Lessons for International Criminal Justice from Rwanda

MARK A. DRUMBL

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Ten years ago, genocide ravaged the tiny African nation of Rwanda. In the wake of this violence, Rwanda has struggled to reconstruct, rebuild, and reconcile. Law – in particular, criminal trials for alleged perpetrators of genocide – has figured prominently among various policy mechanisms in postgenocide Rwanda.

Criminal trials for Rwandan *génocidaires* aspire to achieve several goals. These include imposing retribution, promoting reconciliation, deterring future violations, expressing victims' outrage, maintaining peace, and cultivating a culture of human rights.[1] In this Article, I examine the extent to which these trials attain these multiple, often competing, and largely overwhelming, goals. Part I begins by setting out some historical background to the internecine conflict in Rwanda, which may be helpful to those readers not familiar with the provenance and implementation of the 1994 genocide. Part II provides an overview of the current state of criminal prosecutions for individuals accused of

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[1] *See, e.g.*, Statute of the International Criminal Tribunal for Rwanda (ICTR), S.C. Res. 955, U.N. SCOR, 49th Sess., 3453 mtg. (November 1994), preamble; Int'l Ctr. For the Study & the Promotion of Human Rts. & Info., THE GENOCIDE AND THE CRIMES AGAINST HUMANITY IN RWANDAN LAW 4 (Commentaries on the Organic Law, 1997); Comments of Gerald Gahima, Prosecutor General of Rwanda, to the Fifth Biennial Conference of the International Association of Genocide Scholars (National University of Ireland-Galway, June 7-10, 2003) (document on file with the author).

involvement in genocide in Rwanda. In Part III, I examine the accomplishments of these prosecutions and inquire about the extent to which they attain their diverse and highly ambitious aspirations. Part IV tracks the emergence of a different – and not necessarily complementary – policy mechanism, namely the use of traditional dispute resolution (*gacaca*) in Rwanda and its controversial application to certain defendants accused of involvement in genocide. The restorative methodologies of *gacaca* stand in some contrast to the adversarial approaches of criminal trials. This comparative assessment can serve important pedagogical purposes. This is the basis for Part V, in which I offer a number of lessons that Rwanda's valiant attempt to impose law in the wake of mass atrocity can offer for other sites of such tragedy and for international criminal law generally. Although international law mandates accountability for serious human rights abusers, the processes of accountability cannot exist only in the abstract for the benefit of the international community. These processes also must resonate on the ground in afflicted places and among afflicted peoples. Whereas formalized legal process often enjoys unique authority, informal or extra-judicial narratives may benefit from considerable legitimacy in memorializing atrocity and then transcending it. If the privileging of formalized law comes at the expense of these other methods of accountability and remembering, then law may be disserving the communities it claims to serve.

I. GENOCIDE: BACKGROUND AND REALITY OF BRUTALITY

Approximately 800,000 people were massacred in genocidal pogroms that assailed Rwanda

from April to July 1994.[2] This constitutes roughly ten percent of the Rwandan national population. The majority Hutu ethnic group, radicalized by an extremist government obsessed with Hutu power, perpetrated the violence against the minority Tutsi group. The Hutu comprise approximately 85% of Rwanda's population (estimated at seven to eight million), the Tutsi 14%. However, between 10,000 and 30,000 Hutu also were murdered. These victims mostly were moderates opposed to the genocide. But, whereas these Hutu were killed as individuals and because of their politics, the Tutsi were killed as a group and because they were Tutsi.[3] One official report determined that 93.7% of the victims were killed because they were identified as Tutsi, 1% because they were related to, married to, or friends with a Tutsi, 0.8% because they looked like a Tutsi, and 0.8% because they opposed the Hutu regime or were protecting people from the killers.[4]

Victims were savaged with incredible brutality. Many were tortured, raped in the most gruesome fashion, and forced to watch as their loved ones were hacked to death.[5] Subsequently, the records of many victims located in local governmental offices were destroyed so as to ensure their

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[2] Gérard Prunier, THE RWANDA CRISIS: HISTORY OF A GENOCIDE 261, 265 (1995); Philip Gourevitch, WE WISH TO INFORM YOU THAT TOMORROW WE WILL BE KILLED WITH OUR FAMILIES: STORIES FROM RWANDA 4, 133 (1998). The Rwandan government maintains that over one million individuals were killed during the genocide. *See* Comments of Gerald Gahima, Prosecutor General of Rwanda, to the Fifth Biennial Conference of the International Association of Genocide Scholars (National University of Ireland-Galway, June 7-10, 2003) (document on file with the author); *Official Census Puts Genocide Toll at Over One Million* (Feb. 12, 2002) (document on file with the author).

[3] Mahmood Mamdani, WHEN VICTIMS BECOME KILLERS 5 (2001).

[4] *Official Census Puts Genocide Toll at Over One Million* (Feb. 12, 2002) (document on file with the author). The report does not explain why these figures do not add up to 100% or what the outstanding percentages represent.

[5] Roméo Dallaire, SHAKE HANDS WITH THE DEVIL: THE FAILURE OF HUMANITY IN RWANDA 281 (2003).

complete erasure. Most people were killed by civilians, militia, peasants, and farmers.

Tensions between the Hutu and Tutsi ethnic groups have existed throughout history. These tensions, however, were exacerbated by colonial interventions and did not abate following Rwandan independence in 1960.[6] In the early 1990's, anti-Tutsi sentiment was catalyzed by military action undertaken within Rwanda by Tutsi armed forces based in Uganda. Following Rwandan independence, many Tutsi, fearing actual or prospective reprisals as a minority group, had left Rwanda for Uganda. There, these Tutsi fostered a political party, the Rwandan Patriotic Front (RPF), with its own armed forces, the Rwandan Patriotic Army (RPA, now called the Rwandan Defense Forces). The RPA invaded Rwanda in the early 1990's. The armed forces of the Rwandan government repelled this incursion. However, the RPF threat prompted then President Juvénal Habyarimana, a Hutu who had ruled Rwanda since 1973, to suggest publicly the need for power sharing among ethnic groups and political parties (although there is cause to question the authenticity of Habyarimana's intent actually to implement power-sharing).

Together with the leader of neighboring Burundi, Habyarimana was killed in a plane crash on April 6, 1994. Although the Hutu government charged that the plane was shot down by the RPA, there is evidence that it was downed by extremist Hutu who were suspicious of Habyarimana's apparent power-sharing reforms. In any event, a radical clique of Hutu militants succeeded Habyarimana. These militants immediately put in place their previously designed plans for genocide.

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[6] Mamdani, *supra* note ___, at 16, 190.

The RPF was the only entity that actively sought to stop the genocide. It did so essentially without assistance from the international community. In fact, international peacekeeping efforts were weak and ineffective and, unsurprisingly, have been derided by Rwandans as cowardly. In the spring of 1994, the RPA once again invaded Rwanda. The armed forces of the genocidal Hutu regime could not repel the RPA, in part because of their efforts directed at Tutsi civilians. In mid-July 1994 the RPF took power in Rwanda. The RPF continues to govern the country. In August 2003, RPF leader Paul Kagame was re-elected as President of Rwanda with over 90% of the vote.[7] There were numerous allegations of improprieties during the election.[8]

II. LEGAL GRIDLOCK

Postgenocide Rwanda has seen a vigorous attempt to secure accountability through the use of criminal prosecutions and trials.[9] These prosecutions and trials operate at three different levels: national, international, and foreign. The Rwandan genocide has given rise to the largest number of actual or pending prosecutions for systematic human rights abuses in the shortest order ever in history. Still, about three hundred planners of the genocide are believed to remain at large, hiding in a variety

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[7] Rodrique Ngowi, *Incumbent Wins by Landslide in Rwanda*, WASHINGTON POST (Aug. 26, 2003).

[8] *Harassment in run up to Rwandan elections*, THE GLOBE AND MAIL (TORONTO) (Aug. 21, 2003); *Rwandans vote for a President*, THE GLOBE AND MAIL (TORONTO) (Aug. 25, 2003).

[9] Jeremy Sarkin, *The Tension Between Justice and Reconciliation in Rwanda: Politics, Human Rights, Due Process and the Role of the Gacaca Courts in Dealing with the Genocide*, 45(2) J. AFRICAN L. 143, 146 (2001). *See also* Erin Daly, *Between Punitive and Reconstructive Justice: The Gacaca Courts in Rwanda*, 34 N.Y.U. J. INT'L L. & POL. 355, 367 (2002) ("[T]he transitional Rwandan government of national unity has been committed to principles of retributive justice ...").

of countries.[10]

1. National Trials

The RPF government currently imprisons approximately 80,000 genocide suspects in jails initially built to accommodate 15,000. Approximately 6,500 individuals thus far have been tried[11] under the Organic Law, a domestic statute specially enacted in 1996 for the prosecution of genocide-related offenses.[12] This amounts to about 6% of the total number of detainees and parolees. Many detainees have been incarcerated since 1994 while they await a putative trial date. In recent years, there have been some infrastructural improvements and the pace of trials has accelerated.[13] Still, and even at this accelerated rate of trials, it would take over a century to clear all the cases.[14] As many as 30,000 additional individuals have been paroled (provisionally released) in recent years owing to lack of evidence, age, infirmity, illness, or because they have confessed. Many of these parolees have

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[10] Emily Wax and Nancy Trejos, *Ten Years Later, Rwanda Mourns*, WASHINGTON POST (April 8, 2004) A01.

[11] BBC News, *Mass genocide verdict delivered*, August 1, 2003 (on file with the author); Peter Uvin and Charles Mironko, *Western and Local Approaches to Justice in* Rwanda, 9 GLOBAL GOVERNANCE 219, 223 (2003). That said, there is a lack of consistency among publicly available statistics. For example, Beigbeder reports that, as of January 2002, only 1989 defendants had been brought to trial (294 sentenced to capital punishment, 586 received life sentences, 809 received other sentences, and 300 acquitted). Yves Beigbeder, JUDGING CRIMINAL LEADERS 115 (2002).

[12] Organic Law No. 8/96 on the organization of prosecutions for offenses constituting the crime of genocide or crimes against humanity committed since 1 October 1990 (August 1996).

[13] Beigbeder states that between 1994 and 2002, the number of judges in Rwanda increased from 244 to 841, prosecutors 12 to 156, court clerks 59 to 325, and investigators 22 to 895. Beigbeder, *supra* note ___, at 114. Over time, there has been an increase in acquittal rates and a decrease in sentences of death or life imprisonment.

undertaken to participate in informal community dispute resolution, called *gacaca* (discussed at length in Part IV of this Article). Many of these parolees underwent several months of special "civic education" prior to their release.[15]

Many Rwandans view the national court system somewhat skeptically. This skepticism derives from the historical fact that Rwandan courts never have been independent or impartial; moreover, corruption was widespread among the judiciary.[16] Accordingly, the postgenocide national judicial system has inherited not only infrastructural limitations, but also a legacy of historical illegitimacy.

2. International Trials

The United Nations Security Council established the International Criminal Tribunal for Rwanda (ICTR) in November 1994. The Security Council elected to site the ICTR in Arusha (Tanzania). It also chose – in the name of neutrality and impartiality – to exclude Rwandans from the bench and prosecutor's office. The ICTR currently has about fifty-five genocide suspects in custody. It has convicted 18 people and acquitted three (some of these verdicts remain subject to appeal).

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[14] Uvin and Mironko, *supra* note __, at 223.

