

Article

Crimes of States/Crimes of Hate: Lessons from Rwanda

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Rwanda had presented the world with the most unambiguous case of genocide since Hitler's war against the Jews, and the world sent blankets, beans, and bandages to camps controlled by the killers, apparently hoping that everyone would behave nicely in the future.¹

I. INTRODUCTION

The justifications for international criminal liability for perpetrators of the international crimes of genocide,² war crimes,³ and crimes against

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1. PHILIP GOUREVITCH, *WE WISH TO INFORM YOU THAT TOMORROW WE WILL BE KILLED WITH OUR FAMILIES* 170 (1998).

2. See Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951) [hereinafter Genocide Convention].

humanity⁴ have remained essentially unchanged in the half century since World War II's Nuremberg and Tokyo trials. Despite the vast literature on those famous prosecutions, including extensive critiques leveled at what they accomplished,⁵ there is a remarkable degree of consensus among international lawyers in favor of international criminal accountability for mass murderers, rapists, and torturers. To the extent there is debate concerning that question, it remains framed by the legalist/realist divide that dominates international law.⁶ Political realists argue that the choice of whether or not to prosecute perpetrators must be left to the discretion of the sovereign states where such mass atrocities occur, since new governments within such states must retain the power to decide whether to forgive the prior regimes' transgressions for the sake of securing peace.⁷ Legalists, including most international lawyers, contend either that international law requires prosecution or that even if the law leaves states with considerable discretion, states ought not permit impunity for perpetrators.⁸ They argue that criminal accountability is compatible with, and perhaps vital to, lasting peace and real national reconciliation.⁹

Recently, in the wake of horrendous massacres within Rwanda and the territories of the former Yugoslavia,¹⁰ the international legalists have

3. See Convention for the Amelioration of the Condition of the Wounded and the Sick in Armed Forces in the Field (Geneva Convention No. I), Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea (Geneva Convention No. II), Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Convention Relative to the Treatment of Prisoners of War (Geneva Convention No. III), Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Convention Relative to the Protection of Civilian Persons in Times of War (Geneva Convention No. IV), Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 28.

4. While crimes against humanity have not been codified in a treaty regime, such offenses were defined in the course of the Nuremberg trials, and have been the subject of extensive scholarly commentary. See, e.g., M. Cherif Bassiouni, "Crimes Against Humanity": *The Need for a Specialized Convention*, 31 COLUM. J. TRANSNAT'L L. 457 (1994). As Bassiouni notes, international lawyers regard such crimes as well established under customary international law. See *id.* at 465-66.

5. See, e.g., DAVID LUBAN, LEGAL MODERNISM 335-91 (1994); MICHAEL P. SCHARF, BALKAN JUSTICE 3-17 (1997); TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS (1992); Kevin R. Chaney, *Pitfalls and Imperatives: Applying the Lessons of Nuremberg to the Yugoslav War Crimes Trials*, 14 DICK. J. INT'L L. 57 (1995); *Telford Taylor Panel: Critical Perspectives on the Nuremberg Trials*, 12 N.Y.L. SCH. J. HUM. RTS. 453 (1996).

6. See *infra* notes 49-52, 89-92 and accompanying text. For a sweeping survey of this divide, see MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT (1989).

7. See *infra* note 92 and accompanying text. At this writing, Cambodian government elites appear to be struggling with such decisions. See, e.g., Seth Mydans, *A Tale of a Cambodian Woman: Assigning the Guilt for Genocide*, N.Y. TIMES, Jan. 21, 1999, at A1.

8. See, e.g., IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE 28-30 (Naomi Roht-Arriaza ed., 1995) [hereinafter IMPUNITY AND HUMAN RIGHTS]; Diane Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537 (1991); Michael Scharf, *The Letter of the Law: The Scope of the International Legal Obligation to Prosecute Human Rights Crimes*, LAW & CONTEMP. PROBS., Autumn 1996, at 41. But see Carlos S. Nino, *The Duty to Punish Past Abuses of Human Rights Put into Context: The Case of Argentina*, 100 YALE L.J. 2619 (1991) (casting doubt on the alleged duty to prosecute at least in the case of Argentina).

9. See *infra* notes 37-42 and accompanying text.

10. By most accounts it appears that some 250,000 civilians have been killed, perhaps 20,000 women raped, and another 2 million driven from their homes in the course of the recent breakup of the former Yugoslavia while, over an even shorter period of some 100 days in 1994, a staggering 500,000 to 800,000 people have been massacred in the Hutu/Tutsi killings of Rwanda. See, e.g., ALAIN DESTEXHE,

prevailed. For the first time since the end of World War II, international war crimes tribunals have been established¹¹ and the states that have emerged from the breakup of the former Yugoslavia and Rwanda are, warily, engaging in an international legal process specially designed to deal with atrocities in their respective territories.¹² Further, in the wake of these two ad hoc tribunals, the establishment of a permanent International Criminal Court (ICC) is also underway.¹³

This Article examines the arguments of the epistemic community¹⁴ of international lawyers (primarily scholars, human rights activists, and others involved in the establishment or the operation of the ad hoc tribunals) that have been used to justify the creation, jurisdiction, and ongoing operation of the Balkan and Rwanda tribunals.¹⁵ First, international lawyers characterize offenses in both regions as *crimes of states*, because such offenses, either by definition or because of their scale or scope, tend to require the connivance or at least acquiescence of governmental authority. They are seen as crimes committed by states.¹⁶ Second, they are seen as crimes of states because, at least since Nuremberg, if not before, such offenses have been criminalized by

RWANDA AND GENOCIDE IN THE TWENTIETH CENTURY 68 (Alison Marschner trans., 1995); GÉRARD PRUNIER, *THE RWANDA CRISIS: HISTORY OF A GENOCIDE* 265 (1995); SCHARF, *supra* note 5, at xiv. However, as is all too common in the immediate wake of such atrocities, there are considerable difficulties in accurately assessing these figures. See, e.g., PRUNIER, *supra*, at 263–73 (detailing the bases for the figures cited in the text with respect to Rwanda); Eric Alterman, *Bosnian Camps: A Barbed Tale*, *THE NATION*, July 28, 1997, at 17 (disputing the figures cited with respect to the Balkans). In both regions, there are reports of continued violence.

11. Both the war crimes tribunal for the former Yugoslavia as well as the tribunal for Rwanda were established by the U.N. Security Council under its Chapter VII powers. See S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827, para. 2 (1993); *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, U.N. SCOR, 48th Sess., U.N. Doc. S/25704 (1993) [hereinafter *Secretary-General's Report*] (establishing the tribunal for the former Yugoslavia); S.C. Res. 955, U.N. SCOR, 49th Sess., 3453rd mtg., U.N. Doc. S/RES/955 (1994) (establishing the tribunal for Rwanda). The tribunal for the former Yugoslavia was based in The Hague, the Netherlands, and the tribunal for Rwanda was based in Arusha, Tanzania.

12. For a readable account of the establishment of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the difficulties in securing cooperation from local governments, see SCHARF, *supra* note 5, at 51–73. For accounts of the International Criminal Tribunal for Rwanda's (ICTR) establishment despite Rwandan government opposition, see Madeline H. Morris, *The Trials of Concurrent Jurisdiction: The Case of Rwanda*, 7 *DUKE J. COMP. & INT'L L.* 349 (1997) and William A. Schabas, *Justice, Democracy, and Impunity in Post-Genocide Rwanda: Searching for Solutions to Impossible Problems*, 7 *CRIM. L. F.* 523 (1996). See also *infra* Section III.B.

13. See United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (July 17, 1998) [hereinafter Rome Statute]. Under that treaty's Article 126, the new ICC would come into being 60 days following the deposit of the 60th instrument of ratification.

14. Political scientists have defined an "epistemic community" as groups sharing a particular expertise and a social agenda. See, e.g., Special Issue, *Knowledge, Power, and International Policy Coordination*, *INT'L ORG.*, Winter 1992 (focusing on the studies of such communities in distinct international settings).

15. See, e.g., Naomi Roht-Arriaza, *Conclusion: Combating Impunity*, in *IMPUNITY AND HUMAN RIGHTS*, *supra* note 8, at 281, 295 (discussing how this community of lawyers, scholars, and human rights activists "was instrumental in disseminating arguments based on international law, which were then picked up and used in subsequent national debates"); see also ARYEH NEIER, *WAR CRIMES* 111–33 (1998) (same).

16. See *infra* notes 300–309 and accompanying text (discussing requisites for genocide and crimes against humanity).

the collective action of sovereign states. Since the international community of nations has defined the requisites of genocide, crimes against humanity, and war crimes, these criminal norms belong to the international community of states that gave them legal imprimatur through treaties or through the practice and *opinio juris* that creates customary international legal norms.¹⁷ Finally, they are considered to be crimes of states because states' failure to prevent such offenses or to punish perpetrators has a direct impact on interstate interests (for example, because of the consequences to international peace and security or because of the implications for the credibility of international norms and institutions).¹⁸ International lawyers build a set of arguments from the notion of crimes of state, which I call the international legal paradigm, to justify and operationalize international criminal accountability. I argue that seeing the underlying offenses as primarily crimes of states helps explain certain important but troublesome characteristics of these ad hoc tribunals.¹⁹

I contrast the international legal paradigm, not with the realist accounts with which it is usually compared, but with a perspective that is common to many journalistic accounts of events in the former Yugoslavia and in Rwanda.²⁰ Many of these accounts, relying on interviews with alleged perpetrators and victims, present a grass-roots perspective that is not grounded in Nuremberg or the unfulfilled needs of the international community for effective enforcement of international law. Journalists are more likely to characterize atrocities in both regions as *crimes of hate*—the product of homegrown struggles having little to do with the needs of, or the norms defined by, the international community. This second, less state-centric perspective highlights the localized, often ethnic nature of offenses in both regions, while the international legalist regards an emphasis on ethnicity as antithetical to criminal accountability.²¹

International lawyers are right to be suspicious of more ethnocentric accounts. Much of the day-to-day reporting about Rwanda's "tribal warfare" or Balkan "ethnic conflicts" has been simplistic. However, international lawyers have been insufficiently attentive to the particularities of distinct atrocities and overly dismissive of the significance of ethnicity in these events. They have not paid sufficient attention to how international efforts are perceived by and affect local communities, institutions, and the national rule of law. They have not given sufficient consideration to the nature of the

17. See generally M. Cherif Bassiouni, *Searching for Peace and Achieving Justice: The Need for Accountability*, LAW & CONTEMP. PROBS., Autumn 1996, at 9, 13–18 (surveying the international community's "normative framework").

18. See *infra* notes 48, 55–56 and accompanying text (discussing interstate interests cited for establishing the ICTY and ICTR).

19. See *infra* Part II.

20. The two "paradigms" described might best be seen as Weberian "ideal types"—generalized rubrics for arguments made by a number of commentators that do not necessarily represent the views of any single person as such. See generally MAX WEBER, *THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION* 89 & n.5 (A.M. Henderson & Talcott Parsons, trans., 1947) (defining "pure" or "ideal" types as part of the methodological foundations of sociology). Readers will have to judge for themselves whether the paradigms as outlined usefully describe the respective views of two relatively distinct epistemic communities.

21. See *infra* notes 80–89 and accompanying text.

crimes of hate or to the enormous difficulties these offenses have engendered for the governments where such crimes have been committed. It is time to consider exactly what type of “synergy” exists between international and national attempts to provide accountability for mass atrocities.²²

This Article uses the dichotomy between the “crimes of states” and “crimes of hate” perspectives to critique the international community’s response to the Rwandan genocide of 1994. This critique is not premised on cultural relativism. While there may indeed be idiosyncratic cultural or historical reasons why Rwandans or other groups may resist solutions designed or imposed by the international community—some of which are suggested here—my reexamination of the international legal paradigm assumes that international lawyers are correct in arguing that perpetrators and victims have common needs despite differences among the afflicted societies. For the purposes of this Article, I assume that many of these needs might be remedied or at least ameliorated by criminal accountability.²³ The emphasis here is on demonstrating the tensions between the international lawyers’ approach to international criminal accountability and these lawyers’ own goals.

Part II contrasts the international legal paradigm with the more ethnocentric journalistic one. I outline the premises of each, noting how the first purports to respond to the flaws of the second. This Part highlights three fundamental, interrelated elements of the international legal paradigm: its preference for international fora; its insistence on achieving impartial results through “ethnically neutral” methods; and its need to characterize the underlying offenses as aberrant or exceptional deviations from the norms of interstate behavior. Parts III to V show the consequences of each of these elements, indicating how the pursuit of each may prove inconsistent with, and even undermine, international lawyers’ goals to preserve collective memory, vindicate and respond to the needs of victims, affirm the national and international rule of law, and promote national reconciliation. Part VI identifies the lessons that emerge if the underlying offenses in Rwanda are regarded as both crimes of states and crimes of hate and applies these lessons not only to Rwanda but to current efforts to establish a permanent International Criminal Court.

The principal lesson drawn is not that the establishment of international forms of accountability, whether through ad hoc tribunals or through a permanent international court, is invariably a mistake. On the contrary, I agree with international lawyers that international tribunals may be vital to achieve the goals commonly articulated to support criminal accountability, including

22. See, e.g., Theodor Meron, *Is International Law Moving Towards Criminalization?*, 9 EUR. J. INT’L L. 18, 31 (1998) [hereinafter Meron, *Criminalization*] (suggesting that there is a “clear synergy” between universal crimes submitted to domestic jurisdiction and those prosecuted at the international level); Theodor Meron, *War Crimes Law Comes of Age*, 92 AM. J. INT’L L. 462, 468 (1998) [hereinafter Meron, *War Crimes Law Comes of Age*] (noting that criminalization at the international level “will inevitably influence national laws governing crimes subject to universal jurisdiction”).

23. See, e.g., STEVEN R. RATNER & JASON S. ABRAMS, *ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW* 22–23 (1997) (making similar assumptions).

the affirmation of the rule of law. This is especially the case when there are no viable alternatives. Nor is the lesson that national courts applying national laws are invariably better alternatives to be pursued or preferred. Sham trials by insincere regimes implicated in the very atrocities adjudicated or political show trials by successor regimes bent on vengeance instead of justice are not likely to advance the rule of law at either the national or international levels. Such all or nothing alternatives only replace one mistaken, one-sided perspective with another. Recent events in Rwanda suggest that international law and fora should mediate, but not dictate, the forms of criminal accountability. The paramount lesson is that the international community needs to be responsive to the idiosyncratic conditions that give rise to massive violations of human rights as well as to the conditions prevailing in those societies in the immediate wake of atrocities. In instances such as those facing Rwanda in 1994, international processes for criminal accountability need to encourage and adapt to local processes directed toward the same end; international judges may need to, for example, apply local law, including laws with respect to sentencing. Rwanda provides a cautionary tale against a "one size fits all" approach to international criminal justice.

II. TWO PARADIGMS

If one asks an international lawyer to explain why mass atrocities have repeatedly occurred fifty years after the Holocaust, one is likely to get a state-centric response that reflects the state-centric nature of much of international law, namely, that these crimes of states result from the actions of government perpetrators and the failure of other government actors to respond.²⁴ For international lawyers, recent atrocities demonstrate the failure to enforce, against rogue government actors, fundamental rules of international humanitarian law proclaimed at Nuremberg by the victors of World War II and ratified many times since, including by the United Nations. Massacres in the Balkans or in Rwanda are regarded as shameful reminders that the promises of that law, solemnly memorialized by governments in a multitude

24. International lawyers commonly (if imprecisely) call the offenses committed in Rwanda and the Balkans "war crimes" even though these extend beyond violations of the laws and customs of war and international crimes and include, *inter alia*, genocide and crimes against humanity, whether or not committed by agents of government. The terminology is suggestive of the entrenched state-centricity of international law. As Steve Ratner has pointed out, although some international crimes extend to acts by private individuals, international criminal law, like human rights law, has been primarily concerned with state-sponsored violence and "some nexus to official conduct is still a useful starting point for criminalization, even if some treaties currently go beyond it." Steven R. Ratner, *The Schizophrenias of International Criminal Law*, 33 *TEX. INT'L L.J.* 237, 254 (1998); *see also infra* note 307 (discussing the requirements of "systematic" violence for crimes against humanity). The deep-rooted nature of the crimes of states perspective is also suggested by progressive developers' struggle to secure recognition, including by the ICTY and ICTR, that certain war crimes norms apply even when states (in the plural) are not involved. *See, e.g.,* Meron, *Criminalization*, *supra* note 22, at 25-30 (discussing the need to extend international humanitarian law to non-international armed conflicts). For a more general critique of the state-centricity of international law, see Hilary Charlesworth et al., *Feminist Approaches to International Law*, 85 *AM. J. INT'L L.* 613 (1991); Christine Chinkin, *The Gender of Jus Cogens*, 15 *HUM. RTS. Q.* 63 (1993).

of international instruments,²⁵ remain unfulfilled because of a lack of political will at the national and international levels.²⁶ At the same time, international lawyers condemn the atrocities as aberrant deviations from the authorized rules for the conduct of war and argue that such behavior justifies the admittedly rare application of international criminal law by international society to express that community's collective outrage against those relatively few state actors who violate fundamental norms of civilized behavior.²⁷

Having defined the problem in interstate terms, international lawyers have tended to define the solution in similar ways. Since the perceived problem is the breakdown in enforcement of the international rule of law against rogue state actors, the solution needs to be provided, in top-down fashion, by the international community's most reputable enforcer, namely the United Nations.²⁸ This state-centric perspective continues to dominate the international lawyers' approach to war crimes even though the central aim of criminal accountability is to enforce international obligations upon individuals, not states, and even in instances, as with respect to Rwanda, where the vast majority of perpetrators were civilians with no clear governmental ties.

The creation of two ad hoc war crimes tribunals, the ICTY and ICTR, established in 1993 and 1994 respectively by the U.N. Security Council, the most credible enforcer of norms directed at sovereigns, responds to the international legal paradigm. Established by Council fiat in reaction to two perceived "exceptional" threats to the international peace, the two tribunals, as international in composition as the organization that created them, are granted the power to enforce international criminal law in the context of two geographically and temporally limited instances: post-1991 offenses committed within the territory of the former Yugoslavia and those committed within Rwanda during 1994.²⁹ To international lawyers, these tribunals are

25. It is estimated that, through 1996, some 315 international instruments address 24 categories of either international or transnational crimes. See JORDAN PAUST ET AL., *INTERNATIONAL CRIMINAL LAW* 11 (1996).

26. See, e.g., Antonio Cassese, *On the Current Trends Towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law*, 9 EUR. J. INT'L L. 2, 7 (1998). For a survey of efforts to capture or to try violators of international humanitarian law, see PAUST ET AL., *supra* note 25, at 707-857.

27. See, e.g., MARSHALL FREEMAN HARRIS ET AL., *BRINGING WAR CRIMINALS TO JUSTICE* (1997) [hereinafter DAYTON CENTER REPORT]; Kenneth Roth, *Why Justice Needs NATO*, THE NATION, Sept. 22, 1997, at 21. For a related argument, suggesting that what international criminal law proscribes is necessarily "aberrant" human behavior because "it would be unrealistic to expect a legal system to penalize behavior that is either widespread or inherent to human nature," see, for example, Payam Akhavan, *Justice in the Hague, Peace in the Former Yugoslavia? A Commentary on the United Nations War Crimes Tribunal*, 20 HUM. RTS. Q. 737, 741 (1998).

28. As succinctly put by Saul Mendlovitz and John Fousek, "International jurisdiction is clearly more effective than state jurisdiction, since genocide is commonly state-sanctioned. For this reason, primacy or even exclusive jurisdiction should be given to the UN, preferably through the creation of a permanent International Criminal Court." Saul Mendlovitz & John Fousek, *The Prevention and Punishment of the Crime of Genocide, in GENOCIDE, WAR, AND HUMAN SURVIVAL* 137, 141-42 (Charles B. Strozier & Michael Flynn eds., 1996). As this statement, by two political scientists, implies, the popularity of the international legal paradigm is not limited to international lawyers.

29. See S.C. Res. 955, *supra* note 11, art. 2 (establishing the ICTR); S.C. Res. 827, *supra* note 11, para. 2; *Secretary-General's Report*, *supra* note 11.

hopeful signs that the international system is finally taking seriously the lessons of Nuremberg and is, at last, inching towards the effective enforcement of fundamental human rights norms against state actors.³⁰

International law scholars, prosecutors, and judges within these tribunals, and the leaders of influential human rights organizations, see these new tribunals—backed by the sanctions power of the Security Council and, at least in the Balkans, a NATO-led force capable of giving effect to tribunal orders compelling the presentation of evidence or the arrests of suspects—as significant steps towards effective international law enforcement.³¹ As an official of the ICTR stated, “[t]here is more at stake beyond the image of the United Nations. This is the first time the international community has really geared up with a determination that it is no longer going to allow these kinds of crimes.”³² The ad hoc tribunals are also seen as important precursors to the eventual establishment of a permanent international court capable of enforcing the commitments contained in treaties such as the Genocide and Geneva Conventions.³³ Further, pending establishment of a permanent court, the ad hoc tribunals are regarded as providing the most significant and the best prospects for the progressive development of international humanitarian law.³⁴

30. See, e.g., Cassese, *supra* note 26, at 7.

31. Human rights organizations have been among the strongest advocates for multilateral action, including economic sanctions and the use of force, to enforce the tribunals' orders for evidence and for the arrest of suspects. See, e.g., *Advertisement*, N.Y. TIMES, July 15, 1997, at A7; Roth, *supra* note 27. The position of the human rights community has received the forceful backing of many lawyers. See, e.g., John F. Hector, *Why U.S. Troops Must Arrest War Criminals*, A.B.A. NAT'L SECURITY REP., Summer 1997, at 7; Walter Gary Sharp, Sr., *International Obligations to Search for and Arrest War Criminals: Government Failure in the Former Yugoslavia?*, 7 DUKE J. COMP. & INT'L L. 411 (1996). Prior to the successful conclusion of the Rome Conference for an International Criminal Court, see *supra* note 13 and accompanying text, it was widely feared that should these new tribunals not succeed, their failure would postpone or even destroy the prospects for such a court. See, e.g., Graham T. Blewitt, *International and National Prosecutions*, in REINING IN IMPUNITY FOR INTERNATIONAL CRIMES AND SERIOUS VIOLATIONS OF FUNDAMENTAL HUMAN RIGHTS: PROCEEDINGS OF THE SIRACUSA CONFERENCE 17–21 SEPTEMBER 1998, at 155 (Christopher C. Joyner & M. Cherif Bassiouni eds., 1998) [hereinafter REINING IN IMPUNITY].

32. James C. McKinley, Jr., *On 1994 Blood Bath in Rwanda, Tribunal Hews to a Glacial Pace*, N.Y. TIMES, Nov. 21, 1997, at A10 (quoting Agwu Okali, registrar of the tribunal). That credible enforcement of international humanitarian law is essential for the credibility of post-Cold War international institutions, including the Security Council, is a theme that is often repeated among the advocates of ad hoc tribunals. See, e.g., Richard Goldstone, *The United Nations' War Crimes Tribunals: An Assessment*, 12 CONN. J. INT'L L. 227, 239 (1997). For a discussion of the contradictions between this perspective and the common assumption that international law is characterized by the absence of Austinian sanctions, see Lucas W. Andrews, *Sailing Around the Flat Earth: The International Criminal Tribunal for the Former Yugoslavia as a Failure of Jurisprudential Theory*, 11 EMORY INT'L L. REV. 471 (1997).

33. See, e.g., M. Cherif Bassiouni, *From Versailles to Rwanda in 75 Years: The Need to Establish a Permanent International Criminal Court*, 10 HARV. HUM. RTS. J. 11 (1997); Cassese, *supra* note 26, at 8–10; Goldstone, *supra* note 32, at 237; Theodor Meron, *The Case for War Crimes Trials in Yugoslavia*, FOREIGN AFF., Summer 1993, at 122. International lawyers see the establishment of such a court, by treaty, as one way to obviate the need to resort to the Security Council to establish further ad hoc tribunals. See, e.g., Louis Joinet, *The Administration of Justice and the Human Rights of Detainees*, U.N. Commission on Human Rights, 49th Sess., Annex II, Principle 21, U.N. Doc. E/CN.4/Sub.2/1997/20, reprinted in LAW & CONTEMP. PROBS., Autumn 1996, at 250, 271–72.

34. See, e.g., William A. Schabas, *Sentencing by International Tribunals: A Human Rights Approach*, 7 DUKE J. COMP. & INT'L L. 461 (1997) (discussing the significance of these precedents with respect to gaps in international law's approach to sentencing); see also Theodor Meron, *International*

At the same time, the carefully circumscribed jurisdiction of these tribunals—limited to a small number of “well-established” international crimes within the context of two egregious instances of atrocities—as well as the limited resources allocated to them, convey to other sovereigns the more subtle message that recourse to such tribunals is an exceptional response to aberrational crimes.³⁵

The distinguished jurist, Antonio Cassese, presently a judge on the ICTY, has best expressed the essential components of the international legal paradigm. Cassese argues that (1) the rendering of justice (that is, criminal accountability) is better than the alternatives (including private vengeance, collective amnesia, or general unconditional amnesties for perpetrators); (2) international justice is preferable to national justice; (3) international justice is not in conflict with peace; and (4) the major stumbling blocks to effective international justice can be remedied with sufficient political will.³⁶

Cassese’s arguments for preferring criminal accountability are premised on morally grounded practicality. Forgetting, he argues, “makes a mockery of the dead” and is, in any case, a fiction since injustices are never truly forgotten but fester.³⁷ Cassese contends that conditional amnesties, such as that by South Africa’s Truth and Reconciliation Commission, while suitable to nations that are undergoing a real democratic transition, are not the best option for countries of the former Yugoslavia or Rwanda since “(a) they have been the scene of appalling atrocities which are beyond amnesty, (b) they are still riven by the violent nationalisms or ethnic hatred over which the wars were fought, and (c) they are not yet willing to be reconciled.”³⁸ In such cases, he argues:

trials establish individual responsibility over collective assignation of guilt, i.e., they establish that not all Germans were responsible for the Holocaust, nor all Turks for the Armenian genocide, nor all Serbs, Muslims, Croats or Hutus but individual perpetrators—although, of course, there may be a great number of perpetrators; justice dissipates the call for revenge, because when the Court metes out to the perpetrator his just desserts, then the victims’ calls for retribution are met;

Criminalization of Internal Atrocities, 89 AM. J. INT’L L. 554 (1995) (suggesting ways that the ad hoc tribunals can progressively develop the substantive law); Meron, *Criminalization*, *supra* note 22 (same); *infra* note 46 and accompanying text (same).

35. For a discussion of the ICTR’s jurisdictional limits, see *infra* Section III.B. The limits on the jurisdiction of the ad hoc tribunals, as well as the rare resort to such mechanisms, recognize that the Security Council can only be an effective enforcer to the extent it is not called upon to sanction too many states for offenses too many other nations are prone to commit.

36. See Antonio Cassese, *Reflections on International Criminal Justice*, 61 MOD. L. REV. 1 (1998). In a more recent article, Cassese outlines the basic elements of the international legal paradigm as a historical progression. See Cassese, *supra* note 26. The subtitles of this article reveal the building blocks of the international legal paradigm: (1) “international criminal prosecution as a means of enforcing international humanitarian law”; (2) “the failure of prosecution through national jurisdiction”; (3) “the failure of prosecution through international jurisdiction prior to 1993”; (4) “the turning point: the new world order”; (5) “the post-Cold-War Twin-Track: the establishment of ad hoc international tribunals and work on the establishment of a permanent international criminal court”; (6) “the problems of international criminal courts as a means of enforcing international humanitarian law”; and (7) “international criminal justice v. State sovereignty.” *Id.* at 2–3.

37. *Id.* at 2–3.

38. *Id.* at 5.

by dint of dispensation of justice, victims are prepared to be reconciled with their erstwhile tormentors, because they know that the latter have now paid for their crimes; a fully reliable record is established of atrocities so that future generations can remember and be made fully cognizant of what happened.³⁹

Cassese's arguments for criminal accountability, strongly reminiscent of the rationales originally offered for the Nuremberg trials, are repeated, almost as a mantra, by other advocates of modern international war crimes prosecutions. Again and again, advocates stress the singular significance of international trials, namely that such proceedings produce historical accounts of barbarism vital to preserving collective memory and preventing its reoccurrence,⁴⁰ mollify surviving victims or families of the dead, affirm the national and international rule of law, and thereby promote national reconciliation.⁴¹ Many contend, in addition, that bringing war crimes suspects to trial encourages governments to respect human rights more generally as well as to democratize.⁴²

39. *Id.* at 6; see also Antonio Cassese, *The International Tribunal for the Former Yugoslavia and the Implementation of International Humanitarian Law*, in THE UNITED NATIONS AND INTERNATIONAL HUMANITARIAN LAW 229 (Luigi Condorelli et al. eds., 1996).

40. One commentator has defined "collective memory" as a "contemporary experiencing, a constant reinterpretation, of the historic past . . . [that is] in constant flux, subject to relatively sudden changes" and that "plays a key role in the symbolic discourse of politics, in the legitimation of political structures and action, and in the justification of collective behavior." Robert R. Shandley, *Introduction to UNWILLING GERMANS? THE GOLDHAGEN DEBATE* 1, 10-11 (Robert R. Shandley ed., 1998) (quoting Andrei Markovits and Simon Reich).

41. See, e.g., *Statement by France at the Security Council*, U.N. SCOR, 48th Sess., 3175th mtg. at 8, 27, U.N. Doc. S/PV.3175 (1993); *Statement by the United States at the Security Council*, U.N. SCOR, 48th Sess., 3217th mtg. at 12-17, U.N. Doc. S/PV.3217 (1993). For similar lists of goals, see SCHARF, *supra* note 5, at 214-48; Payam Akhavan, *Justice and Reconciliation in the Great Lakes Region of Africa: The Contribution of the International Criminal Tribunal for Rwanda*, 7 DUKE J. COMP. & INT'L L. 325 (1997); Payam Akhavan, *Punishing War Crimes in the Former Yugoslavia: A Critical Juncture for the New World Order*, 15 HUM. RTS. Q. 262 (1993); Bassiouni, *supra* note 17, at 9; Richard Goldstone, *Conference Address*, 7 TRANSNAT'L L. & CONTEMP. PROBS. 1 (1997); Richard J. Goldstone, *Justice as a Tool for Peace-Making: Truth Commissions and International Criminal Tribunals*, 28 N.Y.U. J. INT'L L. & POL. 485 (1996) [hereinafter Goldstone, *Justice as a Tool*]; Mark W. Janis, *The Utility of International Criminal Courts*, 12 CONN. J. INT'L L. 161, 163-67 (1997); Theodor Meron, *Answering for War Crimes*, FOREIGN AFF., Winter 1997, at 2; Meron, *supra* note 33; Michael P. Scharf, *Reining in Impunity for International Crimes Report of the Rapporteur*, in REINING IN IMPUNITY, *supra* note 31, at 127; Minna Schrag, *The Yugoslav War Crimes Tribunal: An Interim Assessment*, 7 TRANSNAT'L L. & CONTEMP. PROBS. 16 (1997); Daphna Shraga & Ralph Zacklin, *The International Criminal Tribunal for Rwanda*, 7 EUR. J. INT'L L. 501; and M. Cornelio Sommaruga, *Allocution d'ouverture du Président du Comité international de la Croix-Rouge*, in THE UNITED NATIONS AND INTERNATIONAL HUMANITARIAN LAW, *supra* note 39, at 21, 25.

42. See, e.g., Iris Almeida, *Compensation and Reparation for Gross Violations of Human Rights: Advancing the International Discourse and Action*, in REINING IN IMPUNITY, *supra* note 31, at 399, 401. For an account that sees accountability as "intrinsic to the legitimation of democratic states and theoretically prior to conceptions of human and property rights," see JOHN BORNEMAN, *SETTLING ACCOUNTS* at ix (1997). Borneman argues that trials for mass atrocities are ritualistic performances needed for democratic legitimacy. See *id.* at x; see also Stephan Landsman, *Alternative Responses to Serious Human Rights Abuses: of Prosecution and Truth Commissions*, LAW & CONTEMP. PROBS., Autumn 1996, at 81 (considering the pros and cons of criminal prosecutions in terms of the promotion of democracy); Ruti Teitel, *Transitional Jurisprudence: The Role of Law in Political Transformation*, 106 YALE L.J. 2009 (1997) (arguing that the role of law in transitional jurisprudence centers on its use as a paradigm for the new political regime).

This first set of arguments has readily led judges like Cassese, as well as many other international lawyers, to their second set of contentions in favor of international forms of accountability. Thus, it is argued that the rendering of justice is too important to be left to the whims of governments that are prone to compromise either on enforcing the law against perpetrators or on guaranteeing them due process.⁴³ It is also said that, even when national authorities demonstrate a willingness to try perpetrators fairly, international fora more readily fulfill victims' expectations for the "highest form of justice"⁴⁴ and are better at upholding the "rule of international law."⁴⁵ By comparison to national courts, international tribunals are perceived to enjoy certain advantages: they are less destabilizing to fragile governments, are less likely to cede to "short-term objectives of national politics," can count on the expertise of jurists who are better qualified and able to progressively develop international law, are more impartial than proceedings adjudicated by judges "caught up in the milieu which is the subject of the trials," are more likely to be respected by national authorities, can investigate crimes with ramifications in many states more easily, and can render more uniform justice.⁴⁶ Further, because international tribunals are purportedly impartial, they are best able to build "impartial and objective" records of events that are more "far-reaching and thorough than those undertaken by a fact-finding commission."⁴⁷ Arguments in favor of international prosecutions are also linked to the need to promote and maintain international peace; international trials are seen as superior methods of meeting the symbolic and practical needs of the international community.⁴⁸

Cassese's third and fourth arguments, contending that the pursuit of international criminal accountability is fully consistent with peace and can be made effective, address international lawyers' *bête noire*—the views of political realists.⁴⁹ Cassese argues that international trials "do not make wars" but that the absence of such trials leaves undeterred advocates of ethnic nationalism, thereby perpetuating ethnic and religious hatreds and preventing

43. See Cassese, *supra* note 36, at 6; see also Cassese, *supra* note 39, at 241 (indicating that international tribunals are "arguably, in a better position to enforce international humanitarian law," at least with respect to high-level perpetrators).

44. Goldstone, *supra* note 32, at 238.

45. Cassese, *supra* note 26, at 9.

46. See Cassese, *supra* note 26, at 9–10; Cassese, *supra* note 36, at 8–9. For similar arguments, see RATNER & ABRAMS, *supra* note 23, at 184. See also Cassese, *supra* note 39, at 232–43, 245 (discussing ways international tribunals clarify the substantive and procedural law relevant to international crimes and stimulate wider appreciation for international humanitarian law); Meron, *Criminalization*, *supra* note 22 (same).

47. Cassese, *supra* note 26, at 9–10.

48. Thus, Payam Akhavan argues that the destabilizing effects of the Balkan conflict spilled over into neighboring states and created a "general sense of insecurity on the part of other vulnerable minorities," creating a need for a general warning to would-be aggressors everywhere. See Akhavan, *supra* note 27, at 740–41; see also *id.* at 742 (arguing that the ICTY contributes to general deterrence in the world through the "moral propaganda of international criminal justice").

49. Repeatedly, supporters of the ad hoc tribunals have striven to answer the demands of *realpolitik*. See, e.g., Bassiouni, *supra* note 17, at 11–13; Elizabeth Odio Benito, *Justice for Peace: No to Impunity*, in REINING IN IMPUNITY, *supra* note 31, at 149, 151.

the installation of pluralist democracy.⁵⁰ He argues that the major stumbling blocks to effective international justice, its remoteness from the locale of evidence and witnesses, and the reluctance of states to enforce international edicts, can be overcome if states prove amenable to treating orders issued by war crimes tribunals as lawful commands.⁵¹ As this suggests, misplaced or parochial worries about the erosion of state sovereignty are regarded as the main threat to the "vertical" enforcement of international norms by the international community through such tribunals.⁵²

The rules and jurisdiction of the new ad hoc tribunals for the former Yugoslavia and Rwanda correspond closely to these contentions. The jurisdictional provisions within each of these tribunals' statutes provide for "primacy" over national courts.⁵³ This reflects the prevailing wisdom that trials organized within the regions affected by mass atrocities should either be discouraged, as within the Balkans where they are likely to be political show trials that would undermine public support for the rule of law, or kept at a distance, as within Rwanda, where such second-best alternatives would prove selective in applying the law and less competent in applying the requirements of the treaty and customary law developments that have emerged in the fifty years since Nuremberg. Creation of these tribunals pursuant to U.N. Charter authority also accords with the view that it is politically desirable, as well as legally justified, to conduct such proceedings at the international level given the interstate interests implicated by the nature or extent of atrocities in the former Yugoslavia and in Rwanda.⁵⁴

50. See Cassese, *supra* note 36, at 8–9.

51. See *id.* at 9–10.

52. See, e.g., Cassese, *supra* note 26, at 11–12, 16 (describing "excessive clinging to state sovereignty" as the main threat to ad hoc tribunals' effectiveness).

53. See Statute of the International Tribunal, art. 9(2), available at <<http://www.un.org/icty/basic/i-b-ens.html>> [hereinafter ICTY Statute]; Statute of the International Tribunal for Rwanda, art. 8(2), available at <<http://www.ict.rw/statute.html>> [hereinafter ICTR Statute].

54. These interests were enumerated by the Security Council when it established both the ICTY and the ICTR. In both instances, the Council determined that crimes committed in these regions entail credible "threats to the international peace," as foreseen under Chapter VII of the U.N. Charter, because the offenses create waves of refugees across international boundaries; the failure to prosecute international crimes threatens the stability or efficacy of the international rule of law and the credibility of the United Nations; at least some of the crimes involve the actions of more than one state; and the international community is entitled to assume that governments that unleash such brutal forces, even against their own citizens, are, sooner or later, apt to commit aggression against other states or aliens within their borders. See, e.g., *Secretary-General's Report*, *supra* note 11, para. 6; S.C. Res. 955, *supra* note 11, pmbl. Apart from the endorsement of the U.N. Secretariat and the Security Council, establishment of the ad hoc tribunals on the basis of such justifications has won the endorsement of the General Assembly, the human rights community, the vast majority of legal commentators, and the judges on the ICTY. See, e.g., G.A. Res. 49/10, U.N. GAOR, 49th Sess., Agenda Item 39, at 7, U.N. Doc. A/RES/49/10 (1994) (encouraging full funding for the Yugoslav Tribunal); *Financing of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighboring States Between 1 January and 31 December 1994: Report of the Fifth Committee (Part III)*, U.N. GAOR, 50th Sess., Agenda Item 160, at 4, U.N. Doc. A/50/852/Add.2 (1996) (allotting an additional \$32.5 million to the Rwanda Tribunal for 1996); HUMAN RIGHTS WATCH, *PLAYING THE "COMMUNAL CARD": COMMUNAL VIOLENCE AND HUMAN RIGHTS 1–17* (1995) (discussing Rwanda and

There is also widespread consensus among international lawyers that the flaws of prior proceedings at Nuremberg and Tokyo have been largely corrected and that the new ad hoc tribunals for the former Yugoslavia and Rwanda are more credible instruments of the international community in terms of their respective bases of jurisdiction, rules and procedures, bench, and bar.⁵⁵ To date, most international lawyers regard proceedings within these ad hoc tribunals as more attractive than available alternatives and few criticize the jurisdictional primacy these entities enjoy.⁵⁶

International lawyers' emphasis on international fora has also been accompanied by clear preferences as to whom to indict. From the outset, most international lawyers have argued that the scarce resources of the international community need to be devoted to trying those perpetrators who have the greatest responsibility, by which they mean the leaders and instigators, at a high policy level, of mass atrocities in the former Yugoslavia and in Rwanda.⁵⁷ While circumstances, such as the fortuitous sighting and subsequent arrest of a low-level Serbian perpetrator, Dusko Tadic, compelled the ICTY to proceed with his trial as its first full-fledged effort, tribunal insiders and supporters have generally argued that the tribunals' success will be judged by the degree to which both reach high-level perpetrators.⁵⁸ Logistical limitations are not the only reason for this emphasis on investigating, indicting, and prosecuting primarily high-level individuals, even if this results in few actual trials.⁵⁹ Such preferences are directly linked to the

the international community's response).

55. See, e.g., RATNER & ABRAMS, *supra* note 23, at 185; SCHARF, *supra* note 5, at 3–17.

56. For a rare critique of the ICTR's jurisdictional primacy, see Morris, *supra* note 12, *passim*. Significantly, jurisdictional primacy is not anticipated for the permanent international criminal court. See *infra* note 551 and accompanying text. Nonetheless, most international lawyers evince a clear preference for a permanent international criminal court over the establishment of additional ad hoc bodies. See, e.g., RATNER & ABRAMS, *supra* note 23, at 184–89; PROCEEDINGS OF THE 89TH ANNUAL MEETING OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW 301, 301–04 (1995) (remarks by James Crawford).

57. Compare Bassiouni, *supra* note 17, at 20 & n.51 (urging that, as a matter of policy, international prosecutions be limited to high-level perpetrators except where low-level trials may usefully generate information regarding high-level actors), and Joinet, *supra* note 33, para. 48 (arguing that, since international criminal tribunals can try only a few people annually, perpetrators at the top of the hierarchy should be tried first), with Morris, *supra* note 12, at 370 (questioning international lawyers' traditional preference for high-level international prosecutions). See also Cassese, *supra* note 39, at 242 (arguing that the Chapter VII mandate of the ad hoc tribunals justifies a focus on bringing to trial those who are most responsible for the underlying threat to international peace).

58. Dusko Tadic was the first defendant in the ICTY's first full trial and the judgment against him the first international war crimes judgment since Nuremberg. See *Prosecutor v. Tadic*, No. IT-94-1-T (ICTY May 7, 1997) available at Opinion and Judgment (visited Mar. 30, 1999) <<http://www.un.org/I.C.T.Y./trialc2/jugement-e/70714se2.htm>> [hereinafter Tadic Judgment]. As that judgment indicates, Tadic was not ultimately charged with genocide and there was no claim that he was in charge of or instigated Balkan "ethnic cleansing." Tadic was convicted of physical beatings and other abuses committed against approximately 30 individuals. See *id.* While some international lawyers have argued that there are tactical benefits to trying low-level perpetrators, see, e.g., SCHARF, *supra* note 5, at 85, most have stressed the need to focus the tribunals' energies on those regarded as most responsible for atrocities, especially high-level government officials. See also *id.* at 219, 225 (noting that the ICTY's deterrent value may ultimately be judged by whether its reach extends to Karadzic and Mladic, two high-level Bosnian Serb leaders).

59. As might be expected, international lawyers argue that trials for large numbers of perpetrators are not necessary to achieve most, if not all, of their goals. Thus, Payam Akhavan argues that general deterrence is achievable without punishing large numbers because "the ultimate foundation

premise that these are crimes of states. Only exceptional crimes, after all, are committed by government elites, are the subject of international treaties or customary law, and implicate transborder issues of direct concern to organizations such as the United Nations. In addition, some contend that the enforcement advantages enjoyed by international tribunals apply only with respect to the prosecutions of "higher ups" and that, for this reason, low-level perpetrators should mostly be dealt with by national courts "as guided by the decisions of the international tribunal."⁶⁰ The ICTR's prosecutors have been especially attentive to such recommendations. To date, the public indictments, suspects in custody, and ongoing trials of that tribunal, although few in number in proportion to the number of likely Rwandan perpetrators, have involved a veritable who's who of prominent persons within the former regime in Rwanda.⁶¹

Journalists, by contrast, argue that recent atrocities in Rwanda and the Balkans can only be understood by comprehending the underlying social and other conditions of the regions affected, including the prevalence of endemic ethnic hatred. To many people, especially foreign correspondents who cover Rwanda and the Balkans, atrocities in these regions are prototypical crimes of hate—that is, particularly virulent forms of intergroup violence with only sporadic, incidental interstate dimensions. Contemporaneous press accounts, as well as many other chronicles by those outside international law circles, tend to describe Rwanda and Balkan atrocities as arising from situations in which a variety of individuals (from politicians to cultural icons) and groups (from political parties to churches) have chosen to revive latent hostilities, thereby inflaming groups to act on familiar fears or hatreds of "the other" as defined by gender, race, religion, or ethnicity (or a combination of all of these).⁶² While explanations for these crimes of hate vary, by region and by storyteller, these perspectives rely less on the failures (and potential benefits) of international law.

This second paradigmatic perspective does not view the Rwandan genocide or Balkan "ethnic cleansing" as aberrant deviations from the norm of interstate behavior and neither tragedy is regarded as having much in common with classical resorts to interstate aggression. Thus, while popular press

for prevention of future criminal behavior is the transformation of popular conceptions of correct behavior and the gradual internalization of values that encourage habitual conformity with the law." Akhavan, *supra* note 27, at 747. For the argument that criminal trials for too many perpetrators may undermine the goals of international accountability, see *infra* note 441 and accompanying text.

60. Cassese, *supra* note 39, at 241.

61. See *Suspects* (visited Apr. 12, 1999) <<http://www.wcw.org>> (providing an alphabetical listing of 21 suspects indicted by the ICTR through May 29, 1998, including 13 in custody or in the midst of trials and Rwanda's former vice president, four former mayors, one cabinet minister, and seven other ministers or elected officials).

62. For a distillation and detailed enumeration of press accounts relating to the Balkans, see GENOCIDE AFTER EMOTION: THE POSTEMOTIONAL BALKAN WAR (Stjepan G. Meštrović ed., 1996) [hereinafter GENOCIDE AFTER EMOTION]. Some of the press coverage seems inspired by Samuel Huntington's predictions about looming intra-cultural wars. See BORNEMAN, *supra* note 42, at 141–42 (contending that this "culturalist" perspective assumes that all differences are inherited from the weighty past and fails to explain change); Samuel Huntington, *The Clash of Civilizations?*, FOREIGN AFF., Summer 1993, at 22–49 (predicting future clashes).

accounts acknowledge that these conflicts have international dimensions in terms of effects (given the resulting streams of refugees, for example) and are partly caused by the shipment of arms and people across borders, most of these descriptions emphasize instead the degree of similarity between the Balkan and Rwanda massacres and ubiquitous domestic pogroms having little to do with transborder aggression.⁶³

For minorities within the United States, and possibly throughout the world, this second perspective is likely to have more resonance than the first. The typical person of color in the United States or a member of a recognizable minority group anywhere scarcely needs a briefing on the laws of war or the structure of the Westphalian system to find familiar analogues to the ugly appeals to "ethnic purity" that have preceded and accompanied these massacres and that are still commonly encountered in both regions. The psychological tools used to inflame perpetrators seem sadly familiar. The propaganda spewed forth by hate-mongers in the former Yugoslavia and Rwanda, pitting Serb against non-Serb or Croat against Muslim or Hutu versus Tutsi, replicate the rhetoric, the tactics, and many of the arguments used by white supremacists in the United States or neo-Nazi skinheads elsewhere in Europe. Hate groups throughout the world, it seems, target perceived enemies through nearly identical appeals. In all cases, the message conveyed is that members of the other group are subhuman, not entitled to respect, and a threat to core values. Further, to the extent violence in either Rwanda or the Balkans has been directed at women, perpetrators there seem to have borrowed a page from age-old misogyny and the ageless tendency to target groups that are among the least empowered.⁶⁴ In both Rwanda and the Balkans there is much evidence of gender-specific violence and considerable evidence to suggest that where it does occur, as with respect to systematic rapes against Muslim women in the Balkans or against Tutsi women by Hutu, such crimes are often committed against those who are of the "wrong" ethnicity, tribe, or religion *and* who are female.⁶⁵ In both regions, gender has

63. See, e.g., James C. McKinley, Jr., *Machete Returns to Rwanda, Rekindling a Genocidal War*, N.Y. TIMES, Dec. 15, 1997, at A1; James C. McKinley, Jr., *Searching in Vain for Rwanda's Moral High Ground*, N.Y. TIMES, Dec. 21, 1997, at C3 [hereinafter McKinley, *Searching in Vain for Rwanda's Moral High Ground*]; Tina Rosenberg, *Defending the Indefensible*, N.Y. TIMES MAGAZINE, Apr. 19, 1998, at 46; Ronald Steel, *Let Them Sink*, NEW REPUBLIC, Nov. 2, 1992, at 15.

