

# DEMYTHOLOGIZING RESTORATIVE JUSTICE: SOUTH AFRICA'S TRUTH AND RECONCILIATION COMMISSION AND RWANDA'S GACACA COURTS IN CONTEXT

*Olivia Lin\**

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## I. INTRODUCTION

Since the Allied-overseen Nuremberg Trials in 1945, the legal measures pursued by nations negotiating political transition and responding to the human rights abuses of prior regimes (“transitional justice”)<sup>1</sup> are subject to examination by the watchful eye of the international community and international standards.<sup>2</sup> Despite the development of a “universalizing” rule of law, the subsequent interplay of internationalist and nationalist responses to transition reveal a continuing tension between the Nuremberg model of retribution and appeals for

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\* J.D./Master of Theological Studies dual degree candidate, May 2006, Duke University School of Law and Duke Divinity School; B.A., Brown University, 2001.

1. Ruti G. Teitel, *Transitional Justice Genealogy*, 16 HARV. HUM. RTS. J. 69 (2003).

2. *See id.* at 73 (“The period immediately following World War II was the heyday of international justice. The critical turn away from the prior nationalist transitional responses and toward an internationalist policy was thought to guarantee rule of law.”).

amnesty.<sup>3</sup> Lately, as nations have sought a middle ground between retributive justice and a “comprehensive policy of official amnesia,”<sup>4</sup> truth commissions have emerged as an increasingly popular model of restorative justice in times of transition.<sup>5</sup> Whether confronting human rights abuses committed during liberation conflicts<sup>6</sup> or resulting from prior military regimes,<sup>7</sup> the primary motif of truth commissions is to narrate individual stories and acknowledge abuses within the framework of a “jurisprudence of forgiveness and reconciliation”<sup>8</sup> that abstracts discrete, local events into universally applicable themes.<sup>9</sup>

Of these truth commissions, the chief model capturing the imagination of the global community is South Africa’s Truth and Reconciliation Commission (TRC).<sup>10</sup> The lion’s share of the scholarship that exists concerning South Africa’s TRC revolves around its value as a form of restorative justice that

3. See *id.* at 76 (“The profound and permanent significance of the Nuremberg model is that by defining the rule of law in universalizing terms, it has become the standard by which all subsequent transitional justice debates are framed. Whereas the [post-Nuremberg jurisprudence] simply assumed the legitimacy of punishing human rights abuses, [in later years,] the tension between punishment and amnesty was complicated by the recognition of dilemmas inherent in periods of political flux.”).

4. John P. McCormick, Book Review, 25 N.Y.U. REV. L. & SOC. CHANGE 109, 111 (1999) (reviewing David Dyzenhaus, *JUDGING THE JUDGES, JUDGING OURSELVES: TRUTH, RECONCILIATION AND THE APARTHEID LEGAL ORDER* (1998)).

5. See, e.g., Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 U. PA. L. REV. 311, 436 n.509 (2002) (“[T]ruth commissions have been established in countries including Argentina, Bolivia, Chile, El Salvador, Guatemala, Haiti, the Philippines, Rwanda, Somalia, South Africa, Uganda, and Uruguay.”); Erin Daly, *Transformative Justice: Charting a Path to Reconciliation*, 12 INT’L LEGAL PERSP. 73, 76–77 (“Because truth commissions eschew both criminal prosecution on the one hand and blanket amnesty on the other, they are often referred to as a ‘middle path’ or ‘third course’ or ‘golden mean.’”); Carrie J. Niebur Eisnagle, Note, *An International Truth Commission: Utilizing Restorative Justice as an Alternative to Retribution*, 36 VAND. J. TRANSNAT’L L. 209, 224 (2003) (“Since [Argentina’s creation of a truth commission after its defeat in the Falkland Islands war,] more than 20 truth commissions have existed around the world in the past 20 years.”).

6. See Daly, *supra* note 5, at 77 (“[T]he Truth and Reconciliation Commission (TRC) was carefully designed to attend to the particular ills that characterized South Africa at the end of the apartheid era.”).

7. See John Dugard, *Reconciliation and Justice: The South African Experience*, 8 TRANSNAT’L L. & CONTEMP. PROBS. 277, 288 (1998) (“The truth commission for Argentina/the National Commission for the Disappeared/was set up by President Raul Alfonsín in 1983 after the fall of the military junta and was able to carry out thorough investigations into torture and disappearances.”).

8. Teitel, *supra* note 1, at 81.

9. See *id.* at 81–82 (“The truth and reconciliation project incorporated much of its normative discourse from outside the law, specifically from ethics, medicine, and theology . . . Both political activism and scholarship sought to move outside contemporary politics and history to represent conflict in timeless and universal terms.”) (emphasis added).

10. See Daly, *supra* note 5, at 77 (“While there have been truth commissions in the past, none has been as successful or has garnered as much international attention as South Africa’s.”); *id.* at 112 (“[T]he international response to the TRC suggests that it, more than any other recent experiment in transitional justice, is the *beacon* to which other emerging nations are looking.”) (emphasis added).

emphasizes ideological virtues *du jour* such as reconciliation,<sup>11</sup> communitarian values,<sup>12</sup> or confession.<sup>13</sup> In overwhelming measure, these reports rely on this significant baseline assumption: South Africa's TRC was a success.<sup>14</sup> This article proposes that a critical gap<sup>15</sup> exists between the ideological weight that the TRC carries within the international community and the political realities initiating and controlling the TRC's development.

In establishing a productive critique of South Africa's experience with the TRC, this article seeks to penetrate past pure ideology to ask whether, in fact, South Africa's story is a wholly successful one, and to question the merit of its development into an international metanarrative. Through a more critical lens with which to view the TRC and truth commissions in general, it becomes possible to properly review the situation of other nations, such as Rwanda, who are attempting to borrow pages from South Africa's now-universalized narrative. Truth commissions may be the cinderella of international law's transitional justice models, but demythologizing the responses to civil conflict and ethnic unrest in Africa requires a look at the political realities that informed each country's choice to move toward restorative or punitive justice.<sup>16</sup>

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11. See Mark A. Drumbl, *Punishment, Postgenocide: From Guilt to Shame to Civis in Rwanda*, 75 N.Y.U.L. REV. 1221, 1268 (2000) ("National reconciliation and individual rehabilitation are facilitated by acknowledging the suffering of victims and their families, helping to resolve uncertain cases, and allowing victims to tell their story, thus serving a therapeutic purpose for an entire country, and imparting to the citizenry a sense of dignity and empowerment that could help them move beyond the pain of the past.") (citation omitted).

12. *Id.* at 1270 (describing how truth commissions may respond to mass human rights violations by "offering individual therapy, solidarity with other survivors, a dramaturgical recovery system, and, in the end, group catharsis") (citation omitted).

13. See Teitel, *supra* note 1, at 83 (suggesting that truth commissions created a "move from the courtroom to the hearing room and [a] turn to discursive confessional testimonials" which "tended to eschew judgment and instead aimed to move beyond legal notions of guilt and responsibility").

14. See, e.g., Daly, *supra* note 5, at 112 ("[T]he TRC . . . demonstrate[d] that values other than retributive justice can and should be promoted during times of transition . . . However, the TRC's success in South Africa does nothing to predict the success of other TRCs elsewhere."); Drumbl, *supra* note 11, at 1268 ("Although certainly not without its criticisms and controversies, the overall evaluation of the TRC has been a positive one"); Donald W. Shriver, *Truth Commissions and Judicial Trials: Complementary or Antagonistic Servants of Public Justice?*, 16 J.L. & RELIGION 1, 16 (2001) ("One of the great services of the South African TRC to the formation of a new national political culture was its back-and-forth dialogue between victims and perpetrators. . . ."); Eisnaugle, *supra* note 5, at 224 ("Out of all the truth commissions that have operated since the surge began, South Africa's TRC has emerged as the best example of restorative justice ideals and practices on a national level.").

15. See Teitel, *supra* note 1, at 85 ("Existing scholarship has not yet captured the prevailing dynamic of transitional justice or its nexus with ongoing political change.").

16. See Okechukwu Oko, *Confronting Transgressions of Prior Military Regimes Towards a More Pragmatic Approach*, 11 CARDOZO J. INT'L & COMP. L. 89, 95 (2003) ("[T]here is no guarantee that what worked in one country will be appropriate in another country with dramatically different social, political and cultural assumptions.").

In Part I, this article outlines the background to South Africa's TRC, and subsequently critiques the prevailing international perspective on South Africa as a successful model of the restorative justice ideology. By contrast, this article argues that the animating principles for the Commission were *political*, rather than ideological. Part II provides a brief outline of the TRCs structure, and subsequently develops an intellectual history for the birth of the TRC as a restorative justice metanarrative. Here, the discussion seeks to illustrate how the reconciliation myth at the heart of the South African experience is precisely that—a myth that resonates for a newly globalized community that is increasingly responsive in a *categorical* way to restorative justice. In analytical partnership with Part II, Part III examines the fundamental premises of truth commissions, and in particular, the usefulness of past-oriented, confessional methods of response to political transition. In particular, this portion of the article engages with the most recent sociological scholarship and legal theory to militate against the notion of revisiting the past as an ideological end and a productive means of transitional justice. Finally, Part IV examines the current situation in post-genocide Rwanda as a relevant case study. After providing background to the human rights abuses in Rwanda, this article examines Rwanda's present attempt at developing a Gacaca court system from the rehabilitated critical lens of the South African experience.

## II. CRITIQUING THE METANARRATIVE

### A. Apartheid and Background to South Africa's TRC

A contextual understanding of South Africa's TRC requires a close examination of the definitive features of apartheid, a policy of "racial separateness" that broadly distinguished "whites" ("Europeans") from "non-whites" ("non-Europeans"), with the latter category encompassing the racial labels of "African" (black), "colored," and "Indian."<sup>17</sup> Unlike human rights abuses in other countries or generations, apartheid was "a system of oppression that was defined by law."<sup>18</sup> The underlying push of apartheid was not the result of a mob culture, unsupported by dominant governmental entities. Rather, with the election victory of D.F. Malan and the Nationalist Party in 1948,<sup>19</sup> South Africa's primary civil structures began to serve as a buttress for human rights abuses.<sup>20</sup>

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17. RICHARD SPITZ & MATTHEW CHASKALSON, *THE POLITICS OF TRANSITION: A HIDDEN HISTORY OF SOUTH AFRICA'S NEGOTIATED SETTLEMENT* 4 (2000).

18. Daly, *supra* note 5, at 113.

19. SPITZ & CHASKALSON, *supra* note 17.

20. See Daly, *supra* note 5, at 114 ("A strong legal framework, including all branches of government, succeeding constitutions, and a vast array of laws duly passed by Parliament, supported this

Ultimately, under the parliamentary sovereignty that typified the apartheid era, members who were unrepresentative of the non-white majority<sup>21</sup> could exercise essentially unlimited power to enact laws which generated profoundly oppressive measures against South African blacks.<sup>22</sup>

The political roots of apartheid have a deep historical reach, and for that reason, understanding the development of the TRC requires examining how oppressive ideals reified through the passage of time. During the period of British occupation of South African territory in the early nineteenth century, policies of separation became pervasive: blacks were segregated in their living environments, places of employment, and education; political participation by the black majority was forbidden or stymied by the white minority in power; property ownership was largely only a possibility for whites.<sup>23</sup> Moreover, when the country's first parliament formed in 1910, enacted legislation continued to reinforce the policy of inequity, including the passage of the Natives Land Act of 1913, which precluded blacks from land transactions and paved the way toward both political and practical dispossession of the black majority.<sup>24</sup>

Although South Africa's early colonial period nurtured a culture of racial inequity, apartheid came to a head in legislative terms after the Nationalist Party (NP) gained power in the mid-twentieth century.<sup>25</sup> In a single decade (1950–1959), laws were enacted to register every South African as a member of a specific racial group,<sup>26</sup> force black Africans to carry passes,<sup>27</sup> restrict the

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system of oppression.”). However, while apartheid was not a haphazard system of government, its execution was not without difficulty. *Id.* See KENNETH CHRISTIE, *THE SOUTH AFRICAN TRUTH COMMISSION* 21 (2000) (“[Apartheid] was a policy which saw many internal struggles and contradictions; it was revised over and over again and these uncertainties, conflicts, failures and deviations, although often less visible than the continuities and triumphs of Apartheid, were fundamental to its development.”).

21. Daly, *supra* note 5, at 114.

22. *See id.* (observing that these legislated oppressions included: racial registration laws, segregation laws, dispossession laws, removal laws, pass laws, suppression of expression and assembly laws, detention laws, disenfranchisement laws, dis-employment laws, dis-education laws, anti-miscegenation laws, and anti-injunction laws).

23. Cassandra Fox Charles, *Truth v. Justice: Promoting the Rule of Law in Post-Apartheid South Africa*, 5 ST. MARY'S L. REV. ON MINORITY ISSUES 81, 85 (2002).

24. *Id.*; *see* CHRISTIE, *supra* note 20, at 12 (“[The] Land Act of 1913 . . . limited black ownership to 13 per cent of the country.”).

25. *See* SPITZ & CHASKALSON, *supra* note 17, at 4 (“The National Party government's objective was to make South Africa a country run by whites for whites only, and particularly for those of Afrikaner descent. Its intentions, as well as the extent to which it sought to reserve the power of enforcement to the executive, were quickly laid bare by its enactment of a series of laws.”).

26. *See id.* (“The Population Registration Act of 1950 provided for the compilation of a register of the entire population, designed to allocate every person in South Africa to a particular racial group.”).

27. *See id.* (“[The Abolition of Passes and Coordination of Documents Act of 1952,] contrary to the apparent meaning of its title, required all black Africans to carry detailed ‘reference books’, commonly known as ‘passes’.”).

right of black Africans to live in white urban areas,<sup>28</sup> create separate political and educational structures,<sup>29</sup> establish racially exclusive residential locations,<sup>30</sup> and prevent non-white South Africans from voting.<sup>31</sup> Moreover, not only did the National Party enact legislation to perpetuate apartheid, they also worked to prevent opposition to the new legal measures.<sup>32</sup> For example, the Internal Security Act of 1950 prohibited listed individuals and organizations from promoting “ideologies and activities opposed to white domination or apartheid.”<sup>33</sup> The likeminded Criminal Law Amendment Act of 1953 punished civil disobedience with a three-year prison sentence.<sup>34</sup> These and similar enactments stymied the possibility of effective opposition by the African National Congress (ANC) and other organizations critical of the apartheid legislation.<sup>35</sup>

Through the next thirty years, the political tension surrounding the issue of apartheid increased steadily as the Nationalist Party sought to suppress an increasingly violent reaction against apartheid, buttressed separatist policies, and initiated only cosmetic reforms (which were largely enacted for economic reasons).<sup>36</sup> In particular, when H. F. Verwoerd served as the Prime Minister of South Africa from 1958 to 1966, the tenor of apartheid resistance shifted toward violence.<sup>37</sup> After the police shot and killed sixty-nine people and wounded 180 others during what was intended to be a peaceful protest in March 1960 at Sharpeville (the “Sharpeville massacre”), both the African National Congress and the Pan Africanist Congress moved their organizations underground<sup>38</sup> and

28. See *id.* (“Section 10 of the Black (Native) Laws Amendment Act of 1952 restricted the right of blacks to live in the white urban areas to those who had been born there, those who had lived there continuously for fifteen years, and those who had worked continuously for the same employer for ten years.”).

