

A NEGLECTED OPTION: THE CONTRIBUTIONS OF STATE RESPONSIBILITY FOR GENOCIDE TO TRANSITIONAL JUSTICE

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Despite the pervasive involvement of government bureaucracies in perpetrating genocide and other atrocities, the international community's efforts to assist societies emerging from these horrors have relied primarily on establishing the guilt of individuals in criminal tribunals, rather than addressing the wrongs committed by governments through other means. The International Court of Justice diverged from this approach to transitional justice when it decided in 2007 that states themselves can be held civilly responsible for committing genocide. Characterizing the decision as reviving the concept of collective guilt in contravention of accepted principles of transitional justice, some warned that holding states responsible for mass atrocity would trigger renewed conflict and prevent peace in societies attempting to recover from violent conflict or mass atrocity. This Article challenges the notion that state responsibility for genocide is incompatible with transitional justice. The jurisprudence of international criminal tribunals reveals that despite the tribunals' mandate to determine the guilt only of individuals, group dynamics play a significant underlying role in prosecutions and convictions. Moreover, holding states responsible for committing genocide contributes to accountability and truth-telling, the professed goals of transitional justice, while criminal trials come up short. When atrocities are committed through the systematic, coordinated actions of a state, contemplating accountability only in relation to the offenses of individuals is imprecise and incomplete. In order to establish meaningful accountability and reveal the truth about a genocide, the state institutions that urged, organ-

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ized, and facilitated the crimes committed by individuals should be acknowledged and held responsible on their own.

INTRODUCTION

The landmark trials at Nuremberg and Tokyo in the aftermath of World War II established the responsibility of individuals, as opposed to groups, as a core principle of efforts by the international community to achieve peace and justice in societies emerging from violent conflict or atrocity. In the trials confronting the legacies of repressive military rule in Latin America in the 1980s; the creation of the international tribunals addressing the crimes committed in the former Yugoslavia and Rwanda in the 1990s; the establishment of South Africa's ambitious and groundbreaking Truth and Reconciliation Commission in 1995; and the adoption of the Rome Statute of the International Criminal Court ("ICC") in 1998, jurists, policymakers, and human rights advocates have emphasized the importance of focusing attention on the actions of individuals, and have cautioned against assigning blame for atrocities to groups or states. By the time that transitional justice—the term used to describe the set of activities societies undertake to grapple with the legacies of conflict or atrocity and to move toward peace and the rule of law—was consolidated as a coherent framework for addressing past abuses, the days of collective responsibility had passed. The crucial elements of transitional justice—accountability, truth-telling, and reconciliation—were considered to be best achieved by exposing and condemning the actions of individuals, not by pointing a finger at states and pronouncing the guilt of the whole.

In 2007, the International Court of Justice ("ICJ") took a significant step outside the boundaries of traditional transitional justice, when it decided that states, in addition to individuals, can be held responsible for committing genocide under the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.¹ In an action brought by Bosnia against

1. See Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.) (Judgment of Feb. 26, 2007), available at <http://www.icj-cij.org/docket/files/91/13685.pdf> [hereinafter Genocide Judgment] (deciding that under Article I of the Genocide Convention, states are obligated not to commit genocide and that under Article IX of the Convention, the ICJ has jurisdiction to decide a state's responsibility for committing genocide in violation of the Convention); see also *infra* Part I.A.

Serbia, the Court determined that genocide had occurred in Srebrenica, but ultimately it concluded that responsibility for the genocide could not be attributed to Serbia.² Nonetheless, the decision that the Genocide Convention contemplates state responsibility triggered warnings on the risks of holding states, rather than individuals, civilly responsible for genocide and inspired new discussion on the incompatibility of state responsibility with the framework of transitional justice. In some views, the notion of state responsibility appeared to be nothing more than a destructive resurrection of collective guilt, a concept thought to perpetuate the cycles of group hatred that often cause mass atrocity in the first place. State responsibility was seen as dangerously at odds with the accepted wisdom of transitional justice that individual accountability is the path toward reconciliation and peace.³

This Article challenges the notion that state civil responsibility for genocide is incompatible with transitional justice. By examining the jurisprudence of the International Military Tribunal (“IMT”) at Nuremberg, more recent developments in the international criminal tribunals for the former Yugoslavia and Rwanda, and the deficiencies of the international community’s focus on individual responsibility, this Article demonstrates the consistency of state civil responsibility with the transitional justice movement’s focus on achieving accountability and truth-telling through criminal trials of individuals. Further, it explores the significant benefits of holding states civilly responsible for genocide.

Part I examines the legal basis for holding a state responsible for committing genocide. Section A outlines the negotiation of the text of the Genocide Convention and discusses the attempts of certain states to draft a provision on state responsibility, as well as the controversy sparked by these attempts. Section B analyzes the ICJ’s recent decision holding that the

2. See Genocide Judgment, *supra* note 1, ¶¶ 297, 413. The Court additionally held that Serbia had violated its obligations under the Genocide Convention (1) to prevent genocide, on the ground that it “had the means” to prevent genocide in Srebrenica and “manifestly refrained from using them,” and (2) to punish genocide, as a result of its failure to cooperate in sending alleged perpetrators to the International Criminal Tribunal for the Former Yugoslavia. See *id.* ¶¶ 425–50.

3. See, e.g., Bronwen Maddox, *Sane Verdict May Pave the Way for Peace*, TIMES (London), Feb. 27, 2007, at 36; Eric A. Posner, *Sins of the Fatherland*, BOSTON GLOBE, Mar. 5, 2006, at E4; Anthony Dworkin, *Serbia, Genocide and the International Court of Justice*, CRIMES OF WAR PROJECT, Mar. 5, 2007, <http://www.crimesofwar.org/onnews/news-serbia2.html>.

Convention contemplates not only liability for commission of genocide by individuals, but also liability for commission of genocide by states.

Part II examines the current framework of transitional justice and considers why the international community has focused its attention on individual criminal trials as the primary method to achieve accountability, establish the truth of past atrocities, and, ultimately, facilitate transition. This Part concludes that in light of the widespread reliance of the international community on processes for individual accountability, as opposed to mechanisms that contemplate the actions of groups or states, it is no surprise that the decision of the ICJ to uphold state responsibility was met with skepticism and criticism.

Part III focuses on the methods used to achieve transitional justice in practice. Examining the jurisprudence of the IMT on criminal organizations and conspiracy and decisions of the International Criminal Tribunal for the Former Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda ("ICTR"), this Part argues that despite the mandate of these transitional trials to determine guilt of individuals, not of groups, the law of the tribunals consistently acknowledges that mass atrocity is committed by masses, and is often facilitated by the institutions of the state. Prosecutions and convictions rely on innovative offenses and theories of liability rooted in group dynamics of atrocity, thus making apparent the significance of the collective nature of the defendants' crimes. Given that transitional trials already contemplate that mass atrocity is unique in that it is perpetrated by groups and states, this Article argues that holding a state civilly responsible for committing genocide is consistent with the primary methods on which transitional justice already relies.

Part IV argues that state responsibility for genocide not only is consistent with the methods of transitional justice, but also is compatible with and, indeed, beneficial to its goals. While conceding that collective guilt poses a danger to societies emerging from mass atrocity, this Article challenges the notion that state responsibility is nothing more than collective guilt. This Part proposes that civil responsibility does not assign guilt or blame, but instead simply allocates liability, and that all citizens of a state, whether or not they are culpable or complicit in the crimes, have a duty to share in the burdens of the state.

After concluding that state responsibility is not a determination of collective guilt, this Article explains that state responsibility not only is fair, but also promotes the goals of transitional justice. Given that genocide is generally perpetrated by groups, and is most often organized and supported by states,⁴ the current attempts at justice that focus on individuals are insufficient. This Article argues that massive crimes committed using state institutions inflict harm on a society that is distinct from the harm created by massive crimes committed without the state. Thus, holding states responsible for committing genocide allows the affected societies, and the international community, to announce that state institutions must not be used for unlawful purposes. Where atrocities are committed through the systematic and coordinated actions of a group, using the machinery of a state, it is imprecise and incomplete to contemplate accountability in relation only to the crimes of individuals. State responsibility can fill the gaps that assignment of individual blame may leave in the processes of truth-telling and accountability and thus may serve to further reconciliation and peace, the ultimate goals of transitional justice.

I. THE LEGAL BASIS FOR STATE RESPONSIBILITY: DRAFTING AND APPLICATION OF THE GENOCIDE CONVENTION

The Convention on the Prevention and Punishment of the Crime of Genocide, which was drafted and negotiated just after the end of World War II,⁵ primarily focuses on criminal accountability for individuals who commit genocide.⁶ Article IV provides that “[p]ersons committing genocide or any of the other acts enumerated in article III shall be punished”; Article V concerns “effective penalties for persons guilty of genocide or

4. See *infra* notes 287–291 and accompanying text (describing role of states in genocide).

5. See *infra* Part I.A.

6. Raphael Lemkin coined the term “genocide” to mean “a coordinated plan of different actions aiming at the destruction of essential foundations of the life of the national groups, with the aim of annihilating the groups themselves.” RAPHAEL LEMKIN, *AXIS RULE IN OCCUPIED EUROPE: LAWS OF OCCUPATION, ANALYSIS OF GOVERNMENT, PROPOSALS FOR REDRESS* 79 (1944). The Convention defines genocide as actions “committed with intent to destroy, in whole or in part, a national, ethnic, racial, or religious group, as such.” Convention on the Prevention and Punishment of the Crime of Genocide, art. 2, Dec. 9, 1948, S. EXEC. DOC. O, 81-1, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

any of the other acts enumerated in article III"; and Article VI sets forth methods of prosecution of "[p]ersons charged with genocide or any of the other acts enumerated in article III."⁷ The Convention also imposes obligations on states. Article V calls on states parties to enact necessary legislation; and Article VII requires them to grant extradition in genocide cases in accordance with their laws and treaties.⁸ The Convention, however, does not explicitly provide that states themselves must not commit genocide.⁹ Whether the Convention obligates a state not to commit genocide and contemplates liability for a state in the event that it does commit genocide has aroused great controversy,¹⁰ and was decided definitively only in 2007, nearly sixty years after the adoption of the Convention.¹¹

This Part lays out the foundations under the Genocide Convention for holding a state responsible for commission of genocide and examines how the Convention has been interpreted to impose such responsibility on states. First, this Part describes the negotiation of the Convention and explains how and why the drafters arrived at a final text that includes a provision relating to state responsibility. Second, this Part analyzes the decision of the ICJ that parties to the Genocide Convention can be held responsible for commission of genocide in violation of the Convention.

A. *The Drafting of the Convention*

The Genocide Convention originated in the passage of a resolution by the UN General Assembly that declared genocide a crime under international law and requested the Economic and Social Council ("ECOSOC") to prepare a draft convention on the subject.¹² ECOSOC subsequently shifted the responsibility of drafting to the Secretariat,¹³ which consulted with three experts in international and criminal law as it con-

7. Genocide Convention, *supra* note 6, arts. 4–6. Article III defines the crimes that may be punished under the Genocide Convention: genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide, and complicity in genocide. *See id.* art. 3.

8. *Id.* arts. 5, 7.

9. *See generally id.*

10. *See infra* Part I.B.

11. *See* Genocide Judgment, *supra* note 1, ¶ 179.

12. *See* G.A. Res. 96 (I), at 188–89, U.N. Doc. A/64/Add.1 (Dec. 11, 1946).

13. *See* E.S.C. Res. 47 (IV), at 5, U.N. Doc. E/325 (Mar. 28, 1947).

structed a preliminary text.¹⁴ After the draft languished for some time amid discussion of whether a convention on genocide was “desirable and necessary,”¹⁵ ECOSOC resumed work on the draft and, in early 1948, established an ad hoc drafting committee comprising representatives from China, France, Lebanon, Poland, the Soviet Union, the United States, and Venezuela.¹⁶ ECOSOC forwarded the draft convention prepared by the ad hoc committee, along with a report on the draft convention, to the General Assembly, which referred the draft to the Sixth Committee on legal issues.¹⁷

Neither the Secretariat nor the ad hoc committee addressed the issue of state responsibility in their drafts.¹⁸ The subject arose only in the Sixth Committee debate, in which delegates disagreed about whether the text should include a provision allowing states, in addition to individuals, to be held accountable for committing genocide.¹⁹ Ultimately, the drafters agreed on a text that included a reference to state responsibility:

Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.²⁰

14. NEHEMIAH ROBINSON, *THE GENOCIDE CONVENTION: ITS ORIGINS AND INTERPRETATION* 19 (1949).

15. U.N. GAOR, 6th Comm., 3d Sess., ¶1(b), U.N. Doc. A/C.6/201 (Nov. 20, 1947).

16. See E.S.C. Res. 117 (VI), at 19, U.N. Doc. E/734 (Mar. 3, 1948).

17. See E.S.C. Res. 153 (VII), at 27, U.N. Doc. E/1049 (Aug. 26, 1948). As a main committee of the General Assembly with universal membership, each UN member state had a representative in the Sixth Committee. Shabtai Rosenne, *Codification Revisited After 50 Years*, in 2 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW 1, 5 (Jochen A. Frowein & Rudiger Wolfrum eds., 1998).

18. See U.N. Econ. & Soc. Council, Ad Hoc Comm. on Genocide, *Report of the Committee and Draft Convention Drawn up by the Committee* at 54–59, 18, U.N. Doc. E/794 (May 24, 1948) [hereinafter Ad Hoc Committee Report]; Draft Convention on the Crime of Genocide at 10, U.N. Doc. E/447 (June 26, 1947) [hereinafter Secretariat Draft].

19. See *infra* Part I.A.1–3.

20. Genocide Convention, *supra* note 6, art. 9; see U.N. GAOR, 6th Comm., 3d Sess., 103d mtg. at 430–31, U.N. Doc. A/C.6/SR.103 (Nov. 12, 1948) [hereinafter Sixth Committee 103d Meeting]. For a discussion of the vote to reconsider the text of Article IX, see U.N. GAOR, 6th Comm., 3d Sess., 131st mtg. at 690–91, U.N. Doc. A/C.6/SR.131 (Dec. 1, 1948).

The drafters, however, held divergent views on whether the Convention should address state liability for committing genocide at all and what kind of liability could be imposed on a state under international law.²¹ While most states agreed that genocide generally resulted from state action or complicity, they disagreed on whether and how the Convention should address the role of states in the perpetration of genocide. This played out during the debates on Articles IV, VI, and IX.

1. Debate on Article IV

Discussion regarding whether the Convention should address state responsibility for committing genocide initially arose during the Sixth Committee's negotiations on the issue of head of state immunity under Article IV of the Convention.²² The United Kingdom introduced an amendment that envisioned responsibility of both states and individuals for committing genocide:

Criminal responsibility for any act of genocide as specified in Articles II and [III] shall extend not only to all private persons or associations, but also to States, Governments, or organs or authorities of the State or Government, by whom such acts are committed. Such acts committed by or on be-

21. See ROBINSON, *supra* note 14, at 42. The Soviet Union believed that under the Convention national courts should take responsibility for prosecuting individuals. See U.N. GAOR, 6th Comm., 3d Sess., 64th mtg. at 14, U.N. Doc. A/C.6/SR.64 (Oct. 1, 1948). France agreed that the Convention should focus on individual accountability but argued that because genocide usually was carried out with the complicity of governments, a domestic court would not be an appropriate forum for prosecution. See U.N. GAOR, 6th Comm., 3d Sess., 63d mtg. at 8, U.N. Doc. A/C.6/SR.63 (Sept. 30, 1948). The United Kingdom, in contrast, wanted a Convention that would hold accountable states rather than individuals, on the theory that "it was impossible to blame any particular individual for actions for which whole governments or States were responsible." WILLIAM A. SCHABAS, *GENOCIDE IN INTERNATIONAL LAW: THE CRIME OF CRIMES* 419 (2000).

22. Article IV of the Convention provides: "Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals." Genocide Convention, *supra* note 6, art. 4. The Ad Hoc Committee version of Article IV (which at the time constituted Article V) read: "Those committing genocide or any of the other acts enumerated . . . shall be punished whether they are Heads of State, public officials, or private individuals." Ad Hoc Committee Report, *supra* note 18, at 56.

half of States or Governments constitute a breach of the present Convention.²³

In the view of the United Kingdom, genocide was most likely to be perpetrated by a state, so the Convention should address this reality and should account for the fact that a state would not prosecute the individuals who had acted on its behalf.²⁴

Many delegations agreed that states were instrumental in committing genocide and that in some cases attribution of genocide to a whole government might be more appropriate than assigning responsibility to particular individuals. The representative of Ecuador, for example, emphasized that when government officials committed an act punishable under the Convention, the state was ultimately responsible:

There would be no difficulty in punishing individuals who were found to be accomplices and collaborators in the committing of a physical act of genocide, but the Committee should not forget that Governments, States and parliaments had made possible those acts of genocide.²⁵

For its role in facilitating genocide, he argued, a State should be subject to moral sanctions, at least.²⁶ Luxembourg's representative noted that "decisions of a State were frequently not the result of an individual will but the concurrence of the will of an assembly," and cautioned that in cases in which the machinery of a state was used to commit genocide, "there would be no possibility of taking measures against individuals, and the whole system would have to be made responsible." In such circumstances, he argued, the entire state should face liability.²⁷

A few delegations, however, opposed the notion of state responsibility. The United States strongly held the position that

23. U.N. GAOR, 6th Comm., 3d Sess. at 1, U.N. Doc. A/C.6/236 (Oct. 16, 1948) [hereinafter UK Amendment]. For commentary on the proposed amendment, see NINA H.B. JØRGENSEN, *THE RESPONSIBILITY OF STATES FOR INTERNATIONAL CRIMES* 35–36 (2000).

24. See U.N. GAOR, 6th Comm., 3d Sess., 95th mtg. at 342, U.N. Doc. A/C.6/SR.95 (Nov. 8, 1948) [hereinafter Sixth Committee 95th Meeting].

25. U.N. GAOR, 6th Comm., 3d Sess., 96th mtg. at 350, U.N. Doc. A/C.6/SR.96 (Nov. 9, 1948) [hereinafter Sixth Committee 96th Meeting].

26. *Id.* at 349–50.

27. See *id.* The representative of Luxembourg pointed out that while criminal liability could not be imposed on a state, other sanctions could be applied, such as the "dissolution of a criminal police or the seizure of material goods and financial resources belonging to the responsible Government." *Id.* at 350.

the Convention should focus on punishment of individuals, not states, and should not broach the subject of reparations.²⁸ To Canada, a finding that states had committed genocide in violation of the Convention would be pointless if there was no way to punish them for the act.²⁹

For those delegations that supported state responsibility, the question of remedy carried great significance. Several delegations stressed the importance of granting the ICJ jurisdiction to decide the responsibility of states for committing genocide.³⁰ Various delegates noted the improbability that national governments would choose to prosecute their own public officials and opined that there was only a remote possibility that the international community would agree to create and accept the jurisdiction of an international criminal court.³¹ As a result, the ICJ represented a crucial element in avoiding impunity.³² The representative of the United Kingdom explained the necessity of adjudication before the ICJ of state liability for genocide:

In the case of a head of State being guilty of genocide . . . either he was a despot, who would not be punished by his own national courts; or he was a ruler who acted only with the advice of his ministers, in which case, as the Government was the real culprit, the ruler would not be arraigned by the courts of his country. Since there was no international criminal court, the provisions of article IV were meaningless as far as heads of State were concerned, both on the na-

28. See Sixth Committee 95th Meeting, *supra* note 24, at 344.

29. See *id.* at 346.

30. See, e.g., U.N. GAOR, 6th Comm., 3d Sess., 93d mtg. at 319, U.N. Doc. A/C.6/SR.93 (Nov. 6, 1948) [hereinafter Sixth Committee 93d Meeting] (statement of the representative of the United Kingdom) (discussing the role of the ICJ in disciplining governments for breaching the Convention).