64. While certain aspects of such crimes, including allegations of deliberate campaigns to rape-with-intent-to-impregnate in the course of Balkan "ethnic cleansing," may constitute new forms of victimization, the vast bulk of gender specific violence, especially in Rwanda, has been (sadly) reminiscent of an ancient connection between rape and warfare. See, e.g., HUMAN RIGHTS WATCH, *SHATTERED LIVES: SEXUAL VIOLENCE DURING THE RWANDAN GENOCIDE AND ITS AFTERMATH* (1996); NEIER, *supra* note 15, at 172-91.

65. With respect to the Balkans, see, for example, the *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780*, Commission of Experts, U.N. SCOR, U.N. Doc. S/1994/674, at 57-60 (1994); and Amy E. Ray, *The Shame of It: Gender-Based Terrorism in the Former Yugoslavia and the Failure of International Human Rights Law to Comprehend the Injuries*, 46 AM. U. L. REV. 793 (1997). With respect to Rwanda, see HUMAN RIGHTS WATCH, *supra* note 64, at 42-52.

been used as a tool of discrimination against the offending other, in addition to ethnicity or religion.⁶⁶

Despite its appeal among some audiences, this more ethnocentric⁶⁷ perspective has been subject to severe criticism in the context of Rwanda and the Balkans. Some political scientists and historians have argued that accounts of mass atrocities that attribute these offenses to "ethnic conflict" encourage facile generalizations across continents and time at the expense of inconvenient facts, including the existence of significant groups within the Balkans and Rwanda who resisted the calls for violence (and who sometimes paid for their tolerance with their lives),⁶⁸ as well as the problem that similar appeals to ethnic violence have not always succeeded.⁶⁹

Other observers have challenged not only the accuracy of these descriptions but also their suggested prescriptions. Ethnocentric accounts appear objectionable to the extent they imply that outsiders should do nothing in response since ancient "tribalisms" in the Balkans or in Rwanda would only be worsened by ignorant, even if well-intentioned, foreign intervention.⁷⁰ An emphasis on the alleged ethnic origins of the conflict can easily lead to condemnation of all groups in the regions affected by violence or to the conclusion that cases of feuding neighbors are not deserving of outside intervention because such cases are characterized by the equal or at least

66. See Simon Chesterman, *Never Again . . . and Again: Law, Order, and the Gender of War Crimes in Bosnia and Beyond*, 22 YALE J. INT'L L. 299, 324-42 (1997); Christine Chinkin, *Rape and Sexual Abuse of Women in International Law*, 5 EUR. J. INT'L L. 326, 326-30 (1994); Catharine A. MacKinnon, *Crimes of War, Crimes of Peace*, 4 UCLA WOMEN'S L.J. 59 (1993); see also *supra* notes 64-65 (enumerating instances of gender violence in both the Balkans and Rwanda).

67. Max Weber's extremely generalized notion of "ethnicity" seems suitable in this context. "We shall call 'ethnic groups' those human groups that entertain a subjective belief in their common descent because of similarities of physical type or of customs or both or because of memories of colonization and migration." Giorgio Ausenda, *Postscript: Current Issues in the Study of Ethnicity, Ethnic Conflict and the Humanitarian Intervention and Questions for Future Research*, in WAR AND ETHNICITY: GLOBAL CONNECTIONS AND LOCAL VIOLENCE 218 (David Turton ed., 1997) [hereinafter WAR AND ETHNICITY] (quoting MAX WEBER, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY* 389 (Guenther Roth & Claus Wittich eds., 1978)). This inclusive conception of ethnicity is grounded in subjective perceptions of identity or extended kinship that make distinctions based on racial, geographic, linguistic, religious, tribal, and even cultural lines. See, e.g., Amy L. Chua, *Markets, Democracy, and Ethnicity: Toward a New Paradigm for Law and Development*, 108 YALE L.J. 1, 10 (1998) (quoting Donald L. Horowitz). An ethnocentric approach to mass atrocities suggests an emphasis on the discriminatory animus that drives perpetrators to target individuals based on perpetrators' subjective definition of the target group's status as "the other." To this extent, such approaches can be adapted to examining gender-based, as well as ethnic, bigotry.

68. For critiques of such accounts, see, for example, HUMAN RIGHTS WATCH, *supra* note 54, at 17 (discussing Rwanda); Tom Gallagher, *My Neighbor, My Enemy: The Manipulation of Ethnic Identity and the Origins and Conduct of War in Yugoslavia*, in WAR AND ETHNICITY, *supra* note 67, at 47, 68-70 (discussing the Balkans).

69. See, e.g., Stefan Troebst, *An Ethnic War That Did Not Take Place: Macedonia, Its Minorities and Its Neighbors in the 1990s*, in WAR AND ETHNICITY, *supra* note 67, at 77; cf. Eric Stein, *On Peaceful Resolution of Ethnic Differences*, in Festschrift für Ernst-Joachim Mestmäcker 321 (Ulrich Immenga et al. eds., 1996) (discussing the Czecho-Slovak separation).

70. For examples of such prescriptions, see, for example, John Stedman, *The New Interventionists*, FOREIGN AFF., Winter 1992, at 3, 7-8, 14-16; Steel, *supra* note 63. Thus, the British historian Paul Johnson has argued that Balkan problems are "rooted in the nature of the inhabitants" and that "[s]hort of exterminating them, there is really nothing to be done." NEIER, *supra* note 15, at 146 (quoting Paul Johnson).

comparable guilt of all sides.⁷¹ Critics complain that an emphasis on race, ethnicity, or religion can become a comfortable rationale for passivity for those outside the affected region.⁷²

There also appear to be latent forms of racism in Western newspaper editorials suggesting that, given the supposed intractability of Rwandan tribal antagonisms or the ostensible irrationality of Bosnia's fundamentalists, it might be best to simply leave the parties to fend for themselves, or even kill themselves off. Such stereotyping of the antagonists in both regions seems sadly reminiscent of the racist propaganda that helped to inflame the massacres themselves.⁷³ Similarly, those who admit that gender-specific violence has occurred but resist calls for outside intervention either to prevent its reoccurrence or to punish perpetrators seem to be suggesting, at least sub-rosa, that "boys will be boys" or that rape and sexual assaults are endemic to war and impossible to eradicate.⁷⁴

There is, finally, suspicion of the motives of those whose accounts focus on discrimination based on ethnicity and who draw cautionary lessons from the spiral of ethnic politics. Political conservatives in the United States have argued that violence in Rwanda and the Balkans suggest the perils of encouraging, particularly through government policies, ethnic identity at the expense of a united national identity, as through government efforts that reportedly "promote" ethnic self-identification, such as affirmative action programs.⁷⁵ Similarly, some have suggested that Western feminists have

71. Compare McKinley, *Searching in Vain for Rwanda's Moral High Ground*, *supra* note 63, at 3 (describing Rwanda as a "moral quagmire"), with GOUREVITCH, *supra* note 1, at 185-86 (questioning such journalistic accounts).

72. For such critiques, see PRUNIER, *supra* note 10, at 339-40 (discussing French officials' statements suggesting that the killings in Rwanda in 1994 were "double genocides" whereby both sides were equally guilty); Michael Sells, *Religion, History, and Genocide in Bosnia-Herzegovina*, in RELIGION AND JUSTICE IN THE WAR OVER BOSNIA 23, 41 (G. Scott Davis ed., 1996) (critiquing "moral equalizing" in the context of the Balkans); see also GOUREVITCH, *supra* note 1, at 59, 185-86 (observing the simplicity of media reports and the possible passivity that those reports cause); HUMAN RIGHTS WATCH, *supra* note 54, at vii (stating that international inaction is "more easily excused if the source of . . . violence is understood to be beyond control"); James J. Sadkovich, *The Response of the American Media to Balkan Neo-Nationalisms*, in GENOCIDE AFTER EMOTION, *supra* note 62, at 113-57. As David Turton points out, those who see these massacres as the result of the unfreezing of suspended ancient hostilities in the wake of the end of the Cold War or the collapse of communism are apt to recommend against intervention. See David Turton, *Introduction to WAR AND ETHNICITY*, *supra* note 67, at 1, 33-34. For international lawyers' responses, see *infra* notes 77-88 and accompanying text (discussing Akhavan).

73. With respect to Rwanda, see generally GOUREVITCH, *supra* note 1, at 154-57. With respect to the Balkans, see, for example, Turton, *supra* note 72, at 32-34; and GENOCIDE AFTER EMOTION, *supra* note 62, *passim*. As one Croatian journalist, commenting on how concepts of the "other" have been deployed in the Balkans, put it: "For Europe, the 'other' is the wild 'Balkans' that they pretend not to understand." See Violet B. Ketels, *Havel to the Castle! The Power of the Word*, 548 ANNALS AM. ACAD. POL. & SOC. SCI. 45, 60 (1996) (quoting Slavenka Drakulić).

74. Cf. Rhonda Copelon, *Gendered War Crimes: Reconceptualizing Rape in Time of War*, in WOMEN'S RIGHTS, HUMAN RIGHTS: INTERNATIONAL FEMINIST PERSPECTIVES 197, 197 (Julie Peters & Andrea Wolper eds., 1995) (noting that military tribunals rarely indict rape). For an account of how the "gender culture of the military" may contribute to the likelihood of rape, see Madeline Morris, *By Force of Arms: Rape, War, and Military Culture*, 45 DUKE L.J. 651, 654 (1996).

75. See generally Kenneth Anderson, *Illiberal Tolerance: An Essay on the Fall of Yugoslavia and the Rise of Multiculturalism in the United States*, 33 VA. J. INT'L L. 385, 420 n.91, 424-27 (discussing such arguments); *The Balkanization of American Culture*, CHRONICLES, June 1993, at 25

exploited the gender-specific aspects of these atrocities to promote their own domestic agendas.⁷⁶

The problems with some of the more ethnocentric accounts, real or imagined, have only reinforced the confidence of international lawyers. Because it does not rely on the significance of race, ethnicity, religion, or gender, and only deals with such issues to the extent these are relevant to prove particular charges under international humanitarian law, the international legal paradigm seems free from many of the same critiques.

Since international lawyers start from the premise that international crimes were committed in both Rwanda and the Balkans, they presume from the outset that there are culprits and innocent victims, aggressors/perpetrators, as well as law-abiding soldiers and civilians, all of whom can be judged in terms of moral, or at least legal, culpability. As noted, international lawyers argue that international criminal prosecutions will show the guilt of identifiable individuals, and not Serbs, Croats, Muslims, Hutus, Tutsis, or any other group. As Cassese contends, the point is to discourage notions of collective complicity by finding individual perpetrators, and not ethnic groups, accountable.⁷⁷

Contrary to those who would blame ancient ethnic hatreds, international lawyers are proactive and non-defeatist. They believe that the rule of law can be applied even in the face of mass atrocity, that criminal accountability is appropriate because all sides are not equally guilty, and that international intervention to encourage accountability is neither useless nor counterproductive. International lawyers assert that “there is always *something to be done*.”⁷⁸ The international legal paradigm is therefore hostile to the view that the primary causes for atrocities in the former Yugoslavia or Rwanda are “primordial tribal hatreds” or historically predetermined but spontaneous outbursts of uncontrollable bloodlust between distinct ethnic groups. Accordingly, Payam Akhavan, presently a prosecutor in the ICTR, argues that “primordialist” views imply that trials for perpetrators could only have a marginal impact on deterrence, the prospects for reconciliation, or

(featuring a series of perspectives on the “balkanization” of American culture).

76. See Anderson, *supra* note 75, at 397 n.39.

77. See *supra* note 39 and accompanying text; see also Akhavan, *supra* note 27, at 741–42 (arguing that one goal of the ICTY is to produce a historic account that demonstrates that individuals, primarily leaders, bear responsibility, and not groups); Meron, *supra* note 41, at 2–3 (stating that criminal trials “assign guilt for war crimes to the individual perpetrators and the leaders responsible, rather than allowing blame to fall on entire groups and nations”); Roth, *supra* note 27, at 21 (same). Nor are these views limited to the scholarly community. See, e.g., *The Search for Justice in the Former Yugoslavia and Beyond: An Interview with Minna Schrag* ’75, COLUM. L. SCH. REP., Autumn 1996, at 25 (quoting Minna Schrag, a former prosecutor at the ICTY); Sharp, *supra* note 31, at 454 (quoting the top human rights officer at the U.S. Department of State on the importance of bringing war criminals to justice); Mary Ann Tétreault, *Justice for All: Wartime Rape and Women’s Human Rights*, 3 GLOBAL GOVERNANCE 197, 197 (1997) (quoting the former chief prosecutor within the tribunals on the importance of individual guilt).

By comparison, alternatives to criminal trials, such as lustration, are seen as fundamentally defective precisely because they encourage notions of collective complicity. See, e.g., Ved P. Nanda, *Civil and Political Sanctions as an Accountability Mechanism for Massive Violations of Human Rights*, in REINING IN IMPUNITY, *supra* note 31, at 313, 322–23.

78. Anderson, *supra* note 75, at 405.

peace-building.⁷⁹ He proposes countering such ethnocentric views by showing that genocide is the end product of a deliberate campaign by leaders and other elites to artificially create an ethnic enemy, a “calculated conspiracy that is capable of definition, containment, and prevention.”⁸⁰ From Akhavan’s perspective, the international legal paradigm is partly defined by its rejection of primordialism since it is that rejection that helps to justify the pursuit of accountability, legitimizes the targeting of high-level architects of violence, excuses the failure to punish each and every one of the thousands of other (particularly low-level) perpetrators, and answers realist critics who argue that trials and the truths they reveal accomplish nothing.

While international lawyers do not ignore the ethnic origins of these conflicts, their paradigm is premised on an “instrumentalist” view of ethnicity that tends to subsume its importance.⁸¹ Although ethnicity is barely discussed by the supporters of the ad hoc tribunals, to the extent it is addressed, ethnic identity is seen as pliable, artificial, constructed, and therefore dismissible.⁸² Thus, for example, Payam Akhavan argues that ethnic identity is essentially a “political contrivance of elites” that, in the context of the Balkans, became an instrument of systematic incitement to mass violence.⁸³ He argues that Balkan ethnic cleansing, far from representing a historically determined “clash of civilizations,” was really a “clash of political elites.”⁸⁴ Akhavan therefore concludes that one of the major functions of the ICTY is to recount the story of how “elites manipulated ethnic identity to foment violence and consolidate political power.”⁸⁵ He argues that by revealing this truth, the ICTY serves to counter Rwandan political elites’ campaign of collective demonization, thereby promoting all the laudatory goals of criminal accountability.⁸⁶ Under the international legal paradigm, judicial accounts of mass atrocity should avoid dwelling on alleged ethnic differences but should emphasize how ethnic identity came to be exploited by high-level instigators of violence.⁸⁷ It also implies that for criminal trials to be effective conveyors of the truth, they need to be seen as impartial public fora far removed from the vestiges of ethnic

79. See Akhavan, *supra* note 27, at 752–65.

80. *Id.* at 752.

81. See, e.g., *id.* at 752–65. Revealingly, Akhavan entitles this portion of his article “Understanding the Non-Ethnicity of Ethnic Conflict.” *Id.* at 752. The dismissal of ethnic concerns may lead to policy recommendations that go beyond the issues addressed here. Thus, Mendlovitz and Fousek, for example, recommend the establishment of a transnational “Genocide Police Force” on the basis that it would “bypass the politically volatile issues of national identity.” Mendlovitz & Fousek, *supra* note 28, at 147.

82. Benedict Anderson’s concept of “imagined communities” is frequently cited for this purpose. See, e.g., David Wippman, *Introduction to INTERNATIONAL LAW AND ETHNIC CONFLICT* 4 (David Wippman ed., 1998). As Wippman points out, international lawyers’ dismissal of ethnicity as an “ordinary or natural category for legal analysis,” *id.* at 2, also stems from liberal assumptions regarding the ostensibly diminishing significance of ethnicity in the wake of modernization. See *id.* at 6.

83. Akhavan, *supra* note 27, at 753.

84. *Id.* at 758–65.

85. *Id.* at 765.

86. See *id.*

87. See José E. Alvarez, *Rush to Closure: Lessons of the Tadic Judgment*, 96 MICH. L. REV. 2031, 2044–53, 2066–68 (1998) (analyzing how the ICTY attempted to follow this approach in the course of the *Tadic* case).

indoctrination and misinformation. For this purpose, the international legal paradigm relies on a judiciary whose composition and judgments evince ethnic neutrality.⁸⁸

As is suggested by Cassese's third and fourth arguments above,⁸⁹ the main critique of the international legal paradigm has come from political realists, including a few renegade lawyers who regard the arguments for international trials as based on naive internationalism or utopian visions of world order.⁹⁰ For such realists, the establishment of these tribunals is an exercise in hypocrisy and constitutes only a cowardly attempt to disguise the West's failure to prevent predicted atrocities in both regions.⁹¹ Apart from the few that decry all attempts to impose international criminal accountability, the main lines of contention are between those who suggest, as does W. Michael Reisman, that amnesties need to remain part of the lawyers' "toolbox," especially when perpetrators are not defeated on the battlefield and need to be enticed to make peace, and those, like Cassese, who strenuously deny that criminal trials are incompatible with achieving peace.⁹²

88. See Akhavan, *supra* note 27, at 771 (arguing that international tribunals can arrive at objective truth or at least "an empathy for human suffering that transcends the bonds of blood and soil"); see also *supra* text accompanying note 46 (citing Cassese); *infra* Part IV (questioning attempts to implement ethnic neutrality).

89. See *supra* notes 49–52 and accompanying text.

90. See, e.g., ALFRED P. RUBIN, *ETHICS AND AUTHORITY IN INTERNATIONAL LAW* 156–57, 183 (1997); Anderson, *supra* note 75, *passim*; see also Akhavan, *supra* note 27, at 738–40 (discussing the "peace versus accountability" debate that initially surrounded the ICTY); Alfred P. Rubin, *An International Criminal Tribunal for the Former Yugoslavia*, 6 PACE INT'L L. REV. 7–17 (1994) (discussing the contradictions between the Westphalian legal order and an idealistic, "monist" conception of the United Nations).

91. See Robert M. Hayden, *Reply*, 55 SLAVIC REV. 767 (1996) [hereinafter Hayden, *Reply*]; Alfred P. Rubin, *Dayton, Bosnia, and the Limits of Law*, NAT'L INTEREST, Winter 1996–97, at 41 (suggesting alternatives to establishing a tribunal). For a more general critique of international humanitarian law, see Chris af Jochnick & Roger Normand, *The Legitimation of Violence: A Critical History of the Laws of War*, 35 HARV. INT'L L.J. 49 (1994). See also Robert M. Hayden, *Schindler's Fate: Genocide, Ethnic Cleansing, and Population Transfers*, 55 SLAVIC REV. 727, 736–43 (1996) (criticizing attempts to criminalize "ethnic cleansing" in the European context) [hereinafter Hayden, *Schindler's Fate*].

92. Compare W. Michael Reisman, *Legal Responses to Genocide and Other Massive Violations of Human Rights*, LAW & CONTEMP. PROBS., Autumn 1996, at 75 (warning of "judicial romanticism"), with *supra* notes 38–40 and accompanying text (noting Cassese's responses). The legalist/realist divide is also evident with respect to arguments about whether or not accountability demands criminal liability. The realist school argues that, given objections to international criminal liability likely to be posed by reluctant sovereigns and the need to secure prompt peace on the ground in fragile states that have been the site of mass atrocities, it may be sufficient in some cases to pursue other remedies. Other remedies may include compensation commissions or other forms of public acknowledgment on behalf of victims, truth commissions, or lustrations. See generally IMPUNITY AND HUMAN RIGHTS, *supra* note 8, at 13–70 (surveying such techniques); Reisman, *supra*, at 76 (claiming that to achieve all the goals of public order more means than just criminal tribunals are required). Compare Goldstone, *Justice as a Tool*, *supra* note 41, at 492–501 (distinguishing the South African Truth Commission from the ICTR and ICTY), with Emily H. McCarthy, *South Africa's Amnesty Process: A Viable Route Toward Truth and Reconciliation?*, 3 MICH. J. OF RACE & L. 183 (1997) (critiquing aspects of the South African Truth Commission approach). For an argument for a permanent international truth commission as an adjunct to international and national prosecutions, see Michael P. Scharf, *The Case for a Permanent International Truth Commission*, 7 DUKE J. COMP. & INT'L L. 375 (1997).

This Article leaves the realist critique to others. My intent here is, instead, to use the disjuncture between the two paradigms described—between “crimes of states” and “crimes of hate”—to explore its implications for criminal accountability for mass violence. Assuming for the purpose of this Article that, as Cassese argues, justice ought to be pursued in cases of mass atrocity,⁹³ I consider a further question: should the perspective that offenses are crimes of hate inform the views of international lawyers, along with their solutions? I address whether the crimes of hate perspective has implications for *where* we should try offenders (internationally or domestically), *who* we should try (high-level leaders versus others), and *how* those selected for prosecution should be tried, including what criminal charges should be brought (international offenses or crimes under domestic law), and by what kind of judges.

In the Parts that follow I critically examine, within the context of recent events in Rwanda, three aspects of the international legal paradigm—its preference for an international venue, its emphasis on ethnic neutrality, and its insistence on pursuing exceptional and high-level perpetrators of crimes of state. I argue that the international legal paradigm fails to address the interaction between local and international proceedings and fails to accord sufficient importance to the ethnic divides that characterized the underlying atrocities and continue to exist in their wake. These failings have implications for whether international trials will preserve the collective memory of barbarous acts, mollify victims, affirm the rule of law, or promote national reconciliation.

III. THE PERILS OF PRIMACY

The international legal paradigm attempts to merge the “profoundly consensual” body of international law with the “profoundly coercive” nature of domestic criminal law.⁹⁴ International lawyers assume that if this tension is resolved in favor of effective international tribunals enjoying primacy with respect to jurisdiction, the Nuremberg-inspired goals of accountability will be achieved. There are many difficult problems involved in making international tribunals as effective in enforcing the law as most domestic courts. Perhaps because these have proven so intractable, international lawyers have avoided examining the premise that the goals of accountability are furthered by primacy for international tribunals.

The statutes of both the ICTR and the ICTY resolve jurisdictional conflicts in their favor. While both statutes recognize that national courts, particularly those in the states in which the atrocities occurred, may have concurrent jurisdiction over the international crimes enumerated in these statutes, both insist that the respective international tribunals enjoy “inherent

93. See *supra* notes 37–39 and accompanying text.

94. Louise Arbour, *Progress and Challenges in International Criminal Justice*, 21 *FORDHAM INT'L L.J.* 531, 531 (1997). Cassese's fourth argument attempts to reconcile the tensions between these two bodies of law. See *supra* note 50 and accompanying text; see also James Crawford, *An International Criminal Court?*, 12 *CONN. J. INT'L L.* 255, 256, 262 (1997) (noting the same tension).

supremacy” not in the usual sense of being able to review the decisions of lower courts but “rather to exercise jurisdiction in the first instance as a trial court.”⁹⁵ “Primacy” under both tribunals’ statutes means that “at any stage of the procedure” the international tribunal may order national courts to defer to its competence and release a suspect to its custody for trial.⁹⁶ Moreover, for the ICTR the principle of primacy applies with respect to *all* national courts that exercise jurisdiction.⁹⁷ The international prosecutor’s right to insist on jurisdictional primacy applies whenever “what is in issue is closely related to, or otherwise involves, significant factual or legal questions which may have implications for investigations or prosecutions before the Tribunal.”⁹⁸ Neither the international tribunal nor a national court, however, can attempt to retry an

95. VIRGINIA MORRIS & MICHAEL P. SCHARF, AN INSIDER’S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 126 n.378 (1995).

96. See ICTY Statute, *supra* note 53, art. 9; ICTR Statute, *supra* note 53, art. 8. Article 8(2) provides that the ICTR shall have primacy over the national courts of all States: “At any stage of the procedure, the International Tribunal for Rwanda may formally request national courts to defer to its competence in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal for Rwanda.” ICTR Statute, *supra* note 53, art. 8(2). For a survey of some of the interpretative and practical issues raised by this provision in terms of the ICTR, see Frederick Harhoff, *Consonance or Rivalry? Calibrating the Efforts to Prosecute War Crimes in National and International Tribunals*, 7 DUKE J. COMP. & INT’L L. 571 (1997). See also Bartram S. Brown, *Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals*, 23 YALE J. INT’L L. 383, 395 (1998) (discussing the justification for this “extraordinary jurisdictional priority”). As Brown notes, although these provisions state that the respective tribunals may “request” national courts to defer to their jurisdiction and some permanent members of the Security Council initially suggested that the tribunals could not require states to defer, the appellate chamber of the ICTY has endorsed the view that states must comply with tribunal requests to defer to international jurisdiction. See *id.* at 395–404. As the ICTY put it:

Indeed, when an international tribunal such as the present one is created, it must be endowed with primacy over national courts. Otherwise, human nature being what it is, there would be a perennial danger of international crimes being characterised as “ordinary crimes” . . . or proceedings being “designed to shield the accused,” or cases not being diligently prosecuted

If not effectively countered by the principle of primacy, any one of those stratagems might be used to defeat the very purpose of the creation of an international criminal jurisdiction, to the benefit of the very people whom it has been designed to prosecute. The principle of primacy of this International Tribunal over national courts must be affirmed; the more so since it is confined within the strict limits of Articles 9 and 10 of the Statute and Rules 9 and 10 of the Rules of Procedure of the International Tribunal

Prosecutor v. Tadic, IT-94-1, Oct. 2, 1995, paras. 58–59 (appeals decision), available at <<http://www.un.org/icty/tadic/appeal/decision-e/510022.htm>>.

97. Compare ICTR Statute, *supra* note 53, art. 8(2) (providing for primacy “over the national courts of all states”), with ICTY Statute, *supra* note 53, art. 9 (providing for primacy merely “over national courts”). It is not yet clear whether this difference in wording will lead to differing results.

98. ICTY Rules of Procedure and Evidence, Rule 9(iii), available at <http://www.un.org/icty/basic/rpe/IT32_rev13con.htm>; ICTR Rules of Procedure and Evidence, Rule 9(iii), available at <<http://www.un.org/icty/rules.html>>. Brown contends that under Rule 9(iii), both tribunals can assert their primacy “in virtually any situation, not merely when it will remedy specific problems with an ongoing national proceeding.” Brown, *supra* note 96, at 397. The ICTY Rules also provide for deference to international jurisdiction if the act being investigated at the national level is characterized as an ordinary crime; there is lack of impartiality or independence; the investigations or proceedings are designed to shield the accused from international criminal responsibility; or the case is not diligently prosecuted. See ICTY Rules of Procedure and Evidence, *supra*, Rule 9(i)–(ii).

individual for acts that have already been diligently prosecuted as an international crime.⁹⁹

In the succeeding Sections I present a brief account of the Rwandan genocide and thereafter indicate how the ICTR's jurisdictional primacy may undermine the preservation of accurate collective memory, the national rule of law, the realization of justice, and even the effective development of international criminal law. I conclude that international lawyers' struggle to wrestle primary jurisdiction away from Rwanda was probably not a battle worth winning.

A. *History of a Genocide*

The Rwandan government that came to power in the wake of the 1994 genocide has, as might be expected of a regime that consists of many of those targeted by that genocide, a strong incentive to punish Rwanda's genocidaires,¹⁰⁰ and yet cast the sole vote within the Security Council against establishing the ICTR.¹⁰¹ At this writing, years after creation of the ICTR and with several trials underway within that body, relations between the ICTR and the Tutsi-dominated government in Rwanda remain "frosty."¹⁰² The reasons for this are grounded in the history of the genocide. That history, although well told elsewhere, is worth summarizing here.¹⁰³

While no one knows the exact origins of the Hutu, Tutsi, and Twa peoples (the latter representing only one percent of Rwanda's population), there is little evidence of deep-rooted or ancient hatreds among these castes, at

99. See ICTR Statute, *supra* note 53, arts. 9–10 (addressing non-bis-in-idem). Article 9 of the ICTR Statute provides:

1. No person shall be tried before a national court for acts constituting serious violations of international humanitarian law under the present Statute, for which he or she has already been tried by the International Tribunal for Rwanda.

2. A person who has been tried by a national court for acts constituting serious violations of international humanitarian law may be subsequently tried by the International Tribunal for Rwanda only if:

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

3. In considering the penalty to be imposed on a person convicted of a crime under the present Statute, the International Tribunal for Rwanda shall take into account the extent to which any penalty imposed by a national court on the same person for the same act has already been served.

ICTR Statute, *supra* note 53, art. 9; see also ICTR Rules of Procedure and Evidence, *supra* note 98, Rule 13 (authorizing Trial Chambers to issue a "reasoned order" to a national court requesting the discontinuation of national proceedings).

100. See, e.g., Morris, *supra* note 12, at 353–57 (describing the Rwandans' objections to various provisions of the new International Criminal Tribunal).

101. See *id.* at 357.

102. McKinley, *supra* note 32; see also GOUREVITCH, *supra* note 1, at 252–53 (noting how some Rwandans regard the ICTR as an "insult").

103. I have adopted much of the foregoing account from the following sources: DESTEXHE, *supra* note 10; GOUREVITCH, *supra* note 1; PRUNIER, *supra* note 10; Morris, *supra* note 12; Schabas, *supra* note 12; and *Frontline: Rwanda Chronology* (visited Mar. 24, 1999) <<http://www.pbs.org/wgbh/pages/frontline/shows/rwanda/etc/cron.html>>.

least prior to colonial rule.¹⁰⁴ While intermarriage did not occur often, Hutus and Tutsis spoke the same language, shared the same territory, fought common wars against outside aggressors, and followed the same traditions. This began to change with European colonization and the import of "race science" first by the Germans and later the Belgians, who governed the former German colony as a U.N. protectorate. Rwanda's colonizers encouraged "tribalism without tribes," classifications that corresponded to European racist aesthetic preferences.¹⁰⁵ The colonizers of Rwanda made distinctions based on physical characteristics and perceptions of differences in political and social organization that reinforced preexisting economic and social differences between Tutsis and Hutus.¹⁰⁶ With the onset of colonial rule, Tutsis, despite their minority status, gained greater economic and social status over the Hutu, particularly through a division of labor that gave many Tutsis control over cattle and left hard labor to Hutu agriculturalists.¹⁰⁷ In the twentieth century, Europeans "played an essential role in creating an ethnic split and ensured that the important feeling of belonging to a social group was fueled by ethnic, indeed racial, hatred."¹⁰⁸ Destexhe concludes that the ethnic classification scheme recorded on identity cards, first introduced by the Belgians, served as the basic instrument for the genocide of the Tutsi people who were "guilty" on

104. See DESTEXHE, *supra* note 10, at 36–37. For a more thorough account that is essentially in accord with Destexhe's, see PRUNIER, *supra* note 10, at 1–23.

105. DESTEXHE, *supra* note 10, at 36 (quoting JEAN-PIERRE CHRÉTIEN, BURUNDI, L'HISTOIRE RETROUVÉE (1993)).

106. According to Destexhe:

The colonisers established a distinction between those who did not correspond to the stereotype of a negro (the Tutsis) and those who did (the Hutu). The first groups, "superior African," were designated Hamites or "white coloureds" who represented a "missing link" between the "Whites" and the "Blacks" . . . Although lacking proof, successive colonial administrators and missionaries become convinced that the Tutsi were immigrants to the region and that these cattle owners were of different genetic stock to the Hutu. . . [and were] "Europeans under a black skin." . . . According to this theory, the Hutu (the majority of the population) are assimilated to the Bantu. Although first used to describe a linguistic group, the term Bantu rapidly took on a pejorative racial connotation to designate the "negroes" as members of another human species who played the role of serfs within society.

DESTEXHE, *supra* note 10, at 38–39; see also HUMAN RIGHTS WATCH, *supra* note 54, at 1–2 (containing a similar account); PRUNIER, *supra* note 10, at 23–54 (same).

107. See DESTEXHE, *supra* note 10, at 39–40.

108. *Id.* at 41. The book describes how Germans subscribed to the "superior race" theory and promoted military assistance to Tutsi; how Belgian colonizers' introduction of chiefdoms and identity cards reinforced Tutsi domination; and how the Roman Catholic Church and missionaries generally further encouraged such sentiments and used the Tutsi power structure to evangelize downward from the Tutsi chiefs to the "Hutu masses." See *id.* at 40–41. The book's overview of recent history concludes:

What happened in Rwanda illustrates a situation where the coexistence of different social groups or castes metamorphosed into an ethnic problem with an overwhelmingly racist dimension. The caricature of physical stereotypes . . . was manipulated to provide proof of the racial superiority of one group over the other. Archaic political divisions were progressively transformed into racial ideologies and repeated outbreaks of violence resulting from the colonial heritage which was absorbed by local elites who then brought it into the political arena. The present generation has internalized this ethnological colonial model, with some groups deliberately choosing to play the tribal card. The regimes that have ruled Rwanda and Burundi since independence have shown that they actually need ethnic divisions in order both to reinforce and justify their positions.

Id. at 47.

three counts: They were a minority; they were a reminder of a feudal system; and they were regarded as colonizers in their own country.¹⁰⁹

Although the Belgians favored the Tutsi with privileges and Western-style education and used the Tutsi elite to enforce their rule, historical circumstances, including those elites' increasing challenge to the colonial order, along with the pressures of the Cold War, prompted a shift in European sympathies on the "eve of independence."¹¹⁰ Eventually, both Belgium and France became closely aligned with the majority Hutu against the Tutsi minority.¹¹¹

In the late 1950s to early 1960s, Rwanda became a more polarized ethnic state with the Hutu majority conducting periodic, systematic, violent purges of Tutsis, thereby prompting periodic streams of Tutsi refugees to neighboring countries.¹¹² Despite independence, foreign intervention continued. The French served the financial and military needs of the Habyarimana government, despite growing evidence of governmental incitements to, and occasional outbreaks of, killings directed at Tutsi. The purges and ever-increasing harsh conditions imposed on Tutsis within Rwanda led to a substantial exile community abroad and, in 1986, Tutsi exiles in Uganda formed the Rwandan Patriotic Front (RPF). Thereafter, RPF guerrillas made occasional raids into Rwanda from bases in Uganda, and French forces were often called to help the Habyarimana government repel them. Despite the constant reports of purges and the growing pattern of exclusion of Tutsis from every segment of Rwandan society, French troops and arms continued to flow to the Habyarimana government into the early 1990s, apparently on the premise that the threat to that government posed particularly by Tutsi refugees in Uganda was, in reality, an "Anglo-Saxon" threat to Francophone Africa.¹¹³ French troops deployed in Rwanda in this period, while not directly involved in combat, freed Rwandan troops for frontline duties, provided logistical support, organized artillery positioning and ammunition supplies, ensured radio communications, and even undertook the interrogation of detained suspects.¹¹⁴

In 1990 to 1991, amid continuing massacres of Tutsis, the Rwandan army began to train and arm civilian militias known as the *interahamwe* ("those who stand together").¹¹⁵ As late as 1992, French agents were not only serving as intermediaries for the Rwandan government with countries such as South Africa for weapons, but also were "in complete control of [Rwandan] counterinsurgency operations"¹¹⁶ while repeatedly denying "rumors" of

109. *Id.*

110. GOUREVITCH, *supra* note 1, at 61.

111. *See, e.g.*, PRUNIER, *supra* note 10, at 44–100 (chronicling the emergence of Belgian and French alliances with the Hutu majority).

112. *See, e.g.*, GOUREVITCH, *supra* note 1, at 58–62.

113. *See* PRUNIER, *supra* note 10, at 106; *see also* HUMAN RIGHTS WATCH, *supra* note 54, at 6 (noting expansive French monetary and military aid).

114. *See* PRUNIER, *supra* note 10, at 110–11.

115. *See* GOUREVITCH, *supra* note 1, at 93; *Frontline: Rwanda Chronology*, *supra* note 103.

116. PRUNIER, *supra* note 10, at 149.

massacres.¹¹⁷ In November 1992, a prominent Hutu activist appealed to Hutus to send the Tutsis “back to Ethiopia” via the rivers, and, by the next year, fierce fighting erupted between the Rwandan government and RPF forces. In August 1993, a peace accord was signed, permitting the repatriation of refugees, but on April 6, 1994, the eve of the long delayed implementation of this agreement, President Habyarimana’s plane was shot down by missiles. Some believe that Hutu extremists were behind the attack. That evening, the long-anticipated massacres of Tutsis began in earnest.

Beginning the day after Habyarimana’s death, Rwandan Armed Forces (FAR) and the *interahamwe* set up roadblocks and went on a house-to-house search to identify and kill Tutsis. While the 2500 U.N. troops deployed in Kigali to implement the peace accord stood by, thousands of Tutsis were killed in these initial weeks. After ten Belgian peacekeepers were killed on April 21, 1994, the United Nations effectively withdrew its troops, leaving a token force behind. Amid a wave of refugees and a new offensive by the RPF, the U.N. Security Council finally agreed to send 6800 troops into Rwanda, but their arrival was delayed over debates on who would pay for the expense. In June, the Security Council authorized instead the deployment of French forces to establish a “safe area” in a government-controlled area in southwest Rwanda. Troops in that deployment, Operation Turquoise, were welcomed as “French Hutus” by the local population.¹¹⁸ At this time, the French government’s position appeared to be that Rwanda presented a case of a “double genocide” in which all sides were guilty; nonetheless, it is alleged that the French deployed forces in Rwanda to defend the genocidaires from the RPF.¹¹⁹ According to Gourevitch, the net effect of Operation Turquoise was (one hopes not by conscious design) “to permit the slaughter of Tutsis to continue for an extra month, and to secure safe passage for the genocidal command to cross, with a lot of its weaponry, into Zaire.”¹²⁰

While the motivations and actions of the French government remain the subject of conjecture, what is less debatable is that even after the 1994 killings began, French (and Belgian) troops, still loyal to the Hutu, ignored killings of Tutsis committed before them, helped circumvent the U.N. arms embargo, repeatedly refused to take opportunities to condemn the killing of Tutsis as “genocide,” and even extended official presidential welcomes to some of the

117. *Id.* at 148–49, 176.

118. See GOUREVITCH, *supra* note 1, at 155.

119. See *id.* at 156–157. A French parliamentary committee, which issued its report in December 1998, had a different assessment. While that report blamed the French government for “errors of judgment,” it concluded that the “French in no way incited, encouraged, aided or supported those who orchestrated the genocide . . .” The report does indicate, however, that from 1990 to April 1994, France sold 137 million francs worth of arms to Rwanda, and provided more than 10,000 mortar rounds, 1,000,000 bullets, and six Gazelle helicopters. The report also acknowledges that while French soldiers did not participate in battle, they worked closely with Rwandan forces on the ground. Not surprisingly, the report criticized the United Nations, and especially the United States, for failing to respond with force earlier to prevent the genocide. See Craig R. Whitney, *Panel Finds French Errors in Judgment On Rwanda*, N.Y. TIMES, Dec. 20, 1998, at A17. For the underlying report, see *Mission d’information sur le Rwanda* (visited March 24, 1999) <<http://www.assemblee-nationale.fr/2/2rwanda.html>> [hereinafter *French Report*].

120. GOUREVITCH, *supra* note 1, at 161.

top Rwandan leaders implicated in the genocide.¹²¹ For all these reasons, the principal historian of the Rwandan genocide, Gérald Prunier, concluded that French authorities “played an important part in one of the worst genocides of the twentieth century.”¹²² Of course, as French officials have since indicated, the entire international community, including the U.N. and the United States, shares some of the blame for failing to prevent these killings and for letting them go on for as long as they did.¹²³

The mass wave of killings stopped by mid-July 1994 and by July 17, the RPF captured the city of Kigali. As of that date, governmental authority came under the effective control of those who had been victimized by the genocide, or at least the RPF.¹²⁴ While the actual numbers of dead will probably never be known, what is known is that in the course of some hundred days in the early summer of 1994, between 500,000 and 800,000 people were put to death through a clear programmatic effort to eliminate Tutsis, along with Hutu “moderates” believed to be sympathetic to Tutsis. The numbers of those implicated in these killings are even more difficult to estimate, but given the principal methods used—“inefficient” individual killings by machete—it is assumed that many thousands, perhaps millions, were directly involved.¹²⁵ But if the extent of complicity was very probably massive, so was the extent of victimization. Indeed, a UNICEF study posited that five out of six children present in Rwanda during the killings had, at the very least, witnessed bloodshed.¹²⁶ As Gourevitch suggests, we can readily assume that “[n]obody in Rwanda escaped direct physical or psychic damage.”¹²⁷

Ironically, even at the end of an entirely preventable genocide, the international community seemed to show greater concern for its perpetrators than for its victims. During the first few months following the genocide, the attention of the international community was directed at the plight of Hutu refugees from Rwanda and not on internal conditions in that devastated country.¹²⁸ While the Rwandan government waited in vain for desperately needed foreign assistance for a country ravaged by the worst atrocity since the Holocaust, foreign aid and humanitarian agencies flooded the refugee camps

121. See PRUNIER, *supra* note 10, at 276–80. Prunier argues that the later French humanitarian intervention, authorized by Security Council Resolution 929, was an attempt by the French to wash off “genocidal bloodspots” and came too late to save the Tutsis from slaughter. See *id.* at 281–98.

122. *Id.* at 340.

123. See, e.g., *French Report*, *supra* note 119. Indeed, Gourevitch calls the Rwanda genocide and its aftermath a “case study of international negligence.” GOUREVITCH, *supra* note 1, at 326; see also *id.* at 150 (noting the commander of UNAMIR’s estimate that the 5000 troops would have effectively halted the genocide); *id.* at 335–36, 350–52 (noting candid acknowledgments after the fact by high-level officials, including President Clinton and Secretary of State Madeline Albright).

124. As Gourevitch argues, the common journalistic description of the new “Tutsi-dominated” regime was, at least in the immediate wake of the 1994 genocide, inaccurate since 16 of the 22 cabinet ministers, including the Prime Minister and Ministers of the Interior and Justice, were Hutu and the government as a whole appeared committed to a multiparty, multi-ethnic Rwanda. See GOUREVITCH, *supra* note 1, at 222.

125. See *id.* at 244.

126. See *id.* at 224.

127. *Id.*

128. For a damning portrait of the ironic efforts of humanitarian relief agencies, see *id.* at 161–

even though many in those camps were genocidaires.¹²⁹ Worse still, killings of Tutsis continued within the camps and continue to the present day as a result of a continuing series of raids by Hutu guerrillas into Rwanda.¹³⁰

As many close observers of the Rwandan genocide have repeatedly stressed and as the ICTR has itself confirmed,¹³¹ this was not “a spontaneous outburst of killing” but the product of a heavily orchestrated campaign that had begun as early as 1990, and dating back to the mid-1993 founding of Radio-Télévision Libre des Milles Collines (RTL), an ostensibly “private” radio station founded by leading Hutu extremists from the government, military, and business communities.¹³² Well before 1994, RTL began broadcasting vitriolic appeals to private militias and individuals intended to incite killings of Tutsis (along with Hutus regarded as being sympathetic to Tutsis). As early as 1992, U.N. officials and nongovernmental human rights organizations were warning that radio transmissions within Rwanda were playing a central role in inciting ethnic tension and ethno-political murders.¹³³ Knowledgeable observers regard the mass killings that began in April 1994, therefore, as “an important component of the implementation of genocide” planned long before; indeed, there had been calls for the jamming of RTL broadcasts before the actual killings began.¹³⁴ Unlike secret government disappearances, such as in Argentina, there was nothing concealed about either the continuous public incitements to mass killing or the 1994 killings themselves.¹³⁵

B. *Primacy, the Rwandan Authorities, and Collective Memory*

In mid-1994, the new Rwandan government, then a non-permanent member of the U.N. Security Council, sought international assistance in

129. See, e.g., *id.* For a description of one modest attempt by the U.S. military to assist Rwandan judicial authorities, see Peter H. Sennett & Gregory P. Noone, *Working with Rwanda Toward the Domestic Prosecution of Genocide Crimes*, 12 ST. JOHN'S J. LEGAL COMMEN. 425 (1997). As Sennett and Noone point out, at least through 1996, the international community failed to provide significant assistance to the Rwandan authorities for this purpose and left the Rwandans “to their own devices.” *Id.* at 442.

130. See GOUREVITCH, *supra* note 1, at 164–67, 229. For one report of a Hutu guerrilla attack on a Tutsi refugee camp and retaliations by the Rwandan army, see James C. McKinley, Jr., *Machete Returns to Rwanda, Rekindling a Genocide War*, N.Y. TIMES, Dec. 15, 1997, at A1.

131. See, e.g., *Prosecutor v. Akayesu*, Case No. IT-9-4-T (ICTR Sept. 2, 1998), § 5, available at <<http://www.un.org/I.C.T.R./english/judgements/akayesu.html>> [hereinafter Akayesu Judgment]; see also NEIER, *supra* note 15, at 204–05.

132. See Jamie Frederic Metzl, *Rwandan Genocide and the International Law of Radio Jamming*, 91 AM. J. INT'L L. 628, 630–31 (1997).

133. See *id.* at 629.

134. *Id.*

135. Indeed, some have suggested that the present Secretary-General, Kofi Annan, ignored detailed evidence of the impending genocide as early as January 11, 1994. See GOUREVITCH, *supra* note 1, at 103–07 (reporting on cable from the field and Annan's office's reaction); see also *Triumph of Evil*, FRONTLINE ONLINE (visited May 10, 1999) <<http://www.pbs.org/wgbh/pages/frontline/shows/evil/warning/cable.html>> (presenting the exchange of cables between Secretary-General Kofi Annan's Office and Booh-Booh/Dallaire, text of Jan. 11, 1994); Memorandum from Kofi Annan's Office, United Nations, New York, to Booh-Booh/Dallaire (Jan. 11, 1994), available at <<http://www.pbs.org/wgbh/pages/frontline/shows/evil/warning/unresponse.html>>.

prosecuting the perpetrators of the 1994 genocide. It proposed establishment of an international tribunal for this purpose.¹³⁶ The Rwandan government wanted the tribunal's jurisdiction to extend to the full range of offenses committed by the prior Hutu regime, including to many acts of incitement that preceded the great wave of actual killings from April through July of 1994.¹³⁷ In addition, it hoped that international assistance would take the form of joint trials and investigations, or at least international proceedings within Rwanda.¹³⁸ As discussions for an international criminal tribunal progressed within the Security Council, Rwanda, as a member of the Council, argued that the jurisdiction of any self-standing international tribunal should be limited to offenses committed through mid-July 1994—that is, prior to the new government's assuming power. To some, this limit on jurisdiction appeared designed to limit the potential liability of the new Rwandan government's officials and supporters because it would exclude from international jurisdiction the majority of Tutsi retaliation killings or other acts of revenge.¹³⁹ When the Security Council opted for a foreign tribunal with jurisdiction extending to offenses committed in calendar year 1994, the Rwanda government, as previously noted, voted against its establishment.

Subsequently, on September 1, 1996, in response to the need to deal with the approximately 90,000 detainees then being held in Rwandan prisons awaiting trial, the Rwandan government enacted a new Organic Law on the Organization of Prosecutions for Offenses Constituting the Crime of Genocide or Crimes Against Humanity Committed Since October 1, 1990.¹⁴⁰ That law classifies suspects into four categories according to degree of culpability. Perpetrators in category one (including leaders and organizers of the genocide and perpetrators of particularly heinous murders or sexual torture) are subject to the death penalty. Those in categories two through four, including those accused of violent offenses of lesser gravity, are entitled to reduced sentences as part of guilty plea agreements.¹⁴¹ Preset, fixed reductions of penalties are available to all non-category-one perpetrators in return for an accurate and complete confession, a plea of guilty, and an apology to victims.¹⁴²

As Professor Madeline Morris has noted, the Rwandan law entails complex compromises between expediency and fairness.¹⁴³ Although, as its title indicates, the Organic Law was adopted to deal with the logistical

136. See Morris, *supra* note 12, at 353.

137. See *id.* at 353–54.

138. See Schabas, *supra* note 12, at 553. Once the tribunal was established, the Rwandan government also complained that the international community was devoting only meager resources to the effort. See Morris, *supra* note 12, at 355, 357.