29. *Id.* (“[The Nationalist Party tried] to resuscitate tribal forms of political authority in the ‘reserves’ . . . in the hope that black political and other aspirations could be accommodated there. Meanwhile the Bantu Education Act of 1953, which transferred the responsibility for the administration of black education to the Department of Native Affairs, initiated the establishment of separate education systems for whites and blacks. . .”).

30. See SPITZ & CHASKALSON, *supra* note 17, at 4–5 (“The Group Areas Act of 1950 provided that areas not already set aside for blacks could be made racially exclusive—with the adverse impact borne by coloreds and Indians, who were forced to live in wretched and overcrowded locations.”).

31. See *id.* at 5 (“In 1956 the government disenfranchised coloreds in the Cape, thereby removing the last vestige of non-white political participation.”).

32. *Id.*

33. *Id.*

34. *Id.*

35. SPITZ & CHASKALSON, *supra* note 17, at 5.

36. See *id.* at 9 (“The Nationalists came to recognize the economy’s dependence on black labor, and began a course of limited reforms designed to bring black workers into the state’s economic infrastructure.”).

37. *Id.* at 6.

38. *Id.* Both organizations were banned by the government under the Unlawful Organizations Act of 1960. *Id.* at 7.

created military wings.<sup>39</sup> For many moderates, the 1960s ushered in a forcible awareness that non-violent resistance may have gained the movement international sympathy, but little substantive change.<sup>40</sup>

Although hostility between the two camps increased throughout the 1970s, the Nationalist government successfully thwarted any active form of armed rebellion through a series of authoritarian measures geared to sustain the apartheid regime.<sup>41</sup> Under Verwoerd, the ideological voice behind the apartheid state, the homeland system was created, which further reified racial segregation.<sup>42</sup> The homeland process forced millions of blacks to exchange their South African citizenship for citizenship specific to a homeland.<sup>43</sup> In creating homelands in the reserves, the government hoped to “absorb ‘economically superfluous’ blacks” while allowing economically “‘useful’” blacks to remain in the cities (although often in poverty).<sup>44</sup>

The development of the homeland system accentuated an intensifying rift between those who were otherwise united against apartheid. In particular, the liberation movement was divided with regard to whether dialogue with the ruling civil power structures was necessary or productive.<sup>45</sup> While Chief Mangosuthu Buthelezi of the KwaZulu territory argued that participation in the national political structures could prevent black homelands from being cast aside with an unwanted independence and blacks from being stripped of their South African citizenship, the ANC criticized his stance, arguing that Buthelezi’s Inkatha movement merely supported the political fiction of a productive yet separate development.<sup>46</sup> The rift within the resistance movement diverged most notably after the Soweto Uprising in June 1976.<sup>47</sup> Largely the product of a reaction against the mandate of Afrikaans as the language for state education in black schools, a dramatically unsuccessful rebellion occurred in which hundreds of protesters were killed and thousands injured or exiled.<sup>48</sup> In

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39. SPITZ & CHASKALSON, *supra* note 17, at 7.

40. *Id.*

41. CHRISTIE, *supra* note 20, at 27 (“[B]y the mid 1970s the armed struggle in South Africa had to all intents and purposes ground to a halt. Little was seen or heard of the ANC during this period.”).

42. SPITZ & CHASKALSON, *supra* note 17.

43. *Id.*

44. *Id.* (quoting an unnamed source).

45. *See id.* at 8 (“Several of the homelands, though slow to release themselves from Pretoria’s shackles, became progressively less subservient to the South African government and more interested in bringing about an end to the apartheid system to which they owed their status. Others attempted to prop up the system and their role in it.”).

46. *Id.*

47. *See* SPITZ & CHASKALSON, *supra* note 17, at 8–9.

48. *Id.* at 8.

the wake of the uprising, the resistance movement found itself at an internal crossroads: while Buthelezi believed that black lives were needlessly wasted in the attempt, the ANC emerged adamant to engage in a resuscitated armed struggle.<sup>49</sup> Indeed, until and throughout the formal negotiations between the resistance leaders and the South African government in 1990, Nelson Mandela, the deputy president of the ANC, affirmed that armed struggle was a legitimate form of self-defense when confronted with morally repugnant government structures.<sup>50</sup> The division within the resistance merely underscores the complexity of South Africa's political terrain during the grand apartheid years.

In the final decade of apartheid, although the Nationalist government enacted a series of superficial reforms in response to a growing realization of South Africa's economic dependence on the black population,<sup>51</sup> those measures could not conceal the increasingly apparent failures of the separatist system. Acknowledging that South Africa had to "adapt or die," P.W. Botha inaugurated policies from the late 1970s into the 1980s that purported to encourage "a united South Africa, with one citizenship and a universal franchise,"<sup>52</sup> but the developed measures merely perpetuated the existing system. For example, although the 1983 Constitution created a tricameral Parliament with distinct chambers for coloreds and Indians, these chambers remained subordinate to the largely white President's Council.<sup>53</sup> Likewise, although some of the most egregious apartheid measures were repealed, including prohibitions on mixed marriages and segregation on public transportation, the ruling minority still denied the black majority the opportunity for full rights.<sup>54</sup>

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49. *Id.* at 8–9.

50. See Peter N. Bouckaert, Note, *The Negotiated Revolution: South Africa's Transition to a Multiracial Democracy*, 33 STAN. J. INT'L L. 375, 386 (1997) ("I am in prison as the representative of the people and your organization, the African National Congress, which was banned. What freedom am I being offered while the organization of the people remains banned? . . . Only free men can negotiate. Prisoners cannot enter into contracts.") cited in SHERIDAN JOHNS & R. HUNT DAVIS, MANDELA, TAMBO, AND THE AFRICAN NATIONAL CONGRESS: THE STRUGGLE AGAINST APARTHEID 1948–1990 at 215 (1991).

51. See SPITZ & CHASKALSON, *supra* note 17, at 9 ("The Nationalists came to recognize the economy's dependence on black labor, and began a course of limited reforms designed to bring black workers into the state's economic infrastructure. Yet they never considered granting full political rights to blacks.")

52. *Id.*

53. *Id.*

54. *Id.* at 10.

The South Africa of 1985–1990 was in a perpetual state of emergency.<sup>55</sup> Politically, the constitutional structure of South Africa and the demands of popular will were at odds.<sup>56</sup> Less than 20 percent of South Africa's population could engage in the democratic political game, and a robust form of judicial review was consistently rejected by the ruling party in South Africa throughout the twentieth century.<sup>57</sup> Indeed, the concept of a bill of rights as a component of a new constitutional order was anathema to an *Afrikaanerdom* tradition which gave priority to the State over the interests of the individual.<sup>58</sup> The legacy of apartheid was not merely a government-enforced racism or segregated civil power structures. In the socio-economic sphere, apartheid's repercussions were devastating: income inequality in South Africa had reached catastrophic heights, with the white minority (approximately 15 percent of the population) earning on average eight times the income of the black majority (approximately 75 percent of the population); the top 5 percent of the population consumed more than the bottom 85 percent; four white conglomerates held 87 percent of the land and 95 percent of South Africa's productive capital.<sup>59</sup>

In light of the incontrovertible problems South Africa was facing, when F.W. de Klerk replaced Botha as the National Party Leader and State President in August 1989, a period of "cautiously reformist policy"<sup>60</sup> transitioned quickly into a period pregnant with the possibility of more radical reform measures.<sup>61</sup> Although many were surprised by De Klerk's responsiveness to systemic changes,<sup>62</sup> his willingness to dialogue with the resistance leaders—represented

55. See *id.* at 11 ("In July 1985 President Botha declared a nationwide state of emergency which gave the government even greater powers and discretion to implement detention without trial, to break up the smallest gatherings, and generally to suppress political activity. The state of emergency was renewed each June until 1990.")

56. Ran Hirschl, *The Political Origins of Judicial Empowerment Through Constitutionalization: Lessons from Four Constitutional Revolutions*, 25 LAW & SOC. INQUIRY 91, 135 (2000) ("Prior to the enactment of the 1993 interim Bill of Rights . . . there was perhaps no other country in the postwar world in which the gap between popular will and constitutional arrangements was quite so wide.")

57. SPITZ & CHASKALSON, *supra* note 17, at 11.

58. *Id.*

59. Hirschl, *supra* note 56, at 136.

60. SPITZ & CHASKALSON, *supra* note 17, at 13.

61. In part, the NP's willingness to entertain more radical reform was due to a withdrawal of support from dominant global players such as the United States. During the Cold War era, South Africa garnered international support by "characterizing its struggle with the liberation forces as a fight against communism." See Bouckaert, *supra* note 50, at 378. With the Soviet Union's collapse, the semiotic worth of South Africa in stymieing communism diminished. See *id.* ("Stripped of its anticommunist cloak, the South African government was exposed as an anomalous minority regime which brutally oppressed its majority African population.")

62. See SPITZ & CHASKALSON, *supra* note 17, at 13 ("Many observers were surprised, having thought De Klerk to be conservative and suddenly finding him to be more radical than they had believed.")

by his willingness to release Mandela and other prominent ANC and South African Communist Party (SACP) leaders and enter into negotiations with them—illustrated the diversity of opinion within the National Party.<sup>63</sup> This diversity was even more apparent in National Party members such as Roelf Meyer, Leon Wessels, and Dawie de Villiers, whose leftist positions were integral to the subsequent dialogues.<sup>64</sup> As a result of the new leadership, the mentality toward negotiations shifted. In a watershed speech during the opening of Parliament on February 2, 1990, De Klerk declared: “[O]nly a negotiated understanding among the representative leaders of the entire population is able to ensure lasting peace.”<sup>65</sup> With a changing of the guard, new leadership realized the need for a new platform for negotiation.

### *B. The TRC as a Political Settlement*

Effectively at a deadlock in 1990, both the National Party (NP) and the African National Congress realized that some form of political settlement could not be avoided.<sup>66</sup> While the NP perceived a political re-ordering as the only means of resuscitating a failing economy, the ANC viewed a settlement as a requisite move toward dismantling white hegemony.<sup>67</sup> The backdrop for these negotiations was a series of dramatic reforms announced by De Klerk during his momentous February 2, 1990 address to Parliament: the legalization of several black liberation organizations (including Umkhonto) and the SACP, the release of political prisoners (including the unconditional release of Mandela), and the promise to develop a new, democratic national constitution through dialogue between the NP and the newly-legalized organizations.<sup>68</sup> In the Pretoria Minute of August 7, 1990, the ANC formally suspended armed struggle, committed to the negotiating table, and affirmed the bilateral commitment characterizing the negotiations.<sup>69</sup> The violence between the ANC and the Inkatha Freedom Party

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63. *See id.* at 14 (“[F]actional differences within the governing party were reflected in generational differences. Many of the party’s ‘elder statesmen’, including Botha, were reactionaries. Their rise within the NP paralleled the evolution of apartheid from 1948. For Botha to have started major changes would have amounted to a repudiation of his political heritage.”).

64. Roelf Meyer in particular established important links between the National Party and the ANC; *see id.* at 13 (“[Meyer’s] constant line of communication with the ANC’s Cyril Rampahosa—the Meyer-Ramaphosa ‘channel’—became an indispensable feature of the negotiated transition.”).

65. SPITZ & CHASKALSON, *supra* note 17, at 15 (quoting *Hansard*, 2–9 Feb. 1990, cols. 1–2 (Cape Town: Government Printer)).

66. *See* Bouckaert, *supra* note 50, at 379 (“The ANC and the NP each came to the table with the realization that they had reached a stalemate in their often bloody struggle for power.”).

67. SPITZ & CHASKALSON, *supra* note 17, at 14.

68. Bouckaert, *supra* note 50, at 387.

69. *See id.* at 388 (“We are convinced that what we have agreed upon today can become a milestone on the road to true peace and prosperity for our country. In this we do not pretend to be the only parties

(IFP) continued and ground negotiations to a standstill in the townships.<sup>70</sup> However, with the mediating help of an interfaith group of church leaders led by Frank Chikane, the government and ANC moved out of political deadlock and signed the National Peace Accord in September 1991, a multilateral commitment to pursuing peace.<sup>71</sup>

Formally, what would be an arduous process of constitution-making began at Kempton Park (outside Johannesburg) in December 1991 with the Convention for a Democratic South Africa (or "CODESA I").<sup>72</sup> As a foundational step, CODESA I established a multilateral movement toward a common vision. In the Declaration of Intent, a near-unanimous portion of the attendees pledged their commitment to a "united, nonracial and non-sexist state [and] multiracial democracy."<sup>73</sup> Moreover, the conference established five working groups focused on the following topics: establishing a free political climate, developing a constitution, forming a transitional government, reincorporating the homelands, and deciding time frames for the transition.<sup>74</sup>

When negotiations resumed in May 1992 through CODESA II, the dialogue between the government and the ANC again grew tense as discussions began to implicate questions of who would gain or retain power in the transitional government. Although the two factions agreed on a number of principles, deadlocking the negotiations was the issue of what number would constitute the decision-making majority in the different regions.<sup>75</sup> In the wake of a stymied conference, violent incidents took place, including an attack on the ANC by IFP hostel dwellers, an event which cost forty-nine lives and threatened the negotiation process as a whole.<sup>76</sup> Subsequent to this attack, the Ciskei Military killed twenty-eight people ANC protestors who had entered the homeland.<sup>77</sup> Faced with these examples of spiraling violence,<sup>78</sup> South Africa solicited

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involved in the process of shaping the new South Africa . . . All of us henceforth walk that road in consultation and cooperation with each other." (quoting TIMOTHY D. SISK, *DEMOCRATIZATION IN SOUTH AFRICA: THE ELUSIVE SOCIAL CONTRACT* 94 (1995)).

70. Bouckaert, *supra* note 50, at 387.

71. *Id.*

72. SPITZ & CHASKALSON, *supra* note 17, at 18.

73. Bouckaert, *supra* note 50, at 390.

74. *Id.*

75. *See id.* at 391 ("The ANC saw the issue [of the majority size for decision-making authority] in light of its commitment to democratic majority rule and as an attempt to preserve minority privilege, and both sides refused to budge.").

76. *Id.*

77. *Id.* at 392.

78. *See* Marianne Geula, Note, *South Africa's Truth and Reconciliation Commission as an Alternate Means of Addressing Transitional Government Conflicts in a Divided Society*, 18 B.U. INT'L L.J. 57, 61 (2000) ("The ferocity of the violence, both within South Africa and in the bordering countries, heightened the

international intervention; ultimately, however, the international response did not prove instrumental in the negotiation process.<sup>79</sup>

When productive negotiations did resume, they resumed as a result of encouragement from a surprising corner of the discussions: Joes Slovo, Chairman of the South African Communist Party and commander of Umkhonto, ANC's military wing.<sup>80</sup> Few people were ambivalent toward Slovo, a white South African who was an established and controversial political voice.<sup>81</sup> In his groundbreaking 1992 article, "What Room for Compromise?," Slovo argued that the power imbalance between the South African government and the resistance movement made an unconditional surrender by the ruling regime an unrealistic goal.<sup>82</sup> Rather, the "dangerous radical"<sup>83</sup> counseled compromise, suggesting that the focus of negotiations should remain on "the acceptability of the package as a whole," rather than "minor details" such as those which were currently shackling productive dialogue among the factions.<sup>84</sup> In his article, Slovo outlined essential features<sup>85</sup> which compromise could not diminish, including: a mutually agreed upon compendium of constitutional principles, a permanent constitution adopted by a sovereign, democratically-elected body, and a specific plan for transition toward democracy.<sup>86</sup> Yet, Slovo also suggested areas in which compromise might be justified, such as a "sunset clause" allowing for a discrete period in which power could be shared between the regimes, an informal agreement resolving the regional power dispute, general amnesty for past crimes, and employment benefits for civil servants and security

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realization among the major parties that this stalemate might only be resolved through extreme bloodshed or negotiation.").