31. See, e.g., Sixth Committee 96th Meeting, *supra* note 25, at 350 (statement of the representative of Ecuador) (noting that some delegations doubted states could be made responsible for genocide). The creation of the ICC of course resolves this particular concern. Nonetheless, holding a state itself responsible serves particular interests beyond those that would be served by simply trying state officials in a criminal court. See *infra* Part IV.B. Accordingly, the development of an international criminal court does not obviate the need for a mechanism for state responsibility.

32. See Sixth Committee 96th Meeting, *supra* note 25, at 353–54 (statement of the representative of the United Kingdom); *id.* at 351 (statement of the representative of Iran); Sixth Committee 95th Meeting, *supra* note 24, at 342 (statement of the representative of the United Kingdom); *id.* at 341 (statement of the representative of Belgium); Sixth Committee 93d Meeting, *supra* note 30, at 319 (statement of the representative of the United Kingdom).

tional and on the international level In those circumstances, the only provision that could be made was to arraign Governments guilty of genocide before the only existing international court: the International Court of Justice, which would not pronounce sentence, but would order the cessation of the imputed acts, and the payment of reparation to the victims.³³

Ultimately, the United Kingdom's amendment was defeated, with twenty-four states voting against and twenty-two states voting in favor of the amendment.³⁴ The explanations of vote indicate that states did not fundamentally disagree with the idea of state accountability; instead, they opposed the ambiguous manner in which the United Kingdom's amendment would import the notion of state responsibility into the Convention.³⁵ Although the United Kingdom maintained that the amendment envisioned only civil responsibility, and not criminal liability,³⁶ the notion that a state could be held responsible for a crime aroused particular controversy.³⁷ Iran explained

33. Sixth Committee 95th Meeting, *supra* note 24, at 342; *see also supra* note 31 (discussing the importance of state responsibility despite the existence now of the International Criminal Court).

34. Sixth Committee 96th Meeting, *supra* note 25, at 355.

35. *See id.*

36. *See id.* at 353 (statement of the representative of the United Kingdom) (acknowledging that "States and Governments could not be made criminally responsible" and could only be held civilly responsible for genocide).

37. *See id.* at 355; *see also* U.N. GAOR, 6th Comm., 3d Sess., 92d mtg., at 301-14, U.N. Doc. A/C.6/SR.92. Whether a state can be held criminally responsible for an act has continued to inspire debate. To the extent that a state's actions comprise those undertaken by individuals acting in their official capacity, a state can be deemed to have committed a criminal act. But any responsibility for the act attributed to the state, rather than to its constituent actors, will necessarily be civil, rather than criminal, in nature. *See* Marko Milanović, *State Responsibility for Genocide*, 17 EUR. J. INT'L L. 553, 562, 601 (2006). *See generally* JØRGENSEN, *supra* note 23. The 1996 draft of the International Law Commission's Articles on State Responsibility provided in Article 19 that "breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole" would constitute a crime. Int'l L. Comm'n, *Part One of the Draft Articles on State Responsibility as Adopted by the Commission on First Reading at its Thirty-second Session in 1980 and Text and Titles of Parts Two and Three of the Draft Articles on State Responsibility as Provisionally Adopted by the Drafting Committee on First Reading at the Forty-eighth Session in 1996*, art. 19, § 2, U.N. Doc. A/CN.4/L524 (June 21, 1996). In 1998, however, the Commission dropped the discussion of state crimes. *See* Int'l L. Comm'n, *Second Report on State Responsibility by Mr. James Crawford, Special Rapporteur*, ¶ 372, U.N. Doc. A/CN.4/498/Add.4 (July 19, 1999) ("In 1998 the Commission decided to set aside the notion of State crime for the time being, and to explore 'whether the system-

that despite its support for civil responsibility of states for genocide, it could not support the amendment because it did not properly distinguish between civil liability and criminal liability.³⁸ The Dominican Republic opposed the amendment on the ground that “legal entities could not be held guilty of committing a crime.”³⁹ Brazil similarly resisted “the impression [given by the amendment] that a State could be held guilty of the commission of a crime.”⁴⁰

2. Debate on Article VI

During the discussion of Article VI, which addresses criminal prosecutions,⁴¹ the United Kingdom again attempted to insert a provision on state responsibility:

Where the act of genocide . . . is, or is alleged to be the act of the State or Government itself or of any organ or authority of the State or Government, the matter shall, at the request of any other party to the present Convention, be referred to the International Court of Justice whose decision shall be final and binding. Any acts or measures found by the Court to constitute acts of genocide shall be immediately discontinued or rescinded and if already suspended shall not be resumed or reimposed.⁴²

Belgium proposed an amendment to the United Kingdom text:

atic development in the Draft articles of key notions such as obligations *erga omnes*, peremptory norms (*jus cogens*) and a possible category of the most serious breaches of international obligation could be sufficient to resolve the issues raised by article 19’” (quoting Int’l L. Comm’n, *Report of the International Law Commission on the Work of its Fiftieth Session* at 147, U.N. Doc. A/53/10 (1998)). The final version adopted by the Commission in 2001 ultimately did not address state criminal responsibility and replaced the former Article 19 with provisions regarding serious breaches of peremptory norms. See Daniel Bodansky & John R. Crook, *The ILC’s State Responsibility Articles: Introduction and Overview*, 96 AM. J. INT’L L. 773, 780 n.50, 784–85 (2002).

38. See Sixth Committee 96th Meeting, *supra* note 25, at 351.

39. *Id.* at 355.

40. *Id.*

41. Article VI provides: “Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.” Genocide Convention, *supra* note 6, art. 6.

42. U.N. GAOR, 6th Comm., 3d Sess., U.N. Doc. A/C.6/236 Corr.1 (Oct. 19, 1948).

Any dispute relating to the fulfillment of the present undertaking or to the direct responsibility of a State for the acts enumerated in article [III] may be referred to the International Court of Justice by any of the Parties to the present Convention. The Court shall be competent to order appropriate measures to bring about the cessation of the imputed acts or to repair the damage caused to the injured persons or communities.⁴³

The United States took the position that the Committee should not debate the United Kingdom and Belgium proposals, as the issue had already been decided during consideration of Article IV.⁴⁴ The United Kingdom and Belgium withdrew their proposals and drafted a new proposal to be discussed during the debate on Article IX.⁴⁵

3. Debate on Article IX

The Secretariat draft of the Convention had included a compromissory clause providing for settlement of disputes on interpretation or application of the Convention by the ICJ, which the ad hoc draft committee adopted, over the objection of Poland and the Soviet Union, with only minor modification.⁴⁶ In the Sixth Committee debate, the United Kingdom and Belgium resubmitted a modified version of the text they had previously withdrawn:

Any dispute between the High Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including disputes relating to the responsibility of a State for any of the acts enumerated in articles [I] and

43. U.N. GAOR, 6th Comm., 3d Sess., U.N. Doc. A/C.6/252 (Nov. 6, 1948).

44. See U.N. GAOR, 6th Comm., 3d Sess., 99th mtg. at 392, U.N. Doc. A/C.6/SR.99 (Nov. 10, 1948).

45. U.N. GAOR, 6th Comm., 3d Sess., 100th mtg. at 394, U.N. Doc. A/C.6/SR.100 (Nov. 11, 1948).

46. U.N. ESCOR, Ad Hoc Comm. on Genocide, 6th Sess., 20th mtg. at 6, U.N. Doc. E/AC.25/SR.20 (Apr. 26, 1948). The Ad Hoc Committee added the words "between any of the High Contracting Parties" to the language proposed in the Secretariat draft. See Secretariat Draft, *supra* note 18. The United States proposed an additional clause, which the ad hoc committee adopted, providing that "no dispute shall be submitted to the International Court of Justice involving an issue which has been referred to, and is pending before or has been passed upon by a competent international criminal tribunal." U.N. ESCOR, Ad Hoc Comm. on Genocide, 6th Sess., 20th mtg. at 6, U.N. Doc. E/AC.25/SR.20 (Apr. 26, 1948).

[III], shall be submitted to the International Court of Justice, at the request of any of the High Contracting Parties.⁴⁷

States had mixed responses to the amendment, again focused on the distinction between civil and criminal responsibility and the impact of a determination of state responsibility. Like the debate about Article IV, the concerns generally stemmed from confusion regarding the nature of the responsibility contemplated in the amendment, not from opposition to state responsibility itself.⁴⁸ Despite the concerns and confusions, the Committee adopted the amendment.⁴⁹ It would be nearly fifty years before any state put the disputed language to the test and brought to the ICJ a claim that a state had committed genocide in violation of the Convention.

B. The Debate on Article IX in the ICJ

On March 20, 1993, the ICJ for the first time faced the question of whether it could hold a state responsible for commission of genocide, when Bosnia and Herzegovina filed an application to the Court charging that Serbia and Montenegro (at that time known as the Federal Republic of Yugoslavia) had committed genocide and would “continue to commit genocide unless they are stopped.”⁵⁰ The facts of the case are well known. Following the breakup of the former Yugoslavia, a violent conflict raged throughout the region. The death toll in Bosnia and Herzegovina remains uncertain, but estimates of

47. U.N. GAOR, 6th Comm., 3d Sess., U.N. Doc. A/C.6/258 (Nov. 10, 1948).

48. See Sixth Committee 103d Meeting, *supra* note 20, at 431; see also *supra* text accompanying notes 37–40. States had divergent interpretations of the amendment. The Philippines believed it imposed criminal liability. Sixth Committee 103d Meeting, *supra* note 20, at 433. Haiti interpreted the provision to mean civil liability, but thought that civil liability could not be imposed until criminal liability had been established. *Id.* at 436–37. Canada reminded the delegates that the Committee had already rejected the idea of state criminal responsibility and cautioned that the United Kingdom could be trying to reintroduce it. *Id.* at 439. The United Kingdom then reiterated that “the responsibility envisaged by the joint Belgian and United Kingdom amendment was the international responsibility of States following a violation of the convention. That was civil responsibility, not criminal responsibility.” *Id.* at 440.

49. See U.N. GAOR, 6th Comm., 3d Sess., 104th mtg. at 447, U.N. Doc. A/C.6/SR.104 (Nov. 13, 1948).

50. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugo. (Serb. & Mont.)), ¶ 4 (Application of the Republic of Bosn. & Herz.) (Mar. 20, 1993), available at <http://www.icj-cij.org/docket/files/91/7199.pdf> [hereinafter Genocide Application].

the number of persons killed range between 97,000 and 200,000.⁵¹ Ethnic cleansing formed a significant part of the atrocities, with Serbian forces and local Bosnian Serbs seeking to create Serb-only regions in Bosnia.⁵² The July 1995 massacre of some eight thousand Bosnian Muslim men and boys by the Army of Republika Srpska in the small town of Srebrenica stands out among the many horrors that took place throughout the conflict and is widely regarded as worst atrocity committed in Europe since World War II.⁵³

Bosnia alleged that Serbia had breached, and was continuing to breach, its legal obligations under the Genocide Convention.⁵⁴ Bosnia's complaint noted that under Article I of the Convention, the Contracting Parties agree that genocide is a crime under international law, and it claimed that because Serbia "planned, prepared, conspired, promoted, encouraged, aided and abetted and committed genocide against the People and State of Bosnia and Herzegovina," it had breached its obligations under Article I.⁵⁵ Based on those actions and the obligations set forth in the Convention, Bosnia argued that a dispute existed between it and Serbia "relating to the interpretation, application, or fulfilment of the present [Genocide] Convention, including those relating to the responsibility of a State for genocide or any of the other acts enumerated in article III', within the meaning of Article IX of the Convention."⁵⁶ Bosnia requested reparations and immediate cessation by Serbia of all activities in violation of the Convention.⁵⁷

Because Bosnia's application marked the first time a state was claiming before the ICJ that another state was responsible

51. See *17,000 Still Missing from Balkan Wars*, N.Y. TIMES, Aug. 30, 2007, at A9; Marlise Simons, *Bosnia: Study Puts War Dead at 97,207*, N.Y. TIMES, June 22, 2007, at A6. In their pleadings and during oral hearings, Bosnia and Serbia disputed the number of people killed during the conflict. See, e.g., Verbatim Record: Public Sitting, CR 2006/12, ¶¶ 70–74 (Mar. 8, 2006) (quoting representative of Serbia as accusing Bosnia of exaggerating the number of fatalities); Verbatim Record: Public Sitting, CR 2006/2, ¶¶ 56–60 (Feb. 27, 2006) (quoting representative of Bosnia as noting that estimates of the number of people killed as a result of ethnic cleansing range between 100,000 and 200,000).

52. See Marlise Simons, *Bosnia's Genocide Case Against Serbia Starts*, N.Y. TIMES, Feb. 28, 2006, at A8.

53. The ICTY declared the massacre at Srebrenica a genocide in 2001. See *Prosecutor v. Krstić*, Case No. IT-98-33-T, Judgment, ¶ 599 (Aug. 2, 2001).

54. See Genocide Application, *supra* note 50, ¶ 135(a).

55. *Id.* ¶ 103.

56. *Id.* ¶ 100 (quoting Genocide Convention, *supra* note 6, art. 9).

57. See *id.* ¶ 103.

for the commission of genocide in violation of the Genocide Convention, the Court faced the threshold question of whether Article IX conferred jurisdiction in the ICJ to determine state responsibility. While Bosnia argued that Article IX clearly contemplates ICJ jurisdiction over a determination of state responsibility, Serbia maintained that the Genocide Convention provides only for the punishment of individuals for commission of genocide,⁵⁸ and that under its provisions a state cannot be determined to be responsible for genocide.⁵⁹

The ICJ cursorily addressed this question for the first time in its April 8, 1993 order granting provisional measures against Yugoslavia. Noting that a decision on provisional measures does not require a decision on jurisdiction, the Court reasoned nonetheless that it should not decide a request for provisional measures unless the provisions invoked by the application appeared to afford a *prima facie* basis on which the jurisdiction of the Court could be established.⁶⁰ The Court held that Article IX of the Convention

appears . . . to afford a basis on which the jurisdiction of the Court might be founded to the extent that the subject-matter of the dispute relates to “the interpretation, application or fulfilment” of the Convention, including disputes “relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III” of the Convention.⁶¹

At the same time, the Court maintained that “the decision given in the present proceedings in no way prejudices the question of the jurisdiction of the Court to deal with the merits of the case, or any questions relating to the admissibility of the Application, or relating to the merits themselves.”⁶²

58. See Counter-Memorial of the Federal Republic of Yugoslavia, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugo. (Serb. & Mont.)), at 308–12 (July 22, 1997), available at <http://www.icj-cij.org/docket/files/91/10503.pdf>.

59. See Rejoinder of the Federal Republic of Yugoslavia, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugo. (Serb. & Mont.)), at 664 (Feb. 22, 1999), available at <http://www.icj-cij.org/docket/files/91/10507.pdf>.

60. See Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugo. (Serb. & Mont.)), 1993 I.C.J. 3, 11–12 (Req. for the Indication of Provisional Measures) (Order of Apr. 8).

61. *Id.* at 16 (quoting Genocide Convention, *supra* note 6, art. 9).

62. *Id.* at 23. The Court ordered that the Government of Yugoslavia

The Court delved deeper into the issue in the preliminary objections phase. Yugoslavia argued that the “key provisions” of the Genocide Convention require states only to: (1) prevent and . . . punish the crime of genocide under Article I; (2) enact necessary legislation to give effect to the Convention under Article V; and (3) try persons charged with genocide in a competent tribunal of the state in the territory of which the act was committed under Article VI.⁶³ In Serbia’s view, the duties of a state prescribed by the Convention are limited to those relating to the prevention and punishment of genocide.⁶⁴ Accordingly, Serbia argued, the Court did not have jurisdiction under Article IX of the Convention to decide whether Serbia was responsible for committing genocide.⁶⁵

By a vote of eleven to four, the Court rejected Yugoslavia’s contention that state responsibility falls outside the jurisdiction of the ICJ⁶⁶ and held that “the reference in Article IX to ‘the responsibility of a State for genocide or for any of the other acts enumerated in Article III’ does not exclude any form of State responsibility.”⁶⁷ The Court noted further that because

should in particular ensure that any military, paramilitary or irregular armed units which may be directed or supported by it, as well as any organizations and persons which may be subject to its control, direction or influence, do not commit any acts of genocide, of conspiracy to commit genocide, of direct and public incitement to commit genocide, or of complicity in genocide

and ordered both the Government of Yugoslavia and the Government of Bosnia and Herzegovina to “not take any action and should ensure that no action is taken which may aggravate or extend the existing dispute over the prevention or punishment of the crime of genocide, or render it more difficult of solution.” *Id.* at 24.

63. See Preliminary Objections of the Federal Republic of Yugoslavia, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugo. (Serb. & Mont.)), at 129–30 (June 26, 1995) [hereinafter Serbia Preliminary Objections]; see also Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Yugo. (Serb. & Mont.)), 1996 I.C.J. 595, 616 (Preliminary Objections) (Judgment of July 11) [hereinafter Preliminary Objections Judgment] (“According to Yugoslavia, [Article IX] would only cover the responsibility flowing from the failure of a State to fulfil its obligations of prevention and punishment as contemplated by Articles V, VI and VII; on the other hand, the responsibility of a State for an act of genocide perpetrated by the State itself would be excluded from the scope of the Convention.”).

64. See Serbia Preliminary Objections, *supra* note 63, at 130.

65. See *id.*

66. See Preliminary Objections Judgment, *supra* note 63, at 623. Two of the four judges who voted against the rejection, however, ultimately ruled that the Court had jurisdiction over the claim. See *id.* (noting decision by a vote of thirteen to two that the Court has jurisdiction under Article IX).