[15] *Genocide Suspects Rush to Confess Ahead of Deadline* (Feb. 20, 2004) (document on file with the author). In part, the purpose of this reeducation is to familiarize the detainees with what life is like outside prison.

[16] Comments of Gerald Gahima, Prosecutor General of Rwanda, to the Fifth Biennial Conference of the International Association of Genocide Scholars (National University of Ireland-Galway, June 7-10, 2003) (document on file with the author).

Given its annual budget of $U.S.180 million,[17] this translates to an average cost of $90 million for each concluded trial. A number of trials are ongoing and many more are pending. Some of these trials involve joined proceedings implicating senior political and military leaders who exerted considerable influence during the genocide. As such, over the next year or so it is anticipated that the ICTR will issue and finalize an increasing number of verdicts. Still, $U.S. 180 million per year is a substantial sum that, if otherwise invested in Rwanda instead of in an international institution located in a foreign country, could go a long way to develop infrastructure and human capital within Rwanda.

ICTR proceedings have been criticized by Rwandans as slow, expensive, too selective, and unduly solicitous of the rights of the accused in the name of rule of law. The Rwandan government also has voiced misgivings regarding the ICTR (and at times has maintained a negative attitude), which may not be surprising given that Rwanda, which then had a seat on the U.N. Security Council, initially had voted against the creation of the ICTR.[18] That said, the Rwandan government generally cooperates with the ICTR, although there has been conflict, discord, and tension. The ICTR "has also been dogged by scandals including the discovery that genocide suspects themselves were on the tribunal's payroll as defence-team investigators."[19]

On the positive side, ICTR trials have raised international awareness of what happened in

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[17] Id.

[18] Rwanda's concerns involved a number of issues. These include: the inability of the ICTR to issue a death sentence; the limited temporal jurisdiction of the ICTR (limited to the calendar year 1994), the small number of defendants, the siting of the ICTR outside of Rwanda, the absence of Rwandans on its staff, its isolation from the influence of the Rwandan government, and the possibility it might prosecute members of the Rwandan government for abuses committed in the ousting of the genocidal regime.

Rwanda in 1994 and have developed an historical record. ICTR jurisprudence has advanced and clarified numerous areas of international criminal law. For example, the *Akayesu* decision provided a sophisticated definition of ethnicity (for the purposes of proving genocide) and also advanced a progressive understanding of sexual violence in which rape was constructed as a tool of genocide.[20] The *Musema* decision extended command responsibility outside of the military context and into a private corporate environment.[21] In *Barayagwiza*, the ICTR issued the first verdict ever to media leaders for inciting genocide and differentiated statements of ethnic pride (protected by virtue of freedom of expression) from incitement to hate (not protected by freedom of expression).[22] The ICTR also has advanced the definition of conspiracy in international criminal law from its troubled debut at Nuremberg.[23] In another important jurisprudential development, the ICTR has convicted defendants for complicity in genocide and crimes against humanity.[24]

However, the main beneficiary of the ICTR's work arguably has been the international community – whether in terms of assuaging guilt or developing the law – and not Rwandans. In fact, many Rwandans simply remain unaware of the ICTR's work. There is some indication that the more

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[19] *Search for speed and reconciliation*, THE ECONOMIST 48 (October 6, 2001).

[20] Prosecutor v. Akayesu, Case No. ICTR-96-4 (ICTR Appeals Chamber, 2001, affirming judgment of ICTR Trial Chamber).

[21] Prosecutor v. Musema, Case No. ICTR-96-13-T (ICTR Appeals Chamber, Nov. 16, 2001).

[22] Prosecutor v. Nahimana, Barayagwiza, and Ngeze, Case No. ICTR-99-52-T (ICTR Trial Chamber, Dec. 3, 2003).

[23] Prosecutor v. Niyitegeka, Case No. ICTR-96-14-I (ICTR Trial Chamber, May 15, 2003).

[24] Prosecutor v. Semanza, Case No. ICTR-97-20-T (ICTR Trial Chamber, May 15, 2003).

Rwandans learn of the ICTR's work the more inclined they are to view the institution more favorably.[25] But this is not a steady trend. In fact, many of these informed Rwandans see the ICTR as a foreign tribunal operating far away under the aegis of the same entities that permitted the genocide to continue in the first place.[26] Many others believe that although ICTR trials place considerable emphasis on the rights of the accused, they disregard the rights of victims and witnesses.[27]

The retributive value of ICTR convictions also has been assailed in Rwanda. For example, although the ICTR asserts custody over the leaders and architects of the genocide, it can not issue a death sentence. The Rwandan courts, with custody over notorious – albeit lesser – offenders, can issue death sentences and do so in about 20 per cent of cases.[28] This leads to a strange paradox: the leaders of the genocide are punished less severely than lower level offenders. Moreover, those individuals sentenced by the ICTR (and also those individuals awaiting trial) receive a quality of health care that vastly exceeds that accorded to defendants in national trials and, more starkly, victims living in Rwanda. Many perpetrators are HIV-positive and many victims were deliberately infected during the genocide. The fact that ICTR defendants have access to medication than ordinary Rwandans are denied further erodes the retributive value of prosecution and punishment by the ICTR.

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[25] Comments of Professor Timothy Longman, Conference on International War Crimes Trials: Are They Making a Difference, University of Texas School of Law, November 6, 2003 (notes on file with the author).

[26] Luis Salas, *Reconstruction of Public Security and Justice in Post Conflict Societies: The Rwandan* Experience, 26 INT'L J. COMP. AND APPL'D CRIM. J. 165, 191 (2002).

[27] Kingsley Chiedu Moghalu, *Image and Reality of War Crimes Justice: External Perceptions of the International Criminal Tribunal for Rwanda*, 26:2 FLETCHER F. WORLD AFF. 21, 29 (2002).

[28] Sarkin, J. AFRICAN L., *supra* note __, at 157.

3. Foreign Trials

A handful of foreign states have tried perpetrators of the genocide in their national courts.[29] In some cases, these trials have stemmed from the exercise of universal jurisdiction. In other cases, foreign courts have asserted jurisdiction based on territoriality (*i.e.* the defendants were residing in that foreign jurisdiction). There have been very few such trials.

III. THE ACHIEVEMENTS OF GENOCIDE TRIALS IN RWANDA

Although sited in different places, all three levels of trials share common goals. These include punishment of the guilty, retribution, specific and general deterrence, Rwandan national reconciliation, justice for victims, narrating history, expressing the value of law, incapacitating offenders, and maintaining peace. My experience in Rwanda is that, to varying degrees, all three levels of criminal trials go some way in the direction of each of these goals. For this they should be lauded. But, they still have a long way to go.

Trials awkwardly promote national reconciliation.[30] They have been more effective at incapacitating alleged offenders through extensive pre-trial detention. To some extent, trials have punished some offenders, and thereby have furthered retributive goals, particularly at the national

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[29] Beigbeder, *supra* note __, at 116 (citing Switzerland and Belgium as examples); Chandra Lekha Sriram, *Exercising Universal Jurisdiction: Contemporary Disparate Practice*, 6 INT'L J. HUMAN RTS. 49, 62-63 (2002) (discussing France).

[30] Mahmood Mamdani, *Reconciliation Without Justice*, 46 SOUTHERN AFRICAN REVIEW OF BOOKS 3-5 (November-December 1996) (observing that "Rwanda exemplifies ... the pursuit of justice without reconciliation").

level. That said, they have done less to promote the equally important deontological goal of narrating the radical evil of the genocide to Rwandan Hutus. What they have accomplished more successfully is to narrate the deontological evil of the Rwandan genocide to the international community at large and, principally through the jurisprudence of the ICTR, significantly to expand the frontiers of international criminal law. Further, I worry that trials only tepidly promote the long-term utilitarian goal of mitigating the risk of future violence and, even, genocide. I am not alone in these empirical and anecdotal observations.[31]

One source of the disarticulation between the goals of the trials and their effects on the ground is the attitude of defendants and prisoners. In a nutshell: trials in Rwanda have produced a limited sense of individual responsibility or blameworthiness only among a minority of prisoners. I first noted this disconnect in 1998, when I interviewed hundreds of genocide prisoners in the central prison of

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[31] Gérard Prunier finds that "ethnic relations are based on mutual fear, lies, unspoken prejudices and continued stereotyping." Prunier, *supra* note 2, at 389. Neil Boisen remarks that, among Hutu, there is a "[n]early universal and overwhelming sense of injustice." Neil Boisen, FOCUS GROUP STUDY REPORT: KNOWLEDGE, ATTITUDES AND PRACTICES AMONG INMATES OF RWANDAN DETENTION FACILITIES ACCUSED OF CRIMES OF GENOCIDE (U.S. Institute of Peace: Washington D.C., 1997). Stef Vandeginste concludes that "[i]t is a widely shared perception [...] that victor's justice is being done." Stef Vandeginste, *Rwanda: Dealing with Genocide and Crimes against Humanity in the Context of Armed Conflict and Failed Political Transition*, in Neil Biggar, (ed.), BURYING THE PAST 223-253, 245 (Georgetown University Press: Washington, D.C., 2001). Jeremy Sarkin observes that the use of the legal system has "led to increased human rights violations, anger, and distrust of the system among both victims and accused." Jeremy Sarkin, *The Necessity and Challenges of Establishing a Truth and Reconciliation Commission in Rwanda*, 21 HUM. RTS. Q. 767, 771 (1999). Specifically referring to the Rwandan proceedings, Martha Minow concludes that "rather than ending the cycles of revenge, the trials themselves were revenge." Martha Minow, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE 124-125 (1998). The Organization for African Unity found that "denial of the one-sided genocide of April to July 1994 remains an unshakable article of [radical Hutu] faith. Accordingly, there is no need for collective atonement or for individual acknowledgment of culpability." ORGANIZATION FOR AFRICAN UNITY REPORT, ch. 23.61 (July 7, 2000), available at <http://www.internetdiscovery.org/forthetruth/Rwanda-e/EN-III-T.htm>.

Kigali, the Rwandan capital.[32] At that time, the denials of responsibility were clear and nearly uniform. They have thawed since then. In fact, tens of thousands of detainees have since confessed and entered guilty pleas.[33] Many have rushed to confess in light of a March 15, 2004 deadline at which point the promise of an automatically reduced sentence in exchange for a confession and guilty plea expired.[34] To some degree, these confessions were encouraged by the fact that those who plead guilty would have their sentence determined in accordance with the *gacaca* procedure. To another degree, those who confessed were lower-level offenders to be released upon confession because they already had spent over nine years in prison and, thereby, have been imprisoned awaiting trial longer than they would have been imprisoned were they to have been found guilty through *gacaca* of the crimes with which they were charged.[35] Moreover, there is some evidence than many of the putative

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[32] Mark A. Drumbl, *Rule of Law Amid Lawlessness: Counseling the Accused in Rwanda's Domestic Genocide Trials*, 29 COLUM. H. RTS. L. REV. 545, 604-609 (1998). Other observers report similar findings. *See* Gourevitch, *supra* note __, at 244, 305; Prunier, *supra* note 2, at 389; Boisen, *supra* note __, at 25; Sarkin, HUM. RTS. Q., *supra* note __, at 772.

[33] *Genocide Suspects Rush to Confess Ahead of Deadline* (Feb. 20, 2004) (document on file with the author). Some of these initially were vetted through internal proceedings within the prisons themselves. In total, it is estimated that slightly over 30,000 detainees now have pleaded guilty, most in very recent years. This figure represents approximately one-quarter of the total number of those individuals detained on the basis of involvement in the 1994 genocide.