79. See Bouckaert, *supra* note 50, at 391-92 ("[T]he United Nations sent peace observers to work with the National Peace Accord and Goldstone Commission structures, and urged other international organizations to do the same . . . However, in contrast to its interventionist approach in Yugoslavia and Somalia, the United Nations seemed intent on forcing the parties in South Africa to formulate their own solution to the problem.").

80. *Id.* at 392.

81. See *id.* ("[Among many white South Africans,] Slovo was seen as a dangerous radical and as the ultimate traitor to his race. Conversely, few whites in South Africa could compete with Slovo for the love and admiration he received from black South Africans.").

82. *Id.*

83. *Id.*

84. Bouckaert, *supra* note 50, at 393.

85. See *id.* (Conversely, Slovo also listed "impermissible" features, including: a minority veto applied to the writing of the constitution, a mandatory power-sharing regime, a permanent agreement regarding the regional powers and boundaries, and any compromise which would perpetuate contemporary racial imbalances.).

86. *Id.*

personnel.<sup>87</sup> Ultimately, through meetings in January and February of 1993 (the “Kempton Park Talks”), Slovo’s suggestions became the structural model which was at the center of a tentative agreement between the once deeply divided ANC and South African government.<sup>88</sup>

With the resuscitation of the negotiation process, several factors subsequently enabled the process to move more quickly toward conclusion. First, after the assassination of Chris Hani, a popular ANC leader, Mandela counseled for sobriety.<sup>89</sup> Indeed, the assassination had the counterintuitive effect of provoking the ANC toward a quicker resolution to the talks, including the establishment of an April 27, 1994 date to the first democratic elections.<sup>90</sup> Second, although the government and ANC sought external support for their bilateral agreement in May 1993, the compromises proved untenable for right wing extremists, who subsequently left the negotiating table,<sup>91</sup> clearing the political road considerably.<sup>92</sup> Third, the global community offered more explicit support of the negotiation process and its resolution.<sup>93</sup> Bearing witness to the international awareness and endorsement of the transitional process ensuing in South Africa, Mandela and De Klerk would share the Nobel Peace Prize in 1993.<sup>94</sup>

Although the formal negotiations inaugurated at CODESA I, CODESA II, and the subsequent Kempton Park Talks were directed toward the construction of a workable constitution, it is impossible to understand why the TRC was defined as a political settlement without accounting for the politics of the constitution-making. Although the TRC did not begin its hearings until 1996, it was negotiated and is anticipated in the “postamble” to South Africa’s Interim Constitution, which states in relevant part:

In order to advance such reconciliation and reconstruction, amnesty shall be granted in respect of acts, omissions and offences associated

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87. *Id.*

88. *See id.* at 394 (“[T]he National Executive Committee of the ANC adopted Slovo’s proposals as the strategic perspective which would guide the ANC through the negotiations, and returned to the negotiating table.”).

89. Bouckaert, *supra* note 50, at 394.

90. *Id.*

91. *See id.* at 395 (Although the Inkatha Freedom Party (IFP) and the extremist white right left to form the Freedom Alliance, opposed to the transition process, the violence which the Freedom Alliance incited merely “inflicted [damage] on the image of the highly splintered right-wing movement.”).

92. *See id.* at 394 (“The walkout and the violence which ensued had the positive effect of strengthening the center and allowing the remaining parties to resolve additional points of dispute more quickly.”).

93. *Id.* at 396.

94. Bouckaert, *supra* note 50, at 396.

with political objectives and committed in the course of the conflicts of the past. To this end, Parliament under this Constitution shall adopt a law determining a firm cut-off date, which shall be dated after 8 October 1990 and before 6 December 1993, and providing for the mechanisms, criteria and procedures, including tribunals, if any, through which such amnesty shall be dealt with at any time after the law has been passed.<sup>95</sup>

The postamble to the Interim Constitution sought to provide a recapitulation of the Constitution's proposals for the future of South Africa in lay terms<sup>96</sup> and was the product of negotiations similar to that which defined the entire constitution-building process.

Despite being the product of one of the last nights of negotiation and "tacked on" to the Interim Constitution, it would be historical revision to argue from those facts that the postamble was politically an afterthought of the negotiations process.<sup>97</sup> Rather, a central argument of this article is that the political momentum (and, at times, deadlock) occasioned by the negotiations process found a necessary resolution in the drafting of the postamble, and as a result, predated the political settlement that was the TRC. The preceding context of the negotiations as a whole—a process which spanned three years and ten months, from February 1990 to November 1993<sup>98</sup>—provides the necessary backdrop to the political tension preceding the drafting of the postamble and the formal completion of the Interim Constitution. From the outset of the negotiations during 1993, a central problem emerging across the negotiation table was whether leaders in the Nationalist Party government were subject to prosecution or extradition.<sup>99</sup>

For those involved in the negotiation process, the question of legal response to NP leaders was a live one, for at that point, apartheid had been deemed in violation of international law.<sup>100</sup> In its initial form, the Constitution

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95. SPITZ & CHASKALSON, *supra* note 17, at 412.

96. *See id.* ("This Constitution provides a historic bridge between the past of a deeply divided society characterized by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colored, race, class, belief or sex. The pursuit of national unity, the well-being of all South African citizens and peace, require reconciliation between the people of South Africa and the reconstruction of society.").

97. *Id.* at 413.

98. *Id.* at 414.

99. *See* Geula, *supra* note 78, at 62 ("Whether the leaders of the NP government could be subjected to prosecution or extradition under international law remained an open question.").

100. *See* John Dugard, *Reconciliation and Justice: The South African Experience*, 8 *TRANSNAT'L L. & CONTEMP. PROBS.* 277, 291(1998) ("Although apartheid was an international crime there was no suggestion from the United Nations, following the peaceful transition from apartheid to democracy between

contained no amnesty clause; indeed, ANC leaders were not only adamant in their refusal to entertain the notion of blanket amnesty, but sought a closer investigation of potential excesses on the part of the NP government.<sup>101</sup> In effect, the political terrain of both South Africa's history as well as the immediate context of the negotiations process led the bargaining parties to a standoff: in the period of the negotiations, because South Africa's situation no longer presented a viable threat to international peace, an international criminal tribunal (such as that created for Rwanda under the UN Charter's Chapter VII powers) was not justified.<sup>102</sup> Moreover, while the new regime could decide to prosecute NP leaders for their involvement with apartheid, prosecution would have been politically untenable given the NP government's active presence throughout the constitution-making process and transition period.<sup>103</sup> As a result of the political landscape at the culmination of an already beleaguered series of talks, only two alternatives remained: unconditional (blanket) amnesty or conditional amnesty for specific individuals.<sup>104</sup> As the postamble illustrates the result of political negotiation—and indeed, the means inaugurating South Africa's democratic state—was the constitutional inclusion of conditional amnesty for “political” crimes.<sup>105</sup>

### III. THE BIRTH OF A METANARRATIVE

Understanding the Truth and Reconciliation as first and foremost a political settlement need not eviscerate the TRC of its ontological worth. However, as

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1990 and 1994, that those responsible for the worst features of apartheid should be brought to international justice.”).

101. Geula, *supra* note 78, at 61–62.

102. Dugard, *supra* note 100.

103. *Id.* at 291–92 (noting that the National Party likely expected to be “rewarded with places in a government of national unity” functioning under an interim Constitution).

104. *Id.* at 292.

105. What constitutes “political objectives” for the purposes of conditional amnesty remains the subject of great debate. See, e.g., Ronald Slye, *Justice and Amnesty*, in LOOKING BACK, REACHING FORWARD: REFLECTIONS ON THE TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA 174, 179 (Charles Villavicencio & Wilhelm Verwoerd eds., 2000) [hereinafter LOOKING BACK] (“While all states accept in principle the legitimacy of the political office exception, there is no consensus on the definition, interpretation, and application of the exception.”); Anurima Bhargava, *Defining Political Crimes: A Case Study of the South African Truth and Reconciliation Commission*, 102 COLUM. L. REV. 1304 (2002) (“Determining whether an act was associated with a political objective, or, articulated more broadly, how a political crime should be defined, presented considerable difficulty to the Committee.”); Emily H. McCarthy, *South Africa's Amnesty Process: A Viable Route Toward Truth and Reconciliation?*, 3 MICH. J. RACE & L. 183, 213 (1997) (“Conceivably, [the political amnesty clause] gives the Committee the discretion to deny amnesty for certain acts, even if they served a political goal, on the grounds that the ‘political’ act in question was too horrific or disproportional to the goal pursued to qualify for amnesty.”).

this article argues, to understand the TRC outside its political context—and in an artificial marriage to pure ideology—is to generate a metanarrative that may ultimately prove a fiction, to the detriment of its advocates and adherents. This article militates against that (pervasive) perception of the TRC, and instead, seeks a more balanced perspective, one which can better gauge the application (or non-application) of the TRC to the experiences of states engaging the restorative justice question. In this discussion, the initial section will set out the element of the TRC as they developed subsequent to the drafting of the Interim Constitution. Subsequently, the discussion shifts to the international community's reaction toward the South African experience, and analyzes whether that experience has been justly interpreted. Under the thesis of this article, the international community has not, in fact, portrayed the TRC in an objective fashion, and instead, developed a restorative justice mythology that continues to be perpetuated today.

#### *A. Forming the TRC: Process and Elements*

Although the formal legislation inaugurating the TRC was not enacted until two years after the completion of the Interim Constitution, the outline for its existence was foundationally negotiated through the series of political compromises between the National Party and the African National Congress.<sup>106</sup> However, while the general concept—conditional amnesty—may have been a negotiated and settled concept, the precise mechanism by which that amnesty could be granted remained opaque.<sup>107</sup> Complicating matters was the realization that a context-appropriate model for the TRC might prove difficult to find. A pivotal player in the early discussions concerning the TRC, Minister for Water Affairs Kader Asmal, articulated these difficulties: “[t]here is no prototype that can be automatically used in South Africa. We will be guided, to a greater or lesser extent, by experiences elsewhere, notably in those countries that managed to handle this highly sensitive—even dangerous—process with success. But at the end of the day, what is most important is the nature of our particular settlement and how best we can consolidate the transition in South Africa.”<sup>108</sup>

Although South Africa was not without precedent to consult in the creation of its TRC, South Africa was distinguished as the first such attempt to officially

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106. See LYN S. GRAYBILL, *TRUTH & RECONCILIATION IN SOUTH AFRICA: MIRACLE OR MODEL?* 2 (2002) (“The whole notion of amnesty in the TRC . . . was largely the outcome of various compromises that had been hammered out between the African National Congress (ANC) and the National Party (NP) in the transition period leading to the adoption of an interim constitution in 1993, with input from twenty-six political parties.”).

107. See *id.* at 3 (“Although amnesty had been agreed to in the interim constitution, the procedures had been left open.”).

108. *Id.* at 1 (quoting *THE HEALING OF A NATION?* 27 (Alex Boraine & Janet Levy eds., 1994)).

invite public debate and engagement with the practical development of a truth commission.<sup>109</sup> At the outset, when nongovernmental organizations, spiritual leaders, and human-rights lawyers first began discussing the possibility of a truth commission as a means of transitional justice for South Africa,<sup>110</sup> the creators of the Commission turned to prior truth commissions in Brazil, Argentina, Chile, and El Salvador for practical guidance.<sup>111</sup> In fact, in 1994, the Institute for Democracy in South Africa (IDASA) sponsored two conferences which allowed delegates from Chile, Argentina, and eastern and central Europe to narrate their own context-specific struggles in dealing with former members of oppressive regimes.<sup>112</sup> These conferences served to increase the public dialogue concerning the potentially problematic features of the truth commission model of restorative justice.<sup>113</sup> For example, when considering the Latin American examples, a problem that featured prominently in each situation was difficulty in maintaining accountability for uncooperative perpetrators of crimes.<sup>114</sup> Borrowing from the flawed histories of these prior truth commissions, the creators of the TRC wanted to ensure the cooperation of those involved in the human rights violations in South Africa's apartheid history.<sup>115</sup>

Although South Africa's TRC was the first truth commission to be established by Parliament rather than presidential decree,<sup>116</sup> the legislative process remained a "patchwork of all the viewpoints of the country,"<sup>117</sup> and others have maintained that the enactment of the Truth and Reconciliation Act remained very much a settlement of political compromises.<sup>118</sup> On several points, the legislative momentum could have ground to a halt. From May 1994 through March 1995, the parliamentary Standing Committee on Justice (whose

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109. See GRAYBILL, *supra* note 106.

110. See Eisnaugle, *supra* note 5, at 224 ("The idea that something like the TRC would be necessary in order to help ease South Africa's transition from the system of apartheid to a democratic system was first developed by nongovernmental organizations, religious leaders, and human-rights lawyers.").

111. *Id.*

112. GRAYBILL, *supra* note 106.

113. *Id.*

114. See Eisnaugle, *supra* note 5, at 224-25 ("The creators of South Africa's truth commission quickly realized that many of the truth commissions in Latin America failed to get the cooperation of the perpetrators of crimes that had been committed. For example, Chile's truth commission, the Rettig Commission, possessed no judicial powers. This lack of power meant that the commission could not establish culpability or impose penalties.").

115. *Id.* at 225.

116. GRAYBILL, *supra* note 106, at 3.

117. *Id.* at 2-3.

118. See *id.* at 3 ("The process reflects to a certain degree party political compromises and not so much 'the will of the people.'"); see also CHRISTIE, *supra* note 20, at 81 ("The TRC was to some extent driven by ANC directives and to some extent by various different groups within civil society.").

members spanned all the major political parties) met to hold public hearings asking for recommendations concerning the draft legislation, debate these recommendations, and drafting the legislation itself.<sup>119</sup> Illustrating the difficulties of the process, in March 1995, the Committee met daily and ultimately invested 127 hours before tabling the draft to the National Assembly.<sup>120</sup> When Parliament passed the bill on May 17, 1995, nearly a year had elapsed since its presentation.<sup>121</sup>

Among the several potential areas for political deadlock was the concern over whether the amnesty hearings should be held in secret.<sup>122</sup> The National Party objected early to the clause in the initial draft of the bill declaring that the committee and sub-committee meetings would be open to the public.<sup>123</sup> After further deliberation, the bill was only accepted with a concessionary "secrecy clause."<sup>124</sup> To the NPs detractors, the clause constituted a desire to obfuscate the history of what had occurred or avoid indictment, a violation of the Bill of Rights, and an affront to both the victims and survivors of apartheid.<sup>125</sup> Rising to the NPs defense, others argued that secrecy was necessary to protect witnesses.<sup>126</sup> However, faced with overwhelming external support of public hearings,<sup>127</sup> the Committee ultimately overturned the cabinet's decision to include a secrecy clause and returned to a draft which allowed for public hearings with provisional conditions on when in-camera hearings would be allowed.<sup>128</sup>

Further complicating the political process of drafting the Truth and Reconciliation Act was the choice of commissioners.<sup>129</sup> After rejecting an initial suggestion that commissioners be appointed by the president as inviting political favoritism, most of the parties to the process agreed on creating a consulate

119. GRAYBILL, *supra* note 106, at 2.

120. *Id.*

121. *Id.*

122. CHRISTIE, *supra* note 20, at 83.

123. *Id.* at 84.