67. *Id.* at 616 (quoting Genocide Convention, *supra* note 6, art. 9).

the parties clearly disagreed about the scope of Article IX, there undoubtedly existed a dispute relating to the interpretation, application, or fulfillment of the Convention. As a result, the decision reasoned, the Court certainly had jurisdiction under Article IX—at the very least based on the existence of a dispute between the parties on this question.⁶⁸ This final basis of the Court's discussion of the issue suggests that the judges may not have agreed that a state may be held responsible for committing genocide under the Convention, but instead reached a decision only that the Convention does not explicitly exclude any form of state responsibility and that because there was a "dispute" between the parties on interpretation, the issue fell into the scope of Article IX of the Convention. Rejecting Yugoslavia's other objections, the Court decided that it had jurisdiction under Article IX and could proceed to consider the merits of the case.⁶⁹

68. See *id.* at 616–17.

69. See *id.* at 622. Writing separately, four judges disagreed that Article IX provided jurisdiction for the Court to decide whether a state had committed genocide in violation of the Convention. Each analyzed the text and negotiating history of the Convention and disputed the Court's rejection of Yugoslavia's claim that Article IX provides jurisdiction only over states' failure to prevent and punish genocide. Significantly, three of those judges focused not only on textual arguments, but also on policy concerns. Judge Shi and Judge Vereshchetin filed a separate declaration noting that although they believed that Article IX can provide a basis for jurisdiction, they disagreed with the Court's rejection of Yugoslavia's claim that Article IX provides jurisdiction only over states' failure to prevent and punish genocide and were "disquieted by the statement of the Court, in paragraph 32 of the Judgment, that Article IX of the Genocide Convention 'does not exclude any form of State responsibility.'" *Id.* at 631 (Joint Declaration of Judge Shi and Judge Vereshchetin) (quoting Preliminary Objections Judgment, *supra* note 63, at 616). Citing Articles IV, V, and VI of the Convention as evidence that "[i]n substance, the Convention remains an instrument relating to the criminal responsibility of individuals," they noted that the *travaux préparatoires* indicate that only during the final stages of negotiation of the draft Convention—and with many doubts about the meaning of the new language—did the drafters decide to include in Article IX the language relating to responsibility of states for genocide "without the concurrent introduction of necessary modifications into other articles of the Convention." *Id.* at 631. They underscored their argument by going beyond the text to opine that in light of the international community's interest in bringing to justice individual perpetrators of genocide or genocidal acts, "it might be argued that this Court is perhaps not the proper venue for the adjudication of the complaints which the Applicant has raised in the current proceedings." *Id.* at 632.

Also in a separate declaration, Judge Oda similarly characterized the Convention as focusing not on the rights and obligations of states, but rather—because of the success of the Nuremberg trials just prior to the drafting—on individuals. See *id.* at 626 (Declaration of Judge Oda). Moreover, evincing his interest in the political aspects of the issue, he questioned whether the ICJ was the "appropriate" forum for determining state responsibility, and he expressed doubt

The Court reached a final decision eleven years later, in 2007. The Court addressed the jurisdiction arguments, and specifically the arguments on the scope of Article IX, in far greater detail than it had in its preliminary objections judgment.⁷⁰ It rooted its determination in analysis of Article I and Article IX of the Convention. Citing the principles of interpretation of the Vienna Convention on the Law of Treaties,⁷¹ the Court first turned to Article I, which affirms that genocide “is a crime under international law which [parties] undertake to prevent and to punish.”⁷² The court interpreted the word “undertake” to indicate that the drafters chose to express an obligation, not merely an aspiration, and determined that Article I “creates obligations distinct from those which appear in the subsequent Articles.”⁷³

The Court asserted that its conclusion was supported by the “humanitarian and civilizing purpose of the Convention,” as well as by the preparatory work of the Convention.⁷⁴ The Court noted that in requesting ECOSOC to submit a report and a draft convention on genocide, the General Assembly had declared that “ ‘genocide is an international crime entailing national and international responsibility on the part of individuals and States.’ ”⁷⁵ To the Court, that declaration, coupled with the General Assembly’s adoption the same day of two associated resolutions, one concerning the formulation of the Nuremberg principles on the rights and duties of individuals, and the

that the international community or the victims of the abuses alleged would “benefit” from consideration of state responsibility by the Court. *Id.* at 629. Conceding that “the extremely vague and uncertain provisions of Article IX . . . may leave room” for the Court to decide the issue of state responsibility, Judge Oda took the position that state responsibility would be incompatible with “the real spirit of the Genocide Convention” and recommended that, in light of the focus since World War II on the rights of individuals rather than the duties of states, the work of the newly constituted ICTY in pursuing accountability for individuals should be noted. *Id.* at 630.

70. Yugoslavia had criticized the Court’s decision on jurisdiction in the preliminary objections judgment, contending that the Court’s evaluation of Yugoslavia’s claim on the scope of Article IX “is of marked brevity and . . . is not buttressed by any reference to the substantial preparatory work of the Convention.” Genocide Judgment, *supra* note 1, at 57.

71. Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331.

72. Genocide Convention, *supra* note 6, art. 1.

73. Genocide Judgment, *supra* note 1, at 61.

74. *Id.*

75. *Id.* at 62 (quoting G.A. Res. 180 (II), at 129–30, U.N. Doc. A/519 (Nov. 21, 1947)).

other concerning the draft declaration on the rights and duties of states, reiterated the international community's interest not only in the responsibilities of individuals, but also in the responsibilities of states.⁷⁶

The Court also looked to the text, focusing on the fact that Article I had been drafted as an operative paragraph, rather than as a hortatory preambular declaration.⁷⁷ The Preamble to the draft Convention originally prepared by the ad hoc drafting committee had provided in part that the High Contracting Parties "[h]ereby agree to prevent and punish the crime as hereinafter provided," with the first paragraph in the draft providing that "[g]enocide is a crime under international law whether committed in time of peace or in time of war."⁷⁸ In the Sixth Committee, Belgium suggested that an agreement to prevent and punish genocide would be made more effective if it were in the operative part of the Convention rather than in the preamble, and proposed a revised Article I: "The High Contracting Parties undertake to prevent and punish the crime of genocide."⁷⁹ The Netherlands, in turn, proposed a revised text for Article I that combined the Committee draft with the Belgian proposal, along with a few modifications: "The High Contracting Parties reaffirm that genocide is a crime under international law, which they undertake to prevent and to punish, in accordance with the following articles."⁸⁰ The Danish representative proposed deletion of the final phrase, "in accordance with the final articles," to make the language more effective.⁸¹ With minor modifications, the Committee adopted the text of Article I: "The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish."⁸²

The Court viewed the movement of the undertaking to prevent and punish genocide from the Preamble to the opera-

76. See *id.* (citing G.A. Res. 178 (II), at 112, U.N. Doc. A/519 (Nov. 21, 1947); G.A. Res. 177 (II), at 111-12, U.N. Doc. A/519 (Nov. 21, 1947)).

77. See *id.*

78. *Id.* (quoting Ad Hoc Committee Report, *supra* note 18, at 2, 18).

79. *Id.* (quoting U.N. GAOR, 6th Comm., 3d Sess., U.N. Doc. A/C.6/217 (Oct. 5, 1948)).

80. *Id.* (quoting U.N. GAOR, 6th Comm., 3d Sess., U.N. Doc. A/C.6/220 (Oct. 5, 1948)).

81. See *id.* (quoting U.N. GAOR, 3d Sess., 68th mtg. at 49-50, U.N. Doc. A/C.6/220 (Oct. 5, 1948)).

82. Genocide Convention, *supra* note 6, art. 1.

tive section and the removal of the phrase “in accordance with the following articles” as an indication that Article I does not merely represent an empty statement, but instead imposes obligations on parties, and that those obligations are distinct from those imposed by other provisions of the Convention.⁸³ Conceding that Article I “does not *expressis verbis* require States to refrain from themselves committing genocide,” the Court found that, “taking into account the established purpose of the Convention, the effect of Article I is to prohibit States from themselves committing genocide.”⁸⁴

The Court based its conclusion on two factors. First, because under Article I parties “confirm” that genocide constitutes “a crime under international law,” parties to the Convention logically must agree not to commit the act they have defined as a crime. Second, because States are required to prevent genocide, they must be obligated also not to commit genocide:

It would be paradoxical if States were . . . under an obligation to prevent . . . commission of genocide by persons over whom they have a certain influence, but were not forbidden to commit such acts through their own organs, or persons over whom they have such firm control that their conduct is attributable to the State concerned under international law. In short, the obligation to prevent genocide necessarily implies the prohibition of the commission of genocide.⁸⁵

The wording of Article IX provided further support for the Court’s conclusion that the parties to the Convention are bound not to commit genocide or other genocidal acts. The decision focused in particular on the inclusion of the word “fulfilment” in Article IX and the insertion of the phrase “including those [disputes] relating to the responsibility of a State for genocide or any of the other acts enumerated in [A]rticle III.”⁸⁶ According to the Court’s reasoning, the word “including” indicates that disputes relating to the responsibility of parties for geno-

83. See Genocide Judgment, *supra* note 1, at 63.

84. *Id.* at 63; see Paola Gaeta, *On What Conditions Can a State Be Held Responsible for Genocide?*, 18 EUR. J. INT’L L. 631, 632–40 (2007) (discussing the Court’s analysis of roots of state obligation not to commit genocide).

85. Genocide Judgment, *supra* note 1, at 63. The court added that the obligation not to commit genocide extends to an obligation not to commit other acts enumerated in Article III. *Id.*

86. Genocide Convention, *supra* note 6, art. 9.

cide or other acts in Article III are part of a broader group of disputes relating to the interpretation, application, or fulfillment of the Convention, and the phrasing “responsibility . . . for genocide” indicates that Article IX contemplates not simply responsibility for failure to prevent or punish genocide, but also responsibility for commission of genocide itself.⁸⁷

Serbia objected to the notion of state responsibility on three grounds, all of which the Court rejected. First, Serbia argued that international law does not recognize criminal responsibility of a state, and the Convention does not provide for a way to impose criminal responsibility. The Court responded that the obligations arising from the Convention and the responsibilities imposed on a state arising from a breach of those obligations are civil, not criminal.⁸⁸

Second, Serbia argued that holding a state responsible for commission of genocide would clash with the Convention’s scope and purpose, as the Convention concerns criminal prosecution and punishment of individuals, not responsibility of states. The ICJ responded that “duality of responsibility continues to be a constant feature of international law,” citing Article 25 of the Rome Statute of the International Criminal Court, which provides that “[n]o provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law,” and the International Law Commission’s Articles on the Responsibility of States for Internationally Wrongful Acts, which provide in Article 58 that the rules on state responsibility “are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State.”⁸⁹ The ICJ concluded that neither the wording nor the structure of the provisions relating to individual criminal liability alter the distinct obligations the Convention imposes on states.⁹⁰

87. See Genocide Judgment, *supra* note 1, at 64.

88. *Id.*; see also *supra* note 37 (discussing debate in International Law Commission over state criminal responsibility).

89. Genocide Judgment, *supra* note 1, at 65 (quoting Rome Statute of the International Criminal Court, art. 25, Jul 1, 2002, 2187 U.N.T.S. 90; Responsibility of States for Internationally Wrongful Acts, G.A. Res. 56/83, Annex, art. 58, U.N. Doc. A/56/83/Annex (Dec. 12, 2001)).

90. Genocide Judgment, *supra* note 1, at 65–66; see Antonio Cassese, *On the Use of Criminal Law Notions in Determining State Responsibility for Genocide*, 5 J. INT’L CRIM. JUST. 875, 879–81 (2007) (criticizing Court’s classification of state actions under criminal law categories).

Third, Serbia argued that the negotiating history of the Convention indicates that the responsibility of the state was tied to Articles IV, V, and VI, as the civil responsibility of states to prevent and punish was meant to support the main thrust of the Convention, the criminal responsibility of individuals. Serbia focused on the Sixth Committee's rejection of the United Kingdom proposal to extend Article IV with a sentence providing that acts of genocide "committed by or on behalf of States or governments constitute a breach of the present Convention."⁹¹ Reviewing the drafting history, the Court concluded that proposals concerning the *criminal* responsibility of states were not adopted, whereas the amendment that was adopted, modifying Article IX, "is about jurisdiction in respect of the responsibility of States *simpliciter*."⁹² The Court concluded that the drafting history supported its conclusion that states are bound under Article I not to commit genocide and that under Article IX international civil responsibility is incurred for breach of that obligation.⁹³

The ICJ's conclusion that the Genocide Convention obligates states not to commit genocide and that the ICJ has jurisdiction to decide the responsibility of a state for committing genocide aroused significant criticism. Several judges invoked the legacy of Nuremberg to challenge the majority's decision to assign blame for genocide to a collective. Echoing his declaration during the Preliminary Objections phase, Judge Shi, along with Judge Koroma, stressed that, in line with the principles governing the Nuremberg trials, the focus of the Convention should be on the acts of individuals, not on those of states.⁹⁴ Judge Owada, recalling the IMT's statement that " 'crimes against international law are committed by men, not by abstract entities,' " noted that the tribunal punished only the individuals involved, not the state as such.⁹⁵ Similar criticisms

91. Genocide Judgment, *supra* note 1, at 66 (quoting UK Amendment, *supra* note 23); *see also supra* notes 23–33 and accompanying text (describing debate over United Kingdom's proposed amendment to Article IV).

92. Genocide Judgment, *supra* note 1, at 67.

93. *See id.*

94. *See* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), at 2 (Feb. 26, 2007) (Joint Declaration of Judges Shi and Koroma), *available at* <http://www.icj-cij.org/docket/files/91/13695.pdf> (last visited Mar. 17, 2008); *see also supra* note 69.

95. *See* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Mont.), at 12 (Feb. 26, 2007) (Separate Opinion of Judge Owada) (quoting International Military Tribunal,

were voiced outside the Court as well. Commentators emphasized that the international community deliberately had chosen to focus since World War II on the guilt of individuals rather than that of states.⁹⁶ The ICJ's decision that a state can be held responsible for committing genocide was represented as a dangerous step toward energizing the concept of collective guilt.⁹⁷

II. REACHING PEACE BY ASSIGNING GUILT: THE GOALS AND METHODS OF TRANSITIONAL JUSTICE

The controversy provoked by the idea of holding a state responsible for committing genocide seems incongruous in light of the international community's routine pronouncement of states' need to satisfy their obligations under international

Judgment, in 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG, 14 NOVEMBER 1945–1 OCTOBER 1946: OFFICIAL DOCUMENTS 171, 223 (1947)), available at <http://www.icj-cij.org/docket/files/91/13697.pdf>).

96. See *supra* note 3 and accompanying text (describing criticisms of ICJ decision and providing examples); see also Editorial, *No Escape from Balkan Guilt*, EDMONTON J. (Alberta), Mar. 1, 2007, at A18 (supporting Court's decision not to "lay[] collective guilt" on the ground that "the idea that such things as blame can be shared by all members of a national group, and even by subsequent generations, is one of the things that helped people like Milosevic whip up murderous fear of other ethnic groups during the breakup of the former Yugoslavia"); David Luban, *Timid Justice*, SLATE, Feb. 28, 2007, <http://www.slate.com/id/2160835> (explaining that reluctance to hold a state responsible for committing genocide is rooted in reluctance to "offend[] [states'] sovereign dignity and majesty" and in resistance to the concept of collective guilt).

97. One of the few positive aspects of the judgment was seen to be that the Court did not go so far as to name Serbia a perpetrator of genocide and thereby turn back the crucial progress toward reconciliation and peace that the international community had made by pursuing the guilty individuals—and not the groups—who were responsible for the atrocities in the former Yugoslavia. See, e.g., Editorial, *No Escape from Balkan Guilt*, *supra* note 96. In addition to concerns about the impact of holding states responsible for commission of genocide under the Convention, commentators also criticized the Court's decision on several other grounds. See, e.g., Yehuda Z. Blum, *Was Yugoslavia a Member of the United Nations in the Years 1992–2000?*, 101 AM. J. INT'L L. 800, 813–18 (2007) (criticizing inconsistencies in decision on jurisdiction); Antoine Ollivier, Introductory Note, *The Judgment of the International Court of Justice in the "Genocide" Case Between Bosnia and Herzegovina v. Serbia and Montenegro*, 46 I.L.M. 185 (2007) (noting Court's failure to resolve contradictions in jurisdiction analysis); Susana SáCouto, *Reflections on the Judgment of the International Court of Justice in Bosnia's Genocide Case Against Serbia and Montenegro*, 15 HUM. RTS. BRIEF, Fall 2007, at 2, 4 (criticizing treatment of evidence in a piecemeal fashion and failure to infer genocidal intent from pattern of atrocities); Luban, *supra* note 96 (same).

law.⁹⁸ State responsibility is, of course, not an unusual concept in international law; indeed, until the recent advent of individual rights and responsibilities, state action was the very basis of international law. Traditionally, instead of grappling with the acts of individuals, international law attributes acts of individuals to the state.⁹⁹ Although “in factual terms states act through individuals, in legal terms state responsibility is born not out of an act of an individual but out of an act of the state.”¹⁰⁰ Moreover, there are many acts, such as aggression and killing protected persons in armed conflict, for which the international community assigns responsibility to both states and individuals.¹⁰¹ The international community has not hesi-

98. See, e.g., G.A. Res. 62/168, ¶ 3, U.N. GAOR, 62d Sess., U.N. Doc. A/RES/62/168 (Mar. 20, 2008) (calling upon the Government of Iran to respect fully its human rights obligations, including taking specific actions such as abolishing executions of persons who were under the age of eighteen at the time of their offense and eliminating torture and other cruel, inhuman, or degrading punishment or treatment, both in law and in practice); S.C. Res. 1591, ¶¶ 1, 7, U.N. Doc. S/RES/1591 (Mar. 29, 2005) (recognizing failure of Government of Sudan to fulfill its commitments under previous resolutions, demanding that the Government and other parties take steps to implement obligations under prior agreements, and imposing arms embargo on Government in Darfur); S.C. Res. 1441, ¶ 1, U.N. Doc. S/RES/1441 (Nov. 8, 2002) (holding Iraq “in material breach of its obligations” under previous Security Council resolutions and establishing under Chapter VII an enhanced weapons inspection regime). The International Law Commission’s Articles on Responsibility of States for Internationally Wrongful Acts provide that a state responsible for an internationally wrongful act must cease that act if it is continuing or offer guarantees of non-repetition if it has ceased, and require that the offending state must make full reparation for the wrongful act, whether in the form of restitution (re-establishing the situation that existed before the wrongful act was committed), compensation (in the event that damage is not made good by restitution), or satisfaction (such as an acknowledgement of the commission of the wrongful act, an expression of regret, or a formal apology, in the event that the injury cannot be made good by either restitution or compensation). See Responsibility of States for Internationally Wrongful Acts, G.A. Res. 56/83, Annex, arts. 30–37, U.N. Doc. A/56/83/Annex (Dec. 12, 2001).

99. BARRY E. CARTER ET AL., *INTERNATIONAL LAW* 14 (5th ed. 2007) (explaining that international law was traditionally “law between nation states”).

100. André Nollkaemper, *Concurrence Between Individual Responsibility and State Responsibility in International Law*, 52 INT’L & COMP. L.Q. 615, 616 (2003); see also Case of Certain Questions Relating to Settlers of German Origin in the Territory Ceded by Germany to Poland, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 6, at 12 (Sept. 10) (“States can act only by and through their agents and representatives.”); G.A. Res 56/83, Annex, *supra* note 98.