139. See, e.g., LAWYERS COMMITTEE FOR HUMAN RIGHTS, PROSECUTING GENOCIDE IN RWANDA § III (1997) available at <<http://www.lchr.org/pubs/rwanda.htm>> (discussing the temporal limits of the ICTR's jurisdiction).

140. Organic Law of August 30, 1996 on the Organization of the Prosecutions for Offenses Constituting the Crime of Genocide or Crimes Against Humanity Committed Since October 1, 1990, No. 08/96 available at <<http://www.rwandemb.org/prosecution/law.htm>> [hereinafter Organic Law].

141. See *id.* arts. 2, 5, 14–16.

142. See *id.* arts. 14–16. Under Article 15, perpetrators who plea guilty prior to prosecution are entitled to further reductions in their sentences. See *id.* art. 15.

143. See Morris, *supra* note 12, at 357–61.

difficulties posed by the enormous number of killings that occurred in the middle of 1994, to avoid accusations of *ex post facto* criminal legislation, the law does not formally charge perpetrators with international crimes that had not been previously incorporated into Rwandan law. Under that law perpetrators in category one would not be formally charged with "genocide."¹⁴⁴ Secondly, the law was limited to actions committed since October 1, 1990, thereby including most of the actions that precipitated the 1994 genocide but not extending to earlier purges of Tutsis, a move intended as a more reasonable compromise with respect to the use of judicial resources than the ICTR's more limited temporal jurisdiction.¹⁴⁵ Thirdly, the law compromised on demands for individualized criminal trials by adopting a form of plea bargaining unprecedented in Rwanda (as it would be in most civil law systems). The law recognized the impossibility of conducting individual trials for the approximately one percent of Rwanda's population then in detention.¹⁴⁶ Although intended to balance the need for fair and expeditious treatment of those detained with the thirst for recompense and revenge felt by many survivors of the Rwandan genocide,¹⁴⁷ the system contained in the Organic Law as administered has since drawn the ire of international human rights lawyers who have pointed to the limited guarantees of procedural fairness in a context where most prisoners have not been formally charged, witnesses are difficult to find, few defense attorneys exist, and where there is a grave risk that innocent suspects may choose to plead guilty for fear of a worse outcome or extensive delays.¹⁴⁸

Although international lawyers have tended to emphasize the numerous shortcomings of Rwanda's administration of the Organic Law,¹⁴⁹ the merits of Rwanda's complaints about the ICTR have largely escaped their notice. While the new Rwandan government's effort to *limit* the ICTR's jurisdiction to offenses committed before July 1994, if intended to secure impunity for revenge crimes committed by Tutsis, represents an example of an attempt to impose one-sided "victor's justice,"¹⁵⁰ its attempt to *expand* the ICTR's

144. Category one is defined to cover persons "whose criminal acts or whose acts of criminal participation place them among the planners, organizers, instigators, supervisors and leaders of the crime of genocide or of a crime against humanity." Organic Law, *supra* note 140, art. 2. While this provision identifies who is subject to the Act, it does not itself charge them with the international crimes of genocide or crimes against humanity. Rwandan prosecutors are, under the law, therefore impliedly urged to find applicable domestic offenses that cover the criminal acts described. *Id.*

145. Compare *id.* art. 1 (providing jurisdiction to prosecute criminal acts dating from October 1, 1990 onward) with ICTR Statute, *supra* note 53, art. 1 (limiting the ICTR's jurisdiction to events in calendar year 1994).

146. The number held in Rwandan prisons has, despite the plea bargains, grown to about 130,000 by the end of 1998. See Mark A. Drumbl, *Rule of Law Amid Lawlessness: Counseling the Accused in Rwanda's Domestic Genocide Trials*, 29 COLUM. HUM. RTS. L. REV. 544, 549 (1998).

147. See *infra* note 207. For reports of instances where prisoners have been released only to be killed, presumably by survivors seeking revenge, see GOUREVITCH, *supra* note 1, at 245-46.

148. See, e.g., LAWYERS COMMITTEE FOR HUMAN RIGHTS, *supra* note 139, § VIII.

149. See, e.g., RATNER & ABRAMS, *supra* note 23, at 154-56; LAWYERS COMMITTEE FOR HUMAN RIGHTS, *supra* note 139, § VIII.

150. An alternative justification for this proposed limit is that the mass wave of killings were over by mid-July 1994 and that international adjudication of offenses committed thereafter would not be necessary and would imply distrust of the new Rwandan regime. Indeed, through 1997, the Rwandan

jurisdiction to include relevant offenses committed before 1994 should not be so easily dismissed. Rwanda's new government sought criminal trials for those who incited the genocide, including those who acted *before* 1994. While the new Rwandan government undoubtedly regarded pre-1994 prosecutions as politically useful since they would embarrass the prior regime, the goals of the international legal paradigm, especially its aspiration for a judicial rendering of the whole truth,¹⁵¹ would also support such expanded jurisdiction.

One of the main critiques of the major Nuremberg trials had been directed, after all, at their temporal limitations. The Allies' decision to charge only crimes committed after 1939 was not, in hindsight, the best way to preserve an accurate historic account of barbarism.¹⁵² Critics have long argued that by failing to direct attention to, for example, Germany's pre-1939 racial purity laws, the Nuremberg trials failed to show that the Nazis had targeted Jews, homosexuals, gypsies, and other groups because they deemed them unfit to live—and not because this was vital to their plan for conquest.¹⁵³ This flaw, together with the theory propounded by the Nuremberg prosecution—that high-level Nazi leaders were an especially evil group of “gangsters” bent on aggressive conquest and willing to kill innocent civilians who stood in their

government had arrested and charged at least 1000 of its own soldiers, including officers, for revenge killings and other more common crimes. See Robert F. Van Lierop, *Rwanda Evaluation: Report and Recommendations*, 31 INT'L LAW. 887, 897 (1997). Van Lierop, the co-chair of the African Law Committee of the ABA Section of International Law and Practice, praises these Rwandan efforts as “an admirable effort to maintain discipline, instill respect for the rule of law, and build a viable system of justice in Rwanda for the first time in the country's history.” *Id.*; see also GOUREVITCH, *supra* note 1, at 246 (noting that over 1000 RPF soldiers had been imprisoned in military jails for killings and other violations of disciplinary rules). *But see* Barbara Crossette, *U.S. Judge Orders a Rwandan to Surrender for Trial on Genocide*, N.Y. TIMES, Aug. 8, 1998, at A3 (reporting recent Rwandan government killings in the Congo).

151. See *supra* note 40 (defining collective memory). The international legal paradigm puts exceptional emphasis on the need for judicial mechanisms that are “as exhaustive of the truth as possible.” See, e.g., M. Cherif Bassiouni, *Searching for Peace and Achieving Justice: The Need for Accountability*, in REINING IN IMPUNITY, *supra* note 31, at 45, 65. Indeed, some have suggested that victims of mass atrocities enjoy a “right to individualized truth.” See, e.g., Joinet, *supra* note 33, at 265–66 (Principles 1–4, Annex II); see also Juan E. Mendez, *The Right to Truth*, in REINING IN IMPUNITY, *supra* note 31, at 255, 265 (arguing for such a right on the basis of the Inter-American Court of Justice's decision in *Velásquez*). *But see* Priscilla B. Hayner, *International Guidelines for the Creation and Operation of Truth Commissions: A Preliminary Proposal*, LAW & CONTEMP. PROBS., Autumn 1996, at 173, 176 (questioning whether a society's right to truth should be turned into an “unbending obligation”). For a thorough analysis of how the production of a common history judged by common standards—that is, the production and preservation of “collective memory”—is alleged to produce social solidarity within the societies affected by mass atrocities as well as the international community as a whole, see Mark J. Osiel, *Ever Again: Legal Remembrance of Administrative Massacre*, 144 U. PA. L. REV. 463, 470–505 (1995).

152. Compare DAVID LUBAN, LEGAL MODERNISM 335, 365–74 (1994) (arguing, among other things, that the major Nazi trials rendered less evident how the Nazis were able to “bureaucratize” their final solution), with Cassese, *supra* note 26, at 9 (arguing on behalf of trials since these “build an impartial and objective record of events”). Some have argued that a more balanced, historically accurate portrayal of the nature of the Holocaust has only emerged in the wake of later developments, including trials within occupied Germany. See, e.g., ANNE SA'ADAH, GERMANY'S SECOND CHANCE: TRUST, JUSTICE, AND DEMOCRATIZATION 143–88 (1998).

153. For an account of the “mosaic of victims” targeted by the Nazis that is strikingly different from the proceedings at Nuremberg, see Mary Johnson & Carol Rittner, *Circles of Hell: Jewish and Non-Jewish Victims of the Nazis*, ANNALS AM. ACAD. POL. & SOC. SCI., Nov. 1996, at 123.

path—put a political agenda ahead of historical truth.¹⁵⁴ It implied that the Holocaust was incidental to the waging of World War II, thereby obscuring the scope and depth of the Holocaust by failing to present a forceful account of the discriminatory animus that motivated leaders and low-level Nazi functionaries, including many ordinary German citizens.¹⁵⁵ In this respect, critics have argued that the Nuremberg trials were unfair to the memory of the victims of the Holocaust who died simply because of who they were and not merely because they were in the way of conquest.¹⁵⁶

Since the ICTR has no jurisdiction over aggression and does not limit criminal liability to offenses committed in the course of aggressive war, it does not run the same risks. Neither the ICTR nor the ICTY is required to show that the crime against humanity known as persecution, for example, occurred in the course of international armed conflict.¹⁵⁷ Nonetheless, the Rwandan government's complaint about the ICTR's temporal limits has a legitimate basis. While it is understandable that the international community may not wish to devote unlimited resources to ICTR prosecutions, it is important to recognize that these constraints conflict with that community's own aspirations for the rendering and preservation of an accurate collective memory.

Various factors explain the ferocity unleashed by appeals to ethnic hatred, as opposed to appeals to material need or to nationalism. Appeals to fear or to hatred of "the other" (which some characterize as the "mobilization of bias") often invoke a mythical invented past; emotive descriptions of alleged prior victimization at the hands of the targeted group often make such appeals potent and lasting.¹⁵⁸ There are distinctive tactics used to create or

154. See generally SA'ADAH, *supra* note 152, at 154–63 (describing the goals of the Nuremberg trials).

155. See, e.g., LUBAN, *supra* note 152, at 335–78. For a recent controversial critique of the ostensibly extraordinary murderers targeted at Nuremberg, see DANIEL JONAH GOLDHAGEN, *HITLER'S WILLING EXECUTIONERS: ORDINARY GERMANS AND THE HOLOCAUST* (1997) (providing an account of the Holocaust that is starkly different from the perpetrator-driven version presented in the course of the Nuremberg trials). But see NORMAN G. FINKLESTEIN & RUTH BETTINA BIRN, *A NATION ON TRIAL* (1998) (giving critiques of Goldhagen's thesis); UNWILLING GERMANS? *THE GOLDHAGEN DEBATE*, *supra* note 40 (same).

156. Presumably in response to sensitivities concerning the extent to which the Nuremberg trials may have dishonored the memory of victims of the Holocaust, international prosecutors are now attempting to ensure that Balkan and Rwandan trials include an accurate account of the broader context in which war crimes are committed. Thus, the first case to be prosecuted in either tribunal, the case against a Serbian former café owner, Dusko Tadic, began with month-long testimonies by academic and policy witnesses, none of whom had witnessed the crimes at issue. These witnesses described the rise of ethnic, religious, and nationalist bigotry in the Prijedor region of the Balkans. The subsequent judgment in the *Tadic* case preserved this testimony in a lengthy section entitled "Background and Preliminary Factual Findings." See *Tadic Judgment*, *supra* note 58, paras. 53–192; Alvarez, *supra* note 87, at 2053–58 (criticizing the historical truth recorded in the *Tadic* judgment despite these efforts). While the first judgment issued after a full trial in the ICTR, against a provincial mayor named Jean-Paul Akayesu, contains a far less elaborate historical section, it too provides a succinct "historical context" for the events leading to the genocide in 1994. See *Akayesu Judgment*, *supra* note 131, § 1.5.

157. See, e.g., ICTR Statute, *supra* note 53, art. 3; ICTY Statute, *supra* note 53, art. 5.

158. See Harry Goulbourne, *Ethnic Mobilization, War and Multi-Culturalism*, in *WAR AND ETHNICITY*, *supra* note 67, at 163, 166; see also DESTEXHE, *supra* note 10, at 28–35 (giving examples); NOEL MALCOLM, *BOSNIA: A SHORT HISTORY* 234–52 (1994) (same); Slaven Letica, *The Genesis of the Current Balkan War*, in *GENOCIDE AFTER EMOTION*, *supra* note 62, at 91–112 (same). This may be the

reinforce “ethnic” nationalism and ethnic identity, as ‘opposed to “liberal” nationalism.¹⁵⁹ Economic inequalities and political dislocations, sometimes exacerbated or created by globalization trends, including the strictures imposed by international lending institutions, may pave the way for ethnic discontent.¹⁶⁰ In some recent instances, including in Africa and the Balkans, the (in)actions of U.N. organs (as through economic sanctions or arms embargoes), prominent members of the international community, and even peacekeepers themselves, have worsened ethnic tensions.¹⁶¹ The 1994 Rwandan genocide shares many if not all of these partial explanations.¹⁶² Whether or not any criminal trial can ever provide an account of that genocide that does justice to this variety of causal or explanatory factors,¹⁶³ the ICTR’s prosecutions, artificially constrained to events occurring over one year and limited to actions taken within Rwanda,¹⁶⁴ seem especially unlikely to produce the full account of barbarism that the international legal paradigm demands.¹⁶⁵

Moreover, as at least some of the possible factors in the Rwandan genocide imply, the limits on the ICTR’s jurisdiction are not simply the result of resource constraints. Those limits were the product of a highly political process within the Security Council and reflect diplomatic concerns. Broader jurisdiction for the ICTR could well have led to inquiries that would have embarrassed either the U.N. as a whole or particular permanent members of the Security Council.¹⁶⁶ But such political factors should also make us

case even with respect to countries with a colonial past such as Rwanda, where, even though ethnic and racist perceptions may be of relatively recent vintage, they are nonetheless passed on or engendered by colonizers and later collaborators (in this instance, the Germans, the Belgians, and the French). See DESTEXHE, *supra* note 10, at 71–74; PRUNIER, *supra* note 10, at 336–45; see also *supra* notes 104–114 and accompanying text.

159. See, e.g., Jakob Rosel, *Nationalism and Ethnicity: Ethnic Nationalism and the Regulation of Ethnic Conflict*, in *WAR AND ETHNICITY*, *supra* note 67, at 145, 152.

160. See, e.g., Mark Duffield, *Ethnic War and International Humanitarian Intervention: A Broad Perspective*, in *WAR AND ETHNICITY*, *supra* note 67, at 203.

161. See, e.g., Turton, *supra* note 72, at 35. Consider, in this connection, the controversial roles of French peacekeepers during the Rwanda genocide. See *supra* notes 117–121 and accompanying text.

162. See generally GOUREVITCH, *supra* note 1 (presenting a journalistic account of the Rwandan genocide); PRUNIER, *supra* note 10 (presenting the most authoritative account of the causes of the Rwandan genocide).

163. For an exhaustive account of the many ways judicialized histories may fall short in this respect, see Osiel, *supra* note 151, at 505–691.

164. Indeed, the geographical limitations imposed on the jurisdiction of the ICTR demonstrates that its creators decided not to take advantage of the tribunal’s international status in this respect. Cf. *supra* note 46 and accompanying text (arguing that one benefit of international tribunals is their capacity to consider interstate issues and crimes).

165. This is all the more likely given the relatively few number of perpetrators likely to face international trials. The selectivity of international trials sends a misleading message about the scope of the Rwanda massacre, as well as the number of those complicit. Cf. *supra* notes 57–61 and accompanying text (justifying selective prosecutions).

166. The combination of the ICTR’s temporal and subject matter jurisdictional limits helps to ensure, after all, that no state, other than Rwanda, is likely to face the real prospect that one of its nationals will face international charges. Cf. *infra* note 171 (discussing the attempt by Akayesu’s defense counsel to draw support from the U.N.’s helplessness). Had the tribunal’s jurisdiction not been restricted to offenses committed in the territory of Rwanda in calendar year 1994, see ICTR Statute, *supra* note 53, art. 1, it might have been easier to bring charges of complicity in genocide or other charges against, for example, French functionaries (both present in Rwanda and abroad). Cf. *supra* notes

somewhat skeptical of those judicial accounts of Rwandan history produced by the ICTR even within its limited jurisdiction. It remains to be seen whether that tribunal, wholly independent in theory from the Security Council but dependent on it in fact¹⁶⁷ and consisting of judges from a variety of nations with interests in the way Rwanda's recent history is told, will be able to engage in the kinds of broad-gauged historical inquiries into the Rwandan genocide that are essential to preserving collective memory and to generating public confidence in its accuracy. Thus, whether or not it is true, as many charge, that U.N., United States, Belgian, and French officials all ignored clear warnings of impending genocide,¹⁶⁸ that French officials gave aid and comfort to genocidaires before the killings, during them, and after,¹⁶⁹ or that international humanitarian relief agencies made it possible for some of the genocidaires to continue their extermination plans from inside refugee camps,¹⁷⁰ one doubts that such inquiries will be pursued in the course of proceedings organized and conducted by judges under U.N. auspices and subject to its funding. One suspects that the ICTR's judges will be sensitive about encouraging presentation of such evidence at trial (even if such questions were to arise) or about airing such issues in their judgments.¹⁷¹

To be sure, Rwandan national courts also face massive practical constraints with respect to the production and preservation of accurate collective memory. Resource limitations, as well as the political composition of the Rwandan judiciary under a regime that came to power in the wake of Hutu-led killings, make Rwandan local prosecutions unlikely sources for the rendering of fully truthful judicialized histories. Unassisted, such local trials are particularly unlikely to provide an accurate account of the full spectrum of the Tutsis' role in mass atrocities. On the other hand, the sheer number of local prosecutions and guilty pleas may, in itself, have positive implications

117–121 and accompanying text (questioning French motives). France, a veto-wielding member of the Security Council, presumably would have objected to an ad hoc tribunal likely to reach such cases.

167. See, e.g., Mark Thieroff & Edward A. Amley, Jr., *Proceeding to Justice and Accountability in the Balkans: The International Criminal Tribunal for the Former Yugoslavia and Rule 61*, 23 YALE J. INT'L L. 231, 272 n.188 (1998) (noting that shifting political winds within the Security Council, unrelated to the ad hoc tribunals themselves, may practically gut their effectiveness).

168. See *supra* note 122 and accompanying text.

169. See *supra* notes 117–121 and accompanying text.

170. See *supra* notes 128–129 and accompanying text.

171. The legal, as opposed to the moral, culpability of non-Rwandan nationals is not an academic question, even if the jurisdictional and other limits of the ICTR may tend to make it so. Consider the case of the first defendant to face a full trial in the ICTR, Jean-Paul Akayesu, the *bourgmestre* of Taba commune, who was charged with genocide, crimes against humanity, and violations of the laws of war. See Akayesu Judgment, *supra* note 131. Among the accusations against Akayesu that ultimately led to his conviction for genocide were a number of charges involving the failure to act or to prevent what he must have known would occur in the ordinary course of events or for being present at the scene where crimes were committed. See, e.g., *id.* § 5.2.1. Indeed, during his trial Akayesu's defense counsel sought the testimony of Canadian General Romeo Dallaire, former commander of the U.N. Mission in Rwanda (UNAMIR) in an attempt to show that if the U.N. could not forestall genocide, no one could expect a small town mayor to be able to do so. Contrary to this defense claim, it might be argued instead that foreign nationals (including peacekeepers and humanitarian relief personnel) present in Rwanda during the killings and in positions of considerable real or apparent authority also had a legal obligation to prevent the killings of civilians.

for the preservation of a more accurate collective memory.¹⁷² As some commentators have argued, speedy and sharply focused trials may be better than lengthier symbolic ones, especially if the latter face flagging public attention or take so long that they lose the public support needed to make them effective purveyors of collective memory.¹⁷³ Moreover, as those who have examined the effects of truth commissions on the construction of memory confirm, the participatory nature of the exercise matters as much as the final product. The “home-grown” nature of truth commissions, in terms of composition, mandate and origin, matters in terms of the impact of its final product.¹⁷⁴ Collective memory, after all, ideally should be constructed by the collective; it should be a product of local civil society—even if mediated and assisted by the international community.¹⁷⁵

In addition, not all instances of mass violations of human rights are equal. There are no “generic” massacres or genocides.¹⁷⁶ The particular circumstances surrounding the killings in Rwanda make those killings distinct in ways that matter for purposes of collective memory. As noted, there was nothing secret about what was done in Rwanda in 1994. As Neier indicates, the openness with which the slaughter took place was an open act of defiance directed both at the international community and at Rwandan institutions—both of which, the genocidaires felt, would fail to intervene.¹⁷⁷ The attempt to involve as many perpetrators within Rwanda and to make the international community indirectly complicit was intended to preclude the possibility of

172. Although the Rwandans began prosecuting cases related to the 1994 genocide only on December 27, 1996, by February 1997 their courts had issued 11 death sentences, 16 life imprisonments, and one acquittal. See Sennett & Noone, *supra* note 129, at 445; see also *infra* Part IV (discussing the implications for collective memory stemming from attempts to conduct war crimes trials in ethnically neutral terms); cf. McCarthy, *supra* note 92, at 188 (arguing that one advantage of South African truth commission proceedings over judicial proceedings is that the latter overly individualize the past, presenting atrocities as more piecemeal and less systematic than they actually were).

173. See, e.g., Stephan Landsman, *Retroactive Trials and Justice: Radical Evil on Trial*, 96 MICH. L. REV. 1456, 1468 (1998).

174. See Abdullah Omar, *Truth and Reconciliation in South Africa: Accounting for the Past*, 4 BUFF. HUM. RTS. L. REV. 5, 6, 12–14 (1998); Roht-Arriaza, *supra* note 15, at 281–86; see also SA’ADAH, *supra* note 152, at 186–88 (discussing the significance of “bottom-up strategies” such as truth commissions as example of “self-help from below”); Akhavan, *supra* note 27, at 747 (quoting Pospíšil, the Czech legal anthropologist, for the proposition that most law is enforced through internal norms rather than by external pressure).

175. See *supra* note 173 and accompanying text; see also Paul Schiff Berman, *Rats, Pigs, and Statues on Trial: The Creation of Cultural Narratives in the Prosecution of Animals and Inanimate Objects*, 69 N.Y.U. L. REV. 288, 315–18, 326 (1994) (arguing that trials are cultural performances that permit groups to heal themselves by creating their own understanding of crisis and that a society’s primary social institutions must function as storytellers for such “consensus narratives” at such moments). Even with respect to Germany after World War II, it can scarcely be said that Germany’s collective memory of the Holocaust has been primarily formed by the international trials at Nuremberg. As the recent public reception of Daniel Goldhagen’s controversial book in Germany suggests, a nation’s collective memory of atrocity may be assisted by foreign intervention but is primarily the product of a continuous series of local interactions that cannot be dictated from abroad. See, e.g., Jürgen Habermas, *Goldhagen and the Public Use of History: Why a Democracy Prize for Daniel Goldhagen?*, in UNWILLING GERMANS? THE GOLDHAGEN DEBATE, *supra* note 40, at 263, 263–72.

176. See GOUREVITCH, *supra* note 1, at 186.

177. See NEIER, *supra* note 64, at 217.

prosecution on the premise that “[if] all are guilty, no one is guilty.”¹⁷⁸ As this suggests, the truth that needs to emerge must address these specific realities, as well as the wider circles of complicity. It is not the same kind of truth as that which was needed and attempted in other cases of atrocities, such as those involving “secret” government disappearances.

While international trials of a few Rwandan high-level perpetrators will provide some additional details about much that we already know, namely how the genocide was orchestrated and how the actual killings were organized, such trials will tell us next to nothing about those most directly involved in the killings or about their individual victims. They will not tell family members where victims are buried or the particular circumstances of their deaths. And they will not tell anyone how the average Rwandan, not in a position of authority, was co-opted into mass slaughter. This is the kind of truth about these crimes of hate that the journalist Gourevitch aspires to capture in his book,¹⁷⁹ and it is the kind of truth that even the speedy, but abundant, trials now being conducted inside Rwanda might help to produce given time. At the same time, such local plea bargains and trials, directed at the full range of perpetrators, as opposed to international trials for a selective few, attempt to demonstrate that impunity through massive complicity does not always succeed in intimidating domestic institutions or the rule of law.

As this suggests, in circumstances such as Rwanda, an accurate collective memory may require an attempt to make large numbers of perpetrators accountable, not only because large numbers *were* culpable, but also because those who have survived need to have an accounting of what was done to their own.¹⁸⁰ As Juan Mendez has pointed out, many victims desire and need individualized justice, particularly a forum in which they can be heard, have their injuries acknowledged, and be told the truth about what happened to themselves and to family members.¹⁸¹ This is less likely to occur if few trials proceed or if those that do proceed focus on high-level perpetrators who had little direct contact with their victims, if international resources are diverted away from national prosecutions and directed at the ICTR, or if the bifurcation of trials between the international and domestic levels produces an incoherent collective memory.

Both international and domestic fora face distinct constraints with respect to the preservation and presentation of a fully realized collective memory.¹⁸² But, contrary to the premises of at least some international lawyers, there is no reason to presume that in all cases this goal will be more

178. *Id.*

179. See GOUREVITCH, *supra* note 1.

180. Cf. *supra* note 59 (discussing Akhavan’s argument that select prosecutions may be sufficient). For an argument that, counter to the assumptions of many international lawyers, individual trials do not, and probably should not, attempt to exonerate the collective, see Alvarez, *supra* note 87, at 2086–88. These issues are revisited in Part IV.

181. See Mendez, *supra* note 151, at 265 (identifying the need for “individualized truth”).

182. Elsewhere, I have argued that criminal prosecutions play a far more limited role with respect to producing collective memory than some international lawyers have suggested. See Alvarez, *supra* note 87, at 2105–06. The point here is simply that to the extent we rely on criminal trials to help produce or to preserve the truth, we need to consider the respective strengths of domestic trials.

effectively realized within international tribunals.¹⁸³ National trials, capable of reaching further back into Rwanda's recent past than the ICTR's selective trials of some high-level perpetrators and deeper into the full range of Rwandan society, may be more likely to provide a fuller account of how these killings occurred and a more accurate account of the scope of complicity.¹⁸⁴ It may well be that those who want an exhaustive rendering of the Rwandan genocide, as well as victims who want all those complicit in genocide to be held accountable, would, all things considered, prefer that jurisdictional primacy, as well as international resources, be accorded to alternatives that reach, as under Rwanda's Organic Law, at least to events as early as 1990 and that are capable of reaching related offenses that have occurred since 1994 as well, including acts of retaliation.

The Rwandan government's complaints about the international community's unwillingness to conduct international trials on Rwandan territory suggest other reasons, quite apart from collective memory, to be critical of the ICTR's hierarchical primacy. International lawyers, including the ICTR's first prosecutor, Richard Goldstone, are too quick to dismiss the Rwandan government's resistance to the ICTR as the product of a lack of confidence in international procedures or as being due to misguided notions of sovereignty.¹⁸⁵

Consider Goldstone's account of the contest between the ICTR and the Rwandan government over the custody of Colonel Theoneste Bagasora, one of the most important of the prior leaders of Rwanda implicated in mass crimes who had been arrested in the Cameroons at the request of the Rwandan government.¹⁸⁶ Goldstone relates the story of how he, as international prosecutor, "was not prepared to surrender the primacy of the Rwanda tribunal in respect of Bagasora" and suggests why it was important that the ICTR take custody (as it eventually did) in preference to Rwandan courts: because any other result would have "subverted" the credibility of the international tribunal.¹⁸⁷ Goldstone further argues that even if the Rwandan government were, in the future, to request the discontinuation of international trials, the international community should nonetheless continue to insist on the exercise of "primacy of jurisdiction through the Rwanda tribunal" because of the magnitude of the crimes committed, their international consequences, and the location of culprits.¹⁸⁸ Even though Goldstone assumes that Rwanda would nonetheless continue to prosecute other culprits in national courts, his plea for

183. For more general descriptions of the constraints faced by all courts with respect to the preservation of collective memory, see Osiel, *supra* note 151, at 505–648.

184. The issuance of public indictments in lieu of trials, under the tribunals' Rule 61 proceedings, is also unlikely to produce authoritative truth. See, e.g., Thieroff & Amley, *supra* note 167, at 248–50.

185. See Goldstone, *Justice as a Tool*, *supra* note 41, at 497.

186. See *id.*

187. See *id.*; see also ICTR Rules of Procedure and Evidence, *supra* note 98, Rule 59 (establishing that failure to execute a tribunal order for arrest may result in a prompt resort to the Security Council). But see Harhoff, *supra* note 96, at 580 (suggesting that the tribunal has followed a less confrontational approach in practice when asserting its "supremacy over national authorities").

188. See Goldstone, *Justice as a Tool*, *supra* note 41, at 498.

the primacy of the international criminal process rests on the presumed greater legitimacy of the international process over the local and the need to continually buttress this presumption. "These were truly international crimes," he writes, "and the international community, through the Security Council, having assumed jurisdiction, has no good reason to surrender it."¹⁸⁹

As this incident suggests, the international law paradigm does not countenance the possibility that the goals articulated for international prosecutions contain inherently contradictory elements or that some of these goals imply giving Rwandan courts jurisdictional primacy. Yet, to many people within Rwanda, and clearly to its present government, conducting a national trial of someone as significant as Bagasora¹⁹⁰ may be just as necessary to affirm the credibility of Rwandan efforts to prosecute these crimes and to restore the legitimacy of Rwanda's devastated legal system as conducting such a trial at the international level may be for the credibility of the U.N. A local trial for Bagasora, even one subject to extensive international observation or even the possibility of appeal to the ICTR, would have affirmed to the world, and most importantly to all Rwandans, that Rwanda's institutions, including its judiciary, were capable of rendering justice even with respect to formerly exalted public officials. To Tutsis, it would have symbolically affirmed that their nation was no longer the de facto apartheid state that targeted them for extermination.¹⁹¹ By contrast, denying the Rwandan government the right to try Bagasora withheld from that government the power to fulfill one of its major political pledges, and undermined its claim that it was, unlike the former regime, committed to the rule of law in a multiparty, pluralistic state.¹⁹² Depriving the Rwandan government of

189. *Id.* As is discussed further, the ICTR's jurisdictional primacy is premised on such international priorities and not on the possibility that national proceedings will violate the fundamental human rights of criminal defendants. See *infra* notes 235-237 and accompanying text. Both Goldstone and the text of the ICTR's Article 8 proclaim the ICTR's jurisdictional primacy irrespective of whether or not a criminal defendant's rights are adequately protected by national processes.

190. According to an authoritative account of the Rwanda genocide, Bagasora has the distinction of being its "general organizer," the one individual who, as director of services of the Ministry of Defence, seems to have "coordinated the 'final solution' activities as long as they retained enough coherence to be coordinated." PRUNIER, *supra* note 10, at 240. Indeed, some suspect Bagasora of being involved in Habyarimana's murder. See, e.g., GOUREVITCH, *supra* note 1, at 113.

191. For the symbolic and other significance of such foundational trials generally, see LUBAN, *supra* note 152, at 379-91. For a recent recognition by a German court of the symbolic importance of a decision in a war crimes context, see Christoph Safferling, *International Decisions: Public Prosecutor v. Djajic*, 92 AM. J. INT'L L. 528 (1998) (summarizing *Public Prosecutor v. Djajic*, No. 20/96, excerpted in 1998 *Neue Juristische Wochenschrift* 392, Supreme Court of Bavaria, 3d Strafsenat, May 23, 1997). In that case, the Bavarian court convicted the defendant of various murders committed in the former Yugoslavia. Among the rationales given by that court for its decision was the need to safeguard and foster the trust of German citizens in the national and international legal order, as well as to show the world that Germany was not sheltering international criminals. See *id.* at 532. Just as German courts have their own historic reasons for taking such a position, Rwandan courts have even more immediate needs to affirm their credibility on such issues.

192. At a more pedestrian but nonetheless significant level, an insistence that those who are most culpable will not face the death penalty (unlike category one offenders who remain in Rwanda), would appear to undermine the plea bargaining system contained in Rwanda's Organic Law. As Madeline Morris has suggested, a prosecutor seeking to induce credible confessions and avoid trials needs to be able to rely on the threat that those who are more culpable will face the greater penalty. Remarks of Madeline Morris, *International Law Weekend*, Nov. 13-14, 1998 (author's notes).

conducting the trial of such a high-level perpetrator of the former regime deprived the current government of legitimacy at a critical time.

It is not self-evident that in a contest between maintaining the credibility of national law and maintaining the credibility of the ICTR, the needs of the latter tribunal should always take priority—and yet this is what jurisdictional primacy implies. On a day-to-day basis, more people rely on the protection and viability of their own local law and institutions than on international law or the U.N. The Rwandan people have a greater interest and stake in empowering their own local courts and other institutions than in protecting the credibility of the Security Council.¹⁹³

C. *Primacy's Audiences*

International lawyers acknowledge that both amnesties and war crimes trials are intended to send distinct messages to diverse constituencies, national and international. Amnesties, they contend, signal lawlessness to victims, to perpetrators, and to relevant national communities, as well as to international society as a whole. This message is ostensibly countered and the rule of law affirmed through international criminal accountability.¹⁹⁴ In this Section I will show why the visions of justice conveyed to relevant audiences by the ICTR are more contradictory than the international legal paradigm assumes.

For victims of mass atrocities, international justice is not indistinguishable from national justice. The survivors of mass atrocities cannot reasonably expect, nor are they likely to receive, the same thing from both processes. The geographical distance between the place where international trials are conducted and the place where the atrocities occurred has consequences, and not merely to the efficacy of international processes.¹⁹⁵ To many surviving family members of the victims of the Rwandan genocide, it matters a great deal whether an alleged perpetrator of mass atrocity is paraded before the local press, judged in a local courtroom in a language that

193. As was recognized by the Security Council itself when, in the course of establishing the ICTR, it stressed the “need for international cooperation to strengthen the courts and judicial system of Rwanda, having regard in particular to the necessity for those courts to deal with large numbers of suspects.” S.C. Res. 955, 49th Sess., 3453rd mtg., pmb., U.N. Doc. S/RES/955 (1994). Despite this exhortation, international assistance directed at assisting Rwandan courts has been meager, particularly when it would have mattered most (that is, immediately upon the fall of the former regime in 1994) and especially by comparison to the sums allocated to the ICTR. See Carla J. Ferstman, *Rwanda's Domestic Trials for Genocide and Crimes Against Humanity*, HUM. RTS. BRIEF, Fall 1997, at 1, 13 (discussing the failure of the legal assistance program *Avocats sans Frontières* to provide adequate services); *infra* note 569 (indicating total aid sums for Rwanda legal assistance). Indeed, the assertion of ICTR primacy could undermine particular local investigations, prosecutions, or efforts to provide compensation to victims should any of these appear at odds with concurrent ICTR efforts. See Harhoff, *supra* note 96, at 576–84 (discussing the need for cooperation between the ICTR and Rwandan courts to prevent such an outcome).

194. That these groups are the principal intended audiences under the international legal paradigm seems clear. See, e.g., Nanda, *supra* note 77, at 313–14 (addressing an audience of the victim, the defendant, the traumatized society, and the world order).

195. Cf. *supra* text accompanying note 51 (mentioning the problems of remote witnesses and evidence).

they can understand,¹⁹⁶ subjected to local procedures, and given a sentence that accords with local sentiments, including perhaps the death penalty.¹⁹⁷ Given a choice between local justice and justice once removed (as in a trial in Tanzania under unfamiliar processes and judges), it should hardly be a surprise if most survivors of the Rwanda genocide, and not merely Rwandan government officials, prefer local trials or local plea bargains, especially where it appears that national venues may produce quicker results than prolonged international processes.¹⁹⁸

These preferences are supported by tangible reasons, both practical and psychological. As U.S. courts' reluctance to countenance changes of venue without good reason suggests, trials are undermined and not merely rendered more difficult the greater the distance between their venue and the location of witnesses and evidence. Trials that have to be conducted, as are those in the ICTR, through the aid of interpreters and without the knowledge of local culture and manners are bound to lead to misunderstandings at all levels. Thus, as the *Akayesu* judgment itself acknowledges, the ICTR judges in that case had to wrestle with subtleties in the way Rwandans express themselves that made it difficult to tell whether witnesses had actually witnessed acts that they were reporting or reporting what others had seen and told them.¹⁹⁹ It is difficult to know whether the judges came to the correct conclusions concerning such culturally sensitive questions. Further, local Rwandan processes provide, at least in theory, recourses for victims that are not available at the international level: the possibility of concurrent civil suits against perpetrators; the prospect of a private prosecution should the public prosecutor fail to proceed; a sentence that accords with local sentiments and local conditions (including relatively harsh prison conditions and the death penalty); and local vindication. Local trials are covered extensively on local radio broadcasts; further, victims' family members and friends, even those who are not called as witnesses, are far more likely to attend and personally witness the proceedings and, perhaps most importantly, see perpetrators face to face.

196. Cf. Sara Darehshori, *Inching Toward Justice in Rwanda*, N.Y. TIMES, Sept. 8, 1998, at A25 (noting the difficulties for those working within the ICTR of working through one "overworked translator"). Indeed, the linguistic and cultural gaps within the ICTR (frequently involving translations from the local Rwandan dialect to French and then to English) required the use of an expert witness on linguistics during the course of the *Akayesu* trial. See *Akayesu Judgment*, *supra* note 131, para. 4. That witness also attempted to clarify that "evidence which had been reported as an eyewitness account was in fact a second-hand account of what was witnessed." *Id.* § 4, para. 11.

197. See, e.g., *infra* note 207.

198. The first trial at the ICTR, against Jean-Paul Akayesu, began in January 1997 and concluded in March 1998. See Darehshori, *supra* note 196. As noted in the *New York Times*, at the current rate, the ICTR would take 20 years merely to try the 35 people whom it has to date indicted. See McKinley, *supra* note 32. The ICTR's current President, Laity Kama, is more optimistic. In a letter dated Aug. 1, 1997, he estimated that it would take the tribunal at least 88 months to conclude trials for the 20 detainees then in custody. See *Report of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States Between 1 January and 31 December 1994*, U.N. SCOR, 52nd Sess., Annex, U.N. Doc. S/1997/812 (1997).

199. See *supra* note 196 (reporting on the ICTR's attempts to deal with these difficulties).

Victims may also care about having some control over the process. It is not merely that Rwandans are more likely to regard local courts as “theirs,” but also that, as is common in continental jurisdictions, local decisions to prosecute are not invariably left in the hands of public servants. Under Rwandan law, should a government prosecutor fail to institute proceedings against some individuals, litigants may themselves institute private prosecutions as well as civil suits for damages.²⁰⁰ At least in theory, Rwandan courts, unlike the tribunal at Arusha, provide some avenues for survivors of the Rwandan genocide where they can target their own defendants, choose their own lawyers, shape their own claims, and direct their own cases.²⁰¹

As has been noted with respect to civil suits in U.S. courts directed at Balkan defendants, such a process is potentially more accountable to victims than proceedings subject to the vicissitudes of international prosecutors, who must be accountable to many interests and not merely to victims.²⁰² Even if Rwandan victims do not exercise the option of bringing their own criminal or civil suits, having such remedies available may, in itself, serve as a comfort and help to generate greater confidence in those public prosecutions that are brought.²⁰³ Such psychological comforts are all the more important given the remote prospects that either national or international prosecutions will enable victims to secure more tangible forms of relief, including monetary compensation.²⁰⁴ While observers of Rwandan processes for civil

200. See Organic Law, *supra* note 140, art. 29.

201. Cf. Catharine A. MacKinnon, *Remedies for War Crimes at the National Level*, J. INT'L INST., Fall 1988, at 1 (describing the benefits of a civil suit brought by Balkan victims in a U.S. court). As this suggests, such assertions of control may be more effective modes of catharsis for victims than the opportunity to serve as mere passive witnesses at prosecutions controlled by others. Indeed, MacKinnon, who is now involved in a civil suit on behalf of women from the former Yugoslavia in the United States, see *Kadic v. Karadzic*, 70 F.3d 232, 236 (2d Cir. 1995), contends that clients such as hers found the ICTY more accountable to the international community than to victims and suggests that this may explain why they have been more forthcoming in the course of her suit than they might otherwise have been. See MacKinnon, *supra*, at 1; see also TOM R. TYLER, WHY PEOPLE OBEY THE LAW 126–34 (1990) (presenting empirical evidence that the element of control over judicial processes matters to perceptions of procedural justice).

MacKinnon also contends that her clients have a somewhat different agenda both in terms of their suit and more generally, namely, “(1) stopping the violations; (2) naming them what they are; (3) accountability to the violated for what was done to them; and (4) continuity between the legal changes made and other law, so that what was done here counts and has meaning beyond the context of these proceedings.” MacKinnon, *supra*, at 23.

202. See *id.* As MacKinnon puts it, “The process, by design, is accountable to them—not to the press, not to international politics, not to the bureaucratic imperatives of international organizations, . . . and not to criminal prosecutors enhancing their careers by claiming to represent ‘the law.’” *Id.* at 6; see also *Mushikiwabo v. Barayagwiza*, 1996 WL 164496 (S.D.N.Y. Apr. 9, 1996) (providing a civil verdict against a Rwandan political leader implicated in Rwanda’s 1994 killings). For a critique of how the *Tadic* trial in the ICTY forced victim/witnesses to relate “fragmented narratives,” see Alvarez, *supra* note 87, at 2068–69 (arguing that the *Tadic* trial used victims as “essentially faceless place-holders for dates, times, and acts” relevant to the indictment).

203. In addition, the prospect of private prosecutions may force public prosecutors to be more accountable to victims and more responsive to victims’ concerns in the charges that they bring.

204. There is little evidence to date that the ICTR will be able to do much by way of recompensing victims or family members. Cf. ICTR Statute, *supra* note 53, art. 23 (providing that chambers “may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners”). Apart from this provision, nothing in the ICTR Statute envisions civil claims for damages. See Almeida, *supra* note 42, at 404 (suggesting reasons from moral

compensation have criticized its operation in many respects,²⁰⁵ no one denies that, properly conducted, such procedures hold considerable promise in meeting victims' needs.²⁰⁶

Finally, victims of mass atrocity and their family members, like victims of crime everywhere, care about the types of penalties imposed on perpetrators.²⁰⁷ The depth of Rwandan feeling on the need to impose the death penalty on some offenders is underscored by their law's insistence that "category one" perpetrators cannot escape the death penalty no matter what they do: whether or not they choose to confess, to name accomplices, or to spare the state the burden of a trial.²⁰⁸ The international community's

philosophy); see also Yael Danieli, *Justice and Reparation: Steps in the Process of Healing*, in REINING IN IMPUNITY, *supra* note 31, at 303, 308–11 (identifying needs met by restitution and compensation); cf. Organic Law, *supra* note 140, art. 10 (anticipating the possibility of civil claims); PRUNIER, *supra* note 10, at 354–55 (arguing that a minimum cash payment is a necessary component of the justice due to Rwandan survivors). For an argument that judicial consideration of damage claims are useful, whether or not judicial awards prove to be enforceable, see Alvarez, *supra* note 87, at 2102.

205. See William A. Schabas, *Compensation and Reparation: Problems of Access to Civil Justice*, in REINING IN IMPUNITY, *supra* note 31, at 445, 451–55 (concluding that given the difficulties with Rwandan procedures and that country's lack of resources available for compensating victims, the international community should recognize a degree of international responsibility); see also Drumbl, *supra* note 146, at 595–97 (discussing problems with Rwandan procedures for civil liability under its Organic Law). Despite the reputed connection between criminal accountability for war crimes and the "international community's interests," international lawyers have been reticent about embracing Schabas's conclusions.

Few international lawyers have argued that compensation for victims of international crime, including genocide, are owed an indemnity by the international community. Compare Theo van Boven, *Study Concerning the Right to Restitution, Compensation, and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms*, U.N. ESCOR, 45th Sess., U.N. Doc. E/CN.4/Sub.2/1993/8, reprinted in LAW & CONTEMP. PROBS., Autumn 1996, at 283, 297–303, 344–471 (outlining applicable principles of state responsibility under which the international community would appear to owe nothing in this regard), and Theo van Boven, *Accountability for International Crimes: The Victim's Perspective*, in REINING IN IMPUNITY, *supra* note 31, at 349, 355 (noting that only under some unspecified "special circumstances" should reparation mechanisms be created at the international level), with Yvez Sandoz, *Reflections on Impunity and the Need for Accountability*, in REINING IN IMPUNITY, *supra* note 31, at 381, 391 (suggesting that affirming the right to victim compensation is unrealistic unless the international community is ready to assume collective responsibility for some cases).

206. For further discussion of the aspirational needs met by the *Kadic v. Karadzic* litigation and by civil claims generally, see Judge Jon O. Newman, *Toward an International Civil War Claims Tribunal*, 12 CONN. J. INT'L L. 245, 245 (1997) (arguing that civil suits could ultimately afford a greater redress of rights). See also *The Genocide Convention After Fifty Years: Contemporary Strategies for Combating a Crime Against Humanity*, 92 AM. SOC'Y INT'L L. PROC. 1, 13–19 (1998) (publishing remarks by Delissa Ridgeway discussing the significance of reparations to Holocaust survivors).

207. While there is evidence that some victims of atrocity seek only acknowledgment of what occurred, others, including many of the survivors in Rwanda, want perpetrators to be punished, in some cases, severely. See, e.g., GOUREVITCH, *supra* note 1, at 131, 245–46; James C. McKinley, Jr., *Ex-Rwandan Premier Gets Life in Prison On Charges of Genocide in '94 Massacres*, N.Y. TIMES, Sept. 5, 1998, at A4; cf. Carrie Gustafson, *International Criminal Courts: Some Dissident Views of the Continuation of War by Penal Means*, 21 HOUS. J. INT'L L. 51 (1998) (criticizing retributivist reactions to mass atrocity).

208. See Organic Law, *supra* note 140, arts. 5, 14. The first 22 executions of Rwandans convicted for the 1994 genocide occurred on April 24, 1998, amidst calls for more such executions by Rwandans and considerable international criticism. See Dianna Cahn, *Justice Must Be Done*, ANN ARBOR NEWS, Apr. 24, 1998, at A3. In the wake of executions, an increasing number of genocide suspects have been coming forward to confess their crimes in order to get a reduced sentence. See *Minor Tried for Rwandan Genocide Crimes*, AFR. NEWS ONLINE (visited May 25, 1998)

opposition to the death penalty, illustrated by the myriad resolutions and U.N.-sponsored treaties, spanning decades, devoted to the abolition of the death penalty,²⁰⁹ as well as the Security Council's insistence, over Rwanda's objection, that such a penalty not be available to ICTR judges,²¹⁰ thwarts such sentiments. Moreover, most of the discussion in favor of the abolition of the death penalty, at both the international and national levels, relates to its imposition with respect to ordinary crimes of much less magnitude or scale. Indeed, the international abolitionist campaign has been usually directed not at the sentence of death as such but to underlying flaws in imposing that sentence.²¹¹ It is also clear that at least some of the U.N. members now criticizing Rwandan executions for perpetrators who have been convicted of some of the most grievous offenses known to humankind have themselves refused to forego the use of the death penalty with respect to ordinary offenders involved in crimes of much less gravity within their own borders.²¹²

For Rwandan survivors of the 1994 genocide there is considerable hypocrisy in the United Nations' insistence that those defendants lucky enough to face trial at the ICTR will not face the kinds of penalties, including death, imposed under Rwandan law, even if they were the foremost leaders of genocide.²¹³ Apart from the charge of double standards, few international lawyers appear to have squarely addressed whether Rwandan authorities have the legal or the moral right to insist on the death penalty for such cases. By contrast, the author of an authoritative account of Rwanda's genocide

<http://www.africanews.org/past/rwanda/stories/19980525_feat1.html>.