124. *Id.*

125. *See id.* ("[P]erhaps the most damning view of this attempt to make amnesty proceedings secret was the fact that the people who had suffered would never really know who had ordered the violations in the first place and how such things operated, whether in a systematic or haphazard way.")

126. *Id.*

127. *See* CHRISTIE, *supra* note 20, at 84-85. ("The various NGOs and organizations were quick to react to [the possibility of a secrecy clause] and in a press statement endorsed by 30 of them argued that secrecy was contrary to the Bill of Rights and violated the rights of victims and survivors of the apartheid regime, including the right to information and fair administrative proceedings.")

128. *Id.* at 85.

129. *See id.* ("How would commissioners be appointed? What kinds of qualities would a commissioner require? What measures should be taken now?")

between the president and the cabinet to pick the members.<sup>130</sup> However, the process by which the commissioners would be chosen remained unclear: while the political entities involved in the negotiations sought to preserve democratic participation in choosing members, the Non-governmental Organizations (NGOs) (again exerting their influence) maintained that commissioners should not be subject to a political appointments process, but rather, selected through an evaluation of their personal qualities.<sup>131</sup>

Finally, the passage of the Truth and Reconciliation Act also required navigating the problematic political waters of what constituted a “political” crime for the purposes of the legislation.<sup>132</sup> Several criteria were proposed to determine what might constitute a political crime: the “gravity” of the offense, whether a “reasonable and proportional relationship” existed between an individual’s political objective and means used to attain that objective; and whether the act was directed against the government, political opponents, or private individuals.<sup>133</sup> The criteria were adopted from a list of principles compiled by Carl Norgaard, then President of the European Commission on Human Rights, who had researched the application of the political offense exception in extradition law.<sup>134</sup> However, the NP rejected these criteria, arguing that the ANC were not subject to the same criteria, and that the principles, as applied, would amount to a witch hunt on the part of the ANC.<sup>135</sup> These differences of opinion resulted in political deadlock between the two parties,<sup>136</sup> and a compromise was not reached until the NP conceded to a contextual understanding of the Norgaard principles. These principles were codified into section 20 of the Truth and Reconciliation Act.<sup>137</sup>

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130. *Id.*

131. *See id.* at 86 (The qualities suggested in deciding who should be a commissioner included: an ability to make impartial judgments; moral integrity accompanied by a known commitment to human, rights, reconciliation, and disclosure of truth; no high profile political involvement or affiliation; not a potential applicant for amnesty within the bounds of the legislation.)

132. CHRISTIE, *supra* note 20, at 86.

133. *Id.* at 87.

134. Bhargava, *supra* note 105, at 1312.

135. CHRISTIE, *supra* note 20, at 87–88.

136. *Id.* at 88.

137. As codified, the Act suggests that the Committee consider the following principles in determining whether an act was a political crime:

[T]he motive of the person who committed the act; the context in which the act took place; the legal and factual nature of the act, including the gravity of the act; the object or objective of the act, and in particular whether the act was primarily directed at a political opponent or against private property or individuals; whether the act was committed in the execution of an order of, or on behalf of, or with the approval of a political organization or the state; the relationship between the act and the political objective pursued, and in particular the directness and proximity of the relationship and

After years of apartheid-related human rights abuses, and drawing from the postamble drafted at the culmination of years of negotiation, the South African Parliament enacted the Promotion of National Unity and Reconciliation Act 34 (or the Truth and Reconciliation Act) on July 19, 1995.<sup>138</sup> According to its stated objectives, the TRC would investigate the human rights abuses occurring within a determined period after March 1, 1960, grant amnesty to those who would “make full disclosure” within the given period, afford victims an opportunity to narrate the violations they suffered, and facilitate nation-wide healing and reconciliation.<sup>139</sup> As established, the TRC did not exist as a judicial body—it possessed no power to punish or determine any form of liability, and indeed could provide amnesty to those who might make full disclosure of such acts, if those acts could be related to political objectives.<sup>140</sup> The quasi-legal body was composed of sixteen members, with Desmond Tutu, the Anglican Archbishop of Cape Town, serving as chair.<sup>141</sup> Three committees established by the TRC assess, respectively, human rights violations, reparations and possible rehabilitation, and justice.<sup>142</sup> Moreover, by its own legislative mandate, the TRC committees only cover those “gross” violations of human rights which occurred between March 1, 1960 (the Sharpeville massacre) and December 5, 1993 (the date that the transitional government was established). With these elements, the

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the proportionality of the act to the objective pursued.

Promotion of National Unity and Reconciliation Act, No. 34 of 1995, available at <http://www.polity.org.za> [hereinafter Truth and Reconciliation Act]; see also Bhargava, *supra* note 105, at 1312 [hereinafter Truth and Reconciliation Act].

138. Truth and Reconciliation Act, *supra* note 137.

139. *Id.* at 1. In relevant part, the Truth and Reconciliation Act states:

[The objectives of the Truth and Reconciliation Commission are to:] [P]rovide for the investigation and establishment of as complete a picture as possible of the nature, causes, and extent of gross violations of human rights committed during the period from 1 March 1960 to the cut-off date contemplated in the Constitution, within or outside the Republic, emanating from the conflicts of the past, and the fate and whereabouts of the victims of such violations; the granting of amnesty to persons who make full disclosure of all the relevant facts relating to acts associated with a political objective committed in the course of the conflicts of the past during the said period; affording victims an opportunity to relate the violations they suffered; the taking of measures aimed at the granting of reparation to, and the rehabilitation and the restoration of the human and civil dignity of, victims of violations of human rights; reporting to the Nation about such violations and victims; the making of recommendations aimed at the prevention of the commission of gross violations of human rights. . . .

*Id.* (emphasis added).

140. CHRISTIE, *supra* note 20, at 90.

141. *Id.*

142. *Id.*

Truth and Reconciliation Act inaugurated the TRC after a process of negotiation and political concession. From December 1995 until October 1998 (when a 3500-page final report was presented to President Nelson Mandela), the TRC held hundreds of hearings, received the statements of 21,000 individuals, and processed more than 7000 applications for amnesty.<sup>143</sup>

### B. Ideology

With Nelson Mandela at the helm, his new government, the Government of National Unity (GNU) faced the daunting task of navigating the terrain of a land that was defined largely by the ravages of apartheid policies.<sup>144</sup> As discussed above, although issues of national unity and reconciliation—which have rightly captured the imagination of the global community—were crucial to the vocabulary of the TRCs creation, the fundamental engine of the new Constitution and the TRC was the political desire to ensure a peaceful transition to democracy.<sup>145</sup> The driving factors in these negotiations were not simply truth and reconciliation—both values were abstractions that, while derivative of a peaceable negotiation's result, were subject to the political concessions characteristic of the entire negotiation. However, today, a ten-year space has allowed for a re-reading of the South African narrative. Few acknowledge that the TRC was forged in the furnace of political dissention, and throughout its hearings, was subject to internal and external controversy.<sup>146</sup> Just as the focus of the international community in the mid-1970s was on the particularities of South Africa's oppressive apartheid regime,<sup>147</sup> today, the international focus is on the semiotic weight of South Africa's TRC as a restorative justice success story.<sup>148</sup> Significantly, there exists a "schism" between the response of South

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143. Daly, *supra* note 5, at 122.

144. See Charles, *supra* note 23, at 82 ("The most pressing problem confronting the new government was how to reconcile a country that had been torn apart for decades by apartheid.").

145. *Id.* at 82–83.

146. See Colleen Scott, *Combating Myth and Building Reality*, in LOOKING BACK REACHING FORWARD: REFLECTIONS ON THE TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA 107, 108 (Charles Villa-Vicencio & Wilhelm Verwoerd eds., 2000) ("To say that the TRC was controversial would be a radical understatement. Thanks to the transparency of the entire process, it even generated controversy outside the country. Several of the South African political parties declined to accept the TRC officially.").

147. See Jeremy Rabkin, *The Politics of the Geneva Convention: Disturbing Background to the ICC Debate*, 44 VA. J. INT'L L. 169, 196 (2003) ("South Africa's apartheid system probably exhibited the most systematic policy of racial discrimination practiced by any state in the world at the time and was roundly denounced by almost every other state. It provoked particular fury among the newly independent states, which, by the mid-1970s, constituted, the majority of the General Assembly.").

148. See, e.g., François Du Bois, "Nothing but the Truth": the South African Alternative to Corrective Justice in Transitions to Democracy, in LETHE'S LAW: JUSTICE, LAW AND ETHICS IN RECONCILIATION 91 (Emilios Christodoulidis & Scott Veitch eds., 2001) ("[J]ust as the architects of the South

Africans and non-South Africans to the TRC—while the TRC enjoys an exceedingly high international reputation, many South Africans themselves remain “skeptical” of its benefits.<sup>149</sup> Describing the development of this metanarrative early in the TRCs development, journalist Antjie Krog wrote, “It is clear that the commission has taken on a moral life of its own and is willing to oppose even the party that gave it birth.”<sup>150</sup> Ironically, a process geared toward the cathartic reconstruction of a legitimate narrative and “exposing reality”<sup>151</sup> can itself become subject to historical re-reading and revision.

The TRC’s semiotic weight derives largely from its development within intersecting spheres of politics and ideology. At the outset of the resistance movement in South Africa, political and ideological goals existed in a functional marriage. As Jakes Gerwel, former Director-General in the Office of the State President describes: “[n]ational reconciliation was . . . concurrently imbedded in the anti-apartheid and democratic struggle.”<sup>152</sup> What makes productive analysis of the TRC difficult is the conflation of political goals or concessions (in the push toward a democratic state) with ideological guideposts (such as national reconciliation). Therefore, a critique of the TRC as a developing metanarrative needs to engage in some conceptual severance in order to parse out the reasons for its constructed mythology.

In many ways, the reasons behind the formation of the TRC as a dominant ideological metanarrative flow from its own legislative mandate to focus on those gross violations of human rights that characterized decades of injustice and oppression.<sup>153</sup> As a result of the limited range of actions implicated within the terms of the TRC, those “gross violations” became representative of the apartheid years.<sup>154</sup> Naturally, with the focus on such egregious acts, the TRC was translated, for the global community, from a primarily political narrative

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African strategy drew on experiences elsewhere, others have looked expectantly towards South Africa for a precedent on dealing with past injustice in the transition to democracy.”)

149. Daly, *supra* note 5, at 156. Daly observes further that outsiders may have the “luxury” of focusing on the TRC’s promise (rather than its shortcomings) because “they do not live with the problems of quotidian life in South Africa and can think about how the lessons learned in South Africa can be used in other parts of the world.” *Id.* at 158.

150. Shriver, *supra* note 14, at 13 (citation omitted).

151. See Scott, *supra* note 146, at 111 (“The South African TRC was—and is—about peeling away deceit and exposing reality.”).

152. Jakes Gerwel, *National Reconciliation: Holy Grail or Secular Pact?*, in *LOOKING BACK REACHING FORWARD: REFLECTIONS ON THE TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA* 277 (Charles Villa-Vicencio & Wilhelm Verwoerd eds., 2000).

153. *Id.* at 279.

154. See *id.* (“These limited categories of human rights violations, subsequently heard and publicized by the TRC, had in a sense to symbolically carry the burden of that entire past of division, strife, conflict, suffering, and injustice.”).

into a primarily ideological narrative.<sup>155</sup> The overall result of this new metanarrative has been a conceptual shift, one which invited a move away from the “statist” perception of the apartheid regime and the ensuing negotiation process to “a more human substantive understanding based in social history and biography.”<sup>156</sup> Through public hearings that became the site for oral histories, the TRC sidestepped its laborious birthright in the political negotiations process and acquired a literary legacy and force.<sup>157</sup> The overall result was a Commission that took on mythological proportions by adopting a universally-applicable vocabulary for discourse.<sup>158</sup>

Politically, the individuals who were involved in the TRCs development amplified its construction as an ideological formula rather than its original position as a “primarily formal measure in [the] overall political settlement.”<sup>159</sup> In particular, with Bishop Desmond Tutu<sup>160</sup> and Dr. Alex Boraine<sup>161</sup> at the helm, the Commission was naturally overlaid with vocabulary that traversed the sacred and secular.<sup>162</sup> The ethos of forgiveness captured by the TRC fueled a view of the Commission as having an almost scriptural intonation.<sup>163</sup> The public

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155. See *id.* (“The pure horror of those narratives of suffering, degradation and the personal tragedy, of human beings caught up and involved as victims and perpetrators, could not but have focused the national attention and awareness on the deeply personal and emotional levels at which people in this society, given its history, should (also) reconcile with each other and with themselves for their part in structured brutality.”).

156. *Id.*

157. See Gerwel, *supra* note 152, at 280 (“It is in the construction of such a lineage of narratives of national remembrance that the TRC may be found to have made its most lasting contribution. As an event of story-telling, confession and forgiving, within a quasi-judicial framework, it represented a unique moment in the country’s history—an interstitial pause for a nation to acknowledge its unity and intimate inter-connections also in perversity and suffering.”).

158. See Teitel, *supra* note 1, at 83 (“Conflating public and private choices [in the restorative justice model] signaled the breakdown and interconnection of the private and public spheres, a phenomenon associated with globalization. The perceived democratic deficit has led to the pursuit of a universalizing and legitimizing discourse.”).

159. Gerwel *supra* note 152, at 280.

160. See Paul Lansing & Julie C. King, *South Africa’s Truth and Reconciliation Commission: The Conflict Between Individual Justice and National Healing in the Post-Apartheid Age*, 15 *Ariz. J. Int’l & Comp. L.* 753, 785 (1998) (noting that the choice of Tutu as chairperson of the TRC has been subject to criticisms that the TRC was dominated by “an element of clericalism”).

161. Richard John Galvin, *The Case for a Japanese Truth Commission Covering World War II Era Japanese War Crimes*, 11 *TUL. J. INT’L & COMP. L.* 59, 96 n.292 (2003) (At the time of his appointment as Deputy Chairperson of the TRC, Dr. Boraine was a prominent “former church leader.”).

162. See Nancy J. Holland, “*Truth as Force*”: *Michel Foucault on Religion, State Power, and the Law*, 18 *J.L. & RELIGION* 79, 92 (2002) (“The reconciliation at issue [in South Africa’s Truth and Reconciliation Commission] remains . . . ambivalent between a socio-political rite of, if not forgiveness, at least reintegration into the social fabric of the society, and religious salvation.”).

163. See Eisnagle, *supra* note 5, at 229 (“The TRC best exemplifies how an international truth commission focused on the theological goals of restorative justice would look and function.”).

hearings, in particular, re-framed the TRC as less an agent for political transition and rather, an agent for spiritual rehabilitation. For those involved, Tutu's leadership informed the tenor of the proceedings: "[Tutu] wept with the victims and marked every moment of repentance and forgiveness with awe. Where a jurist would have been logical, [Tutu did not hesitate] to be theological. He sensed when to lead audience members in a hymn to help a victim recover composure and when to call them all to prayer."<sup>164</sup> Ultimately, the spiritual vocabulary engaged by the TRC leadership helped amplify the TRCs development into the restorative justice narrative. As a result, contemporary elements of TRCs in different countries are instinctively associated with a theological discourse.<sup>165</sup>

Moreover, economically, these are beneficial times for transitioning states to be utilizing restorative justice ideologies. As a result of the popularity of the TRC metanarrative in the global community, nations in transition may become more influenced to pursue a restorative justice model since "they rely disproportionately on international legitimacy and material aid."<sup>166</sup> The effect of these subtle economic pressures is not only a more categorical acceptance of truth commissions, but also the perpetuation of a mythology which, as discussed *infra*, may be ill-suited to meet its professed goals.