101. Article VI of the Charter of the International Military Tribunal criminalized aggression for individuals, see Charter of the International Military Tribunal art. 6(a), in 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG, 14 NOVEMBER 1945–1 OCTOBER 1946: OFFICIAL DOCUMENTS 10, 11 (1947) [hereinafter IMT Charter], and the Rome Statute includes aggression as one of the four crimes for which the ICC may de-

tated to assign responsibility to states in circumstances in which individuals were also pursued. The Allies' prosecution of political and military leaders after World War II did not preclude the concurrent declaration that Germany and Japan were responsible as well.¹⁰² The trial and conviction of particular individuals for bombing the La Belle disco in Berlin in 1986 did not detract in the popular imagination from the validity of the claim that Libya owed compensation to the victims of the attack.¹⁰³

The difference between those situations and circumstances in which societies seek to recover from mass atrocity or violent conflict, of course, is the accepted framework for transitional justice. Examining the mechanism of criminal trials in particular, this Part evaluates the focus of transitional justice on individual accountability and considers how that focus contributes to the goals of transitional justice. This discussion sheds light on why the inclusion of a clause for state responsibility in the Genocide Convention and the decision of the ICJ that it can hold a state responsible for committing genocide in violation of the Convention appear to stand in stark contrast to the efforts of the international community to help societies grapple with past atrocities. As discussed in Parts III and IV, however, rather than detracting from the goals of transitional justice, state responsibility for genocide may in fact serve them in a way that individual criminal accountability has failed to do.

termine individual criminal responsibility (although the definition of the crime and the conditions for the exercise of jurisdiction remain to be determined), see LARRY MAY, *AGGRESSION AND CRIMES AGAINST PEACE* 13 (2008). For a discussion of the prohibition of aggression for states, see *Military & Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14, 191 (June 27). Killing protected persons in armed conflict is a grave breach of the Fourth Geneva Convention that is prohibited for individuals under Article 146 and prohibited for states under Article 32. See *Geneva Convention Relative to the Protection of Civilian Persons in Time of War* arts. 32, 146, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

102. See Pierre Marie Dupuy, *International Criminal Responsibility of the Individual and International Responsibility of the State*, in 2 *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY* 1085, 1086 (Antonio Cassese et al. eds., 2002).

103. See Nollkaemper, *supra* note 100, at 619. In November 2001, a German court convicted four individuals for the bombing. The court decided that because Libyan secret service agents and the Libyan Embassy had planned the bombing, Libya was jointly responsible for the attack. See Steven Erlanger, *Four Guilty in Fatal 1986 Berlin Disco Bombing Linked to Libya*, N.Y. TIMES, Nov. 14, 2001, at A7.

A. *Transitional Justice: A Basic Framework*

Transitional justice has been defined as “the conception of justice associated with periods of political change, characterized by legal responses to confront the wrongdoings of repressive predecessor regimes.”¹⁰⁴ Nuremberg was a turning point for international criminal justice in particular and for transitional justice overall, but transitional justice mechanisms existed prior to World War II, for example in the trials at Leipzig after the first World War.¹⁰⁵ The contemporary notion of transitional justice as a framework for characterizing the legal side of political transitions, however, gained currency in the 1990s, amid the transitions taking place in Latin America, Eastern Europe, and South Africa.¹⁰⁶

The ultimate goal of transitional justice is to use legal mechanisms to stabilize the transition from one regime to another and ultimately to achieve reconciliation and peace.¹⁰⁷ Because of the profound corrosion of a society affected by an atrocity such as genocide, societies transitioning out of periods of mass atrocity face a broad range of dilemmas. Does focusing on the past prevent a society from moving forward, or is it necessary to show victims of atrocities that their suffering has not been forgotten? Is acknowledgment of past abuses sufficient to satisfy victims, or is punishment necessary to make victims whole again? How can a society draw a clear line between a violent past and a future under which the rule of law prevails?

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

105. See RUTI G. TEITEL, *TRANSITIONAL JUSTICE* 47 (2000).

106. See generally THE LEGACY OF ABUSE: CONFRONTING THE PAST, FACING THE FUTURE (Alice H. Henkin ed., 2002); 1 TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES (Neil J. Kritz ed., 1995); TEITEL, *supra* note 105. Eric Posner and Adrian Vermuele contend that transitional justice should be “continuous with ordinary justice,” rather than treated as a “distinctive topic presenting a distinctive set of moral and jurisprudential dilemmas.” Eric A. Posner & Adrian Vermuele, *Transitional Justice as Ordinary Justice*, 117 HARV. L. REV. 761, 764 (2004).

107. The Statute of the ad hoc tribunal for Rwanda states that the trials held by the Tribunal “would contribute to the process of national reconciliation.” Statute of the International Tribunal for Rwanda pmbl., S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994) [hereinafter ICTR Statute]. The statute of the ICTY similarly states that the Tribunal seeks to “bring justice” to perpetrators of atrocities and to “contribute to the restoration and maintenance of peace.” Statute of the International Tribunal for the Former Yugoslavia pmbl., S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993) [hereinafter ICTY Statute].

The tension between many of the goals of transitional societies—vengeance or forgiveness, remembering or forgetting¹⁰⁸—demands consideration of the particular needs and unique circumstances in deciding the approach that will lead to a successful transition. In recent years, however, the international community largely has settled on a framework under which transitional justice is pursued through a limited set of goals, primarily reestablishing the rule of law, promoting accountability, and creating a historical record of past events.¹⁰⁹

B. Individual Criminal Responsibility

Despite variance among transitional societies in the balance of priorities in these goals, individual responsibility has taken center stage as the preferred method for achieving them.¹¹⁰ Traditionally, of course, individuals had little place in international law, which focused on relations between states, rather than on relations between a state and its citizens or relations among individuals themselves.¹¹¹ This limited attention paid to individuals, and the absence of accountability for

108. See generally MARTHA MINOW, *BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE* (1998).

109. See TEITEL, *supra* note 105, at 220–21.

110. See, e.g., MINOW, *supra* note 108, at 123 (noting that advocates and journalists “claim that trials produce justice, gather truth, and create needed public acknowledgment”); ARYEH NEIER, *WAR CRIMES: BRUTALITY, GENOCIDE, TERROR, AND THE STRUGGLE FOR JUSTICE* xii–xiii (1998) (describing the movement for accountability as “central to the international human rights movement in recent years”). Many scholars, of course, have questioned the singular focus of the international community on judicial resolution to past abuses. See *infra* notes 267–274 and accompanying text.

111. The only area in which individual rights were addressed comprehensively concerned actions by a government against citizens of other states, which encompassed two issues: the law of state responsibility for injury to aliens, and the law of war. See generally Karl Josef Partsch, *Individuals in International Law*, in 2 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 957, 959–60 (Rudolph Bernhardt ed., 1995). Enforcement mechanisms for violations of the law of war, however, were nearly nonexistent: The 1899 and 1907 Hague Conventions and the 1929 Geneva Convention on prisoners of war did not contain any provisions setting forth punishment for violations. See International Convention with Respect to the Laws and Customs of War by Land (Hague II), July 29, 1899, 32 Stat. 1803, T.S. No. 403; Convention Respecting the Laws and Customs of War on Land (Hague IV), Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539; Convention Relative to the Treatment of Prisoners of War, July 27, 1929, 47 Stat. 2021, 118 L.N.T.S. 343. The 1929 Geneva Convention on the Wounded and the Sick in Armies required only that belligerents “repress” violations “as promptly as possible,” Convention for the Amelioration of the Condition of the wounded and Sick in Armies in the Field, July 27, 1929, art. 30, 118 L.N.T.S. 303, 329.

individuals, shifted slightly after World War I. Following a determination by the Allies that the Central Powers had committed acts “in violation of established laws and customs of war and the elementary laws of humanity,”¹¹² the Treaty of Versailles included three articles providing for trials before Allied military tribunals of persons accused of violating the laws and customs of war.¹¹³ The Allies, however, never held trials; instead, the German Imperial Court of Justice at Leipzig tried twelve of the forty-five individuals that the Allies had recommended for prosecution and convicted only six.¹¹⁴ Leipzig became known as a sham.¹¹⁵

In addition to the trials of individual leaders, the Versailles Treaty included a provision declaring the acceptance of Germany of its responsibility for all damage and loss suffered by the Allies and Associated Governments during the war.¹¹⁶ The now-infamous “war guilt” clause, as well as the accompanying collective sanctions levied against Germany,¹¹⁷ became known as a root of Germany’s move toward fascism and a reason for the rise of the Nazis.¹¹⁸ After World War II, consequently, to avoid the prospect of another declaration of collective guilt and the damaging consequences thereof, the Allies turned away from the idea of declaring the responsibility of an entire state, and focused instead on the notion that individuals,

112. COMMISSION ON THE RESPONSIBILITY OF THE AUTHORS OF THE WAR AND ON ENFORCEMENT OF PENALTIES, REPORT PRESENTED TO THE PRELIMINARY PEACE CONFERENCE (March 29, 1919), *reprinted in* 14 AM. J. INT’L L. 95, 115 (1920).

113. Treaty of Peace, arts. 228–230, June 28, 1919, 225 CONSOL. T. S. 118, 285–86 [hereinafter Versailles Treaty].

114. ROBERT K. WOETZEL, *THE NUREMBERG TRIALS IN INTERNATIONAL LAW* 32–34 (1960). The Allies had originally submitted a list of more than 800 individuals for trial, but Germany opposed the breadth of the list and warned the Allies that such widespread prosecutions would result in renewed war. YVES BEIGBEDER, *JUDGING WAR CRIMINALS: THE POLITICS OF INTERNATIONAL JUSTICE* 29 (1999); DONALD A. WELLS, *WAR CRIMES AND LAWS OF WAR* 70 (1984).

115. See George Gordon Battle, *The Trials Before the Leipsic Supreme Court of Germans Accused of War Crimes*, 8 VA. L. REV. 1, 13–15 (1921); Steve Sheppard, *Passion and Nation: War, Crime, and Guilt in the Individual and the Collective*, 78 NOTRE DAME L. REV. 751, 756 n.15 (2003).

116. See Versailles Treaty, *supra* note 113, art. 231.

117. See *id.* arts. 232–237; see also TEITEL, *supra* note 105, at 121 (describing reparations levied against Germany and noting that the Versailles Treaty understood responsibility in collective terms and imposed sanctions that impacted the state as a whole); Teitel, *supra* note 104, at 72–73.

118. DAVID A. WELCH, *JUSTICE AND THE GENESIS OF WAR* 137–39 (1993); ROBIN W. WINKS & RALPH JAMES Q. ADAMS, *EUROPE, 1890–1945: CRISIS AND CONFLICT* 209–210 (2003).

not states, were responsible for their crimes against the international community.¹¹⁹ The IMT famously pronounced that “[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.”¹²⁰

Nuremberg’s legacy of holding individual perpetrators criminally accountable for atrocities recently has reemerged as a focus of the international community’s efforts to assist societies transitioning out of massive human rights abuses and atrocity. With the creation of the ICTY and ICTR in the early 1990s, international criminal justice mechanisms have become the favored avenue for responding to mass atrocity.¹²¹ The two ad hoc tribunals were followed by the establishment of the ICC in 1998,¹²² as well as the creation of the hybrid Special Court for Sierra Leone in 2002 to try individuals responsible for the crimes committed during that country’s gruesome civil war¹²³

119. See Teitel, *supra* note 104, at 73 (“[A] striking innovation at the time was the turn to international criminal law and the extension of its applicability beyond the state to the individual.”). The UN War Crimes Commission described the Charter of the International Military Tribunal at Nuremberg as

presuppos[ing] the existence of a system of international law under which individuals are responsible to the community of nations for violations of rules of international criminal law, and according to which attacks on the fundamental liberties and constitutional rights of peoples and individual[s] . . . constitute international crimes not only in time of war, but also, in certain circumstances, in time of peace.

UNITED NATIONS WAR CRIMES COMM’N, HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION AND THE DEVELOPMENT OF THE LAWS OF WAR 192–93 (1948).

120. International Military Tribunal, Judgment, in 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG, 14 NOVEMBER 1945–1 OCTOBER 1946: OFFICIAL DOCUMENTS 171, 223 (1947) [hereinafter IMT Judgment]. At the same time, however, the Nuremberg trials, as well as those in Tokyo, have been condemned as victor’s justice, selective prosecution, and violation of the prohibition against ex post facto laws. See, e.g., PETER H. MAGUIRE, LAW AND WAR: AN AMERICAN STORY 283 (2001) (comparing “the American myth of the redemptive trial and the German myth of harsh victor’s justice”); KINGSLEY CHIEDU MOGHALU, GLOBAL JUSTICE: THE POLITICS OF WAR CRIMES TRIALS 30–38 (2006).

121. See Mark A. Drumbl, *Collective Violence and Individual Punishment: The Criminality of Mass Atrocity*, 99 NW. U. L. REV. 539, 545–46 (2005) (describing the view of many commentators that trials have unique “transformative potential”).

122. See Rome Statute of the International Criminal Court, art. 1, Jul 1, 2002, 2187 U.N.T.S. 90.

123. See Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone art. 1, Jan.

and the Extraordinary Chambers in the Courts of Cambodia to try Khmer Rouge leaders for atrocities committed between 1975 and 1979.¹²⁴ The international community has emphasized again the importance of holding individuals responsible for past abuses and has exalted Nuremberg as a symbol of the power of the law to provide redress and repose in the aftermath of horror.¹²⁵

Criminal trials contribute to the goals of transitional justice because they are seen as accomplishing far more than a determination of the guilt or innocence of particular individuals.¹²⁶ Prosecutions provide victims with a sense that the abuses they suffered have been addressed, which can relieve a desire for personal vengeance.¹²⁷ They also instill a sense in society that those who commit crimes will be held accountable, thus helping to “remove the stain of impunity from traumatized societies” and establish the rule of law.¹²⁸ Moreover, by

16, 2002, 2178 U.N.T.S. 137, 138 [hereinafter Special Court for Sierra Leone Agreement].

124. See Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea arts. 1–2, June 6, 2003, available at <http://www.cambodia.gov.kh/krt/pdfs/Agreement%20between%20UN%20and%20RGC.pdf>.

125. See MINOW, *supra* note 108, at 26–27 (“When any nation or international body seeks to prosecute individuals for war crimes or domestically perpetrated mass violence, it embraces and builds upon the complex legacies of the Nuremberg and Tokyo trials.”); TEITEL, *supra* note 105, at 31 (describing how Nuremberg “has shaped the pervasive understanding of transitional criminal justice,” including a shift in approach from the national to international processes and from the collective to the individual). Of course, as Professor Martha Minow notes, during a long period of time following the Nuremberg trials, many atrocities took place, but there was no international effort to prosecute wrongdoers. See MINOW, *supra* note 108, at 27–28.

126. Professor Ruti Teitel notes that, in contrast to conventional arguments in favor of punishment, which focus on the consequences of punishment for the perpetrator or for society, in transitional societies punishment is justified by reference to the counterfactual: “What result if no punishment? To what extent are broader rule-of-law values jeopardized without punishment?” TEITEL, *supra* note 105, at 28. This analysis indicates the extent to which punishment is considered a default and divergence represents a potential threat to successful transition.

127. See Neil J. Kritz, *Coming to Terms with Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights*, 59 LAW & CONTEMP. PROBS. 127, 128 (1996); Jamie O’Connell, *Gambling with the Psyche: Does Prosecuting Human Rights Violators Console Their Victims?*, 46 HARV. INT’L L.J. 295, 300 (2005).

128. Jane E. Stromseth, *Pursuing Accountability for Atrocities After Conflict: What Impact on Building the Rule of Law?*, 38 GEO. J. INT’L L. 251, 253 (2007); see CARLOS SANTIAGO NINO, *RADICAL EVIL ON TRIAL* 187 (1996) (arguing that trials “demonstrat[e] that no group is above the law and can instill respect for the rule

declaring the guilt of particular individuals, trials declare the innocence of everyone else;¹²⁹ prosecuting particular individuals declares that not all Serbs committed murder, rape, and torture in the former Yugoslavia, that not all Germans were responsible for the Holocaust.¹³⁰ At the inaugural meeting of the judges of the ICC, UN Secretary-General Kofi Annan proclaimed the importance of avoiding placing blame on whole groups for past atrocities:

[O]nly by clearly identifying the individuals responsible for these crimes can we save whole communities from being held collectively guilty. It is that notion of collective guilt which is the true enemy of peace, since it encourages communities to nurture hatred against each other from one generation to the next.¹³¹

Individual accountability serves ultimately to promote reconciliation by “break[ing] the cycle of the collective attribution of

of law”); TEITEL, *supra* note 105, at 30; Benedict Kingsbury, *Foreword, Is the Proliferation of International Courts and Tribunals a Systemic Problem?*, 31 N.Y.U. J. INT’L L. & POL. 679, 688 (1999) (commenting that it is “an article of faith among most international lawyers that the growing availability and use of international tribunals advances the rule of law in international relations”).

129. See Aryeh Neier, *Rethinking Truth, Justice, and Guilt after Bosnia and Rwanda*, in HUMAN RIGHTS IN POLITICAL TRANSITIONS 39, 45 (Carla Hesse & Robert Post eds., 1999) (“By trying and punishing those directly responsible [for crimes in the former Yugoslavia], the burden of blame would not be carried indiscriminately by members of an entire ethnic group. Culpability would not be passed down from generation to generation. Trials would single out the guilty, differentiating them from the innocent.”).

130. See Theodor Meron, *Answering for War Crimes*, 76 FOREIGN AFF. Jan.–Feb. 1997, 2, 2–3 (characterizing the purpose of the ICTY as “assign[ing] guilt for war crimes to the individual perpetrators . . . rather than allowing blame to fall on entire groups and nations”); see also Kritz, *supra* note 127, at 128 (describing this consequence as “[p]erhaps most important[] for purposes of long-term reconciliation”); Kenneth Roth, *Why Justice Needs NATO*, THE NATION, Sept. 22, 1997, at 21 (“Bringing war criminals to justice will help break assumptions of collective guilt that fueled the conflict—to show that particular individuals, not all Serbs, Croats, or Muslims, are guilty of atrocities.”); James Vescovi, *The Search for Justice in the Former Yugoslavia and Beyond: An Interview with Minna Schrag* ‘75, COLUM. L. SCH. REP., Autumn 1996, at 27 (quoting statement of former ICTY prosecutor that individual rather than collective accountability is necessary to avoid collective guilt and prevent future generations from saying, “It’s the Serbs who did this to my father,” or “It’s the Croats who did that to my aunt.”).

131. Press Release, Secretariat, International Criminal Court Judges Embody “Our Collective Conscience” Says Secretary-General to Inaugural Meeting in the Hague, U.N. Doc. SG/SM/8628 (Mar. 11, 2003), available at <http://www.un.org/News/Press/docs/2003/sgsm8628.doc.htm>.

guilt” that often results in mass atrocity.¹³² Trials of individuals thus are crucial if warring groups are to reconcile and coexist peacefully in the wake of mass atrocity.¹³³ To heal from past conflict, it is necessary to differentiate the guilty from the innocent.

In the context of transitional justice, trials are also important because they write history.¹³⁴ Trials always function to establish a definitive version of a disputed event, but this is magnified in a transitional trial because the disputed events are massive atrocities that fracture societies and corrode their institutions. Professor Mark Osiel explains that in criminal trials pursued as an element of transitional justice, “the criminal courtroom will inevitably be viewed as providing a forum in which competing historical accounts of recent catastrophes will be promoted . . . and judgments likely will be viewed as endorsing one or another version of collective memory.”¹³⁵ Truth reveals the abuses of the past, delegitimizes the perpetrators of

132. NEIER, *supra* note 110, at 211; *see also* Carla Hesse & Robert Post, *Introduction*, in HUMAN RIGHTS IN POLITICAL TRANSITIONS, *supra* note 129, at 13, 16–17 (describing purposes of punishment in transitional societies). Neier notes that “[t]he resentments that Serbs harbored against Croats for the unpunished crimes of the Ustasha state during World War II was a major factor in the catastrophic developments in ex-Yugoslavia” in the 1990s. NEIER, *supra* note 110, at 213.

