy unilaterally³⁹⁷

Ethnic contracts can create individual rights that are protected through courts, constitutions, and bills of rights. In South Africa, the Constitution (which contains a bill of rights), and institutions such as the Constitutional Court and the TRC, have been tremendous catalysts in the nation's consociational power-sharing arrangement and its transition to democracy.³⁹⁸ The constitutional settlement has served to "generate, build, and strengthen polyarchal practices in society at large and within contending political factions."³⁹⁹ The effectiveness of this compromise has been assessed as follows:

Given the apartheid legacy and the suspicion that has naturally prevailed in relations among racial and ethnic groups, this is a bold attempt to ensure that issues of justice in intergroup relations can be handled in both the political and judicial arenas. Black South Africans support such a bill of rights as a safeguard of recently earned rights. White South Africans see it primarily as a safeguard against the tyranny of the majority. . . . [T]he constitutional move made by

³⁹⁷ David A. Lake & Donald Rothchild, *Containing Fear: The Origins and Management of Ethnic Conflict*, in *Nationalism and Ethnic Conflict*, *supra* note 45, at 97, 105.

³⁹⁸ See Erasmus & Fourie, *supra* note 220, at 711 ("[T]he South African process . . . resulted in a contract being concluded between all the various groups constituting South African society. That contract is contained in the Constitution itself and various new institutions have been established in order to give effect to it."). For a discussion of civil society and personal identity in South Africa, see Rachel L. Swarns, *In Apartheid's Wake, A Word Still Divides*, N.Y. Times, Oct. 3, 1999, § 4 (Week in Review), at 1 (discussing argument that South African transformation only will be complete "when whites and blacks learn to see each other and to accept each other as people, as fellow Africans, regardless of race"); see also Jane Perlez, *Voice of Hope in Kosovo Tells the U.S. of Goals*, N.Y. Times, May 7, 2000, § 1, at 8 (citing senior Kosovo journalist as arguing that Kosovo needs constitution of its own to provide legal framework to build democratic institutions and establish individual rights).

³⁹⁹ John W. Harbeson, *Rethinking Democratic Transitions: Lessons from Eastern and Southern Africa*, in *State, Conflict, and Democracy in Africa*, *supra* note 5, at 39, 44 (pointing to South Africa as positive example of democratic transition). One unique element in the South African negotiated political settlement is the stature of Nelson Mandela, which has been "an important factor in sustaining both political stability and democracy in South Africa." *Id.* at 46. Rwanda does not have a leader of the stature of Mandela, nor of Archbishop Desmond Tutu, another key player in the transition away from apartheid. Although idiosyncratic factors such as individual leadership certainly facilitate consociational power-sharing and multiethnic rule, they are not necessarily determinative conditions.

the South Africans has at least provided a platform for resolving potential conflicts among groups in society⁴⁰⁰

The situation in South Africa is markedly different from that in Rwanda, where constitutional discourse is very limited. As a result, there are few rights-protecting institutions.⁴⁰¹ Rwanda is lacking what Paul van Zyl calls a "culture of human rights."⁴⁰² Nor is there any ethnic contract. The apparatus of the state is in no way designed to hinder ethnic hijacking. Rwanda has few political parties that pursue policies unrelated to ethnicity. Even though Hutu and Tutsi are found intermingled in groups as disparate as farmers, workers, landholders, students, and the elderly, current political parties still remain grouped largely around ethnicity. Moreover, there are few multiethnic non-governmental organizations. Longman observes that "civil society in Rwanda has substantially declined, with many organizations having dissolved altogether, slumped into inactivity, or been brought fully under state control."⁴⁰³

Constitutional formulas that accommodate ethnic differences, arrangements that induce inclusionary politics, and the creation of structural incentives for intercommunal cooperation⁴⁰⁴ are central to the success of state and society in the postgenocide period. In order for political reforms to have any effect, at least a critical mass of all group members in Rwanda must perceive these reforms to be in their individual interest, or for the betterment of a collective civil interest in which these individuals believe themselves to have a stake. Economic growth and improvements in quality of life can play a pivotal role in

⁴⁰⁰ Goran Hyden, *Governance and the Reconstitution of Political Order, in State, Conflict, and Democracy in Africa*, supra note 5, at 179, 189-90; see also Mark Gevisser, *Strange Bedfellows: Mandela, de Klerk, and the New South Africa*, *Foreign Aff.*, Jan.-Feb. 2000, at 173, 177 (book review) ("Mandela's legacy is a country where the rule of law is entrenched in a virtually unassailable bill of rights, where predictions of racial and ethnic conflict proved wrong, and where the political violence that claimed thousands of lives annually in the decade before 1994 has almost entirely ceased.").

⁴⁰¹ Rwanda recently has created a Constitutional Commission, the purpose of which is to discuss the "nature of the constitution, the form of elections, and issues related to ensuring Hutu participation and Tutsi security." Prendergast & Smock, supra note 237. There is also a Rwandan National Human Rights Commission. See *Women's Human Rights*, supra note 202. The legislation creating the National Human Rights Commission was adopted by the Rwandan National Assembly on January 19, 1999. See *id.* The Chair of the Human Rights Commission is to be accorded the rank of Minister in the Rwandan government, and the other members of the Commission the rank of Secretary-General. See *id.* It is quite unclear, however, what de facto powers these two Commissions shall be able to exercise.

⁴⁰² van Zyl, supra note 309.

⁴⁰³ Longman, supra note 5, at 355.

⁴⁰⁴ See Ottaway, supra note 60, at 306 ("In general, it is unlikely that a government will succeed in deliberately manipulating identities unless the new identity offers some rewards, if not materially, at least psychologically.").

shifting public loyalties: The government needs to demonstrate an effective bureaucratic presence, perhaps by creating schools, clinics, and national roads. Here the international community must play an important role, just as it has in the reconstruction of other societies trying to move past sustained mass atrocity. After all, what would have been the transformative potential of the Nuremberg trials and post-Holocaust public inquiries without the implementation of the Marshall Plan?

Consociational power-sharing has the potential to promote civic identity in the long run. The hallmark of consociationalism is the sharing of authority and political power through the state, special institutions, and groups in civil society.⁴⁰⁵ Power-sharing arrangements can be predicated on an ethnic contract that guarantees some element of joint exercise of governmental power, proportional distribution of government funds and jobs, some autonomy on ethnic issues, and perhaps even a veto on issues of basic importance to each ethnic group. These accommodations can diffuse political power and decentralize authority.⁴⁰⁶ In this vein, Professor Jeffrey Herbst makes the interesting argument that political power-sharing, now called consociational democracy in Anglo-American academic circles, in fact flourished in precolonial Africa.⁴⁰⁷ Precolonial political culture was a dynamic and polycentric process in which "sovereignty was sometimes shared and [in which] there were many different arrangements regarding the exercise of political authority depending on local circumstances."⁴⁰⁸

These sorts of indigenous alternatives to the failing structure of the colonial state might be effective political options for Rwanda. Care must be taken to avoid the possibility that the consociational compact reinforces ethnic affinities in the transition to majoritarian democracy.⁴⁰⁹ One way to attenuate the possibility of ethnic retrenchment at the national level lies in decentralizing power and diffusing centers of authority throughout the country. Diffusion of power, which political scientists call "subsidiarity,"⁴¹⁰ in part can be accom-

⁴⁰⁵ See *supra* note 38 for a general definition of consociationalism.

⁴⁰⁶ See Ted Robert Gurr, *Ethnic Warfare on the Wane*, *Foreign Aff.*, May-June 2000, at 52, 52 (arguing that ethnic conflict should be managed by devolving state authority, by recognizing group rights, and by sharing power).

⁴⁰⁷ See Jeffrey Herbst, *Responding to State Failure in Africa*, in *Nationalism and Ethnic Conflict*, *supra* note 45, at 374, 382.

⁴⁰⁸ *Id.* at 394.

⁴⁰⁹ This, in fact, is a leading critique of consociationalism. See Horowitz, *supra* note 38, at 568-76.

⁴¹⁰ See, e.g., George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 *Colum. L. Rev.* 331, 338-66 (1994) (discussing role of subsidiarity in European Community); Franck, *supra* note 342, at 369

plished by transferring authority to local *gacaca* tribunals, creating a new level for power-sharing. In the case of Rwanda, "subsidiarity" might also mitigate the threat of future violence since obedience to central state-sponsored authority was an important factor contributing to the pervasiveness of the genocide.⁴¹¹ Although consociational regimes need to be designed with care, it remains that there is little more retrenching of ethnic polarization than the inclusion of one group in power and the exclusion of the other group from power. In the end, consociational solutions can serve as a departure point from ethnocracy and, if properly designed with checks and balances, as a tool to dampen the politicization of ethnicity through the limited recognition of ethnicity, thereby providing an interim safeguard for the eventual integration of Hutu and Tutsi within an overarching Rwandan *civis*.

Majoritarian democracy simply may be premature for scarcity-prone, multiethnic societies such as Rwanda, and consociational elite accommodation arrangements may be preferable as transition mechanisms. Donald Rothchild writes that "an elite pact may seem a logical alternative to a political order based on a winner-takes-all election that excludes the losers from the decisionmaking process."⁴¹² These negotiated arrangements are predicated upon "procedural rules that protect . . . interests during a transitional period. These rules also provide for a balanced distribution of resources among elites and their supporters, and for shared decisionmaking at the political center on certain matters."⁴¹³ Although these elite systems "are not as open and participatory as full democratic regimes, . . . they are characterized by a continuing process of bargaining among diverse elites."⁴¹⁴ In the end, they may lay the groundwork for majoritarian democracy.