#### IV. SOUTH AFRICA TODAY—WHEN CONFESSION PROVES INSUFFICIENT

Since the metanarrative of the TRC turns largely on the presumption that cathartic truth-telling and forgiveness could repair a nation broken by apartheid, a productive critique of South Africa's TRC must also examine the effectiveness of this model of restorative justice. Has the TRC made strides in the national reconciliation it sought to inaugurate? This section of the article suggests that the culture of confession modeled in the TRC and dominating contemporary discourse concerning restorative justice is more cathartic<sup>167</sup> than constructive.

The contemporary culture of restorative justice, and of current truth commission models, is forward-looking, focusing on the future possibilities of

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164. *Id.* at 230 (quoting Peter Storey, *A Different Kind of Justice: Truth and Reconciliation in South Africa*, NEW WORLD OUTLOOK, July/Aug. 1999, at 17).

165. See, e.g., Nahal Kazemi, *Prospects for Justice and Reconciliation in Sierra Leone*, 44 Harv. Int'l L.J. 287, 293 (2003) ("Churches in Sierra Leone played a significant role in the peace negotiations through the Inter-Religious Council of Sierra Leone, so the choice of a religious leader for the commissioner may resonate with the country.").

166. Daly, *supra* note 5, at 111–112.

167. See Margaret M. Russell, *Cleansing Moments and Retrospective Justice*, 101 MICH. L. REV. 1225, 1265 (2003) ("Critical to the investigatory function of the TRC was the catharsis of personal storytelling by survivors, witnesses, and wrongdoers. According to Archbishop Tutu and others, storytelling as the articulation of suffering is therapeutic, rehabilitative, and educational; it was the first step toward forgiveness and reconciliation.").

forgiveness and reconciliation. In discussing the development of restorative justice, Ruti Teitel notes: “[f]orgiveness became a distinctive form of political apology, understood as an act of contrition in a realm of unity politics.”<sup>168</sup> Suddenly, personal rehabilitation is replete with political significance.<sup>169</sup> The outstanding question, however, is to what degree confession and truth-telling are effectively therapeutic measures.

If a proper critique of the Truth and Reconciliation is to develop, a fundamental premise must be challenged: is this new, forcible re-encountering of the past<sup>170</sup> a productive therapy? Although contemporary scholarship concerning the TRC may assume otherwise,<sup>171</sup> as a matter of “intellectual historiography and human self-understanding,” the notion of revisiting the past in order to move forward is a value that is “under siege.”<sup>172</sup> Restorative justice models are nominally attached to the legal sphere, yet truth commissions may now engage a more metaphysical process.<sup>173</sup> The question of whether past-orientation can be a successful means of nation-(re)building is critical today, for six years after the final report of the TRC, many South Africans continue to wonder “why the end of the rainbow seems so dull.”<sup>174</sup>

While the TRC established an express goal of promoting national reconciliation, the process of individual applications created a confusing interface between politics and ethics: while the limited number of cases seen by the TRC naturally took on symbolic force in moral terms, the screening process was defined by a legal definition of those acts which could claim a political

168. Teitel, *supra* note 1, at 84.

169. See Daly, *supra* note 5, at 86 (“In the TRC’s understanding, reconciliation, through individually experienced, has national ramifications.”).

170. See Scott Veitch, *The Legal Politics of Amnesty*, in *LETHE’S LAW: JUSTICE, LAW AND ETHICS IN RECONCILIATION* 33, 36 (Emilios Christodoulidis & Scott Veitch eds., 2001) (“[L]aw is conventionally future-oriented [and] retrospectively is shunned [because] law’s normativity is bound up with the possibility of obeying or disobeying its commands.”).

171. See, e.g., Daly, *supra* note 5, at 132–33 (“The families of those unlawfully tortured, maimed or traumatized become more empowered to discover the truth, the perpetrators become exposed to opportunities to obtain relief from the burden of a guilt or an anxiety they might be living with for many long years, the country begins the long and necessary process of healing the wounds of the past, transforming anger and grief into a mature understanding and creating the emotional and structural climate essential for [reconciliation].”).

172. Teitel, *supra* note 1, at 86.

173. See *id.* at 87 (“The question remains whether there are any transitional justice baselines or any threshold minimum beyond which historical, psychological, or religious inquiry ought to be characterized as justice-seeking. . . The relevant inquiry is not a metaphysical enterprise, but rather must be understood in its historical and political context.”) (emphasis added); but see Daly, *supra* note 5, at 134 (“While justice and healing are not synonymous, there is a certain commonality in the sense that both are concerned with achieving a balance, within the body or the body politic.”).

174. Daly, *supra* note 5, at 156–57 (observing that some South Africans themselves believe the TRC to have produced “division and pain and very high but unfulfilled expectations of closure and healing”).

objective. The amnesty process developed according to an individual-by-individual mechanism; for example, when thirty-seven ANC members sought amnesty for human rights violations on which they did not elaborate, that “blanket” amnesty was categorically denied.<sup>175</sup> However, the individualization that characterizes the amnesty process has counterintuitive results. While the individual narrative gains a certain moral force, particularly in light of hearings which stressed the quasi-religious parables of oral histories, the overt language of the hearings maintains an (arguably artificial) distinction between the legal and ethical spheres by focusing on the language of actions “associated with a political objective.”<sup>176</sup> Although the TRC panel ultimately considers the ways in which expression of “moral aspects” as a component of the “process of reconciliation in its broader context,” the panel refuses to confer a judgment based on the “moral appropriateness” of an action in its prior context.<sup>177</sup> The argument of this article is that the TRCs legacy has been confused as a result of two conflated contexts: the moral and legal spheres. The national reconciliation for which the TRC was tailored cannot exist merely on symbolic or moral grounds, which is the force of the TRCs legacy.

Confounding the TRCs pursuit of truth (as a necessary predecessor to reconciliation)<sup>178</sup>—and thereby complicating the TRCs legacy—is the complex interrelationship between truth and memory. In analyzing the amnesty process instituted by the TRC, legal theorist Scott Veitch observes: “[T]ruth is not the object to be uncovered in the contemporary hearings on amnesty, but rather what is to be articulated is the truth of the manifestation of memory. Moreover, this memory is not itself simply an object, since it is inseparable from the performative process that recalls it as an event.”<sup>179</sup> Effectively, the theoretical complication of the TRC is that “truth,” in all its assumed, capitalized grandeur, is not necessarily an artifact of the past that can then be subject to forensic<sup>180</sup> discovery. Rather, truth operates in tandem with an individual’s disclosures, and the process which constitutes memory is located in “no less than the decision-making process of the amnesty panel.”<sup>181</sup> Ultimately, the process is

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175. Veitch, *supra* note 170, at 38.

176. *Id.*

177. *Id.*

178. *See id.* at 39 (observing that the TRC premised amnesty on the notion that truth was required for reconciliation); *see also* Du Bois, *supra* note 148, at 92 (“Reconciliation through truth” was the lodestar of the South African vision of transitional justice.”) (quoting unnamed source).

179. Veitch, *supra* note 170, at 39 (emphasis original).

180. For a discussion of various definitions of “truth” examined by the TRC, *see infra* Part III. My use of the term “forensic” here is not intended to be conflated with a forensic concept of truth, which was arguably dismissed by the TRC. *See* Du Bois, *supra* note 148, at 97–98 (“The TRC itself discounted the value of the ‘forensic’ notion of truth.”).

181. Veitch, *supra* note 170, at 39.

problematic because the amnesty hearings are dependent on what is essentially “not the truth of the event but of its accounting . . . [which] from the point of view of adjudication [is] unknown and unknowable.”<sup>182</sup> Since the TRC panel already possessed a distinct view on the events of apartheid,<sup>183</sup> the practical result of the TRCs emphasis on full disclosure is an inevitably political re-evaluation of the past events.<sup>184</sup>

Perhaps most fundamentally, the TRC is problematic in its assumption that confession and truth-telling will produce a psychological benefit of reconciliation and a social benefit of nation-building without the “settled” quality of a judicial decision or the requisite repentance of a theological process.<sup>185</sup> As François du Bois, law professor at the University of Cape Town, observes: “[t]o engage in the search for understanding is therefore to express a commitment to the possibility of meaning. Hence, before the search can begin, that possibility must be established.”<sup>186</sup> Simply put, can nation-building, reconciliation, and justice be legitimate results of truth-telling when “truth” itself is flexible in meaning? According to the Final Report from the TRC, four notions of truth are implicated in the public hearings: “factual or forensic truth; personal or narrative truth; social or ‘dialogue’ truth and healing and restorative truth.”<sup>187</sup> However, the ethos of the hearings, and in particular, the emphasis on oral confession as preceding reconciliation, suggest that the notion of “healing and restorative truth” was the guiding principle of the Commission’s work.<sup>188</sup>

182. *Id.* at 40.

183. *See* Du Bois, *supra* note 148, at 93–94 (noting that the question of how to approach the past nearly derailed the initial transitional negotiations because it was a position of power to “control the past”).

184. *See* Veitch, *supra* note 170, at 42 (“The explicit insertion of a conditional re-reading of the events of the past requires a determinedly political assessment of the legal response.”); Du Bois, *supra* note 148, at 107 (“[T]he TRC’s truth was as conditioned by the network of power relationships that existed during the transition as criminal trials would have been.”). *See* Veitch, *supra* note 170, at 41 (noting that further complications of political assessment of memory is inconsistency in application outcomes and that inconsistency may result from judges who have naturally not been able to distance themselves from “assessing qualitatively” the applications for amnesty).

185. *See* Du Bois, *supra* note 148, at 96 (“[There is an underlying] suspicion that the search for truth does *not* provide a way out of the dilemma of having to choose between, and deal with the draw-backs of, impunity—allowing the past to rule the future—and victor’s justice—allowing the future to harness the past to its own ends.”).

186. *Id.* at 97.

187. *Id.* (quoting TRUTH AND RECONCILIATION COMMISSION OF SOUTH AFRICA REPORT 110 (1998)).

188. *See id.* at 98. (“It is difficult to see how the TRC could have concluded [that any notion of justice would take priority over ‘healing truth.’] . . . It was meant to be neither a court nor a promoter of impunity. Its task was not to establish guilt, but to establish responsibility. Since it could not judge or punish, it had to diagnose and heal.”).

Another difficulty with conditional amnesty which focuses simply on “full disclosure”<sup>189</sup> of some politically-associated act is the divergence between confession and repentance. Is repentance, and not merely confession, what is required of a truly forward-looking attempt at reconciliation? In the dialectical tension that exists between secular law and ethics, it often appears that “repentance belongs to another world, to another universe of discourse.”<sup>190</sup> Aeyal M. Gross, law professor at Tel Aviv University, emphasizes that legal discourse can indeed bear sociologically relevant fruit: “[d]uring transitions, the law plays a pivotal role in shaping social memory through trials, investigations, and TRCs. The preservation of a historical narrative during transitions is crucial for addressing past events that have not been talked about, as well as for informing the evolution of a more democratic society.”<sup>191</sup> However, the shaping of a society’s collective memory and the development of a coherent historical narrative may not effect nation-wide reconciliation.<sup>192</sup> Problematically, these notions of reconciliation and a truthful social memory are often conflated in scholarly analysis.<sup>193</sup> For Gross, to “some small degree,” repentance was indeed a part of the TRC process, but “only under certain conditions and as part of the forgiveness-repentance exchange.”<sup>194</sup> However, other studies have suggested that indeed, truth may not lead naturally to either repentance or reconciliation.<sup>195</sup> Capturing this perspective is the widow of resistance leader Steve Biko, tortured to death by South African police during the apartheid regime. Although ultimately unsuccessful, Biko’s widow joined other individuals and organizations in petitioning that the statute establishing the TRC (and its conditional amnesty) be declared unconstitutional.<sup>196</sup>

Ironically, the TRCs emphasis on “healing and restorative truth” may have subverted its own pursuit of nation-building and reconciliation. Reconciliation in the abstract requires a communion of equal (as opposed to politically imbalanced) adversaries: reconciliation thus argues for “the creation of some

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189. See Aeyal M. Gross, *The Constitution, Reconciliation, and Transitional Justice: Lessons from South Africa and Israel*, 40 STAN. J. INT’L L. 47, 69 (2004) (“The South African process required publicly acknowledging the past and exposing the offences of the apartheid regime.”).

190. *Id.* at 47 (quoting J. M. COETZEE, *DISGRACE* 58 (1999)).

191. Gross, *supra* note 189, at 68 (emphasis added).

192. See *id.* (“[D]ealing with the past extends beyond the sphere of criminal responsibility and personal impunity, encompassing larger questions that countries must address in times of transition.”).

193. See *id.* at 68–69 (suggesting that the desire for “[n]ational [u]nity and [r]econciliation” is conceptually equivalent to the mission of “fashion[ing] a new consensual memory of the past as one of injustice”).

194. Gross, *supra* note 189, at 72.

195. See generally PRISCILLA HAYNER, *UNSPEAKABLE TRUTHS: FACING THE CHALLENGE OF TRUTH COMMISSIONS* (2002).

196. Gross, *supra* note 189, at 75.

commonality, the transcending of at least some differences.”<sup>197</sup> However, the TRCs extension of conditional amnesty changed the rhetoric of the political dialogue from that of “perpetrators and victims” to an amorphous group of “confessors” of oral histories.<sup>198</sup> The TRC thereby struggled with competing desires for a “healing truth” (which diminishes the distinctions between victim and perpetrator) on the one hand and reconciliation (which presumes a distinction between victim and perpetrator) on the other. As a result, the Commission may have been fighting a losing battle in its attempt to inaugurate lasting reconciliation. After the Final Report of the Commission was released, the Report was subject to criticism by South Africans on either side, both of which argued that the “truth” which the TRC was meant to unveil did not emerge.<sup>199</sup> Ultimately, the TRCs legacy is problematic: in its own Report, there is a frank acknowledgment that “everyone who came before the Commission did not experience healing and reconciliation.”<sup>200</sup> Although certainly, the TRC should not be held to unrealistic goals, this article has argued that its fundamental premises were flawed, and therefore, substantiates a critique of the metanarrative of this restorative justice model that now dominates the international community.

## V. CASE STUDY: RWANDA

### A. *Background on the Rwandan Genocide of 1994*

While officials in South Africa sought to develop a tenable foundation for the TRC, in central Africa, the country of Rwanda became the backdrop for genocide of global proportions. Before one hundred days would pass, the Rwanda of 1994 would be the stage for anachronistically primitive carnage. The Rwandan genocide of 1994 was singular in several respects: “the number and concentration of deaths, the intensity of the killing, the extensive use of rape as a form of ethnic violence, and the massive involvement of the Rwandan population.”<sup>201</sup> Although controversy surrounds every attempt at explaining the

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197. Du Bois, *supra* note 148, at 103.