[34] Id. The sentence reductions are substantial. For example, a individual who confesses to homicide who would normally face a maximum sentence of life imprisonment would receive between seven and eleven years in prison. Since many detainees have been in jail pending trial for over nine years already, a confession would trigger automatic release for many such individuals.

[35] In January 2003, Rwandan President Paul Kagame issued a decree for the release of suspects "that had been (or risked spending) in detention without trial longer than they would serve should the be convicted, as well as confessed criminals that had served most of their time in jail." *See* Gabriel Gabiro, CLAMPING KILLERS AND SURVIVORS TOGETHER (Feb. 18, 2004) (document on file with the author).

guilty pleas lack in authenticity.[36] As such, although the attitude of prisoners and defendants has become more nuanced over time – and arguably more contrite – the point remains that the extensive judicialization of the process of accountability creates persistent sclerosis, manipulation, and disavowal of genuine responsibility among detainees even after nearly one decade of imprisonment.

In this regard, let me revisit my findings from the 1998 interviews. Almost every interviewee did not believe he or she did anything "wrong," or that anything really "wrong" happened in the summer of 1994. As a general rule, the trials, or the prospect of facing trial, failed to produce shame, contrition, regret, or remorse among the prisoners. What they instead produced is emphatic denial, buttressed by the group solidarity that pervades the Rwandan prisons.[37] These sentiments still persist over time: some prisoners still refer to their fellow prisoners as "a community."[38] For Hannah Arendt, writing within the context of the Nazi Holocaust, this would not necessarily be surprising: if massacre was not perceived as manifestly illegal[39] at the time it was committed, why should it retroactively

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[36] Gabriel Gabiro, *Gacaca Courts Edge On* (June 5, 2003) (document on file with the author).

[37] Jennifer Widner, *Courts and Democracy in Postconflict Transitions: A Social Scientist's Perspective on the African Case*, 95 AMERICAN JOURNAL OF INTERNATIONAL LAW 64, 69 (2001) (reporting that high-level organizers of the genocide construct this solidarity after they reestablish authority in prison).

[38] Gabriel Gabiro, *Running away from the Genocide* (Oct. 8, 2003) (document on file with the author).

[39] An act is manifestly illegal if its illegality immediately can be identified by any reasonable person in any and all circumstances. There is, therefore, a natural law element to manifest illegality, insofar as the act in question remains illegal even though this act positivistically may be legitimized by state law or superior order. The doctrine of manifest illegality has acquired some traction in international law. The Rome Statute of the International Criminal Court, for example, stipulates that subordinates are not relieved of criminal responsibility for genocide and crimes against humanity, even if they were ordered to perform those acts. Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9* (July 17, 1998), art.33 <available at http://www.un.org/law/icc/statute/romefra.htm>. The Statute of the ICTR provides a somewhat more nuanced treatment of manifest illegality: "The fact that an accused person acted pursuant to an order of a government or of a superior shall not relieve him or her of criminal responsibility, but may be considered in

become perceived as manifestly illegally just because criminal prosecutions are implemented? No less than Adolf Eichmann, the Rwandan detainees "may be very difficult to grasp juridically" given that, to some extent, they were, like Eichmann, "law-abiding citizen[s] of a criminal state,"[40] "the 'normal' representatives of a pathological society."[41]

Those prisoners who acknowledge that violence took place generally believe it was necessary out of self-defense. In this sense, the prisoners, even after years in jail, have not been disabused of the propaganda fed to them by extremist Hutu leaders: namely, the Tutsi were out to attack them so, therefore, this attack had to be preempted by killing all the Tutsi. This violence therefore is legitimized as a preemptive war of survival, not as genocide. Unsurprisingly, then, many detainees see themselves as prisoners of war, simply ending up on the losing side. With this in mind, they patiently wait for their side to regain power and then liberate them from prison. This patience is sustained by the ongoing conflicts in the Democratic Republic of Congo (DRC), one of Rwanda's neighbors. The violence in the DRC has implicated many African states, including Rwanda, in the fighting on various sides and has thus far killed an estimated 3.3 million people.[42] Although some of the bloodshed has been quelled by a fragile peace arrangement, Hutu militants (many of whom fled Rwanda following the genocide) continue to murder, rape, and maim in horrific fashion throughout the DRC's eastern Ituri

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mitigation of punishment if the International Tribunal for Rwanda determines that justice so requires." Statute of the ICTR, *supra* note ___, art. 6(4).

[40] Hannah Arendt, EICHMANN IN JERUSALEM 24, 149 (1964).

[41] David Schoenbaum, HITLER'S SOCIAL REVOLUTION 287 (1966) (attributing to Arendt).

[42] Somini Sengupta, *Hopes and Tears of Congo Flow in Its Mythic River*, N.Y. TIMES (April 21, 2004) A1.

region.[43] The prospect of these Hutu extremists reasserting themselves in Rwanda from the DRC feeds the prisoner of war mentality of the detainees. As I have argued elsewhere, the semantic use of the term "prisoners of war" to describe the detainees, as opposed to accused *génocidaires*, "connotes some sort of mutually responsible, mutually justified and mutually culpable forces on different sides of a battlefield" instead of "innocent victims and unjustified perpetrators."[44] Similar reports emanate from ICTR detainees (even following their trials), although there also have been some confessions, some expressions of remorse, and some acknowledgments of responsibility.[45] The perception of the detainees as prisoners of war also is shared by numbers of Hutu civilians.

Victims, too, are frustrated with the due process and exacting proofs, particularly at the ICTR. This frustration also feeds the disarticulation between the aspirations of the trials and their actual achievements. As in the case with criminal process generally, many victims find that testifying can be retraumatizing. The application of modern laws of evidence to the context of mass violence for which they were not initially designed can be particularly problematic. Frankly, it often is difficult for victim testimony to withstand the scrutiny of cross-examination or the laws of evidence. Although it may seem reasonable to conclude that a story must withstand such scrutiny in order to ground a

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[43] Id. This violence has been referred to the International Criminal Court, which may exercise its discretion to investigate and possibly prosecute perpetrators.

[44] Mark A. Drumbl, *Restorative Justice and Collective Responsibility: Lessons for and from the Rwandan Genocide*, 5(1) CONTEMP. J. REV. 5, 16 (2002).

[45] One example is Alfred Musema, an influential businessman convicted by the ICTR of genocide and crimes against humanity, who was found by the ICTR never to have shown remorse despite his having knowingly and consciously participated in the atrocities. *See Prosecutor v. Musema*, Case No. ICTR-96-13, ¶¶ 991, 1008 (March 17, 2000); affirmed on appeal (November 16, 2001), ICTR/INFO-9-2-294.EN.

conviction, by and large such rules are designed to prosecute criminals in relatively well-ordered polities. In the chaos of mass violence, where gangs of perpetrators maul groups of victims, where survivors hide in ceilings, latrines, and under dead bodies (often for weeks at a time) exactly remembering which militant murdered which specific victim at what time of the day through corroborated eye-witness testimony (the staples of the modern law of evidence) simply is unrealistic. I am not suggesting the suspension of such rules for the criminal trial process. Rather, I am pointing out that the application of such rules to the context of mass violence will frequently result in the painful discrediting of testimony, thereby prompting dissonance on the part of witnesses and survivors. In addition, the extensive delays keep victims in limbo, not knowing who murdered whom, when their tormentor has his day in court, or when they may be called to testify.

In all quarters, there is a lingering sense of sclerosis. As such, my sense is that the challenge for Rwanda is not so much the performance of the trials *per se* but, rather, more deep-seated – and often popular – questions regarding the contextual relevance of international criminal justice to Rwandans, whether survivors, aggressors, or bystanders. Although this sclerosis is beginning to dissipate somewhat, this is not due to the criminal justice system *per se*. Rather, it is the possibility of *gacaca* that has, more than any other policy initiative, cracked the silence.

IV. TRADITIONAL DISPUTE RESOLUTION, REINTEGRATION, AND GENOCIDE

It seems eminently reasonable to suppose that popular and contextual relevance could be facilitated through the use of methodologies that appear on popular levels in local contexts. In certain

cases these methodologies may deviate from the adversarial, and essentially retributive, nature of criminal trials. These methodologies may invoke communitarian or even restorative approaches. In fact, I have argued elsewhere that certain characteristics of the Rwandan violence suggest that restorative justice initiatives may hold promise.[46]

Rwanda is what I have called a 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.[47] In today's Rwanda (as has been the case throughout its history), Hutu and Tutsi live geographically intermingled and in close economic interdependence. They speak the same language. Religious affiliations are not ethnically driven.

This commingling between Hutu and Tutsi operates in tandem with a second – and potentially more important – characteristic: the high degree of public participation and complicity in the genocide, together with the pronounced level of victimization. In Rwanda, the killings were committed publicly and were known to all. No attempt was made to conceal them. Most of the killers were civilians armed with machetes, hoes, and spiked clubs. Moreover, those involved in the genocide encompass a group much larger than the actual killers. Many Rwandans provided lists of Tutsi in their region to the killers. Teachers identified students, physicians identified patients, and pastors identified the faithful. Moreover, significant numbers of Rwandans acquiesced in the face of genocide: remaining silent as bystanders when murder plagued their streets. Deep popular involvement in the Rwandan violence

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[46] *See* Mark A. Drumbl, *Punishment, Postgenocide: From Guilt to Shame to Civis in Rwanda*, 75 N. Y. U. L. REV. 1221 (2000).

renders criminality, guilt, and deviance difficult and awkward terms.

These two characteristics, in turn, suggest that individualized and punitive trials may not be the best mechanism to reconstruct social norms, assign blame, or promote peace, reconciliation, and justice. In a restorative justice paradigm, on the other hand, criminal violence is viewed primarily as an injury to individuals and communities, and only secondarily as an injury to the state or international order. [48] Under this paradigm, the purpose of legal intervention is to establish peace in local communities by repairing injury, encouraging atonement, stimulating restitution, promoting rehabilitation, and, eventually, facilitating reintegration.

The Rwandan government has rejected the implementation of the prototypical restorative justice mechanism, namely a truth and reconciliation commission along the lines of the South African model (TRC).[49] That said, the Rwandan government recently has sought to invoke traditional community-based dispute resolution that resembles what the Western tradition might call restorative justice. In October 2000, the Rwandan Parliament approved legislation establishing local participatory

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[47] Id.

[48] Restorative justice initiatives characteristically involve less formalized or non-adversarial dispute resolution, reparations, truth commissions, public commemorations, aggressors directly involved in restoring the lives of survivors and communities through ventures such as community service, labor, or repatriations and reburial of victims.