209. For a survey of these, see Roger Hood, *The Death Penalty: The USA in World Perspective*, 6 J. TRANSNAT'L L. & POL'Y 517, 521 (1997).

210. See Schabas, *supra* note 12, at 553.

211. See generally Hood, *supra* note 209, at 529–40 (observing that ordinary crimes for this purpose are offenses defined solely by reference to national law and not international humanitarian law). As Hood's survey of the relevant international instruments relating to the death penalty demonstrates, the infliction of the death penalty for international crimes such as genocide would appear to conform to the most important U.N. safeguard on its use—that the penalty be limited to the most serious offenses. See *id.* at 530–31.

212. Back in 1953, Pope Pius XII noted the problems with such anomalies:

In the case where human life is made the object of a criminal gamble, where hundreds and thousands are reduced to extreme want and driven to distress, a mere privation of civil rights would be an insult to justice. When, on the contrary, the violation of a police regulation, a thoughtless word against authority, are punished by firing squad or by forced labor for life, the sense of justice revolts.

His Holiness Pope Pius XII, *Address to the Sixth International Congress of Penal Law, October 3, 1953*, in REINING IN IMPUNITY, *supra* note 31, at 13, 17–18. Citing these anomalies, Pope Pius XII recommended that the fixing of penalties for crimes such as genocide should correspond to their gravity and not result in more lenient treatment depending on the nature of the tribunal charged with sentencing. See *id.* at 18. While presumably the Pontiff was not addressing the death penalty, his arguments apply perhaps most forcefully in that context.

213. See, e.g., GOUREVITCH, *supra* note 1, at 131. Indeed, Gourevitch reports that some of the prisoners released from Rwandan prisons have been the victims of reprisals. See *id.* at 223, 245–46. While the Security Council has not prohibited Rwanda from imposing the death penalty on perpetrators who are convicted as category one perpetrators under Rwandan law within the Rwandan court system, its insistence that the ICTR has primary jurisdiction, combined with the ICTR's demand for high-level perpetrators, has the result of effectively preventing Rwandan courts from trying and convicting any individual that the ICTR's prosecutor chooses to indict and to try. See ICTR Statute, *supra* note 53, art. 9(1) (prohibiting national courts from retrying persons for crimes for which they have been tried within the ICTR).

concludes that at least 100 of the well-known perpetrators of that massacre “have to die” since this is “the only ritual through which the killers can be cleansed of their guilt and the survivors brought back to the community of the living.”²¹⁴ The pat response made by international lawyers—that international standards have evolved since those tried at Nuremberg were hanged—fails to identify, precisely, what international instrument or norms in customary law actually prohibit Rwanda from executing persons convicted of serious offenses such as genocide.²¹⁵

Despite the voluminous literature on the ad hoc tribunals, there is scant attention paid to addressing the theories of punishment—whether retributive, rehabilitative or other—that are supposed to underlie the effort.²¹⁶

214. PRUNIER, *supra* note 10, at 355. Prunier states:

The immensity of the crime cannot be dealt with through moderate versions of European criminal law made for radically different societies. This after all is something Europeans already know: after the Nuremberg trial the condemned were hanged in the name of the millions who had died. This is a political and religious question. To reassure the “small guys” who used the machete and to assuage the immense pain of their victims’ relatives, only the death of the real perpetrators will have sufficient symbolic weight to counterbalance the legacy of suffering and hatred which will lead to further killings if the abscess is not lanced.

Id. While Prunier does not indicate his normative framework for his conclusion, advocates of the ad hoc tribunal’s prohibition on the death penalty have also failed to articulate theirs.

215. There do not appear to be any international treaties to which Rwanda is a party that impose such a ban. Neither is it clear that customary international law does so. *See, e.g.*, William A. Schabas, *International Law and Abolition of the Death Penalty*, 55 WASH. & LEE L. REV. 797, 799 (1998) (noting that since, to date, 102 states have abolished the death penalty but 90 have retained it, it is premature to declare that the death penalty is now prohibited by customary international law). Indeed, if Destexhe is correct in suggesting that the Rwandan 1994 killings are only one of three genuine genocides of this century, *see* DESTEXHE, *supra* note 10, at 21–35, there is no state practice since Nuremberg to suggest states have renounced the death penalty with respect to this crime. *But see* Mendlovitz & Foušek, *supra* note 28, at 149 (citing 44 genocides in the 20th century). Even if Destexhe is wrong and many genocides have occurred since World War II, the absence of national trials for such offenses again points to the scarcity of relevant precedents.

Advocates for the ad hoc tribunals have not spent much time addressing why the death penalty cannot, from a legal, as opposed to a political, perspective, be applied in cases of mass atrocities. *Cf.* Jennifer L. Balint, *The Place of Law in Addressing International Regime Conflicts*, LAW & CONTEMP. PROBS., Autumn 1996, at 103, 113 (criticizing the undeveloped nature of international criminology and its simplistic focus on the alleged choice between justice and peace). Less positivistic arguments against the death penalty are suggested by commentators who favor restorative, instead of retributivist, justice and therefore disfavor criminal accountability. *See, e.g.*, Jennifer J. Llewellyn & Robert Howse, *Institutions for Restorative Justice: The South African Truth and Reconciliation Commission as a Model for Dealing with Conflicts of the Past* (Jan. 20, 1998) (unpublished manuscript, on file with *The Yale Journal of International Law*); *see also* Lynn S. Graybill, *South Africa’s Truth and Reconciliation Commission: Ethical and Theological Perspectives*, 12 ETHICS & INT’L AFF. 43 (1998) (assessing the potential for national reconciliation in the wake of South Africa’s truth commission). While, as these commentaries suggest, some nations have foregone the imposition of the death penalty even in the wake of mass atrocities, in none of these cases has the international community required a nation to do this by binding Security Council order, and those nations that have chosen a more merciful route have therefore done so based on their own calculation of what would work best for national reconciliation. By contrast, whenever the ICTR convicts a high-level perpetrator such as Bagasora, its sentence precludes Rwanda from imposing a more severe sentence on that individual. *See supra* note 99.

216. There has been, of course, a continuous and lively debate, primarily outside of international legal circles, concerning such issues. *See, e.g.*, H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW* (1968); Joshua Dressler, *Hating Criminals: How Can Something that Feels So Good Be Wrong?*, 88 MICH. L. REV. 1448 (1990). For a thoughtful consideration of such issues with respect to instances of mass atrocity, see Stanley Cohen, *State Crimes*

International lawyers do not appear to be concerned about grounding the ad hoc tribunals' sentences, including the prohibition on the death penalty, in a coherent moral or philosophical framework. The tribunals' prohibition on the death penalty is simply the result of the perception that it would be politically impossible for the U.N. to extract such a penalty or for it to make it possible for others (for example the Rwandan government) to impose such a penalty for persons convicted at the international level. For survivors of the genocide, the questions remain: How exactly does the ICTR confer the "highest form of justice"²¹⁷ when it fails to permit (and may even help prevent) the execution of someone who has ordered or participated in the death of thousands? Does it matter that such mercy is shown to perpetrators from a nation that continues to impose much more severe punishment even with respect to "ordinary" murderers? What do such anomalies do to the legitimacy of Rwandan criminal justice? Does it matter for the legitimacy of the international "justice" conferred that the mercy shown high-level perpetrators was not accorded their victims by the international community either at the time of the 1994 genocide or since?²¹⁸

ICTR sentencing procedures are also problematic in other respects. Under Rwandan law, perpetrators seeking to reduce their sentences must apologize to their victims.²¹⁹ ICTR procedures, by contrast, do not require or solicit apologies from those who are convicted and nothing in the ICTR's (or the ICTY's) respective statutes encourages any other comparable act of contrition—despite evidence that public apologies and renunciations of past crimes strengthens victim mollification, along with other internationalist goals.²²⁰

As these issues suggest, those who seek primacy for international processes are preferring certain goals—including those of the international community of human rights lawyers who oppose the death penalty in all

of Previous Regimes: Knowledge, Accountability, and the Policing of the Past, 20 L. & SOC. INQUIRY 7 (1995); see also NEIER, *supra* note 15, at 83 (contending that the pendulum has recently swung in favor of retributivist approaches "[t]o restore the equilibrium of benefits and burdens in a society unfairly disrupted by crime and that . . . needs to demonstrate the seriousness with which it regards its laws against criminality, its condemnation of transgressions, and its respect for victims").

217. Cf. *supra* note 32 (citing Goldstone to this effect).

218. For a powerful indictment of the international community's treatment of the perpetrators of the Rwandan genocide as compared to its treatment of its victims, see, for example, GOUREVITCH, *supra* note 1, *passim*.

219. See Organic Law, *supra* note 140, art. 6(c).

220. See, e.g., *The Genocide Convention After Fifty Years: Contemporary Strategies for Combatting a Crime Against Humanity*, *supra* note 206, at 13 (1998) (remarks by Delissa Ridgway) (discussing the Holocaust Claims Program); cf. McCarthy, *supra* note 92, at 244–48 (discussing similar flaws in the South African truth commission process). Neither the victims of Tadic, the defendant whose trial was recently completed within the ICTY, nor those of Jean Kambanda, the first defendant to be sentenced by the ICTR, received a word of remorse or act of contrition from those defendants. See, e.g., *Prosecutor v. Jean Kambanda*, No. IT-97-23-S (ICTR Sept. 4, 1998), paras. 46, 51 (judgment and sentence), available in <<http://www.un.org/ICTR/english/judgements/kambanda.html>> (suggesting that a plea of guilty, standing alone, does not constitute an acknowledgment of remorse or express contrition). On the other hand, it might be argued that an apology under pain of criminal prosecution is too much like a forced recantation. One compromise might be to encourage such apologies without penalizing their absence.

instances—over the desires of many of those who have been most immediately affected by genocide. When international lawyers stress the need for “accountability,” the question of accountability to whom is not candidly addressed. While the advocates of the ICTR repeatedly emphasize the need for accountability to victims,²²¹ U.N. fora, including the ad hoc tribunals, are in reality most accountable to their direct patrons—the international community.²²² As is suggested by the ad hoc tribunals’ prohibition on the use of the death penalty over Rwanda’s objections, international criminal proceedings legitimize the developing *lex ferenda* preferred by U.N. bodies.²²³ Even if the imposition of the death penalty pursuant to national judicial procedures with full due process guarantees does not at present violate any existing norm of customary international law,²²⁴ a U.N. body is not going to defy the abolitionist sentiment prevalent within an important international constituency.

As the death penalty issue suggests, international tribunals are accountable to, and respond most readily to, international lawyers’ jurisprudential and other agendas and only incidentally to the needs of victims of mass atrocity.²²⁵ Quite apart from their presumed importance to the prospects for a permanent international criminal court, the ad hoc international tribunals are regarded as important to legitimate international scrutiny over a government’s treatment of its own citizens, even in instances not now involving international crimes,²²⁶ to legitimize and enforce a large body of international rights that criminal defendants are believed to enjoy,²²⁷ and to affirm international lawyers’ hierarchical claims for *jus cogens*.²²⁸ Some

221. See, e.g., Goldstone, *supra* note 32, at 489.

222. See, e.g., MacKinnon, *supra* note 201, at 1 (contending that the ICTY was “not accountable to survivors, but to international bodies and international politics”). The most tangible way in which such accountability manifests itself is through financing. In this respect, the tribunals’ financial accountability to the U.N. has been the focus of considerable concern and attention. See, e.g., Blewitt, *supra* note 31, at 156 (arguing that financial tensions constantly strain the tribunals’ freedom to “administer [their] own affairs” and presenting specific examples of this impact with respect to the ability to conduct particular investigations or to prosecute certain cases).

223. *But see infra* notes 274–358 and accompanying text (discussing the problems with this assumption).

224. See *supra* note 215.

225. As Neier reminds us, this was no less true at Nuremberg. See NEIER, *supra* note 15, at 181 (discussing why rape charges were not brought at Nuremberg).

226. See, e.g., Andrews, *supra* note 32, at 503; Ratner, *supra* note 24, at 247–48; Thieroff & Amley, *supra* note 167, at 268.

227. Thus, the Lawyers Committee for Human Rights argues in favor of international war crimes tribunals on the grounds that national courts are unable to fulfill the increasing panoply of relevant human rights guarantees, citing the following list of instruments: the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Standard Minimum Rules for the Treatment of Prisoners, the Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment, the Basic Principles on the Independence of the Judiciary, the Basic Principles on the Role of Lawyers, and the Guidelines on the Role of Prosecutors. See LAWYERS COMMITTEE FOR HUMAN RIGHTS, PROSECUTING WAR CRIMES IN THE FORMER YUGOSLAVIA: THE INTERNATIONAL TRIBUNAL, NATIONAL COURTS AND CONCURRENT JURISDICTION 72 & n.142 (1995). The breadth of this list suggests the depth of the perceived international interest at stake.

228. See, e.g., Bassiouni, *supra* note 17, at 17 & nn.21, 41 & 63 (discussing the tribunals’ impact on *jus cogens*); Cassese, *supra* note 26, at 6 (same); see also Juan Antonio Carrillo Salcedo,

would add as well that, like all prior war crimes trials, current international prosecutions are intended to exculpate the international community that permitted the atrocities to occur but is now trying their perpetrators.²²⁹

For all of these reasons, international and national prosecutors do not necessarily have the same goals.²³⁰ ICTR prosecutions are intended to be acceptable to the entire international community, including to many continental lawyers for whom plea bargains are tantamount to immoral deals and to human rights lawyers for whom the death penalty is anathema. The ICTR's prosecutors' need to secure universal acceptability for what they do means that they must reject certain options that remain of vital interest to local prosecutors and to others within Rwanda who are attempting to respond to the needs of the survivors of genocide. Whether or not some aspects of Rwandan trials fall short with respect to international human rights standards, it is hard to deny that, if Rwanda's Organic Law were to operate as anticipated, those local proceedings would be more responsive to the survivors of the Rwandan genocide.

What about the competing vision of justice offered by the ICTR to those accused of these crimes? International lawyers assume that, at least with respect to defendants, proceedings before the ICTR are superior to trials within Rwanda since the former offer incomparable guarantees of due process and impartiality.²³¹ This is a misleading comparison as the ICTR's jurisdictional primacy has little effect on the majority of those facing charges growing out of the Rwandan genocide.

The ICTR's claim to jurisdictional primacy over national courts is not based on any finding by the Security Council that the Rwandan judicial system generally, or its procedures for handling these offences, is *prima facie*

Reflections on the Existence of a Hierarchy of Norms in International Law, 8 EUR. J. INT'L L. 583 (1997) (discussing the challenge to relativism posed by *jus cogens*); J.H.H. Weiler & Andreas L. Pauls, *The Structure of Change in International Law or Is There a Hierarchy of Norms in International Law?*, 8 EUR. J. INT'L L. 545, 564 (1997) (noting the difference between legalists' concept of *jus cogens* and Huntington's "clash of civilizations" thesis).

229. Cf. Dietrich Schindler, Book Review, 92 AM. J. INT'L L. 158, 159 (1998) (discussing this possibility). As is suggested by the historical account in Section III.A, there is much the international community needs to be exculpated from with respect to the Rwandan genocide.

230. See also *infra* Section III.D (indicating where interests may diverge).

231. There is an emerging critique of the fairness of ICTY and ICTR proceedings from the perspective of defendants and the defense counsel. See, for example, Mark S. Ellis, *Achieving Justice Before the International War Crimes Tribunal: Challenges for the Defense Counsel*, 7 DUKE J. COMP. & INT'L L. 519, which notes the challenges for defense counsel before the ICTY, including the inadequate payments offered by that tribunal for defense counsel, and Sienho Yee, *The Erdemovic Sentencing Judgement: A Questionable Milestone for the International Criminal Tribunal for the Former Yugoslavia*, 26 GA. J. INT'L & COMP. L. 263 (1997), which addresses the ICTY's acceptance of guilty pleas. However, these criticisms are nowhere as severe as those that have been directed at local attempts to prosecute within the former Yugoslavia or within Rwanda. For a survey of some of the ways Rwandan proceedings are likely to fall short of international standards, see RATNER & ABRAMS, *supra* note 23, at 154-56; Drumb, *supra* note 146, at 574-633; LAWYERS COMMITTEE FOR HUMAN RIGHTS, *supra* note 139, at 47-57. Under Rwandan law, for example, criminal defendants, while entitled to secure defense attorneys, are not provided with one at government expense. Compare Organic Law, *supra* note 140, art. 36, with International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 14(3)(d), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) (requiring defense counsel) [hereinafter ICCPR], and ICTR Statute, *supra* note 53, art. 20(4)(d) (same).

unfair.²³² Although Rwandan procedures for alleged perpetrators of mass atrocities have since been criticized, usually severely, by human rights organizations, neither those organizations nor the United Nations has seriously proposed that Rwandan prosecutions cease or that the many thousands of detainees in Rwandan custody be transferred to the ICTR or be freed. Nor has there been any international assistance effort, comparable in scale to that conducted with respect to the ICTR, to ensure that national prosecutions satisfy international human rights standards.²³³ Yet, from the date when the ICTR was initially created until the present, all involved have acknowledged that international prosecutions are intended to complement, not displace, national prosecutions within Rwanda.²³⁴ Even international lawyers recognize that Rwandan proceedings, however flawed, are the only viable alternative to impunity, or bloody reprisals, for the vast majority of perpetrators.

Since the post-genocide courts of Rwanda have acquitted a number of Hutu defendants,²³⁵ one might have thought that ICTR proceedings would take precedence only as needed, as when a country refuses to extradite to Rwanda a particular perpetrator or after a particularized finding that Rwandan courts would not grant a defendant a fair trial. But, as suggested by the Bagasora case,²³⁶ the ICTR does not rely on case-by-case determinations of this kind. Unlike the typical request for change of venue within domestic legal systems, an assertion of primacy by the ICTR's prosecutor does not rest on any proof of unfair publicity or any other individualized demonstration of local bias. The superior hierarchical status of the ICTR relies simply on a general claim that international fora ought to be preferred, whether or not such problems are shown to exist.²³⁷

As this suggests, the ICTR's jurisdictional primacy is not premised on greater fairness to defendants but on the flawed premises of the international legal paradigm. The rules and procedures for the ad hoc tribunals are justified on the basis that they constitute a proper *balance* between the needs of defendants and victims. International lawyers concede that these rules are replete with compromises as to the competing demands of defendant and victim.²³⁸ Whether these compromises, when paired with jurisdictional

232. A claim that the post-genocide Rwandan regime cannot legally undertake these trials because it is not, for example, a democratically elected government but is a "minority" or "military" regime would establish new law and pose fascinating dilemmas under, for example, the Genocide Convention's duty on all governments to prosecute or extradite perpetrators. See Genocide Convention, *supra* note 2, arts. V–VII. It would also greatly lessen the prospects for criminal accountability in most instances of mass atrocities since most of these have not resulted in the establishment of an international tribunal and most involve transitional, perhaps undemocratic, regimes—at least in the immediate aftermath of mass atrocities.

233. See *infra* note 250.

234. Cf. *Arbour*, *supra* note 94, at 534 (suggesting that the tribunals' jurisdiction represents "complementarity," albeit with primacy).

235. See, e.g., *Van Lierop*, *supra* note 150, at 896. In addition, a number of prisoners have been released due to illness, age, or lack of evidence. See, e.g., *15 Sentenced to Death*, N.Y. TIMES, Aug. 8, 1998, at A3 (indicating that 137 persons were freed from Gikondo prison in Kigali).

236. See *supra* notes 186–192 and accompanying text.

237. See ICTR Statute, *supra* note 53, arts. 8–9.

238. See, e.g., *Thieroff & Amley*, *supra* note 167, *passim* (discussing the balance struck in the

primacy, strike the proper balance between the rights of alleged perpetrators and victims remains to be seen.

A grave problem with the vision of justice allegedly offered to defendants by the ICTR is that it is illusory since so few prospective defendants are likely to see it. Arguments for international primacy premised on the need for full compliance with the rights due all criminal defendants under international law are disingenuous. As noted, even proponents of international trials acknowledge that the ICTR will only indict (much less try) a minuscule proportion of the likely perpetrators of the Rwandan genocide.²³⁹ Further, quite apart from resource constraints, the ICTR's geographic and temporal jurisdictional limits ensure that many of those accused of relevant offenses before and after 1994 will not have access to its vision of justice. International lawyers' pleas of concern for defendants do nothing for the vast majority of alleged perpetrators who are left to the mercy of local courts.

When the ICTR was established the international community did not attempt to address how all Rwandan perpetrators would possibly be accorded individualized justice consistent with the full panoply of relevant international norms.²⁴⁰ Indeed, the very premise of the ICTR, as noted, was that it would only conduct a select number of high-level trials. But the realities, both then and now, remain stark. Rwanda's plea bargaining arrangement attempts to accommodate vociferous demands for accountability by millions as well as the needs of the many thousands who remain incarcerated under conditions that are a great deal harsher than anyone is likely to encounter among the states that routinely accommodate the requisites of international law.²⁴¹ International human rights lawyers, for their part, are demanding that Rwandan courts provide those accused of heinous offenses rights rarely seen in a country that has, since colonial times, routinely denied an effective right to counsel and accorded no right to confront witnesses or to a writ of habeas corpus.²⁴² Rwanda is also being asked to meet international standards when, of the sixteen attorneys in private practice in that nation in 1996, few have remained untouched by the genocide and are able and willing to objectively defend those accused, and even fewer share the ethnicity (Hutu) preferred by

context of Rule 61 proceedings). For a critique of the balance struck by the ICTY in the course of its first judgment, see Alvarez, *supra* note 87, at 2061–77. See also Kate Fitzgerald, *Problems of Prosecution and Adjudication of Rape and Other Sexual Assaults Under International Law*, 8 EUR. J. INT'L L. 638 (1997) (addressing the ICTY's flaws from the perspective of victims of gender-specific crimes).

239. See *supra* notes 57–61 and accompanying text.

240. For a listing of these rights, see Article 14 of the International Covenant of Civil and Political Rights, which is essentially replicated in Article 20 of the ICTR Statute. See ICCPR, *supra* note 231, art. XIV.

241. See, e.g., Neil J. Kritz, *Coming to Terms with Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights*, LAW & CONTEMP. PROBS., Autumn 1996, at 127, 150 (arguing that even the United States's half a million lawyers would not be able to accommodate the prospect of 100,000 defendants charged with grave offenses, including genocide).

242. See Van Lierop, *supra* note 150, at 889; see also Kritz, *supra* note 241, at 150 (complaining that shortly after the 1994 massacres many within the international community began calling for prompt domestic prosecutions while soon thereafter many of the same voices criticized Rwandan authorities for starting these trials too soon).

most defendants.²⁴³ A nation destroyed by mass killings is being asked to accord these rights in the midst of unstable political conditions and sporadic renewals of horrific violence that the international community has done nothing to prevent.²⁴⁴

These challenges suggest a situation comparable to those “public emergencies” that, under the International Covenant of Civil and Political Rights (ICCPR), permit the suspension of rights owed criminal defendants.²⁴⁵ Since few countries have ever faced a dilemma comparable to that which Rwanda faces,²⁴⁶ it seems highly presumptuous for the international community to insist either that Rwanda suspend its local prosecutions or that these prosecutions meet international due process standards—certainly not until the international community itself proposes a realistic alternative whereby the thousands of Rwandan detainees can be given speedy trials that fully respect Article 14 of the ICCPR.²⁴⁷

Rwanda’s plight calls for a compromise between international lawyers’ demands that all states promptly prosecute individually all those guilty of genocide while according defendants their full panoply of rights. Significantly, possible compromises enumerated under one proposed set of “International Guidelines Against Impunity for International Crimes” include Rwanda-style plea bargaining, as well as prosecutions for lesser offenses, and many “second-best” alternatives to criminal liability such as civil liability, truth commissions, or lustrations.²⁴⁸ Rwanda’s chosen path, under its Organic Law, is consistent with these Guidelines, even if not with most international lawyers’ views of its duties under both the Genocide Convention and the International Covenant on Civil and Political Rights.²⁴⁹ It seems that this admittedly compromised vision of justice, rather than some illusion, ought to be the solution the international community should be attempting to perfect.

Even if one concedes that present Rwandan procedures for trying perpetrators are fundamentally flawed, it is appropriate to ask whether enough attention and resources have been devoted, internationally, to assisting local Rwandan processes as have been to the creation and ongoing efforts of the ICTR. What would have been the state of Rwandan justice today if, instead of spending between forty and fifty million dollars a year on the ICTR, comparable sums of money and effort had been put into assisting the Rwandan government in overcoming the enormous obstacles it faced in the pursuit of criminal accountability?²⁵⁰ What would be the attitude of Rwandan

243. See Van Lierop, *supra* note 150, at 899.

244. See *supra* note 130 and accompanying text.

245. See ICCPR, *supra* note 231, art. IV.

246. See Van Lierop, *supra* note 150, at 897–98 (noting that given its unique needs, “the establishment of an independent and effective system of justice in Rwanda is essential to rebuilding the country and moving the process of national reconciliation forward”).

247. See Kritz, *supra* note 241, at 150–51.

248. See, e.g., *id.* at 134–36; Madeline H. Morris, *International Guidelines Against Impunity: Facilitating Accountability*, LAW & CONTEMP. PROBS., Autumn 1996, at 29.

249. Compare Genocide Convention, *supra* note 2, art. V (imposing a duty to prosecute), with ICCPR, *supra* note 231, art. XIV (outlining rights due criminal defendants).

250. Cf. Kritz, *supra* note 241, at 150 (contending that such sums could have produced “one of

officials towards the U.N. today if they had seen such genuine concern for Rwandan justice back in 1994?²⁵¹ Would a fairer Rwandan criminal process have been encouraged if the international community had helped the Rwandan government to prevent ongoing incursions into its territory by Hutu exiles seeking to continue the 1994 genocide?²⁵² These are but some of the questions left unaddressed by the international legal paradigm.

And what of the vision of justice allegedly offered by the ICTR to Rwandan society as a whole? As noted, the most grave difficulty in this respect may be that the ICTR's vision of justice is scarcely visible within Rwanda. In a poor country like Rwanda, where the vast proportion of the population does not have access to coverage of trials conducted outside their country, it seems doubtful to claim that international processes hold much promise for contributing to national reconciliation.²⁵³ Moreover, as international lawyers are beginning to point out, as in connection with Cambodia, where ordinary felons now face more serious penal consequences than the notorious murderers of Pol Pot, to inspire trust, a legal system needs consistency.²⁵⁴ The anomalies that result as between high-level perpetrators who go before the ICTR and those who remain within Rwanda are not likely to enhance the credibility of the rule of law inside Rwanda.²⁵⁵

For this reason, among others, it is not simply a matter of encouraging greater media coverage for ICTR proceedings. Studies suggest that among the things observers of any judicial process value is the sense that fellow

the better justice systems in the region"). For discussion of the types of international assistance most needed by Rwanda's judiciary, see, for example, Drumbl, *supra* note 146, at 601–22; and Sennett & Noone, *supra* note 129, at 445–47.

For the calendar year 1998, the U.N. General Assembly appropriated over \$50 million to the ICTR, a sum intended to accommodate a third trial chamber authorized in 1998. See *International Criminal Tribunal for Rwanda*, AFR. NEWS ONLINE (visited May 19, 1998) <http://www.africanews.org/east/rwanda/stories/19980519_feat3.html>. Despite the sums allocated, as of May 1998, the ICTR had completed only one full trial, accepted one guilty plea, and was in the process of conducting two additional trials. See *id.*

251. In testimony before the U.S. Congress, one knowledgeable observer argued that the Clinton Administration's failure to prevent the Rwandan genocide contributed to a "go it alone" mentality on the part of Rwandan authorities, with disastrous consequences for human rights within Rwanda and the Congo. See *The 1994 Rwandan Genocide and U.S. Policy: Testimony of Holly Burkhalter*, AFR. NEWS ONLINE, ¶ 25 (visited May 26, 1998) <http://www.africanews.org/east/rwanda/stories/19980519_feat3.html>.

252. Government retaliations to such attacks, which reportedly have cost the lives of many civilians, have only perpetrated continuing divisions between Tutsis and Hutus and have undermined the prospects for effective domestic trials at least by 1998. See *supra* note 130 and accompanying text.

253. See Kritz, *supra* note 241, at 131–32 (arguing that there was good reason after all for locating World War II's tribunals at Nuremberg and Tokyo respectively). Indeed, one of the U.S. lawyers involved in the *Akayesu* case felt compelled to travel to Akayesu's village to inform the people there of his conviction. See *U.S. Lawyer a Champion of Rights in Rwanda*, N.Y. TIMES, Nov. 1, 1998, at A13. While the *Times* reports that the villagers he encountered were gratified, one has to question a process that relies on such personal interventions to reach those whom we most want to reach. Cf. James C. McKinley, Jr., *UN Tribunal in First Such Trial Verdict, Convicts Rwanda Ex-Mayor of Genocide*, N.Y. TIMES, Sept. 3, 1998, at A14 (quoting the reaction of a spokeswoman for a group of Tutsi widows as saying "people in Rwanda can't be satisfied and it's understandable. The survivors are the people who need justice the most. But we don't know about or understand the procedures of the tribunal").

254. See Seth Mydans, *The Long, Erratic Arm of Justice*, N.Y. TIMES, Jan. 3, 1999, at A11.

255. The difficulties with such anomalies are further addressed at *infra* notes 261–267 and accompanying text.

community members have been treated fairly by someone who understands their arguments.²⁵⁶ If Rwandan society shares comparable notions of judicial legitimacy, it stands to reason that having judges who come from the local community may itself be determinative of the legitimacy of these processes. This helps to explain why even some international adjudicative processes, including institutionalized forms of arbitration and the International Court of Justice (ICJ), provide mechanisms for party-appointed arbitrators and judges.²⁵⁷ Even international lawyers usually assume that the legitimacy of judicial processes requires reassurances in the form of a representative judiciary, that is, that international adjudicators need to include representatives from both sides of the dispute. The participation of party-appointed judges, as on the ICJ, sends a message to the respective national communities involved in ICJ cases. It reassures litigants, and the communities of which they are a part, that when those judges deliberate, they will be addressing the merits of their arguments and not simply rolling the dice or, worse, acting on the basis of national, ethnic, or other prejudices. In tribunals that rely solely on verdicts by judges (that is, that operate in the absence of a jury of peers from the local community), such assurances would appear to be especially necessary. At least within the United States, when a dispute has prominent ethnic or gender implications, having participants in the process, as judges or jurors, who appear to be responsive to such concerns is all the more important if proceedings and subsequent verdicts are to have reasonable prospects of generating widespread acceptance.²⁵⁸

The counter-assumption, accepted in connection with the ICTR, that neutrality demands a “denationalized” bench consisting of persons having no connections to the region that suffered the atrocities, is not comparable to instances requiring a change of venue within a locality. Such removals, in the United States usually stemming from fears of biased juries, nonetheless result in a trial within a greater national community. The ICTR, with a bench composed of the principal legal systems of the world but without a judge or judges from within Rwanda, has no comparable claim to representative legitimacy.²⁵⁹ These realities raise doubts about the value of ICTR

256. See, e.g., TYLER, *supra* note 201, at 94–112

257. Cf. Statute of the International Court of Justice, art. 31, June 26, 1945 (permitting party-appointed ad hoc judges); Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, art. 37, available at <<http://www.internationaladr.com/tc11.htm>> (permitting party-appointed arbitrators). The international precedents where this tradition has not been followed, as with respect to the U.N.’s El Salvador Truth Commission, have usually emerged when state parties have themselves agreed to “denationalization” or to forego appointing ad hoc adjudicators. See, e.g., Thomas Buergethal, *The United Nations Truth Commission for El Salvador*, 27 VAND. J. TRANSNAT’L L. 497, 503 (1994). It is also true, of course, that the El Salvador process did not involve criminal prosecutions.

258. See, e.g., Andrew E. Taslitz, *An African-American Sense of Fact: The O.J. Trial and Black Judges on Justice*, 7 B.U. PUB. INT. L. J. 219, 244–49 (1998).

259. See generally Llewellyn & Howse, *supra* note 215 (manuscript at 6) (noting how international tribunals are seen as imposing law on “others, who are assumed to be unable to impose it on themselves” and the risks this poses to the idea of a community governing itself under law). While Rwanda was, fortuitously, represented on the Security Council at the time that the ICTR was established, its vote and views were overridden by the rest of the Council. See *supra* note 101 and accompanying text. By comparison, the Organic Law, *supra* note 140, was the product of extensive

proceedings to Rwandan society even if those trials were more accessible to Rwandan audiences.²⁶⁰

There is, finally, the claim that whatever else it does, the ICTR affirms a vision of justice that best comports with the Nuremberg-inspired goals held by, and valuable to, the international community. Here again, there is the initial question of media coverage. Contrary to the assumptions of international lawyers, not all Nuremberg-styled proceedings get worldwide attention. It has not yet been demonstrated that the ICTR's trials have received greater press coverage than, for example, Rwanda's public executions of those convicted of the 1994 genocide. Even the first trial conducted by these ad hoc tribunals, the *Tadic* trial at the ICTY (billed as the "trial of the century" by Court TV in the United States) suffered from dwindling press coverage.²⁶¹ Indeed, as that case suggests, the very length of international proceedings undercuts the prospects for securing and retaining media coverage.

But even assuming that ICTR trials and indictments are successful in securing international attention, the message being conveyed to observers around the world is problematic when one considers the limits of the ICTR's reach and the anomalies that result from the joint operation of the ICTR and Rwandan criminal processes.

Professor Madeline Morris has identified the "tugs of war" that have emerged over competing claims to jurisdiction by the ICTR and Rwandan courts, noting in particular the absence of criteria with which to resolve such claims.²⁶² Morris castigates the "anomalies of inversion" that result when the ICTR attempts to exercise its jurisdictional primacy to demand custody over the highest leaders of the Rwandan genocide. As Morris argues, it appears highly unjust if high-level perpetrators receive the benefit of the elaborate due process rights established before the ICTR, while more ordinary perpetrators face expedited, imperfect justice within Rwandan courts.²⁶³ Since the ICTR

public debate within Rwandan institutions. *See, e.g.,* Morris, *supra* note 12, at 357–61. Moreover, one early draft of that law anticipated even more public participation in these trials. Under one version of the Organic Law, the specialized trial chambers in charge of these prosecutions would have consisted of three *magistrates de carriere* as well as two assessors, the latter to be appointed through random selection from lists of individuals possessing demographic characteristics appropriate to particular localities within Rwanda. *See* Organic Law, *supra* note 140, arts. 5–9. Although it was envisioned that these assessors would not actually vote on cases, the draft articles anticipated that they would participate in deliberations by the bench. *See id.* art. 12. As Madeline Morris's commentary to these draft provisions indicates, the idea was to strike a balance between legal professionalism and community participation to encourage social reconstruction and reconciliation. *See* Madeline Morris, Commentary to the Draft Genocide Accountability Act of 1996, Mar. 1, 1996 (copy on file with author). While no such provisions survived to the final form of Rwanda's Organic Law, they suggest the enormous potential for participatory legitimacy in local judicial processes.

260. More generally, it suggests the need to devote more attention to "the permeability of international law-based rules and ideas of accountability into the jurisprudence of national courts." Naomi Roht-Arriaza & Lauren Gibson, *The Developing Jurisprudence of Amnesty*, 20 HUM. RTS. Q. 843, 845 (1998) (noting the paucity of serious work on the subject). Roht-Arriaza and Gibson canvass the domestic implementation and the effects of amnesties in a number of countries.

261. *See* RATNER & ABRAMS, *supra* note 23, at 187; SCHARF, *supra* note 5, at xii, 221; *see also supra* note 208 (discussing the international media attention directed at Rwanda's executions).

262. *See* Morris, *supra* note 12, at 362–73.

263. *See id.* at 371.

will focus its own scarce resources on prosecuting select, high-level perpetrators, most of those complicit in Rwandan mass atrocities, especially those who were abroad or who acted prior to January 1, 1994 or after December 31, 1994, will not face international prosecution. Despite concerns that Tutsi-controlled Rwandan courts will not be willing to hear charges against Tutsis accused of targeting Hutus for retaliation, the temporal restrictions on the ICTR's jurisdiction mean that it is not available for prosecuting most of these cases since most occurred after 1994 (and, in some cases, outside Rwandan territory).²⁶⁴ In the end perhaps a few dozen of the highest profile perpetrators of the Rwandan genocide, those whom by the international lawyers' own account are most culpable, will be accorded extensive procedural rights while all others will face Rwandan justice or none at all. To the extent the ICTR is defended on the basis of its symbolic importance, these anomalies are part of the message conveyed.²⁶⁵ The signal the ICTR is now sending to perpetrators everywhere is not that international norms will be enforced against all those who violate them but that those most responsible for the worst offenses will not be accountable directly to the communities they butchered. Instead, they will receive relatively lenient treatment, have their lives spared, and face, at most, some years in confinement²⁶⁶ under conditions far better than any they could have ever anticipated back home.²⁶⁷ Sending a message of preferential treatment to the most culpable few seems a perverse way to affirm the international community's interests in affirming the Nuremberg principles against all.

D. *Primacy's Priorities*

What about contentions that primacy is required: (1) by the need to apply, and symbolically affirm, international law; (2) the greater expertise of international judges in this respect; and (3) the greater likelihood that

264. See, e.g., Barbara Crossette, *U.N. Team Says Congo Army Killed Hutu*, N.Y. TIMES, July 1, 1998, at A6 (reporting on alleged massacres of Hutu by Congolese and Rwandan soldiers in the Congo in 1996 and 1997).

265. See Morris, *supra* note 12, at 371.

266. The anomalies among those convicted by the ICTR are only exacerbated to the extent that those convicted serve their sentences in a variety of states. Under the ICTR's rules, states in which prisoners serve their sentences retain considerable discretion, subject to continued ICTR supervision, over the conditions of confinement. See ICTR Rules of Procedure and Evidence, *supra* note 98, arts. 124-26.

267. See, e.g., GOUREVITCH, *supra* note 1, at 255 (noting the ironies in the privileges accorded those detained by the ICTR). A comparable, and perhaps equally perverse, message was relayed by the U.S. Ambassador for War Crimes, David Scheffer, to members of the former Khmer Rouge. On a visit to Phnom Penh, Ambassador Scheffer reportedly urged Khmer Rouge leaders to surrender in the following terms, "[w]e hope the senior Khmer Rouge leaders realize that their personal safety and the opportunity to live out a natural life would be assured if an international criminal tribunal ultimately gains custody of them." Philip Shenon, *U.S. to Ask for a U.N. Tribunal to Prosecute the Khmer Rouge*, N.Y. TIMES, Apr. 30, 1998, at A16. While it is obvious that Scheffer's intent was to encourage criminal accountability for Cambodian victims and survivors, Scheffer's vision of justice might appear to be an offer of sanctuary to those most culpable of the gravest crimes—an offer made by the same international community that not only failed to halt the killing fields but permitted the main perpetrator, Pol Pot, to be seated as the country's authorized U.N. representative for a time.

international trials will do more for the progressive development of international humanitarian law?

Arguments that ground the ICTR's primacy on the first contention, that is, the need to brand these offenses as violations of international criminal law, are overstated. Rwanda's Organic Law, as noted, permits "category one" convictions for the "planners, organizers, instigators, supervisors and leaders of the crime of genocide or of a crime against humanity."²⁶⁸ Such national convictions, even though brought under national law, would appear to have the symbolic stigma that international lawyers seek.²⁶⁹ While Rwandan courts are not formally charging defendants with "genocide," for example, no one charged with a category one offense under Rwanda's Organic Law can possibly be mistaken for an ordinary murderer; it is clear to all what these convictions are addressing. Further, a category one conviction under Rwandan law may carry a potent symbolic message that no ICTR conviction is capable of having—the death penalty. The seriousness of charges under the Organic Law are clear to anyone. While it is true that a trial and conviction done under U.N. auspices conveys, merely because of the status of the forum, a message that these offenses are of interest to the world community, this does not mean that it is impossible to convey the import of these crimes except through such a forum. It might be argued that the enforcement of international criminal norms by "real" national courts provides a better affirmation of the reality and enforceability of international crimes. Under the circumstances, it is difficult to make the case that only ICTR convictions can symbolically affirm the significance or seriousness of these crimes. Moreover, to the extent Rwandan law is inadequate and fails to cover some international crimes, such failings

268. Organic Law, *supra* note 140, art. 2. However, for reasons noted at *supra* notes 143–44 and accompanying text, Rwanda's Organic Law merges, in its categories one to four, persons accused of international crimes with those accused of crimes under Rwandan law, including those guilty of "intentional homicide," "serious assaults," and "offences against property." As this suggests, this may give rise to difficulties for those who have to determine, as under ICTR Article 8, whether persons charged under Rwandan law have been effectively charged with "international crimes" under the ICTR's jurisdiction, or whether, as under Article 9(1), persons tried under Rwanda law can be tried again at the ICTR. These provisions effectively put tremendous, and from Rwanda's perspective, probably controversial, discretion in the hands of the ICTR's prosecutor. As noted, see *supra* note 99, under Article 9 of the ICTR statute, Rwandan courts are precluded from prosecuting persons who have been tried in the ICTR for "serious violations of international humanitarian law" but the ICTR can nonetheless retry individuals who have been convicted of "ordinary crime[s]" in Rwandan courts. See ICTR Statute, *supra* note 53, art. 9.

269. Cf. Hanne Sophie Greve, "Do Not Interfere . . .": Recording the Facts and the Truth, in REINING IN IMPUNITY, *supra* note 31, at 245, 253 (discussing the potency of a charge of "genocide"). Indeed, Rwanda's imposition of the death penalty for such crimes, however odious that penalty may be to some international lawyers, undoubtedly adds to the symbolic import of a national conviction. The ICTR's rules barring an international trial for those convicted of relevant international crimes at the national level, see *supra* note 99 and accompanying text, implicitly recognizes that international needs can be met by the domestic application of international norms.

Ironically, partly as a result of the establishment of the two ad hoc war crimes tribunals, there are an increasing number of instances in which national courts have applied international humanitarian law in either a criminal or a civil context. See, e.g., *In re G.*, Military Tribunal, Division 1, Lausanne, Switzerland, Apr. 18, 1997 summarized in 92 AM. J. INT'L L. 78 (1998); Public Prosecutor v. Djajic, No. 20/96, excerpted in 1998 Neue Juristische Wochenschrift 392, Supreme Court of Bavaria, 3d Strafsenat, May 23, 1997; *Kadic v. Karadzic*, 70 F.3d 232, 236 (2d Cir. 1995); *R. Bartle and the Commissioner of Police for the Metropolis and Others, Ex parte Pinochet*, House of Lords, Nov. 25, 1998 (under review).

could be solved by affording the ICTR a subsidiary role, that is, by permitting international trials to proceed (or according them primacy) only in such instances.²⁷⁰

Nor is the second argument, premised on the greater expertise and impartiality of international judges, a strong basis for ICTR primacy. The selection of individuals to serve as prosecutors and judges for these ad hoc tribunals is highly political; choosing individuals adept in international humanitarian law has not always been an important criterion.²⁷¹ Further, as is discussed fully below, it is not clear that either the international judges' expertise in international law or their alleged neutrality advances, in all cases, international goals.²⁷²

The third assumption, that judges from diverse legal systems put in place by U.N. political bodies will more credibly serve to "progressively develop" international humanitarian law,²⁷³ needs to be more closely scrutinized. Depending on what is meant, it too appears questionable, or at least needs qualification.

It is undoubtedly true that the establishment of the ICTY and the ICTR has been accompanied by the promulgation of two jurisdictional statutes and that these statutes have, on the whole, expanded the number of offenses included as international crimes. Indeed, in this sense, the ICTR's statute was more "progressive" than the ICTY's in that it expanded upon, for example, the list of gender-specific crimes encompassed as "crimes against humanity."²⁷⁴ To the extent the ICTY's and the ICTR's respective statutes are ultimately seen as attempts to codify international crimes for all members of the community, the uniform development of international humanitarian law has undoubtedly been advanced by the creation of these two tribunals.²⁷⁵ In several instances, including in the landmark *Akayesu* judgment issued by the ICTR, the international judges in these tribunals have broadly interpreted the scope of applicable crimes. Most notably, the *Akayesu* judgment affirms that "measures intended to prevent births within the group," and therefore targeting women as members of an ethnic group, can constitute genocide.²⁷⁶ Judicial interpretation has, in the course of some of the ICTY and ICTR judgments issued to date, expanded the category of offenses that, at least

270. See *infra* Part V.

271. Indeed, when Judge Gabriel Kirk MacDonald was approached by U.S. Legal Adviser to the State Department Conrad Harper with a proposal to serve on the ICTY, Judge MacDonald noted, "But I don't know anything about international war crimes." Harper reportedly responded, "That's not a qualification. You'll learn." Kitty Felde, *Judge Gaby: Work for Justice, Fight for Peace*, MINN./ST. PAUL MAGAZINE (reproduced as part of Conference Materials for a Regional Meeting of the American Society of International Law, Mar. 31 and Apr. 1, 1998, on file with *The Yale Journal of International Law*).

272. See *infra* notes 293-433 and accompanying text.

273. See *supra* note 46 and accompanying text.

274. See, e.g., Christopher L. Blakesley, *Atrocity and Its Prosecution: The Ad Hoc Tribunals for the Former Yugoslavia and Rwanda*, in *THE LAW OF WAR CRIMES* 189, 211 (Timothy L.H. McCormack & Gerry G. Simpson eds., 1997).

275. See *supra* note 46.

276. *Akayesu* Judgment, *supra* note 131, § 6.3.1.

within the context of the Balkans and Rwanda, are now regarded as criminal offenses.²⁷⁷

It is also true that by holding trials and convicting defendants, these tribunals have immeasurably “developed” the law through its routine application.²⁷⁸ While it may appear as no surprise that the ICTR has now determined that the 1994 killings in Rwanda did indeed constitute a “genocide,”²⁷⁹ it is no small achievement that we now have a judicial decision that, for the first time, determines in a concrete fact situation that systemic killings targeting a group for extermination occurred.²⁸⁰ Indeed, Akayesu’s conviction for genocide appears to adopt a postmodern definition of “ethnic group” that accepts that ethnicity “is to some extent a matter of choices and perceptions rather than immutable features.”²⁸¹ Moreover, to the extent the law can be said to be “developed” through a demonstration that it can be effectively applied, this too has now been repeatedly affirmed by trials, convictions, and sentences rendered by both ad hoc tribunals. Finally, it is also clear that the establishment and operation of ad hoc tribunals has significantly expanded the attention paid to international humanitarian law, not merely among international lawyers but among international and national policymakers.²⁸² Even the Spanish judge who issued an indictment under Spanish law against Agosto Pinochet acknowledged a debt to these tribunals and it is doubtful whether a number of recent civil and criminal cases before national courts would have been brought but for the establishment of these

277. See, e.g., Meron, *War Crimes Law Comes Of Age*, *supra* note 22; Darryl Robinson, *Trials, Tribulations, and Triumphs: Major Developments in 1997 at the International Criminal Tribunal for the Former Yugoslavia*, 35 CAN. Y.B. INT’L L. 179 (1997).

278. Thus, Meron argues that the ad hoc tribunals have made what has been formerly been mere rhetoric into the normative, and have transformed what has been the “merely normative” into the “effectively criminalized.” Meron, *War Crimes Law Comes Of Age*, *supra* note 22, at 468.

279. See Akayesu Judgment, *supra* note 131, § 6.3.1; see also Lori Fisler Damrosch, *Genocide and Ethnic Conflict*, in INTERNATIONAL LAW AND ETHNIC CONFLICT, *supra* note 82, at 265, 265–67 (discussing why the Rwandan killings constitute genocide).