When electoral votes determine the allocation of power, political elites will often play the ethnic card so as to retain power.⁴¹⁵ Political scientists are quick to report that, throughout Africa, multipartyism

(identifying subsidiarity as tendency that "seeks to reinforce the role in governance of towns, counties, and intra- and interstatel regional authorities").

⁴¹¹ See Prendergast & Smock, *supra* note 237.

⁴¹² Rothchild, *supra* note 342, at 330.

⁴¹³ *Id.*

⁴¹⁴ *Id.*; see also David Wippman, Practical and Legal Constraints on Internal Power Sharing, in *International Law and Ethnic Conflict* 240-41 (David Wippman ed., 1998) (identifying consociational arrangements as "the least worst alternative" given that at times they may be "the only means by which members of ethnic groups can maintain their identities and still participate meaningfully in the life of the larger society").

⁴¹⁵ See Richard Joseph, Overview to State, Conflict, and Democracy in Africa, *supra* note 5, at 3, 8 (exploring ways of transforming regimes without aggravating ethnic tensions).

often has led people to align themselves based on ethnicity.⁴¹⁶ As a result, there is nothing wrong with (and in fact it may be better for) the process towards democratization to be guarded and characterized by elite accommodation. Such was the case in South Africa. Donald Rothchild reports: "[I]n South Africa, local partisan interests succeeded in negotiating a pact among themselves, . . . [which] set up stable rules of relations among the adversaries during the transition to majoritarian democracy."⁴¹⁷

The destabilizing effect of too much democracy too quickly is demonstrated by the rapid demise of Rwandan society after the signing of the Arusha Accords. Consociational accommodation must strive gradually to create political parties that operate on, for example, a traditional left/right spectrum instead of on the binary calculus of ethnic opposition.⁴¹⁸ After all, creating sustainable democracy is more important than creating volatile democracy, and this may necessitate the use of quasi-democratic measures in the transition process. Pact making, ethnic contracts, consociational arrangements, and institution building are important elements of this transitional process.⁴¹⁹ All of these, together, can help build trust.⁴²⁰ In fact, "[i]n the short run, achieving . . . trust may depend on the crafting of a *modus vivendi* among representatives of the nation's constitutive communities In the long run, institutions of a pluralist democracy can be established to provide more formal mechanisms to foster group amity."⁴²¹ But, as Charles Taylor points out, these institutions only will function if there is social cohesion buttressing the legitimacy of the govern-

⁴¹⁶ See Harbeson, *supra* note 399, at 45 ("Zambia, Kenya, and Ethiopia . . . are cases where an early emphasis on multiparty elections without prior establishment of constitutional ground rules appears to have been a significant factor in derailing democratic progress."); Ottaway, *supra* note 60, at 311.

⁴¹⁷ Rothchild, *supra* note 342, at 333.

⁴¹⁸ The African National Congress has played a decisive role in South Africa's transition to consociational government. The multiethnic nature of the African National Congress as a political party is reflected in the fact that it "has broad appeal among all African ethnic groups, including the Zulus, and it also attracts some Coloured and Indian voters and a sprinkling of whites." Ottaway, *supra* note 60, at 312.

⁴¹⁹ See Joseph, *supra* note 415, at 8 (citing such factors as increasing probability of peaceful transitions from authoritarian rule in ethnically pluralist societies).

⁴²⁰ See Minow, *supra* note 15, at 137 (mentioning institution building as healing response for societies recovering from governmentally sponsored totalitarianism); Lake & Rothchild, *supra* note 397, at 105 ("[R]eciprocal trust can be induced by institutions." (quoting Barry R. Weingast, *Constructing Trust: The Political and Economic Roots of Ethnic and Regional Conflict* (unpublished manuscript, Stanford University, 1995))); Rothchild, *supra* note 342, at 335-36 (noting that elite pacts can lead to democracy, which "can build trust among ethnic minorities").

⁴²¹ Joseph, *supra* note 415, at 8.

ment.⁴²² This is especially the case in dual- or multiethnic states.⁴²³ When democracy lacks this social consensus, it becomes illegitimate and exclusionary. Elites and rank-and-file of majority and minority groups must feel sufficient trust in the state that the alignment of political winners and losers is not perceived to operate along ethnic lines. These decisions to attribute trust to the apparatus of the state need to be made deliberately by individuals. There is nothing unnatural in basing a democracy on such calculated, *micro* decisions. In fact, democracy well may be deliberative.⁴²⁴ In Rwanda the choice in favor of ethnically neutral citizenship will figure prominently as part of these deliberations, which need to be undertaken in order for the government to begin the transition from ethnocracy to democracy.

There are some political scientists who speculate that social reconstruction after mass ethnic atrocity is unattainable. Chaim Kaufmann, for example, argues that “[s]olutions that aim at restoring multi-ethnic civil politics . . .—such as power-sharing, state re-building, or identity reconstruction—cannot work because they do nothing to dampen the security dilemma, and because ethnic fears and hatreds hardened by war are extremely resistant to change.”⁴²⁵ “Intense violence creates personal experiences of fear, misery, and loss which lock people into their group identity and their enemy relationship with the other group.”⁴²⁶

If reconstruction is futile, what, then, is the solution? Kaufmann proposes that “[s]table resolutions of ethnic civil wars are possible, but only when the opposing groups are demographically separated into defensible enclaves.”⁴²⁷ He proposes that Rwandan Tutsis should, to-

⁴²² See Charles Taylor, *Democracy and Exclusion*, Annual Lecture of the Columbia University Center for Law and Philosophy (Nov. 5, 1998) (notes on file with the *New York University Law Review*).

⁴²³ Chabal and Daloz observe that “in Africa all countries (with a few exceptions, such as Lesotho or Swaziland) are multi-ethnic nations.” Chabal & Daloz, *supra* note 342, at 62. As a result, lessons from the Rwandan experience of political accommodation are relevant on a continent-wide basis. Given that multiethnic nations dominate the African continent, Chabal and Daloz are correct to point out that “the only appropriate political order [for Africa] is one which makes space for a political framework grounded in this multi-ethnic reality.” *Id.*

⁴²⁴ See Stotzky, *supra* note 362, at 87 (“[D]emocracy may transform individuals’ selfish preferences into less partial ones through dialogue.”). The notion of democracy as deliberative is based on the principle that democracy issues from the public deliberation of the people when deciding how they wish to be governed. As a result, there is an element of choice in arriving at this democratic framework—it is reasoned and consensus-based.

⁴²⁵ Kaufmann, *supra* note 45, at 268. One international lawyer offers the same argument. See Makau Mutua, *The Tutsi and Hutu Need a Partition*, *N.Y. Times*, Aug. 30, 2000, at A23.

⁴²⁶ Kaufmann, *supra* note 45, at 283.

⁴²⁷ *Id.* at 266.

gether with Burundian Tutsis,⁴²⁸ “be encouraged to relocate to a smaller, defensible, ethnically Tutsi state.”⁴²⁹ The problem with this approach is that difficult decisions would need to be made about borders, who would live where, and how people would be moved. Forced relocation would deprive many people of their livelihood, result in significant refugee flows, and create tremendous insecurity. If people did not want to leave their lands, would they be coerced? What would happen to Tutsis living in Eastern Congo or Uganda? To create a true Tutsi homeland, the governments of Rwanda and Burundi not only would have to cooperate with each other, but they also would have to coordinate with the Democratic Republic of Congo (DRC) and Uganda. In the case of the DRC, many regions of which are essentially ungoverned, any such negotiations are particularly problematic. What will be the size of the new country? If the Tutsi territory were a proportion of Burundi and Rwanda corresponding to the percentage of the population that is Tutsi, then such a state would constitute fourteen percent of the territory of Burundi and Rwanda.⁴³⁰ Would such a tiny state, undoubtedly laboring under a high population density, be capable of supporting itself? These insecurities well may polarize ethnic tensions far more than the prospect of continued cohabitation.

Regardless of the insecurities caused by the procedural implementation of Kaufmann’s proposal, what substantive benefits would arise from two rump-states? If there were an artificial Tutsiland abutting an artificial Hutuland, unless the underlying ethnic tensions constructively would be mediated and accountability for the 1994 violence ascertained, all Kaufmann’s proposal would achieve is the substitution of international war for internal conflict.⁴³¹ Since partition ignores the

⁴²⁸ Conflicts between Hutu and Tutsi have also occurred in Burundi. Since 1993 more than 200,000 people have been killed in ethnic and political violence in Burundi. See Mandela’s *Poisoned Chalice*, *Economist*, Aug. 12, 2000, at 58, 58. The Tutsi government of Burundi forcibly has relocated 300,000 Hutu to squalid “concentration camps” near the capitol, Bujumbura. See Ian Fisher, *Ethnic Fencing*, *N.Y. Times*, May 21, 2000, § 6 (Magazine), at 59. A draft peace agreement initiated by Nelson Mandela “recommends a national truth and reconciliation commission and an international commission of judicial inquiry to investigate genocide.” Mandela’s *Poisoned Chalice*, *supra*, at 58. Such a blended solution may have considerable promise.

⁴²⁹ Kaufmann, *supra* note 45, at 298.