[49] Comments of Gerald Gahima, Prosecutor General of Rwanda, to the Fifth Biennial Conference of the International Association of Genocide Scholars (National University of Ireland-Galway, June 7-10, 2003) (document on file with the author). A National Unity and Reconciliation Commission has been established but this institution is not mandated to establish a truthful historical narrative. Instead, the work of the Commission focuses on civic and peace education, the monitoring of policies and programs, and community reconciliation activities with a view to emphasizing shared culture. *See* http://www.stockholmforum.com/dynamaster/file_archive/020527/44ec669db3c6d18b639c7b32f1f342d7/rwanda.pdf (visited on April 26, 2004). The South African approach incorporates a variety of perspectives, including indigenous understandings of *ubuntu* (forgiveness) but also Western psychoanalytic traditions

justice tribunals.[50] As mentioned earlier, these are called *gacaca*, which means "judgment on the grass" in the Kinyarwandan language.[51] This legislation was adopted by the Rwandan Parliament in February 2001.[52] *Gacaca* was officially launched through a pilot project in June 2002.[53] Progress has been slow and halting. As of June 2003, only 760 *gacaca* tribunals have begun their work. Most remain in preliminary stages of compiling lists of victims and damages. The commencement of the trial phases has been repeatedly delayed owing to infrastructural or political concerns: most recently, by the national elections held in the fall of 2003.[54] That said, it is expected that *gacaca* might begin in earnest throughout Rwanda in 2004, especially given the provisional release of nearly 30,000 prisoners, many of whom have confessed to participating in the genocide with a view to facing *gacaca* proceedings instead of the national court system.[55] This indicates how the prospect of *gacaca* may

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traceable to Freud and Jung.

[50] *See Rwandan Parliament Approves Law on Traditional Courts* (October 15, 2000), available at http://www.hirondelle.org/hirondelle.nsf/caefd9edd48f5826c12564cf004f793d/9117de1eb28f7a4241256beb006b4bc7?OpenDocument (visited on April 26, 2004).

[51] Adrien Katherine Wing and Mark Richard Johnson, *The Promise of a Post-Genocide Constitution: Healing Rwandan Spirit Injuries*, 7 MICH. J. RACE & L. 247, 280 at n. 321 (2002).

[52] Organic Law for the Creation of Gacaca Jurisdictions, 40:6 OFFICIAL GAZETTE OF THE REPUBLIC OF RWANDA (March 15, 2001).

[53] Gabriel Gabiro, *Confronting Genocide with Rwanda's Regular Courts* (Sept. 17, 2003) (document on file with the author).

[54] *Start of Trial Phase in Gacaca Courts Delayed Again* (Oct. 1, 2003) (Hirondelle News Service, document on file with the author).

[55] UN Integrated Regional Information Networks, *Government Extends Deadline as Tens of Thousands Confess to Genocide Crimes*, http://allafrica.com/stories/200403180004.html (visited on April 26, 2004).

prompt contrition and atonement among detainees instead of the stonewalling apparently induced by the prospect of facing criminal trials in the national courts. In this regard, *gacaca* may well represent a modality of justice that can circumvent the denial of responsibility I encountered in my work with prisoners facing criminal trials. Moreover, the *gacaca* proceedings could be truly reintegrative for those prisoners who have confessed to crimes.

Community-based informal justice focusing on reintegrative shaming has a long history throughout Africa and takes various names and forms (*i.e. lekgotla* and *inkundla* in South Africa). For its part, *gacaca* dates back to precolonial Rwanda, where it was used to settle disputes among neighbors. Its principal focus was property crimes. Although *gacaca* occasionally may have been used as a method to mediate more serious crimes, its implementation to genocide – the "crime of all crimes"[56] – essentially remains unprecedented. *Gacaca* will have jurisdiction over intentional and unintentional homicides, other assaults against persons, and property crimes committed between October 1, 1990, and December 31, 1994 (this also is the temporal jurisdiction of the Organic Law, which proscribes and punished genocide and other serious crimes through the traditional Rwandan court system).[57] **[need to get research assistant to update gacaca: where are we at now (ie as of March 15ish, 2004)?].**

Gacaca institutions, which primarily operate at the local level, may inherit greater legitimacy among local audiences that national or international courts. The *gacaca* tribunals are composed of

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[56] William Schabas, GENOCIDE IN INTERNATIONAL LAW 9 (2000).

[57] Daly, *supra* note __, at 371.

elders and "people of integrity" (*Inyangamugayo*) elected from local communities throughout Rwanda. Two-hundred-and-sixty thousand such individuals were chosen in October 2001.[58] Suspects are to be brought to the villages where they are said to have committed their crimes. There, they are to be adjudged by *gacaca* panels composed (at the lowest level, the cell) of nineteen individuals from that area.[59] There will be 11,000 panels in total.[60] They are to apply the same criminal law that is applied by the national genocide courts. *Gacaca* panels will not have jurisdiction over the planners, organizers, instigators, supervisors, and leaders of the genocide, or over sexual offenders, all of whom are to be prosecuted more formally in the national court system. It is anticipated that five or six years' worth of *gacaca* proceedings will be required in order to process all detainees. Practically speaking, the decentralized nature of the *gacaca* process could facilitate access to justice by reducing transportation costs, and generally improve access, which have been cited as shortcomings for the national trials. These trials take place in a relatively small number of urban areas. Many Rwandans, particularly subsistence farmers, may experience difficulty traveling to such areas.

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[58] *Search for speed and reconciliation*, *supra* note __. On another note, traditionally "elders" in Rwanda were senior men of the village. But the current Rwandan population consists of fewer older men. Consequently, women and younger people will have to become more involved in the *gacaca* process.

[59] Wing and Johnson, *supra* note __, at 280-281.

[60] *See* Daly, *supra* note __, at 373 ("Each cell elects nineteen judges. Those nineteen judges choose a representative from among themselves to the sector; the sector representatives choose representatives to the district level; and the district representatives choose representatives to the provincial level."). Each level has original jurisdiction over crimes of increasing seriousness. Each superior level has some appellate jurisdiction over inferior levels, with the exception of the cell level jurisdictions whose decisions are not capable of being appealed (these cover property crimes for which only reparations can be awarded). Beigbeder, *supra* note __, at 115.

Unlike retributive approaches, *gacaca* sentences are geared to reintegrating the offender.[61] Those adjudged by *gacaca* tribunals serve half their sentences outside prison doing community work.[62] Community work can include renovating houses partially destroyed during the genocide or building new houses for survivors. Reparation generally and restitution specifically also are important goals. At the initial *gacaca* proceedings those gathered filled out forms for genocide survivors requesting compensation.[63]

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[61] *Tribunaux gacaca et travail d'intérêt general*, 13-14 REFORME PÉNALE ET PÉNITENTIAIRE EN AFRIQUE 1-2 (mai 2001) (document on file with the author).

[62] *See* Gabriel Gabiro, CLAMPING KILLERS AND SURVIVORS TOGETHER (Feb. 18, 2004) (document on file with the author).

[63] The Statute of the ICTR only makes one reference to restitution. *See* Statute of the ICTR, *supra* note ___, art. 23(3). The ICTR has not yet made use of its authority to order restitution. Stef Vandeginste, *Victims of Genocide, Crimes against Humanity, and War Crimes in Rwanda: The Legal and Institutional Framework of Their Right to Reparation*, in John Torpey, ed. POLITICS AND THE PAST 249, 253 (2003). On a more general note, former Prosecutor Del Ponte had affirmed that "responsibility for processing and assessing claims for such compensation should not rest with" the ICTR. Id. This leaves claims for restitution or compensation to national initiatives, such as the national trials and the *gacaca* process. A domestic framework does exist to process such claims, but funding is lacking. In fact, compensation has been awarded in 50% of the trials that have been completed in the judicial system. However, in none of these cases were the civil verdicts actually enforced against the state or against those found criminally responsible. Id at 256, 258. That said, the Rwandan government has assumed responsibility for the acts of its genocidal predecessor and has established a scheme to finance a special compensation fund from community service performed by convicts and also from the international community. *Gacaca* permits the compilation of an inventory of victims, losses, and damages. Eventually, this inventory is to be merged with this special compensation fund in order to pay out claims. In the end, though, Vandeginste concludes that "it is clear that the legal path, especially at the international level but also at the national level, is likely to lead to effective reparation only in isolated cases." Id. at 270. *Gacaca* is the only apparent alternative. Vandeginste finds some cause to be optimistic about reparation through *gacaca*, in particular through the vehicle of community service. Id. at 265. For a society such as Rwanda, in which tens of thousands of families have been orphaned and for many years were headed by children, financial reparation is not just a matter of commemoration or symbolic justice, it also may prove essential to survival. That said, not all Rwandans wish to receive money or property as some sort of compensation for the loss of their loved ones. *See* Gabriel Gabiro, *Rwanda Genocide: Paying for Reconciliation* (Dec. 19, 2002) (document on file with the author). In October 2003, the President of the United Nations Human Rights Commission, Najat El-Hajjaji, announced that a trust fund for Rwandan genocide victims soon would be set up, but there is no indication that this has been undertaken. *UN Envoy Initiates Establishment of a Trust Fund for Genocide Victims* (Oct. 8, 2003) (Hirondelle News Service, document on file with the author).

Given that in many cases the accused also will be from the same village, *gacaca* truly is an exercise in community-based justice. Erin Daly characterizes *gacaca* as "inherently ... participatory and communal."[64] "The objective [...] is to restore harmony and social order [...] and to reincorporate the person who was the source of the disorder"[65] and "thereby restore the balance of the community."[66] There is something cathartic – almost revivalist or evangelical –about the *gacaca*'s approach to reconstructing communities and revitalizing individuals. Another observer believes that *gacaca* opens "a small, but real democratic space that creates the possibility for unforeseen, non-hegemonic discussions [...]."[67] These discussions could involve issues of accountability for genocide, but also could spill over into other areas unrelated to the genocide, thereby promoting political participation generally.

Paradoxically, although *gacaca* is restorative in nature, it may serve an important retributive function. Early indications from the *gacaca* process suggest that participants are identifying thousands of individuals who have not yet been charged with genocide-related offenses. Accordingly, the *gacaca* process may provide a forum in which evidence is presented that expands the breadth of accountability for the Rwandan genocide. This ensures that blame is distributed more evenly to all responsible. On the other hand, of course, some of the testimonial evidence proffered by detainees

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[64] Daly, *supra* note __, at 375-376.

[65] Vandeginste, *Rwanda: Dealing with Genocide*, supra note __, at 239.

[66] *Rwanda's Revolutionary Justice*, American RadioWorks, July 2002, www.americanradioworks.com/features/justiceontrial/rwanda_print.html (visited on April 26, 2004).

[67] Scott Strauss, *Letter from Rwanda: Gacaca Begins* (June 26, 2002) (available at www.isg-

may be unreliable, dated, and uncorroborated. Moreover, with so many people already facing charges it is unclear whether any system can accommodate any more suspects, although an expanding array of suspects more accurately reflects the popular nature of genocide in Rwanda in 1994.

The *gacaca* proposal has been subject to considerable criticism by international lawyers and human rights activists.[68] The nub of this criticism involves *gacaca*'s lack of conformity with dominant understandings of rule of law.[69] Specific examples of such non-conformity include: defense counsel is not available; there are limited appeal rights; the decision-makers may not be impartial (in fact, the population will at the same time be complainant and judge); and the decision-makers have very limited education or training (and often none in law).[70] These each are important areas of concern. That said, is the fact that *gacaca* deviates from globalized constructions of rule of law indicative of the failure or dangerousness of the project? What is the more important goal: conforming to often abstract

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iags.org/newsletters/29/strauss.html (visited on April 26, 2004).