198. *See id.* (“[T]he truth required for reconciliation is one that restores to victims the dignity needed to face perpetrators as equals, and accordingly, as the TRC realized, acknowledges victims as *victims*. This, however, implies that the distinction between victims and perpetrators be kept alive, emphasized even.”); Gross, *supra* note 189, at 70 (noting that the conditional amnesty conferred by the TRC “risked creating symmetry between the perpetrators of apartheid and its victims”).

199. *See* Du Bois, *supra* note 148, at 113 (“Although the criticism of the *Report* from different sides in the apartheid struggle might tempt one to the satisfying conclusion that the TRC was impartial, it is vital to note that the common ground established by the symmetry of these reactions lies in a shared rejection of the TRC’s truth.”).

200. *Id.* at 112.

201. Erin Daly, *Between Punitive and Reconstructive Justice: The Gacaca Courts in Rwanda*, 34

triggers of the genocide,<sup>202</sup> all scholars concede that in the period from April 7 to July 17, 1994, between 500,000 and 1,000,000 Rwandans<sup>203</sup> were killed by hundreds of thousands of their fellow Rwandans.<sup>204</sup> Systematic in its progress<sup>205</sup> and brutally primitive<sup>206</sup> in its realization, the stark efficiency of the genocide drew comparisons with the Holocaust.<sup>207</sup> In sum, approximately ten percent of the Rwandan national population died within the span of one hundred days.<sup>208</sup>

Although precise reasons for the events of 1994 are difficult to delineate, any productive analysis of the genocide must consider the importance of ethnicity in Rwanda, and particularly, what some have argued as the long-standing rivalry between the majority Hutus and the minority Tutsis.<sup>209</sup>

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N. Y. U. J INT'L L. & POL. 355 (2002) [hereinafter *Daly II*]. As *Daly* notes, in the 100 days of the Rwandan genocide in 1994, the approximated figure of one million Rwandans killed by hand corresponds to the death toll in Washington, D.C. and New York on September 11, 2001, if those deaths occurred every single day for 3 months. *Id.* at 355 n.1.

202. See *id.* at 358 (“Among the disputed issues are the numbers of people who killed and who were killed; the extent of Hutu and Tutsi animosity before the genocide; . . . the role of European colonizers and the Catholic Church in fomenting racial distrust; . . . the role of the international community . . . ; and the extent to which the genocide could have been prevented.”).

203. Although most approximations of those killed during the 1994 genocide fall within this (admittedly generous) range, the precise figure remains controversial. See, e.g., PHILIP GOUREVITCH, *WE WISH TO INFORM YOU THAT TOMORROW WE WILL BE KILLED WITH OUR FAMILIES: STORIES FROM RWANDA* 4 (1999) (“[A]t least eight hundred thousand people were killed in just a hundred days. Rwandans often speak of a million deaths, and they may be right.”); Drumbl, *supra* note 11, at 1222 (“[A]n estimated 800,000 people were murdered in an attempt to wipe out the Tutsi inhabitants of Rwanda.”); Maureen Laflin, *Gacaca Courts: The Hope for Reconciliation in the Aftermath of the Rwandan Genocide*, 46 *ADVOC. (IDAHO)* 19 (2003) (“Over a span of just one hundred days in 1994, upwards of 1,000,000 people died in the genocide in Rwanda.”).

204. *Daly II*, *supra* note 201, at 361.

205. See Drumbl, *supra* note 11, at 1245 (“The Rwandan genocide was organized by the Rwandan government, supported by local authorities, and undertaken by ordinary Rwandan men and women. The violence did not arise out of anarchic chaos. Nor did it emerge from a general breakdown of norms governing group and individual behavior.”).

206. See *id.* at 1245–46 (“These killings were not depersonalized through physical distance or the use of technology. Victims were butchered with machetes (panga), sticks, tools, and large clubs studded with nails (masu).”).

207. See GOUREVITCH, *supra* note 203 (“[T]he dead of Rwanda accumulated at nearly three times the rate of Jewish dead during the Holocaust. It was the most efficient mass killing since the atomic bombings of Hiroshima and Nagasaki.”).

208. Drumbl, *supra* note 11, at 1223.

209. See Christina M. Carroll, *An Assessment of the Role and Effectiveness of the International Criminal Tribunal for Rwanda and the Rwandan National Justice System Dealing with the Mass Atrocities of 1994*, 18 *B.U. INT'L L.J.* 163, 166 (2000) (“Since pre-colonial times, an ethnic, social, political, and economic rivalry has existed between the Hutus and the Tutsis in central Africa.”); but see Drumbl, *supra* note 11, at 1242–43 (“From an historical and anthropological perspective, ethnic cleavages in Rwanda are less pronounced than in other regions where genocidal violence has taken hold . . . Historically, both groups were

Certainly, the vocabulary of ethnic classification existed during Rwanda's colonial era, when both Belgian and European colonizers placed an administrative premium on acknowledging group identities.<sup>210</sup> Among the controversies surrounding the Rwandan genocide, however, is the extent to which ethnic classification is a proper contextual frame.<sup>211</sup> Regardless, whether conflict between the Hutus and the Tutsi was a well-entrenched historical reality prior to the latter decades of the twentieth century,<sup>212</sup> few contest that ethnic conflicts reached a head after Hutu Juvenal Habyarimana seized the presidency in a 1973 coup d'état.<sup>213</sup> In particular, tensions increased during the latter years of Habyarimana's presidency, when Rwandan government forces engaged in sporadic armed conflict with the Rwandan Patriotic Front (RPF), the army of Tutsi refugees and expatriates.<sup>214</sup> These tensions peaked into the one hundred day genocide after Habyarimana's death in a plane crash on April 6, 1994.<sup>215</sup> The ethnic discourse underlying the Rwandan genocide develops from a widely-acknowledged belief that "the propaganda of the Habyarimana government and its genocidal successor induced many Hutu to believe that the [minority] Tutsi were about to attack them," and therefore, to engage in genocide was actually a "preemptive strike."<sup>216</sup> It is uncontested that in the years prior to the genocide,

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socially fluid, with intrasocietal divisions operating more along clan (ubwoko) lines than 'ethnic' lines.").

210. See Carroll, *supra* note 209, at 167 ("For administrative purposes, the Belgian colonial rulers established a system of national identification cards with the ethnic classifications: Hutu, Tutsi, and Twa. The European colonizers accentuate ethnic differences and solidified group identities through this categorization . . . Additionally, ethnicity is recorded on Rwandan's identity cards and in the census.").

211. Daly, *supra* note 201, at 359.

212. Heated debate currently surrounds the question of whether there was historical animosity between the Hutus and the Tutsis. See Carroll, *supra* note 209, at 167 ("Hutus may have been resentful of the favoritism Europeans showed the Tutsis during colonial times. From the early 1960s, when the Hutus gained power, to the 1990s, ethnic violence erupted periodically. Massacres occurred in 1959, 1963, 1966, and 1973."). But see GOUREVITCH, *supra* note 203, at 59 (noting that until 1959, there had "never been systematic political violence recorded between Hutus and Tutsis—anywhere").

213. See Carroll, *supra* note 209, at 167–78.

214. Lafilin, *supra* note 203, at 19; see AMNESTY INTERNATIONAL, GACACA: A QUESTION OF JUSTICE 3 (2002), available at <http://web.amnesty.org/library/index/ENGAFR470072002> (last visited Mar. 23, 2004) [hereinafter QUESTION OF JUSTICE] ("[The one hundred days of genocide] occurred within the context of an on going, albeit intermittent, armed conflict (October 1990 to July 1994) between the RPF and Rwandese government forces . . . Following the RPF invasion, and preceding the killings that occurred between April and July 1994, local authorities—with government connivance—launched 17 large-scale attacks against Tutsi in 12 communities, killing an estimated 2,000 individuals.").

215. Extremists among the Hutu accused the RPF of assassinating President Habyarimana. U. S. INSTITUTE OF PEACE, RWANDA: ACCOUNTABILITY FOR WAR CRIMES AND GENOCIDE (1995), available at <http://www.usip.org/pubs/specialreports/early/rwanda1.html> (last visited Mar. 21, 2004) (hereinafter ACCOUNTABILITY FOR WAR CRIMES).

216. Drumbl, *supra* note 11, at 1243.

any collective identity that once may have existed in Rwanda was dissipated, and a “ferocious acrimony” existed between the Hutu and the Tutsi.<sup>217</sup>

During the one hundred days of the Rwandan genocide, among the most significant characteristics of the tragedy were the systematic manner of the slaughter and the wide-spread contribution to its progress. Not only did hundreds of thousands of Rwandans contribute to the deaths of Hutu oppositionists and Tutsis,<sup>218</sup> systematic encouragement from radio messages and leaders from every social tier<sup>219</sup> helped incite what was effectively a “populist genocide.”<sup>220</sup> In a Special Report on Rwanda, the United States Institute of Peace notes that typically, when countries experience violations of human rights on the scale of Rwanda, that violence is most often sponsored by military and political organizations, while “the rest of society [is free] to go about its business with relatively clean hands.”<sup>221</sup> However, by contrast, the Rwanda genocide featured a “deliberate attempt to force public participation on as broad a basis as possible, co-opting everyone . . . [and] inciting civilians to participate in the massacre.”<sup>222</sup> In a UN study following the genocide, a Special Rapporteur to the UN Commission on Human Rights found the genocide to be “concerted, planned, and systematic,” citing: the government use of radio broadcasts to incite ethnic dissension and violence, government distribution of arms to the militias and civilians, the discovery of lists naming those to be executed, and the speed with which the massacres were initiated after the April plane crash.<sup>223</sup> As a result, the reach of the genocide extended across every social line and every vocational barrier.<sup>224</sup> Although there was no forced recruitment into the militia, young Rwandan males flocked into the ranks, creating what would become 500,000 active militia members.<sup>225</sup> While armed forces and local police engaged in the violence, professionals such as physicians and teachers were often equally enthusiastic participants.<sup>226</sup> Indeed, teachers figured prominently

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217. *Id.* at 1244.

218. Daly, *supra* note 201, at 361–62; see Pernille Ironside, *Rwandan Gacaca: Seeking Alternative Means to Justice, Peace and Reconciliation*, 15 N.Y. INT’L L. REV. 31 (2002) (“The high level of public participation and complicity in the killings, attacks, rapes and pillages, is particularly disturbing. The slaughter often took place in broad daylight within the perpetrators’ local communities and was committed against neighbors, friends and even family members.”).

219. GOUREVITCH, *supra* note 203, at 115.

220. Daly, *supra* note 201, at 361.

221. ACCOUNTABILITY IN WAR CRIMES, *supra* note 215.

222. *Id.*

223. Carroll, *supra* note 209, at 170.

224. See Daly, *supra* note 5, at 162 (“Most were murdered not by professional military personnel, but by fellow citizens, neighbors, friends, teachers, priests, and even family members.”).

225. Drumbl, *supra* note 11, at 1247.

226. *Id.*

in the genocide, with schools forming the backdrop for scenes in which Hutu teachers would denounce Tutsi pupils to the militia or even murder their own students.<sup>227</sup> The Rwandan genocide, therefore, is a study in paradox: while the scope of public participation might suggest a spontaneous and fierce combustion of intra- and inter-tribal tensions, the execution of the campaign was the result of measured, deliberate, individual and corporate choices.

Despite the hundreds of thousands of Tutsi deaths, the Tutsi-populated Rwandan Patriotic Front seized control on July 18, 1994 and the fledgling government began the process of repairing a nation fundamentally changed.<sup>228</sup> In just three months of intense conflict, only 40,000 to 50,000 men and women remained of the 350,000 inhabitants in the capitol city of Kigali.<sup>229</sup> Without running water, electricity, or a functioning government infrastructure, the capitol was a shadow of its former self and emblematic of the systemic problems occurring in the rest of the country as well.<sup>230</sup> In fact, in the wake of the genocide's ravages, the World Bank declared Rwanda the poorest nation on earth.<sup>231</sup> In a Special Report, the Organization for African Unity describes the crippled state of Rwanda post-genocide: "Nothing functioned. There was a country but no state. There was no money; the genocidaires had run off with whatever cash reserves existed . . . There were no organs of government, either centrally or locally. There was no justice system to enforce laws or to offer protection to the citizenry."<sup>232</sup> The new government, therefore, faced a daunting task: the rebuilding of a national infrastructure and the reconciliation of inhabitants whose mutual history was characterized by distrust and political upheaval.

### *B. Development of the Gacaca Courts*

While South Africa moved toward restorative justice through its TRC, Rwanda chose to take a more punitive route, through three separate forums, two more traditionally punitive and one seeking a middle-ground of sorts: the International Criminal Tribunal for Rwanda (the ICTR), the domestic criminal justice system, and the Gacaca courts.<sup>233</sup> Significantly, a retributive justice

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227. *Id.*

228. ACCOUNTABILITY FOR WAR CRIMES, *supra* note 215.

229. *Id.*

230. *Id.*

231. GOUREVITCH, *supra* note 203, at 270 (observing that in the wake of the genocide, 95 percent of Rwandans lived on an average income of 16 cents per day, or 60 dollars per year).

232. Daly, *supra* note 201, at 366. (citation omitted).

233. Laffin, *supra* note 203, at 20. The United Nations established the ICTR through Resolution 995 in November 1994, but the first trial did not occur until 1997. Rosilyn M. Borland, *The Gacaca Tribunals and Rwanda after Genocide: Effective Restorative Community Justice or Further Abuse of Human Rights 1* (Fall 2003) (unpublished manuscript), available at

model was then applauded by other countries: "With the support of most of the international community, including Amnesty International, the Rwandese government opted for extensive prosecution, arguing that it wanted to end the impunity that characterized Rwandese political culture. Justice, the new government deemed, was the necessary and indispensable premise to national reconciliation."<sup>234</sup> However, these measures have proven far from successful—despite promises to ensure "individual criminal accountability" for perpetrators, the ICTR had brought only a little over a dozen cases to judgment as of 2003,<sup>235</sup> the consistently weak judicial system in Rwanda<sup>236</sup> suffered from severe backlog in its case dockets,<sup>237</sup> and despite much discussion over the Gacaca courts in the last five years, the Gacaca system has yet to progress in implementation beyond a few pilot projects.<sup>238</sup> Moreover, the judicial crisis leaves Rwanda in dire

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[http://www.american.edu/academic.depts/sis/sword/Current\\_Issue/essay1.pdf](http://www.american.edu/academic.depts/sis/sword/Current_Issue/essay1.pdf). (last visited Oct. 06, 2005)

234. QUESTION OF JUSTICE, *supra* note 214, at 4.

235. See Borland, *supra* note 233, at 1 ("While the ICTR has made important strides for international humanitarian law, including the first conviction of rape as a war crime, in general it has not met the needs of the Rwandan people."); Victoria Brittain, *Letter from Rwanda*, THE NATION, Sept. 1, 2003, available at <http://www.thenation.com/doc.mhtml?i=20030901&s=brittain> ("The United Nations Criminal Tribunal for Rwanda, which sits in Arusha in neighboring Tanzania, is trying major genocide suspects but has been plagued by internal bickering and inefficiency. It has completed only fifteen cases, and acknowledges that it will be unable to complete the trials of the forty-nine suspects now under arrest before it ends in 2008."); Ironside, *supra* note 218, at 32 ("The International Criminal Tribunal for Rwanda . . . secured fewer than nine convictions in five-and-a-half years of operation, despite an annual budget of approximately \$80 million [in U.S. currency] and over 800 staff members.").