⁴³⁰ See U.S. Inst. of Peace, *Rwanda: Accountability for War Crimes and Genocide* (1995) <<http://www.usip.org/oc/sr/rwanda3.html>> (reporting that Burundi shares population mix identical to Rwanda, 85% Hutu and 14% Tutsi); *supra* note 3 (providing demographic statistics for Rwanda).

⁴³¹ See generally Ruth Lapidoth, *Autonomy: Flexible Solutions to Ethnic Conflicts* (1996) (arguing that redrawing boundaries in response to ethnic conflict carries potential for continuing and internationalizing preexisting internal disputes); Robert K. Schaeffer, *Severed States: Dilemmas of Democracy in a Divided World* (1999) (arguing that partition entrenches enmity, provokes further violence, and most often responds to Western political

need for creating shared civil society, it fails to address the underlying ethnic animus of the violence. In fact, partition dashes the interdependency of Rwanda's postgenocidal society, which, if properly channeled, could constitute a good foundation upon which to build consociational democracy.

In the end, the creation of civic nationalism, ethnic contracts, and a multiethnic state apparatus should be a primary policy goal of any dualist or pluralist postgenocidal society. The absence of such a contract and concomitant political structures may create conditions favorable to the re-emergence of genocide. In this regard, policy choices as to types of legal responses to the genocide must be sensitive to their effects on the development of civil society, civic nationalism, the creation of cross-cutting political cleavages, and associational democracy. One of the reasons that an exaggerated focus on adversarial trials may be an ineffective policy device in dualist postgenocidal societies is that it can weaken the meaning and content of citizenship in such societies, thereby making the ethnic contract harder to develop. This Article suggests that identity transfers from ethnicity to *civis* are facilitated by blended legal responses to genocide. Such responses can include truth commissions and reparations as settlement bargains in elite accommodation, trials for the highest profile perpetrators to promote accountability and set precedent, and transitional institutional structures.

C. *Ethnocracy in Rwanda*

The politics of ethnicity remain intractable in Rwanda, fueled to some degree by the extensive incapacitation of 125,000 detainees awaiting trial. The sclerosis created by the extensive implementation of a retributive justice model in Rwanda reinforces ethnic allegiance to the detriment of Rwandan civic identity. The adversarial genocide trials have turned into a hot-button political issue contributing to the maintenance of ethnic antagonism among Rwandans, and making it all the more difficult to move past the "us and them," Hutu versus Tutsi mentality. Ongoing Hutu rebel violence, which has plagued Rwanda since 1997, has as one of its goals breaking Hutu prisoners out of the prisons and as one of its rhetorical devices the assertion that the trials are political justice.⁴³² In this sense, the retributive justice

imperatives as opposed to concern for affected societies). By way of specific example, the partition of Eritrea from Ethiopia in 1993, designed to settle internal conflict, has resulted in protracted international conflict.

⁴³² See U.S. Dep't of State, Rwanda Country Report on Human Rights Practices for 1997, at 3-4 (1998) (documenting prisonbreaks orchestrated by Hutu rebels).

paradigm has turned into a lightning rod attracting violent opposition to the RPF regime.

The need for interethnic cooperation and civil society is even more important in contemporary Rwanda given the tremendous problems faced by the country. Most immediately, political power must be applied legitimately through some sort of a representative process to address some of Rwanda's most imminent crises:⁴³³ an AIDS epidemic (eleven percent of the adult population nationwide is infected with HIV),⁴³⁴ short-sighted land use patterns,⁴³⁵ refugees,⁴³⁶ and lack of economic diversification.⁴³⁷ Without at least the partial resolution of some of these problems, any legal adjudication of mass atrocity will not offer long-term stability. The problem is that these crises are being addressed by a Tutsi government with a firm hand on what may ultimately be a fragile source of power. The ethnocratic nature of the RPF government consolidates the embedded nature of the politics of ethnicity in Rwanda:

[T]he RPF-dominated government has been careful to prevent an independent civil society from reemerging. The government has actively sought to place its allies in charge of all important social organizations. The government has intervened in the selection of church leaders, in one case using troops to install its candidate RPF soldiers . . . have harassed prominent moderate Hutu

. . . The authoritarian behavior of the RPF since taking office also suggests that the claims by its leaders that they are committed to

⁴³³ Notwithstanding the amplitude of these problems, over 90% of the United Nations's proposed humanitarian programs for 1998 in Central Africa remains unfunded. See IRIN-CEA, UN OCHA, Update No. 430 (June 4, 1998) <<http://www.reliefweb.int/IRIN/index.phtml>>.

⁴³⁴ See James C. McKinley Jr., *Ravaged by War and Massacre, Rwanda Faces Scourge of AIDS*, N.Y. Times, May 28, 1998, at A1 (citing Rwandan Government survey). The infection rate of Kigali residents between the ages of 25 and 44 is an alarming 33%. The national HIV infection rate was less than 2% in 1986. See IRIN-CEA, UN OCHA, Update No. 638 (Mar. 26, 1999) <<http://www.reliefweb.int/IRIN/index.phtml>>.

⁴³⁵ Poor land use triggers deforestation and erosion, as well as food shortages. See IRIN-CEA, UN OCHA, Update No. 499 (Sept. 10, 1998) <<http://www.reliefweb.int/IRIN/index.phtml>>.

⁴³⁶ There are 500,000 displaced individuals in camps in northwest Rwanda alone. See IRIN-CEA, UN OCHA, Update No. 569 (Dec. 17, 1998) <<http://www.reliefweb.int/IRIN/index.phtml>>; see also IRIN-CEA, UN OCHA, Update No. 831 (Dec. 29, 1999) <<http://www.reliefweb.int/IRIN/index.phtml>> (documenting that 300 to 500 refugees per week are returning to Rwanda from Democratic Republic of Congo).

⁴³⁷ Focus on monocrop agricultural production makes the economy overly sensitive to price decreases in cash crops. For example, the precipitous decline in the price of coffee (Rwanda's chief export) in the early 1990s triggered economic insecurity, which contributed to the mobilization of the populace in the genocide. See Human Rights Watch, *supra* note 5, at 3.

democracy are less than sincere, and that their real goal is attaining power.⁴³⁸

Although the RPF has encouraged elections at the local level,⁴³⁹ it has proven resistant to elite accommodation or power-sharing. At the national level, the RPF retains an unflinching hold on power.⁴⁴⁰ The RPF publicly characterizes those who are unsupportive of its initiatives as enemies of Rwanda.⁴⁴¹ There have been recent purges and expulsions of opposition members from the Rwandan parliament.⁴⁴² Despite the fact that the RPF regime calls itself the Government of National Unity, it is unable to transcend ethnic identity.⁴⁴³ In fact, "the government is perceived by the average Hutu peasant as a foreign government."⁴⁴⁴ Because the RPF is not seen as a legitimate national government, its initiatives to implement genocide trials are not likely to create constructive "civil dissensus." Instead, while the RPF

⁴³⁸ Longman, *supra* note 5, at 354-55.

⁴³⁹ See IRIN-CEA, UN OCHA, Update No. 641 (Mar. 31, 1999) <<http://www.reliefweb.int/IRIN/index.phtml>>; IRIN-CEA, UN OCHA, Update No. 642 (Apr. 1, 1999) <<http://www.reliefweb.int/IRIN/index.phtml>>. These local elections (at the *cellule* and *secteur* level) were held in March 1999. See *id.* Rwanda is made up of 12 *préfectures*, which are divided into 155 *communes*; these are further subdivided into 1531 *secteurs* and then into 8987 *cellules*. See *id.* These elections were the first since the genocide. United Nations observers found the electoral process to be open and transparent, with between 80% and 90% of eligible voters participating. See *id.*

⁴⁴⁰ For a critical account of the Tutsi-based and authoritarian nature of the RPF government and the current Rwandan state, see Prunier, *supra* note 1, at 369-71.

⁴⁴¹ For example, in mid-February 1998, the RPF developed a "joint political programme," which purportedly would include the other political parties, to "guide the process of political transformation aimed at unity, reconciliation and democracy." E. Kamasu, RPF Takes a New Political Course, *New Times* (Kigali, Rwanda), Feb. 20-27, 1998, at 1. Notwithstanding, "any political movement, any party or any individual that goes against that programme will be regarded as an enemy of the nation and will be fought accordingly." *Id.* One commentator has concluded that the Rwandan government "remains at heart a military regime controlled by former Tutsi rebel leaders." James C. McKinley, Jr., As Crowds Vent Their Rage, Rwanda Publicly Executes 22, *N.Y. Times*, Apr. 25, 1998, at A1.

⁴⁴² See IRIN-CEA, UN OCHA, Update No. 643 (Apr. 6, 1999) <<http://www.reliefweb.int/IRIN/index.phtml>> (noting that some of expelled members of parliament were accused of cooperating with Hutu rebels).

⁴⁴³ See Herbst, *supra* note 407, at 380 (concluding that RPF government's only constituency is minority Tutsi and that RPF is therefore not viable government). The appointment in April 2000 of Paul Kagame as Rwanda's President reinforces the ethnocratic nature of the Rwandan government. See Rwanda Rebel Named President, *N.Y. Times*, Apr. 23, 2000, § 1, at 2. Kagame, a Tutsi, was the military leader of the RPA, then Vice-President and Minister of Defense prior to assuming the presidency. See Drumbl, *supra* note 31, at 564. He replaces Pasteur Bizimungu, a Hutu.