[68] Rwandans have been surveyed about their perceptions of *gacaca*. The results are mixed. General surveys among the overall population, including Hutu prisoners, are most favorable to *gacaca*. *See e.g.* Salas, *supra* note ___, at 187 (citing national surveys showing that Rwandans feel *gacaca* will help in reunification and peace); Uvin and Mironko, *supra* note 7, at 227 (reporting that a great majority of Rwandans as well as a majority of the prison population were ready to participate in *gacaca* in 2001); *Rwanda - About 92 per cent of population supports traditional courts* - survey, BBC News (March 6, 2003) (on file with the author) (reporting that 92% of the Rwandan population find *gacaca* as a viable remedy to the culture of impunity, a mediation and reconciliation tool, and as key to a new phase in countrywide development); Gabriel Gabiro, *Gacaca Courts Edge On* (June 5, 2003) (document on file with the author) ("among many Rwandans, *gacaca* also seems to be the most acceptable of all other local and international efforts to bring perpetrators of the 1994 genocide to justice"). More detailed surveys among Tutsi survivors are more negative. *See e.g. Rwanda's Revolutionary Justice*, *supra* note __ (reporting on survivors of sexual violence and genocidal assaults not wishing to be retraumatized by hearing confessions from perpetrators).

[69] Amnesty International, RWANDA: THE TROUBLED COURSE OF JUSTICE, Report AFR 47/10/00 (April 2000).

[70] *See* Amnesty International, *supra* note __, at 24-26.

notions of rule of law or, rather, developing institutions most likely to promote peace and justice in a manner compatible with local histories and values? Is rule of law an end in itself? A contextual, socio-legal approach to post-conflict Rwanda might posit the potential for *gacaca* to attain the goals of building justice, a shared sense of citizenship, reconciliation, and reconstruction. Traditional neighborhood dispute resolution – of which *gacaca* is one variety – has been successful elsewhere in Africa in post-conflict situations.[71] Moreover, the managerial value of informal justice mechanisms in clearing huge backlogs of cases and the resultant sclerosis should not be too readily dismissed.

I posit that the more legalized or juridical *gacaca* is pressured by the international community to become, the less effective it may be in stripping away the silence of complicity, barriers to shame, and resistance to the therapeutic discussion so needed to heal Rwanda. There already is considerable evidence that the Rwandan government is responding to international pressure to make *gacaca* akin to a criminal trial. By way of example, on the Rwandan government website, *gacaca* is described as taking place within "courts," whose goal is to process "evidence" and "try cases," and from which there is an option to "hear[] and pass[] judgment on appeal."[72] *Gacaca* tribunals are created "under a

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[71] Priscilla Hayner, UNSPEAKABLE TRUTHS, CONFRONTING STATE TERROR AND ATROCITY 192-195 (2001). *See also* Widner, *supra* note __, at 65-66 (discussing cases of Uganda and Somalia in addition to Rwanda). The Sierra Leone Truth and Reconciliation Commission also incorporates traditional and religious values in resolving local conflicts. Carsten Stahn, *Accommodating Individual Criminal Responsibility and National Reconciliation: The UN Commission for East Timor*, 95 AMERICAN JOURNAL OF INTERNATIONAL LAW 952, 964 (2001). This is not to say that all customary or traditional dispute resolution in Africa inherently is reconciliatory instead of retributive, but, rather, that many traditional approaches are reconciliatory in nature and have met with success.

[72] *See Justice and Genocide*, available at <www.rwanda1.com/government/justice.htm> (visited on April 26, 2004).

department within the Supreme Court."[73] The tribunals are to be advised by appointed *conseillers juridiques* (legal advisers) who Jeremy Sarkin fears may wield disproportionate influence.[74] Moreover, the *gacaca* tribunals – although traditionally reintegrative – will have many "nonindigenous" court-like powers, such as power to summon witnesses, issue search warrants, confiscate goods, and impose serious penal sanctions such as long-term imprisonment.[75] There is a hierarchical appellate structure. Consequently, there is a growing distance between traditional *gacaca* and the proposed *gacaca* tribunals. Whereas "traditional *gacaca* was informal and local, [...] today's is structured by the state from the top-down."[76] Traditional *gacaca* was not a permanent judicial or administrative institution, but something more fluid and *ad hoc*, convened as the need arose. In another vein, as *gacaca* becomes increasingly adversarial, there may be a greater risk that, instead of offering therapeutic healing, it may retraumatize victims who affirm their suffering.[77] It may also stray from the goal of constructing an historical record.

Of course, the success or failure of *gacaca* remains unproven and contingent. The initial proceedings have gotten off to somewhat of a rough start. Some victims are unwilling to tell their stories publicly; others are reluctant to tell the truth. Many of these individuals are justifiably fearful of reprisals: according to Ibuka, a genocide survivors organization, witnesses slated to appear in *gacaca* proceedings

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[73] Sarkin, J. AFRICAN L., *supra* note __, at 159.

[74] Id. at 164.

[75] *See* Vandeginste, *Rwanda: Dealing with Genocide*, *supra* note __, at 242.

[76] Strauss, *supra* note __, at 1.

[77] *See* Hayner, supra note __, at 141-144 (finding that victims and witnesses can be

have been murdered and intimidated.[78] Other victims are simply reticent because the emotional wounds still are too fresh for them to be able to face their accusers. Some experiences from the pilot project reveal that the court-like nature of the *gacaca* project may in fact inhibit testimony by the public.[79] On a different note, there is concern that *gacaca* too easily permits the reintegration of the offender and punishes too lightly. Certain victims believe that the use of *gacaca* minimizes the seriousness of the underlying offense both politically as well as legally – after all, we are talking about genocide here – if the process invokes only ordinary domestic law. Although some defendants avail themselves of the *gacaca* process to express remorse, few actually have made any concrete efforts to ask for or earn forgiveness from relatives of the individuals they murdered.[80] The provisional release of prisoners while they await *gacaca* proceedings understandably has caused consternation. An all-together different criticism is that the community that the *gacaca* presently turns to differs from the community that existed at the time of the genocide; or, more poignantly, that "in places throughout Rwanda, there may be no such thing as

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retraumatized by giving testimony, even at truth commissions or hearings that are less formal than trials).

[78] *Genocide witnesses 'being killed'*, BBC News (Dec. 16, 2003), available at http://news.bbc.co.uk/2/hi/africa/3324871.stm (visited on December 16, 2003); Gabriel Gabiro, TEN YEARS AFTER, CYANGUGU STRUGGLES TO MOVE ON (March 2, 2004) (document on file with the author). In March 2004, the Rwandan courts sentenced 14 individuals to death for the killings of two genocide survivors who were due to testify before a *gacaca* tribunal. UN Integrated Regional Information Networks, *Rwanda: Five Sentenced to Death Over Killing of Genocide Survivor*, available at http://allafrica.com/stories/200403010259.html; UN Integrated Regional Information Networks, *Rwanda: Nine Sentenced to Death Over Killing of Genocide Survivor*, available at http://allafrica.com/stories/200403080134.html.

[79] *On a patch of grass*, THE ECONOMIST 42 (May 17, 2003).

[80] *See* Gabriel Gabiro, CLAMPING KILLERS AND SURVIVORS TOGETHER (Feb. 18, 2004) (document on file with the author).

community."[81] Following the genocide, important population shifts affected the composition, interconnectedness, and familiarity of community. Hundreds of thousands of Tutsi refugees arrived in Rwanda from abroad.[82] This influx is paralleled by a villagization program initiated by the Rwandan government in which inhabitants of scattered farms are relocated, often through the use of compulsion, to villages.[83] Moreover, there also is concern that refugee movements, mass killings, and internal displacements have destroyed so many communities that the notion of community-based justice such as *gacaca* now is anachronistic.[84] Furthermore, as the waiting period for *gacaca* adjudications grows, the decline in enthusiasm for the process among local populations may accelerate. Many of these complaints echo those legitimately brought by victims against the national court system and the ICTR.

All things considered, *gacaca* will have to strike a difficult balance. It will have to maintain its distinctiveness from the criminal justice response while incorporating sufficient formalities and regularities so that it does not trivialize the crimes that were committed.[85] That said, *gacaca* remains the only foreseeable alternative to the criminal justice model for Rwanda, although international pressure might result in the *gacaca* panels' emulating courts in process, procedure, and effect. There may be cause for concern should *gacaca* mimic the trials and depart from the restorative model. If *gacaca* is viewed as a legal institution of the state rather than as a community-based mechanism, it

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[81] Daly, *supra* note __, at 380.

[82] Id. at 379-380.

[83] Sarkin, J. AFRICAN L., *supra* note __, at 152-153.

[84] Vandeginste, *Rwanda: Dealing with Genocide, supra* note __, at 240.

may come to be seen as nothing more than another tool of state power and oppression and, thereby, face delegitimization.[86]

V. JUDICIAL ADMINISTRATION IN THE WAKE OF ADMINISTRATIVE MASSACRE

The restorative potential of *gacaca* stands in some contrast to the adversarial approaches of criminal trials. For the moment, trials still dominate among policy responses to mass atrocity in Rwanda, especially if the *gacaca* becomes more-and-more judicialized. Moreover, criminal justice methodologies more broadly are welcomed at the international community as a policy response to mass atrocity. This is both represented by and in turn encouraged by the entry into force of the International Criminal Court (ICC).

Although it is difficult to speak of one postgenocide society as a place that can offer lessons for other postgenocide (and postconflcit) societies, what I hope to achieve in this Part is to enumerate five important caveats for international criminal justice which, if internalized, could improve the quality of that justice. Rwanda's spirited attempt to impose law in the wake of mass atrocity certainly offers an important bottom-up perspective for the often top-down imposition of international law.

1. Trials and Ethnic Identity Politics

Trials in Rwanda appear to hinder the emergence of a shared political compact and a sense of

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[85] Alex Boraine, A COUNTRY UNMASKED 408 (2000).

Rwandan nationality and citizenship that supersedes ethnic attachments to Hutu or Tutsi. Civic nationalism, ethnic contracts, power-sharing, vibrant civil society, and a genuine multi-ethnic consociational apparatus may quell the re-emergence of genocide. As such, these should be primary policy goals, particularly in Rwanda where a responsible majority must exist alongside a savaged and defensive minority.

But, instead, in Rwanda the politics of ethnicity remain intractable.[87] The country "has not yet successfully conducted a political transition process aimed at power sharing, inclusiveness, and better governance."[88] Rwanda remains very much a Tutsi ethnocracy. To some extent, trials reinforce ethnic divisions instead of mending them, although the younger generation of Rwandans appears less prone to an ethnically-divided world-view. In a sense, trials allow the Hutu to see themselves as suffering political victors' justice. The Tutsi victims, in turn, see the trials as providing a slow and painful forum. The extensive incarceration of 80,000 detainees (with another 30,000 out on provisional release), on the one hand, and the concentration of political power in the hands of fearful Tutsi, on the other, adds fuel to the fire.[89] So long as a sense of civic identity remains undeveloped, the new Rwandan

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[86] Vandeginste, *Rwanda: Dealing with Genocide*, *supra* note __, at 245.

[87] Interview with Jean de Dieu Mucyo, Minster of Justice for Rwanda, *Rwanda Pushes on with Gacaca Tribunals* (Dec. 6, 2002) (reporting that "Rwandans are still strongly divided along ethnic lines"); Gabriel Gabiro, *Ethnically Touchy Rwanda Faces Gacaca Test* (June 22, 2002) (reporting that although in post-genocide Rwanda public references to ethnic identity are more-or-less taboo, in private or among people of the same ethnicity, ethnic sentiments still remain high).

[88] Vandeginste, *Rwanda: Dealing with Genocide*, *supra* note __, at 224. *See also* Rama Mani, BEYOND RETRIBUTION 71 (2002) (writes of a "deepening Hutu exclusion.").