133. *See* NEIER, *supra* note 110, at 211 (“If those directly responsible are tried and punished, the burden of blame will not be carried indiscriminately by members of an entire ethnic group. Culpability will not be passed down from generation to generation.”); Hartley Shawcross, *Let the Tribunal Do its Job*, N.Y. TIMES, May 22, 1996, at A17 (“There can be no reconciliation unless individual guilt for the appalling crimes of the last few years replaces the pernicious theory of collective guilt on which so much racial hatred hangs.”). *But see* José E. Alvarez, *Rush to Closure: Lessons of the Tadić Judgment*, 96 MICH. L. REV. 2031, 2087 (1998) (describing position of some commentators that individual accountability perpetuates the idea of collective guilt).

134. *See generally* LAWRENCE DOUGLAS, *THE MEMORY OF JUDGMENT: MAKING LAW AND HISTORY IN THE TRIALS OF THE HOLOCAUST* (2001) (arguing that trials in the aftermath of extraordinary crimes can serve to establish both conventional accountability and the needs of history and memory); Alvarez, *supra* note 133, at 2031–32 (describing expectations of supporters of the ICTY and ICTR that the tribunals, like the Nuremberg and Tokyo trials, would, *inter alia*, “tell the truth of what occurred, thereby preserving an accurate historical account of barbarism that would help prevent its recurrence”); Kritz, *supra* note 127, at 128 (explaining that prosecutions “provide a public forum for the judicial confirmation of the facts”). *Cf.* Alvarez, *supra* note 133, at 2055–2058 (describing the judges in the Tadić trial as “demonstrably poor historians”).

135. Mark Osiel, *Ever Again: Legal Remembrance of Administrative Massacre*, 144 U. PA. L. REV. 463, 491–92 (1995); *see also* Teitel, *supra* note 104, at 78 (characterizing the construction of “an alternative history of past abuses” as a main purpose of transitional trials).

those abuses, and consolidates the legitimacy of the new leaders, and of the new society, on account of their responsibility for bringing the truth into the open.¹³⁶ Further, by condemning past abuses and past abusers, truth itself is a form of justice in which a society redeems itself after it has been sullied by its past, both by declaring its intention to draw a line between past and present and by clearly pronouncing the horrors of the past. Trials “play[] a central role in a society’s redefinition of itself” and do not allow a version of history peddled by genocidaires “to be perpetuated in the military academies or in textbooks.”¹³⁷

Truth-telling is seen as so important to achieving eventual reconciliation that criminal trials often include testimony that serves to establish facts far beyond those that are relevant to the specific defendant. Prior to the end of the Second World War, for example, U.S. officials who were debating how to deal with Germans who had committed war crimes viewed trials as beneficial because they would “afford the most effective way of making a record of the Nazi system of terrorism and of the effort of the Allies to terminate the system and prevent its recurrence.”¹³⁸ During the trial of SS Lieutenant Colonel Adolph Eichmann before an Israeli court in 1961, the actions that Eichmann personally undertook were “widely considered peripheral to his trial, in which Israel sought to provide a comprehensive account of the Holocaust.”¹³⁹ Similarly, the Trial

136. TEITEL, *supra* note 105, at 72–73; *see also* Neil J. Kritz, *The Dilemmas of Transitional Justice*, in 1 TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES, *supra* note 106, at xix, xxvi (noting that even after the fall of the old regime, defenders will continue to deny that the atrocities at issue took place or will claim that they were perpetrated by others or were justified in some way, which could undermine the new government and further injure victims). Aryeh Neier takes the position that in Bosnia, establishing the truth was unnecessary, as “those committing these crimes were blatant in their conduct and . . . committed crimes against humanity in full view of the international community.” Because “[t]he facts of Bosnia were thus never in dispute[,] . . . it would have been pointless to focus on truth.” Neier, *supra* note 129, at 42–43.

137. Naomi Roht-Arriaza, *Introduction* to IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE 3, 7–8 (Naomi Roht-Arriaza ed., 1995).

138. Memorandum from Henry L. Stimson, Secretary of War, to the President, (Sept. 9, 1944), in BRADLEY F. SMITH, *THE AMERICAN ROAD TO NUREMBERG: THE DOCUMENTARY RECORD, 1944–1945*, at 31 (1982).

139. Allison Marston Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CAL. L. REV. 75, 94 (2005) (citing MARK OSIEL, *MASS ATROCITY, COLLECTIVE MEMORY, AND THE LAW* 60 (1997)); *see also* TEITEL, *supra* note 105, at 76 (explaining that in bringing Eichmann to trial, the Israeli govern-

Chamber of the ICTY devoted more than one hundred paragraphs in the Tadić judgment to establishing historical background based on evidence presented before the Chamber.¹⁴⁰

There is significant tension between the goal of individual trials to establish individual accountability and its goal of truth-telling.¹⁴¹ A prosecutor seeking to tell a comprehensive story of the roots and development of an atrocity might need to introduce evidence beyond what is considered “relevant” under the standards typically applied under criminal law consistent with due process, and a judge with a similar goal might decide to include in a decision facts beyond those necessary to render the judgment. This dilemma reflects the larger difficulty of using trials to accomplish goals beyond simply establishing the guilt or innocence of a defendant. Using criminal trials to accomplish political purposes, such as demonstrating the establishment of the rule of law or telling history, is fundamentally at odds with the rule of law, and thus both unsettles the very basis for the trial and impedes the goals it seeks to establish. As Professor Ruti Teitel explains,

[f]or trials to realize their constructive potential, they need to be prosecuted in keeping with the full legality associated with working democracies during ordinary times, and when

ment sought to “make vividly present the history of the Holocaust for the first Israeli-born generation”).

140. See *Prosecutor v. Tadić*, Case No. IT-94-1-T, Opinion and Judgment, ¶¶ 53–153 (May 7, 1997); Alvarez, *supra* note 133, at 2044–46 (analyzing historical background section of the Tadić judgment). Professor Alvarez opines that the Trial Chamber provided “only so much history as is needed to support a plausible finding of guilt.” Alvarez, *supra* note 133, at 2057. Responding to criticisms that the judgment provided an incomplete account of history, Professor Alvarez argues that the judges could not present a complete portrait, because “to emphasize, as some scholars have, the personal culpability of Milosevic or the impact of certain cultural or religious institutions would be of questionable relevance to the narrow legal issues presented.” Moreover,

[q]uite apart from limits imposed by evidentiary or procedural rules, it would be impolitic for the tribunal to give as frank an assessment of the historical facts as would an academic. In the context of the Balkans, where it is said that at least one group is waging a war against history itself, the telling of accurate history is as much a political act as is a decision to indict.

Id. at 2056–57.

141. See Alvarez, *supra* note 133, at 2100–02; see also Danner & Martinez, *supra* note 139, at 95 (“Although they formally seek to fix liability on individuals rather than on groups, transitional trials paradoxically may sacrifice the traditional criminal law commitment to individual culpability for the demands of history or narrative.”).

they are not conducted in a visibly fair way, the very same trials can backfire, risking the wrong message of political justice and threatening a fledgling liberal state. Accordingly, successor trials walk a remarkably thin line between the fulfillment of the potential for a renewed adherence to the rule of law and the risk of perpetuating political justice.¹⁴²

The particular challenge of relying on trials to achieve transitional justice, therefore, is how to reconcile the normative goals that transitional justice seeks to achieve with the necessity of adhering to the rule of law in pursuing prosecutions. Despite this tension, however, the international community has continued to use trials both to pursue accountability and to tell the truth of a society's horrific past.

C. The Challenges of State Responsibility for Genocide to Transitional Justice

In light of the ultimate goal of transitional justice to achieve reconciliation and peace, state responsibility for committing genocide appears unique from other instances of state responsibility because of the international community's vision of the needs of societies emerging from genocide or other mass atrocity. Transitional societies need to heal, rebuild, and move forward, not only for the sake of the individual victims, but also for the sake of the society and the international community as a whole.¹⁴³ With the flourishing of international human rights law and international humanitarian law, as well as the tendency of mass atrocity to result in cross-border destruction, such as massive refugee flows or regional conflict, the international community is attentive to the need to consolidate peace in societies that have suffered. This is why mass atrocity is envisioned as a threat to international peace and security,¹⁴⁴

142. TEITEL, *supra* note 105, at 30.

143. The need for responding to such a trauma might be seen as similar for individuals and for groups or nations. See Kritz, *supra* note 127, at 127 (explaining similarity between need for individuals and need for societies or nations to confront past abuses).

144. See S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994) (determining that the situation in Rwanda constitutes a threat to international peace and security and deciding to establish an international tribunal to try persons responsible for genocide and other violations of international humanitarian law there); S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993) (determining that the situation in Yugo-

and this is why the international community must be careful not to perpetuate further hatreds when devising avenues to help a society heal from past atrocity. The stakes are higher when it comes to genocide and other mass atrocity; the potential consequence of citing a group's responsibility for an act, rather than declaring an individual's guilt, is revived massacre, continued war, and indefinite instability.

Thus, while blaming a state for a terrorist act is now common, the thought of blaming a state for genocide is, to many people, shocking because it so clearly clashes with the notion that individual accountability is the best path toward justice and truth-telling and thus toward reconciliation. This explains the reservations regarding the ICJ's decision that it can hold a state responsible for committing genocide. The following two Parts, however, look deeper at the assumption that state responsibility is incompatible with accountability, truth-telling, and reconciliation, and conclude that state responsibility in fact is consistent with transitional justice and even can further its goals.

III. THE GROUP DYNAMICS OF INDIVIDUAL RESPONSIBILITY

Through an examination of the jurisprudence of the IMT, the ICTY, and the ICTR, this Part challenges the notion that state responsibility for genocide is incompatible with the methods of transitional justice. As discussed above, the international community has relied primarily on individual criminal accountability to achieve transitional justice. The work of these three tribunals has been premised on the importance of holding individuals responsible for crimes in order to avoid the implication that whole groups are guilty by association.¹⁴⁵ An examination of the decisions of those tribunals, however, reveals that behind the law of individual responsibility is a consistent recognition of the group dynamics at work in the perpetration of mass atrocity—and, indeed, a reliance on those group dynamics as a basis for prosecution and conviction. This implicit acknowledgment that international crimes tend to be group crimes suggests that the idea of holding a collective responsible for genocide, rather than solely holding individuals

slavia is a threat to international peace and security and deciding to establish an international tribunal to try violations of international humanitarian law there).

145. See *supra* Part II.B.

guilty, is not a drastic step beyond what transitional justice mechanisms already do, and indeed is consistent with existing methods of transitional justice.

A. *The International Military Tribunal at Nuremberg*

Although the Nuremberg trials are known for their legacy of focusing on individual responsibility,¹⁴⁶ group dynamics in fact formed much of the basis for the decisions of the IMT. To the planners of the trials, the collective nature of the crimes was significant because of certain factors that characterized the Nazis' actions: (1) the "massive, wholesale nature of the crimes," in terms of both the number of victims and the number of perpetrators; (2) the "systematic, highly organized manner" in which the perpetrators carried out those crimes; and (3) the planning and ordering of those crimes by the leaders of a state.¹⁴⁷ The need to address the group nature of the Nazis' offenses resulted in the development of two legal innovations that the IMT used to prosecute war criminals: conspiracy and criminal organizations.

1. The Development of Conspiracy and Criminal Organizations Liability

The conspiracy and criminal organizations plan originated with Murray C. Bernays, an attorney in the War Department's Special Projects Division, who sought to devise a strategy whereby the Allies could hold accountable the thousands of war criminals who he believed should be tried, convicted, and punished.¹⁴⁸ He considered the laws of war insufficient to cover the entirety of the Nazis' crimes and believed that only a new law could properly and completely address the multitude of offenses committed by all involved.¹⁴⁹ He warned that the limits of the law and the difficulties posed by the facts on the ground should not impede the Allies' efforts:

146. See *supra* text accompanying notes 110–120 (explaining roots of contemporary focus on individual accountability in Nuremberg trials).

147. Stanislaw Pomorski, *Conspiracy and Criminal Organization*, in *THE NUREMBERG TRIAL AND INTERNATIONAL LAW* 213, 213 (George Ginsburgs & V.N. Kudriavtsev eds., 1990).

148. GARY JONATHAN BASS, *STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS* 170–71 (2000).

149. MAGUIRE, *supra* note 120, at 92.

Undoubtedly, the Nazis have been counting on the magnitude and ingenuity of their offenses, the numbers of the offenders, the law's complexities, and delay and war weariness as major defenses against effective prosecution. Trial on an individual basis, and by old modes and procedures, will go far to realize the Nazi hopes in this respect.¹⁵⁰

Bernays was concerned not merely with the impossibility of convicting all—or even many—German war criminals. Indeed, he believed that convictions for every Axis war criminal “would not, of itself, be enough.”¹⁵¹ Beyond those obstacles, Bernays was troubled by the entire structure that lay behind the crimes of the Nazis and believed that the criminality of Nazi doctrine and policy, not only of the individual perpetrators, must be exposed.¹⁵²

To achieve accountability both for individuals and for the organizations that created and pursued policies of aggressive war, war crimes, and crimes against humanity, Bernays envisioned a process under which the anticipated international tribunal would establish the guilt not only of individuals, but also of organizations themselves.¹⁵³ Bernays suggested that the tribunal should charge the appropriate organizations, including the SA, SS, and Gestapo, “with conspiracy to commit murder, terrorism, and the destruction of peaceful populations in violation of the laws of war.”¹⁵⁴ In addition to the organizations, the tribunal would also charge a small number of individual defendants who were considered to be representative of the defendant organizations. Once the guilt of the organization was determined in the international tribunal, every member of the organization would be subject to arrest, trial, and punishment in secondary national trials.¹⁵⁵ Under Bernays's plan, “[p]roof of membership, without more, would establish guilt of participation in the mentioned conspiracy.”¹⁵⁶ This innovation thus

150. Murray C. Bernays, Trial of European War Criminals (Sept. 15, 1944), in *THE AMERICAN ROAD TO NUREMBERG: THE DOCUMENTARY RECORD*, *supra* note 138, at 33, 33.

151. *Id.* at 35.

152. *Id.* Bernays sought not only to establish the guilt of the individual defendants and organizations, but also to “arous[e] the German people to a sense of their guilt, and to a realization of their responsibility for the crimes committed by their government.” *Id.*

153. BASS, *supra* note 148, at 171.

154. Bernays, *supra* note 150, at 36.

155. *Id.*

156. *Id.*

could overcome the obstacle of the resources that would be required to prove the individual guilt of thousands. Instead, national courts would only need to prove that an individual was a member of an organization in order to secure a conviction for participation in the illegal conspiracy. Moreover, once the conspiracy was established, "each act of every member thereof during its continuance and in furtherance of its purposes would be imputable to all other members thereof."¹⁵⁷ Bernays sought through this rule to cast a wide net for accountability that would impose guilt on an individual regardless of actual responsibility for a specific illegal act. Accordingly, no defendant could claim either a defense of superior orders or a defense of head of state immunity.¹⁵⁸

President Truman presented the Bernays plan, which included charges of aggression and other crimes against the peace as both substantive offenses and objectives of criminal conspiracy,¹⁵⁹ to the London Conference in June, during which

157. *Id.* at 37.

158. See Richard Overy, *The Nuremberg Trials: International Law in the Making*, in FROM NUREMBERG TO THE HAGUE: THE FUTURE OF INTERNATIONAL CRIMINAL JUSTICE 1, 16 (Philippe Sands ed., 2003).

159. Pomorski, *supra* note 147, at 217. The conspiracy-criminal organizations plan initially encountered criticism within the U.S. government. *Id.* Assistant Attorney General Herbert Wechsler sent a paper to the War and State Departments and the White House in December 1944 outlining a series of problems. He argued that much of the proposal relied on application of ex post facto law. Further, he objected to the use of conspiracy, as it was virtually unknown outside of Anglo-American law. See Herbert Wechsler, Memorandum for the Attorney General (Francis Biddle) from the Assistant Attorney General (Herbert Wechsler) (Dec. 29, 1944), in THE AMERICAN ROAD TO NUREMBERG: THE DOCUMENTARY RECORD, *supra* note 138, at 84, 86–87. The Malmédy massacre on December 17, in which some seventy American prisoners were slaughtered by the First SS Panzer Regiment, however, changed the fate of conspiracy within the U.S. government: The incident convinced Wechsler and Attorney General Francis Biddle, who had had similar reservations, that the Nazis were in fact engaged in a conspiracy to commit war crimes through the use of criminal organizations. See THE AMERICAN ROAD TO NUREMBERG: THE DOCUMENTARY RECORD, *supra* note 138, at 52. The Judge Advocate General's (JAG) Corps within the War Department also opposed the Bernays Plan, initially on the ground that the Allies had no basis on which to try the Nazis for aggression, as aggressive war was not a crime under international law, see Memorandum for the Judge Advocate General, Subject: Is the Preparation and Launching of the Present War a Crime? (Dec. 18, 1944), in THE AMERICAN ROAD TO NUREMBERG: THE DOCUMENTARY RECORD, *supra* note 138, at 78, 81, 83, and later on the basis of the conspiracy-criminal organizations strategy as well, THE AMERICAN ROAD TO NUREMBERG: THE DOCUMENTARY RECORD, *supra* note 138, at 53. The JAG criticisms were ultimately disregarded, see *id.*, and the Bernays plan, including both conspiracy-criminal organizations

the Allies set out to draft a Charter for the proposed tribunal.¹⁶⁰ The Bernays plan, now the U.S. plan, encountered a rocky reception, in large part because conspiracy was unknown in continental criminal law.¹⁶¹

The principal concern of the Soviets was that it was too vague and unfamiliar a concept to themselves, the French, and the Germans, such that it would inevitably result in “endless confusion.”¹⁶² The French and Soviet delegations proposed revised drafts that omitted conspiracy both as a substantive offense and a theory of liability.¹⁶³ Justice Robert H. Jackson, the chief American delegate at the London conference, strongly opposed those proposals, asserting that there was “‘no acceptable substitution’” for conspiracy “‘as a means of reaching any large number of persons.’”¹⁶⁴

and aggression, remained generally intact, though modified somewhat, *see id.* at 55.

160. *See* THE AMERICAN ROAD TO NUREMBERG: THE DOCUMENTARY RECORD, *supra* note 138, at 140–42. President Roosevelt neither raised the issue for discussion at the Yalta Conference nor indicated within the U.S. government whether he supported it. *Id.* at 135. Until President Truman took office in April 1945, the plan was the “de facto American policy,” but it did not have formal presidential approval. *See id.* at 195.

161. *See* Hans Ehard, *The Nuremberg Trial Against the Major War Criminals and International Law*, 43 AM. J. INT’L L. 223, 226–27 (1949) (“The concept [of conspiracy] is not one familiar to continental law. It has developed in Anglo-Saxon customary law.”); Overy, *supra* note 158, at 19 (“In neither . . . [France nor the Soviet Union] did the legal tradition support the idea of conspiracy. Whereas in Anglo-Saxon law it was possible to declare all those complicit with a conspiracy as equally responsible in law, in French and Soviet (and German) law the defendant had to be charged with a specific crime in which he had directly participated.”). Bradley Smith noted that during the Allies’ discussion of conspiracy, after overcoming their initial “shock[,]” the French viewed the concept of conspiracy “as a barbarous legal anachronism unworthy of modern law,” while the Soviet Union “seem to have shaken their heads in wonderment—a reaction, some cynics may believe, prompted by envy.” BRADLEY F. SMITH, REACHING JUDGMENT AT NUREMBERG 51 (1977). The concept of conspiracy that the United States advocated was wider than was accepted in American and English jurisprudence at the time. *See* Ehard, *supra*, at 227; *see also* TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR 36–37 (1992); ANN TUSA & JOHN TUSA, THE NUREMBERG TRIAL 57 (1984).