⁴⁴⁴ Prunier, *supra* note 1, at 370; see also Human Rights Watch, *supra* note 5, at 14 ("[M]any Hutu now see . . . the government . . . as operating only in the interest of Tutsi."); Prendergast & Smock, *supra* note 237 ("[T]he [Rwandan] government has been heavily criticized for the narrowness of the ruling clique and its silencing of certain voices of dissent.").

sees itself as pursuing justice, others view the RPF as “imprison[ing] tens of thousands of genocide suspects in appalling conditions, fail[ing] to prevent massacres of thousands of Hutu civilians . . . , and allow[ing] Tutsi squatters to seize the property of many absent Hutus.”⁴⁴⁵ The impasse that results from these contrary perspectives impedes social reconstruction. Unblocking this gridlock requires serious policy change, including the manner in which accountability for the genocide is pursued.

The politics of ethnicity now also are being promulgated internationally by the RPF. The RPF has intervened (and continues to intervene) in internal conflicts within the DRC.⁴⁴⁶ The RPF justifies these armed interventions by the fact that there have been massacres of Congolese Tutsi in the DRC.⁴⁴⁷ The RPF’s response to this extension of the Rwandan killing fields reveals the extent to which its notions of political obligation and political community are ethnic, transnational, and diasporic. Can the RPF act both as the protector of all Tutsi everywhere and as the national government of the Rwandan people? In the end, the RPF’s equivocal commitment to national community further consolidates the perception of ethnocracy.

Political scientist Crawford Young points out that the government “is unlikely to enjoy peace or stability until the country can come to terms with its past through some kind of negotiated formula that provides security to all citizens.”⁴⁴⁸ The question that arises is what kind of role can the genocide trials play in establishing such a negotiated settlement? In the Rwandan case, the trials appear to be doing very little as a part of the bargained settlement of postgenocidal politics, in

⁴⁴⁵ Kaufmann, *supra* note 45, at 273.

⁴⁴⁶ See, e.g., Fisher & Onishi, *supra* note 238, § 1, at 1 (describing Rwandan invasion of Congo and subsequent slaughter of Hutus responsible for Rwandan genocide living in Congo); IRIN-CEA, UN OCHA, Update No. 488 (Aug. 26, 1998) <<http://www.reliefweb.int/IRIN/index.phtml>> (“Ugandan and Rwandan soldiers were captured when Angolan forces seized Kitona air base [in the DRC,] . . . Zimbabwean military authorities said”); see also Barbara Crossette, *Africans Want U.N. to Play a Stronger Role in Congo*, N.Y. Times, Feb. 13, 2000, at 12 (mentioning presence of “rebel groups backed by Rwanda” in Congo).

⁴⁴⁷ See IRIN-CEA, UN OCHA, Update No. 498 (Sept. 9, 1998) <<http://www.reliefweb.int/IRIN/index.phtml>> (“[Former] Rwandan President Pasteur Bizimungu has stated that the DRC government’s support for ‘genocidaires’ would be a reason for Rwanda to declare war on DRC”). There is evidence that the Congolese government of Laurent Kabila incited massacres in Eastern Congo in late 1998 and early 1999. See Ian Fisher, *In Congo Carnage, How Many Died?*, N.Y. Times, Jan. 10, 1999, § 1, at 8; Press Statement, Kigali, Jan. 13, 1999 (on file with the *New York University Law Review*) (documenting casualties of anti-Tutsi pogroms and senior minister in Congolese government as publicly having stated that “Tutsis are microbes that need to be exterminated”).

⁴⁴⁸ Crawford Young, *The Third Wave of Democratization in Africa: Ambiguities and Contradictions, in State, Conflict, and Democracy in Africa*, *supra* note 5, at 15, 30-31.

marked opposition to the restorative justice initiatives of South Africa in its indigenous political settlement. Of course, any criticism of the RPF government must be tempered by the fact that the Tutsi of Rwanda have suffered unfathomable horrors. Any discussion of power-sharing, social compacts, and ethnic contracts strains the ability of even the most forgiving survivor to forgive. It is understandable that the RPF believes it "can count on only Tutsi for support."⁴⁴⁹ However understandable, such a belief will subject the Rwandan state to indefinite insecurity given that the Tutsi comprise only a small portion of the population. Governance based on ethnicity as opposed to politically instrumentalized power-sharing within a state structured to repel ethnic challenges is, in the long-run, untenable in dualist postgenocidal societies. In fact, social science research demonstrates that the essentially ethnocratic nature of the Rwandan government is cause for significant concern. Researchers have found that among the factors most closely related to the (re)occurrence of genocide is a "ruling elite whose ethnicity is politically significant but not representative of the entire population."⁴⁵⁰ So long as ethnicity is the driving force of Rwandan politics, the prospect of another genocide (and the possibility that this can foist more unfathomable horrors on Tutsi or Hutu) looms on the horizon.

V

THE GLOBALITARIANISM OF RETRIBUTIVE RETROACTIVE JUSTICE: AN ADMONITION FOR INTERNATIONAL LAWYERS⁴⁵¹

International humanitarian law has institutionalized the individual criminal trial as the preferred remedy to redress egregious and systemic violations of human rights.⁴⁵² The prominence of the trial is assured by the statutes of the ICTR,⁴⁵³ the ICTY,⁴⁵⁴ the ICC,⁴⁵⁵ and

⁴⁴⁹ Longman, *supra* note 5, at 355.

⁴⁵⁰ David J. Scheffer, *Genocide and Crimes Against Humanity: Early Warning and Prevention*, Presentation at Holocaust Museum, Washington, D.C. (Dec. 10, 1998) (transcript on file with the *New York University Law Review*) (citing work of Ted Robert Gurr and Barbara Harff and calling for action to prevent genocide).

⁴⁵¹ By "globalitarianism" is meant the universal, world-wide enforcement of a set of principles through international institutions and authorities. Part V of this Article incorporates and significantly expands upon arguments raised in Drumbl, *supra* note 15, at 296-99.

⁴⁵² See *supra* note 20 and accompanying text.

⁴⁵³ See Statute of the ICTR, *supra* note 25. The mandate of the ICTR is to prosecute persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and in neighboring states between January 1, 1994 and December 30, 1994. See *id.* art. 1. No Rwandan has ever sat as a judge on the ICTR. This peculiar situation reveals the questionable assumption of international criminal law that justice requires an ethnically neutral tribunal consisting only of persons discon-

other elements of the international legal superstructure.⁴⁵⁶ In the deliberations leading up to the adoption of the ICC, the most recent of these entities, Ruth Wedgwood reports that essentially no discussion was had of alternatives to trials for human rights abusers.⁴⁵⁷ Unsurprisingly, then, these statutes provide detailed descriptions of pretrial, trial, and posttrial procedures, but only with minor exceptions do they discuss, accommodate, recommend, or recognize redressing mass violence through restorative or transformative justice. Only in limited circumstances can the prosecutor decide not to take a matter to trial notwithstanding the *prima facie* reasonableness of the charges against the alleged perpetrator.⁴⁵⁸ The “law and order” paradigm, so popular at the national level in Western political discourse, is in effect “going

nected from the tragedies. For a thoughtful critique of the importance of ethnic neutrality to international criminal tribunals, see Alvarez, *supra* note 10, at 436-52; see also Stuart J. Kaufman, *Spiraling to Ethnic War: Elites, Masses, and Moscow in Moldova's Civil War*, *Int'l Security*, Fall 1996, at 108, 133 (arguing forcefully that “[t]hird parties cannot change ethnically defined grievances, negative stereotypes, symbolic disputes, threatening demographic trends, or histories of ethnic domination in foreign countries; and they cannot eliminate the fears of extinction which may result”). Kaufman's exhortation constitutes a solid justification of the merit in “home-grown” domestic remedies.

⁴⁵⁴ See Statute of the ICTY, *supra* note 24. As for the possibilities of integrating the ICTY with alternate methods of promoting accountability, see Remarks by Judge McDonald, *supra* note 20.

⁴⁵⁵ See Rome Statute, *supra* note 11.

⁴⁵⁶ For a discussion of the United Nations's preference for internationally conducted trials as the method to pursue accountability for mass atrocity in Cambodia, see *supra* note 26.

⁴⁵⁷ See Ruth Wedgwood, *The International Criminal Court: An American View*, 10 *Eur. J. Int'l L.* 93, 96 (1999) (stating that:

Sometimes a truth commission, organized under local or international auspices, will be the only course, at least assuring victims that their histories are not forgotten. Sometimes prosecutions can be attempted. But no plenary discussion of this vexing problem was had in Rome. In the August 1997 session of the Preparatory Committee, the United States circulated a nonpaper paper, suggesting that a responsible decision by a democratic regime to allow an amnesty was relevant in judging the admissibility of a case. In conversation, experienced international war crimes prosecutors have also suggested that this is a sensible rule of the road for the ICC. But the Rome Statute omits any direct account of the problem of amnesties . . .).

But see Gerhard Hafner et al., *A Response to the American View as Presented by Ruth Wedgwood*, 10 *Eur. J. Int'l L.* 108, 109 (1999) (asserting that discussions on issue of amnesties were in fact held in Rome).