280. As many commentators have noted, the requisites of the crime of genocide, including the nature of the targeted groups, the level or scope of destruction, and the intent of the perpetrator, remain ambiguous and subject to considerable judicial interpretation. See, e.g., RATNER & ABRAMS, *supra* note 23, at 24–44. There are even greater judicial challenges presented by the ICTR’s jurisdiction over “conspiracy to commit genocide,” “direct and public incitement to genocide,” “attempt to commit genocide,” and “complicity in genocide.” ICTR Statute, *supra* note 53, art. 4(3); see also RATNER & ABRAMS, *supra* note 23, at 118–19 (noting the interpretative problems presented by such crimes, given the lack of uniformity among legal systems in defining such terms); cf. Akayesu Judgment, *supra* note 131, para. 484 (distinguishing between “aiding,” defined as “giving assistance to someone,” and “abetting,” defined as “facilitating the commission of the act by being sympathetic thereto”).

281. See Damrosch, *supra* note 279, at 261. Thus, the Akayesu judges quote approvingly from the definition given by one expert witness, Alison Desforges, who argues that the “primary criterion” for defining an ethnic group is the “sense of belonging to that ethnic group,” a sense that can “shift over time” as definitions of relevant groups change. Akayesu Judgment, *supra* note 131, § 5.1 (factual findings). This malleable view of ethnicity is likely to be attractive to those anxious to extend the scope of the crime of genocide or who want to highlight the impact of government action that encourages ethnic self-identification. See, e.g., Damrosch, *supra* note 279, at 262 (noting how ethnicity has “historically been a matter not only of an individual’s subjective decision to align with a group but also of governmentally manipulated pressures”).

282. See, e.g., Meron, *supra* note 33, *passim*; Meron, *supra* note 34, *passim*.

two ad hoc tribunals.²⁸³ In this sense as well international war crimes' ripple effects are assisting the "progressive development" of international humanitarian law. Yet the increasing likelihood that international humanitarian law may now be the subject of civil or criminal actions in national courts or other domestic fora should prompt reconsideration of the premise that international judges will be free to interpret and develop the law without constraint or with fewer constraints than those faced by local judges.²⁸⁴

As has been repeatedly made clear in the course of cases heard by both the ICTY and the ICTR, the interpretation and application of vaguely defined international crimes leave considerable room for judicial interpretation.²⁸⁵ Considerable political pressures may be brought to bear on how judges fill these gaps. Whereas national judges have to be concerned about sustaining their credibility among local constituencies, international judges need to worry about the reactions of prominent patrons of these tribunals as well as the international community, as represented, for example, on the Security Council.²⁸⁶

There are also tensions between the U.N. status and origins of these ad hoc tribunals and the goal of impartial, objective development of international humanitarian law. The U.N. has long purported to be "codifier, executor, and subject" of this law with uneven success.²⁸⁷ The political character of those

283. See, e.g., Marlise Simons, *Pinochet's Spanish Pursuer: Magistrate of Explosive Cases*, N.Y. TIMES, Oct. 19, 1998, at A1.

284. For discussion of the inherent tensions involved in the attempt to progressively develop the law while applying it in the course of criminal trials, see Alvarez, *supra* note 87, at 2061-64. For the purposes here, I am assuming that international lawyers are right to pursue the goal of progressive development.

285. This is suggested, for example, by the differing views of the judges on the ICTY concerning the scope and applicability of the defense of duress. See *Prosecutor v. Erdemovic*, No. IT-96-22-A (ICTY Oct. 7, 1997) (appeal) available at <<http://www.un.org/ICTY/erdemovic/appeal/sopinion-e>>; *Prosecutor v. Erdemovic*, No. IT-96-22 (ICTY Oct. 7, 1997) (Judgment) available at <<http://www.un.org/ICTY/erdemovic/trial/judgement/80305.ms>>-e.htm [hereinafter Erdemovic Judgment]; *Prosecutor v. Erdemovic*, No. IT-96-22-T (ICTY Nov. 29, 1996) (sentencing judgment) available at <<http://www.un.org/ICTY/erdemovic/trial/judgement>> [hereinafter Erdemovic Sentencing Judgment]; Akayesu Judgment, *supra* note 131, § 6.3.2 (defining "complicity"); Tadic Judgment, *supra* note 58, paras. 694-710 (attempting to define persecution as a crime against humanity); *infra* note 307 and accompanying text (discussing the ICTY's enumerated requisites for crimes against humanity). For a more general overview of the many gaps and imperfections within international crimes, see, for example, Bassiouni, *supra* note 4, *passim* (discussing the unresolved ambiguities of uncodified crimes against humanity); RATNER & ABRAMS, *supra* note 23, at 24-103. See also Ratner, *supra* note 24, at 251-56 (identifying gaps in international humanitarian law given the needs of human rights law).

286. The views of prominent U.N. members, especially permanent members of the Council, may prove influential most directly through tribunal rules for the presentation of amicus curiae. See ICTY Rules of Procedure and Evidence, *supra* note 98, Rule 74; ICTR Rules of Procedure and Evidence, *supra* note 98, Rule 74; Cassese, *supra* note 39, at 246 (discussing the U.S. amicus in the Tadic case). Even without such formal intervention, the political views of the U.N. Secretariat and of powerful U.N. members continue to exert a powerful impact on the effectiveness of these tribunals, as is clear with respect to the Council's unwillingness to impose sanctions on those governments who have to date refused to cooperate with tribunal orders. See, e.g., Brown, *supra* note 96, at 409-11 (discussing the lack of enforcement by the Security Council in the context of the ICTY).

287. See, e.g., Ralph Zacklin, *General Report*, in THE UNITED NATIONS AND INTERNATIONAL HUMANITARIAN LAW, *supra* note 39, at 39, 41.

entities within the U.N. charged with legal codification, especially the General Assembly, along with the organization's peacekeeping responsibilities, are not always compatible with the U.N.'s role as objective codifier and interpreter.²⁸⁸ The potential for conflict has led some to consider the International Red Cross as the more legitimate forum for the neutral elaboration of the norms of international humanitarian law or at least to consider that nongovernmental organization an "ombudsman" over U.N. activity in this field.²⁸⁹ While officials of the Red Cross extol the U.N.'s complementary role in this respect,²⁹⁰ there have been instances in which the two organizations have been at odds with respect to the meaning and interpretation of international humanitarian law²⁹¹ and some of these may produce dilemmas for ICTR and ICTY judges.²⁹²

Despite the trial chamber's considerable achievements in the *Akayesu* case, these realities may undermine the prospects that other ICTR trials will progressively develop, for example, the crime of genocide and crimes against humanity in the ways most favored by international lawyers. Consider the troublesome issue of the meaning and scope of the crime of incitement of genocide. As noted, the Rwanda genocide was not a "spontaneous ethnic war" but one that was deliberately incited by the primary voice and tool of the genocide, Radio Television Libre des Mille Collines (RTLM).²⁹³ Prior attempts to murder government opponents (as in March 1992) had demonstrated to Rwandan perpetrators the effectiveness of radio to reach large numbers of potential assailants but, at the same time, international criticism of such tactics helped to persuade the prior Rwandan government to privatize the incitement to violence as well as its actual infliction. Months of virulent radio

288. For a survey of some of these areas of tension, see contributions by M. Georges Abi-Saab, *Conclusions*, in *THE UNITED NATIONS AND INTERNATIONAL HUMANITARIAN LAW*, *supra* note 39, at 307; Mahnouch H. Arsanjani, *Defending the Helmets: Protection of United Nations Personnel*, in *THE UNITED NATIONS AND INTERNATIONAL HUMANITARIAN LAW*, *supra* note 39, at 115; Mario Bettati, *Le Principe de Libre Accès aux Victimes dans les Résolutions Humanitaires du Conseil de Sécurité*, in *THE UNITED NATIONS AND INTERNATIONAL HUMANITARIAN LAW*, *supra* note 39, at 285; Hans-Peter Gasser, *The International Committee of the Red Cross and the United Nations Involvement in the Implementation of International Humanitarian Law*, in *THE UNITED NATIONS AND INTERNATIONAL HUMANITARIAN LAW*, *supra* note 39, at 259; Françoise Hampson, *States' Military Operations Authorized by the United Nations and International Humanitarian Law*, in *THE UNITED NATIONS AND INTERNATIONAL HUMANITARIAN LAW*, *supra* note 39, at 371; and Daphna Shrager, *The United Nations as an Actor Bound by International Humanitarian Law*, in *THE UNITED NATIONS AND INTERNATIONAL HUMANITARIAN LAW*, *supra* note 39, at 317; Zacklin, *supra* note 287, at 39–53.

289. See, e.g., Abi-Saab, *supra* note 288, at 312; Gasser, *supra* note 288, at 266; Zacklin, *supra* note 287, at 43.

290. See, e.g., Abi-Saab, *supra* note 288, at 311; Gasser, *supra* note 288, at 282.

291. See, e.g., Gasser, *supra* note 288, at 275 (criticizing U.N.-authorized operations in the Gulf War). Compare Theodor Meron, *Conclusions*, in *THE UNITED NATIONS AND INTERNATIONAL HUMANITARIAN LAW*, *supra* note 39, at 443–44 (disputing the U.N.'s position that U.N. operations need only adhere to the "principles and spirit" of international humanitarian law), with Shrager, *supra* note 288, at 317, 440–41 (reiterating the U.N.'s position). For other examples of the tensions between neutral application of international humanitarian law and its operations in the field, see Hampson, *supra* note 288, at 371.

292. See, e.g., Hampson, *supra* note 288, at 423 (questioning how international judges will respond to demands that U.N. armed forces testify in ongoing trials); see also *Akayesu Judgment*, *supra* note 131, § 6.5 (noting such an attempt in the course of the first full trial at the ICTR).

293. See *supra* notes 131–135 and accompanying text.

broadcasts, directed against “alien” and “subhuman” Tutsis, helped to create the climate in which those same radio broadcasts could mobilize private militias to seek out Tutsis for extermination.²⁹⁴ For the victims of the Rwandan genocide, as well as for anyone interested in preserving an accurate record of how that massacre developed and proceeded, there can be few higher priorities than prosecuting those responsible for such incitements to violence.²⁹⁵

The ICTR’s likely difficulties in dealing with such perpetrators do not stem merely from its temporal jurisdictional limitations, however.²⁹⁶ Whether, and to what extent, incitement to ethnic violence can be considered “genocide,” “complicity in genocide,” or the crime against humanity known as “persecution,” have long been contested issues within the international community. From the Cold War to the present day, U.S. government officials and members of Congress, for example, continue to express qualms that the criminalization of “war propaganda” or “hate speech” might, in the hands of totalitarian governments, provide a convenient cover for curtailing freedom of information or individual rights to free expression.²⁹⁷ Thus, while many states have defined such acts as criminal under their domestic law or pursuant to their interpretation of international obligations, as under the International Convention on the Elimination of All Forms of Racial Discrimination and the Genocide Convention,²⁹⁸ an ideological divide is still apparent on this issue.²⁹⁹

It is not yet clear how this controversy will be settled within the ICTR. The ICTR’s statute echoes the Genocide Convention and includes “direct and public incitement” as a cognizable form of genocide.³⁰⁰ Indeed, in the *Akayesu* judgment, the trial chamber affirmed that incitement can be implicit as well as direct and convicted Akayesu of incitement to genocide, noting that such a conviction can result from behavior that “plays skillfully on mob psychology by casting suspicion on certain groups, by insinuating that they were responsible for economic or other difficulties in order to create an atmosphere favorable to the perpetration of the crime.”³⁰¹ Perhaps most significantly, the *Akayesu* judges found that public incitement to commit genocide “can be punished even where such incitement was unsuccessful.”³⁰² Drawing from the common law’s notion of inchoate offenses, the *Akayesu* judges found that the drafters of the Genocide Convention did not intend, by omission, to suggest that unsuccessful incitement was not punishable.³⁰³ The trial chamber’s judges

294. See, e.g., HUMAN RIGHTS WATCH, *supra* note 54, at 4–13.

295. See *supra* note 151 and accompanying text.

296. See *supra* notes 152–184 and accompanying text.

297. See, e.g., Stephanie Farrior, *Moulding the Matrix: The Historical and Theoretical Foundations of International Law Concerning Hate Speech*, 14 BERKELEY J. INT’L L. 1, 27–30 (1996). For one attempt to reconcile convictions for incitement with the right of free expression, see NEIER, *supra* note 15, at 206–09.

298. See Genocide Convention, *supra* note 2, art. III(c); International Convention on the Elimination of all Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195, art. 4.

299. See, e.g., Farrior, *supra* note 297, at 30–36.

300. See ICTR Statute, *supra* note 53, art. 2.

301. *Akayesu* Judgment, *supra* note 131, § 6.3.3.

302. *Id.*

303. See *id.*

therefore affirmed that even incitement that fails to produce the results intended by the perpetrator warrants punishment because of the high risks such actions pose for society.³⁰⁴

While such determination, if affirmed on appeal, will no doubt be welcomed by international lawyers as “progressive developments,” the fate of the crime of incitement to genocide within the ICTR remains uncertain. No one knows how the ICTR will, across a range of cases raising distinct fact patterns, define the scope of such offenses. It is possible that international judges, anxious to secure the continued cooperation and financial support of important states such as the United States, will defer to those states’ views and insist, for example, that the specific intent requirements of genocide, as well as the requirement that any incitement be “direct,” require a clearly established link of cause and effect between inciting words and subsequent violent acts. At the extreme, a high standard of proof might require, for example, evidence that a radio broadcast message targeting named persons for death was immediately followed by the attempt or the completed killings of these same individuals by perpetrators who can be shown to have heard the particular broadcast.³⁰⁵ While such a standard would deflect criticism by advocates of freedom of expression, it would do so at the expense of the expansion of this crime. Of course, such an approach could result in controversial acquittals for at least some of those who instigated and helped perpetuate the Rwandan genocide. As this example suggests, international lawyers appear to be embracing the uniform progressive development of international humanitarian law without regard to whether such uniformity conflicts with other goals.³⁰⁶

Nor are the prospects for successful convictions of the inciters of genocide necessarily any better if pursued under the rubric of the crime against humanity known as persecution.³⁰⁷ Despite the *Akayesu* judgment,

304. *See id.*

305. While the Rwandan genocide is likely to produce cases that would meet even this exacting standard, the more usual case against a Rwandan radio broadcaster is likely to be far more general. For a description of the systematic way in which the Rwandan genocide proceeded, see GOUREVITCH, *supra* note 1, at 85–131. While the standard suggested in the text would appear to exceed the Nuremberg precedents on point, *see Metzler, supra* note 132, at 636–37, those precedents themselves establish a fairly tough standard for bringing successful “incitement” cases and at least some Rwandan cases might flounder if the ICTR strictly adhered to them. *See id.* (discussing the *Striecher* and *Fritzsche* cases).

306. *Cf. Meron, War Crimes Law Comes of Age, supra* note 22, at 465 (praising the “significant contribution to the elucidation of some general principles of criminal law, particular duress and superior orders” of the ICTY). Not everyone would agree with the splintered ICTY judgments in the *Erdemovic* case regarding the defense of duress, however. *Cf. Robinson, supra* note 277, at 203–06 (criticizing the *Erdemovic* case); *see also infra* notes 348–357 and accompanying text (discussing Osiel’s views on duress).

307. A trial chamber of the ICTY has indicated that proof of specific discriminatory intent is also a significant component of crimes against humanity. According to the *Tadic* judgment’s interpretation of Article 5’s “crimes against humanity,” these crimes require, in addition, a showing: (1) that at the time of the commission of the acts or omissions there was an ongoing widespread or systematic attack directed against a civilian population; (2) that the defendants’ acts be undertaken on a widespread or systematic basis and in furtherance of such a policy; (3) that all relevant acts be undertaken on discriminatory grounds; and (4) that the perpetrator have knowledge of the wider context of his actions. *See Tadic Judgment, supra* note 58, para. 626. That judgment determined that the need to have actions “directed against a civilian population” requires a widespread course of conduct

which also convicted that defendant of crimes against humanity, it is not altogether clear how the requisites for that crime, all of which are likely to be deemed applicable by the ICTR,³⁰⁸ will apply, for example, to Rwandan broadcasters of hate speech. Much depends on the quantity and type of evidence ultimately demanded, as for proof of knowledge that a broadcaster's statements were accompanied by the requisite discriminatory intent.³⁰⁹

Quite apart from the amount of evidence required, the success or failure of a prosecution against a Rwandan broadcaster of hate speech on a charge of crimes against humanity will also be determined by how the ICTR applies the ICTY's conclusion that there needs to be evidence that the defendant acted with the requisite subjective discriminatory intent.³¹⁰ This requirement has had a long and checkered history. At one end stands the judgment of the Canadian Supreme Court in the *Finta* case.³¹¹ While the *Tadic* case and the Canadian Court construe the requisites of a crime against humanity in nearly identical

(suggesting a large number of victims) or systematic mass action (suggesting a pattern or methodical plan) and not "isolated or random" acts. *Id.* para. 646. In addition, persons must be victimized "not because of individual attributes but rather because of his membership [within] a targeted civilian population." *Id.* para. 644. In deference to the Report of the Secretary-General that recommended that the Security Council establish the ICTY, *Tadic*'s judges affirmed that discriminatory intent is required and must rest on "national, political, ethnic, racial or religious grounds." *Id.* para. 652 (citing *Secretary-General's Report, supra* note 11). They also agreed that the acts must be part of a formally adopted or at least consciously pursued policy directed against particular groups of people, whether or not pursued by a state. *See id.* paras. 653-55. Further, the *Tadic* judges determined that the crime of persecution requires a showing that:

the perpetrator has knowledge, either actual or constructive, that these acts were occurring on a widespread or systematic basis and does not commit his act for purely personal motives completely unrelated to the attack on the civilian population Therefore the perpetrator must know that there is an attack on the civilian population, know that his act fits in with the attack, and the act must not be taken for purely personal reasons unrelated to the armed conflict.

Id. § VI.D.2(c). That ICTY trial chamber also discussed the requisite level of proof of the defendant's mental state. It indicated that the requisite intent required for individual responsibility "can be inferred from the circumstances" and need not require a "pre-arranged plan." *Id.* § VI.E.2(b)(i). Nonetheless, the chamber also indicated that "mere presence at the scene of the crime without intent is not enough" to show "direct contribution" to the crime. *Id.* § VI.E.2(b)(ii). Finally, the *Tadic* judges concluded that:

the accused will be found criminally liable for any conduct where it is determined that he knowingly participated in the commission of an offence that violates international humanitarian law and his participation directly and substantially affected the commission of that offence through supporting the actual commission before, during, or after the incident. He will also be responsible for all that naturally results from the commission of the act in question.

Id. § VI.E.3.

308. The ICTY and ICTR share appellate chambers and, at least on these issues, identical definitions of the crime of "persecution." *See* ICTR Statute, *supra* note 53, art. 3 (giving the tribunal power to prosecute persons responsible for crimes "directed against any civilian population"); ICTY Statute, *supra* note 53, art. 5 (same). This is intended to further the internationalists' goal of uniform development of international humanitarian law. *See infra* note 326. Of course, international prosecutions for any broadcasts that occurred before 1994 are not, as discussed, within the ICTR's jurisdiction.

309. *See supra* note 307.

310. *See id.*

311. *Regina v. Finta* [1994] 1 S.C.R. 701 (upholding a jury acquittal on all counts of a former Hungarian gendarme accused of confining, robbing, and deporting Jews to Auschwitz). The court dismissed unanimously *Finta*'s appeal challenging the constitutionality of legislation which had enabled the Crown to proceed with its initial prosecution but split, four to three, concerning the Crown's appeal. *See id.* at 705.

ways,³¹² the Canadian majority opinion, by Justice Cory, concludes that the requisite “mens rea” for crimes against humanity needs to be “subjective” because

[T]he crime itself must be considered in context. Such crimes are usually committed during a time of war. Wars are concerned with death and destruction. Sweet reason is often among the first victims. The manipulation of emotions, often by the dissemination of false information and propaganda, is part and parcel of the terrible tapestry of war. False information and slanted reporting is so predominant that it cannot be automatically assumed that persons in units such as the Gendarmerie would really know that they were part of a plot to exterminate an entire race of people.³¹³

That majority opinion cited a contemporaneous news report, an alarmist account of the “acute” nature of the “Jewish threat,” to indicate that the (Hungarian) society of which Finta was a member was loyal to the Axis cause and under great anxiety.³¹⁴ It also noted that crimes against humanity cannot be aimed at those who killed in the heat of battle or in the defense of their country. It is aimed at those who inflicted immense suffering with foresight and calculated malevolence.³¹⁵

While the majority opinion stated that it is “not necessary” to show that the accused knew or believed that his actions were inhumane, it nonetheless found that among the circumstances that gave an “air of reality” to the defenses of mistake of fact and obedience to superior orders in this case was the “general, publicly stated belief in newspapers in Hungary that the Jews were subversive and disloyal to the war efforts of Hungary” as well as the “universal public expression in the newspapers cited by one of the witnesses of approval of the deportation of Hungarian Jews.”³¹⁶

As Irwin Cotler and other critics of the controversial *Finta* decision have argued, these portions of the Canadian Supreme Court’s opinion threaten to turn evidence of anti-Semitism or racism from an element of an international crime into a defense.³¹⁷ Pursued to its logical end, the result could be that “any ‘lynch mob’ atmosphere could arguably be pleaded as a defense.”³¹⁸

312. Like the *Tadic* judgment, Justice Cory’s opinion states that the accused “must be aware of or wilfully blind to the fact that he or she is inflicting untold misery on his victims.” *Finta* [1994] 1 S.C.R. at 816; see *supra* notes 304–310 and accompanying text.

313. *Finta* [1994] 1 S.C.R. at 816.

314. *Id.* at 816–17.

315. See *id.* at 817.

316. *Id.* at 847. Justice Cory states that this evidence “could have supported the defense of mistaken belief that the orders to undertake the actions which gave rise to the charges against the respondent were lawful.” *Id.* at 848. However, Judge La Forest dissented on the grounds that the lower courts had required an excessively high mens rea. See *id.* at 758–59 (La Forest, J., dissenting); see also *id.* at 760 (warning against judging the accused’s actions by “the moral values of the perpetrator of the prohibited act, rather than the moral views of the international community that established the norm”).

317. See, e.g., Irwin Cotler, *International Decisions: Regina v. Finta*, 90 AM. J. INT’L L. 460, 474 (1996). For other critiques of the four-to-three decision dismissing the Crown’s appeal, and especially of the opinion delivered by Justice Cory, see Blakesley, *supra* note 274, at 219; Sharon A. Williams, *Laudable Principles Lacking Application: The Prosecution of War Criminals in Canada*, in THE LAW OF WAR CRIMES, *supra* note 274, at 151, 164–70. As might be expected, the court’s majority opinion also generated considerable heat in the press. See, e.g., Jules Deschênes, *Toward International Criminal Justice*, 5 CRIM. L.F. 249, 266 n.25 (1994).

318. Cotler, *supra* note 317, at 474. For these reasons, among others, Cotler warns of the need

The *Finta* majority's approach to mens rea and applicable defenses finds disturbing parallels in certain defenses that have been attempted (sometimes successfully) to exculpate defendants accused in U.S. courts of lynching African-Americans. Anthony V. Alfieri's account of the "lynching" defenses of jury nullification, victim denigration, and diminished capacity is instructive.³¹⁹ The Canadian Supreme Court's approach, which essentially licensed *Finta*'s jury to acquit the defendant on the grounds of "mistake of fact" or "superior orders," poses the troubling possibility that, as with jury nullification in U.S. lynching cases, the jury is merely being invited to ignore applicable law in deference to their own anti-Semitism or perhaps, in a case like *Finta*'s, out of a sense that, despite applicable Canadian and international law clearly indicating that statute of limitations do not apply to such crimes, such old crimes or wounds should not be reopened. Alternatively, the Canadian Supreme Court's suggestion that racist propaganda gives an "air of reality" to certain defenses might be seen as a sub-rosa form of the victim denigration defense, where an acquittal emerges due to the invitation to decision-makers to consider the racially subordinate status of the victim or because they are invited to make invidious comparisons about the relative worth of defendant and victim. Perhaps most clearly, the apparent license to consider *Finta*'s case one of "mistake of fact" seems but a thinly disguised form of the diminished capacity defense—as where in some U.S. lynching cases, a predominately white jury has been invited to see white lawbreakers as helplessly caught up in emotion or as unwilling dupes of a racially coercive pathology that "negates" free will and responsibility.³²⁰

Unlike the Canadian Supreme Court, the ICTY trial chamber in the *Tadic* case did not fall into the trap of suggesting that the accused can be exculpated on the basis of the discriminatory animus that motivated him. For the *Tadic* bench, which operated in the absence of a jury, Serbian propaganda directed at non-Serbs remained very much a part of the case *against* the defendant.³²¹ Nonetheless, the trial judges in *Tadic* treated the exacerbation of ethnic tensions in *opstina* Prijedor as a "mitigating factor" when it came time to sentence the defendant.³²² While *Tadic*'s judges emphasized that they were not condoning his actions, they indicated that "the virulent propaganda that stoked the passions of the citizenry in *opstina* Prijedor was endemic and contributed to the crimes committed in the conflict and, as such, has been

to guard against appeals to racism and the possibility that such trials may "internalize war crimes revisionism at the expense of war crimes justice." *Id.* at 476.

319. See Anthony V. Alfieri, *Lynching Ethics: Toward a Theory of Racialized Defenses*, 95 Mich. L. Rev. 1063 (1997) (claiming that only an understanding of the politics of identity will bring racial subordination in law and ethics to the fore).

320. *Cf. id.* at 1074–84 (discussing the diminished capacity defense).

321. See *Prosecutor v. Tadic*, No. IT-94-1-T (ICTY July 14, 1997) (sentencing judgment), para. 57 available at <<http://www.un.org/icty/tadic/trialc2/judgement-e/707145e2.htm>> [hereinafter *Tadic Sentencing Judgment*].

322. See *id.* paras. 67–72. Such a possibility was not entirely foreclosed by the Balkan tribunal's statute or its rules. Although neither the Balkan nor Rwanda tribunal allows "superior orders" as a defense, this can be a "mitigating factor" as when these orders are joined with circumstances indicating a lack of moral choice. See, e.g., Blakesley, *supra* note 274, at 219–20; *Secretary-General's Report*, *supra* note 11, para. 57.

taken into account in the sentences imposed on Dusko Tadic.³²³ On this issue the *Tadic* judges appear to have used ethnic tensions as a justification for giving Tadic a relatively lenient sentence³²⁴ and did so on the basis of a rationale that buttresses the international legal paradigm's premises that high-level perpetrators are more culpable than a low-level culprit like Tadic.³²⁵

In the end, it seems that the *Tadic* bench did not see greater culpability in the fact that Tadic carried out with alacrity what the "Zeitgeist" demanded of "loyal" Serbs. The *Tadic* sentencing decision, while an improvement over the *Finta* court's respective conclusions, suggests that these ad hoc tribunals could, particularly in cases involving defendants with less evident governmental connections than proved to be the case with respect to Tadic or Akayesu, fall more readily into the error committed by the judges in *Finta*. If so, one defense to those who engaged in hate speech in Rwanda, as well as many low-level perpetrators, might be that fears of Tutsis, as articulated in RTLTM broadcasts, were so pervasive or genuine that they gave an "air of reality" to the Hutus' fears.³²⁶

As these examples demonstrate, a number of factors could lead the ICTR to narrow or conservative interpretations of the scope of criminal liability. International prosecutions may flounder because of the absence of proof concerning the knowledge that can be attributed to inciters of violence or even because the perceived Tutsi "threat" was widely believed. While alternative ways of characterizing "hate speech" as a cognizable international crime would entail distinct prerequisites, it may well prove to be the case that many instigators of violence will either be acquitted or will not even be indicted simply because all that can be shown is that they advocated racial/ethnic hostility or discrimination but it cannot be demonstrated to the tribunal's satisfaction that they knowingly prompted others to commit specific acts of violence or discrimination. Acquittals may result if international judges, especially at the appellate level, cognizant of their forum's tenuous legitimacy, err on the side of caution. Such acquittals, quite apart from undermining support for the ICTR within Rwanda, could also prove

323. Tadic Sentencing Judgment, *supra* note 321, para. 72.

324. Tadic was sentenced to 20 years and is expected to serve 10. See Sentencing Judgment, *supra* note 321, paras. 74–77.

325. See Akhavan, *supra* note 28, at 790 (praising this aspect of the sentencing decision because it recognizes that "ordinary men are not wont to commit such heinous crimes absent the direction and instigation of leaders").

326. Cf. *supra* note 316 and accompanying text (quoting the *Finta* case). At the very least, it appears that this may be a mitigating factor for purposes of sentencing if the *Tadic* judgment is regarded as the applicable precedent by the ICTR.

It is clear that the ICTR is likely to rely on the prior legal holdings of the ICTY (and vice versa). See e.g., Virginia Morris, *International Decisions: Prosecutor v. Kanyabashi*, 92 AM. J. INT'L L. 66 (1998) (summarizing Prosecutor v. Kanyabashi, No. ICTR-96-15-T, (ICTR, June 18, 1997) (decision on jurisdiction)). Indeed, the establishment of a shared appellate chamber between the two tribunals, see ICTR Statute, *supra* note 53, art. 12, was obviously intended to encourage consistency between the two tribunals. See, e.g., John B. Attanasio, *Rapporteur's Overview and Conclusions: Of Sovereignty, Globalization, and Courts*, 28 N.Y.U. J. INT'L L. & POL. 1, 18 (1995–96) (describing Justice Goldstone's explanation of consistency goals).

detrimental to the progressive development of the underlying crimes of genocide or crimes against humanity.

While neither the ICTY nor the ICTR has had enough cases to demonstrate whether these fears are warranted, the two judgments issued to date by these tribunals after full trial—the trial chambers’ judgments in the *Tadic* and *Akayesu* cases respectively—show that international judges do not always opt for the expansive interpretations of existing international humanitarian law that tribunal advocates seem to expect.³²⁷ Despite the urging of international lawyers, tribunal judges may duck expansive holdings because they operate in the shadow of Nuremberg and want to avoid accusations of judicial legislation or the imposition of ex post facto criminal liability.³²⁸ With respect to Rwanda’s incitement crimes, therefore, the prospects for progressive development (along with successful convictions) may be greater within local courts.³²⁹ Nor is this likely to be an isolated example.³³⁰

Similarly, it is too early to say that the ad hoc tribunals present the best prospects for the progressive development of gender-specific crimes. Despite the *Akayesu* judgment’s progressive approach to rape,³³¹ problems may yet arise with respect to charging perpetrators with gender-specific acts of violence that are not, as such, enumerated in either the ICTR’s or the ICTY’s respective statutes.³³² Expectations that international judges will more

327. Compare *Tadic* Judgment, *supra* note 58, paras. 588, 592–95, 929 (determining that *Tadic* was not guilty of grave breaches of the Geneva Convention because there was insufficient evidence of international involvement in the conflict over the relevant period), with Theodor Meron, *Classification of Armed Conflict in the Former Yugoslavia: Nicaragua’s Fallout*, 92 AM. J. INT’L L. 236 (criticizing the “crazy quilt of norms” that could result if this aspect of the *Tadic* judgment is affirmed on appeal). See also *Akayesu* Judgment, *supra* note 131, § 7.1 (finding the defendant not guilty of violations of common Article II and Protocol II); Meron, *supra* note 34, *passim* (urging an expansive approach to the definition of certain crimes within both ad hoc tribunals). In that instance, involving charges of murder, cruel treatment, and outrages upon personal dignity, the trial judges found, incredibly, that there was insufficient evidence to connect the actions of the *bourgmestre* to those of the armed forces of his country. This appears to undermine the well-established principle, which the trial chamber defends, see *Akayesu* Judgment, *supra* note 131, § 6.4, that civilians can be guilty of war crimes.

328. See Cassese, *supra* note 39, at 230–32 (noting the “inherent ability of a U.N. body to legislate”).

329. But see *infra* notes 340–342 and accompanying text (noting possible adverse effects caused by ICTR precedents).

330. International judges whose positions are due to the actions and the financial generosity of powerful U.N. members are not likely, for example, to seize an opportunity to clarify the meaning of the Genocide Convention’s duty to “prevent” that crime. They are not likely to suggest, even in passing, that prominent U.N. members’ or the Security Council’s own failures to prevent the Rwandan genocide constitute a violation of the Genocide Convention or of customary international law. Nor are they likely to suggest, even in dicta, that complicity in genocide includes passive acquiescence in genocidal actions committed by others. Cf. GOUREVITCH, *supra* note 1, at 152–53 (noting the U.S. government’s hesitation in branding the Rwandan killings “genocide” for fear of promoting legal arguments about the scope of duties to prevent and to punish); PRUNIER, *supra* note 10, at 274–75 (noting similar hesitations by major U.N. patrons with respect to Rwanda for similar reasons).

331. See *supra* notes 274–277 and accompanying text. Note, however, that even in *Akayesu*, the rape and sexual violence charges were not included in the prosecutor’s original indictment but were the result of an amended indictment completed only after witness J testified, in response to questioning by a female judge on the ICTR, that she had heard that young girls were raped at the *bureau communal*. See *Akayesu* Judgment, *supra* note 131, para. 416. This raises some doubts about the sensitivity or the thoroughness with which gender violence is investigated within the ICTR.

332. See, e.g., Alvarez, *supra* note 87, at 2073; Ray, *supra* note 65; see also HUMAN RIGHTS

recognize the victimization of women than traditional Rwandan courts burdened by decades of sexism and scarce resources remain premature.³³³ Such optimism is as yet unwarranted, given international criminal law's oft-noted slighting of gender, as well as the political pressures faced by international prosecutors.³³⁴ Although the *Akayesu* judgment presents reason for optimism in this respect, the first judgment rendered by either tribunal, the *Tadic* judgment, presents a less positive example. At the end of *Tadic's* trial, female victims disappeared from the tribunal's historical account once rape charges were dropped against the defendant.³³⁵ Thus, the first judicially rendered account of Balkan ethnic cleansing became misleadingly gender-neutral, despite the harrowing accounts of gender-specific violence provided by organizations such as Human Rights Watch.³³⁶ The *Tadic* trial stands as a warning that many of the ICTR's indictments and verdicts may also fail to address what it meant to Tutsi victims to be targeted simply because they were female *and* Tutsi, as opposed to being political opponents of the Hutu.

Despite the *Akayesu* judgment, it is possible that the most progressive and innovative interpretations of gendered violence as an international crime will occur not in the indictments or judgments issued by the ICTR or the ICTY but in national courts, including in the United States.³³⁷ If the judges or prosecutors in Rwanda prove to be accountable to the population of Rwanda, there is reason to hope that in a country that is presently seventy percent female (with perhaps fifty percent of households headed by women)³³⁸ political pressures may eventually force the Rwandan criminal process to be more sensitive to gender issues than international judges who remain captive to international law's gendered limitations.³³⁹ As this suggests, the view that

WATCH, *supra* note 64, at 94–96 (discussing the ICTR's difficulties with gender-based crimes).

333. See, e.g., HUMAN RIGHTS WATCH, *supra* note 64, at 19–24; cf. Goldstone, *supra* note 32, at 231 (praising the ICTY's treatment of gender-specific crimes).

334. For further discussion of the difficulties faced by these tribunals with respect to dealing with gendered violence, see Alvarez, *supra* note 87, at 2070–73 (discussing the treatment of gender-specific crimes within the ICTY). For a contemporary example of the difficulties posed by international politics in this regard, see Alessandra Stanley, *Semantics Stalls Pact Labeling Rape a War Crime*, N.Y. TIMES, July 9, 1998, at A3 (discussing the difficulties in securing agreement to include "forced pregnancy" within the statute of the new international criminal court). Although that effort was ultimately successful, see Rome Statute, *supra* note 13, art. 7(g), it remains to be seen whether that new court will be any more successful in handling gendered violence than the ICTY has been to date.

335. For a thorough critique of the *Tadic* case in this respect, see William M. Walker, *Making Rapists Pay: Lessons from the Bosnian Civil War*, 12 ST. JOHN'S J. LEGAL COMMENT. 449 (1997).

336. See, e.g., HUMAN RIGHTS WATCH, *supra* note 64. Nor is the *Tadic* trial the only example emerging from the ICTY's early proceedings. See, e.g., Marlise Simons, *Landmark Bosnia Rape Trial: A Legal Morass*, N.Y. TIMES, July 29, 1998, at A3 (discussing the problems emerging in the course of that tribunal's first attempt to try a defendant for rape as a war crime).

337. See *supra* notes 201–202, 206 and accompanying text.

338. See HUMAN RIGHTS WATCH, *supra* note 64, at 2.

339. Indeed, the Rwandan provision that encompasses heinous murderers and sexual torturers as "category one" perpetrators seems, at least formally, responsive to survivors' demands that such individuals should face the maximum penalty because they would have done so under preexisting ordinary criminal laws in Rwanda—whether or not their acts qualify as violations of "clearly established" international humanitarian law. Revealingly, it was the Rwandan legislature which added "sexual torture" to category one offenses within Rwanda's Organic Law. Conversation with Madeline Morris (Apr. 30, 1998); Cf. Stanley, *supra* note 334 (reporting that international consensus was proving difficult within the ongoing negotiations for a permanent international criminal court on including

international judges are more likely to develop progressively the rules of international law to provide for greater criminal accountability for international crimes fails to take into account the political context in which those judges act. It also fails to consider the possible benefits of using national courts as experimental, risk-taking laboratories for the interpretation of international norms.³⁴⁰

The impact of constricted interpretations of international crimes may not be limited to the international level. There is a risk that current provisions of the ICTR's statute will fetter some attempts by Rwandan courts to progressively develop international norms. If, for example, an attempt to prosecute Rwandan broadcasters for hate speech occurs first within the ICTR where it flounders due to the judges' interpretation of existing international crimes or their evidentiary requisites, that tribunal's rules would appear to prohibit a subsequent trial by Rwanda's courts, even pursuant to national laws that specifically purport to punish hate speech as within category one crimes of genocide or crimes against humanity.³⁴¹ Even where this does not occur with respect to a particular individual, decisions by the ICTR (or even the ICTY) that cast doubt on the viability of proceeding against those who engage in hate speech, for example, could cast a pall over attempts to proceed against such individuals within Rwanda's courts (and possibly even within other jurisdictions). Particularly under a scheme in which international courts enjoy jurisdictional primacy, the ICTR's legal and factual findings could delegitimize any national convictions, and possibly civil verdicts, that are at odds with the international judges' views of applicable law, even if such municipal judgments are more expansive than international ones. For these reasons, it is premature to suggest that ICTR judgments will invariably produce a positive "synergy" with respect to the progressive development of international humanitarian law by national courts.³⁴²

For all these reasons, it is premature to justify primacy for international tribunals on the basis of what they are likely to do to further the progressive criminalization of violations of fundamental human rights. For the past fifty years, with no international tribunals in place, the progressive development of international criminal law, including international humanitarian law, has

enforced pregnancy and other gender-specific crimes within that tribunal's jurisdiction).

To date actual indictments and investigations both within Rwanda and the ICTR have not been particularly sensitive to the needs of victims of gender-specific violence. *See, e.g.*, HUMAN RIGHTS WATCH, *supra* note 64, at 88–97. According to Human Rights Watch, apart from problems stemming from lack of resources, problems at the ICTR include a lack of political will to investigate rape and related crimes, a feeling that since the crimes in Rwanda do not mirror those in the Balkans (where there were claims of forced impregnation) there is less of a need to investigate and prosecute them, mistaken assumptions that Rwandan women will not come forward to talk, insensitive interviewing techniques, and inadequate or nonexistent victim and witness protection guarantees. *See id.* at 94–97. Whether the high number of females in post-genocide Rwanda and the growing numbers of women's organizations, *see id.* at 71, will force changes either at the local or international level remains to be seen.

340. *Cf. Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 440, 454–461 (1963) (White, J., dissenting) (castigating the majority for failing to seize the opportunity to interpret and apply international law).

341. *See supra* note 99 (discussing Article 9 of the ICTR Statute).

342. *Cf. Meron, War Crimes Law Comes of Age, supra* note 22, at 464.

occurred through piecemeal efforts in a variety of fora, including within national courts.³⁴³ As occurs with respect to many areas of domestic law in federal systems, it may be that the development of international humanitarian law should preferably be left to development in many competing venues without the imposition of hierarchy that favors international tribunals or the norms developed therein.³⁴⁴

How progressive development of international humanitarian law occurs is also important. As international lawyers acknowledge, the growth and interpretation of international criminal norms must be reconciled with the fair treatment of defendants, including the prohibition on ex post facto criminal liability.³⁴⁵ The tension between the goals of progressive development and adherence to the *nullem crimen* principle is exacerbated to the extent one relies on the politically expedient device of creating ad hoc tribunals by mere Security Council fiat. That tension is also heightened to the extent one relies on judicial legislation in the course of pending trials to nudge the law in new directions or to fill its gaps.³⁴⁶ These realities should prompt reconsideration of whether it is preferable that progressive development occur through international tribunals instead of domestic prosecutions.³⁴⁷ Ironically, it may

343. See, e.g., Bassiouni, *supra* note 4, *passim*.

344. Moreover, to the extent one accepts the critique that the current definition of international crimes privileges the views of powerful states, see Jochnick & Normand, *supra* note 91, this may suggest additional rationales for preferring to leave the development of international humanitarian law to diverse fora, including the national courts of less powerful states. The "constructive legal reform" of international humanitarian law that authors Jochnick and Normand recommend probably will not emerge from tribunals authorized by, and ultimately reliant on, the Security Council. Cf. Chris af Jochnick & Roger Normand, *The Legitimation of Violence: A Critical Analysis of the Gulf War*, 35 HARV. INT'L L.J. 387, 414–16 (1994).

345. Such protections are no less important even in contexts such as these, involving perpetrators charged with horrendous deeds. Indeed, such traditional protections are perhaps all the more necessary precisely because of the risks to apolitical adjudication posed by the facts in these cases. Consider, in this regard, the first conviction for crimes against humanity before the ICTY: the case of Drazen Erdemovic, an ethnic Croat who had, in order to protect himself and his family against harm and with great reluctance, participated in mass killings as a member of the Bosnian Serb Army and who, with grave remorse, turned himself in to the ICTY authorities. Many have criticized Erdemovic's initial conviction, sentence, and even the decision to indict. See, e.g., Yee, *supra* note 231. Erdemovic's case bitterly divided the judges on the ICTY with respect to the defense of duress. See *supra* note 285; see also Akhavan, *supra* note 27, at 791–93 (discussing the *Erdemovic* case).

346. The tension is recognized explicitly in Article 22 of the Rome Statute for the proposed ICC. The Article instructs ICC judges that the "definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted." Rome Statute, *supra* note 13, art. 22(2); see Alvarez, *supra* note 87, at 2061–64 (identifying tensions with the *nullum crimen sine lege* principle in the course of the *Tadic* case); Zacklin, *supra* note 287, at 47–48 (discussing role of international tribunals in the progressive development of international criminal law). For this reason, among others, even the foremost advocates of international war crimes tribunals have urged that areas of international criminal law that are particularly in need of clarification or development, such as crimes against humanity, be made the subject of a specialized convention. See Bassiouni, *supra* note 4, at 493–94. Others have responded that tribunal innovations may reflect "genuine developments" elsewhere. See M. Dietrich Schindler, *Debats*, in THE UNITED NATIONS AND INTERNATIONAL HUMANITARIAN LAW, *supra* note 39, at 193, 198–99 (comments of Theodor Meron). Whether particular tribunal holdings will result in later genuine developments in state practice remains to be seen. Of course, from the perspective of a defendant convicted on the basis of an innovative interpretation of the law by a tribunal, the prospect that this innovation is later confirmed by genuine developments provides small comfort.

347. For a pungent general critique of the legitimacy of progressive development of the law by

be desirable to leave the development of international crimes such as persecution to understaffed, overburdened, and presumably less expert Rwandan judges, precisely *because* such judges can more readily and more legitimately fill in gaps in international criminal law through resort to established domestic criminal law.³⁴⁸ While this risks a certain lack of uniformity with respect to the application and the progressive development of international humanitarian law, the potential for lack of uniformity already exists and appears to be increasing due to the greater willingness of some national courts to wrestle with these issues in either civil suits or criminal trials. There may be a tradeoff between less uniform progressive development and more effective progressive development. Over time, reliance on national courts and domestic laws by international tribunals may produce more legitimate, and therefore more genuinely long-lasting, progressive developments in international criminal law.

Mark Osiel's reevaluation of existing approaches to the "following orders" defense suggests additional reasons to be cautious about the top-down approach to progressive development of international humanitarian norms assumed by the international legal paradigm.³⁴⁹ As Osiel argues, general international law has given us relatively little precise guidance on the availability and scope of the superior orders defense.³⁵⁰ While the ad hoc tribunals disallow superior orders as a defense and permit its use only in mitigation, it is difficult to say precisely how this rule will be applied, particularly with respect to the soldier of lesser rank.³⁵¹ For the most part, national courts have turned to municipal law to fill these gaps and have emerged with a variety of answers with respect to such issues as burdens of proof:

the judges of the ICJ, see Michael Reisman, *Metamorphoses: Judge Shigeru Oda and the International Court of Justice*, 1995 CAN. Y.B. INT'L L. 185. *But see* Case of C.R. v. United Kingdom, Eur. Ct. H.R. (ser. A) at 58 (1995) (approving a U.K. court's judicial abandonment of marital immunity as a permissible example of "gradual clarification of the rules of criminal liability through judicial interpretation from case to case").

348. For a plea that in instances where there is a gap in existing international humanitarian law international judges should have recourse "as a last resort—to the national jurisdiction of the accused, rather than to moral considerations or policy-oriented principles," see *Prosecutor v. Erdemovic*, No. IT-96-22-A, para. 49 (ICTY Oct. 7, 1997) (judgment) (Cassese, J. dissenting), available at <www.un.org/icty/erdemovic/appeal/sopinion-e/71007jt3.htm>. For one attempt to turn to national rules of criminal procedure and evidence to determine the proper scope of cross examination before the ICTY, see Ilias Bantekas, *Study on the Minimum Rules of Conduct in Cross Examination to be Applied by the International Criminal Tribunal for the Former Yugoslavia*, 50 REVUE HELLENIQUE DE DROIT INTERNATIONAL 205 (1997). One difficulty with this approach, however, is that international judges may get national law wrong. *See, e.g.*, Remarks of Madeline Morris, *supra* note 192 (arguing that the ICTR judges got Rwandan law wrong throughout the *Akayesu* case and noting the difficulties of finding applicable Rwandan law). This may suggest one more reason for including judges from Rwanda within the ICTR. *See infra* notes 424–433 and accompanying text.

349. *See* Mark Osiel, *Obedying Orders: Atrocity, Military Discipline, and the Law of War*, 86 CAL. L. REV. 939 (1998).

350. *See id.* at 950 & n.20. This is also suggested by the split decision in the *Erdemovic* case. *See supra* note 285; *see also supra* note 322 (discussing Tadic's sentencing).

351. *See, e.g.*, ICTY Statute, *supra* note 53, art. 6; Osiel, *supra* note 349, at 949.