162. SMITH, *supra* note 161, at 51.

163. Pomorski, *supra* note 147, at 219.

164. *Id.* Criminal organizations, which Justice Jackson characterized as “the heart” of the U.S. proposal, were similarly controversial, though not because the delegates opposed the idea of declaring a collective, rather than only an individual, to be criminal. *See id.* at 219–20. Instead, the Soviet delegation sought to eliminate the notion of criminal organizations on the ground that because the organizations had already been declared criminal in the Moscow and the Crimea declarations, the fact of their criminality had been established definitively by

The Charter of the IMT adopted by the Allies ultimately incorporated the proposals of the United States for conspiracy and criminal organizations, though in modified form. Article 6 of the Charter granted the IMT “the power to try and punish persons who, . . . whether as individuals or as members of organizations,” committed crimes against peace, war crimes, or crimes against humanity.¹⁶⁵ The definition of crimes against peace included “participation in a Common Plan or Conspiracy for the accomplishment of” “planning, preparation, initiation or waging of” aggressive war.¹⁶⁶ In its final sentence, Article 6 provided: “Leaders, organizers, instigators, and accomplices participating in the formulation or execution of a Common Plan or Conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.”¹⁶⁷ The Charter thus incorporated conspiracy both as a substantive offense and as a theory of accessorial liability for substantive offenses.

Nonetheless, conspiracy was less prominent than it had been in the initial American plan. Conspiracy as a substantive offense figured only into crimes against peace, and not into war crimes or crimes against humanity.¹⁶⁸ Conspiracy as a theory of accessory liability, on the other hand, was incorporated into the charter as a “faithful repetition of the American proposal.”¹⁶⁹ The language of the final sentence of Article 6 established broad liability, targeting not only individuals participating in the “formulation” of the plan (the policymakers) but also those participating in the “execution” of such a plan (the foot soldiers).¹⁷⁰

The Charter also granted the IMT the power to declare an organization criminal. Article 9 provided: “At the trial of any

powers with greater authority than the tribunal. *Id.* at 220. Ultimately, the provision allowing the prosecution of organizations prevailed, with all delegations in agreement that some innovation was necessary to allow the Allies to punish all members of the organizations. *Id.* at 220–21. Moreover, as the French delegate pointed out, although the methods used to criminalize the organizations were innovative, the ultimate practice—the criminalization of membership in a particular organization—was already incorporated into French, Belgian, and Soviet law. *Id.* at 221.

165. IMT Charter art. 6, *supra* note 101, at 11.

166. *Id.* art. 6(a).

167. *Id.* art. 6. The term “conspiracy,” however, was not defined by the Charter. See Pomorski, *supra* note 147, at 225–26.

168. Pomorski, *supra* note 147, at 222.

169. *Id.* at 224.

170. IMT Charter art. 6, *supra* note 101, at 11.

individual member of any group or organization the Tribunal may declare (in connection with any act of which the individual may be convicted) that the group or organization of which the individual was a member was a criminal organization.”¹⁷¹ Article 10 set out the process by which members of an organization declared criminal by the IMT would be prosecuted in secondary proceedings:

In cases where a group or organization is declared criminal by the Tribunal, the competent national authority of any Signatory shall have the right to bring individuals to trial for membership therein before national, military, or occupation courts. In any such case the criminal nature of the group or organization is considered proved and shall not be questioned.¹⁷²

The basis for findings of mass responsibility was thus firmly established.

2. Litigation of Conspiracy and Criminal Organizations Charges

The Charter did not authorize a charge of conspiracy to commit crimes against humanity or conspiracy to commit war crimes. Nonetheless, Justice Jackson, who had been named the American prosecutor at Nuremberg, sought to submit an indictment charging both of those crimes in addition to conspiracy to commit crimes against peace.¹⁷³ As a result, the conspiracy charges in Count One of the indictment were quite broad. Each of the twenty-four defendants was charged with participation in the common plan or conspiracy to commit

171. IMT Charter art. 9, *supra* note 101, at 12. The term “criminal organization,” however, was not defined by the Charter. See TUSA & TUSA, *supra* note 161, at 425.

172. IMT Charter art. 10, *supra* note 101, at 12. The final provision, of course, omitted the process under the original American proposal whereby voluntariness of membership and adherence to the criminal objectives of the organization would be presumed, with the defendant bearing burden of the contrary. See Pomorski, *supra* note 147, at 226.

173. Pomorski, *supra* note 147, at 227. Under a plan devised by the Soviet Union, the United States was responsible for the prosecution of conspiracy and criminal organizations; the United Kingdom would cover crimes against peace; France would prosecute war crimes and crimes against humanity in Western Europe; and the Soviets would prosecute those crimes in the East. See SMITH, *supra* note 161, at 66.

crimes against peace, war crimes, and crimes against humanity, and the indictment alleged that all defendants were “individually responsible for their own acts and for all acts committed by any persons in the execution of such plan or conspiracy.”¹⁷⁴

In its judgment, the IMT took a significantly narrower view of conspiracy than did the prosecution. First, referring to the language of the Charter, it rejected the prosecution’s attempt to impose a charge of conspiracy to commit war crimes and crimes against humanity.¹⁷⁵ As a result, those defendants who had not taken part in the planning of aggressive war but who had participated in the widespread and violent persecution undertaken by the Nazis were acquitted of the conspiracy charges.¹⁷⁶ Second, the judgment rejected the proposition of the prosecution that the conspiracy could be defined by general factors such as literature of the Nazi Party.¹⁷⁷ Although the IMT did not provide its own enumeration of the requirements to establish a conspiracy, it explained that “conspiracy must be clearly outlined in its criminal purposes” and “must not be too far removed from the time of decision and of action.”¹⁷⁸ The IMT characterized the indictment as “say[ing], in effect, that any significant participation in the affairs of the Nazi Party or Government is evidence of a participation in a conspiracy that is in itself criminal,” and firmly rejected the breadth of the prosecution’s interpretation of conspiracy.¹⁷⁹ Instead, the IMT held that in order to establish a conspiracy, there must be a “concrete plan to wage war,” and participants in a conspiracy must have cooperated with that plan with knowledge of the aims of the conspiracy.¹⁸⁰ The judgment ultimately restricted its interpretation of cooperation to those “directly partaking in preparation of specific acts of aggression at the highest level,

174. International Military Tribunal, Indictment, *in* 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG, 14 NOVEMBER 1945–1 OCTOBER 1946: OFFICIAL DOCUMENTS 27, 29 (1947) [hereinafter IMT Indictment].

175. See IMT Judgment, *supra* note 120, at 226 (disregarding the charges in Court One of conspiracy to commit war crimes and crimes against humanity).

176. See, e.g., *id.* at 293, 298, 301, 304, 307, 315, 320, 330, 333, 341 (finding defendants not guilty on Count One).

177. Pomorski, *supra* note 147, at 232.

178. IMT Judgment, *supra* note 120, at 225.

179. *Id.*

180. *Id.* at 226.

notably in a *direct* contact with Adolf Hitler,”¹⁸¹ thus limiting those guilty of Count One to Hitler’s “inner circle.”¹⁸² As a result, the IMT found fewer defendants guilty of Count One than the prosecution had anticipated—in total, only eight of the twenty-two defendants were found guilty on Count One¹⁸³—and the conduct reached by the charge was far narrower than the prosecution had hoped.

The IMT also approached its authority to declare an organization criminal with caution, noting that the discretion to declare an organization criminal “should be exercised in accordance with well-settled legal principles, one of the most important of which is that criminal guilt is personal, and that mass punishments should be avoided.”¹⁸⁴ At the same time, the judgment stated that “[i]f satisfied of the criminal guilt of any organization or group, this Tribunal should not hesitate to declare it to be criminal because the theory of ‘group criminality’ is new.”¹⁸⁵ Without guidance on a definition from the Charter,¹⁸⁶ the IMT explained that a criminal organization is “analogous to a criminal conspiracy” and must exist as a “group bound together and organised for a common purpose.”¹⁸⁷ Further, the criminal objectives of the organization must be pervasive and shared among its members,¹⁸⁸ and persons with no knowledge of the criminal purpose or acts of the organization must be excluded from the definition of criminal organization.¹⁸⁹ With this declaration, the IMT destroyed the plan for streamlined secondary trials with the defendant bearing the burden to disprove voluntary membership.¹⁹⁰

Of the six organizations charged in the indictment—the Leadership Corps of the Nazi Party, the Gestapo/SD, the SS, the SA, the Reich Cabinet, and the General Staff and High

181. Pomorski, *supra* note 147, at 233.

182. Harold Leventhal et al., *The Nuernberg Verdict*, 60 HARV. L. REV. 857, 879 (1947).

183. Pomorski, *supra* note 147, at 235.

184. IMT Judgment, *supra* note 120, at 256.

185. *Id.* at 256.

186. See TUSA & TUSA, *supra* note 161, at 425.

187. IMT Judgment, *supra* note 120, at 256.

188. HERBERT WECHSLER, *The Issues of the Nuremberg Trial*, in PRINCIPLES, POLITICS, AND FUNDAMENTAL LAW: SELECTED ESSAYS 138, 151–52 (1961).

189. IMT Judgment, *supra* note 120, at 256.

190. See Pomorski, *supra* note 147, at 243 (explaining impact of judgment on plan for mass trials).

Command of the German Armed Forces¹⁹¹—only three—the SS, the Gestapo/SD, and the Leadership Corps—were declared criminal.¹⁹² The IMT determined that the General Staff did not constitute an “organization” within the meaning of Article 9, and the Reich Cabinet never acted as an organization or a group.¹⁹³ The IMT acquitted the SA because it saw the alleged criminal activity occurring only since September 1, 1939, and SA atrocities took place before that date.¹⁹⁴ The prosecution’s hopes for indictment of organizations were thus disappointed, because of both its failure to secure convictions for three of the organizations and the IMT’s rejection of the original American plan for streamlined trials.¹⁹⁵

3. Significance of the Conspiracy and Criminal Organization Charges

The IMT’s treatment of the conspiracy and criminal organization charges resulted in the failure of the prosecution’s attempts to impose responsibility on the masses of individuals connected with the Nazis’ efforts in waging war and committing atrocities. This failure is viewed as reaffirming the IMT’s commitment to determining the guilt of individuals rather than assigning blame to the institutions to which those individuals belonged.¹⁹⁶ This perception, however, ignores the trial’s impact on the understanding of group responsibility for atrocity. The indictment itself carried significant expressive value concerning the deep involvement of the state in the crimes com-

191. IMT Indictment, *supra* note 174, at 28.

192. IMT Judgment, *supra* note 120, at 257–73.

193. *Id.* at 275–278; *see also* Pomorski, *supra* note 147, at 245 (analyzing Court’s decision on acquitted organizations).

194. IMT Judgment, *supra* note 120, at 274–75; Pomorski, *supra* note 147, at 244–45.

195. *See* Danner & Martinez, *supra* note 139, at 114 (“With this ruling, the IMT effectively negated the procedural benefits to the prosecution that Bernays had anticipated would flow from the conviction of criminal organizations. In subsequent proceedings, the prosecution was now forced to bear the burden of proving each individual’s voluntary and knowing participation in a group with criminal aims.”). Ultimately, instead of holding thousands of secondary trials, the Allies pursued an administrative denazification program. *See* TAYLOR, *supra* note 161, at 638.

196. *See, e.g.,* Anthony F. Lang, Jr., *Crime and Punishment: Holding States Accountable*, ETHICS & INT’L AFF., Summer 2007, at 239, 239; Karim Khan & Rod Dixon, *International Justice on Trial*, THE TIMES (London), July 10, 2001, at 5.

mitted during the war.¹⁹⁷ Condemnation of the organizations themselves, and declaration that the defendants were engaged in a plan with a common purpose to wage aggressive war, constituted an important pronouncement that organized, mass criminal activity “represented not an aberration, but rather reflected a deep current in the German national life.”¹⁹⁸

Moreover, the judgment’s condemnation of the organizations through which individuals planned and carried out atrocities is a significant step in establishing accountability. Instead of simply declaring the guilt of those individuals who committed crimes, the IMT held accountable those processes and institutions that facilitated the offenses. The decision that the SS, Gestapo/SD, and Leadership Corps were criminal organizations announced that a state’s military forces, security services, and political parties must not be used to commit crimes. This amounted to a legal judgment that under international law, institutions of a state—and thus states themselves—are obligated to serve lawful purposes and prohibited from pursuing unlawful ones.

The IMT’s decision on conspiracy and criminal organizations also is significant for its contribution to truth-telling. The IMT’s determination that the individuals before it participated in a plan, and that the convicted organizations were formed and used for criminal purposes, constructed a detailed narrative on how the atrocities at issue were carried out by organs of the state, as policies of the state, using mechanisms created by the state. By declaring that the use of government institutions to perpetrate atrocities was unlawful, condemnation by the IMT of the role of the German government and bureaucracy in the crimes of the Nazis both informed the public about the recent abuse of state institutions and allowed Germany to make a break with its past.¹⁹⁹

197. See Pomorski, *supra* note 147, at 225 (opining that a declaration that the major structures of the Nazi government were criminal “was to have a great symbolic, moral, political and ideological significance”).

198. *Id.* at 247–48.

199. See Danner & Martinez, *supra* note 139, at 145 (commenting on the importance of the criminal organizations holdings in the trial’s function as a means of educating the German public about their recent history).

B. The International Criminal Tribunals for the Former Yugoslavia and Rwanda

Just as the Allies' approach and IMT's decision demonstrate an acknowledgment of, and focus on, the group aspects of the Nazis' crimes, the jurisprudence of the ICTY and the ICTR reveals a consistent reliance both on substantive crimes and on theories of liability that incorporate notions of collective action. The jurisdiction of both Tribunals to determine the guilt only of individuals, and not of any collective entities,²⁰⁰ should not obscure the basic truth that most of the crimes that the Tribunals address were perpetrated or facilitated by groups. This subsection examines the substantive crime of conspiracy to commit genocide and the joint criminal enterprise ("JCE") theory of liability. Both indicate the inadequacy of substantive crimes and theories that consider only individual action, and they reveal the Tribunals' need to address the reality that mass atrocity is most often the result of mass collective action.

1. Conspiracy to Commit Genocide

The ICTY and ICTR have incorporated crimes of genocide into their statutes based on the enumeration of prohibited acts in the Genocide Convention.²⁰¹ Accordingly, conspiracy to commit genocide is designated a crime under the jurisdiction of each respective Tribunal in the Statutes of the ICTY and the ICTR.²⁰² The drafters of the Genocide Convention chose to address conspiracy because they believed that it reflected the reality that genocide is a crime that is perpetrated by a collective. The UN Secretariat included conspiracy to commit genocide as an offense in the initial draft of the convention it prepared²⁰³ on account of its position that "[g]enocide can hardly be com-

200. See ICTR Statute art. 6(1), *supra* note 107, at 1604; ICTY Statute art. 7(1), *supra* note 107, at 1194; see also GERRY SIMPSON, LAW, WAR AND CRIME: WAR CRIMES TRIALS AND THE REINVENTION OF INTERNATIONAL LAW 67 (2007) (discussing jurisdiction of ICTY, ICTR, and ICC over natural persons).

201. See Genocide Convention, *supra* note 6, art. 3.

202. See ICTY Statute, *supra* note 107, art. 4(3)(b); ICTR Statute, *supra* note 107, art. 2(3)(b).

203. See Secretariat Draft, *supra* note 18, at 29 (including conspiracy to commit acts of genocide in list of punishable offenses).

mitted on a large scale without some form of agreement.”²⁰⁴ The ad hoc drafting committee also focused on the fact that genocide is committed by a group, and it explained its decision to include conspiracy to commit genocide in the list of offenses as resulting from “the fact that in practice genocide is a collective crime, presupposing the collaboration of a greater or smaller number of persons.”²⁰⁵

An examination of the decisions of the ICTY and ICTR shows the continuing resonance of the assertion that genocide “is a collective crime.”²⁰⁶ For example, the decision of the ICTR Trial Chamber in *Prosecutor v. Niyitegeka*,²⁰⁷ the ICTR’s first post-trial conviction on the charge of conspiracy to commit genocide,²⁰⁸ demonstrates the Tribunal’s awareness of the importance of group dynamics in the commission of genocide. The Trial Chamber focused on the interactions of Eliezer Niyitegeka, a journalist who in April 1994 became Rwanda’s Minister of Information in the Interim Government, with a range of government and political officials, including other members of the government, Interahamwe militia leaders, communal police, and the political leadership of the National Republican Movement for Democracy and Development.²⁰⁹ Based on Niyitegeka’s participation with these officials in meetings to plan killings, weapons distributions, and assignments of leaders for attacks,²¹⁰ and noting the organized manner in which the attacks were carried out,²¹¹ the Trial Chamber held Niyitegeka guilty of conspiracy to commit genocide.²¹²

204. *Id.* at 31.

205. Ad Hoc Committee Report, *supra* note 18, at 20. The decision of the international community to include conspiracy in the list of offenses in the Convention appears at odds with the reception given to the concept of conspiracy in the Nuremberg trials just a few years earlier. This is especially true in light of not only the general discomfort with conspiracy outside of the Anglo-American system of law, but also the fact that the IMT had decided that conspiracy as a substantive offense applied only to crimes against peace, whereas genocide was thought to originate from the general category of crimes against humanity. See George P. Fletcher, *Hamdan Confronts the Military Commissions Act of 2006*, 45 COLUM. J. TRANSNAT’L L. 427, 448 (2007).

206. Ad Hoc Committee Report, *supra* note 18, at 20.

207. *Prosecutor v. Niyitegeka*, Case No. ICTR-96-14, Judgment, Trial Chamber (May 16, 2003).

208. Press Release, Int’l Crim. Tribunal for Rwanda, Rwanda Tribunal Delivers Two Judgements Today, U.N. Doc. ICTR/INFO-9-2-344.EN (May 15, 2003).