⁴⁵⁸ See, e.g., Rome Statute, *supra* note 11, arts. 53(1), 53(2) (limiting circumstances where Prosecutor can refuse to initiate prosecution to those where there is insufficient factual or legal basis, case is inadmissible, or prosecution is “not in the interests of justice”). A decision by the Prosecutor not to proceed under article 53(2) can be reviewed by the ICC Pre-Trial Chamber *sua sponte*, and, if such a review occurs, the decision not to proceed must be confirmed by the Pre-Trial Chamber in order to be effective. See *id.* art. 53(3)(b).

global.”⁴⁵⁹ Yet it is “going global” with very little thought given to developing a criminology of mass violence.

In the end, the globalitarianism of retributive justice leaves little room for blended solutions.⁴⁶⁰ The United Nations has never proposed a permanent international truth commission, even as an adjunct to the ICC.⁴⁶¹ This globalitarianism also may have an imperial nature to it: The law and order of international human rights is, after all, a manifestation of a Western approach to justice.⁴⁶² Its indiscriminate and decontextualized application to non-Western societies may result in a disconnect between the imperative of enforcing justice and the effects of that enforcement on local communities.

The prominence of trials in international criminal law is given further effect by the dominance of international tribunals over domestic initiatives. By way of example, the Statute of the ICTR simply accords the ICTR primacy over domestic proceedings in all states, in-

⁴⁵⁹ For a discussion of the internationalization of “law and order” discourse and its adoption by the human rights community, see Schabas, *supra* note 146, at 501-02, 515-16.

⁴⁶⁰ Some scholars argue that the focus on criminal trials for human rights abusers simply reflects the fact that international law places a duty on states to prosecute such abusers, without exception. See Hafner et al., *supra* note 457, at 111 (relying on language of Genocide Convention and Geneva Conventions to conclude that granting immunity from prosecution and punishment would “run the risk of violating duties under humanitarian law”); Orentlicher, *supra* note 255, at 2598 (noting need to prosecute, but recognizing legitimacy of prosecutorial discretion so long as discretion is properly exercised); Jon M. Van Dyke & Gerald W. Berkley, Redressing Human Rights Abuses, 20 *Denv. J. Int’l L. & Pol’y* 243, 243 (1992) (noting obligation to prosecute and arguing that international community must provide assistance). But see *Azanian Peoples Org. v. President*, 1996 (4) SALR 671, 687-91 (CC), in which South Africa’s Constitutional Court held that the amnesty powers of South Africa’s Truth and Reconciliation Commission did not infringe any requirement at international law to prosecute grave human rights violations. Some scholars question the wisdom of an international duty to prosecute human rights violations. See, e.g., Nino, *supra* note 19, at 188 (“Rather than a duty to prosecute, we should think of a duty to safeguard human rights and to prevent future violations by state officers or other parties.”). Others suggest that there may be a right at international law for victims of human rights abuses to receive compensation and restitution for these abuses. See Gannage, *supra* note 43, at 14 (citing in favor of this proposition, United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, G.A. Res. 40/34, U.N. GAOR, 40th Sess., at 213, U.N. Doc. A/40/881 (1985)); Scharf, *supra* note 101, at 388-89. Similarly, there may also be a right at international law for survivors of massive human rights abuses to receive information regarding the abusers and the location of lost relatives. See Universal Declaration of Human Rights, G.A. Res. 217, U.N. GAOR, 3d Sess., pt. 1, art. 19, U.N. Doc. A/810 (1948) (providing right to seek, receive, and impart information); see also Gannage, *supra* note 43, at 39 (suggesting that punitive damages are appropriate form of reparation in instances of abuse). Both of these potential rights—restitution and information—may militate in favor of creating a permanent international truth commission as a matter of international law.

⁴⁶¹ See Scharf, *supra* note 101, at 376.

⁴⁶² See José Alvarez, 93 *Am. J. Int’l L.* 738, 739 (1999) (reviewing Gourevitch, *supra* note 1) (citing discussion of “legal imperialism” by Dianne Otto, Rethinking the “Universality” of Human Rights Law, 29 *Colum. Hum. Rts. L. Rev.* 1, 42-44 (1997)).

cluding Rwanda.⁴⁶³ The effect of this is to render subservient any domestic initiative to redress genocidal violence, especially when that initiative does not conform to the international trial model. This primacy does not operate in the usual sense of judicial review of the decisions of lower courts, but operates instead as individual jurisdiction as a court of first instance. Predictably, this has led to competition between Rwandan authorities and the ICTR over custody of genocide suspects.⁴⁶⁴ The competition does not end once the Rwandan government assumes jurisdiction, since the Statute of the ICTR stipulates that "[a]t any stage of the procedure, the [ICTR] may formally request national courts to defer to its competence."⁴⁶⁵ Moreover, primacy not only is exerted once charges are filed; the ICTR may insist on primacy whenever "it appears to the Prosecutor that crimes which are the subject of investigations . . . in the courts of any State . . . are [or] . . . [s]hould be the subject of an investigation by the Prosecutor."⁴⁶⁶ The concurrent relationship of the ICTR and domestic

⁴⁶³ See Statute of the ICTR, *supra* note 25, art. 8(2) ("The International Tribunal for Rwanda shall have primacy over the national courts of all States."). The ICTR can retry a person already

tried by a national court for acts constituting serious violations of international humanitarian law . . . only if:

- (a) The act for which he or she was tried was characterized as an ordinary crime; or
- (b) The national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted.

Id. art. 9(2). The ICTR can thus "sit in judgment" on a completed national proceeding. On the other hand, no person may be tried before a national (including Rwandan) court for acts constituting serious violations of international humanitarian law for which that person already has been tried by the ICTR. See *id.* art. 9(1). For a critique of international primacy, see Alvarez, *supra* note 10, at 459-62.

⁴⁶⁴ See Alvarez, *supra* note 10, at 442. The ICTR has not deferred or suspended proceedings in order to allow the Rwandan courts to prosecute an individual in the ICTR's custody. In March 1999, the ICTR dropped charges against Bernard Ntuyahaga (accused of killing a former Rwandan Prime Minister together with 10 Belgian peacekeepers), released him, and encouraged Tanzania to transfer him to Belgium to face trial. See ICTR Update 014, March 18, 1999; IRIN-CEA, UN OCHA, Update No. 637 (Mar. 25, 1999) <<http://www.reliefweb.int/IRIN/index.phtml>>; IRIN-CEA, UN OCHA, Update No. 641 (Mar. 31, 1999) <<http://www.reliefweb.int/IRIN/index.phtml>>. Ntuyahaga remains in custody in Tanzania, where a court is considering an extradition request initiated by Rwanda. See UN OCHA, Central and Eastern Africa: IRIN-CEA Weekly Round-up 21 (May 22-28, 1999) <<http://www.reliefweb.int/IRIN/cea/weekly/19990528.htm>>; Rwandan Accused of Killing PM Claims Charges Are Political, Agence France-Presse, Aug. 31, 2000, available in 2000 WL 24700959.

⁴⁶⁵ Statute of the ICTR, *supra* note 25, art. 8(2).

⁴⁶⁶ International Criminal Tribunal for Rwanda, Rules of Procedure and Evidence, Rule 9(i)-(ii) (as amended June 26, 2000) [hereinafter Rules of Procedure and Evidence], available at <<http://www.ictr.org/legal.htm>>. In determining whether or not to exert primacy on this basis, the ICTR is to consider, *inter alia*, the "seriousness of the [alleged] offences," *id.*

Rwandan tribunals has created some tension.⁴⁶⁷

The ICC is more subtle in its primacy over domestic institutions. The subtlety begins with the ICC's characterization of its relationship with national institutions: It is to be one of complementarity rather than primacy.⁴⁶⁸ Yet this "complementarity" may prove equally effective in assuring the hegemonic position of the criminal trial. The ICC will not exert jurisdiction over an accused unless it determines that a national government that would otherwise have jurisdiction is "unwilling or unable genuinely to carry out the investigation or prosecution."⁴⁶⁹ This determination is left in the hands of the ICC, and, as a result, it is the judge of its own jurisdiction. In determining whether a state is "unwilling . . . genuinely to carry out the investigation or prosecution," the ICC is to consider whether one or more of the following exists: (1) the proceedings were undertaken for the purpose of shielding the person responsible from criminal responsibility, (2) there has been an unjustified delay inconsistent with an intent to bring the accused to justice, and (3) the proceedings were not or are not being conducted independently or impartially.⁴⁷⁰ The ICC can thus subject domestic initiatives to judicial review based upon how closely those initiatives correspond to what it deems to be the norms of due process. As for whether a state is "unable" to undertake investigations or prosecutions, the ICC is to consider whether a "total or substantial collapse or unavailability of [the state's] national judicial system . . . [renders the state] unable to obtain the accused or the necessary evidence and testimony or [is] otherwise unable to carry out its proceed-

Rule 9(ii)(a), the "status of the accused at the time of the alleged offenses," *id.* Rule 9(ii)(b), and the "general importance of the legal questions involved in the case," *id.* Rule 9(ii)(c). States who are ordered to defer their proceedings in light of ICTR investigations or prosecutions "shall comply without undue delay." *Id.* Rule 10(C). Failure to comply may result in the matter being reported to the Security Council. See *id.* Rule 11.