236. See Borland, *supra* note 233, at 1 ("Rwanda's legal system was basically destroyed during the genocide; of approximately 785 judges practicing before the genocide, only 20 survived."); Laflin, *supra* note 203, at 20 ("The pre-genocide judicial system in Rwanda was extremely weak, suffering from limited resources, insufficiently trained personnel, and a lack of judicial independence. The genocide totally destroyed it. For over two years following the genocide the country was without a functioning legal system. Not until the latter part of 1886 did the Rwandan judiciary become operational once again.").

237. See Borland, *supra* note 233 ("Within Rwanda, only about 5,000 of the more than 100,000 jailed as genocide suspects have been tried."); Brittain, *supra* note 235 ("The broken judiciary, rebuilt at record speed, has begun trials, but it could never complete anywhere near 100,000 in this generation."); Ironside, *supra* note 218, at 32 ("While the domestic genocide trials have made greater progress with its dockets, having cleared an estimated 5,000 cases since 1996 . . . [,] even if this pace were maintained, it would still take upwards of 120 years to prosecute the estimated 110,000 to 130,000 alleged genocidaires who continue to be held in overcrowded prisons and community lock-up cells throughout the country."); Laflin, *supra* note 203, at 20 ("By the end of 2001, the country's domestic criminal justice system had conducted approximately five thousand genocide-related trials, leaving approximately 125,000 suspects in jails or prisons designed to accommodate only 15,000. It has been estimated that using the conventional court system would take over two hundred years to try the cases of those already incarcerated for crimes related to the genocide. There are simply not enough judges, prosecutors, and lawyers.").

238. See Laflin, *supra* note 203, at 21 ("Contemporary Gacaca courts are still in their infancy. In June 2002, the country started a four-month pilot project with eighty courts. By December 2002, some 600 courts had opened. The goal is to have an estimated 10,000 courts in operation.").

economic straits as well: “while the expense of feeding the detainees has been shared thus far with the international community; donors have indicated that Rwanda will have to bear an increasing amount of this burden in the future, which it cannot afford.”<sup>239</sup> Naturally, this economic pressure translates into the politics of Rwanda’s nation-building: like South Africa in the early stages of its transition period, Rwanda’s transition necessarily takes place under the watchful eye of the international community.

Of the three proposed solutions, the Gacaca courts are distinct from the ICTR and the traditional criminal justice system—an alternative dispute resolution mechanism, the Gacaca courts were first mentioned in 1998 after it became increasingly clear that the other means of judicial resolution were insufficient to try the over 100,000 detainees suspected of having participated in the genocide.<sup>240</sup> The Gacaca system soon became a much-lauded, non-conventional option, in similar fashion to the way in which the TRC became the cinderella story of restorative justice for the international community.<sup>241</sup> This reaction is in contradistinction to the wariness of some Rwandan people. As Anastase Nabahire, director of the genocide survivors group Ibuka<sup>242</sup> observes: “Gacaca is a compromise political solution, but at this point, it is all we have to look forward to.”<sup>243</sup>

Although the scholarship concerning the Gacaca courts has yet to be fully developed,<sup>244</sup> what is known is that it is a community-based form of alterative

239. Ironside, *supra* note 218, at 39.

240. L. Danielle Tully, *Human Rights Compliance and the Gacaca Jurisdictions in Rwanda*, 26 B.C. INT’L & COMP. L. REV. 385, 386 (2003).

241. See QUESTION OF JUSTICE, *supra* note 214, at 2 (“[The gacaca system is] an ambitious, groundbreaking attempt to restore the Rwandese social fabric torn by armed conflict and genocide by locating the trial of those alleged to have participated in the genocide within the communities in which the offenses were committed.”); Ironside, *supra* note 218, at 33–34 (“[I]n the context of post-genocidal Rwanda, Gacaca may well be able to heal the deep wounds that continue to divide the country by ethnicity in a manner for which Western retributive systems are not designed. Indeed, it is unrealistic, impractical and short-sighted to rely solely on the ordinary criminal model with all of its due process guarantees to address mass perpetration of crimes, particularly in a country whose judicial system has to be build ex nihilo and where ethnic tensions continue to run high.”); Radha Webley, *Gacaca and Reconciliation in Post-Genocide Rwanda 1* (2004) (unpublished manuscript), (“When I left for Rwanda, I was extremely hopeful. Most of the reports and analyses I had read on the subject were overwhelmingly positive, both in relation to the potential of the gacaca courts as a reconciliatory initiative and in relation to the process of reconciliation overall in Rwanda.”). available at [http://www.hrcberkeley.org/download/report\\_wradha.pdf](http://www.hrcberkeley.org/download/report_wradha.pdf). (last visited Oct. 6, 2005).

242. *Ibuka* means “remember” in Kinyarwanda. See Prevent Genocide.Org, Kinyarwanda and Rwanda Links, available at <http://preventgenocide.org/rw/links.html>. (last visited Oct. 6, 2005).

243. Borland, *supra* note 233, at 2.

244. See Tully, *supra* note 240, at 395 (“Relatively little is known about the practice of gacaca . . . [which was] a community-based dispute resolution forum[] in pre-colonial Rwanda.”).

dispute resolution that developed in the pre-colonial period.<sup>245</sup> The term “Gacaca” connotes “lawn,” which indicates the manner in which the members of a Gacaca court would sit on the grass while listening to disputes brought before the community.<sup>246</sup> Significantly, the Gacaca courts consistently “maintained restitution and reconciliation as their primary aims.”<sup>247</sup> Although sanctions (such as compensation) were introduced for an offense, imprisonment was not an option, and the sanctions were meant to educate the perpetrator regarding the gravity of the offense as well as reintegrate the accused into his or her community.<sup>248</sup> In similar vein to the TRC, genocide suspects who confess fully to their crimes will have their initial sentence halved; moreover, all suspects tried in the Gacaca system may serve half of their sentence doing community service rather than in prison.<sup>249</sup> Since many suspects have now spent ten years in prison, many of those tried under the Gacaca system will not remain imprisoned but may return to their communities.<sup>250</sup> In its temporal structure, the Gacaca system develops in four phases: first, raising awareness and increasing knowledge about the law;<sup>251</sup> second, election of judges from the community; third, “confession, testimony, and reconciliation,” and fourth, reintegration of some prisoners back into the society through a work program.<sup>252</sup> Today, the Gacaca system is split into sections to adjudicate different categories of crimes, with varying degrees of severity: at the lowest (village) level, the court will only adjudicate property crimes (category 4 crimes); the sector and district Gacaca courts will try more serious crimes (category 3 and 2 crimes); those accused of ordering killings or rape (category 1 crimes) will be tried in conventional courts.<sup>253</sup>

The restorative aims of the Gacaca system, as well as the community atmosphere of the court system, defined the types of disputes relevant to the courts. Traditionally, these disputes would concern “inheritance, civil liability, failure to repay loans, thefts, . . . conjugal matters . . . and minor criminal

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245. *Id.*

246. *Id.*

247. *Id.* at 396 (emphasis added).

248. *Id.*

249. Webley, *supra* note 241, at 5 n.5.

250. *Id.*

251. See Borland, *supra* note 233, at 2 (“One project . . . involved producing and distributing films, radio broadcasts and other media to help spread information about *gacaca*. In this project, Rwandans watched a film about *gacaca* elections, more than 200,000 read a cartoon strip on the same topic, and an estimated 2.7 million people were exposed to radio messages about *gacaca*.”).

252. *Id.*

253. Brittain, *supra* note 235. Although category 1 cases will not be tried in *gacaca* courts, *gacaca* judges take testimony as part of the category 1 process. Borland, *supra* note 233, at 2.

offenses such as theft.”<sup>254</sup> Notably, these community-based courts thus appear to have been formed for the purpose of reinstating those accused of minor relational offenses, as opposed to the inexpressibly violent crimes committed during the 1994 genocide. Throughout the evolution of the Gacaca court system from the pre-colonial period onward,<sup>255</sup> the emphasis remained on disputes “between family members or neighbors,” while disputes with strangers were more likely to be heard in state tribunals.<sup>256</sup> Precisely since the Gacaca system was not originally meant to adjudicate the types of crimes committed during the 1994 genocide, when the Transitional National Assembly of Rwanda adopted Gacaca Law on October 12, 200, the current Gacaca system is conceptually distinguished from the traditional practice.<sup>257</sup> According to the Rwandan government, these Gacaca jurisdictions will try crimes that occurred between October 1, 1990 and December 31, 1994.<sup>258</sup> Ultimately, the goal is to have 10,000 Gacaca jurisdictions in Rwanda composed of individuals elected by the immediate community,<sup>259</sup> and judgments will be made either by consensus or by majority voting.<sup>260</sup>

### C. *The Politics of Reconciliation in Rwanda*

On April 7, 2004, Rwanda remembered the ten-year anniversary of the 1994 genocide. However, despite the passage of a decade, Rwanda continues to struggle in its attempts to rebuild a nation ravaged financially, politically, and emotionally:

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254. Tully, *supra* note 240, at 395–96.

255. *See id.* at 396 (“During the colonial period beginning in 1897, first the Germans and then the Belgians introduced a more formal state-centered legal system in Rwandan society. . . . [L]egal pluralism evolved with gacaca, on the one hand, as an indigenous procedure based largely on traditional values and determining standards of individual and community behavior, and state laws, on the other hand, which were based predominantly on the Belgian framework.”).

256. *Id.* at 397.

257. *See id.* at 397–98. (In an attempt to distinguish the current gacaca concept from the traditional concept, the Rwandan government often refers to today’s system as “modernized gacaca” or “gacaca jurisdictions.”).

258. *Id.* at 398.

259. *See* Tully, *supra* note 240, at 398 (“Each gacaca jurisdiction will have a General Assembly, a Bench, and a Coordinating Committee. . . . The General Assembly of each cellule [the smallest administrative unit in the country] will then elect twenty-four people over the age of twenty-one of ‘high integrity.’ Of these twenty-four individuals, five will be selected to serve as delegates to the General Assembly at the Secteur level and nineteen will remain to serve on the Bench at the cellule level. Out of those nineteen who remain at the Cellule level, the Bench will elect five of its own members to serve on the Coordinating Committee.”).

260. *Id.* at 399.

There are 80,000 detainees in Rwanda's overcrowded prisons, some of whom are allegedly innocent, [awaiting] a fair trial. In some cases, their families and their home communities remain unconvinced that they will get one. Victims and survivors of the genocide also wait for justice and compensation for the human rights abuses they have suffered. Women and girls, in particular, were left infected with HIV or were left with permanent health complications and disease as a result of the brutal sexual violence they suffered. There are hundreds of thousands of Rwandese refugees who returned home involuntarily in the aftermath of the genocide to an unknown future, [and] another 60,000 remain outside Rwanda unsure if they want to return and afraid that their return may be forced.<sup>261</sup>

For many, the Gacaca system seems to be the panacea after years of legal backlog and lack of resolution concerning the crimes committed in 1994.<sup>262</sup> Often, the language of accolade used in describing the possibilities of the Gacaca system is strikingly similar to that used to describe the TRC in South Africa.<sup>263</sup> For example, in their 2001 text *Restorative Justice and Civil Society*, Heather Strang and John Braithwaite write: "For such profound collective wrongs as genocide and apartheid, the world is slowly learning that undominated and state-assisted storytelling is needed, so that truth can lay a foundation for reconciliation."<sup>264</sup> In its rhetoric, the Rwandan government has

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261. AMNESTY INTERNATIONAL, RWANDA: THE ENDURING LEGACY OF THE GENOCIDE AND WAR I (2004), available at <http://web.amnesty.org/library/Index/ENGAFR470082004> (last visited May 10, 2004).

262. See, e.g., Ironside, *supra* note 218, at 34 ("To date, criminal prosecutions have been the sole method by which justice has been sought for post-genocidal Rwanda. This is premised on the perhaps misplaced faith that accountability and reconciliation can only be achieved through a Western-conceived adversarial trial model, and that individual criminal accountability pursued against a select few will 'exonerate' the collective."); Tully, *supra* note 240, at 413-14 ("[I]t is undisputed that the system of justice that Rwanda has maintained for over five years has failed. With over 100,000 pre-trial detainees languishing in over-crowded prisons and local cachots, a compromise is unavoidable. . . . In the face of this daunting situation, the new gacaca jurisdictions have emerged as Rwanda's newest, and certainly most innovative, hope for justice and reconciliation.").

263. See Britain, *supra* note 235 ("Gacaca, with its emphasis on collective truth-telling as a means toward reconciliation rather than summary justice and punishment, has more elements in common with South Africa's traveling Truth and Reconciliation Commission of the 1990s than with, say, Latin American versions following dictatorships, such as Peru's."); Daly, *supra* note 5, at 167 ("The actual, if unrecognized, need for reconciliation may be as strong in Rwanda as it is in South Africa, though it manifests itself quite differently."); *Can the Gacaca Courts Deliver Justice?*, SOUTH AFRICAN PRESS ASSOC., Apr. 8, 2004, 2004 WLNR 7090283 [hereinafter *Gacaca Courts Deliver Justice*] ("[Robert Bayigamba, Minister of Culture, Youth and Sports declares that the gacaca system was intended] to accelerate the process of knowing the truth so that justice may be done.").

264. Borland, *supra* note 233, at 6 (quoting HEATHER STRANG & JOHN BRAITHWAITE, *RESTORATIVE JUSTICE AND CIVIL SOCIETY* 11 (2001)).

been quick to portray the Gacaca system as a beacon of hope for the future—currently, national advertisement posters for the Gacaca system read “The Truth Heals” and “depict a bright yellow sun rising over the hills of Rwanda with villagers holding hands as they move from the dark toward the rising sun.”<sup>265</sup> In part, this focus on restorative justice in Rwanda is a reaction against the poor results from the retributive justice campaign initiated by the Rwandan government after the genocide.<sup>266</sup> The reaction of some scholars—and particularly advocates of the TRCs ideology—has been to promote the possibility of reconciliation in Rwanda. As Erin Daly, law professor at Widener University, writes: “clearly, if Rwanda is to survive, reconciliation can not wait 200 years<sup>267</sup> and must be promoted in conjunction with Rwanda’s other immediate needs.”<sup>268</sup> In this portion of the discussion, this article seeks to substantiate a critique of the Gacaca courts as undergoing a similar reification into metanarrative status as the evolution of the South African TRC.<sup>269</sup> Toward that end, this article will examine the political and economic forces behind the Gacaca courts, and conduct an objective analysis of the current state of that system.

First, the question of whether the Gacaca courts will ever be functional is a real one. Although the Gacaca court initiative began in June 2002, it has yet to become operational beyond a few pilot models.<sup>270</sup> In the first phase of its implementation, a USAID-funded study found that “while awareness is high, knowledge about the functioning of jurisdictions and the specific role of the community is rather limited.”<sup>271</sup> Moreover, as a result of several delays, training

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265. Ironside, *supra* note 218, at 47.

266. See Daly, *supra* note 5, at 165–66 (“The government has embarked on an extensive campaign of arresting and incarcerating suspects believed to have participated, in any way, in the genocide. The result has been disastrous. It is estimated that 125,000 individuals are in jails or community ‘cachots’ (literally hiding places) while only 3000 trials have taken place. Thousands are dying of disease and malnutrition while the wheels of justice turn ever so slowly.”).

267. Daly, *supra* note 5 at 166 (The Rwandan government estimates that at the current rate of adjudication, it will take over 200 years to try all of the genocide suspects currently imprisoned).

268. *Id.* at 166–67.