[89] Vandeginste, *Rwanda: Dealing with Genocide*, *supra* note ___, at 245-46; Mamdani, *supra* note __, at 271-272; *Human Rights Watch, World Report 2001 (Rwanda)*, available at <http://hrw.org/wr2k1/africa/rwanda.html> (visited on April 26, 2004).

constitution's attempts to create some sort of consociational political structure[90] or, even, "outlaw ethnicity"[91] mostly will remain cosmetic.

Although there is a role for law in transcending sustained periods of ethnic violence, it is important to be modest about, and not romanticize, that role. There may be times and places where the search for justice, and the manner in which that search is undertaken, can inhibit political transition. Although there is unquestionably a need for justice for Rwandans, there also is a need for a broad definition of justice that transcends the courtroom. Without economic justice for all, in particular for Tutsi survivors,[92] and political representation by civic-minded Hutu in state institutions, the justice meted out in a courtroom may polarize as much as it may redress.

Criminal trials contribute little to the construction of broadly shared and accepted narratives that memorialize what happened in Rwanda in the summer of 1994. My observations regarding the interplay between trials, ethnic identity politics, and historical truths in Rwanda are similar to those of Laurel Fletcher and Harvey Weinstein in the case of the Balkans.[93] According to their extensive

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[90] For discussion of the new Rwandan constitution, *see* Associated Press, *Rwandans Endorse New Constitution*, N.Y. TIMES (May 27, 2003).

[91] Marc Lacey, *A Decade After Massacres, Rwanda Outlaws Ethnicity*, N.Y. TIMES (April 9, 2004) (discussing special reeducation camps established by the Rwandan government to purge former Hutu fighters of ethnic ideologies). The government also has removed ethnic references from schoolbooks and official identification documents. Id. The government also has added the crime of "divisionism" to the domestic criminal code. Id. This is an offense that includes speaking too provocatively about ethnicity. Id.

[92] Most genocide survivors – like most Rwandans in general – live in poverty, often without guarantees for basic needs such as food and water. Gabriel Gabiro, *Rwanda Genocide: Paying for Reconciliation* (Dec. 19, 2002) (document on file with the author).

[93] Fletcher and Weinstein, *supra* note __.

survey research, it is unclear whether trials lead to overarching ethnically shared narratives regarding the violence that transpired. Rather, trials may prompt group members to believe that theirs was the victimized group and to deny that war crimes were committed in their name.[94] "[T]rials are viewed primarily to confer legitimacy on the status of the respondent's national group as victims rather than to investigate atrocities committed by all forces or to learn what crimes, if any, were committed in the name of the respondent's national group."[95] This is very similar to the attitude of the Hutu detainees I interviewed.[96] These detainees emphasized that they were the victims of RPF aggression and that anti-Tutsi pogroms were a justifiable exercise of self-defense. Moreover, these same individuals believe that this RPF aggression eventually led to Tutsi acquisition of power, which continues to this date. Hutu exclusion from political power in Rwanda persists, thereby perpetuating the Hutu perception of victimization.

2. Mutuality of Responsibility

In the former Yugoslavia all ethnic groups – Serbs, Croats, and Bosnian Muslims – are subject to investigation for gross violations of international law. Individuals from each group have been convicted. The Prosecutor's office of the International Criminal Tribunal for the former Yugoslavia (ICTY) has concluded that investigations of all groups would be in the overall interest of justice, notwithstanding the reality that responsibility for carnage and violence is not equally

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94 Id. at 581.

95 Id. at 589.

96 Assuredly, these interviewees were prisoners. They were not judges or prosecutors (the

attributable to all groups. In a similar vein, the investigation of all groups for abuses in the case of South Africa prompted controversy, although in the long run may have encouraged the legitimacy and credibility of the TRC Report (of course, it still may be too early to pronounce on that point).[97]

Mutuality of responsibility is of some concern to Rwanda, where it is estimated that between 25,000 and 45,000 individuals were killed in human rights abuses propagated by the RPF.[98] But there is little investigative mutuality; and no prosecutorial mutuality. Former ICTR Chief Prosecutor Carla del Ponte did attempt to open investigations into RPF activities. This was met with stiff resistance by the Rwandan government. In September 2003, the United Nations Security Council did not renew del Ponte's mandate as ICTR Chief Prosecutor.[99] This was for a number of reasons, including political pressure brought by Rwanda and certain influential allies, in particular the U.S. In this sense, del Ponte's attempt to involve the ICTR in a mutual assessment of responsibility played some part in her removal as ICTR Chief Prosecutor. Nor has there been prosecution of RPF abuses in the Rwandan national court system. Instead, the government has established military chambers to hear such charges. The Rwandan government believes that military tribunals are appropriate for such

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subjects of the Fletcher/Weinstein study). That said, the comparative value of both studies remains.

[97] On the other hand, some report that this runs the risk of creating mutually offsetting levels of blameworthiness: in the case of South Africa, documenting ANC abuses may have undermined some of the legitimacy of the TRC. *See* Hayner, *supra* note __, at 44-45.

[98] Human Rights Watch, LEAVE NONE TO TELL THE STORY: GENOCIDE IN RWANDA 728 (1999). Filip Reyntjens estimates that the RPF killed about 100,000 Hutu in 1994. *See* Alan J. Kuperman, *Letter to the Editor*, 81:6 FOREIGN AFFAIRS 206, 206-207 (2002) (citing Reyntjens). Roméo Dallaire argues that the RPF could have stopped the genocide earlier than it actually did but chose not to so in order to acquire a firmer grip on power down the line. Dallaire, *supra* note ___, at 515.

[99] Formerly, the Chief Prosecutor was responsible for proceedings at both the ICTR and ICTY. The Security Council split these responsibilities. Del Ponte remains as ICTY Chief Prosecutor. Hassan Bubacar Jallow was appointed ICTR Chief Prosecutor.

incidents of violence insofar as it characterizes these as "operational mistakes" or isolated acts of revenge, and not acts of genocide or systematic violations of international law.[100]

To be sure, the Rwandan violence overwhelmingly was directed by Hutu against Tutsi. However, involving RPF and RPA abuses in the reconciliation process could create mutuality, reciprocity, and historical accuracy.[101] The importance of mutuality to the justice process also is germane to initiatives that may operate outside of the Western legal tradition. The *gacaca* tribunals are limited to investigating crimes committed between October 1, 1990 and December 31, 1994 (the domestic Rwandan trials are similarly limited; the ICTR is temporally limited only to the year 1994). Sarkin writes:

> If only the events that occurred between 1990 and 1994 are examined, people would regard this as prejudicially narrow because the process would focus on the Hutu as perpetrators and fail to take into account the long history of human rights abuses in Rwanda in which both Hutus and Tutsis have been perpetrators and victims.[102]

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[100] Gabriel Gabiro, *Confronting Genocide with Rwanda's Regular Courts* (Sept. 17, 2003) (document on file with the author).

[101] On May 28, 2002, the DRC initiated a claim at the International Court of Justice (ICJ) against Rwanda for activities of the RPA in Congolese territory. In this claim, the DRC accuses Rwanda of "massive, serious and flagrant violations of human rights and of international humanitarian law" resulting from acts of armed aggression allegedly perpetrated by Rwanda in the DRC since August 1998. In particular, the DRC refers to the alleged genocide of 3.5 million Congolese citizens; sexual assault; "large-scale human slaughter" in South Kivu, Katanga Province, and the Eastern Province; "throat-slitting and crucifying"; and "destruction of fauna and flora." It also refers to the downing of a Congo Airlines flight in 1998. The DRC seeks a declaration that Rwanda has violated a series of international treaties, must withdraw its troops from the territory of the DRC, and must pay compensation. This is not the first time the DRC has filed a claim against Rwanda. A very similar claim had been filed on June 23, 1999, only to be discontinued by the DRC on January 30, 2001. On July 10, 2002, the ICJ rejected Rwanda's preliminary request that the case be removed from its docket. *See* International Court of Justice, Press Release 2002/19, available at http://212.153.43.18/icjwww/ipresscom/ipress2002/ipresscom2002-19_crw_20020710.htm (available at April 26, 2004).

[102] Sarkin, J. AFRICAN L., *supra* note __, at 161. *See also* Uvin and Mironko, *supra* note __, at

Unsurprisingly, reports from the pilot project *gacaca* proceedings indicate that local populations are affirming that both Hutu and RPF crimes should be dealt with in order to create "the whole truth."[103] In fact, there is preliminary evidence that an inability to address this "whole truth" is inhibiting the effectiveness of the *gacaca* process.[104]

3. Externalized or Internalized Justice: The Democratic Challenge

To be legitimate, law requires a local connection. It is unclear whether genocide trials meaningfully are connected to local lives in Rwanda. Rather, much of the justice that has been effected is heavily externalized in meaning. I argue that in Rwanda the international and foreign trials lead to a greater externalization of justice -- notwithstanding their heightened due process and legalism -- than do the national trials (despite the thin historical legitimacy of national courts). To be sure, the national trials are viewed with some skepticism; however, this skepticism is more attenuated than that which attaches to the international and foreign trials.[105] Local justice initiatives, such as *gacaca*, may bear the

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[103] Fondation Hirondelle, *Gacaca takes off slowly* (October 14, 2002) (on file with the author); *High Turn Out as Gacaca Courts Open Nationwide* (Dec. 6, 2002) (document on file with the author).

[104] *On a patch of grass*, *supra* note __.

[105] The ICTR in particular is subject to this mental distance. *See* Uvin and Mironko, *supra* note ___, at 221 (reporting that the "largest part of the [Rwandan] population [...] has little or no knowledge of the ICTR. The main sentiment in Rwanda regarding the ICTR may well be massive ignorance: ordinary people know or understand next to nothing about the tribunal's work, proceedings, or results."). *See also* Vandeginste, *Rwanda: Dealing with Genocide*, *supra* note __, at 231 (reporting on the "enormous (mental) distance between the population and the ICTR.").

greatest promise for legitimacy.

In any event, all three layers of trials have limited meaning in Rwanda both to victims and aggressors, as well as suspects and accusers. This arises from what I would call methodological externalization in the case of the domestic trials (where the process that adjudges guilt or innocence, as well as the act of judging itself, has limited meaning).[106] In the case of the international and (especially) foreign trials, the methodological externalization is greater and is exacerbated by the physical externalization of the locus of judging and the cultural externalization of those doing the judging.

A major shortcoming of methodologically, physically, or culturally externalized trials is that they may convey little meaning in those societies they were designed to assist. Different places may well have different methods to right wrongs. For example, South Africa's TRC may represent something "different" than international criminal justice, but may have done much more to denounce *apartheid* as evil and convert that denunciation into a widespread and generally accepted narrative[107] than would have been possible through narrow punitive criminal justice methodologies.[108] Assuredly, if "[t]he best justice is national, rooted in national traditions of legitimacy, procedure, and language,"[109]

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[106] *See* Uvin and Mironko, *supra* note __, at 225 ("Trials are formal events, with their own formalities and procedures, largely alien to most people [in Rwanda].").

[107] This is not to suggest that the TRC process has been without shortcomings. The TRC has engendered considerable controversy. Moreover, given that South Africa's process of political transition will span generations, it still is too early to opine definitively about the success or failure of the institution.

[108] This is not to deny that the threat of criminal sanction played a part in inducing participation in the TRC process. However, the spirit of the TRC differs substantially from punitive criminal justice.