⁴⁶⁷ See, e.g., discussion *supra* notes 294-302 (discussing Barayagwiza conflict); discussion *supra* note 464 (discussing Ntuyahaga affair). Rwanda cast the only dissenting vote when the Security Council created the ICTR. See Mutua, *supra* note 27, at 177. This gave rise to an odd situation in which the nation whose internal conflict the international community had chosen to subject to criminal accountability did not support the intervention. The Rwandan government was opposed to the ICTR for a variety of reasons, including (1) fear that the ICTR would preempt the Rwandan government's own authority to bring perpetrators to trial, (2) mistrust of the international community owing to its unwillingness to stop the genocide, (3) concern that the ICTR would not even be located in Rwanda, and (4) opposition to the limited temporal jurisdiction of the ICTR together with its inability to impose the death penalty. See *id.*; see also Olivier Dubois, Rwanda's National Criminal Courts and the International Tribunal, 321 *Int'l Rev. Red Cross* 717, 718-20 (1997).

⁴⁶⁸ See Rome Statute, *supra* note 11, art. 17.

⁴⁶⁹ *Id.* art. 17(1)(a).

⁴⁷⁰ See *id.* art. 17(2).

ings.”⁴⁷¹ In the end, a state that approaches a legacy of violence through nonprosecutorial or extrajudicial means (for example, truth commissions) may not satisfy the ICC’s requirements and therefore may leave open the door to the ICC’s assumption of jurisdiction. The interaction of *gacaca* with the international legal order is also interesting: Would the ICC consider a *gacaca* hearing to be a “genuine” investigation or prosecution so as to divest the ICC of jurisdiction?⁴⁷²

Since the ICC might try an accused over the objections of a national government that has jurisdiction and is seeking to hold that individual accountable, national governments are given the incentive to implement trials that correspond (procedurally and substantively) as closely as possible to the ICC’s trials, so as to minimize the possibility of reconsideration by the ICC. Innovative restorative approaches are consequently discouraged. The primacy of the ICC further is reflected in the fact that the Rome Statute stipulates that no person shall be tried before another court for a crime for which that person already has been convicted or acquitted by the ICC.⁴⁷³ Thus, although the ICC has the power to reconsider matters already decided in national courts and assume jurisdiction after an individual has faced national accountability, no national or other court may assume jurisdiction with respect to a crime under the ICC’s ambit over anyone who has been convicted or acquitted by the ICC.⁴⁷⁴

There is no obligation on the part of the ICC or the international community to empower states willing yet presently unable to redress humanitarian abuses.⁴⁷⁵ On the contrary, the ICC well may have the

⁴⁷¹ Id. art. 17(3).

⁴⁷² Of course, this question is only speculative. The ICC will never have jurisdiction over the 1994 Rwandan genocide: Its jurisdiction is not retroactive. See id. art. 11. However, the question could become relevant in the tragic event that Hutu-Tutsi strife explodes once again into genocidal violence after ratification of the Rome Statute. Outside of the Rwandan context, contemplating the ability of *gacaca* to coexist with the ICC’s trials is relevant to exploring the ability of other local extrajudicial interventions to operate in conjunction with, and not to be precluded by, the ICC. A related question is whether the extensive due process guarantees in the International Covenant on Civil and Political Rights, *supra* note 309, art. 14, 999 U.N.T.S. at 174-75, might limit the ability of *gacaca* proceedings to address accountability for genocide.

⁴⁷³ See Rome Statute, *supra* note 11, art. 20(2).

⁴⁷⁴ See id.

⁴⁷⁵ The international community has been vigorous about funding the ICTY and ICTR. It has been much more parsimonious in funding initiatives within Rwanda. The United States recently awarded five million dollars to Rwanda for justice initiatives to “bring to justice or rehabilitate” the “huge number” of incarcerated suspects. Scheffer, *supra* note 450. At the same time, the United States authorized the Secretary of State to reward up to a maximum of five million dollars to any individual who provides information leading to the arrest or conviction of an indictee at the international tribunals. See id. This situation prompts Neil Kritz to observe that “the international community is currently spending approximately \$41 million a year on the [ICTR]. . . . \$41 million per year in the rebuilding

perverse effect of starving or minimizing national institutions if it is to maximize its jurisdiction. Yet, the ICC will not have unlimited resources. Therefore, should the ICC squeeze out national initiatives (especially national initiatives other than trials), but be unable to provide the resources to deal with all the individuals who could have been held accountable under those national initiatives, the result simply may be less justice in the aggregate.

When it comes into force, the ICC uniformly could apply, depending on the number of states that ratify it, to almost all prospective genocides.⁴⁷⁶ The result could be a near universal implementation of retributive and punitive justice in response to mass atrocity. This universality eliminates the discretion necessary to assess the nature of the affected postgenocidal society. Removing this discretion limits the range of choices in determining what policies are best for that society. Context, nuance, and local particularities should inform the design of responses to genocide, which should be individualized, carefully planned, and thoughtful. When the retribution and punishment of the trial model become universalized as the exclusive way to “deal with” mass political violence, the creativity of conjunctive local solutions becomes marginalized. What then is lost is precisely what Nino emphasizes is needed, namely “a system whereby the international community itself must consider the unique problems a particular successor . . . government faces and support the efforts that are needed to secure democracy, and hence human rights, in the future.”⁴⁷⁷

Justice may mean many things to many people. Locking up a handful of convicts in a far away prison smacks of narrow mechanical justice. A broader sense of justice better may accommodate the individuality of the postgenocidal society. Were international legal mechanisms to be sensitive to the need for this contextual understanding, and were these mechanisms only to form a part of the overall policy response, they ironically might be better able to satisfy their mandate.

In this vein, international lawyers need to ask fundamentally more probing questions about the goal of legal responses in a postgenocidal situation. Punishing the offenders? Condemning massive breaches of international humanitarian law? Trying to make the sur-

and training of the Rwandan legal system could produce one of the better justice systems in the region.” Kritz, *supra* note 15, at 150.

⁴⁷⁶ As of September 15, 2000, 20 countries have ratified the Rome Statute; 112 countries have committed to the treaty by signing. See Rome Statute of the International Criminal Court—Ratifications (visited Sept. 19, 2000) <<http://www.un.org/law/icc/statute/status.htm>>. Sixty ratifications are required in order for the Rome Statute to come into effect. See Rome Statute, *supra* note 11, art. 126(1).

⁴⁷⁷ Nino, *supra* note 19, at 188-89.

vivors whole again? Deterring future genocides? Revisiting and correcting the forces that may have induced the genocide in the first place? Rebuilding civil society? Even if the punishment of offenders is embraced as the principal goal, obtaining a conviction is only part of the equation. The sentence is equally important. Yet, very little work has been done in formulating a sentencing policy for perpetrators of mass violence.⁴⁷⁸ More work also needs to be done in terms of developing a victimology of mass violence.⁴⁷⁹ What, in fact, do surviving victims want? Is the trial model's focus on the perpetrator compatible with their interests?⁴⁸⁰ Will mollification arise from punishment? Or do surviving victims wish for other remedies? In a poor, agrarian society such as Rwanda, contextual remedies might focus on compensation, perhaps financed by international funds. Rwandan lawyer François Xavier Nkurunziza explains: "When you speak of justice with our peasants, the big idea is compensation. A cattle keeper or cultivator who loses his whole family has lost his whole economic support system. You can kill the man who committed genocide, but that's not compensation—that's only fear and anger."⁴⁸¹

The assumption that not only mollification, but also eventual reconciliation, will arise from punishment runs throughout international criminal law.⁴⁸² This assumption ought to be questioned. Instead, it

⁴⁷⁸ See Alvarez, *supra* note 10, at 408-09 (finding that "[d]espite the voluminous literature on the [international] tribunals, there is scant attention paid to addressing the theories of punishment . . . that are supposed to underlie the effort" and that "[i]nternational lawyers do not appear to be concerned about grounding the . . . tribunals' sentences . . . in a coherent moral or philosophical framework"); Schabas, *supra* note 146, at 515 (remarking that "little attention has been given to sentencing . . . [which] may be partially explained by the fact that human rights activists are ill at ease with punishment").

⁴⁷⁹ It is especially important to develop a victimology of the Rwandan violence given the sheer extent of the victimization. See Gourevitch, *supra* note 1, at 224 (finding that "[n]obody in Rwanda escaped direct physical or psychic damage"). Gourevitch also cites a UNICEF study that concluded that five out of six children present in Rwanda during the killings had witnessed at least bloodshed. See *id.* at 224.

⁴⁸⁰ The deontological trial model is not always attentive to the interests of victims. See Pierre Prosper, Comments at International Law Weekend, *supra* note 26 (notes on file with the *New York University Law Review*) ("Victim participation should not hamper the ability of the court to quickly and expeditiously prosecute crimes."). The ICC does permit victims some involvement in the proceedings. See Rome Statute, *supra* note 11, art. 15(3) (permitting victims to make representations to Pre-Trial Chamber regarding reasonableness of decisions to proceed with investigation); *id.* art. 68(3) (permitting presentation and consideration of victims' views and concerns, even at trial, so long as doing so is not prejudicial to or inconsistent with rights of accused and fair and impartial trial).

⁴⁸¹ Gourevitch, *supra* note 1, at 249.