Some states, seeking to maximize compliance with official directives, offer the soldier a complete excuse when he obeys unlawful orders, regardless of whether he can establish that he mistakenly believed the order to be lawful or whether it contributed to a situation of duress. . . . Other states will excuse the soldier only if his obedience resulted from an honest belief that the order was lawful. Still others, such as the United States and Germany, additionally insist that the soldier's error must have been reasonable (or "unavoidable," in the civil law terminology).³⁵²

Osiel suggests that one reason that some African states have favored the first approach stems from the need to fashion loyalty to the state in contexts where "most people owe competing, often stronger loyalties to tribe, clan, or religious faith."³⁵³ In such contexts, where internal conflict threatens the creation of strong unified armies vital for nation-building, there are understandable reasons why some states find it difficult to completely dispense with the superior orders defense.³⁵⁴

Whether or not one agrees with Osiel's specific recommendations for reform of the rule,³⁵⁵ his work is only one example of how the precise scope of the rules of warfare arises from, and needs to respond to, particular social contexts. Osiel's analysis of the background of the superior orders defense makes it easy to understand why Rwandan authorities, operating in the context of a highly polarized state, might resist attempts by international judges to reduce the scope of this defense should the issue arise (as it undoubtedly will) in the course of the work of the ICTR.³⁵⁶ While presumptive Rwandan concerns about the unity and effectiveness of its army need not deter international lawyers from seeking to eliminate the superior orders defense, these issues should prompt reconsideration of how this can best be accomplished. Even if international lawyers are right to insist that superior orders ought never, in any context, to be a permissible defense and that this rule should apply uniformly to all states, it seems naive to assume that such uniformity can be imposed either on the world as a whole or on Rwanda alone simply because a few international judges so determine in the course of a particular criminal case. Issues of such significance, at the heart of national sovereignty and capable of having a tremendous impact on the way a nation's soldiers are organized before and during combat,³⁵⁷ are ill-suited to progressive gap-filling by international judicial fiat. Such attempts are likely to meet with resistance.³⁵⁸

352. Osiel, *supra* note 349, at 950. As this suggests, the current international legal rule regarding duress and superior orders (such as it is) has always relied on highly selective borrowing from particular national legal traditions.

353. *Id.* at 983.

354. *See id.* at 982–83.

355. *See id.* at 1089–1121.

356. The splintered decisions of the ICTY judges in the *Erdemovic* case regarding the defense of duress, *see supra* note 285, should also suggest skepticism about the ease with which international judges will be able to credibly bridge the divides between judges from common law and civil law jurisdictions regarding such issues. *See* Robinson, *supra* note 277, at 203–05. Decisions such as the one in *Erdemovic*, at both the trial and appellate levels, also raise doubts about the extent to which international judges can achieve what the international legal paradigm apparently demands, namely that judges totally remove themselves from their own national legal traditions.

357. *See* Osiel, *supra* note 349, at 1028.

358. *See generally* Kenneth Anderson, *First in the Field*, TIMES LITERARY SUPPLEMENT

International lawyers should be wary of confident assertions that international tribunals charged with the interpretation of international crimes better promote the international rule of law and ought to be given hierarchical supremacy with respect to its interpretation. The concerns raised here with respect to how progressive development can best be accomplished in a way that has tangible and real world effects need to be balanced against the powerful symbolic benefits of having international judges pass on these issues.

IV. THE HAZARDS OF ETHNIC NEUTRALITY

International lawyers presume that international prosecutions will generate closure among relevant audiences, especially among victims and their families.³⁵⁹ The international legal paradigm assumes that the international criminal process, like the domestic criminal process for ordinary crimes, permits Durkheimian veneration over moral fundamentals—that is, that trials help put the past to rest, defuse ethnic tensions, and avoid collective guilt, while safely channeling communal anger and desires for retribution.³⁶⁰ Although international lawyers usually avoid speculation about the general underlying causes for ethnic tensions or about the kind of governmental structures that would be best to construct to contain these in the future, their approach implies that what is needed is a criminal process untainted by the ethnocentric tensions that gave rise to the offenses under scrutiny.

Like those whom Gary Peller has labeled “integrationists” within the U.S. civil rights community, international legalists presume that the ethnic and other forms of stereotyping pursued by groups such as the Serbs and the Hutus are the product of irrational myths that will give way in the face of knowledge. They hope that, as the culprits stand exposed for the villains that they are, and their victims, given faces and names, are shown, in their individuality, to be innocent, fully-contributing members of society and not part of a depersonalized group threat, stereotyped violence will decline.³⁶¹ The international legalist approach is premised on faith in the eventual victory of rational tolerance over the dark forces of irrational prejudice or “primordialism.”³⁶² Advocates of these international tribunals hope that the mythologies of stereotype, whether tribal, ethnic, or religious, will eventually

(London), July 31, 1998, at 3 (criticizing an international culture of legality that relies on international norms as a “deus ex machina” instead of close attention to developing and influencing the “culture of the professional honour of soldiers”). Anderson’s arguments raise larger questions about whether the international legal paradigm relies on the wrong epistemic community, or at least ignores other potential allies in the struggle to affect military tactics on the ground.

359. See Alvarez, *supra* note 87, at 2033–42; Osiel, *supra* note 151, at 487–88.

360. See *infra* notes 508–511 and accompanying text. For general critiques of such views, see Alvarez, *supra* note 87; Osiel, *supra* note 151.

361. Cf. Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758. To this end, defenders of the international legal paradigm argue that there is a clear choice to be made between an “instrumentalist” and a “primordialist” view of ethnicity. See *supra* notes 81–88 and accompanying text (discussing Akhavan’s views).

362. Compare *supra* notes 81–88 and accompanying text (discussing Akhavan’s views), with Anderson, *supra* note 75, *passim* (critiquing these views).

give way when confronted with irrefutable truths at trial by judges who share none of these biases. They trust that once the extent of persecution stands revealed in its full irrational ferocity, observers of good faith, without respect to ethnic origin or religious affiliation, will be appalled, the convicted duly shamed, and closure will result for all—as the educative engine of an ethnically neutral international criminal process works its magic.³⁶³ It is assumed that exposing the crimes committed in the name of ethnic/religious purity will delegitimize ethnocentric nationalism and win converts for the demonstrably fair application of politically neutral rules of law in accordance with fair process. When international lawyers say that international trials are consistent with the goal of affirming both the international and the national rule of law, what is meant is that observers of the international criminal process within the regions where the crimes occurred will draw lessons from the application of international law by these international bodies and that, as a result, the ambit of the rule of law and equality of treatment will be emulated and extended by national courts throughout Rwanda and the Balkans.³⁶⁴

What “national reconciliation” means or requires under the international legal paradigm is not altogether clear. It appears to mean governments that zealously seek to transcend racial or ethnic consciousness in favor of legal rules requiring equal protection regardless of status.³⁶⁵ To the extent that the nature of national reconciliation is discussed at all, advocates of these tribunals express hope for societies that are not merely characterized by the absence of genocidal acts but are real, functioning pluralistic civil societies—ideally, democracies on the model of a United States or Canada. This is certainly the hope of those who see criminal prosecutions, at both the international and national levels, as facilitating a smoother transition to democratic nations that, over time, will be free of the ethnic, religious, racial, or cultural divides that gave rise to massacre.³⁶⁶ And even those who are less sanguine hope that, whether or not truly democratic transitions occur or are encouraged, the example set by these international criminal prosecutions will at least encourage the adoption and effective implementation of national equal protection legal guarantees on behalf of all individuals.³⁶⁷ It appears that international lawyers aspire for future governments in regions devastated by mass atrocities that are as committed to promoting ethnically neutral

363. Cf. W. Michael Reisman, *Stopping Wars and Making Peace: Reflections on the Ideology and Practice of Conflict Termination in Contemporary World Politics*, 6 TUL. J. INT'L & COMP. L. 5, 49 (1998) (criticizing the belief in war crimes tribunals as a “magic-bullet” technique for making peace).

364. Cf. LUBAN, *supra* note 152, at 345 (noting comparable efforts to use the Nuremberg trial to teach Germans what the “role of law is all about by exemplifying it in the trial itself”).

365. This is most clearly implied by the international legal paradigm’s insistence on the need to avoid a “dangerous culture of collective guilt.” See, e.g., KRITZ, *supra* note 241, at 128; *supra* note 39 and accompanying text; see also WIPPMAN, *supra* note 82, at 6 (discussing the impact of liberalism on international law).

366. This is suggested, for example, by arguments for international criminal prosecutions based on the need to facilitate transitions to democratic governance. See *supra* note 42 and accompanying text.

367. See, e.g., ICCPR, *supra* note 231, arts. 2, 20.

government actions as are the international judges who try the region's war crimes.³⁶⁸

Whether or not one accepts an integrationist agenda within states like the United States,³⁶⁹ such a vision of the future, as applied to the former Yugoslavia or to Rwanda, is subject to considerable doubt, and not merely because of strenuous disagreements about the viability of the states that have emerged from the Dayton Agreements or about the viability of "failed states" such as Rwanda.³⁷⁰ In other contexts, Western lawyers' faith in the export of ethnically neutral solutions has been dismissed as the product of cultural hubris or worse. Thus, the law and development movement, involving private foundations as well as the U.S. Agency for International Development particularly in Latin America in the 1960s and 1970s, was severely critiqued because it, too, evinced a naive faith in the transformative power of law and in the power of universally applicable Western liberal legal institutions to promote equal treatment for all citizens.³⁷¹ Further, as Professor Amy Chua has argued, at least in societies torn by ethnic conflicts along socioeconomic lines, the internationalist goals of trade liberalization and democratization may conflict.³⁷²

Assuming that the international lawyers' integrationist goals are feasible, however, how should we construct systems of criminal accountability that advance such goals? In other ethnically charged contexts, Chua has argued that building sustainable democracies may require the pursuit of ethnically conscious government measures.³⁷³ Others contend that a government's conciliatory actions, intended to defuse tensions and to build trust in the wake of ethnic conflicts, require close attention to ethnic symbols to assuage each group's perceptions of threat.³⁷⁴ As this literature suggests, we ought not

368. See CARLOS SANTIAGO NINO, *RADICAL EVIL ON TRIAL* (1996) (discussing the role of such trials in the transition towards democracy); *supra* notes 81–88 and accompanying text; see also Richard Falk, *Meeting the Challenge of Genocide in Bosnia: Reconciling Moral Imperatives with Political Constraints*, in *GENOCIDE, WAR, AND HUMAN SURVIVAL*, *supra* note 28, at 125, 133 (arguing for the need to counter exclusivist images of identity premised on ethnicity or religion).

369. Cf. Peller, *supra* note 361, at 763–83 (discussing "integrationism" within the United States).

370. For doubts about the viability of the post-Dayton Balkan states, see generally SUSAN L. WOODWARD, *BALKAN TRAGEDY* (1995). For the (in)famous piece identifying methods to save "failed states," see Gerald B. Helman & Steven R. Ratner, *Saving Failed States*, *FOREIGN POL'Y*, Winter 1992–93, at 3. For a critique of the latter and its implications, see Ruth E. Gordan, *Some Legal Problems with Trusteeship*, 28 *CORNELL INT'L L.J.* 301 (1995).

371. See, e.g., David M. Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974 *WIS. L. REV.* 1072, 1074. For further accounts of the law and development movement and its flaws, see JAMES GARDNER, *LEGAL IMPERIALISM* (1980); José E. Alvarez, *Promoting the "Rule of Law" in Latin America: Problems and Prospects*, 25 *GEO. WASH. J. INT'L L. & ECON.* 281 (1991); and David M. Trubek, *Toward a Social Theory of Law: An Essay of the Study of Law and Development*, 82 *YALE L.J.* 1 (1972). Gardner characterized these efforts at exporting U.S. law and institutions as a "rather awkward mixture of goodwill, optimism, self-interest, arrogance, ethnocentricity, and simple lack of understanding." Gardner, *supra*, at 4.

372. See Chua, *supra* note 67, *passim*.

373. See *id.* at 62–63.

374. See Tamara Cofman Wittes, *Resolving Ethnic Conflicts: The Role of Ethnic Symbols in Provoking and Assuaging Ethnic Identity* (Mar. 18, 1998) (unpublished manuscript on file with *The Yale*

blithely to assume that ethnically neutral judicial approaches and structures are the only, or best, way to achieve neutral or impartial verdicts.

One pragmatic consequence of the international legal paradigm's fears of "primordialism" is its insistence on a "denationalized" judiciary—namely a judicial bench that (1) reflects the diversity of the world's legal systems and is therefore representative of the international community but (2) does not consist of individuals from the regions where atrocities occurred and is therefore ethnically neutral.³⁷⁵ This insistence emerges not merely because of unexamined premises about the best way to promote the perception of judicial impartiality, but results from the crimes of state perspective and, more particularly, because of the Chapter VII origins of the ad hoc tribunals. Establishment of these tribunals is, to international lawyers, necessarily on a continuum with other modes of U.N. enforcement action that also require ethnic neutrality.³⁷⁶ Ethnic neutrality is regarded as all the more necessary if one sees the Council's establishment of these tribunals as yet another method, in addition to peacekeeping, by which the organization develops neutral international humanitarian norms.³⁷⁷

But, as has been the case with respect to peacekeeping, maintaining the appearance of ethnic neutrality with respect to these tribunals is difficult.³⁷⁸ Internationalization is not synonymous with denationalization. Trials before the ICTR and ICTY are international in the sense that they result from treaty-based international processes and are conducted by judges from a variety of U.N. member states, but there is no assurance that these processes or the judges selected do not reflect national or other biases or will not be perceived to reflect such prejudices.

Although the judges of the ad hoc tribunals do not have a direct stake in the regions where atrocities were committed, they come from nations that have direct and indirect interests. The ICTR judges are not lifelong civil servants nor stateless individuals, but persons elected by the joint effort of the Security Council and the General Assembly, who serve for limited terms and whose selection turned, in part, on their nationalities.³⁷⁹ While the judges are

Journal of International Law). Wittes writes that "symbols are the arenas in which ethnic conflicts are so often manifested because symbols are the heart of ethnic identity." *Id.* at 14. Her study indicates that ethnic leaders use symbols as benchmarks in judging their group's security and relative success and give events or goals with symbolic significance at least as much weight, and sometimes greater weight, than events with purely strategic significance. Wittes argues that ethnic fears can, therefore, be assuaged by symbolic actions. *Id.* at 36.

375. See, e.g., LAWYERS COMMITTEE FOR HUMAN RIGHTS, *supra* note 227, at 74 (identifying the relative strengths of an independent international tribunal over national courts since the latter cannot "dissociate themselves" from the underlying ethnic conflict).

376. Cf. Arsanjani, *supra* note 288, at 127 (discussing the neutrality of U.N. peacekeeping operations).

377. See *supra* notes 43–48 and accompanying text.

378. Cf. Arsanjani, *supra* note 288, at 119–20 (discussing challenges to the perceived neutrality of U.N. peacekeeping operations).

379. See ICTR Statute, *supra* note 53, art. 12 (requiring geographical diversity, representation of the "principal legal systems of the world," and requiring that no two judges be of the same nationality); ICTY Statute, *supra* note 53, art. 13 (same).

required to be "independent" under the tribunals' respective statutes,³⁸⁰ they are no more and no less independent than judges in any comparable international body. They include individuals from states with national interests in the respective regions, including judges from the United States, Russia, Europe, and China.³⁸¹ The U.N.'s efforts to strike a balance among the national interests represented on the tribunals' bench, regardless of those judges' vaunted independence, is itself an admission that denationalization has not been realized.

In addition, both tribunals remain creatures of the Security Council, a highly politicized entity whose continuing hold over both tribunals remains unresolved and whose political sensitivities must remain of concern to the judges themselves.³⁸² For these reasons, it is not clear that such tribunals will produce verdicts that will be universally regarded as legitimate without respect to ethnicity, religion, or race. This is particularly true to the extent that these judges come from nations that are themselves complicit in the 1994 Rwandan genocide.

As the short history in Section III.A suggests, the West's complicity in the 1994 killings in Rwanda is a discomfiting fact. The scale and seriousness of that complicity take various forms. At one level, certain European powers, namely the colonizers of Rwanda who imported their racist notions of "superior races" to Rwanda, need to accept their responsibility for creating the "tribalism without tribes"³⁸³ that helped make genocide possible and continues to characterize Rwanda today. Much greater blame can be attributed to those, like the French, who, in the 1990s and through the 1994 killings themselves, continued to befriend and arm the Habyarimana government.³⁸⁴ But the circle of blame extends much wider and includes Kofi Annan, who ignored warnings of the impending genocide; all members of the U.N., and particularly the Security Council, who, in the wake of the fiasco of Somalia, failed to send the 5000 troops that, it is estimated, might have prevented the vast majority of the killings; and the international community as a whole, which, in the wake of the emergence of a new government in Rwanda after the genocide, ignored that new government's pleas for assistance but came to the aid of the Hutu

380. ICTY Statute, *supra* note 53, art. 12; ICTR Statute, *supra* note 53, art. 11. The judges are also required to be impartial. See ICTY Statute, *supra* note 53, art. 13; ICTR Statute, *supra* note 53, art. 12.

381. See, e.g., SCHARF, *supra* note 5, at 64 (discussing the credibility problems presented by both the absence of a Muslim member of the bench and the fact that four of the eleven judges of the ICTY at the time of the *Tadic* case came from predominantly Muslim countries). Similarly, the circumstances surrounding the Rwandan genocide suggest that considerable skepticism is likely to arise, at least among Rwandan audiences, with respect to the participation of French or Belgian judges. See *supra* notes 118–122 and accompanying text.

382. For the foreseeable future, international prosecutions are tainted with the suspicion that they are being used to favor someone's political agenda. Cf. Ruth Wedgwood, *The Pitfalls of Global Justice*, N.Y. TIMES, June 10, 1998, at A29 (arguing that an independent prosecutor not subject to a Security Council check could be used to check U.S. political power).

383. See *supra* notes 105–107 and accompanying text.

384. See *supra* notes 113–114 and accompanying text.

killers in exile while failing to prevent their ongoing incursions into Rwanda to continue the genocide.³⁸⁵

For all their attention to the attribution of individual blame for these crimes, international lawyers have not been attentive to these wider circles of guilt. In surreal fashion, international lawyers have argued that judges from some of the very countries that are regarded as partly “to blame” for these crimes will be readily accepted as neutral arbitrators simply because they do not come from Rwanda. Blind to the colonial-era racism that helped to make the Rwandan genocide possible, and equally blind to the continuing insensitivities of the U.N. and its patrons since the genocide, international lawyers pin their hopes for verdicts that will be accepted as impartial on a U.N.-approved bench, simply because it does not contain a Hutu or a Tutsi. This seems a slim reed on which to rely. To the extent that the U.N., as an organization, was itself derelict in enforcing international humanitarian law, that fact is surely detrimental to the credibility of the ICTR’s judgments.³⁸⁶

As Gourevitch argues, we should not continue to deny “the particularity of the peoples who are making history, and the possibility that they might have politics.”³⁸⁷ Knowledge of what led to the Rwandan killings as well as who is to blame in this wider sense strengthens the very premise that individuals must be held responsible.³⁸⁸ In addition, sensitivity to colonial-era racism and what has occurred in its wake prompts scrutiny of the policies now being touted by the U.N.’s Security Council with respect to Rwanda. European racism in the pre-independence period, French anglophobia, and the United States’s lack of political will were all contributing factors in possibly 800,000 deaths. This situation encourages skepticism about the international solutions promoted by those same powers and with their prominent participation—especially when these are imposed on the victims of the atrocities. Those who were blind once to the important consequences of acting on the basis of ethnic prejudices could be wrong a second time when they insist that international trials should proceed as if the prejudices they helped to instill can be ignored.³⁸⁹

385. See *supra* notes 118–123, 128–130 and accompanying text.

386. See *supra* text accompanying note 131. Quite apart from whether such criticisms are merited, it is clear that the U.N. suffers from an image problem with respect to such issues, and not merely within Rwanda. See, e.g., Arsanjani, *supra* note 288, at 119–20; James C. McKinley, Jr., *Annan Given Cold Shoulder by Officials in Rwanda*, N.Y. TIMES, May 8, 1998, at A9; James C. McKinley, Jr., *Ugly Reality in Rwanda*, N.Y. TIMES, May 10, 1998, at A4.

387. GOUREVITCH, *supra* note 1, at 182.

388. Compare Turton, *supra* note 72, who argues that:

The failure (or unwillingness) of the leaders of the international community to appreciate the extent to which Tutsi and Hutu ethnicities were a reaction to the experience of colonialism made it easier for them to portray the 1994 genocide in Rwanda as an eruption of ancient and irrational tribal antagonisms, rather than as the carefully planned, deliberately executed—and therefore preventable—operation it was.

Id. at 7.

389. Gérard Prunier argues that the “most likely” outcome of the ICTR’s efforts will be: poorly prepared and endless court sessions in Arusha, with former ministers of the Habyarimana regime turning the trial into a political tribune, allegations of “double genocide”; inconclusive evidence, long speeches on the inherently democratic nature of “Hutu Power” since the Hutu make up 85% of the population; [and] Belgian NGO

Knowledge of the West's complicity should make us skeptical of a scheme that would deny to the Rwandan government what each Western state has for centuries enjoyed—namely the right to try its own war criminals. How would the United States government have responded if, on the eve of a national trial for someone like William Calley, charged with Vietnam's My Lai massacre, an international prosecutor had tried to make the same pleas for the primacy of international jurisdiction that Goldstone made to the Rwandan government in the case of Bagasora?³⁹⁰ Undoubtedly, the United States would not have been as compliant as the Rwandan officials were.³⁹¹ Many states have traditionally reserved the right to deny an extradition request for their own nationals and international law has long presumed that states retain an interest in the fate of even those nationals they agree to extradite.³⁹² If we assume that the United States would have rejected an extradition request for someone like Calley, this surely would have had something to do with both the nationality of Calley and the fact that his prosecution reverberates with prominent domestic constituencies and has significant national import (as would a national trial of Bagasora). There is more than a hint of racist condescension when the Security Council, dominated by Western powers, ignores the wishes of the present government of Rwanda with respect to the creation and subsequent operation of the ICTR or when it insists that ICTR trials take priority over that government's desire to try its own major perpetrators.³⁹³ The history of prominent powers' involvement in Rwanda also

Rwanda "experts," with warm support from the French, testifying to the fundamental good sense of this line of argument.

PRUNIER, *supra* note 10, at 344. Although Prunier's fears may prove overstated, interesting challenges would indeed be presented for the ICTR should defendants attempt to turn their trials, especially any ultimately appealed to an appellate chamber presided over by a French judge, into a trial of competing versions of history. Cf. Guyora Binder, *Representing Nazism: Advocacy and Identity at the Trial of Klaus Barbie*, 98 YALE L.J. 1321 (1989) (discussing how Barbie's defense team attempted to put recent French history on trial).

390. See *supra* notes 185–189 and accompanying text.

391. Indeed, the recent action of a U.S. magistrate in Texas refusing to transfer Elizaphan Ntakirutimana, a Rwandan Hutu living in Texas accused of organizing the slaughter of 5,000 to 10,000 ethnic Tutsis in Mugonero, Rwanda, to the ICTR is suggestive of the types of feelings such requests inspire even with respect to foreigners present in the United States. In that instance, the magistrate expressed doubts about whether the ICTR would protect the defendant's constitutionally protected liberties in the course of ruling that the federal law requiring U.S. courts to surrender suspects to the ICTR was unconstitutional. See *In re Surrender of Elizaphan Ntakirutimana*, 988 F. Supp. 1038 (S.D. Tex. 1997); see also Brown, *supra* note 96, at 411–12.

The likely attitude of the U.S. government towards such requests should it involve a U.S. citizen is also suggested by the U.S. government's position in recent negotiations for a permanent international criminal court. See Alessandra Stanley, *U.S. Dissents, but Accord Is Reached on War-Crime Court*, N.Y. TIMES, July 18, 1998 at A3; see also Wedgwood, *supra* note 382 (supporting the U.S. government's opposition to an unfettered prosecutor capable of demanding custody of a U.S. individual without prior U.S. government consent).

392. See, e.g., RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 477 (1987).

393. While some might argue that there is no racism involved since the Council did the same with respect to the states of the former Yugoslavia in the heart of Europe, there are three counters to this. First, the fact remains that the Council has seen fit to impose international primacy only with respect to two situations out of many potential recent candidates for war crimes prosecutions around the world. That one of the two situations in which it did so is a small, powerless nation in the heart of Africa should raise some doubts in this regard. A second argument would involve distinguishing the case of Rwanda

raises disturbing questions about the motivations of prominent powers within the Security Council today. Continued French support for the ICTR may partly hinge on its belief that keeping Rwandan prosecutions “in check” is consistent with French interests. On the other hand, are allegations that the U.N. has, from the start, dealt with the ICTR as if it were the “poor cousin” of the “more important” ICTY true, and if so, is this due to lingering racism within the Security Council?³⁹⁴ To what extent will French views that what has occurred (and is occurring) in Rwanda constitutes a “double genocide” for which all sides are equally guilty prevail within the ICTR’s proceedings?³⁹⁵ Given such concerns, international lawyers cannot presume that the international processes that they have established will be readily perceived as impartial merely because they are international.

Attention to the ethnic divisions that underlie the 1994 genocide and the continuing violence in that country should make us skeptical as well about how the ICTR handles evidentiary issues. The difficulties in this regard have been raised most clearly in the ICTY’s *Tadic* case. As is likely to be true with respect to prosecutions within the ICTR, the vast bulk of the evidence in the *Tadic* case came not in the form of physical evidence, such as contemporaneous written records of atrocities (as at Nuremberg), but rather through the oral testimony of self-interested, live witnesses who replicated inside the courtroom the ethnic divides of the society at large. In the *Tadic* case, there were only Serbian witnesses for the defense, while the prosecution relied entirely on non-Serbs (mostly Muslim victims).³⁹⁶ For *Tadic*’s judges, the situation posed considerable difficulties. How does a tribunal generate confidence in its neutral conclusions when the primary source for these must be conflicting testimony that is subject to the challenge that Muslim witnesses will say anything against those who they believe are at war with them and that Serbian witnesses will do the same against non-Serbs? How does a tribunal’s

from the former Yugoslavia. In the case of Rwanda, the complete turnover of government after the genocide of 1994 made national prosecutions against the perpetrators of that genocide a real prospect. The government of Rwanda was, to this extent, in a position that remains more comparable to that of the victors of World War II. Finally, racist condescension is suggested by the altogether different provisions regarding the concurrent jurisdiction of national courts now being contemplated for the permanent international criminal court. *See infra* note 550 and accompanying text. As the statute for that court shows, some of the strongest proponents of primacy in the case of Rwanda are reluctant to apply the concept to themselves. *See id.*

394. *See, e.g.,* Van Lierop, *supra* note 150, at 901–02 (suggesting, among other things, that if the international community is serious about international trials for Rwanda, it is time that it permit the ICTR to have a full time prosecutor and not merely one who is shared with the ICTY).

395. *Cf. supra* note 389 (discussing Prunier’s fears about the tribunal process). These fears extend beyond France’s involvement with the ICTR. Skepticism about the good faith or the wisdom of many of those governments that have led the charge for ad hoc tribunals is also prompted by knowledge of many of those governments’ prior records with respect to criminal accountability for mass atrocities. *Cf. Irwin Cotler, National Prosecutions, International Lessons: Bringing Nazi War Criminals in Canada to Justice, in REINING IN IMPUNITY, supra* note 31, at 161, 171–72 (identifying many examples of willful failure to prosecute war criminals, including by Canada and Great Britain).

396. At Nuremberg, the prosecution submitted some seven million pages of meticulously kept Nazi documents. *See* SCHARF, *supra* note 5, at 117; *see also* Louis B. Sohn, *From Nazi Germany and Japan to Yugoslavia and Rwanda: Similarities and Differences*, 12 CONN. J. INT’L L. 209, 213–15 (1997) (contrasting the available evidence at Nuremberg with that available to the ICTR and ICTY).

treatment of the inevitable conflict between the biases of Serb and non-Serb witnesses avoid replicating among trial observers in the region the prevalent ethnic and religious tensions that gave rise to the Balkan conflict in the first place?³⁹⁷

Tadic's judges reacted to these challenges in the time-honored fashion of judges in liberal states—they pretended such strains did not exist. Thus, the *Tadic* bench gave short shrift to defense arguments that it consider the relevance of witnesses' ethnic or religious affiliations and the judges deftly avoided nearly all reference to such affiliations when stating reasons for determining the credibility of witnesses. The *Tadic* judges' curt response to the politically explosive defense claim that all the Muslim witnesses were inherently biased because they would say anything against their perceived oppressors, is revealing:

The reliability of witnesses, including any motive they may have to give false testimony, is an estimation that must be made in the case of each individual witness. It is neither appropriate, nor correct, to conclude that a witness is deemed to be inherently unreliable solely because he was the victim of a crime committed by a person of the same [sic] creed, ethnic group, armed force or any other characteristic of the accused. That is not to say that ethnic hatred, even without the exacerbating influences of violent conflict between ethnic groups, can never be a ground for doubting the reliability of any particular witness. Such a conclusion can only be made, however, in the light of the circumstances of each individual witness, his individual testimony, and such concerns as the Defence may substantiate either in cross-examination or through its own evidence-in-chief.³⁹⁸

Similarly, that chamber generally avoided casting aspersions on the veracity of defense witnesses due to their pro-Serb sympathies. Occasionally, however, the judgment indicates, without comment, certain background facts with respect to such witnesses, presumably letting these speak for themselves.³⁹⁹ The *Tadic* chamber papered over these difficult issues presumably to elicit confidence in the ICTY's neutrality.

397. For a detailed account of some of the difficulties such oral testimony produced, see SCHARF, *supra* note 5, at 111–205, 212.

398. See *Tadic* Judgment, *supra* note 58, para. 541. The judges also summarily dismissed the defense's attempt to besmirch the testimony of all of the prosecution witnesses on the ground of the notorious testimony of witness L whose testimony at trial had been discredited (forcing the prosecutor to disclaim reliance on it). The defense argued that the incident was "but one instance of a quite general failure by the Prosecution to test adequately the truthfulness of the evidence to be presented against the accused, instead simply accepting as true the evidence given against a single Serb accused by a whole array of Muslim witnesses." *Id.* para. 553. The judges countered that the particular witness was the only one who had been proffered by the Republic of Bosnia and Herzegovina and that there was no evidence of a lack of prosecutorial diligence in that or other instances. See *id.* para. 554; see SCHARF, *supra* note 5, at 199–200.

399. For instance, the judgment implicitly disparaged the credibility of the defense's alibi witnesses U and W by indicating, among other things, that witness U "lives in a house belonging to a Muslim which was assigned to him by a commission on which the accused used to sit" while witness W had in the past threatened Muslims with violence and had uttered anti-Muslim epithets. *Tadic* Judgment, *supra* note 58, para. 333. Even in this instance, however, the judges may not be intending to suggest that the testimony of U and W is made less credible merely because of their general pro-Serb sympathies. The implication of the background facts to which the judges refer seem to be that U is an "interested" witness and that W may be less credible because of his demonstrable personal bias.

Did the *Tadic* judges' efforts to generate confidence in their verdict succeed among significant segments of local communities within the former Yugoslavia? While it is difficult to judge success in this regard and impossible to predict how perceptions of success are likely to change over time, there is reason for skepticism. The immediate reaction to the *Tadic* judgment remained strongly divided along ethnic lines within the former Yugoslavia.⁴⁰⁰ Local governments in the Balkans remain highly suspicious, incredulous, skeptical, or, in some cases, even hostile towards international trials.⁴⁰¹

Despite international lawyers' assumptions, the legitimacy of the international criminal process and its verdicts remains very much a contested issue in both Rwanda and the Balkans. While there are many reasons for this, not a few of them stem from the ethnic nature of the offenses committed in both regions. Even if virulent inter-ethnic hostilities are a relatively recent and "constructed" phenomenon in both regions, no one disputes that these tensions, in the wake of mass atrocities, are now palpable and genuine. By now, years of propaganda and violence have reinforced ethnic self-identification on all sides.⁴⁰²

Whatever its merits are within liberal states, the appeal to ethnic neutrality has a limited audience within places as ethnically polarized as present day Rwanda. Ordinary trials, even Nuremberg's, are not conducted in the midst of ongoing hostilities between the parties where witnesses, both before and after giving their testimony, return to separate enclaves to continue their verbal (and sometimes physical) combat.⁴⁰³ In such contexts a Hutu or Tutsi witness, only temporarily in Arusha for trial, faces enormous pressures to give testimony favorable to his/her ethnic community. Although, as indicated, the *Tadic* chamber attempted to avoid any accusations that any witness, Serb or non-Serb, was lying,⁴⁰⁴ in most cases it found credible the testimony of Muslim victims in the face of an incomplete alibi testimony by (Serbian) defense witnesses, including *Tadic*'s wife. Regardless of what those judges chose to acknowledge, it seems that they decided that certain defense testimony, as by those who adamantly testified that *Tadic* could not have been physically present in prison camps, was not credible because it was self-serving.⁴⁰⁵ In most cases, they refused to accept comparable defense claims that Muslim victims were biased in the same way.

400. The official Serbian reaction has been that the *Tadic* proceedings and verdict constitute further evidence that the ICTY is a "fraud" perpetrated by hostile "foreign" interests pursuing political "show trials" to undermine the Serbian nationalist cause. See Alvarez, *supra* note 87, at 2053 & n.78.

401. See *id.*

402. See, e.g., Damir Mirković, *Ethnic Conflict and Genocide: Reflections on Ethnic Cleansing in the Former Yugoslavia*, 548 ANNALS AM. ACAD. POL. & SOC. SCI. 191, 198 (1996).

403. See generally Michael J. Keegan, *The Preparation of Cases for the ICTY*, 7 TRANSNAT'L L. & CONTEMP. PROBS. 120 (1997) (noting the difficulties such circumstances present for trial participants).

404. See *supra* notes at 397-398 and accompanying text.

405. The testimony of at least some of those witnesses was on some issues so unequivocal that it appears that the tribunal found them not credible *sub silentio*. Thus, it is hard to escape the conclusion that the judges simply chose not to believe one defense witness who testified that the Serbian-run "checkpoints" in which *Tadic* served were established not to confirm ethnic identity but merely to check for stolen cars. See SCHARF, *supra* note 5, at 184; cf. *supra* notes 397-398 and accompanying text

Such credibility determinations, based on subjective factors such as demeanor while testifying, routine to trials in liberal states, assume problematic proportions in the *Tadic* trial because surrounding circumstances have made many, including some in the West, suspicious of the inherent anti-Serb bias of that tribunal.⁴⁰⁶ There is little reservoir of good will upon which the ICTY can draw. Given the high state of mutual suspicions in the Balkans, that tribunal ideally needed to generate societal consensus in its findings of fact, “smoking gun” physical evidence and not merely its own subjective determinations of testimonial credibility. In the absence of abundant physical evidence, it becomes easier for critics of the ICTY to suggest that “not one shred of evidence” connected Tadic to these crimes, that the evidence against him was “fraudulent,” or that the judges’ credibility determinations merely demonstrated “anti-Serb bias.” Coming from Serbian sources, such arguments are tantamount to saying what the defense implied at trial—that only the evidence of a large number of Muslims should be treated, consistent with the presumption of innocence, as equal to the testimony of one Serb defense witness.⁴⁰⁷ Countering these arguments, within a paradigm that seeks to avoid dwelling on ethnic issues, is not easy.

These problems apply with equal vigor to both Rwandan local prosecutions as well as to ICTR trials, given ongoing Hutu/Tutsi suspicions and killings. The liberal appeal to ethnically neutral handling of oral evidence may simply not work well unless it is being used in a (liberal) state already enjoying ethnic peace instead of one just emerging from (or worse still, still in the grips of) ethnic violence. While the goal of reaching an impartial verdict is worth pursuing, it may be that in such contexts this goal has to be achieved in a different fashion.

A second problem with invoking ethnic neutrality with respect to evidentiary issues is that the attempt is subject to misunderstandings or may not appear evenhanded. Compare how Tadic’s judges dealt with witnesses to how they dealt with the defendant himself. While those judges argued that each witness must be judged individually and not by his or her affiliations,⁴⁰⁸ when it came to proving the substantive case against the defendant, the judges found Tadic guilty in substantial part because of his political, religious, and ethnic affiliations. The defendant’s institutional and personal affiliations were a vital link in helping to prove, to the tribunal’s satisfaction, that he was a loyal Serb pursuing the agenda of a “Greater Serbia,” and this, in turn, was a vital link in proving, to the judges’ satisfaction, the basic elements of the substantive crimes charged.⁴⁰⁹

(describing the judges’ approach in the *Tadic* case).

406. See, e.g., RUBIN, *supra* note 90, at 41; Dušan Cotič, *Introduction*, 5 CRIM. L.F. 223 (1994) (introducing issue entitled *A Critical Study of the International Tribunal for the Former Yugoslavia*); Hayden, *Schindler’s Fate*, *supra* note 91, at 736–42; Cedric Thornberry, *Saving the War Crimes Tribunal*, FOREIGN POL’Y, Fall 1996, at 72.

407. See *supra* notes 397–398 and accompanying text.

408. See *supra* note 397 and accompanying text.

409. See Tadic Judgment, *supra* note 58, paras. 180–92 (describing Tadic’s background).

The unstated reasons for the disjuncture between the treatment of witnesses and the treatment of Tadic are, to a lawyer, obvious: the judges determined that absent specific grounds for believing that a particular witness is lying because of his or her affiliations or group status, these matters are not of themselves relevant to credibility determinations, but they found group affiliations to be relevant with respect to the defendant under the substantive requirements of the crimes charged.⁴¹⁰ Yet even assuming that the chamber's analysis of the substantive law was impeccable and the judges were legally correct in giving weight to Tadic's associative status, outside observers, particularly those without legal training, are more likely to focus on the fact that the defendant, who is entitled to the presumption of innocence, was convicted in part because he was shown to be a sympathizer of Greater Serbia while comparable evidence as to the political sympathies or biases of (Muslim) witnesses were curtly dismissed even though those witnesses had considerably less at stake. The chamber's references to Tadic's political and ethnic affiliations are all the more likely to prove controversial given lingering sensitivities that Nuremberg's judges overreached when they convicted some individuals for mere membership in criminal organizations.⁴¹¹ Such evidentiary decisions are also troublesome given the emphasis, under international legalists' insistence on ethnic neutrality, in judging an individual and not the community of which he/she is a part.⁴¹² Particularly for non-lawyers, it may appear strange, and perhaps unjust, that Tadic was convicted at least partly because he was affiliated with pro-Serbian organizations while the similarly ethnically based affiliations of the witnesses against him were considered irrelevant.

Similar dilemmas will bedevil judges on the ICTR. It seems likely, for example, that to the extent a broadcaster for RTLM is found guilty of incitement to genocide, such a conviction will necessarily be based on the broadcaster's political affiliations and ethnic sympathies.⁴¹³ These same affiliations and sympathies, however, cannot, as such, be used to discredit the testimony of any witness—not if the tribunal is trying to be ethnically neutral in its handling of ethnically loaded evidence.

410. See *id.* paras. 180–192, 693 (stating the legal findings as to count one).

411. For discussions of the problematic aspects of Nuremberg's concepts of group criminality, see, for example LUBAN, *supra* note 152, at 368–72. For related criticisms of Nuremberg's charges of conspiracy or “common plan,” see Kevin R. Chaney, *Pitfalls and Imperative: Applying the Lessons of Nuremberg to the Yugoslav War Crimes Trials*, 14 DICK. J. INT'L L. 57, 72–73 (1995).

412. Given these sensitivities, the chamber could have done more to justify its treatment of Tadic's affiliations, particularly since it refused to consider the associative status of witnesses against him. It might have argued, for example, that defense arguments with respect to witnesses were premised purely on their ethnic or religious status and not, as with Tadic, on evidence of *illegal* associative activity. Even these arguments, however, may prove troublesome from the standpoint of the tribunal's refusal to provide for organizational criminality in its statute and in light of internationally and nationally recognized concepts of freedom of association and free speech. See *supra* note 297 and accompanying text; see also Thomas M. Franck, *Clan and Superclan: Loyalty, Identity and Community in Law and Practice*, 90 AM. J. INT'L L. 359 (1996) (discussing the emerging norm of individual “self-determination”).

413. See *supra* note 307 and accompanying text (discussing requisites of “persecution”).

The *Tadic* bench pursued its own vision of neutral justice based on its view of the requirements of the law and its own sense of the kinds of rationales that would enhance its credibility. Presumably, Tadic's judges believed that public acceptance of their verdict would not be enhanced if they openly wrestled with the contentious and politically explosive credibility issues suggested in the course of that trial by the prosecution and the defense. The *Tadic* judgment deftly avoids any allusion to the ethnic sympathies of any witnesses despite the salient importance of these background facts. The judges may have feared that any such discussions would only play into the hands of those who continue to argue that the ICTY was established by and is doing the bidding of the "enemies of Serbia." Regardless of whether or not those judges followed the right path, it seems clear that the ICTY's tenuous hold on legitimacy played a role in how Tadic's judges chose to portray ethnic issues in their judgment—a point that would scarcely surprise critical race scholars in the United States but one that casts doubt on the assumptions of many international lawyers that international trials only reflect truth but do not construct it.⁴¹⁴

As Gary Peller has argued, there are more general reasons for doubts about the viability of an approach that seeks to produce integrative results premised on ethnic neutrality.⁴¹⁵ Peller's scholarship is itself an exemplar of postmodern challenges to law's ability to fashion objective solutions based on neutral principles or to tell anything other than politically predetermined stories.⁴¹⁶ Whether or not one agrees with such critical perspectives, their prevalence poses grave challenges to the notion that judges can credibly rely on ethnically neutral principles for legitimacy. Even within the United States, courts now operate amid pervasive doubts about whether all are really equal before the law. The prospect that the international community, with all of its divisions, can render neutral justice in instances involving thousands of defendants inflamed by religious or ethnic hatred exacerbated by nationalist

414. *But see* Akhavan, *supra* note 27, at 774–77 (acknowledging that ICTY prosecutors and judges construct an "optimal" truth). Legitimacy concerns are also likely to play an important role with respect to which cases are brought before the Yugoslav and Rwanda tribunals. Both tribunals are undoubtedly sensitive to the charges that each was established to pursue particular types of cases—against Serbs with respect to the ICTY, and against Hutu in the case of the ICTR—and each will probably attempt to bring other types of cases in order to show its evenhandedness. *See id.* at 781–82 (discussing the impact of the demand for ethnic parity for prosecutorial discretion). This probably explains why the ICTY is now, in its second set of trials, going after Croat and Muslim defendants. Indeed, there is a hope (and an attendant risk) that both tribunals' respective desires to purchase legitimacy among all sides may eventually lead to "evenhanded" trials among the respective ethnic or religious groups. The ICTY may attempt to strike a balance among trials of Muslims, Serbs, and Croats, even if, as appears likely, the bulk of the most serious offenses (especially genocide) were committed by Serbs. For its part, the ICTR may attempt, even within its constricted one year mandate, to pursue at least some trials against Tutsi, even though the majority of the most serious offenses (especially genocide) appear to have been committed by the Hutu (especially through 1994). To the extent that these tribunals pursue this course of action, their legitimacy might be purchased at the expense of an accurate portrayal of either Balkan "ethnic cleansing" or the 1994 Rwandan genocide.

415. *See* Peller, *supra* note 361, at 791–811 (using black nationalism as a starting point for a critique of universalism).

416. *See id.* *See generally* Heidi Feldman, *Objectivity in Legal Judgment*, 92 MICH. L. REV. 1187 (1994) (addressing the postmodern critique of legal objectivity).

aspirations seems dramatically more quixotic than the possibility that a white jury in Orange County, California could have rendered colorblind justice in the case charging white police officers with the beating of Rodney King. The international legalist model, as applied to Rwanda and the Balkans, asks us to believe that under infinitely more divisive circumstances, where mass atrocities have resulted from ethnic/religious conflicts, a case like the King case can and should have been expected to generate societal consensus and not ethnic conflict. In the Balkans and Rwanda there are enormous hurdles for anyone who evinces faith in the irrelevancy of ethnicity to the veracity of defendants or witnesses or the neutrality of judges and law. In the midst of such skepticism (if not cynicism) about the prospects for judicial neutrality, judges, both international and national, may need to be more candid about the ethnic and other tensions in their courtrooms than were the judges in the *Tadic* case if they wish to generate confidence in their efforts at truth-telling.

The international legal paradigm's insistence on ethnic neutrality also threatens internationalist aspirations with respect to the preservation of collective memory. As noted, under the paradigm, judicialized truth-telling should downplay the significance of ethnicity, for fear of playing into the hands of the "primordialists." A judicial bench of outsiders, applying an ethnically neutral approach to the evidence, will, it is hoped, produce a "higher" truth that "transcends" ethnic divisions.⁴¹⁷ The ICTY's judgment in the *Tadic* case is again instructive. Despite the attention lavished on describing the society-wide discriminations of which Tadic's actions were a part, that judgment, as might be expected, does not attempt to distinguish what it means to target individuals for violence on the basis of religious preference, ethnic origin, or gender—as opposed to politics. Since international crimes against humanity require only a demonstration that the underlying acts were improperly motivated by politics, race, ethnicity, or religion,⁴¹⁸ no one at Tadic's trial attempted to parse these components. All of Tadic's convictions for persecution were based on the proposition that discrimination on the grounds of political beliefs is indistinguishable from discrimination on the grounds of race, ethnicity, or religion.

Throughout, Tadic's judges dealt with all of the evidence that the defendant had discriminatory intent in indistinguishable fashion—as if the defendant's reputed desire to name his child after Slobodan Milosevic or his statements on behalf of a Greater Serbia were equally worthy of note as was the defendant's (and others') use of ethnic slurs. While this is, as noted, understandable given the applicable law's failure to distinguish discrimination based on politics from discrimination based on ethnicity, the result is not likely to be satisfactory to those who are sensitive to the very real differences, to both culprit and victim, of violence and other acts that are motivated by

417. See Akhavan, *supra* note 27, at 771. As the ICTY's sentencing judgment in *Erdemovic* put it, only such a truth "cleanses the ethnic and religious hatreds and begins the healing process." *Erdemovic* Sentencing Judgment, *supra* note 285, para. 21.

418. See *Tadic* Judgment, *supra* note 58, para. 652; cf. Genocide Convention, *supra* note 2, art. II (requiring proof of intent directed at the elimination of a national, ethnic, racial, or religious group as such).

differences in political beliefs as opposed to status-based characteristics such as ethnicity. For these reasons, judgments that strive for ethnic neutrality in this respect are less likely to prove satisfactory to victims who want official acknowledgment of their *ethnically based* victimization.

Verdicts that are cleansed of ethnic concerns will fail to satisfy those looking for judicialized collective memory that is sensitive to such differences.⁴¹⁹ Indeed, critical race scholars would undoubtedly wince at the unintended moral equivalence suggested by Tadic's judges between these two very different types of discrimination but for the context: the tribunal's treatment of the defendant's mixed political/ethnic motives is palatable because the judges undoubtedly assumed that most will understand that the defendant's political affiliations and beliefs were objectionable precisely because they were based on a desire to do harm to certain groups based on their immutable characteristics.⁴²⁰ Still, it would have helped if the chamber hearing Tadic's case had said as much—that is, if Tadic's judges had not simply presumed that persecution on the grounds of immutable characteristics is particularly egregious but had indicated why this was so.⁴²¹

Like the victims of Rwanda's genocide, Tadic's victims are entitled to recognition that they suffered because of no fault of their own, simply because of who they were, and not merely because they were opponents of a political cause. While it is possible that in the future international judges will become more sensitive to the need to deal with the nature of defendants' discriminatory animus, the precedent of the Nuremberg trials compared to, for example, Israel's prosecution of Eichmann, suggests that national courts, whatever their other flaws, because they are more closely attuned to local constituencies' needs for a clear recognition of the nature of their victimhood, sometimes do a better job of accommodating this concern.⁴²² The judgment in *Tadic* suggests that there is a risk that international prosecutions will fail to give judicial legitimation to these aspects of the Balkan and Rwandan conflicts and that these proceedings will obscure these aspects as much as the homophobic and anti-Semitic nature of the Holocaust was obscured by the Nuremberg trials—to the detriment of the goals of collective memory and victim mollification.

The flaws in ethnic neutrality enumerated here do not stem from the jurisdictional primacy of the ICTR, although that is part of the problem. Assuming that both Rwandan proceedings and international processes proceed

419. Cf. *supra* notes 152–156 and accompanying text (noting Nuremberg's flaws with respect to portraying the real horrors of the Holocaust).