209. See *Niyitegeka*, Case No. ICTR-96-14, ¶ 422.

210. See *id.*, ¶ 424.

211. See *id.*, ¶ 428.

212. See *id.*, ¶ 429.

The decision of the ICTR in the *Media* case also is instructive.²¹³ The case involved three defendants. Jean-Bosco Barayagwiza was a founding member of the Coalition for the Defense of the Republic (“CDR”), a Hutu extremist party formed in 1992, and a board member of the Comité d’initiative of the Radio Télévision Libre des Mille Collines (“RTL”), a radio station which devoted itself during the genocide to urging Hutus to kill Tutsis.²¹⁴ Hassan Ngeze was a founding member of CDR with political control over the Interahamwe, and was editor-in-chief of *Kangura* newspaper, a publication which promoted anti-Tutsi messages.²¹⁵ Ferdinand Nahimana was a founder of RTL and exercised control over the programming.²¹⁶ Based on its ruling in *Niyitegeka*, the Trial Chamber determined that it could infer an agreement in a conspiracy to commit genocide “from coordinated actions by individuals who have a common purpose and are acting within a unified framework.”²¹⁷

The Trial Chamber focused in particular on the institutions with which the defendants were involved, and it held that a “conspiracy to commit genocide can be comprised of individuals acting in an institutional capacity . . . even independently of their personal links with each other. Institutional coordination can form the basis of a conspiracy among those individuals who control the institutions that are engaged in coordinated action.”²¹⁸ Accordingly, the ICTR looked not only to the collaboration among the individual defendants themselves, but also to the coordination among their respective institutions. The Trial Chamber noted that *Kangura* was a shareholder of RTL; that the two closely collaborated; that RTL promoted issues of *Kangura* to its listeners; that *Kangura* devoted a special issue

213. See *Prosecutor v. Nahimana*, Case No. ICTR-99-52-T, Judgment and Sentence, Trial Chamber I (Dec. 3, 2003).

214. See HUMAN RIGHTS WATCH, LEAVE NONE TO TELL THE STORY: GENOCIDE IN RWANDA, available at http://www.hrw.org/reports/1999/rwanda/Geno4-7-03.htm#P704_188237 (last visited Jan. 31, 2009).

215. *Nahimana*, Case No. ICTR-99-52-T ¶¶ 7, 135–257.

216. *Id.* ¶¶ 5, 566–568.

217. *Id.* ¶¶ 1045–1047 (explaining that, in *Niyitegeka*, the ICTR “inferred the existence of a conspiracy to commit genocide based on circumstantial evidence, including various actions of the Accused, such as his participation and attendance at meetings to discuss the killing of Tutsi, his planning of attacks against Tutsi, his promise and distribution of weapons to attackers to be used in attacks against Tutsi, and his leadership role in conducting and speaking at the meetings”).

218. *Id.* ¶ 1048.

to the establishment of CDR and encouraged its readers to join the party; and that *Kangura* “interacted extensively” with RTLM and CDR.²¹⁹ In the view of the Trial Chamber, “[a]s a political institution CDR provided an ideological framework for genocide, and the two media institutions formed part of the coalition that disseminated the message of CDR that the destruction of the Tutsi was essential to the survival of the Hutu.”²²⁰ Based on these links, the Trial Chamber concluded that the three defendants “consciously interacted with each other, using the institutions they controlled to promote a joint agenda, which was the targeting of the Tutsi population for destruction.”²²¹ The ICTR found the three defendants guilty of conspiracy to commit genocide, both “through personal collaboration as well as interaction among institutions within their control, namely RTLM, *Kangura*, and CDR.”²²²

The decision was overturned on appeal on the ground that although a reasonable trier of fact could find that the facts supported an inference of conspiracy to commit genocide, a conspiracy was not the only reasonable inference that could be drawn.²²³ The Appeals Chamber, however, did explicitly take the position that “the existence of a conspiracy to commit genocide between individuals controlling institutions could be inferred from the interaction between these institutions.”²²⁴ Thus, the Appeals Chamber did not dispute the Trial Chamber’s holding that institutional coordination, rather than personal coordination, can form the basis of a conspiracy to commit genocide.

The Trial Chamber’s decisions on conspiracy recall the position both of the Genocide Convention drafters and of the planners of the IMT that there should be some way to capture within the law the reality that individuals commit atrocities in groups, and that groups committing atrocities carry out their crimes with the assistance of administrative structures such as political parties, media outlets, or government bureaucracies.²²⁵ The *Media* and *Niyitegeka* judgments demonstrate how

219. *Id.* ¶¶ 1051–1053.

220. *Id.* ¶ 1053.

221. *Id.* ¶ 1054.

222. *Id.* ¶ 1055.

223. Prosecutor v. Nahimana, Case No. ICTR-99-52-A, Judgment, Appeals Chamber ¶ 907 (Nov. 28, 2007).

224. *Id.* ¶ 910.

225. See *supra* Part III.A.

the Tribunals, within the limits of their jurisdiction to hold only individuals accountable for their crimes, have nonetheless condemned the actions of groups and have recognized the significant role that government and administrative structures play in organizing, facilitating, and perpetrating genocide.

2. Joint Criminal Enterprise

Joint criminal enterprise (“JCE”) similarly shows the compatibility of transitional justice mechanisms with the group dynamics of atrocity. Under JCE, which is also known as common plan or common purpose liability,²²⁶ if an individual participates with others in a common plan that involves the commission of a crime enumerated in the Statute of the relevant Tribunal, that individual may be held responsible for all crimes committed pursuant to the existence of the common plan.²²⁷ The ICTY initially explored JCE in the case of *Dusko Tadić*,²²⁸ the first full trial heard by the Tribunal.²²⁹ Tadić was a low-level Serbian army officer in Bosnia in the early 1990s and was convicted by the ICTY Trial Chamber of several counts of war crimes and crimes against humanity.²³⁰ The Chamber acquitted Tadić, however, on the charge of crimes against humanity for the murder of five Muslim men in the village of Jaskici in northwest Bosnia.²³¹ The Trial Chamber determined that Tadić was a member of an armed group that entered the village and beat its inhabitants, and that the five men who were found shot to death after the group departed had been alive when the group entered the town. Nonetheless, the Chamber concluded that the prosecution had not established beyond a reasonable doubt that Tadić “had any part in the killing of the five men.”²³²

226. See *Prosecutor v. Brdjanin*, Case No. IT-99-36, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, Trial Chamber II, ¶ 24 (June 26, 2001) (describing *Tadić* judgment as using variety of names for this type of liability).

227. See *Prosecutor v. Vasiljević*, Case No. IT-98-32-A, Judgment, Appeals Chamber, ¶¶ 94–101 (Feb. 25, 2004) (summarizing the law of JCE).

228. See *Prosecutor v. Tadić*, Case No. IT-94-1-T, Opinion and Judgment, Trial Chamber (May 7, 1997).

229. *Id.* ¶ 19.

230. PAUL R. WILLIAMS & MICHAEL P. SCHARF, PEACE WITH JUSTICE?: WAR CRIMES AND ACCOUNTABILITY IN THE FORMER YUGOSLAVIA 114–115 (2002).

231. See *Tadić*, Case No. IT-94-1-T, ¶ 373.

232. See *id.*

On appeal, the Appeals Chamber agreed with the prosecution that the Trial Chamber had misapplied the test of proof beyond reasonable doubt and held that “the only reasonable conclusion the Trial Chamber could have drawn is that the armed group to which [Tadić] belonged killed the five men in Jaskici.”²³³ The Appeals Chamber then considered whether Tadić could be found guilty of the killing notwithstanding the absence of proof that he personally had shot the victims.²³⁴ The Appeals Chamber’s analysis reveals that it accepted two propositions: (1) that the crime before it was committed by a collective, and (2) that assigning criminal responsibility to this collective was a desirable—and legal—result.

The Appeals Chamber began its discussion with a review of Article 7(1) of the Statute, which provides that “[a] person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.”²³⁵ The Chamber found that this provision concerns “first and foremost the physical perpetration of a crime by the offender himself.”²³⁶ Nonetheless, it further considered that the provision contemplates that crimes “might also occur through participation in the realisation of a common design or purpose.”²³⁷ The Chamber reasoned that the object and purpose of the Statute indicate that the Statute “intends to extend the jurisdiction of the [ICTY] to *all* those ‘responsible for serious violations of international humanitarian law’ committed in the former Yugoslavia,” which “is not limited merely to those who actually carry out the *actus reus* of the enumerated crimes but appears to extend also to other offenders.”²³⁸ The Chamber specifically noted Article 2, which, it emphasized, refers both to committing and to ordering grave breaches of the Geneva Convention, and Article 4, which sets forth offenses in relation to genocide, including, notably, “conspiracy, incitement, attempt, and complicity.”²³⁹

233. Prosecutor v. Tadić, Case No. IT-94-1-A, Judgment, Appeals Chamber, ¶ 183 (July 15, 1999).

234. See *id.* ¶ 185.

235. ICTY Statute, *supra* note 107, art. 7(1); see also ICTR Statute, *supra* note 107, art. 6(1).

236. Tadić, Case No. IT-94-1-A, ¶ 188.

237. *Id.*

238. *Id.* ¶ 189.

239. *Id.* (emphasis omitted).

Thus, not only the actual perpetrator of an offense, but also those involved in the wide and complex machinery of atrocity, should be held accountable.

The Appeals Chamber then turned to the requirements for holding an individual responsible based on common design or purpose. Examining case law of military courts established after World War II, many of which had convicted individuals based on participation in a common plan, the Chamber concluded that “broadly speaking, the notion of common purpose encompasses three distinct categories of collective criminality.”²⁴⁰ First, there are “cases where all co-defendants, acting pursuant to a common design, possess the same criminal intention.”²⁴¹ Second, there are cases in which there exists an “organised system” of ill-treatment, such as in concentration camps.²⁴² Third, there are cases “involving a common design to pursue one course of conduct where one of the perpetrators commits an act which, while outside the common design, was nevertheless a natural and foreseeable consequence of the effecting of that common purpose.”²⁴³ The Appeals Chamber concluded that Tadić had participated in a common criminal plan to rid the region of the non-Serb population and held that the killing of non-Serbs was foreseeable in light of this purpose. Further, it determined that Tadić was aware of this risk but nevertheless participated willingly in the common plan.²⁴⁴ Accordingly, Tadić was convicted of the murder of the five men.²⁴⁵

Since the Appeals Chamber’s initial use of JCE, the ICTY has increasingly relied on this theory.²⁴⁶ Professors Alison

240. *Id.* ¶ 195; see also Elies van Sliedregt, *Joint Criminal Enterprise as a Pathway to Convicting Individuals for Genocide*, 5 J. INT’L CRIM. JUST. 184, 185–86 (2007) (commenting that the ICTY “devised a group liability concept to prosecute and convict those involved in collective crimes” and describing decision of Appeals Chamber in Tadić).

241. *Tadić*, Case No. IT-94-1-A ¶ 196. In later decisions, the Appeals Chamber refined the common design element to require that defendants have entered into an agreement with other members of the JCE to commit crimes. See *Prosecutor v. Milutinović*, Case No. IT-99-37-AR72, Decision on Dragoljub Ojdanić’s Motion Challenging Jurisdiction—*Joint Criminal Enterprise*, Appeals Chamber, ¶ 23 (May 21, 2003).

242. *Tadić*, Case No. IT-94-1-A, ¶ 202.

243. *Id.* ¶ 204.

244. See *id.* ¶¶ 230–233.

245. See *id.* ¶¶ 235–237.

246. See Kelly D. Askin, *Reflections on Some of the Most Significant Achievements of the ICTY*, 37 NEW ENG. L. REV. 903, 910–11 (2003) (commenting that in the last two years, “participating in a joint criminal enterprise has become the

Danner and Jenny Martinez note that if all indictments that include charges that the defendant acted “in concert” with others are viewed as implicitly employing a theory of JCE, then thirty-four of the forty-three indictments filed between June 25, 2001 and January 1, 2004—eighty-one percent of the total—incorporate JCE.²⁴⁷ The ICTR, too, has relied on JCE, though with less frequency than the ICTY.²⁴⁸ The prevalence

principal charging preference in ICTY indictments”). The first indictment that explicitly relied on JCE—Tadić’s indictment did not mention JCE, common plan, or any of its other names, *see* Prosecutor v. Tadić, Case No. IT-94-1-I, Indictment (Amended) (Dec. 14, 1995)—came only in June 2001. In July 2004, the Trial Chamber finally ruled that “the alleged form of participation of the accused in a crime pursuant to Article 7(1) of the Statute should be clearly laid out in an indictment.” Prosecutor v. Blaškić, Case No. IT-95-14-A, Judgment, Appeals Chamber, ¶ 215 (July 29, 2004).

247. Danner & Martinez, *supra* note 139, at 108 (quoting Prosecutor v. Simić, Case No. IT-95-9-T, Judgment, Trial Chamber, ¶ 149 (Oct. 17, 2003)). Nonetheless, because of its breadth and potential for reaching such a wide range of individuals, JCE has been controversial. *See id.* at 108, 137 (opining that JCE “raises the specter of guilt by association and provides ammunition to those who doubt the rigor and impartiality of the international forum”); George P. Fletcher & Jens David Ohlin, *Reclaiming Fundamental Principles of Criminal Law in the Darfur Case*, 3 J. INT’L CRIM. JUST. 539, 548–50 (2005) (criticizing JCE as “overbroad” and urging revision); van Sliedregt, *supra* note 240, at 187 (noting that “[t]he concept of JCE, as developed by the ICTY, has evoked strong criticism from practitioners, academics and even from one of the ICTY judges” and quoting statement of one ICTY judge dissociating himself from the concept of JCE). It should be recognized, however, that the ICTY has made some effort to limit the scope of JCE liability. The Appeals Chamber in *Krnojelac* found that JCE requires “a strict definition of common purpose.” Prosecutor v. Krnojelac, Case No. IT-97-25-A, Judgment, Appeals Chamber, ¶ 116 (Sept. 17, 2003). The *Kvočka* Appeals Chamber ruled that for category two JCEs, under certain circumstances the prosecution may be required to offer evidence to prove that the accused made a “substantial contribution” to the JCE. Prosecutor v. Kvočka, Case No. IT-98-30/1-A, Judgment, Appeals Chamber, ¶¶ 90, 97 (Feb. 28, 2005).

248. Professors Danner and Martinez attribute this in part to the fact that in the ICTR the prosecution frequently charges conspiracy to commit genocide, so JCE is not necessary in order to capture individuals who participated in a common plan to perpetrate a crime but did not perpetrate the crime themselves. *See* Danner & Martinez, *supra* note 139, at 108 n.135. The ICTR has also expanded the definition of direct commission of genocide by no longer requiring direct and physical perpetration of the killing. The Appeals Chamber of the ICTR held that committing genocide may occur where the actions of the perpetrator are “‘as much an integral part of the genocide as were the killing which [they] enabled.’” Prosecutor v. Seromba, Case No. ICTR-2001-66-A, Judgment, Appeals Chamber, ¶161 (March 12, 2008). The Appeals Chamber held that Seromba, a Roman-Catholic priest from Rwanda, was guilty of committing genocide as a “principal perpetrator of the crime itself by approving and embracing as his own the decision to commit the crime.” *Id.* The charges against Seromba stemmed from the bulldozing of a church that resulted in the deaths of at least 1500 displaced Tutsi; the Chamber found that because Seromba was present at the attack, approved the

of JCE in international criminal law indicates the pervasive recognition of the group dynamics of mass atrocity today.²⁴⁹ Instead of being held guilty for individual crimes, defendants are being held guilty “for their involvement in a genocidal whole.”²⁵⁰

C. Addressing the Group Aspects of Mass Atrocity

The IMT, ICTY, and ICTR have incorporated innovative substantive crimes and theories of liability to establish guilt of individuals for crimes that are committed in a collective. The work of these tribunals has aroused criticism and controversy, as in some cases they appear to expand a defendant’s exposure to guilt beyond the degree of her personal participation in a crime. These criticisms generally focus on the potential violation of the principle of personal culpability (*nulla poena sine culpa*) and the accompanying objection to guilt by associa-

decision to destroy the church, and gave directions to the individuals who ultimately bulldozed the church, he had committed genocide. *See id.* ¶ 171. To the Appeals Chamber, it was “irrelevant that [he] did not personally drive the bulldozer that destroyed the church.” *Id.*

249. *See* Fletcher & Ohlin, *supra* note 247, at 547 (noting that mass atrocity is “rarely—if ever—accomplished on an individual level” and proposing that this is why international criminal law has focused so heavily on conspiracy and joint criminal enterprise). JCE is considered particularly appealing from a prosecutorial standpoint, as, in the absence of a concept of conspiracy that reaches beyond genocide, it captures an array of criminal conduct that is covered neither by the theory of superior responsibility, because of that doctrine’s more restrictive mens rea requirement, or by accomplice liability. *See* Prosecutor v. Blaškić, Case No. IT-95-14-A, Judgment, Appeals Chamber, ¶ 62 (July 29, 2004) (holding that “a superior will be criminally responsible through the principles of superior responsibility only if information was available to him which would have put him on notice of offences committed by subordinates” (emphasis omitted)); van Sliedregt, *supra* note 240, at 187. *Cf.* ICTY Statute, *supra* note 107, art. 7(3) (providing that a superior is not relieved of criminal responsibility if, inter alia, “he knew or had reason to know that the subordinate was about to commit [criminal] acts or had done so”).

250. Mark Drumbl, Prosecutor v. Radislav Krstić: *ICTY Authenticates Genocide at Srebrenica and Convicts for Aiding and Abetting*, 5 MELB. J. INT’L L. 434, 447 (2004). The tribunals have readily adopted these theories and crimes in order to expand defendants’ liability beyond their personal culpability in the perpetration of a crime, but they increasingly have questioned the propriety of widening the net so greatly. Professor Drumbl aptly points out a “schizophrenia” in the tribunals: They “incorporate vicarious legal elements in order to secure convictions, but then express concern that criminalization ought not be based on vicarious liability.” Mark A. Drumbl, *Pluralizing International Criminal Justice*, 103 MICH. L. REV. 1295, 1310 (2005) [hereinafter Drumbl, *Pluralizing*].

tion.²⁵¹ But the criticisms do not object to the legal recognition of group perpetration of atrocity; they question instead the expansion of criminal law that is taking place in response to this recognition.

Although they do not acknowledge it overtly, JCE and conspiracy to commit genocide reveal a deep undercurrent in the law of the trials, and in the stories they tell, showing that groups, and often states, are a driving mechanism in the atrocities committed by individuals. Along with other forms of liability such as superior responsibility and other crimes such as incitement to genocide, JCE and conspiracy also show the need of criminal tribunals to capture within the law the reality that individuals commit atrocities in groups, and that groups committing atrocities carry out their crimes with the assistance of administrative structures such as political parties or state bureaucracies. This implicit acknowledgment that international crimes tend to be committed by groups, and the apparent inclination to condemn such group action, suggest that the idea of holding a collective responsible for genocide, rather than solely holding individuals guilty, is not a drastic step beyond what transitional justice mechanisms already do. On this ground, this Article posits that holding states civilly responsible for commission of genocide would be parallel to, and consistent with, the present methods of transitional justice. Because transitional trials already recognize the group dynamics of atrocity—and, indeed, focus on them for the purpose of achieving convictions—a judicial pronouncement in a civil proceeding that a state or its organs had perpetrated genocide would be consistent with the current methods of transitional justice.²⁵²

251. See, e.g., Danner & Martinez, *supra* note 139, at 109 (explaining controversy of common plan JCE); Göran Sluiter, *Guilt by Association: Joint Criminal Enterprise on Trial*, 5 J. INT'L CRIM. JUST. 67, 67 (2007) (describing debates regarding JCE since *Tadić*).

252. Civil liability could, of course, take a form other than solely a judicial pronouncement, such as reparations. This raises significant questions about the appropriateness of imposing penalties on individuals within a collective who did not necessarily participate in the underlying crime, or even worked to prevent that crime. For further discussion, see *infra* notes 299–302 and accompanying text.