⁴⁸² This prompts Alvarez to comment that "international tribunals are accountable to, and respond most readily to, international lawyers' jurisprudential and other agendas and only incidentally to the needs of victims of mass atrocity," Alvarez, *supra* note 10, at 410, and that "[t]here appears little room . . . for adapting penalties to the needs or desires of those victimized by . . . crimes or of the societies of which they are a part," *id.* at 479.

reigns supreme and infuses the choice of sentences under the ICC. These are limited to imprisonment (for a term of up to thirty years or, in extremely grave cases, life), fines and a forfeiture of proceeds, property, and assets derived directly or indirectly from the crime.⁴⁸³ The ICC does create the possibility of reparations to victims; these are to flow directly from the assets of the convicted person or from a Trust Fund constituted of fines and sums forfeited from those convicted at large.⁴⁸⁴ However, the effectiveness of these reparation provisions is sharply reduced by the fact that the ICC only has jurisdiction over individuals.⁴⁸⁵ As a result, there is no possibility for state, corporate, or institutional reparations, nor any possibility for accountability of institutions. Another limitation is that the ICC has not yet adopted rules that can provide for the freezing of assets or provisional forfeiture of an accused's property at the moment of arrest. Without such relief, the possibility of reparations will be more apparent than real.

Individuals convicted by the ICC are eligible for sentence reductions (parole).⁴⁸⁶ These reductions may be granted by the ICC, after the convict has served two-thirds of the sentence, or after twenty-five years in the case of life imprisonment.⁴⁸⁷ Conditions for sentence reductions are similar to those available in domestic criminal legislation: cooperativeness, providing information or reparations, and "[o]ther factors establishing a clear and significant change of circum-

⁴⁸³ See Rome Statute, *supra* note 11, art. 77. The language of these provisions suggests that the fines or forfeitures cannot be substituted for imprisonment or awarded in the absence of a term of imprisonment. See *id.* art. 77(2) ("In addition to imprisonment, the court may order . . .").

⁴⁸⁴ See *id.* art. 75. The reparations provision of the Rome Statute is important since it goes somewhat beyond the retributive justice paradigm and, as a result, may represent the beginnings of a more diversified approach to redressing genocide and crimes against humanity. The reparations are to be made pursuant to a court order. See *id.* The ICC may order restitution, compensation, and rehabilitation in making this order. See *id.* art. 75(2). The order can be made either on independent motion by the victims or, in exceptional circumstances, at the behest of the ICC. See *id.* art. 75(1). In either case, the ICC will invite legal representations from the convicted person, victims, or other interested parties. See *id.* art. 75(3). In a sense, a proceeding under article 75 is akin to a separate and *ex post facto* civil damages claim. The ICC must first establish principles relating to reparations, restitution, compensation, and rehabilitation to guide its reparative orders. See *id.* art. 75(1). This provision may provide the impetus necessary to think about a more sophisticated sentencing policy and criminology for massive human rights abuses. In the end, however, the ICC remains unflinching in its exclusive use of trials (and imprisonment, given that fines only can be ordered in addition to imprisonment) as the way of dealing with perpetrators of such abuses, as opposed to blending this approach with public inquiries, truth commissions, or other mechanisms to allocate responsibility and ensure accountability.

⁴⁸⁵ See Rome Statute, *supra* note 11, art. 25.

⁴⁸⁶ See *id.* art. 110.

⁴⁸⁷ See *id.* arts. 110(2), (3).

stances.”⁴⁸⁸ The ICC simply superimposes traditional sentencing practices—whose effectiveness is unclear even in deterring deviant criminal behavior⁴⁸⁹—to the situation of an individual who has perpetrated massive human rights abuses in a society engulfed by structural violence. Does this superimposition not seem simplistic? Can the international community not do better in terms of conceptualizing deviance, criminal motive, and prevention in the unique situation of mass atrocity? Is it, therefore, so unsurprising that the threat of international prosecution has done little to deter crimes against humanity in Kosovo?⁴⁹⁰

Penalties and sentences are similarly limited under the Statute of the ICTR: The focus is on imprisonment and, additionally, the possibility of the “return of any property and proceeds acquired by criminal conduct to their rightful owners.”⁴⁹¹ Thus far, the verdicts of the

⁴⁸⁸ Id. art. 110(4).

⁴⁸⁹ There is a broad literature addressing this point. For an overview, see Charles Fried, *Reflections on Crime and Punishment*, 30 *Suffolk U. L. Rev.* 681 (1997).

⁴⁹⁰ See Carla Hesse & Robert Post, Introduction, in *Human Rights in Political Transitions*, supra note 56, at 13, 26 (noting that ICTY has “permit[ted] the international community to express moral outrage, but [has] thus far had little effect either in deterring further crimes or in bringing the conflict to an end”). No doubt this has been to the disappointment of those who optimistically had predicted the deterrent value of the ICTY’s first trial, that of Dusko Tadić:

[T]he image of Dusko Tadic in the dock, transmitted throughout the world by satellite, sends a message to would-be war criminals and human rights abusers around the globe that in the future those who commit such acts may be held accountable for their actions. . . .

The vehicle of a televised trial is an especially potent one both for attaining respect for the rule of law and for deterring future violations.

Scharf, supra note 66, at 218. This may continue to be a disappointment to the leadership of the ICTY, which had envisioned that aggressive efforts to arrest those indicted for war crimes in Bosnia would be a “powerful deterrent” to Serb atrocities in Kosovo. See Barrie McKenna, *War Criminals Must Pay*: *Arbour, Globe & Mail* (Toronto), May 1, 1999, at A14. For a broader discussion of the failure of the threat of international legal sanction post-Nuremberg to dissuade mass atrocity, see Minow, supra note 15, at 27-28, 49.

⁴⁹¹ Statute of the ICTR, supra note 25, art. 23(3); see also Rules of Procedure and Evidence, supra note 466, Rule 106 (detailing right of victim to pursue compensation in national courts). As for the possibilities for restitution, see id. Rule 88(B) (permitting Tribunal to make finding of unlawful taking of property), Rule 105 (noting that pursuant to finding under Rule 88, Tribunal can order restitution either of property or proceeds or make such other order as it may deem appropriate). The fact that the ICTR will not issue the death sentence means those individuals it convicts (supposedly the directing minds of the genocide) may be treated more leniently than those tried by the Rwandan courts (generally not the ringleaders of the genocide, since the ICTR has asserted jurisdictional primacy over most such individuals). On another note, at times the Organic Law evidences a more sophisticated sentencing theory than the Statute of the ICTR; for example, it requires that an apology precede a confession and plea bargain. “[N]othing in the ICTR’s (or the ICTY’s) . . . statutes encourages any other comparable act of contrition—despite evidence that public apologies and renunciations of past crimes strengthens victim mollification” Alvarez, supra note 10, at 409.

ICTR have involved only imprisonment and no elucidation of the principles animating the restitutionary remedy has been made.⁴⁹² Sentencing guidelines contained in the Statute of the ICTR, as well as curial interpretation thereof, remain anchored within a traditional deviance framework and show little sign of accommodating the peculiar situation of mass crime.⁴⁹³ As a result, criminal sanctions may not be a particularly effective deterrent. As the case of Rwanda demonstrates, criminal sanction also may be a frail basis upon which to build a postgenocidal state.⁴⁹⁴

CONCLUSION

In adopting the Statute of the ICTR, the Security Council emphasized in the Statute's Preamble its conviction that "in the particular circumstances of Rwanda, the prosecution of persons responsible for serious violations of international humanitarian law would . . . contribute to the process of national reconciliation and to the restoration and

⁴⁹² In the trial of Albert Musema at the ICTR, an attempt by African Concern, a charitable nongovernmental organization, to intervene to promote restitutionary interests was rejected. See *Prosecutor v. Musema*, Case No. ICTR-96-13-T (Int'l Crim. Trib. for Rwanda Mar. 17, 1999) <<http://www.ictr.org/english/decisions/Musema/amicus.htm>>. Musema was not even charged with unlawful taking of property. See *id.* The ICTR is empowered to accord pardon or commutation after a sentence has been awarded. See Statute of the ICTR, *supra* note 25, art. 27. This provision has not yet been applied. Nonetheless, it does not represent a deviation from the retributive criminal justice model insofar as the pardon only can be ordered after the trial is completed and the sentence already issued.

⁴⁹³ See Rules of Procedure and Evidence, *supra* note 466, Rule 101(B) (providing some sentencing guidelines); see also *Prosecutor v. Serushago*, Case No. ICTR-98-39-S, Parts II.B, C (Int'l Crim. Trib. for Rwanda Feb. 5, 1999) <<http://www.ictr.org/ENGLISH/SENTENCE/os1.htm>>; *Prosecutor v. Kambanda*, Case No. ICTR-97-23-S, ¶¶ 26-37 (Int'l Crim. Trib. for Rwanda Sept. 4, 1998) <<http://www.un.org/ictt/english/judgements/kambanda.htm>>. Sentences are to be established taking into account the "general practice" of the criminal courts in Rwanda. See Statute of the ICTR, *supra* note 25, art. 23.1. This provision has the potential to make the ICTR sentences more sensitive to context and more meaningful to local populations. Nonetheless, the rationale behind the reference to the "general practice" of local courts is not really to create context or incorporate local norms but, instead, to respond to concerns regarding the prohibition of retroactive sentences. See Schabas, *supra* note 146, at 468-69 (explaining "general practice" rationale). The Rome Statute does not authorize judges to consider or to defer to the local sentencing practices of the jurisdiction where the offense occurred. See Rome Statute, *supra* note 11, arts. 76-78.

⁴⁹⁴ The Rwandan experience appears to substantiate Martha Minow's conclusion that [h]ealing and justice seem most compatible for groups poised to reclaim or restart a nation under terms conducive to democracy. They are less compatible where the victimized group has been expelled or so decimated that it has no nation in which to reconcile and rebuild.