420. As the *Tadic* chamber's decision indicates at great length, to be an advocate of "Greater Serbia" in the time period addressed by the *Tadic* case was tantamount to being an advocate of ethnic and gender-specific cleansing. See Tadic Judgment, *supra* note 58, paras. 85–126, 182–192. To accuse Tadic of being a Milosevic sympathizer is not the equivalent of accusing someone in the United States of being a Republican.

421. Indeed, the difference seems vital to those who, like Destexhe, believe the killings in Rwanda in 1994 constitute one of the three real genocides of the 20th century. See DESTEXHE, *supra* note 10, at 21–35.

422. See generally Osiel, *supra* note 151, at 15–17 (discussing the prosecutorial goals in the Eichmann case).

apace, it may be that we need to take seriously the lessons of the law and development movement, as well as the counsel of Chua and Wittes,⁴²³ and that we should consider applying an ethnically sensitive, instead of an ethnically neutral, approach to accountability in order to reach verdicts that are more likely to be regarded as “fair” to all sides. One way that this could be achieved would be through joint ICTR/Rwandan investigations or trials, combined with an approach that would give the ICTR subsidiary jurisdiction.⁴²⁴

A more controversial alternative would involve restructuring the ICTR’s judicial bench. Consider the impact, on both perceptions and results, if the ICTR were to include a Hutu and a Tutsi judge.⁴²⁵ The presence of such judges in the courtroom as well as during deliberations could encourage a more thorough venting of difficult issues such as those surrounding the credibility of witnesses (and the role of ethnicity in such determinations), including through dissenting or separate concurring opinions.⁴²⁶ Their presence and views could also generate more nuanced accounts of what it means to be targeted for violence on the basis of ethnicity. Such judges would also provide the tribunal with valuable insights as to Rwandan law.⁴²⁷ Depending on how such a bench is configured, a more “representative” bench could also be much more symbolically appealing to both sides in the Rwandan conflict and would give Rwandans a greater sense of proprietorship in the ICTR.⁴²⁸ For Hutus who have been subject to a constant barrage of propaganda portraying Tutsis as a threat to their livelihood or existence, such inclusion would help mitigate fears and distrust. The same might be said for Tutsis, who, for the reasons indicated,⁴²⁹ have many fears to overcome with respect to the good faith of the international community. Having Rwandan

423. See *supra* notes 373–374 and accompanying text.

424. For recommendations along the lines of those suggested here, see Todd Howland & William Calathes, *The UN’s International Criminal Tribunal, Is it Justice or Jingoism for Rwanda? A Call for Transformation*, 39 VA. J. INT’L L. 135 (1998) (recommending, among other things, a major role for Rwandans in the ICTR’s prosecutorial decisions and other “joint projects”).

425. While it seems clear that the current U.N. approach to “representation” issues on the ICTR’s bench is to include as many judges as possible from the region, that is, Africa, it is questionable whether Africans who are not from Rwanda itself truly understand the particularities of Tutsi/Hutu relations in that country. Cf. GOUREVITCH, *supra* note 1, at 178 (reporting on the misunderstandings generated by Archbishop Tutu’s 1995 visit to Rwanda).

426. As noted, see *supra* note 331, the *Akayesu* judgment’s far-reaching conclusions with respect to gender-specific violence arose most directly from allegations raised by a witness. As noted in an editorial in the *New York Times*, that particular line of questioning was initiated and elaborated by Judge Navanethem Pillay, a South African who was at the time the ICTR’s sole female judge. See *When Rape Becomes Genocide*, N.Y. TIMES, Sept. 5, 1998, at A10. As noted in the *Times*, it may well be that but for the presence of a female judge on the ICTR, along with the subsequent pressures by women’s groups, “this cruel aspect of the Rwandan genocide might never have been addressed.” *Id.* Is it such a stretch to suggest that the presence of judges familiar with local conditions, local customs, and local dialects might also enhance the quality of judicial truth?

427. Cf. *supra* note 348 and accompanying text (discussing the alleged ICTR problems in this respect, along with linguistic/cultural difficulties).

428. Given the complexities of Hutu versus Tutsi sympathies, as well as the fact that many Hutus were regarded as sympathetic to Tutsis, appointing a Hutu to the bench, either on a case-by-case basis or more permanently, need not mean that such an individual would invariably refuse to convict a fellow Hutu. Indeed, individuals with extremist political sentiments would probably refuse to serve on the ICTR.

429. See, e.g., *supra* notes 118–130 and accompanying text.

representatives on the ICTR could encourage closer coordination between that entity and local Rwandan courts. For reasons that will be further addressed in Part VI, an ethnically representative judicial bench could also enhance the prospects for national reconciliation.⁴³⁰

While a more ethnically representative ICTR bench does not ensure greater ethnic sensitivity, we ought not to dismiss the value of insiders' insights nor underestimate the difficulty outsiders have in discovering the truth under ethnically charged circumstances.⁴³¹ We should not blithely discard Michael Ignatieff's profound insight that only an insider can appreciate the moral significance of facts or that truths, if they are to be believed, "must be authored by those who have suffered its consequences."⁴³² While international lawyers have tended to see "instrumentalism" and "primordialism" as dichotomous categories that point in opposite directions on the issue of criminal accountability,⁴³³ a more promising route to finding a truly "shared truth,"⁴³⁴ as well as credible verdicts, may lie in building bridges across ethnic divides. It may be that such bridges cannot be built unless the profound ethnic cleavages that exist in the wake of ethnic violence are not ignored but recognized. Even if the institutional reforms suggested here are rejected, we ought to acknowledge the potential costs, as well as potential benefits,⁴³⁵ of our current attempts to deploy ethnic neutrality.

V. THE RISKS OF EXCEPTIONALISM

Support for establishing international war crimes tribunals is premised on the aberrational nature of these crimes.⁴³⁶ To international lawyers, these offenses are exceptional in two senses: (1) few governments encourage or undertake war crimes as a matter of state policy and (2) even within such rogue states, only some individuals, and not communities as a whole, are complicit.⁴³⁷

430. See *infra* notes 500–504 and accompanying text.

431. Cf. Michael Ignatieff, *Articles of Faith*, INDEX ON CENSORSHIP, Sept./Oct. 1996, reprinted in HARPER'S MAG., Mar. 1997, at 15, 16. ("The very fact of being an outsider discredits rather than reinforces one's legitimacy. For there is always a truth that can be known only by those on the inside.")

432. *Id.* But see Akhavan, *supra* note 27, at 771 ("But surely this is buying into the divisive falsehood that is the instrument of power for the unscrupulous politician. To reduce Serb and Croatian identity to such base stereotypes is to give credence to the notion of primordial tribal hatreds.")

433. See *supra* notes 81–88, 431 and accompanying text.

434. Cf. Akhavan, *supra* note 27, at 771 (arguing that "shared truth" can only be established if we share a "common humanity" and that attention to ethnicity is destructive to such a goal).

435. Presumably one of these potential benefits lies in refusing to legitimize ethnic cleavages through judicial action at the international level. Cf. Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances after Shaw v. Reno*, 92 MICH. L. REV. 483 (1993) (noting "expressive harms" of certain judicial actions).

436. See *supra* note 35 and accompanying text. Exceptionalism seems a necessity to the extent Chapter VII action is the trigger for securing international criminal accountability as well as for compliance with tribunal orders. See *supra* note 54 and accompanying text.

437. Both of these justifications were repeatedly offered during the main Nuremberg trials of high-level former Nazi officials; the Nazis were portrayed as the rare rogue aggressor nation and the 22 defendants in the dock as primarily responsible for offenses that ordinary Germans would have found reprehensible. See, e.g., SA'ADAH, *supra* note 152, at 156. As noted, the Nuremberg precedent is routinely cited for the need to use individualized guilt to avoid "laying guilt upon a whole people." See,

Exceptionalism serves a multitude of purposes. Convicting someone like Akayesu of an aberrational crime such as genocide serves a didactic purpose that is not met by a mere conviction for murder.⁴³⁸ Exceptional condemnation is appropriate for exceptional crimes. Exceptionalism is also a convenient response to those who ask why it is appropriate to establish ad hoc international tribunals in the cases of Rwanda and the Balkans but not in other comparable cases involving mass atrocity.⁴³⁹ Exceptionalism also deflects objections to these tribunals premised on the threat to sovereignty. Limiting the jurisdiction of international tribunals with primacy over national courts to a relatively small number of offenses that most governments do not see themselves as likely to commit is less threatening and more readily acceptable to other governments.⁴⁴⁰

Exceptionalism is also grounded in other logistical and philosophical concerns. The need to attribute direct criminal responsibility and, under international human rights law, to pursue individualized trials means that it is not possible to attribute responsibility to too many people. Individual trials for dozens or possibly hundreds of persons are feasible; trials for thousands are more difficult; and for millions, inconceivable. Beyond these practical difficulties, the imputation of criminal liability for entire communities raises profound moral dilemmas and risks delegitimizing the effort to punish perpetrators.⁴⁴¹

The ostensible aberrational quality of war crimes has consequences, however. The idea that only the rare government and its elites engage in such conduct tends to discourage wider inquiries as to whether others are culpable or complicit.⁴⁴² There are competing virtues to a broader, more honest appraisal of who is responsible for mass atrocities. Scholars who have gone outside the international legal paradigm to ask who, other than those who gave the orders to kill or who actually wielded the weapons, is to blame, have emerged with disturbing (if inconsistent) answers with respect to both the Balkan and Rwandan atrocities.⁴⁴³ One researcher has argued that the United States's and its allies' foreign policies toward the Balkan region aggravated

e.g., Goldstone, *supra* note 32, at 229.

438. See *Regina v. Finta* [1994] 1 S.C.R. 701, 714, 814–15.

439. See, *e.g.*, Goldstone, *Justice as a Tool*, *supra* note 41, at 493–96 (suggesting that these offenses are graver than those committed during apartheid in South Africa and therefore merit international prosecutions and not merely truth commission-type efforts as in South Africa today).

440. As Pope Pius XII diplomatically put it, the international community can only reach exceptionally serious crimes because “it is only for such crimes that it is possible to establish a uniform penal code between states.” His Holiness Pope Pius XII, *supra* note 212, at 15.

441. See, *e.g.*, RATNER & ABRAMS, *supra* note 23, at 159–61.

442. With respect to Rwanda, international lawyers and U.N. diplomats have a clear interest in keeping the focus on the culpability of elites in Rwanda, and not on, for example, the individuals or governments who armed them from abroad or on the thousands of ordinary Rwandan citizens who avidly sought out ethnic enemies to kill.

443. Complicity for genocide is rarely, if ever, a matter involving a few individuals. As Tacitus wrote of the murder of Galba centuries ago, “A shocking crime was committed on the unscrupulous initiative of a few individuals, with the blessing of more, and amid the passive acquiescence of all.” See NEIER, *supra* note 15, at 225 (quoting Tacitus).

ethnic violence in the Balkans.⁴⁴⁴ This account otherwise favors causal factors involving international change and interdependence, factors not unique to the Balkans.⁴⁴⁵ Others have pointed the finger directly at the United Nations itself, and particularly permanent members of the Security Council, contending that, for example, the U.N. arms embargo on the former Yugoslavia only assisted Serbian extermination policies and prolonged the Balkan conflict.⁴⁴⁶ And, as is suggested by the account of the Rwandan genocide in Section III.A., it is relatively easy to portray Western nations, including the governments most vocally in support of these tribunals, as informed, complacent bystanders to genocide that were only peripherally engaged because their strategic interests were not threatened.⁴⁴⁷

Although exceptionalism is consistent with international lawyers' claim that war crimes trials exonerate those who are not prosecuted,⁴⁴⁸ neither exceptionalism nor the attempt at collective exoneration is consistent with judicial truth-telling. By elevating people like Bagasora or Akayesu to the status of a Goering, judges render less visible the fact that those defendants' desires to persecute "the other" were probably no different than those of perhaps millions of their comrades who will never be charged. Further, it deflects attention from the reality that such defendants shared the sentiments of millions around the world who face no prospect of a criminal indictment, let alone a conviction under international law (and only rarely under national law).⁴⁴⁹ To the extent judges adhere to the Nuremberg precedent and portray international defendants as aberrational monsters unrepresentative of their societies, they elevate the goal of absolving those who are not criminally indicted over the goal of telling the truth about the extent of collective complicity in such crimes within those societies.⁴⁵⁰

To the extent collective exoneration is successful, it spares observers the discomfort of critically examining their own attitudes towards "the other." To the extent atrocities in Rwanda and the Balkans are portrayed as exceptional

444. See WOODWARD, *supra* note 370, at 146–98.

445. See *id.* at 374–400.

446. See also MALCOLM, *supra* note 158, at 234–52; C.G. Schoenfeld, *Psychoanalytic Dimensions of the West's Involvement in the Third Balkan War*, in GENOCIDE AFTER EMOTION, *supra* note 62, at 158, 168–69.

447. See, e.g., Falk, *supra* note 368, at 125 ("[T]here is a fearsome normalcy about genocide that makes efforts to portray its occurrence as abnormal deviance profoundly misleading, but worse, more easily evaded as a challenge to complacency."). Falk argues that the ICTY was established "in an atmosphere of overall ambivalence." *Id.* at 133.

448. See *supra* notes 39 & 77 and accompanying text.

449. Cf. Eric Markusen, *Genocide and Warfare*, in GENOCIDE, WAR, AND HUMAN SURVIVAL, *supra* note 28, at 83 (arguing that modern war-making and genocide share "similar psychological and social facilitating factors" and contending that the capacity for genocide is not limited to obvious monstrous villains but is "widely shared").

450. For critiques of the concept of closure, see Osiel, *supra* note 151. The argument here is that, even if closure is not attainable, the attempt to exonerate the collective is not consistent with the goal of telling the unvarnished truth about the nature of mass atrocities. Moreover, it is not always clear that those who have experienced atrocities first hand will agree with prosecutorial priorities at the international level. Cf. Howland & Calathes, *supra* note 424, at 158–59 (questioning, from the Rwandans' perspective, the ICTR's decision to proceed against Akayesu as the first defendant to face a full trial).

crimes of state, observers outside the affected regions (including within the state that has been most supportive of these tribunals, namely the United States) are encouraged to view the underlying offenses as alien tragedies unrelated to events in their countries and in which their governments have no complicity.⁴⁵¹ Consideration of the extent to which Western countries share blame for recent atrocities in Rwanda has direct policy implications. It is one thing to suggest that the United States and other Western states need to contribute to both national and international efforts to prosecute perpetrators because due regard to the fate of fellow human beings requires such kindheartedness. It is quite another to argue that such involvement is *owed* by at least some Western states because their action or inaction contributed to these tragedies. How Western involvement is cast—disinterested gift or debt owed—is likely to prove important to whether attempts to arrest and try culprits at the international level will continue over the long term; to whether those efforts, as well as initiatives to assist Rwandan local prosecutions, prove serious; or even to whether the international community will attempt to provide funds for reparations to Rwandan victims.⁴⁵² The attempt to exonerate the collective is admittedly valuable to Western government elites, including U.S. members of Congress, as it implies that any assistance rendered by Western governments to these tribunals, along with related efforts, such as the costs of maintaining a NATO-led force in the Balkans, are purely disinterested *ex gratia* gestures that can be easily withdrawn.

This distancing becomes more problematic if emphasis is put on the prevalent origins of such atrocities. The more these foreign conflicts are seen as variations (albeit extreme) on appeals to the discriminatory animus periodically made within all countries, the more probable it becomes that such events will draw the attention of domestic constituency groups in the West beyond those concerned with foreign affairs. To the extent that what has occurred in Rwanda (and in the Balkans) is portrayed as examples of gynocide,⁴⁵³ for example, such an account resonates with women's groups in the West and many other Western audiences and not merely organizations like the New York-based Council on Foreign Relations. Accounts that stress the discriminatory animus that Bagasora and Akayesu probably shared with millions of others who aspire to an "ethnically pure" nation is more likely to resonate within minority groups in the United States. Accounts that identify the commonalities between some of the goals articulated and means followed by those advocating a Rwanda or a Serbia cleansed of the offending "other"

451. See, e.g., GOUREVITCH, *supra* note 1, *passim*; Sells, *supra* note 72, *passim*.

452. Cf. *supra* note 204 (discussing how international lawyers do not seriously consider international reparations). In this light, one of the critiques made of local Rwandan procedures for civil damages alongside criminal proceedings, namely that no such funds exist within the Rwandan treasury, has a ready response: provide foreign assistance precisely for this purpose. Cf. Drumbl, *supra* note 146, at 597–99 (discussing problems with Rwandan procedures for civil liability, including the possibility of successful recovery).

453. See, e.g., MICHAEL A. SELLS, *THE BRIDGE BETRAYED: RELIGION AND GENOCIDE IN BOSNIA* 21–24 (1996) (arguing that the organized rapes of Bosnian women constituted a deliberate attack on women as childbearers).

and certain groups within the United States⁴⁵⁴ sustain interest in those regions within diverse U.S. constituencies, among groups that could exert pressures on government policies, including with respect to the persons the U.S. government supports to serve as judges on these tribunals.⁴⁵⁵ Such groups are more readily motivated to push their own governments to act if they are encouraged to see interconnections between the actions of their governments (to whom they pay taxes) and the otherwise inexplicable, "savage" actions of foreigners.⁴⁵⁶

Another difficulty with exceptionalism is that the claim has been inconsistently made since Nuremberg. The same international lawyers who insist that these crimes are aberrational also stress the universal lessons of war crimes prosecutions. Thus, the Holocaust is simultaneously portrayed as aberrational and endemic to the history of humankind; uniquely horrific, even abnormal, but also atemporal and universal.⁴⁵⁷ Since the same international lawyers who helped to establish the ad hoc tribunals for Rwanda and the Balkans are usually strong proponents of a permanent international criminal court, most are anxious to draw universal lessons from ongoing prosecutions in Arusha and the Hague. Thus, most of the accounts of the Rwandan and Balkan massacres, by international lawyers, as by others, tend to reflect Konrad Lorenz's insight that "[m]ilitant enthusiasm can be elicited with the predictability of a reflex."⁴⁵⁸

Whether they are primarily sociological accounts that stress ethnic or cultural factors or analyses that stress nationalist yearning for cleansed territory, whether they emphasize psychological factors based on perceptions

454. According to one sociologist's description of the nature of "ethnic cleansing," what is intended is the purification of an ethnic group (characterized by specific cultural traditions, a language, a sense of identity, and sometimes a religion) by eliminating "foreign elements" defined as people whose cultural or other characteristics are different. Ethnic cleansing "pertains to overt behavior and actions together with discrimination" and, short of mass killings, can take the many forms that have been seen in recent years within the former Yugoslavia, including the suppression or destruction of the other culture through division of the population into first and second class citizens, differential treatment for jobs, firing from government jobs, bans on assembly, and prohibitions on the use of language or religious practices. See Mirković, *supra* note 402, at 191, 196-97; see also *infra* note 461 and accompanying text (discussing the Spanish Inquisition).

455. See, e.g., BARRY CARTER, INTERNATIONAL ECONOMIC SANCTIONS 23 (1989) (arguing that economic sanctions against South Africa served to educate the U.S. public about apartheid, thereby generating greater opposition to it within the United States). For a general survey of the impact of minorities on U.S. foreign policy, see HOLLIE I. WEST, COUNCIL ON FOREIGN RELATIONS, IN THE NATIONAL INTEREST: DOES DIVERSITY MAKE A DIFFERENCE? (1997).

456. As Martin Luther King, Jr. acknowledged when he linked the civil rights movement in the United States to the Johnson Administration's "arrogance" in Vietnam. See, e.g., MARTIN LUTHER KING, JR., *A Time to Break Silence*, in A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS OF MARTIN LUTHER KING, JR. 231 (James Melvin Washington ed., 1986) [hereinafter A TESTAMENT OF HOPE]. While some have criticized domestic groups' efforts to "exploit" these tragedies, see, e.g., Anderson, *supra* note 75, at 397 & n.39 (criticizing Western feminists), it is not clear why rediscovering commonalities between the virulent forms of intolerance seen in the Balkans and in Rwanda and its far less virulent forms in the United States (whether in the form of racism, sexism, or militarism) should be regarded, in and of itself, as illegitimate. See generally Markusen, *supra* note 449, at 75-86 (suggesting parallels between genocidal acts and aspects of modern warfare).

457. See Osiel, *supra* note 151, at 567-87; Gerry J. Simpson, *War Crimes: A Critical Introduction*, in THE LAW OF WAR CRIMES, *supra* note 274, at 21.

458. KONRAD LORENZ, ON AGGRESSION 272 (1963).

of victimhood grounded in historic grievances or more political narratives that stress economic dislocations or other internal or external governmental missteps, most of the explanations for what befell Rwanda and the Balkans suggest fundamental agreement with Lorenz's four requisites for triggering aggression. Lorenz argued, after all, that what was needed was: (1) the creation or existence of a social unit with which the subject identifies himself whose values appear to be threatened by some danger from outside; (2) the presence of a hated enemy from whom the threat to the values emanates; (3) the action of an inspiring leader figure or figures; and (4) the presence of many other individuals all of whom can be agitated by the same emotion.⁴⁵⁹

To the extent international lawyers aspire that international prosecutions will lead to universal insights, they should not ignore those aspects of the Rwandan genocide that make those killings crimes of hate. Both the possibility of general deterrence and the promise of universal lessons rely on the proposition that recent horrors in the Balkans, as in Rwanda, far from being historical aberrations, have a great deal in common with ubiquitous appeals to man's⁴⁶⁰ discriminatory animus. The goals of the international legal paradigm themselves suggest that comparable appeals extend, in the modern era, in a virtually unbroken line from the Spanish Inquisition to modern nations that have defined their status in ethnically or religiously homogenous terms, and even to the World War II victors that now advocate modern international prosecutions for war crimes.⁴⁶¹ Facile politically motivated generalizations aside,⁴⁶² even international lawyers ought to be interested in the possible lessons and risks of government policies that are premised on "ahistorical assumptions of unimpeachable singularities."⁴⁶³

The international legal paradigm's underlying ambivalence towards exceptionalism is also rooted in its need for progressive development of international criminal law. Exceptionalism is difficult to reconcile with international accountability for offenses that involve a large number of non-state actors, that occur in the course of internal civil conflicts, or that have only indirect transborder effects.⁴⁶⁴ As Professor Steven R. Ratner has argued, there are "schisms" in international criminal law—between wartime and peacetime atrocities, interstate and civil conflicts, and between different types of criminality among peacetime offenses—that are made only more difficult to bridge because of international law's state-centricity and its related

459. See *id.* at 272–73. For an international lawyer's attempts to draw comparable lessons from the ICTY's *Tadic* case, see SCHARF, *supra* note 5, at 217.

460. Given the extent to which such violence has targeted women, use of the male term here, while undoubtedly less than fully accurate, seems appropriate.

461. Thus, a history of the Spanish Inquisition, originally published in 1937, includes a preface warning that it was "not intended as a satire on present-day conditions." CECIL ROTH, *THE SPANISH INQUISITION* iii (W.W. Norton & Co. 1996) (1937). Present-day readers of Roth's volume would, alas, need a similar warning, as the similarities between the religious bigotry and the tactics/pattern of terror that he describes and recent events in Rwanda and the Balkans are striking.

462. See *supra* note 75 and accompanying text.

463. See Jean Bethke Elshtain, *Nationalism and Self-Determination: The Bosnian Tragedy, in RELIGION AND JUSTICE IN THE WAR OVER BOSNIA*, *supra* note 72, at 45, 52.

464. The Rwandan genocide of 1994 arguably fits all three of these descriptions. See, e.g., PRUNIER, *supra* note 10, at 213–73.

concepts, including principles of state responsibility and non-intervention in domestic jurisdiction.⁴⁶⁵ Seeing offenses in places like Rwanda as primarily or exclusively crimes of state makes it more difficult to criminalize abuses committed by state actors against that state's own citizens or by millions of private citizens against each other. To this extent, exceptionalism's state-centric focus impedes the attempt to criminalize, for example, many peacetime atrocities or human rights abuses.⁴⁶⁶

Exceptionalism also presents interesting dilemmas with respect to sentencing. As the difference between the sentences imposed on low-level perpetrators like Tadic and high-level defendants like Kambanda and Akayesu indicates, under the international legal paradigm, exceptional perpetrators require and deserve greater punishment.⁴⁶⁷ There is some room to doubt, however, whether this view accurately reflects the views of those who were Tadic's direct victims; it is not clear why, morally or legally, Tadic's relative unimportance should mitigate his punishment, any more so than the fact that he shared his discriminatory animus with so many others around him.⁴⁶⁸ Moreover, even if one were to agree that high government officials' actions, given their greater cumulative impact, merit graver punishment, this message is compromised, as are so many others attempted under the international legal paradigm, by contemporaneous sentences being handed down by Rwandan courts. The anomalies previously noted between the punishments inflicted at the international and national levels⁴⁶⁹ blunt the symbolic or deterrent value that exceptionalism seeks to achieve.

VI. LESSONS FROM RWANDA

A. *Specific Lessons*

Lesson 1: International efforts to prevent the continuation of genocidal acts and other acts of violence must precede attempts at criminal accountability.

Drawing lessons from the 1994 Rwandan genocide five years after it occurred is treacherous. At this writing Hutu guerrilla attacks along Rwanda's border continue to generate Tutsi retaliations and civilian casualties; amidst

465. See, e.g., Ratner, *supra* note 24, at 241; see also Mark R. von Sternberg, *Yugoslavian War Crimes and the Search for a New Humanitarian Order: The Case of Dusko Tadic*, 12 ST. JOHN'S J. LEGAL COMMENT. 351 (1997) (discussing the ICTY from the perspective of a shift towards a human rights paradigm).

466. See Ratner, *supra* note 24, at 252–54. For these reasons, exceptionalism may pose difficulties for international judges attempting to progressively develop the criminalization of gender-specific offenses. See *supra* notes 330–336 and accompanying text.

467. Thus, Tadic's "relative unimportance" was considered a mitigating factor with respect to his sentencing by the ICTY. See Tadic Sentencing Judgment, *supra* note 321, para. 60 (1997). By comparison, the life sentences imposed on Akayesu, a mayor, and Kambanda, Rwanda's prime minister, reflected the ICTR's view of these individuals' respective positions. See Prosecutor v. Kambanda, *supra* note 220, para. 44; Akayesu Judgment, *supra* note 131, para. 12.

468. See *supra* notes 321–325 and accompanying text.

469. See *supra* notes 262–267 and accompanying text.

such renewals of ethnic violence, Rwandan prosecutions appear to many to mock justice.⁴⁷⁰ While some might suggest that no “victor” is capable of fairly bringing to trial both members of the current government as well as those of the former regime, drawing such a lesson threatens the prospect for any criminal accountability since it would preempt the primary method by which this would occur.⁴⁷¹ In addition, such a conclusion would ignore the many intervening variables that help to explain the Rwandan government’s current difficulties as well as its own recent resorts to violence.

As international lawyers themselves acknowledge, the possibility of international or national criminal accountability is undermined from the outset to the extent atrocities are permitted to continue.⁴⁷² If there is a lesson that can be fairly drawn from Rwanda’s experience, it is that international or national attempts to use the criminal law to achieve the goals of Nuremberg are severely compromised from the outset if Hutus continue to target Tutsis and if Tutsi-led forces are permitted to retaliate.⁴⁷³ So long as violence continues to perpetuate and exacerbate ethnic tensions, international lawyers need to identify more precisely which one of their goals—from deterrence to national reconciliation—is truly being furthered by international trials. They need to answer the skepticism of those inside Rwanda for whom there does not appear to be much point in conducting international trials in the midst of ongoing atrocities the international community fails to prevent by other means, including the use of force.⁴⁷⁴

Lesson 2: Assuming that the violence has generally ceased, the international community should encourage attempts to prosecute perpetrators at the national level unless such attempts are wholly implausible (as where, for example, a genocidal regime remains in power)

470. See, e.g., McKinley, *Searching in Vain for Rwanda’s Moral High Ground*, *supra* note 63.

471. Indeed, if recent history is any indication, it is quite common for states in which mass atrocities occurred to suffer a change in government with the new emerging regime consisting wholly or principally of members of the former resistance movement, including the former regime’s victims. Indeed, the issue of criminal accountability is only likely to be raised once this occurs. See NINO, *supra* note 368, at 107–34.

472. See, e.g., *The Genocide Convention After Fifty Years: Contemporary Strategies for Combating a Crime Against Humanity*, *supra* note 206, at 13 (1998) (remarks by Payam Akhavan) (arguing that absent prevention of ongoing violence “it is difficult to view *ad hoc* courts as anything but a pretense of justice by the powerful”); Omar, *supra* note 174, at 14 (noting that in South Africa, ending the violence as well as the “culture of violence” was a priority); see also Reisman, *supra* note 92, at 75 (expressing skepticism about “judicial romanticism”).

473. See, e.g., McKinley, *Searching in Vain for Rwanda’s Moral High Ground*, *supra* note 63.

474. See, e.g., GOUREVITCH, *supra* note 1, at 250–55, 340. By contrast, some have sought to establish *ad hoc* war crimes tribunals as a way to stop ongoing violence or as an attempt to pressure warring parties to proceed to a peace agreement. *But see*, e.g., Reisman, *supra* note 363, at 47–50 (criticizing this view on the basis that there is no evidence that courts “create the minimum political order that is necessary for their operation”).

In one civil case conducted directly on behalf of victims of mass atrocity, however, the first demand made by those claimants is that ongoing violence cease. See *supra* note 201 (discussing MacKinnon’s suit against Karadzic and the demand for an injunction). One wonders whether, even if the ICTR had been given authority to issue injunctions to states, it would ever have dared to demand, for instance, that the government of Zaire patrol its borders to prevent the reentry of genocidaires into Rwanda.

since local criminal processes may make valuable contributions to the preservation of collective memory, victim mollification, and the national and international rule of law.

The second lesson emerges from the difficult standard international lawyers appear to apply with respect to encouraging national prosecutions within states that have suffered mass atrocities. Ratner and Abrams argue that attempts at providing local criminal accountability have a “detrimental impact” unless four fundamental conditions for a “fair and effective judiciary” exist, namely:

a workable legal framework through well-crafted statutes of criminal law and procedure; a trained cadre of judges, prosecutors, defenders, and investigators; adequate infrastructure, such as courtroom facilities, investigative offices, record-keeping capabilities, and detention and prison facilities; and, most important, a culture of respect for the fairness and impartiality of the process and the rights of the accused.⁴⁷⁵

As these authors acknowledge, however, these conditions tend to be “woefully lacking” precisely in those places, like Rwanda, just emerging from a period of grave mass atrocities.⁴⁷⁶ The application of such a strict standard, particularly in the absence of any ongoing efforts to assist local judiciaries, readily leads to the conclusion that, in instances such as Rwanda’s, its judiciary should not attempt to prosecute perpetrators and the international community should not assist or encourage such attempts, but should instead establish international forms of accountability ideally at some psychological and physical distance from contaminating local influences. As is demonstrated by the Rwanda case, such a conclusion is untenable given the obvious need to render some kind of justice to thousands incarcerated and the very real prospect that absent local prosecutions, mass violence may reemerge. Moreover, the high bar set for national prosecutions fails to acknowledge that the alternative in instances where the four enumerated fundamentals are not in place, namely an international criminal forum, since it needs to be constructed, does not itself fulfill the enumerated conditions.

In 1994, at the end of the Rwanda genocide, Ratner and Abrams’s four fundamental preconditions for successful criminal proceedings were undoubtedly not fulfilled within Rwanda, but they were not met at the international level either, where there was no judiciary of any kind. A workable legal framework for the ICTR with well-crafted criminal law statutes and procedures had to be adapted from the very different context of the ICTY; an entire cadre of judges, prosecutors, defenders, and investigators had to be found, and a necessary bureaucratic infrastructure had to be built. It was not evident in 1994 and is arguably not even clear today whether the resulting tribunal enjoys the needed “culture of respect” for fairness and impartiality. Indeed, as Parts III to V suggest, doubts remain about whether

475. RATNER & ABRAMS, *supra* note 23, at 159.

476. *Id.* at 159–60 (noting the singular importance for countries like Rwanda and Ethiopia of foreign assistance for these purposes).

today, four years later, the ICTR's proceedings have generated the requisite perceptions of legitimacy among either local Rwandan audiences or the international community as a whole.

The four part feasibility test, built on the premises of the international legal paradigm, is obviously intended to be applied only to local criminal prosecutions. The test assumes that international proceedings are presumptively desirable and preferable to local trials that fall short on any of the four criteria. Rwanda's case suggests, to the contrary, that the standard for determining the feasibility and desirability of national trials should be considerably lower.

The international community should ask not whether a fair and effective national judiciary exists when atrocities end, but whether, given all possible resources, national efforts for criminal accountability are plausible in the relative near term and whether international efforts can further that goal.⁴⁷⁷ This alternative formulation of the question would put the burden on the international community to justify why it is desirable to allocate the level of resources and effort that it takes to construct an entirely separate international forum if national forums are, given at least comparable resources, within reach. At a minimum it would suggest that greater consideration be given to joint international/national efforts, including joint investigations or trials. In an instance such as Rwanda, where a new government has replaced the prior regime, we need to ask whether this test for feasibility would have been met when the new regime came into power in 1994. Despite a devastated judicial system and scarce resources at every level, the new Rwandan government was able to cobble together an approach to criminal accountability that, at least through 1996, led one wary international human rights group to conclude that "even with enormous logistical weaknesses and shortages of trained personnel, Rwanda can provide trials that meet or approach minimum guarantees of fairness and due process."⁴⁷⁸ What would have occurred if, from mid-1994 through 1996, instead of generally ignoring local efforts, the international community had been willing to accord Rwanda the millions of dollars and intellectual resources it allocated to the ICTR during that period and had tied those resources to securing the necessary assurances of fairness to defendants?

Local adjudications having resort to local law should not be seen as merely necessary concessions to *realpolitik* or as necessary stop-gaps when international enforcement efforts fail.⁴⁷⁹ A government's reluctance to hand over perpetrators to international processes ought not be automatically seen as a wrong-headed, unenlightened, and parochial attempt to protect national sovereignty.⁴⁸⁰ "Sovereign concerns" need not be regarded as automatically

477. See Kritz, *supra* note 241, at 151 (giving examples of how and when the international community should supplement national courts).

478. LAWYERS COMMITTEE FOR HUMAN RIGHTS, *supra* note 139, at 62.

479. Cf. Cassese, *supra* note 39, at 241-42 (suggesting that national courts have a vital role because of the volume of likely defendants and because international courts need to focus on high-level perpetrators).

480. Compare Brown, *supra* note 96, at 398 (suggesting that such resistance stems from

antithetical to providing accountability for war criminals. Local prosecutions for mass atrocity may advance many of the Nuremberg-inspired goals international lawyers have. With respect to the goal of collective memory, such local prosecutions, particularly when they have available a large number of defendants as in Rwanda, or are capable of reaching further into the past than international fora, may more authoritatively convey the scope of complicity and the particular horrors of ethnically motivated violence.⁴⁸¹ Local trials are far more likely to be responsive to victim mollification and vindication since local justice is more accessible, more compatible with community expectations, and, depending on local procedures, may present greater opportunities for control over both criminal and civil proceedings.⁴⁸² With respect to affirming the national rule of law, such processes present clear advantages given their impact on greater numbers of people and local institutions, greater representational legitimacy, and greater responsiveness to local audiences in terms of both substantive and procedural law.⁴⁸³ And even with respect to affirming and progressively developing the international rule of law, where local prosecutions pursue offenses that are, *de facto* if not *de jure*, international crimes (as under Rwanda's Organic Law), local indictments, plea bargains, trials, and sentences may stigmatize perpetrators at least as much as any international tribunal. Moreover, in such cases, local judges may be less politically constrained innovators of international law and more familiar with domestic criminal law that might usefully fill gaps in international humanitarian law. In particular instances, resort to national law to fill the numerous gaps in international criminal law may be the best way to further effective progressive development, even if at the expense of uniformity of the law.⁴⁸⁴ Indeed, this last possibility suggests that international tribunals that share concurrent jurisdiction with national courts for international crimes, such as the ICTR, may need to be empowered to apply relevant domestic criminal law, especially where this is not clearly inconsistent with international law.⁴⁸⁵

sovereignty concerns), with Hazel Fox, *The Objections to Transfer of Criminal Jurisdiction to the UN Tribunal*, 46 INT'L & COMP. L.Q. 434, 436-42 (1997) (objecting to the transfer of U.K.-based defendants to the ICTY based on absence of safeguards for them).

481. See *supra* notes 157-185 and accompanying text.

482. See *supra* notes 195-230 and accompanying text.

483. See *supra* notes 231-261 and accompanying text.

484. See *supra* notes 348-352 and accompanying text (discussing examples of gap-filling through resort to national law).

485. Cf. ICTR Statute, *supra* note 53, art. 23 (authorizing resort to the "general practice regarding prison sentences in the courts of Rwanda"). Since all offenses over which the ICTR has jurisdiction transpired in Rwanda and in all likelihood involve Rwandan nationals, there would be considerable merits to such an amendment of the ICTR's statute given ordinary choice of law principles. Whether international lawyers would be willing to compromise to this extent on their insistence that such offenses be prosecuted as violations of international law remains to be seen. Such an amendment would also undermine, to some extent, international lawyers' hopes for internationally uniform international precedents (reflected in the present arrangement under Article 12(2) of the ICTR's statute, under which the ICTR and ICTY share a common appellate chamber). See, e.g., RATNER & ABRAMS, *supra* note 23, at 175. Of course, to the extent international tribunals have jurisdiction over offenses committed in more than one state, they may need to be authorized to apply the criminal law of more than one state.

Lesson 3: Assuming that reasonable efforts at local prosecutions as well as international proceedings are to be pursued simultaneously, international proceedings should be truly complementary to national processes that are pursued in good faith. Indeed, such national proceedings may need to be accorded jurisdictional primacy, except with respect to particular cases presenting due process concerns. Generally, the jurisdictional limits, procedures, and sentences of international processes should avoid conflicts with and enhance the effectiveness of concurrent national efforts.

The third lesson that emerges from Rwanda, however, is that the possibility of local prosecutions ought not to discourage attempts to establish truly complementary international fora for criminal accountability. At times, as is true with respect to much of the former Yugoslavia, and perhaps with respect to some individual Rwandan perpetrators, international tribunals present the only opportunity for criminal accountability.⁴⁸⁶ And, despite the Rwandan government's ultimate dissatisfactions with the ICTR, we should not ignore that this government very much sought an international tribunal⁴⁸⁷—to secure universal condemnation of the 1994 genocide, to buttress the political legitimacy of its regime, and to obtain the assistance of international authorities with respect to the arrest of suspects and the gathering of evidence (particularly where these were located abroad).⁴⁸⁸ As this suggests, while the international legal paradigm's claimed advantages for international processes appear wildly exaggerated,⁴⁸⁹ properly constructed, and with due attention to the idiosyncratic needs of particular situations, such fora may more easily deal with the interstate dimensions of mass atrocities and may assist domestic prosecutions.⁴⁹⁰ International courts have the potential to consider the culpability of actors who are outside the reach of the country in which the atrocities occurred or who committed offenses abroad and these courts may be better able to secure the cooperation of foreign states

486. Cf. Cotler, *supra* note 395, at 174 (warning that complementarity should not be used to preempt international jurisdiction where international trials are necessary).

487. See *supra* notes 136–139 and accompanying text.

488. See Arbour, *supra* note 94, at 534–35. Indeed, in some cases, new governments may favor international trials rather than risk alienating powerful domestic groups.

489. See *supra* notes 43–48 and accompanying text.

490. This approach seems generally consistent with using international law and its fora to “mediate” periods of domestic transition. See Teitel, *supra* note 42, at 2028–29 (noting how in periods of democratic transition, international law posits institutions and processes that “transcend domestic law and politics” and “mediates” the rule of law dilemma by incorporating values of justice associated with natural law). While much of this Article has emphasized the need to bring insiders into international processes, outsider perspectives and assistance may be vital to maintaining the credibility of internal mechanisms. Cf. Habermas, *supra* note 175, at 263–72 (noting outsiders' effects on Germans' view of their own history); Daniel Jonah Goldhagen, *Modell Bundesrepublik: National History, Democracy, and Internationalization in Germany*, in UNWILLING GERMANS? THE GOLDHAGEN DEBATE, *supra* note 40, at 275, 278–80 (contending that the internationalization of German national history, including pressure from outsiders, has helped to create a pluralized national history).

where witnesses, evidence, or suspects may be located.⁴⁹¹ International courts also may be needed to prosecute those who are found abroad in countries that refuse to extradite them to any forum except an international body.⁴⁹² Under such circumstances and if they fulfill such needs, international indictments might have greater international credibility and therefore have a favorable impact on other international processes (such as multilateral diplomatic negotiations at Dayton with respect to the Balkans).⁴⁹³ In addition, such tribunals might be necessary to try persons who are either likely to be unfairly treated in local courts or who face little probability of local prosecution.⁴⁹⁴ Beyond such practical concerns, international courts and verdicts have undeniable symbolic import.⁴⁹⁵

These possible advantages imply, however, a very different mandate for international tribunals than that suggested by the international legal paradigm or that is manifest in the ICTR's current operation. Since local courts, particularly those in states with successor regimes, would, under Lesson Two, be the preferred and primary fora for trying high-level perpetrators associated with the former regime, international fora would focus their efforts on trying those perpetrators, high or low, for whom local trials are impossible or unfair. Whereas the ICTR's reach now delimits the reach of Rwandan prosecutions, under this alternative the temporal and geographic reach of international tribunals would depend on the reach and capacities of local courts. This implies that in a case like Rwanda's, the ICTR's jurisdiction would preferably extend to offenses occurring after 1994 and to offenses committed outside Rwandan territory—to better capture those cases least likely to be reached by Rwandan courts—but at the same time, in all instances, the ICTR would defer to Rwandan courts if those courts were available, unless in a particular case there was a grave risk of unfairness to a defendant. While it might appear unusual for an international court to “sit in judgment” of a domestic court, this is exactly what the ICTR's statute already authorizes, since it anticipates a second trial at the ICTR where national courts demonstrate “lack of

491. As noted, *see supra* notes 165–166 and accompanying text, this potential was not wholly realized in the context of the ICTR since that tribunal's jurisdictional limits did not take advantage of its international status to reach to perpetrators, including non-Rwandans, who may have committed offenses outside Rwanda.

492. States may refuse to extradite a particular individual, as to Rwanda, for fear of violating the non-refoulement provision in the Convention Relating to the Status of Refugees, *see* Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137, art. 33; Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267, because of opposition to Rwanda's death penalty, or for other reasons.

493. *Cf.* Goldstone, *supra* note 32, at 233 (contending that the ICTY's indictments had a direct impact on the Dayton process).

494. This potential has not been fully realized in the ICTR since that tribunal is precluded from reaching the vast majority of Tutsi retaliation killings to the extent these occurred after 1994. In addition, as discussed at *supra* notes 236–237 and accompanying text, the ICTR has not attempted to identify, on a case-by-case basis, instances where Rwandan justice is likely to be or has been inadequate.

495. *See supra* notes 48, 282–283 and accompanying text. Of course, there are other ways to symbolically affirm the international rule of law or to apply “global censure” against violators. *See, e.g.*, NEIER, *supra* note 15, at 227 (discussing the merits of international economic sanctions and the sports boycott of South Africa).

impartiality.”⁴⁹⁶ Deference to domestic processes would also suggest that international tribunals would attempt to emulate, to the extent possible, features of domestic processes for the sake of uniform treatment of perpetrators involved in the same mass atrocities. In the context of the ICTR and Rwanda, this would call for changes to the ICTR’s statute and rules, for example, to encourage apologies to victims as well as to accord greater access to civil penalties, since both of these are (at least in principle) available under Rwandan law.⁴⁹⁷ The lesson is simple: domestic courts, not international ones, need to be accorded jurisdictional primacy subject to due process limits, and international tribunals, not national courts, need to retain residual jurisdiction.⁴⁹⁸

While limiting international tribunals’ jurisdictional reach to those cases in which they enjoy a clear advantage requires reaching an accommodation with the government in which the atrocities occurred, there are distinct reasons why governments might be induced to cooperate. Rwandan authorities, for example, might have been willing to forego prosecuting certain individuals whose trials prompt due process concerns if the quid pro quo for such forbearance had included significant foreign assistance to rebuild their judicial system along with the assistance of international prosecutors in gathering evidence and other suspects located abroad.

Restricting an international tribunal to a residual role vis-à-vis local courts considerably reduces the potential for destructive anomalies of inversion with respect to the sentencing and treatment of high-level perpetrators.⁴⁹⁹ Since an international tribunal would no longer be the primary forum for trying high-level perpetrators, the discrepancies between its applicable penalties and those enforced under local law would be lessened.⁵⁰⁰

496. See ICTR Rules of Procedure and Evidence, *supra* note 98, Rule 9(ii). The lack of impartiality language was imported from the Balkan context, however, and appears more suited to instances in which there is a suspicion that municipal courts will be reluctant to prosecute perpetrators or will fail to do so diligently. It is not entirely clear whether the rule, as written, would be interpreted to cover the more likely scenario before Rwandan courts, that is, a particular instance in which a local court, it is feared, would be biased against a defendant. Cf. LAWYERS COMMITTEE FOR HUMAN RIGHTS, *supra* note 227, at 71 (contending that the comparable provision in the ICTY statute does not cover situations where national trials might be expected to be unfairly severe against defendants).

497. See *supra* notes 200–201, 219 and accompanying text. Real complementarity might even entail granting Rwandan courts the power to sentence those convicted by the ICTR, provided there was sufficient confidence in Rwandan sentencing procedures. In instances in which the perpetrator had not been transferred to the ICTR by a state on condition that the death penalty not be imposed, this could even include the infliction of the death penalty.

498. Cf. *Avocats Sans Frontières, Open letter regarding the need to expand the jurisdiction of the International Tribunal for Rwanda*, available at <http://www.asf.be/asf/uk/letter/lettertpir_uk.html> (advocating substantive changes to the ICTR’s jurisdiction similar to those proposed here but without mentioning the respective role of Rwandan courts).

499. See *supra* notes 262–267 and accompanying text.

500. Cf. *supra* Part III.B. This assumes that political realities, resource constraints, as well as perceptions of fairness to defendants would bar a second trial, at either the international or the domestic level, for the same underlying offense for someone who has already been tried for an international crime. See *supra* note 99 and accompanying text (discussing the ICTR’s rules). This need not bar consideration of more innovative approaches, such as joint international/domestic investigations followed by national trials with a significant international presence in its bench and bar. It also does not bar two-track approaches, such as convictions at the international level paired with domestic fora for

Real and effective complementarity between national and international prosecutions would no longer imply that those who are most culpable will receive the most lenient treatment. In addition, such a reconfiguration of the respective roles of both types of forum would vastly increase the potential to use criminal accountability as a tool to buttress and affirm the rule of law where it matters most—in those communities in which prior mass atrocities have devastated it.

That Rwandan courts are, at present, free to pursue perpetrators who are not sought by the ICTR does not mean that those courts are unhindered by the ICTR or that the Rwandan criminal justice system is not affected by the ICTR's operation. International and domestic processes directed at pursuing criminal accountability arising from the same events do not and cannot remain insulated from one another. That high-level perpetrators can be and often are directed to a foreign court may undermine the credibility of Rwandan plea bargains and sentences, local courts' attempts to render an accurate historical account, and Rwandan judges' efforts to progressively develop the law. Each time the Rwandan legal system is denied the right to put on trial a prominent member of the former regime, the international community is sending an implicit (if perhaps intended) message that Rwandan institutions cannot be trusted or that its judiciary is not ready to implement the rule of law. Each time someone at the level of a Bagasora is sent to Tanzania for trial instead of a local court somewhere in Rwanda, Rwandan victims are denied the benefit of seeing justice done. And given the scarcity of international resources, one suspects that each dollar spent by the international community on the ICTR is one less dollar available for assistance to Rwandan courts—and it is certainly one dollar that is not spent on establishing the joint tribunal on Rwandan soil that Rwanda's post-genocide government originally sought.