[109] Michael Ignatieff, *We Are Not the World*, THE NEW REPUBLIC 14 (August 13, 2001).

then it would be preferable in some instances for defendants to be subjected to indigenous proceedings at home rather than internationally-defined rule of law initiatives abroad. One advantage of local proceedings is that they permit the building of a post-conflict domestic judicial infrastructure. In this sense, the UN-assisted courts for Kosovo and East Timor are attractive joint ventures that, notwithstanding their numerous shortcomings and challenges, have the potential to create a constructive admixture of international norms and local values.[110]

To be sure, I recognize that in many places local dispute resolution entities may be view cynically insofar as they may serve as instruments of social control and institutionalize the power of unaccountable local elites.[111] It therefore becomes necessary in certain cases to differentiate between manipulated constructions of the local, on the one hand, and the truly representative or indigenous, on the other. International criminal law interventions would do well to engage with those practices that actually reflect the customs, procedures, and mores of those individuals affected by violence (as agents and victims). At the same time, these interventions could help reform those institutions that hitherto may have served only narrow elite interests. Moreover, international criminal law interventions could democratize communities by encouraging self-expression and the inclusion of all members of

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[110] For an interesting discussion, *see* Wendy S. Betts, Scott N. Carlson, and Gregory Gisvold, *The Post-Conflict Transitional Administration of Kosovo and the Lessons Learned in Efforts to Establish a Judiciary and Rule of Law*, 22 MICH. J. INT'L L. 371, 373 (2001) (reporting that a salutary approach would be for an initial immediate term with internationals controlling the process followed by a gradual transition to an intermediate term where locals assume control of the process).

[111] I have argued this to be the case in Afghanistan. *See* Mark A. Drumbl, *Rights, Culture, and Crime: The Role of Rule of Law for the Women of Afghanistan*, 42 COLUM. J. TRANS. L. 349 (2004) (positing the Pashtunwali as an example of problematic local law made through exclusionary and patriarchal means; the Pashtunwali operates as local law in may parts of Afghanistan and redresses human rights abuses when the family of the aggressor restores the family of the victim through the transfer of money, livestock or, preferentially, young girls or women).

those communities in the edification of community norms. Many local customs to which international law understandably expresses considerable reticence are in fact promulgated by elites unrepresentative of local populations or religious leaders unrepresentative of the members of religious communities. In this sense, international criminal law could avoid disempowering the local (by virtue of imposing its modalities upon afflicted societies) and thereby itself acting undemocratically and, at the same time, address the very real concern that the content of the local often is determined through profoundly undemocratic means. In the end, there is room for international criminal law to address these two types of democratic deficit.[112]

4. Individual Guilt, Collective Innocence, and International Absolution

The criminal law, particularly international criminal law, often selects for indictment and punishment only those people who are the most notoriously and self-evidently guilty.[113] As a corollary, then, international criminal law vigorously eschews notions of collective guilt or state criminal liability. Immi Tallgren offers the following explanation for this pattern:

> By focusing on individual responsibility, criminal law reduces the perspective of the phenomenon to make it easier for the eye. Thereby it reduces the complexity and scale of multiple responsibilities to a mere background.[114]

But it is not correct to extrapolate that those individuals who are not charged are innocent.

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[112] Oddly, and certainly unfortunately, the academic literature largely elides this connection.

[113] Mark Osiel, MASS ATROCITY, ORDINARY EVIL, AND HANNAH ARENDT 157 (2001).

[114] Immi Tallgren, *The Sensibility and Sense of International Criminal Law*, 13 EUR. J. INT'L L. 561, 594 (2002).

What is more, Fletcher and Weinstein suggest that "individualized guilt may contribute to a myth of collective innocence."[115] Here, the work of Karl Jaspers also is apposite.[116] Jaspers discusses a number of levels of guilt, including the criminal, the moral, and the metaphysical.[117] The criminally guilty are those who gave orders or executed crimes.[118] The morally guilty are those who "conveniently closed their eyes to events, or permitted themselves to be intoxicated, seduced or bought with personal advantages or who obeyed from fear."[119] The metaphysically guilty are those who fail to do whatever they can to prevent the commission of the crime.[120] Trials do not involve the morally or metaphysically guilty. Nor should they, as it is doubtful that such individuals deserve individual criminal punishment. Yet this does not mean that such individuals are blameless or that they ought to be considered as blameless. Rather, I believe such individuals must be made aware of their responsibility in order for the society to move forward. Trying the most notorious and absolving the rest[121] may not achieve what Mark Osiel suggests is the best guard against future atrocity, namely "the

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[115] Laurel E. Fletcher and Harvey M. Weinstein, *Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation*, 24 HUM. RTS. Q. 573, 580 (2002).

[116] Discussed in Lynn Graybill, TRUTH & RECONCILIATION IN SOUTH AFRICA 113 (2002)

[117] Id.

[118] Id.

[119] Id.

[120] David Luban, *Intervention and Civilization: Some Unhappy Lessons of the Kosovo War*, in GLOBAL JUSTICE & TRANSNATIONAL POLITICS 79, 96-97 (eds. Pablo De Greiff and Ciaran Cronin, 2002).

[121] Fletcher and Weinstein found that "in periods of collective violence, the focus on individual crimes has been used by many to claim collective innocence." See Fletcher and Weinstein, *supra* note ___, at 604.

thinking, judging citizen who is able and willing to question unjust authority."[122] One way to encourage the development of "thinking citizens" is to create some type of collective sanction or liability that would apply to populations that perpetrate mass violence. Faced with the possibility of collective sanction, ordinary individual citizens may oppose conflict entrepreneurs instead of supporting them. If ordinary citizens know that they will not face punishment for passively or quietly supporting political extremists, then they have no incentive to withdraw their support. On the other hand, if there were some room for collective sanction, then the citizenry may play more of a gatekeeping or monitoring role on conflict entrepreneurs and extremist leaders insofar as that same citizenry may be held accountable for the activities they engage in and encourage.

One poignant lesson from Rwanda is that the agency of genocide may not be uni-directional and top-down. There may well be an important bottom-up component. In Rwanda, the breadth of the violence was made possible by the fact that so many people were, to varying degrees, participants. The multi-directional agency of violence in Rwanda means that exceptionalizing guilt may be convenient and assuaging. Although such exceptionalizing goes some way to achieving some justice, it is neither realistic nor transformative. In Rwanda, genocide was to some extent a social project that drew upon a significant – not all, but a significant – proportion of the population. It was, as Jose Alvarez observes, a crime of hate more than a crime of state.[123] This suggests that international criminal law's predicate of avoiding collective guilt may need to be rethought, or at least

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[122] Osiel, *supra* note ___, at 150.

[123] Jose E. Alvarez, *Crimes of States/Crimes of Hate: Lessons from Rwanda*, 24 YALE J. INT'L L. 365 (1999).

the orthodoxy of that predicate rethought, and broader "ecological" approaches to the violence acknowledged.[124]

On a related note, individual criminal trials can mask international involvement and responsibility. After all, the collective factors that facilitate systematic human rights violations may include international action or inaction. This (in)action scales a gamut that ranges from state responsibility for colonial policies that exacerbated ethnic conflict, to decisions by foreign states to ignore the violence after it had begun, to international responsibility for failing to develop effective rules of engagement for peacekeeping missions. U.N. involvement in failed peacekeeping has prompted public inquiries in the case of Rwanda and also Srebrenica (in Bosnia-Herzegovina). This is an important step forward. However, it is not right to permit trials of particularly evil individuals to hide the structural, international, and colonial influences that facilitated the wide-scale nature of the Rwandan violence, and of mass atrocity generally. The failure of the international community to intercede to prevent, or at least mitigate, the Rwandan violence is galling.[125] Unsurprisingly, for many Rwandans justice means having their day in court not only with those individuals physically responsible for the killings, but also with the United Nations, France, Belgium, and the United States as dithering

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[124] *See* Fletcher and Weinstein, *supra* note ___, at 580, 601.

[125] Roméo Dallaire, the Canadian general tasked with peacekeeping responsibilities during the Rwandan genocide, bluntly states that the international community "did not have the will" to intervene decisively in Rwanda. Dallaire, *supra* note ___, at 79. He reports that communicated to senior U.N. officials the intelligence he had received from informants well ahead of time that genocide was being planned. Id. at 142-143. Moreover, the execution of the actual genocide corresponded closely to what Dallaire had been told months in advance would take place. Id. Dallaire also reports on poor training and bad behavior on the part of some of those peacekeepers who had been committed to Rwanda, although he underscores that many more of that small and understaffed contingent performed brilliantly under essentially impossible circumstances. Id. at 183.

facilitators. At the events held in Rwanda to commemorate the tenth anniversary of the genocide in April 2004, the overwhelming sentiment was one of bewilderment and anger at the world's failure to stop the violence.[126] Criminal trials of individual Rwandan killers will not dissipate these feelings. Nor will the essentially cosmetic designation by the UN of April 7 as an "International Day of Reflection" for Rwanda.[127]

5. Healing Spirit Injury

Accounts of life in Rwanda today reveal the pervasiveness of what critical legal scholars call "spirit injuries."[128] For Adrienne Wing, these include "defilement, silence, denial, shame, guilt, fear, blaming the victim, violence, self-destructive behaviors, acute despair/emotional death, emasculation, trespass, and pollution [...]."[129] By pollution Wing means specifically "ethnic pollution": namely, children born from inter-ethnic rape who experience great difficulties in becoming accepted in society.[130] Spirit injury is, to some extent, historically shared among both Hutu and Tutsi -- the Tutsi clearly being the most recent victims of particularly extreme violence.[131] Coincident with spirit injury, Prunier specifically has noted the persistence of severe mental health issues among the Rwandan

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126 *Rwanda Pauses to Remember Its Massacres*, N.Y. TIMES (April 7, 2004).

127 Id.

128 Wing and Johnson, *supra* note __.

129 Id. at 289.

130 Id. at 292.

131 Id.

population that manifests itself in what he identifies as large numbers of the "walking dead."[132] Anne Aghion poignantly has documented the depth of post-traumatic stress disorder, fear of new attacks, and massive depression among Tutsi survivors in Rwanda.[133] Many survivors suffered gang-rage and widespread sexual violence and, thereby, require specialized medical and psychological treatment.[134] According to a UNICEF study, nearly 80% of Rwandan children experienced death in their immediate family and 50% watched genocidal killings.[135]

However, very little effort or resources have been invested into treatment of these incapacitating psychological scars. This is troubling insofar as Rwanda truly cannot move forward and heal until the survivors' spirit injuries are addressed. Whether complex trials in far away countries can do so is unclear; whether local *gacaca* proceedings can do so also is unclear, although some analysts are somewhat more optimistic.[136] What is clear is that expiating Rwanda's spirit injury, and its pervasiveness, will require much more than criminal justice intervention. It will also entail applied – and massive – psychological counseling and therapy. All this takes us back to the need to circumscribe

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[132] Prunier, *supra* note 2, at 327.

[133] Anne Aghion, *Gacaca: Living Together Again in Rwanda?*, video (2002), information available at <http://www.sundancechannel.com/docday/?ixContent=6259>. Similar findings emerge in a PBS Frontline series entitled "Ghosts of Rwanda", available at <http://www.pbs.org/wgbh/pages/frontline/shows/ghosts/>.

[134] Gabriel Gabiro, *Silent Victims of Rwanda's Genocide* (Nov, 18, 2003) (document on file with the author).