269. Although there are substantial due process concerns with the gacaca system, this Article focuses more narrowly on a theoretical critique of gacaca law. See Ironside, *supra* note 218, at 51–56 (analyzing concerns for gacaca defendants, such as: the right to a fair hearing by a competent, independent and impartial tribunal, the right to have adequate time and facilities to prepare a defense and consult with counsel, and the right to review by a higher tribunal).

270. See Borland, *supra* note 233, at 3 (“As of November 2002, twenty-six pilot courts had begun hearing testimony.”).

271. *Id.* at 2 (quoting S. Gabisirege and S. Babalola, Johns Hopkins University, Center for Communications Programs, PERCEPTIONS ABOUT THE GACACA LAW IN RWANDA: EVIDENCE FORM A MULTI-METHOD STUDY (2002), available at <http://www.jhuccp.org/pubs/sp/19/English/19.pdf> (last visited Oct. 6, 2005)).

of judges did not begin until April 2002.<sup>272</sup> Pilot courts were not inaugurated until July 2002; four years after the first mention of a Gacaca system,<sup>273</sup> and even afterward, community participation in the Gacaca courts have been lower than initially predicted.<sup>274</sup>

On an ideological basis, it is possible to argue that the current manifestation of the Gacaca court system is not the community-based, traditional system that is being lauded by the international community.<sup>275</sup> In his on-site research for Amnesty International, Richard Haavisto describes latent concerns about Rwanda's Gacaca court system, and in particular, the lack of full community participation.<sup>276</sup> When the pilot models began three years ago, community members often failed to attend trials, or did not provide testimony if they did attend.<sup>277</sup> The initial interest in Gacaca law has "dropped markedly" since the pilot models began, and often, weekly Gacaca meetings must be canceled as a result of a failure to meet the one hundred person quorum requirement.<sup>278</sup> According to Haavisto, fear is often a factor in dividing communities and malcontent concerning the Gacaca courts: "Many of those who might be willing to give evidence are afraid of retribution."<sup>279</sup> The retribution factor is real, for while the TRC addressed crimes on the part of both the resistance movement and the Nationalist Party, the Gacaca system only deals with crimes committed by the "genocidaires," and not members of the Rwandan Patriotic Front, who gained control of Rwanda after the end of the 1994 genocide.<sup>280</sup> Although the government has sought to affirm that witnesses will

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272. *Id.* at 3.

273. *Id.*

274. *Id.*

275. See Ironside, *supra* note 218, at 59 ("[T]he Gacaca system's emphasis on restorative modes of justice, through participative story-telling, atonement, public scrutiny, and reintegrative community service, provide post-genocide Rwanda's best hope for progressing toward national reconciliation and some greater sense of justice."); Webley, *supra* note 241, at 8 ("[U]niversal participation is one of the theoretical underpinnings of the gacaca system itself, for such participation is seen as the central mechanism for making the dual processes of justice and of reconciliation not only institutional projects but felt realities in the lives of the Rwandan people.").

276. See *Gacaca Courts Deliver Justice*, *supra* note 263.

277. *Id.*

278. Webley, *supra* note 241, at 5.

279. See *Gacaca Courts Deliver Justice*, *supra* note 263 ("[T]here have been reports in the last few years of killings and attacks on witnesses who were expected to testify in gacaca courts."); Borland, *supra* note 233, at 3 ("Both inside and outside Rwanda, people of all ethnic groups fear the outbreak of renewed violence. Some witnesses are afraid they will be attacked if they speak the truth."); Webley, *supra* note 241, at 5 (describing one gacaca court where survivors refused to account for known genocidaires because the murderers "had never been imprisoned but were still living in the community in question").

280. *Gacaca Courts Deliver Justice*, *supra* note 263. U.N. consultant Robert Gersony found that "the RPF had engaged in widespread and systematic slaughter of unarmed civilians." *Id.* The NGO Penal Reform

be protected, “no clear security mechanism has been established to protect community witnesses who testify . . . and Rwandans have little reason at present to believe they will be protected.”<sup>281</sup> One Rwandan woman, Mbezuanda, was victimized by the Hutu militia, but remains terrified of testifying in a public court because it will be “her word against the accused . . . there are no other witnesses.”<sup>282</sup> Concerned that the wheels of justice move far too slowly to protect her, she believes that it would be dangerous to provide evidence: “Maybe by the time it comes I will be dead.”<sup>283</sup> With many in these communities fearful of involvement and perceiving the tribunals themselves as one-sided, there is little implicit confidence in the system.<sup>284</sup> As Haavisto notes, “The government has to create a climate which convinces people that there is an equitable system of justice at work.”<sup>285</sup> For the several thousand Rwandan refugees currently in other countries, without a sufficient promise that they will be protected, voluntary return is unlikely.<sup>286</sup>

The possibility of a true “community”-based system post-genocide becomes further complicated in light of the historical disconnect between the community that experienced the persecution and that which is initiating the trial. Causing a fundamental rift is the reality that an enormous part of the population was involved in the genocide. As Elizabeth Onyango, of the non-governmental organization (NGO) African Rights observes: “[i]n Rwanda you have a situation in which a large part of the population participated in the genocide. A select few might have orchestrated it, but they did it so cleverly that they got a lot of the population implicated—and how do you try cases like this, all these people?”<sup>287</sup> Although it could be argued that despite reconfiguration, the prosecutions are still taking place, the fundamental appeal of the Gacaca system for the international community was not merely the prosecutions, but the restorative ethos of the system. Will the “community” receive the perpetrator back into its midst after he or she serves the maximum time required by Gacaca law? The sentiments of at least one survivor toward the Gacaca system suggest otherwise:

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International noted in a recent report: “There is a growing disenchantment with the first phase of the gacaca pilots: the number of participants is going down and many participants no longer express themselves during the meetings. The enthusiasm of some people has diminished considerably when they realized that Gacaca could not investigate the past.” Borland, *supra* note 233, at 4.

281. Borland, *supra* note 233, at 3.

282. *Gacaca Courts Deliver Justice*, *supra* note 263.

283. *Id.*

284. *Id.*

285. *Id.*

286. Borland, *supra* note 233, at 3.

287. *Gacaca Courts Deliver Justice*, *supra* note 263.

They killed us, completely finished us. Some of them were arrested and imprisoned, but recently they were released even though they had killed us. We had assumed that they would be killed the same way they killed us. So for us, we don't understand Gacaca . . . The people who killed us are being released. Those who are not being released we hear they will be imprisoned for life. There they eat, they live alright and grow old like normal people. We don't see the benefits for us in that process. They should have died the way we died.<sup>288</sup>

Another problematic feature of the Gacaca systems is the same as that which underlies South Africa's TRC as well—the often-indistinguishable lines between oral confession and memory, confession and truth. In Rwanda, like South Africa and most other African nations, there is a long history of oral tradition, where stories can be perpetuated for generations without written record.<sup>289</sup> As a result, “people tend to blur the lines between what they have seen themselves, and what others have told them.”<sup>290</sup> The oral tradition can then have a distinct impact on judicial proceedings, whether restorative or retributive. For example, in the ICTR, lawyers have recounted stories of how intense cross-examination of a witness can, days later, lead to the damaging revelation that “he did not actually see the event himself. . . . But his wife's aunt did.”<sup>291</sup> In the Gacaca courts, similar problems can surface. Describing her experience at a Gacaca court in the village of Kigese, journalist Victoria Brittain writes: “[a]s the hours went on, contradictory stories were told, and witnesses and defendants went off on irrelevant stories. Many times someone in the general assembly rose to ask the chairman to keep the witnesses to the point.”<sup>292</sup> Certainly, some have argued that both the Gacaca system and the TRC allow for justice through cathartic confession and the opportunity to offer a personal narrative: “[t]o have your story of unjust suffering entered into a public record and thence into future history-writing is to experience an increment of justice.”<sup>293</sup> However, just as the

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288. Webley, *supra* note 241, at 4.

289. See *Rwanda's Slow Justice*, BBC NEWS (May 19, 2001) available at [http://news.bbc.co.uk/1/hi/programmes/from\\_our\\_own\\_correspondent/1338263.stm](http://news.bbc.co.uk/1/hi/programmes/from_our_own_correspondent/1338263.stm). (last visited Oct. 6, 2005) [hereinafter *Slow Justice*]; but see *Gacaca Courts Deliver Justice*, *supra* note 271 (“[As Elizabeth Onyango notes:] Rwanda is a society where people, because of all they've been through . . . don't really speak up. Gacaca does give people a chance to begin to talk about genocide.”).

290. *Id.*

291. *Id.*

292. Brittain, *supra* note 235.

293. Borland, *supra* note 233, at 10 (quoting Donald Shriver, *Where and When in Political Life is Justice Served by Forgiveness?*, in *BURYING THE PAST: MAKING PEACE AND DOING JUSTICE AFTER CIVIL CONFLICT* 28 (Nigel Biggar, ed., 2001)).

TRC struggles with the question of whether confession and repentance can be fairly conflated, genocide survivors are equally wary of the sincerity of suspects in the Gacaca system.<sup>294</sup> As one woman noted, prisoners who had returned into her community professed openly that if another genocide occurred, the “only thing they would do differently is to make sure to kill all of the Tutsis.”<sup>295</sup> Ultimately, the dubious distinction between fact and fiction prolongs the judicial process and complicates the possibility for reconciliation.

The notion of community-based reconciliation becomes complicated when raising the question of whether “living together again,” one of the catchphrases of the Rwandan government’s reconciliation rhetoric, is currently at work.<sup>296</sup> The ostensibly restorative aim of Gacaca law manifest through a community dialogue is a key political tool for the Rwandan government at a time when the international community is heavily invested in the restorative justice model. The Rwandan government has been vocal in its claim that the community-based Gacaca courts are the centerpiece of a reconciliation process—as one government official notes:

[Gacaca] is the biggest single investment in the reconciliation process. As soon as the victims of genocide see punishment for the perpetrators of genocide, they are ready to forgive. As soon as those who are in prison are facilitated to get out, to be tried, and to be reinserted into community, to do community service as part of the project, then you are building the bridges for conflict management, you are building the bridges for reconciliation, things have started gain. So gacaca is therefore tied to the reconciliation process, as soon as both parties to this unfortunate divide see that justice is being done.<sup>297</sup>

Officially, the Rwandan government insists that reconciliation is already beginning in Rwanda, and that “reconciliation [is] a process that can be both successfully engineered and successfully completed within a finite period of time.”<sup>298</sup> However, there is a fundamental disconnect between the government rhetoric concerning the gacaca court system and how Rwandans view the methods.<sup>299</sup>

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294. See Webley, *supra* note 241, at 10 (“Many . . . feel that . . . requests for forgiveness, as well as the confessions themselves, are wholly insincere, and emphasize that unless they are accompanied by true remorse, they will mean nothing, and will not in any way contribute to the process of reconciliation.”).

295. *Id.* at 9.

296. *Id.* at 3.

297. *Id.* at 4.

298. *Id.* at 2.

299. Webley, *supra* note 241, at 4.

A primary feature of this disconnect between the official perspective on gacaca law and that of the Rwandan people is the fact that the gacaca courts are explicitly state-run. Among many Rwandans, there is a prevailing suspicion that the gacaca system is merely a “government-run attempt to deal with a six-figure prison population.”<sup>300</sup> The manner in which the gacaca system currently operates is effectively “top-down,” a factor that subverts the purposes of reconciliation and nation-building at the heart of the government’s rhetoric.<sup>301</sup> For example, at weekly gacaca meetings, armed security forces are often present, and coerced participation is “a relatively frequent trend.”<sup>302</sup> In their involvement during the gacaca process, district, sector, and national-level officials tended to be the voices driving the sessions, as opposed to merely possessing an administrative role.<sup>303</sup> Effectively, the gacaca courts are enacting state-sponsored retribution rather than the restorative aims they profess.<sup>304</sup>

It is necessary to ask, further, whether there is, in fact, a gacaca system in Rwanda, or whether the pilot models are merely political mirages that will enable a poor state to collect money and military support from the West without moving any of the prisoners out. Since the gacaca system is being marketed to the international community as traditional African justice, it remains somewhat unassailable, because no external state will feel comfortable critiquing “African” justice.<sup>305</sup> For example, while the public position of the United States on the Gacaca systems has been categorically positive, the United States has a political stake in promoting a nationally oriented and controlled justice for international crimes as a position against international tribunals. Ironically, while the gacaca system may be Rwanda’s carrot for economic aid from the international community, the gacaca courts themselves may prove a financial strain of the communities they purport to serve, particularly since most individuals do not receive compensation for their involvement.<sup>306</sup>

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300. *Id.*

301. *Id.* at 8.

302. *Id.*

303. *Id.*

304. See Webley, *supra* note 241, at 10 (“[T]he government is actively manipulating the rhetoric of reconciliation in ways that seem to have little to do with a desire to actually further the process of reconciliation and that appear to have more to do with consolidating its own political power.”).

305. But see Britain, *supra* note 235 (“[G]acaca has come in for harsh criticism as unworkable from some sections of the donor community. How can untrained and mainly illiterate peasants be trusted with the judgment of tangled tales often involving their own relations? Where is the administrative capacity to process 100,000 dossiers or more? What will happen to the approximately half a million new suspects, now at large, named already in suspects’ confessions during the gacaca process of the past few months? What does the election as judges of some people known to have been active participants in the genocide say about the fairness of the trials?”).

306. *Gacaca Courts Deliver Justice*, *supra* note 263.

## VI. CONCLUSION

At a time when nations rebuild and transition under the scrutiny of the international community, a new pressure exists to model a transitional justice that accommodates the political and ideological interests of other states. Particularly because the judicial model of a broken state can rarely operate without the economic backing and political involvement of other countries, it is nearly impossible to conceptually sever the issues central to restorative and retributive justice from political aims. Today, nations such as Rwanda and South Africa showcase the extent to which restorative justice has captured the approval of the global community. However, as this article argues, not only do the politico-economic contexts of South Africa's TRC and the Rwandan *gacaca* system powerfully shape each nation's restorative rhetoric, the ideological aims of these models may ultimately prove insufficient tools for nation-building.

Since the inauguration of South Africa's TRC, a fundamental shift has occurred in the international perspective on transitional justice—a jurisprudence of forgiveness and reconciliation has emerged as a dominant motif. As this article contends, while the emphasis on the restorative rhetoric of reconciliation and truth-telling may be compelling, the current situation may be one in which the reality of what restorative justice has effected may be in disjunction with the popular response. Complicating the narrative ethos of reconciliation narratives are a number of foundational questions: Whose story should be heard? Is a changing story necessarily a fiction? Is the storytelling merely cathartic or a symptom of repentance?

For South Africans, the TRC may have been a cathartic process of sorts, but the metanarrative of restorative justice now accepted by most of the international community does not account for the less-reconciliatory political realities which drove and continue to define the Commission's legacy. This article has sought to warn of the dangers of a categorical acceptance of restorative justice as a panacea, and establish a more productive critique of how these metanarratives develop, and on what grounds.

The ten-year anniversary of the Rwandan genocide recently passed, and it is clear that Rwanda is a state that has been influenced by the restorative justice metanarrative. While the *gacaca* system is a middle ground model—with both retributive and restorative attributes—it is largely the restorative aims of *gacaca* law that are being advertised internationally and nationally.

Despite the best of intentions, true nation-building and reconciliation will only develop from a less categorical and more critical understanding of the interplay of restoration, retribution, and the political state.