Lesson 4: Avoid ethnically neutral approaches if these threaten rather than advance the legitimacy of international processes.

At present, criminal processes in Arusha and within Rwanda are likely to generate radically different reactions along ethnic lines. For many Hutus, both international and national criminal processes appear skewed against them since the ICTR's temporal limits mean that its indictments and trials will focus on offenses committed by Hutus and ignore most violence committed by Tutsis,⁵⁰¹ while Rwanda's present courts are more likely to be unfair to Hutu defendants and less likely to pursue charges against Tutsi offenders. For many Tutsis, on the other hand, Rwandan courts pose fewer problems compared to the ICTR's unaccountable foreign process, judges, and judgments.⁵⁰² Under the circumstances, international lawyers are correct to

sentencing. *See supra* note 497. As these possibilities suggest, this may require establishing highly adaptable international processes, as opposed to a fixed permanent international criminal court or a series of ad hoc tribunals fashioned on the model of the ICTY and the ICTR.

501. *Cf. supra* note 264 (noting Tutsi killings).

502. *See supra* Section III.B.

worry about the perceived biases in these respective fora, but their solution to date, which relies on benign neglect of Rwandan courts and on an ostensibly ethnically neutral international bench charged with the rendering of ethnically neutral judgments, is not sufficiently responsive to the depth of the problem.

International lawyers and judges should not continue to act as if ethnic tensions that have given rise to mass violence will no longer matter if judges refuse to recognize them in their judgments. Ethnic identities, along with their symbols, retain significance long after ethnic violence ends. In the wake of ethnic atrocities, it is doubtful that an ethnically neutral approach to criminal accountability will generate confidence in judicial verdicts. Moreover, we need to acknowledge that there is no universal confidence in the impartiality of international judges given the political agendas and the prior or continuing derelictions of countries represented on the international bench.⁵⁰³ On the contrary, the tenuous legitimacy of ad hoc international tribunals, along with the difficulties of constructing ethnically neutral judgments for ethnically loaded cases,⁵⁰⁴ may require a more ethnically sensitive approach at the international level. This could consist of joint investigations and trials or greater use of international observers within national trials or, at the international level, a bench that is ethnically representative from the perspective of the primary audience for its verdicts and that is less apt to dissemble with respect to such issues. Such a bench may, paradoxically, produce verdicts that are more likely to be regarded, over time, as fair and impartial.⁵⁰⁵ However accomplished, a more ethnically sensitive international approach may enhance the credibility of the lessons sought to be conveyed to both the national and international communities. In addition, international trials with more genuine legitimacy among both Hutus and Tutsis are more likely to put pressure on Rwandan courts to improve their own procedures and impartiality.

Lesson 5: Both international and domestic procedures need to acknowledge that massive atrocities usually involve massive complicity by large numbers of perpetrators, at all levels of domestic and international society, and not merely by a select group of government elites.

The case of Rwanda also casts doubt on the premise that individual criminal accountability pursued against a select few will “exonerate” the collective. When one percent of a country’s population is under arrest for such offenses, amid credible charges that millions were involved in atrocities,⁵⁰⁶ an attempt to dissemble on the scope of likely collective complicity is likely to fail. In addition, the attempt at exceptionalism deflects self-examination by those outside the regions directly affected; discourages their involvement and

503. By contrast, the international legal paradigm assumes widespread agreement that the ad hoc tribunals are “above political pressures.” See, e.g., Cassese, *supra* note 39, at 241.

504. See *supra* Part IV.

505. See also *infra* notes 508–536 and accompanying text.

506. See, e.g., GOUREVITCH, *supra* note 1, at 244–45 (quoting Rwandan officials who suggest that perhaps a million or more Rwandans were complicit or actively engaged in the 1994 genocide).

assistance; and diminishes the prospects for universalist lessons and for wider searches for the culpable.⁵⁰⁷

In any case, such dissembling is inconsistent with the goal of preserving and establishing an exhaustive rendering of the truth. Judicialized truth-telling calls for many trials, not a selective few, and of many types of perpetrators, at all levels of society, not merely elites. Since such thoroughgoing efforts to provide individualized trials would overwhelm judicial resources for virtually any legal system, and most especially for those in societies recovering from mass atrocity, this is yet one more reason in favor of crafting innovative procedures, including Rwandan-style plea bargains capable of striking a balance between the rights of victims and the rights of defendants. Absent special circumstances, such as instances in which third-party states are willing to turn over only high-level perpetrators to international processes, this may justify directing at least some international resources to trying different kinds of individuals and not only high-level perpetrators. In this sense as well, international processes need to be complementary to domestic proceedings. Both national and international proceedings ought to be striving to tell the truth about mass atrocities, however uncomfortable that truth may prove to be.

B. *Larger Lessons*

International lawyers have not devoted much systematic thinking to what Balint calls "international criminology."⁵⁰⁸ There is little in the legal literature that purports to explain exactly how trying the perpetrators of mass atrocities can be expected to help achieve national reconciliation or the prevention of further violence. Perhaps because it has proven to be, historically, such a daunting struggle to get war criminals to the dock, international lawyers have had little time to consider what is achieved by getting to the dock, beyond locking up the guilty.

As Mark Osiel has demonstrated, to the extent the issue has been addressed at all there appears to have been, at least since Nuremberg, an unstated assumption that criminal accountability will promote peace by terminating contentious debates among adversaries, that is, through an emotional appeal for closure.⁵⁰⁹ But the assumption that once accusations are leveled and indictments and judgments are issued, all will come to acknowledge the barbarous evils committed by genocidaires, does not comport with what we are hearing from observers inside Rwanda. The majority of the thousands detained inside Rwanda's jails today report, and perhaps genuinely feel, that "they have done nothing wrong" and are being victimized merely because they were on the "wrong side of a war."⁵¹⁰ While

507. See *supra* notes 441–469 and accompanying text.

508. See Balint, *supra* note 215, at 113 (noting that most have not gone beyond rebutting the realists' argument that punishment is inconsistent with peace). But see *supra* notes 40–43, 77 and accompanying text (raising relevant arguments of Cassese and others).

509. See *supra* notes 359–360 and accompanying text.

510. See, e.g., Drumbl, *supra* note 146, at 605–07. Nor is this lack of closure necessarily limited to instances in which criminal prosecutions have been the focus of attention. Cf. Omar, *supra*

many of those detained within Rwanda on the basis of mere denunciations may indeed be innocent, observers report similar reactions even among those against which there is considerable evidence since almost all prisoners have little faith in the government that imprisoned them or in the Rwandan judicial system.⁵¹¹ Indeed, the pervasive sense of “moral ambiguity” among Rwanda’s prisoners, the flaws in Rwandan criminal proceedings, and that sense that these are being used by the RPF regime in Rwanda to perpetuate “collective Hutu guilt,” has led one Western observer to conclude that criminal prosecutions under the circumstances do more harm than good since they only deepen wounds rather than reconcile them.⁵¹² This conclusion would appear to stem, at least in part, from misplaced faith in the prospects for judicially inspired closure.

As Mark Osiel has argued, the attempt to justify criminal accountability for mass atrocity on the basis of closure is untenable since fractured societies, including postwar Germany, do not reach closure on exceptionally contentious matters involving rival perceptions of history and ethnic identity; he argues instead that criminal trials can nonetheless serve as relatively peaceful forums for channeling and encouraging a constructive discourse about such issues.⁵¹³ Elsewhere, I have applied Osiel’s alternative justification for criminal prosecutions, which he dubbed “civil dissensus,” to recent conflicts in the Balkans and in Rwanda.⁵¹⁴ I have argued that this alternative model of civil dissensus provides a better justification for both national and international prosecutions.⁵¹⁵ Under this view, trials are needed to promote the deliberation of contentious questions, including the constructed nature of judicial truth, the scope and nature of collective complicity or guilt, the tensions between progressive development of the law and the principle of *nullum crimen*, and the legitimacy of selective enforcement of the norms of international humanitarian law.⁵¹⁶ The point of properly conducted criminal trials, at both the national and international levels, is precisely to provoke socially desirable, if contentious, conversations in the hope that through honest discourse the guilty will eventually come to recognize that brutal killings are not morally ambiguous.

Unlike the international legal paradigm, civil dissensus does not assume that trial participants or observers share common integrationist values. Civil dissensus does not assume that persons emerging from ethnic violence are ready to accept the irrationality of judgments premised on ethnicity. It does not assume that judges will be able to elicit a settled consensus on the need to

note 174, at 8 (noting that the South African reconciliation attempt will not produce a “fairy tale ending” but involves a “long struggle” requiring the “transformation of our country”); Suzanne Daley, *South African Panel’s Report Arrives in Swirl of Bitterness*, N.Y. TIMES, Oct. 30, 1998, at A1 (discussing the acrimonious reception greeting the issuance of the final report from the South African Truth and Reconciliation Commission).

511. See, e.g., Drumbl, *supra* note 146, at 606.

512. See *id.* at 625.

513. See Osiel, *supra* note 151, at 240–92.

514. See Alvarez, *supra* note 87, at 2082–108.

515. See *id.*

516. See *id.*

respect the equal dignity of all persons despite ethnic or religious differences—however fundamental notions of equal protection may be within liberal Western nations. It does not presume that prosecuting particular high-level perpetrators will exonerate those who are accused or that it will exculpate either the Security Council or particular governments for their (in)actions with respect to the 1994 Rwandan genocide. It does not assume that criminal judgments will secure closure with respect to such divisive, difficult issues. Civil dissensus is premised instead on the idea that deliberation itself, as channeled by the constraints of the law into reasoned exchanges not wholly driven by emotion, can eventually generate a measure of trust across ethnic differences without resolving them.

The discursive justification for criminal accountability postulates that *honest* judicial consideration of contentious issues is worthwhile, perhaps even vital, for fractured societies. It assumes that such trials are most useful when they *prevent* attempts to bury such issues through premature closure. Under this rationale, however, the best forms of accountability are those that truly resonate with relevant audiences and establish connections with their concerns, including the ethnic divides that may have led to the atrocities and continue to pose immense challenges to national unity. The suggestions for joint international/domestic trials or for a more ethnically representative bench are attempts to promote such deliberative processes. Securing greater Rwandan inclusion within international processes for accountability is important not merely because of the obvious symbolism and greater representative legitimacy thereby generated. For the reasons enumerated here, joint international/local trials or an international bench that includes both a Hutu and a Tutsi are not likely to produce judgments as bereft of ethnic context as the judgment in *Tadic*⁵¹⁷ or as wrong with respect to Rwandan law as was the judgment in *Akayesu*.⁵¹⁸ Those judges' questions from the bench and separate or concurring opinions would be valuable components of the discursive process.

Although international lawyers, stung by Justice Pal's dissent in the Tokyo trials,⁵¹⁹ are understandably wary about the possibility that an international judge may challenge the legitimacy of the international process, they ought to be more concerned if such criticisms are left to be raised and addressed outside of the processes they establish. It is ultimately better if competing perspectives—as to what is relevant to judging the credibility of witnesses, for example—are openly aired within an international tribunal

517. See *supra* notes 422–448 and accompanying text.

518. See *supra* note 348 and accompanying text.

519. See generally Elizabeth S. Kopelman, *Ideology and International Law: The Dissent of the Indian Justice at the Tokyo War Crimes Trial*, 23 N.Y.U. J. INT'L L. & POL. 373 (1991) (analyzing the implications of Justice Rahadbinod Pal's dissent from the majority judgment of the International Military Tribunal for the Far East). It would, of course, be wrong to assume that a Tutsi judge would not convict a Tutsi defendant or that a Hutu judge would not do the same with respect to a Hutu defendant. The 1994 Rwandan genocide was filled with examples of "moderate" individuals on both sides of the ethnic divide who refused to go along with the incitement to violence. The selection of appropriate Rwandans to serve on the ICTR would legitimately focus on persons whose views would not preclude their ability to judge cases fairly, regardless of their ethnicity.

itself. It speaks volumes for the credibility of international processes if criticisms come from within the process itself. Moreover, internal critiques are more likely to be taken seriously.⁵²⁰

Similar premises underlie the recommendation, made above, that both national and international trials frankly acknowledge the complexities of collective complicity. Keeping alive the question of who else was “to blame” may be vital to eventual national reconciliation. Trials that candidly concede that government leaders were not the only persons culpable, and may not have been necessarily the most egregious offenders, are more promising venues for truth-telling than select trials of an elite intended to exonerate the collective. Trials that accurately reflect the wide variety of people complicit in atrocities, because they are more honest about the scope of real complicity, are also more promising venues for channeling debates away from unproductive, unlayerly notions of guilt by association.⁵²¹ International processes that acknowledge that states outside Rwanda were partly responsible for Rwandan atrocities or for failing to halt or prevent them are also far more likely to win the respect of Rwandans.

The five lessons enumerated above, intended to encourage contentious judicial exchanges at both the national and international levels, assume that civil disagreements, channeled by the law, may, over time, generate respect among adversaries, even perhaps the kind of solidarity that Martin Luther King, Jr. attributed to “*agape*.” King’s vision for reconciliation through nonviolent action was premised on the need to secure mutual recognition that all life is interrelated, that there is a community of common humanity, and a kind of civil respect, even love, amongst enemies.⁵²² While much of King’s references to this kind of respect or *agape* drew on religious imagery, King also acknowledged that the law played a role. He frequently asserted that while “the law may not change the heart . . . it can restrain the heartless.”⁵²³ While he accepted that “morality cannot be legislated,” he argued that “behavior can be regulated,” implying that the law could help promote or elicit *agape*.⁵²⁴ Despite the recent claims by some, King’s notion of *agape* was

520. These arguments are not novel. They were successfully made to ensure that women were appointed to the ICTY’s bench. Thus, Madeline Albright at the time that the ICTY was established declared the United States’s determination “to see that women jurists sit on the Tribunal and that women prosecutors bring war criminals to justice.” See *Statement by the United States at the Security Council*, *supra* note 41, at 14; see also *supra* note 426 (noting that gender-specific violence in the aftermath of the *Akayesu* case would not have been addressed but for female judges). The arguments for an ethnically sensitive bench evoke some of the justifications underlying traditional international rules requiring exhaustion of local remedies and choice of law rules. See *Interhandel Case (Switz. v. U.S.)* 1959 I.C.J. 6, 26–27 (Mar. 21); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 713 reporter’s note 5 (1987).

521. See Alvarez, *supra* note 87, at 2086–88.

522. See MARTIN LUTHER KING, JR., *An Experiment in Love, in A TESTAMENT OF HOPE*, *supra* note 456, at 16, 19–20 (particularizing the ancient concept of “*agape*”).

523. MARTIN LUTHER KING, JR., *The Case Against “Tokenism”, in A TESTAMENT OF HOPE*, *supra* note 456, at 106, 107.

524. MARTIN LUTHER KING, JR., *The Ethical Demands for Integration, in A TESTAMENT OF HOPE*, *supra* note 456, at 117, 124; see also MARTIN LUTHER KING, JR., *Facing the Challenge of a New Age, in A TESTAMENT OF HOPE*, *supra* note 456, at 135, 142. Indeed, some have noted that many of the rules of international humanitarian law that are being enforced by the ICTR and ICTY are themselves

not premised on the need for the law or its institutions to apply ethnically neutral approaches.⁵²⁵

It remains to be seen whether ICTR proceedings, Rwandan prosecutions, or other forms of accountability will successfully generate respect among adversaries or King's concept of "*agape*." The substantial literature dealing with the civic virtues that characterize societies that are least prone to violent ethno-religious conflicts supports the conclusion that one route to national reconciliation lies in generating respect among adversaries and that such respect may hold together societies divided along ethnic lines. Many have concluded that societies in transition, such as those emerging from communism, require changes in the mind-set of their peoples.⁵²⁶ Others, especially political scientists, have distinguished among different types of ethnic identity (historical, cultural, linguistic) and have examined the complex, symbiotic relationships between these and different types of governmental structures.⁵²⁷ Those who turn to criminal prosecutions for mass atrocities to promote the rule of law and national reconciliation may ultimately find that they are relying, perhaps optimistically but hopefully not futilely, on faith in the law's capacity to generate civil dissensus.⁵²⁸ If so, they may need to draw upon the insight that these are crimes of hate in order to best inspire Martin Luther King Jr.'s concept of "love."

Faith in the possibility of judicially-created civil dissensus also underscores another common element in the lessons enumerated above: acknowledgment of the local. As some international lawyers are beginning to recognize, since people everywhere, including in Rwanda, experience violence and its aftermath within their own communities, local enforcement should be a priority of *international* enforcement itself.⁵²⁹ This calls for melding the concepts of crimes of state and crimes of hate in an effort to use international law and processes to mediate national attempts at accountability.⁵³⁰ It is important to recognize, as the international legal paradigm does, that crimes of state violate the enduring values of the

premiered on notions that appear nearly identical to King's notion of "*agape*." Thus, one commentator has argued that the rules for noncombatant immunity, as well as their absolute nature, are based in part on the "Christian ethical requirement of love of neighbor, which is known both directly by Christians and indirectly as a requirement of justice by non-Christians." James Turner Johnson, *War for Cities and Noncombatant Immunity in the Bosnian Conflict*, in RELIGION AND JUSTICE IN THE WAR OVER BOSNIA, *supra* note 72, at 63, 68 (citing Paul Ramsey).

525. See, e.g., Ronald Turner, *The Dangers of Misappropriation: Misusing Martin Luther King, Jr.'s Legacy to Prove the Colorblind Thesis*, 2 MICH. J. OF RACE & L. 101 (1996).

526. See, e.g., Karol Edward Soltan, *Agape, Civil Society and the Task of Social Reconstruction*, 4 CARDOZO J. INT'L & COMP. L. 237, 241-42 (1996).

527. See, e.g., G. Ausenda, *Postscript: Current Issues in the Study of Ethnicity, Ethnic Conflict and Humanitarian Intervention, and Questions for Future Research*, in WAR AND ETHNICITY, *supra* note 67, at 217.

528. But see Reisman, *supra* note 363, at 49 (criticizing the use of tribunals as a "magic bullet").

529. See, e.g., Cotler, *supra* note 395, at 174; Naomi Roht-Arriaza, *Combating Impunity: Some Thoughts on the Way Forward*, LAW & CONTEMP. PROBS., Autumn 1996, at 93, 98 (urging international bodies to pay closer attention to local efforts).

530. Cf. *supra* note 490 (discussing Teitel's concept of using international law to "mediate" governmental transitions).

international community and that this community has a duty to assist. However, it is also vital to identify the need to promote recognition, by both perpetrators and victims, that these crimes of hate violate local values and need to be put right as much as possible by their own community.

While the international legal paradigm emphasizes the need for reconciliation between government elites and between those elites and the international community,⁵³¹ broader social reconciliation requires acknowledging that comparable needs exist between all individuals harmed and all those that did them harm.⁵³² Effective social reconciliation requires justice to be furthered between those who survived and individual killers, torturers, and rapists—and not just between the “international community” writ large and select government elites who gave the impersonal order to kill, torture, or rape.⁵³³ As Naomi Roht-Arriaza puts it, “reconciliation may be a process that must take place above all at the local level, the village or township, in order to take root. It may involve expressions of contrition and apology from perpetrators or those who were both perpetrators and victims, as much as simply finding facts.”⁵³⁴

Under civil dissensus, national reconciliation is encouraged to the extent criminal prosecutions constitute and promote a continuous and shared social drama among all those affected.⁵³⁵ Such shared experiences are best promoted through proximity to where the crimes were committed. Irrespective of where trials occur, they require generating a sense of genuine participation with the judicial institutions involved since such participation is more likely to generate shared conversations. Just as local civil society needs to be involved in the composition and mandate of truth commissions, if these are to

531. Critics of the ad hoc tribunals are therefore not far off the mark when they contend that these are elitest exercises. For these reasons, as well as the substantive scope of some international crimes, it may be that international lawyers find it easier to deal with situations in which nationals of one state are killed by the military of another, rather than cases like Rwanda, involving internal genocide. Cf. Balint, *supra* note 215, at 109 (noting that traditional human rights law finds it easier to resolve difficulties when the issue involves the military of one nation acting against nationals of another).

532. Cf. *id.* at 114 (observing that broader social reconciliation, extending beyond political elites and state agents, may be needed).

533. For a powerful literary interpretation of the need for victims to confront these individuals, see ARIEL DORFMAN, *DEATH AND THE MAIDEN* (1992).

534. Naomi Roht-Arriaza, *Truth Commissions as Part of a Social Process: Possible Guidelines*, in REINING IN IMPUNITY, *supra* note 31, at 279, 283.

For a thoughtful analysis of the distinct ways that Germany and Japan have come to terms with each countries' responsibilities for atrocities during World War II, see IAN BURUMA, *THE WAGES OF GUILT: MEMORIES OF WAR IN GERMANY AND JAPAN* (1994). Buruma contends that to the extent Germans have, as a nation, engaged in greater self-reflection on their own culpability than have the Japanese, this is due not to the major Nuremberg trials conducted by the Allies but primarily as a result of later developments, including trials and other proceedings conducted by the Germans themselves. See *id.* at 137–58. Similarly, Buruma argues that the Tokyo trials had minimal resonance within Japan and may even have been counterproductive since these proceedings were disparaged within Japan as anti-Japanese propaganda. See *id.* at 159–76.

535. Cf. Osiel, *supra* note 151, at 473 (describing trials as “social dramas”); see also Berman, *supra* note 175, at 292–93, 314 (discussing the role of trials as a genre of “public discourse and storytelling” that is valuable to a society’s own internal evolution).

contribute to genuine reconciliation,⁵³⁶ local civil society needs to be involved when it comes to local and international courts.

There are clear connections between the lessons enumerated here and the work of U.S. critical race scholars. Clearly, the divide between the internationalist epistemic community and those who address issues of race and ethnicity needs to be bridged. International humanitarian law experts, as well as those who judge, prosecute, or defend these international crimes, must consider the questions raised by critical race theorists. Given the international legal paradigm's implicit reliance on liberalism,⁵³⁷ there is much to learn from analyses of U.S. municipal law that demonstrates how liberal judicial processes, and the substantive legal rules they apply, render issues of ethnicity less visible than they ought to be.⁵³⁸ Critical race storytelling shows us how important it is for the law to "look to the bottom" to determine whether such procedures and rules are fair to the least empowered as well as perceived as such.⁵³⁹ Certainly the voices and perspectives of those who remain within Rwanda appear to have been "suppressed, devalued, and abnormalized" no less than those of the "outgroups" that are the subject of critical race analyses.⁵⁴⁰ Much of the effort here can be seen as demonstrating the gulf that separates the international legal paradigm's implicit account of the Rwandan genocide and its aftermath from the "counterstory"⁵⁴¹ told by journalists like Gourevitch.⁵⁴² As with respect to such critical race literature as Patricia Williams's well-known Benetton story,⁵⁴³ Gourevitch's account "kindle[s] conscience and awaken[s] sympathy."⁵⁴⁴ Gourevitch's view from the bottom, particularly its emphasis on the West's complicity, needs to be considered by international lawyers who need to become more aware of how their solutions are perceived by, and have effects on, both alleged perpetrators and genocide survivors inside Rwanda.

536. See *supra* note 174 and accompanying text.

537. See *supra* notes 361–368 and accompanying text.

538. See generally CRITICAL RACE THEORY: THE CUTTING EDGE pts. I, XII (Richard Delgado ed., 1995) (describing characteristics of critical race scholarship) [hereinafter CRITICAL RACE THEORY].

539. See, e.g., Mari Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 324 (1987); cf. *supra* note 205 (noting how most international lawyers promptly dismiss the notion of international reparations to Rwandan victims of genocide).

540. Richard Delgado & Jean Stefanic, *Critical Race Theory: Past, Present, and Future*, in 51 CURRENT LEGAL PROBLEMS 467, 482 (M.D.A. Freeman ed., 1998).

541. Many critical race theorists attempt to demonstrate how the "the law can prevent a people from expressing their own voice and worldview by imposing rigid categories and ways of speaking." *Part II: Storytelling, Counter-Storytelling and "Naming One's Own Reality"*, in CRITICAL RACE THEORY, *supra* note 538, at 37–97. Their oppositional storytelling, or "counterstories," seeks to alter how we construct legal reality. See *id.*

542. See GOUREVITCH, *supra* note 1, at 182–83 (stressing the need to counter an account of the Rwandan genocide that implies that these killings were not the West's problem and were a "free-for-all" among equally culpable ethnic tribes).

543. See Patricia Williams, *Spirit-Murdering the Messenger: The Discourse of Fingerpointing as the Law's Response to Racism*, 42 U. MIAMI L. REV. 127, 127–28 (1987) (describing how the author, as an African-American woman, was refused entry into a store).

544. Cf. Delgado & Stefanic, *supra* note 540, at 475 (describing the intent of much critical race scholarship).

As is true of much of the work of U.S. critical race scholars, this Article has a reformist agenda. As do many critical scholars with respect to U.S. law, I suggest that we be skeptical of liberal solutions to ethnic conflicts. International lawyers need to be leery of internationalist approaches that, at least to date, have avoided listening to genocide's victims and very likely perpetuate racism that did not abruptly cease with the end of colonial rule. As with many critical race critiques, some of what I suggest here, as with respect to the possible effects of the ICTR's "progressive development" of international humanitarian law given that tribunal's jurisdictional primacy, stems from misgivings that present processes may advance legal interpretations that serve the interests of the powerful. Further, as does critical race theorists' notion of "intersectionality,"⁵⁴⁵ the analysis here encourages a move beyond the dichotomous (instrumentalist/primordialist) views of ethnicity to force consideration of how the categories of "Hutu" and "Tutsi," as well as male and female members of such groups, are affected by international processes.⁵⁴⁶ Clearly, critical race theorists need to do more to go beyond the water's edge to consider the implications of their approaches to the actions of the United States government when it helps to establish, staffs, and funds international courts to adjudicate crimes of hate.⁵⁴⁷

Rwanda presents ample lessons for those now engaged in efforts to establish a permanent international criminal court (ICC) and for the international community should it ever again be tempted to create additional ad hoc war crimes tribunals.⁵⁴⁸ The case of Rwanda should stand as a warning against turning the hope for enforceable international criminal law into a religious crusade for an international criminal court, or a series of them, while ignoring other routes to justice, deterrence, and accountability.

The new Rome Statute for an ICC constitutes, in some respects, an improvement over the ICTR. That statute contains many more detailed provisions with respect to the substantive crimes covered, therefore leaving considerably less room for judicial "gap-filling."⁵⁴⁹ In addition, the ICC's

545. See, e.g., *id.* at 474 (discussing critical race theorists' work at the intersection of racial, ethnic, and gender categories).

546. Others may want to go beyond the subjects addressed here to explore, for example, whether international humanitarian norms, as presently constructed and interpreted, construct unhelpful categories of race. See *id.* at 475–80.

547. U.S. critical race theorists have only begun to address international law, see *id.* at 487–88, and even fewer have addressed mass violence and its consequences; for one rare example of the latter, see Adrien Wing, *Rape, Ethnicity, and Culture: Spirit Injury from Bosnia to Black America*, 25 COLUM. HUM. RTS. L. REV. 1 (1993).

548. See, e.g., Barbara Crossette, *Beijing Refuses to Go Along with Creation of Pol Pot Tribunal*, N.Y. TIMES, June 25, 1997, at A6 (discussing proposals for an ad hoc tribunal for Cambodia).

549. See Rome Statute, *supra* note 13, arts. 22–33 (discussing "general principles of criminal law"). Further, it is anticipated that yet more gaps in international criminal law will be filled through the ICC's (yet to be drafted) rules of procedure and evidence. See *id.* art. 21(1)(a). This attempt to "progressively develop" the law through international agreement may generate greater legitimacy in the final product and may reflect more genuinely the views of the international community as a whole as compared to comparable attempts through "judicial legislation" in the course of ongoing trials in the ICTY and the ICTR. Of course, even this attempt may ultimately shortchange less powerful states during the course of the negotiations and the final product will almost certainly fall short of establishing a comprehensive criminal code. Even the ICC's judges will be faced with the need to fill in gaps.

jurisdiction, although not retrospective in application, does not contain the temporal and geographic constraints reflected in the ICTR.⁵⁵⁰ Perhaps most significantly for our purposes, the ICC's jurisdiction is premised on "complementarity" and not jurisdictional primacy.⁵⁵¹ The ICC will only have jurisdiction to investigate or prosecute in instances where national authorities are "unwilling" or "unable" to do so.⁵⁵²

But it is not clear whether the ICC's drafters have truly responded to, or learned from, the Rwandan experience. First, there is no evidence, on the face of the ICC statute, that anything has been learned with respect to the need to prevent ongoing violence or that the failure to prevent such violence dramatically affects the viability of attempts to make perpetrators accountable, at both the international and local levels. As with the ICTR and the ICTY, there is no attempt to connect states' (or the Security Council's) duty to prevent genocide with the regime for prosecuting genocide to be established. Such matters are left, as at present, to be handled under separate treaty regimes.⁵⁵³ While it is unrealistic to expect that the drafters of the ICC could have revisited the duties of the Security Council under the U.N. Charter, it would have been desirable to reaffirm that states have a duty to prevent genocide under the ICC treaty, and some consideration ought to have been given to the discretion to prosecute in cases of ongoing genocide. Absent some demonstrated capacity to protect witnesses, proceeding with trials in such cases, as we have seen with respect to Rwanda, may be tantamount to encouraging retaliation against them.⁵⁵⁴

A second difficulty is that the ICC's complementarity may not truly complement local proceedings. It does not appear that the ICC's drafters

550. *See id.* arts. 5–21 (discussing crimes within the jurisdiction of the court) & arts. 12–13 (discussing the court's exercise of jurisdiction in states that are party to the statute). *But see id.* art. 11 (limiting the ICC's jurisdiction to offenses committed after the Rome Statute enters into force). Although some states' consent to jurisdiction will be required before the ICC can pursue a case, *see id.* art. 12, once that consent is given the ICC will not be examining, as is the ICTR, offenses committed only during a particular time.

551. *See id.* arts. 17–19. A trial by the ICC for conduct covered by its jurisdictional provisions (namely genocide, crimes against humanity, and war crimes) would preclude a later trial by any other court (and vice versa); *see id.* art. 20 (discussing *ne bis in idem*).

552. *See id.* art. 17(1)(a)–(b). The ICC's prosecutor may defer to a state's initiation of an investigation but may reassert his/her authority if a state shows an unwillingness or inability to proceed. *See id.* art. 18(3). Prior to commencement of trial within the ICC, states can seek to block the ICC from proceeding by challenging admissibility. *See id.* arts. 17–19. Except in "exceptional circumstances," a category left to be defined by and applied by the ICC's judges, a state may challenge the admissibility of a case only once and only prior to commencement of trial within the ICC. *See id.* art. 19(4).

553. *See* U.N. CHARTER art. 43, para. 3. Although the proposed ICC is intended to be an independent body that does not rely on the Security Council to the same extent as the present ad hoc tribunals, action by the ICC is made explicitly subject to the Council in a few crucial respects. *See* Rome Statute, *supra* note 13, art. 13 (permitting the Council to refer a situation to the ICC's prosecutor); *id.* art. 16 (permitting the Council to seek deferral of an investigation or prosecution). At least to this extent the ICC's legitimacy and independence may be compromised. The attempt to limit the role of the Security Council in the proposed ICC implicitly concedes that the ad hoc tribunals' reliance on the Council undermines those tribunals' credibility.

554. *See* LAWYERS COMMITTEE FOR HUMAN RIGHTS, *supra* note 139, at 45–46 (noting the ICTR's difficulties in establishing an effective witness protection program and noting that in the first month and a half of 1997 alone, 54 genocide survivors or people linked to them had been killed).

accepted complementarity because of enlightened notions concerning the relative merits of national proceedings or due to a realization of primacy's problems. On the contrary, the principal actors involved in the ICC effort, particularly the powerful human rights community that has been so influential in promoting the idea of a permanent court, appear to regard complementarity as the maximum that could be achieved under the present circumstances; that is, as a reluctant concession to *realpolitik* and parochial notions of state sovereignty.⁵⁵⁵ Despite the complementarity built into its statute, it is not clear how the future ICC would respond in a future case similar to that of Rwanda's.

The Rome Treaty's recipe for permitting an international prosecution could lead to a preference for international venues even in a situation like Rwanda's, that is, where, in the immediate wake of mass atrocities, local investigations and trials are not immediately possible not because of lack of political will by a new government but because of serious resource constraints.⁵⁵⁶ Much will depend on the discretion exercised by the ICC's prosecutor (and its judges) in such instances. In the hands of people who subscribe to the international legal paradigm's preference for international fora, the ICC's proposed complementarity could become, in the worst case scenario, a race to the courthouse between international and local prosecutors, with the first to emerge with a plausible trial precluding the attempt by the other.⁵⁵⁷ Nor is it clear how ICC prosecutors and judges will approach local procedures, like Rwanda's under its Organic Law, that result in reduced sentences based on plea bargains without trial,⁵⁵⁸ or, as in South Africa, grant amnesties upon full confession under threat of criminal sanction for failure to come forward.⁵⁵⁹ It is not clear whether either of these compromises on individualized trials would be regarded by ICC authorities as intended to shield defendants from criminal prosecution, thereby entitling the ICC to

555. See, e.g., LAWYERS COMMITTEE FOR HUMAN RIGHTS, ESTABLISHING AN INTERNATIONAL CRIMINAL COURT: MAJOR UNRESOLVED ISSUES IN THE DRAFT STATUTE 13 (1996) (discussing how complementarity makes the ICC "weaker" than the ad hoc tribunals but saying nothing about its possible virtues).

556. Thus, the Lawyers Committee for Human Rights notes that the ICC's admissibility provisions prevent a "functioning" judicial system from coming under the ICC's scrutiny. See *id.* at 14. Ultimately, what constitutes a viable system, or a plausible local investigation or prosecution, lies within the discretion of the ICC's judges and prosecutors. Absent a greater assistance effort by the international community than that which emerged with respect to Rwanda in the first few years after the genocide, it is likely that many judicial systems will remain "nonfunctioning" in the wake of mass atrocity, even if the government is no longer in the hands of those who committed the vast majority of the atrocities. Cf. *supra* notes 475-479 and accompanying text (discussing Ratner and Abrams's test and its inadequacies).

557. See Rome Statute, *supra* note 13, art. 20. Under Article 20's concept of *ne bis in idem*, persons convicted or acquitted elsewhere for aggression cannot be tried by the international court. The same holds for those previously convicted of the other international crimes enumerated in the statute—that is, the crimes of genocide, crimes against humanity, and war crimes—except that in these instances the international court has discretion to retry the individual if the proceedings in the domestic court were for the purpose of shielding the person from criminal responsibility or were not conducted independently or impartially in accordance with due process.

558. See *supra* notes 140-146 and accompanying text.

559. See, e.g., McCarthy, *supra* note 92, at 185.

proceed on its own.⁵⁶⁰ As this suggests, the present statute is silent about a common conundrum faced by societies in the wake of mass atrocity: how to fashion a coherent compromise between the need for individualized trials and the difficulty or impossibility of providing these where so many have been complicit. Absent considerable flexibility by ICC authorities with respect to such compromises, it is possible that its proceedings could interfere with or be incompatible with the fashioning of viable compromises at the local level. While the ICC's statute has abandoned strict hierarchical supremacy, that court may not, like the ICTR, be fully responsive to the very real differences between states in which there is no real hope for criminal accountability and nations, like Rwanda (and arguably South Africa), where it is reasonable to expect that, given enough time and assistance, some form of criminal accountability will be pursued.

As presently drafted, the Rome Statute makes no explicit concessions to states like Rwanda in mid-July 1994—that is, nations still reeling from mass atrocities and not yet ready to begin national prosecutions for quite understandable reasons having little to do with political will. Since the drafters of the Rome Statute apparently regarded international prosecutions as functionally equivalent to, if not preferable, to local ones, it is possible that they assumed that the race to the international courthouse can begin as soon as a cognizable offense is committed. There is no recognition in the anticipated arrangements for the ICC that encouragement for local forms of accountability ought to be, in instances like Rwanda's, a top priority for the international community, second only to the prevention of further violence. There is nothing in the present statute for the ICC that addresses the need to provide judicial assistance to states that have suffered mass atrocities and now have a new government willing but still unable to undertake criminal prosecutions. There is no provision, at least on the face of the new statute, for joint investigations between ICC and local prosecutors while a traumatized nation struggles to rebuild its devastated judiciary. There is no suggestion that international prosecutors ought to turn over their evidence or suspects to local authorities even after ICC proceedings begin should local authorities later seek to proceed with a prosecution.

Further, despite complementarity, the ICC adheres to the international legal paradigm's emphasis on the need to develop uniform international humanitarian norms, even at the expense of local legal traditions or sentiments. While the ICC's statute recognizes, like the ICTR's, that judges need to have expertise in criminal as well as international law, its provisions

560. Cf. Rome Statute, *supra* note 13, art. 17(2)(a) (permitting the ICC to proceed with a case where municipal proceedings are being undertaken or a national decision is made "for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the court"); LAWYERS COMMITTEE FOR HUMAN RIGHTS, *supra* note 555, at 14 (stating that the ICC cannot claim jurisdiction unless it can be shown that national proceedings "were a deliberate attempt to forestall international justice"). In addition, as noted at *supra* note 551, the ICC adheres to a concept of *ne bis in idem* that usually precludes a municipal court retrial and could therefore have a wider impact on those courts' development of the law. See Rome Statute, *supra* note 13, art. 20; *supra* notes 341–342 and accompanying text (noting how ICTR rulings could prevent Rwandan courts from developing the law).

for applicable law do not explicitly authorize the judges to turn to local law to fill in the gaps of international humanitarian law.⁵⁶¹ It anticipates that judges will turn only to the standard international law sources, that is, treaty, custom, and general principles.⁵⁶² There appears little room as well for adapting penalties to the needs or desires of those victimized by such crimes or of the societies of which they are a part. As with the ICTR and the ICTY, the only sentences authorized are terms of imprisonment, not the death penalty, and, unlike the ICTR or the ICTY, judges are not even authorized to consider or to defer to local sentencing practices where the offense occurred.⁵⁶³

Third, there is nothing in the Rome Statute suggesting that any lessons have been learned with respect to ethnic neutrality. As with the ICTR and the ICTY, the new ICC's judicial bench is intended to be independent, international, and impartial; judges are not to participate "in any case in which his or her impartiality might reasonably be questioned."⁵⁶⁴ Yet there is no recognition in the present statute that often, even such "impartial" judges will be nationals of very partial nations, or at least of states that stood by and did nothing to prevent mass atrocities and who may be regarded, especially by local audiences, as complicit in the very atrocities with which they are dealing. There is nothing, in short, that recognizes that international fora are not necessarily rendered "impartial" merely because they are international or that ethnically loaded proceedings may require ethnically sensitive accommodations to generate verdicts acceptable to local audiences. While it is possible that the procedural rules of the new court could facilitate the appointment of judges who are ethnically representative of regions affected by atrocities, nothing in the statute anticipates such a possibility (as compared to, for example, the specific provision for party-appointed judges in the ICJ's statute).⁵⁶⁵

Finally, there is nothing in the ICC's statute, or in the negotiations leading up to it, that suggests that any minds have been changed with respect to the need to focus primarily on select trials of high-level perpetrators. Exceptionalism appears alive and well. Indeed, given the relatively scarce resources likely to be made available to a court that when it begins to operate will cover at least sixty state parties, it is reasonable to assume that practical

561. See Rome Statute, *supra* note 13, arts. 21, 39 (regarding applicable law). While Article 21 appears to anticipate the application of local law, the wording of that article appears to assume that local law ought to be used only to the extent necessary to determine applicable general principles of law. It appears that what is contemplated is the comparative use of local law—that is, that judges look to the body of local laws in general in order to infer commonly accepted principles among a variety of legal systems. The use of, for example, preexisting Rwandan law as to the definition of "complicity," if the acts are committed by a Rwandan national within Rwanda, is not apparently authorized. *Cf. supra* notes 346–348 and accompanying text (discussing difficulties with existing approaches to gap-filling in the ad hoc tribunals).

562. See Rome Statute, *supra* note 13, art. 21.

563. See Rome Statute, *supra* note 13, arts. 76–78; ICTY Statute, *supra* note 53, art. 24 (authorizing recourse to the "general practice" regarding sentences in the former Yugoslavia); ICTR Statute, *supra* note 53, art. 23 (authorizing recourse to the "general practice" regarding sentences in Rwanda).

564. Rome Statute, *supra* note 13, art. 41(2)(a).

565. See *supra* notes 257–260, 425–430 and accompanying text.

realities will lead to an emphasis on high profile trials of a selective few, regardless of any anomalies of inversion that result.⁵⁶⁶

While there is still room for the ICC's mandate, composition, and, of course, ultimate operation to change, the international legal paradigm that governed the creation of the ICTR still holds sway. Despite the Rome Statute's explicit deference to local courts, its provisions do not demonstrate real awareness of the potential benefits of local criminal trials. The ICC's envisioned operation evinces little concern for how the operation of international processes may interact with local processes. There is no evidence that those who negotiated the new ICC operated on the basis that international processes should be adapted to local realities rather than the other way around. There is no suggestion that internationalist priorities may require assistance to local efforts for accountability.

VII. CONCLUSION

Post-1994 Rwanda demonstrates that not all instances of mass atrocity present stark choices between legalism and *realpolitik*—that is, between prosecution and impunity. Indeed, as international lawyers succeed in convincing more nations that criminal accountability for international crimes can be made real, we can expect more genuine enforcement efforts at the local level, including individual criminal trials as well as Rwandan-styled plea bargains where such trials are impossible. The establishment of the ad hoc war crimes tribunals, and the prospect of a permanent international criminal court, presents us, then, with a paradox: these tribunals' very success in generating efforts at domestic fora for accountability may require reexamining fundamental elements of the international legal paradigm.

Not all mass atrocities are alike. International responses to them need to be sensitive to differences as well as commonalities between them. After the 1994 genocide, Rwanda was in a position that is more analogous to that faced by Germany during the Nuremberg trials than is the case today with respect to the Balkans. While in parts of former Yugoslavia, the perpetrators of mass killings have been treated as heroes, in Rwanda many of these people are in custody and subject to the victorious wrath of their former victims.⁵⁶⁷ While with respect to the Balkans, the choice in 1993 may have been between international justice or none at all, with respect to Rwanda, the choices as of the middle of 1994, when the massive killings ended and the new government took power, were more complex. Despite the differences, the international community adhered to the international legal paradigm and took a one-size-fits-all approach, adapting the statute and rules of the earlier Balkan tribunal, with but slight modification, to Rwanda. Despite lip service to the importance of accountability at the national level, both from the Security Council as well as from legal scholars, the bulk of international attention and resources has

566. Cf. *supra* notes 262–267 and accompanying text (discussing the anomalies resulting from concurrent prosecutions at the international and national levels).

567. See, e.g., Sohn, *supra* note 396, at 211.

gone into constructing international processes enjoying primacy over local proceedings, and charged with applying an ethnically neutral approach to select trials of high-level perpetrators.

Supporters of the ICTR overlooked the anomalous and perverse messages being sent by the “trials of concurrent jurisdiction” to survivors of mass atrocities, to the vast majority of perpetrators, to Rwandan society generally, and to the international community.⁵⁶⁸ The possibility that jurisdictional primacy for the ICTR could undermine the goals for judicial truth, for accountability to victims, for fair treatment of *all* those accused of crimes, and for the affirmation of the national and international rule of law was not addressed. No one expressed qualms about the lack of local representation on the ICTR’s bench and the Security Council ignored complaints from Rwandan authorities about locating the tribunal in a distant foreign city, about the absence of the death penalty or accountability for pre-1994 events, and about limiting its resources and mandate.

Instead, caught in the international legal paradigm’s vision of justice, the international community invested its resources, intellectual and material, in constructing a tribunal of “impartial,” “denationalized” judges whose expertise and ethnic neutrality would hopefully legitimate the uniform progressive development of international humanitarian law.⁵⁶⁹ The notion that the affirmation of the national and international rule of law could benefit from “inexpert” judges (both those willing to return to the country as well as those who could be trained) from a devastated African nation was never seriously entertained. The architects of the ICTR did not consider the probable benefits of turning to local judges who would not be beholden to an internationalist agenda and would be farther removed from the political whims of the Security Council. Nor did they consider a role for such judges at the international level. Despite the luminous arguments about the need to use criminal processes to promote a transition to democracy, few argued in favor of local proceedings—even though such proceedings would have had more representative legitimacy and, especially with significant assistance, could have been made more responsive to the demands of human rights advocates. Despite emphasis on the need to symbolically affirm the rule of law, few considered whether proceedings in Tanzania would find an audience within the neighboring nation seriously in need of affirming the credibility of law and its institutions. Few considered whether proceedings abroad, conducted in a foreign language, would resonate with Rwandan audiences as well as trials in Rwanda broadcast on local radio.

For purposes of this Article, I have assumed, as do most international lawyers, that a truth commission process not accompanied by either the threat or the reality of criminal proceedings would have been inappropriate in the

568. See *supra* Section III.B.

569. Cf. SCHARF, *supra* note 5, at 224 (reporting that the one-year-long *Tadic* trial at the ICTY cost about \$20 million), with HUMAN RIGHTS WATCH, *supra* note 64, at 88 (reporting that over the 1994–96 period the Rwandan government received about \$19 million from U.S. and other international donors). At present, the international community allocates about \$50 million a year to the ICTR’s operation. See *supra* note 250.

case of Rwanda. As do most international lawyers, I assume that in cases like Rwanda's, lasting peace and national reconciliation require some form of criminal accountability. But one must consider what is done in the name of accountability since not all forms of accountability produce the same effects. I have indicated how, in the case of Rwanda, international accountability premised on jurisdictional primacy, ethnic neutrality, and exceptionalism has significant shortcomings through the selection of defendants, the kinds of acts to be punished, and the parts of history to be preserved. I have suggested why, contrary to the assumptions of the international legal paradigm, Rwandans might prefer other processes, including joint proceedings or local trials subject to international observation, and why they regard contrary demands as examples of condescending Eurocentrism or racism.

Complaints about the primacy of the ICTR are not merely the result of parochialism or misconceptions about what international judges and prosecutors might do. Some of these complaints stem from legitimate concerns about that tribunal's (limited) jurisdictional basis, meager resources, available sanctions, judicial makeup, and likely approaches to applicable law. There are risks in sending some high profile cases to Tanzania for trial, while leaving the vast number of others, including the vast majority of more ordinary defendants, to their fate in Rwanda. While Rwandan processes pose risks that judges will be entirely too involved in local ethnic tensions to render evenhanded justice, international judges' attempts to render "ethnically neutral" justice may not produce verdicts acceptable to all sides, and their judicialized histories may be both insufficiently sensitive to distinct forms of victimhood and overly sensitive to the political sensibilities of powerful U.N. patrons. International prosecutions may even on occasion undermine local ones.

A more ethnically sensitive perspective of the crimes committed in Rwanda would expand the historical context that needs to be addressed (along with the number of those who are complicit), the numbers of external observers that may become interested in these policy decisions, and the universal appeal of any lessons that might be drawn. An approach to criminal accountability that acknowledges that these are crimes *of hate* as well as *of states* may also help to redefine the kind of national reconciliation that we are seeking to achieve within societies devastated by mass atrocities.

Effective international criminal law enforcement requires *international* efforts directed at prosecuting crimes such as genocide by the most effective means any of us are likely to see in our lifetimes—by local police, local prosecutors, and local courts. While international tribunals need to be kept as an option of last resort, good faith domestic prosecutions that encourage civil dissensus may better preserve collective memory and promote the mollification of victims, the accountability of perpetrators, the national (and even the international) rule of law, and national reconciliation. The didactic functions of war crimes trials may best be furthered locally, through thousands of indictments and trials that truly resonate within a culture and whose lessons do not appear to be imposed, in top-down fashion, by the international

community. Properly mediated by international law (and fora where necessary), local criminal accountability helps to restore the rule of law where it matters most—at the local level, where all of us live.