[135] Reported in http://www.stockholmforum.com/dynamaster/file_archive/020527/44ec669db3c6d18b639c7b32f1f342d7/rwanda.pdf (visited on April 26, 2004).

[136] Among all mechanisms of accountability it may be best-suited to deal with "spirit injury" owing to its "reliance on Rwandan cultural mechanisms of conflict management." Uvin and Mironko,

judicial romanticism.

6. International Lawyers Should Think Contextually and Interdisciplinarily

Increasingly, human rights concerns weave themselves into the language of international politics. This often takes the form of what political philosophers call "legalism."[137] Legalism implies there is an important role for law in limiting the behavior of states and state actors in the name of a greater good. The operationalization of legalism in the context of mass atrocity primarily takes the form of the criminal law. In particular, legalism derives from and in turn advances the perception that adversarial and individual criminal trials, preferably led by or at a minimum including disinterested international experts, constitute a presumptive way to deal with individuals who systematically abuse human rights.[138] This perception has generated the construction of a legal superstructure, which includes the ICC, the ICTR and ICTY, and a number of hybrid and special courts.[139]

However, this construction has proceeded without sustained attention to developing a

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supra note __, at 227.

[137] Judith Shklar, LEGALISM: LAW, MORALS, AND POLITICAL TRIALS 1 (rev. ed., 1986).

[138] *See, e.g.* Fletcher and Weinstein, *supra* note __, at 578 (concluding that many "diplomats and human rights advocates conceive of international criminal trials as the centerpiece of social repair.").

[139] One example is the Special Court created by treaty between the U.N. and Sierra Leone. Another is the draft agreement concluded in March 2003 between Cambodia and the United Nations regarding the establishment of a tribunal to try former Khmer Rouge leaders. The U.N. also has been involved in creating hybrid national/international tribunals for Kosovo and East Timor. Although outside of the auspices of the UN, criminal prosecutions of human rights abusers has been suggested as central to political transition in Iraq. In December 2003, a Special Tribunal was proposed for Iraq. The crimes within the jurisdiction of the Special Tribunal bear a striking resemblance to the crimes with the jurisdiction of international criminal law institutions. The Special Tribunal is to be run by Iraqis assisted by the expertise of foreign, in particular U.S., legal

criminology of mass violence or theorizing a sentencing policy for perpetrators of such violence. Nor has there been much success in involving members of victimized societies in the process by which victimizers are brought to account. In some ways, this latter deficiency may not be surprising, given that the many – albeit certainly not all – of the architects of this international legal superstructure are Western activists who, as John Dugard points out, are "strangers to repression."[140] The end result is a response that may relegate to a subordinate status the specific contextual characteristics or needs of that society or, even, substantially disempower that society.[141]

Subordination may arise directly through the explicit primacy of international organizations, which is the case for the ICTR and ICTY.[142] It may also arise indirectly through the more refined, and certainly well-intentioned, doctrine of complementarity, which is central to the ICC. According to this doctrine, national courts are given initial jurisdiction over alleged offenders, but will lose that jurisdiction if they are unable or unwilling genuinely to prosecute. States therefore are incentivized to implement procedures that resemble those at the ICC in order to minimize the risk of ceding jurisdiction to the ICC. The state therefore is constrained in its choices as to how to promote accountability. So, although the ICC may encourage heterogeneity in terms of the types of institutions

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advisors.

[140] John Dugard, *The Third Manfred Lachs Memorial Lecture -- Dealing with Crimes of a Past Regime: Is Amnesty Still an Option?*, Paper Presented at the "TRC: Commissioning the Past" Conference, University of Witwatersrand, Johannesburg, June 11-14, 1999, at 13.

[141] This approach often has placed international institutions in conflict with domestic political or legal institutions. Such conflicts have occurred in Rwanda, the FRY, and in attempted international prosecutions in Cambodia.

[142] Statute of the ICTR, *supra* note ___, art. 8(2); Statute of the ICTY, S.C. Res. 827, U.N.

prosecuting serious international crimes, it collaterally encourages homogeneity in terms of the modalities by which those crimes are prosecuted.

In the end, this uniformity of response downplays the usefulness of contextual and individuated approaches that reflect the social and cultural geographies of the afflicted society. If the punitive criminal trial model becomes ingrained as the international norm, this might threaten restorative or other approaches that a post-conflict government may enact nationally out of a good faith belief that non-punitive approaches may be best for that society's pursuit of transitional justice.[143] States may have a variety of reasons to join the ICC: it is not to be assumed that a state's decision to join the ICC reveals a normative preference for systemic criminality to be punished by Western-derived

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SCOR, 48th Sess., 3217 mtg. at 29 (1993), art. 9(2).

[143] For a discussion of how the principle of complementarity intrinsic to the ICC may dissuade states from using truth commissions, *see* Jennifer Llewelyn, *A Comment on the Complementary Jurisdiction of the International Criminal Court: Adding Insult to Injury in Transitional Contexts*, 24 DAL. L. J. 192 (2001); *see also* Mohamed M. El Zeidy, *The Principle of Complementarity: A New Machinery to Implement International Criminal Law*, 23 MICH. J. INT'L L. 869, 940-945 (2002) (discussing the interface between the complementarity principle and good faith and bad faith national amnesties or pardons). Llewelyn concludes complementarity might add "insult to already existing injuries in countries undergoing transition from pasts marred by gross violations of human rights." Id. at 192. However, article 53 of the Rome Statute affords the Prosecutor some discretion in determining whether an investigation should be initiated. Rome Statute, *supra* note ___, art. 53. This provision was included in the Rome Statute in part to shield initiatives such as the South African TRC from being trumped by the ICC. Secretary-General Annan has clearly stated that the ICC would not oust national initiatives "like South Africa's, [where] it is inconceivable that […] the Court would seek to substitute its judgment for that of a whole nation which is seeking the best way to put a traumatic past behind it and build a better future." *See* U.N. Doc. SG/SM/6686 (Sept. 1, 1998). Although there may be consensus that Prosecutorial discretion would preserve the TRC in particular, the incentive persists to model national procedures on the ICC process in order to minimize the risk of being trumped by the ICC, or of relying on discretionary exceptions to the presumption of redressing mass atrocity through criminal trials. It is unclear how article 53 would interface with other examples of local justice, or *extra*-criminal adjudication, in the future. In the case of Rwanda, it is unclear whether traditional extrajudicial dispute resolution, such as *gacaca*, would be found to constitute a genuine attempt to prosecute and, hence, fall within the scope of the complementarity proviso.

notions of individualized and retributive criminal process.[144]

VI. CONCLUSION

In this Article, I flag some of the disarticulations between the aspirations of criminal process for the Rwandan *génocidaires* and the actual effects of that process on the ground. In this vein, Rwanda instructs on certain shortcomings of maximally relying on criminal trials as mechanisms of effecting the goals of justice, reconciliation, vindication, and transition in the wake of mass atrocity. One important lesson is the need to avoid methodological iconoclasm: consideration could be given to consolidating diverse mechanisms more closely attuned to the social geographies of the relevant societies.[145] Although there is a duty to prosecute serious human rights abuses, there is no correlative

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[144] These reasons include considerations that have little to do with the actual content of the treaty, such as maintaining standing in the international community, pursuing the appearance of legitimacy, and bowing to pressure from donor states. Moreover, the process by which many states (particularly illiberal states) consent to international treaties such as the Rome Statute of the International Criminal Court is far from democratic insofar as there may be little to no bottom-up participation or debate during the ratification process. Furthermore, the operation of the ICC, including the development of its rules, occurs by consensus without the need for the actual individuated agreement of the state in which the ICC exercises jurisdiction. The ICC has independent law-making capacity through whose exercise it becomes more than the agent or delegee of the consenting state. *See* Madeline Morris, *The Disturbing Democratic Defect of the International Criminal Court*, XII FINNISH YEARBOOK OF INTERNATIONAL LAW 109, 112 (2001).

[145] There is some evidence international legal actors are warming to such a proposition. However, although calls for reform based on disconnects between international and local actors have prompted responses at the FRY, there has been little structural change in the administration of international justice in Rwanda. *See Joint Preliminary Conclusions of OHR and ICTY Experts Conference on Scope of BiH War crimes Prosecutions*, ICTY Press Release OHR/PIS/723-e (Jan. 15, 2003). There have been some policy innovations, although these may be more cosmetic than structural. For example, the ICTR has (together with some Rwandan non-governmental organizations) developed a support initiative in Rwanda for witnesses and potential witnesses, and has established a public information area and library in Kigali to instruct on the work of the ICTR. *See* ICTR/INFO-9-2-241.en (25 September 2000); ICTR/INFO-9-2-242.en (26 September 2000).Moreover, although there has been a change to the ICTR Rules that permits the ICTR to refer a case under indictment to a national court, it is unclear whether this change ever will take operational effect and, if it ever does, whether it will inure to be benefit of Rwandan national courts or, rather, to those of other countries

obligation to implement that duty in a narrow and uniform manner.

Encouraging local justice means more than nodding permissibly in the direction of local justice initiatives. It means committing resources, infrastructure, and human capital towards the institutions that will enforce such justice.[146] It also means accepting the modalities and mechanisms that are familiar at the local level. To be sure, international lawyers should not naively venerate all aspects of what may appear as unorthodox local justice. There is a crucial need to delineate local modalities that are representative of aggrieved populations and separate those from local modalities that serve the interests of preserving the power of local elites.

International lawyers have rewritten international politics – in my mind, unmistakably for the better – by indelibly embedding prosecution of egregious human rights offenders as part of the fabric of postconflict transition. That said, we must remain mindful that retributive criminal trials are not a cure-all, nor a be-all or end-all. Nor are they a satisfactory quick-fix solution. Depending on ideological preferences and political pressures, various solutions may have such an allure. For the international lawyer it may be the criminal trial, for the political realist it may be the amnesty, for the

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who could prosecute based on principles of universal jurisdiction. On another note, the development of a UN-created truth commission for East Timor (which incorporates East Timorese nationals and community-based approaches) may signal the beginnings of a much-welcomed paradigmatic diversity. UNTAET Regulation 2001/10, On the Establishment of a Commission for Reception, Truth and Reconciliation in East Timor (13 July 2001). However, this commission is designed to "complement" and not "replace" national or international prosecutions, thereby preserving the presumptive position of trials within the hierarchy of post-conflict justice mechanisms. Stahn, *supra* note __, at 953, 954, 960. Another paradigmatic limitation is that the community-based methodologies are not applicable to criminal proceedings. *Id*. at 964.

[146] Relative to its investment into the ICTR, the international community has not transferred much in the way of resources to the domestic Rwandan justice system. It is unclear what the state of the Rwandan judicial system would be if the hundreds of millions of dollars allocated to the ICTR instead would have been injected into the domestic infrastructure. It costs Rwanda $1 million per year to incarcerate the detainees.

psychologist it may be the truth commission, and for the humanitarian worker it may be financial reparations. The allure of any quick-fix deceivingly may prove to be the lure of the pyrrhic solution.

It is terribly difficult and profoundly messy to redress systemic tragedy. No single profession or discipline has the singular expertise to resolve – let alone prevent – mass atrocity. To this end, postconflict policy mechanisms would do well to be diversified and contextual, individuated and carefully crafted, balanced and proportional, and always patiently multigenerational. Accordingly, international criminal justice should not be appropriated by any individual academic or professional community. This means that it now becomes incumbent for international lawyers, whose work in developing international criminal justice has been so catalytic, to generously construct international criminal justice as much more than just a subfield of international law.