The very vocabularies of healing and restoration are foreign to the legal language underpinning prosecutions.

Minow, *supra* note 15, at 63.

maintenance of peace.”⁴⁹⁵ Similar goals are attributed to the domestic Rwandan genocide legislation, which “will allow the return of social peace among Rwanda’s people . . . [through] legitimate tribunals judging on the base of legal principles that are clearly established.”⁴⁹⁶

This Article questions the ability of genocide trials in Rwanda to attain these goals. Drawing from a contextually contoured sociological analysis, this Article views as probative to the design of postgenocidal public policy in Rwanda the highly interdependent, dualist nature of Rwandan society, together with the widespread level of public participation in the genocide. These characteristics create a situation in which accountability for genocide, and the deterrence of future interethnic violence, can be pursued more effectively through restorative justice initiatives (motivated by the cultivation of shame) as opposed to the retributive justice of the criminal trial (motivated by the imposition of guilt). Restorative justice initiatives, which emphasize the need for atonement, shaming, and reintegration, may be well-suited for societies moving past mass atrocity where both victims and aggressors need to be accommodated within the same polity, society, and government.

Lessons learned from the Rwandan experience—in which the pursuit of punitive criminal justice (although successful in establishing microscopic truths in some select cases) does not appear to be making significant headway in reducing ethnic tensions and divides—are applicable to the international level. At this level, human rights activists are increasing awareness of the need for legal responses to mass atrocity but are focusing the response efforts on the criminal trial. This focus on trials well may arise from a misplaced faith in the ability of trials to mollify victims, punish aggressors, and build peace and unity in postgenocidal societies. Criminal trials may offer the lure of the easy solution to the complexities of mass atrocity. But this lure may create unrealistic expectations and, in the end, lead to disappointing results. International lawyers may be guided better by sensitivity to the individuality of each postgenocidal society, and might consider distancing themselves from what appears to be a newly emerging preference in favor of dealing with perpetrators of mass atrocity primarily through adversarial, and necessarily selective, criminal proceedings. Policy responses to genocide should not be dictated by globalitarian agendas but rather should be founded upon contextual inquiries,

⁴⁹⁵ Statute of the ICTR, *supra* note 25, pmbl.; see also Cisse, *supra* note 20, at 98.

⁴⁹⁶ Int’l Ctr. for the Study & the Promotion of Human Rts. & Info., *The Genocide and the Crimes Against Humanity in Rwandan Law* 4 (1997).

which recognize the uniqueness of each incident of mass atrocity and the uniqueness of the reconstruction process that should follow.

Martha Minow calls for an “honest modesty” about the transformative potential of trials.⁴⁹⁷ This “honest modesty” leads to the position that trials can play a part in postgenocidal transitions, although, in the case of dualist postgenocidal societies, likely just a small part of an admixture of policies tilted toward a restorative justice paradigm. Professor Mutua advocates such a polycentric approach: “[T]ribunals would only make sense in the context of an overall solution, a comprehensive and bold settlement addressing the foundational problems that unleashed the genocide in the first place.”⁴⁹⁸ They “would only make sense as part of a comprehensive domestic and international process of punishment, reconstruction, and reconciliation.”⁴⁹⁹

In the Rwandan context, a diversified approach could incorporate (1) trials for notorious killers and the leaders of the genocide as well as RPF human rights violations, (2) *gacaca*-based reintegrative shamings for all other offenders, (3) a truth commission able to obtain, if not compel, testimony from Rwandans as well as international officials, (4) the creation of an international fund to administer compensation to the victims of the genocide and of subsequent RPF violence, and (5) elite accommodation of Hutu and Tutsi in multiethnic governance based upon a political settlement that would include legal responses to genocide (unlike the trials, which are not part of a legitimately accepted settlement bargain among ethnic groups and, in the case of the ICTR, are even separate from Rwanda itself).

The social engineering contemplated by retributive criminal justice does little to address the structural sources of the mythology of ethnic superiority in a society such as Rwanda's.⁵⁰⁰ Trials create a bipolar *leitmotiv* of the postgenocidal society, which is binarily deconstructed into the “guilty” and the “innocent.” This deconstruction runs the risk of oversimplifying history by negating the importance of collective wrongdoing, acquiescent complicity, and the embeddedness of “radical evil.”⁵⁰¹ By treating genocidal violence as an individual-

⁴⁹⁷ See Minow, *supra* note 15, at 51.

⁴⁹⁸ Mutua, *supra* note 27, at 168.

⁴⁹⁹ *Id.* at 170.

⁵⁰⁰ See Roach, *supra* note 152, at 243 (concluding that “[t]he use of the criminal sanction to protect minorities . . . promoted a criminalization of politics which diverted attention from more tangible and expensive means to increase equality, liberty, and security”).

⁵⁰¹ Challenging collective wrongdoing runs afoul of one of the tenets of the trial model, which views the apportioning of guilt on individuals as opposed to society as integral to peace and reconciliation. See Scharf, *supra* note 66, at 221 (quoting ICTY spokesperson as stating that “[a]voiding collective guilt will greatly strengthen the peace process in Bos-

ized, pathological, and deviant transgression of social propriety, the criminal justice system may do the dualist postgenocidal society a disservice by blanketing and perpetuating the structural nature of this violence to the detriment of survivors and future generations.⁵⁰² Blaming occurrences of radical evil entirely on the existence of some evil people obscures the fact that so many people, to varying degrees of complicity, are required for “radical evil” to operate publicly on a macro level.⁵⁰³

The bipolarity of this *leitmotiv* is especially pronounced when—as is the case in Rwanda—trials are pursued as the exclusive official mechanism for seeking accountability following mass atrocity. Is it thus surprising that many of the conditions precedent to the Rwandan

nia”); Press Statement Made by the Prosecutor Carla Del Ponte in Zagreb 5 April 2000, ICTY Press Release PR/P.I.S/488-E (Apr. 6, 2000) <www.un.org/icty/pressreal/p488-e.htm> (“[N]otions of collective guilt are wrong and will hinder reconciliation.”). Proponents of the trial model seek to discourage notions of collective complicity by finding individual perpetrators, as opposed to groups, accountable. See Alvarez, *supra* note 10, at 382 (summarizing arguments of international lawyers). Policy mechanisms that encourage collective complicity are “seen as fundamentally defective.” *Id.* at 382 n.77.

⁵⁰² The international trial model also characterizes mass political offenses as “aberrant or exceptional deviations from the norms of interstate behavior.” Alvarez, *supra* note 10, at 369. This imposes closure once the individuals who lead these rogue states have been singled out and punished for their deviant behavior. In the end, “[t]he idea that only the rare government and its elites engage in such conduct tends to discourage wider inquiries as to whether others are culpable or complicit.” *Id.* at 453. On the other hand, the political realist perspective views atrocities in Rwanda as “prototypical crimes of hate—that is, particularly virulent forms of intergroup violence with only sporadic, incidental interstate dimensions.” *Id.* at 378. According to this view, the Rwandan atrocity arose

from situations in which a variety of individuals (from politicians to cultural icons) and groups (from political parties to churches) have chosen to revive latent hostilities, thereby inflaming groups to act on familiar fears or hatreds of ‘the other’ as defined by gender, race, religion, or ethnicity (or a combination of all of these).

Id. This political realist perspective is more conducive to the implementation of structural and collective responses that focus on broad social accountability.

⁵⁰³ See generally Goldhagen, *supra* note 190 (investigating genocidal acts of many “ordinary” Germans). This book has created its fair share of controversy. See, e.g., Christopher R. Browning, *Ordinary Men: Reserve Police Battalion 101 and the Final Solution in Poland* (1992) (arguing that Germans acted no differently than people from any country might have acted in their situation). For a discussion of the linkages between mass complicity and mass violence in Chile and Nazi Germany, see Eric A. Johnson, *Nazi Terror: The Gestapo, Jews, and Ordinary Germans* 27 (1999) (“Although the Nazi Party leadership in Berlin set the terror in motion and determined its broad contours, its implementation and effectiveness depended on the voluntary choices and local actions of individual German citizens.”); Isabel Allende, *Pinochet Without Hatred*, N.Y. Times, Jan. 17, 1999, § 6 (Magazine), at 26 (“Neither Hitler nor Pinochet could have existed without the tacit or explicit consent of millions of citizens.”); Ariel Dorfman, *It Is Up to Chile to Try the General Now*, Independent (London), Mar. 6, 2000, at 5 (“Countless people participated in and permitted [Pinochet’s] abuses . . . [including] those who closed their eyes so as not to see, who decided to ignore the screams, who murmured publicly that the mothers of the disappeared were mad . . .”).

genocide—poverty, autocracy, ethnic hatred, political alienation, a psychosis of violence—still define the Rwandan national community? Trials are an essentially reactive crisis management device. International lawyers would do well to think hard about the alternate paradigm of crisis prevention.⁵⁰⁴ This means reflecting upon proactive devices that can stop genocidal crises from occurring or reoccurring. Absent preventative measures in Rwanda, the cycle of violence will continue to turn: latent—indeed for now—but unbroken and volatile.

⁵⁰⁴ This also would do full justice to the Genocide Convention, which, after all, mandates both the punishment as well as prevention of genocide. See Genocide Convention, *supra* note 22, art. 1, 78 U.N.T.S. at 280 (“The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.”).