IV. STATE RESPONSIBILITY, TRUTH, AND ACCOUNTABILITY

A. Collective Responsibility and Collective Guilt

Of course, even though international criminal trials already acknowledge the collective nature of mass atrocity, the argument remains that states still should not be held accountable for genocide because that would amount to a finding of collective guilt, which would do damage to the goals of accountability, truth, stability, and peace that transitional justice seeks to accomplish—and that are so crucial to transitional societies.²⁵³ By laying blame on an entire state, rather than on the individuals who perpetrated particular acts, critics argue, state responsibility serves to feed the cycle of hatred that has stirred conflicts in the former Yugoslavia, Rwanda, and the Middle East.²⁵⁴

This argument, however, fails to acknowledge that state responsibility is not collective guilt. Collective guilt certainly can be damaging to societies in transition.²⁵⁵ Calling an entire people guilty of the acts that only a subset undertook disregards that actions are taken by individuals, based on their own choices, and that an individual must not be tainted by those with whom she is associated on the basis of her ethnicity, race, religion, or, indeed, nationality. Such an idea necessarily impedes recovery from conflict, as atrocities continue to be attributed to whole groups rather than to the individuals who commit them.

But holding a state civilly responsible for commission of genocide must be distinguished from holding a state collectively guilty. State responsibility does not purport to find any guilt in the state itself, nor does it taint as guilty every citizen of the state. Instead, the guilt attaches only to the individuals whose acts are attributed to the state. While the individuals

253. See *supra* notes 3, 96–97 and accompanying text.

254. See *supra* Part II.B.

255. Professor George Fletcher proposes that collective guilt is a “plausible . . . and sometimes healthy response to collective wrongdoing.” George P. Fletcher, *Collective Guilt and Collective Punishment*, 5 THEORETICAL INQUIRIES IN LAW 163, 168, 173–74 (2004); see also George P. Fletcher, *The Storrs Lectures: Liberals and Romantics at War: The Problem of Collective Guilt*, 111 YALE L.J. 1499, 1504 (2002) (defending the idea of collective guilt and urging that we should “take seriously the possibility that entire bodies of people, in particular the nations of which we are a part, can be guilty for the crimes actually carried out by a few”) [hereinafter Fletcher, *Liberals and Romantics*].

whose crimes result in state responsibility are guilty, the rest of the citizenry is implicated in the state's responsibility—not its guilt—only by virtue of the function of any citizenry to share in the burdens and benefits of the state. Professor Michael Walzer explains the nature of citizenship:

[C]itizenship is common destiny, and no one, not even [the government's] opponents . . . can escape the effects of a bad regime, an ambitious or fanatic leadership, or an overreaching nationalism. But if men and women must accept this destiny, they can sometimes do so with a good conscience, for the acceptance says nothing about their individual responsibility. The distribution of costs is not the distribution of guilt.²⁵⁶

Professor Walzer's explanation of the burdens of citizenship invokes the ideas of Karl Jaspers, who explored the nature of Germans' individual and collective responsibility for the crimes of the Nazis in *The Question of German Guilt*, published just after the end of the war.²⁵⁷ Jaspers identified four types of guilt—criminal, moral, metaphysical, and political.²⁵⁸ Of the four, only political guilt—which might more appropriately be described as political liability—is collective. Jaspers took the position that “[a] people answers for its polity,” and as a result, every German shares in liability for the crimes committed in the name of the German state.²⁵⁹ He was careful, however, to distinguish political guilt from personal guilt, and he argued that Germans ought to feel responsible “in the political sense of the joint liability of all citizens for acts committed by their state,” but not in the sense of “actual or intellectual participation in crime.”²⁶⁰ Significantly, Jaspers explained that “[t]o hold liable does not mean to hold morally guilty.”²⁶¹ Just as

256. MICHAEL WALZER, *JUST AND UNJUST WARS* 297 (Basic Books 1977), quoted in Thomas Franck, *Individual Criminal Liability and Collective Civil Responsibility: Do They Reinforce or Contradict One Another?* 6 WASH. U. GLOBAL STUD. L. REV. 567, 570–71 (2007). Professor Walzer refers specifically to democracies in this discussion. This Article argues that his position applies both in democracies and in systems of government in which government actions are imposed on the people. See *infra* text accompanying notes 299–300.

257. See KARL JASPERS, *THE QUESTION OF GERMAN GUILT* (E.B. Ashton trans., Dial Press 1947).

258. See *id.* at 31–32.

259. *Id.* at 61.

260. *Id.*

261. *Id.*

Professor Walzer asserts that even though “it cannot be said that every citizen is the author of every state policy, . . . every one of them can rightly be called to account,”²⁶² Jaspers explains:

One might think of cases of wholly non-political persons who live aloof of all politics, like monks, hermits, scholars, artists—if really quite non-political, those might possibly be excused from all guilt. Yet they, too, are included among the politically liable, because they, too, live by the order of the state. There is no such aloofness in modern states.²⁶³

Collective responsibility is not foreign to us. Willy Brandt fought against the Nazis and is undoubtedly not guilty for their crimes, but the world accepted—and indeed welcomed—his act of silently begging forgiveness on behalf of Germany for the acts of his predecessors.²⁶⁴ Not all Americans are guilty of the injustices committed against Japanese in the United States during World War II, but all American citizens shared collectively in liability when Congress enacted the Civil Liberties Act of 1988 and instituted reparations for surviving internees.²⁶⁵ In contrast to collective guilt, collective responsibility merely identifies mass distribution of burdens. And, as Professor Thomas Franck explains, “It is both fair and right that the citizenry of every state that visits serious injury on a people should have to bear at least significant parts of the cost.”²⁶⁶

262. WALZER, *supra* note 256, at 297.

263. JASPERS, *supra* note 257, at 62.

264. See Ruti Teitel, *The Transitional Apology*, in *TAKING WRONGS SERIOUSLY: APOLOGIES AND RECONCILIATION* 105 (Elazar Barkan & Alexander Karn eds., 2006) (describing Brandt's act); NEIER, *supra* note 110, at 226 (explaining that although Germans collectively are not guilty for the acts of the Nazis, “we welcome their assumption of collective moral and political responsibility”).

265. Civil Liberties Act of 1988, 50a U.S.C. § 1989b-4 (2007).

266. Franck, *supra* note 256, at 571; see also *id.* at 572–73 (“In modern international law, the state no longer owns the individual; rather, the individuals collectively own the state. With the privilege of that new status, the people who constitute the modern state must willingly accept their share in state responsibility, not try to shirk it. When a state deliberately leads, helps, trains, arms, clothes, pays and inspires those who do commit genocide, then, while the passive citizenry does not share the perpetrators' guilt, it does share responsibility for the enormity of what was done in the citizenry's name and the citizens' responsibility to help make amends.”) (emphasis omitted).

B. The Benefits of State Responsibility

There is more to be said for state responsibility, however, than simply that it is “fair and right.” Beyond that, state responsibility promotes accountability and contributes to truth-telling—those same goals of transitional justice that the international community relies on criminal trials to accomplish. Criminal trials, however, come up short. A number of scholars recently have questioned the wisdom of the nearly exclusive focus on criminal accountability as a path toward reconciliation. Professors Laurel Fletcher and Harvey Weinstein argue that although trials have certain merit, they largely fail to account for the actions of the individuals who stand by and watch those who personally commit the slaughters and rapes, or those who elect and support the political leaders who call for elimination of an entire people.²⁶⁷ Focusing on the widespread participation of whole communities in mass atrocity, they urge us to consider “the possibility that holding everyone responsible for past atrocities may force a nation to come to terms with its past as well as to lay the groundwork for true reconciliation.”²⁶⁸ Accordingly, Professors Fletcher and Weinstein question the wisdom of individual trials, because “individualized guilt may contribute to a myth of collective innocence.”²⁶⁹ To respond to the collective nature of mass atrocity, they propose instead an “ecological model” of social reconstruction that can replace the failed criminal framework too often applied in transitional societies.²⁷⁰ This model is built on the notion that in order for a society to recover after atrocity, it must acknowledge the full range of actors who participated and the “collective processes that created, abetted, or passively supported the violence.”²⁷¹

Professor Mark Drumbl also has urged reconsideration of the prevailing criminal law paradigms for transitional justice. Subjecting “extraordinary crimes,” as he describes mass atroc-

267. See Laurel E. Fletcher & Harvey M. Weinstein, *Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation*, 24 HUM. RTS. Q. 573, 579 (2002).

268. *Id.* at 601.

269. *Id.* at 580.

270. See *id.* at 601 (“The assumption that holding individuals accountable for atrocities alleviates despair, provides closure, assists in creating and strengthening democratic institutions and promotes community rebuilding overstates the results that trials can achieve.”).

271. *Id.* at 618.

ity,²⁷² to the same criminal processes as ordinary crimes limits both the legitimacy and the effectiveness of the methods the international community uses to address mass atrocity.²⁷³ Because criminal trials have failed to achieve the ambitious goals that the international community has envisioned, Professor Drumbl urges that the responses to mass atrocity must acknowledge their collective nature.²⁷⁴

The work of these scholars shows the importance of questioning the wisdom of placing the burden of achieving truth, accountability, reconciliation, and peace exclusively on the criminal law. Criminal prosecutions of a few individuals—whether those who acted as leaders, or those who happen to be available for trial²⁷⁵—fail to reflect the reality that mass atrocity requires mass action.²⁷⁶ Of the tens or hundreds of thousands of individuals who participated in the genocide in Rwanda,²⁷⁷ and the approximately ten thousand murderers or rapists in the former Yugoslavia,²⁷⁸ only a small fraction has been indicted, prosecuted, or punished by the ICTR or the ICTY.²⁷⁹ The international community has neither the will nor the resources to prosecute huge numbers of people. As a result, prosecutions—and, consequently, convictions and identifications of guilt—are limited to an incomplete subset of offenders. The individuals who are prosecuted are usually those identified

272. See MARK A. DRUMBL, ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW 3–4 (2007); Drumbl, *supra* note 121, at 541.

273. See DRUMBL, *supra* note 272, at 10.

274. See *generally id.*; Drumbl, *supra* note 121.

275. See *infra* note 281 (describing ICTY decision to prosecute Dusko Tadić).

276. See MAHMOOD MAMDANI, WHEN VICTIMS BECOME KILLERS: COLONIALISM, NATIVISM, AND THE GENOCIDE IN RWANDA 18 (2001) (“Too many experts on Rwanda have shied away from . . . the ‘popular’ agency in the genocide . . .”); Drumbl, *supra* note 121, at 569 (“Atrocity would not reach truly epidemic levels but for the vigorous participation of the masses.”); see also DANIEL JONAH GOLDHAGEN, HITLER’S WILLING EXECUTIONS: ORDINARY GERMANS AND THE HOLOCAUST (1996) (contending that direct participation of Germans in the Holocaust was more widespread than has been previously acknowledged). Of course, there are some cases in which atrocity has been perpetrated by a small group of actors, such as in Chile. See THE PINOCHET FILE: A DECLASSIFIED DOSSIER ON ATROCITY AND ACCOUNTABILITY 157–61 (Peter Kornbluh ed., 2003) (describing composition and activities of Directorate of National Intelligence, Chile’s secret police agency under Pinochet).

277. For a discussion on the difficulty of determining how many perpetrators there were, see Scott Straus, *How Many Perpetrators Were There in the Rwandan Genocide?: An Estimate*, 6 J. GENOCIDE RES. 85, 87–95 (2004).

278. See MICHAEL MANN, THE DARK SIDE OF DEMOCRACY: EXPLAINING ETHNIC CLEANSING 418, 424 (2005).

279. EVE LAHAYE, WAR CRIMES IN INTERNAL ARMED CONFLICTS 319 (2008).

as the leaders who ordered the most egregious crimes,²⁸⁰ but sometimes the focus turns to low-level offenders who happen to be available for prosecution when the leaders are not.²⁸¹ As discussed above, these individuals are prosecuted for crimes and under theories that acknowledge that they undertook their acts in groups, but that fail to identify and hold accountable each and every member of those guilty collectives. Although many more have been or will be tried at the national level, a complete accounting of all who participated or were complicit in crimes is impossible. A trial's depiction of responsibility is undeniably incomplete.²⁸²

In light of these truths about the perpetration of mass atrocity, the importance that the transitional justice movement places on criminal accountability is disheartening. This is not meant to suggest that criminal trials of a subset of the perpetrators are not valuable on their own. To the contrary, prosecutions—no matter how many or of whom—serve to pronounce unambiguously the condemnation of both the criminals and the crimes, and to acknowledge the suffering of the victims.²⁸³ But by targeting only a handful of individuals when thousands have blood on their hands, criminal trials “erase[] . . . the involvement of ordinary [persons].”²⁸⁴ This results in a “retributive shortfall, insofar as only a few people receive their just de-

280. The Special Court for Sierra Leone, for example, has jurisdiction to try “persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law.” See Special Court for Sierra Leone Agreement, *supra* note 123, art. 1.

281. Dusko Tadić, for example, was a mid-level army official and, according to ICTY Prosecutor Richard Goldstone, was prosecuted only because he “ ‘was the only accused available . . . at a time when the judges, the media, and the international community were clamoring for [the Tribunal] to begin prosecutions.’ ” WILLIAMS & SCHARF, *supra* note 230, at 115; see also BASS, *supra* note 148, at 301 (explaining that prosecuting a minor figure such as Tadić for the ICTY's first trial created the problem that Serbs could “plausibly argue that there were countless Tadic in the Bosnian Croat militia”). In fact, most defendants before the ICTY were low-level figures. WILLIAMS & SCHARF, *supra* note 230, at 115. In response to criticism that the Tribunal could not achieve its objectives through prosecutions of minor figures, the Office of the Prosecutor announced the dismissal of indictments against fourteen Serbs accused of atrocities at two prison camps in 1998. The Office of the Prosecutor explained that its decision was part of an overall strategy to focus on senior figures and to leave lower-level actors for national prosecutions. *Id.* at 115–16.

282. See NEIER, *supra* note 110, at 220–21 (discussing the inadequacies of trying only a small subset of the actual perpetrators).

283. See *id.* at 222.

284. Drumbl, *Pluralizing*, *supra* note 250, at 1314.

serts while many powerful states and organizations avoid accountability.”²⁸⁵ This is a skewed version of justice, and as a result, the hope of achieving reconciliation and peace is compromised.²⁸⁶

Moreover, criminal prosecutions of a few individuals fail to acknowledge the role that the state plays in atrocities. In most cases in which the international community has focused on individual responsibility, the crimes of individual perpetrators have been undertaken as part of a systematic policy of the state.²⁸⁷ In contrast to conventional crimes that are perpetrated by a single person, mass atrocity such as genocide is “the product of collective, systematic, bureaucratic activity, made possible only by the collaboration of massive and complex organizations in the execution of criminal policies initiated at the highest levels of government.”²⁸⁸ The Holocaust, of course, was

285. *Id.*; see also Drumbl, *supra* note 121, at 570 (“In Rwanda, genocide was a social project. . . . To speak of individual mens rea in such contexts is a bit facile. . . . This suggests that international criminal law’s formal predicate of avoiding collective guilt may need to be revisited, or at least the orthodoxy of that predicate rethought, and broader ‘ecological’ approaches to the violence acknowledged.” (footnotes omitted)).

286. See NEIER, *supra* note 110, at 212–13 (“Justice provides closure; its absence not only leaves wounds open, but its very denial rubs salt in them. Accordingly, partisans of prosecutions argue, peace without justice is a recipe for further conflict.”).

287. See FRANK CHALK & KURT JONASSOHN, *THE HISTORY AND SOCIOLOGY OF GENOCIDE: ANALYSES AND CASE STUDIES* 28 (1990) (explaining that genocide requires dehumanization of victims and a “strong, centralized authority and bureaucratic organization”); James Crawford, *First Report on State Responsibility*, U.N. GAOR, Int’l Law Comm’n, 50th Sess., ¶ 89, U.N. Doc. A/CN.4/490/Add.3 (1998) (“It is a characteristic of the worst crimes of the period since 1930 that they have been committed within and with the assistance of State structures”); Lang, *supra* note 196, at 254 (explaining that genocide requires state complicity and is necessarily a “large-scale operation beyond the scope of any one individual or even a small number of individuals”); Nollkaemper, *supra* note 100, at 624 (describing that in most cases of mass atrocity, “it will mostly be impossible to separate the individual from the state”). At the same time, state involvement is not required as a legal matter for an act to constitute genocide and is not necessarily a factor in all acts of genocide. See, e.g., GÉRARD PRUNIER, *THE RWANDA CRISIS: HISTORY OF A GENOCIDE* 247 (1995) (explaining that although government authorities did participate in the genocide, in some areas there was neither government involvement nor government compulsion, and genocide instead was perpetrated by ordinary peasants in a “spontaneous movement of the population to ‘kill the enemy Tutsi’”).

288. David Cohen, *Beyond Nuremberg: Individual Responsibility for War Crimes*, in *HUMAN RIGHTS IN POLITICAL TRANSITIONS*, *supra* note 129, at 53; see also CHARLES S. MAIER, *THE UNMASTERABLE PAST: HISTORY, HOLOCAUST, AND GERMAN NATIONAL IDENTITY* 69–70 (1988) (“The entrepreneurs of genocide are like the organizers of Adam Smith’s pin factory who have discovered the division

perpetrated using the mechanisms of the German government. Hannah Arendt famously wrote that “crimes of this kind . . . were, and could only be, committed under a criminal *law* and by a criminal *state*.”²⁸⁹ In Rwanda, the same administrative, political, and military structures that the government used one day to organize citizens to participate in *umuganda*, public works projects such as building roads and schools and hospitals, were used the next day to organize citizens to participate in mass slaughters. Government officials sent their subordinates from house to house to sign up all adult males for massacres, coordinated with local councils to implement the plans to kill, and delivered killers straight to massacre sites.²⁹⁰

The focus of the international community on criminal trials fails to acknowledge the significant and troubling role state institutions play in genocide. It is the individuals that perpetrate mass atrocity, of course, but they do so on behalf of the state, using the institutions of the state.²⁹¹ But those institu-

of labor. Ideologues conjure up a monstrous conspiracy[.] . . . ambitious administrators define target categories and compete for jurisdiction; different officials pass sentences or create administrative authorities; others arrest, some load onto trains, others unload, some guard, others herd people to the killing ground or into the gas chambers; still others shake cyanide crystals into the vents.”).

289. HANNAH ARENDT, *EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL* 240 (Viking Press 1963).

290. HUMAN RIGHTS WATCH, *supra* note 214; *see also* PHILIP GOUREVITCH, *WE WISH TO INFORM YOU THAT TOMORROW WE WILL BE KILLED WITH OUR FAMILIES* 95 (1999) (describing genocide as “an exercise in community building”); Samantha Power, *Bystanders to Genocide: Why the United States Let the Rwandan Tragedy Happen*, *ATLANTIC MONTHLY*, Sept. 2001, at 84, 94 (citing report of the U.S. Defense Intelligence Agency stating that the massacres in Rwanda were “not spontaneous” and were “directed by the government, with lists of victims prepared well in advance”). Gérard Prunier commented that “[t]he efficiency of the massacres bore witness to the quality of Rwandese local administration.” PRUNIER, *supra* note 287, at 244.

291. *See* Nollkaemper, *supra* note 100, at 625 (“The dogma of individual responsibility that ‘Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced’ is doubtful at best.” (quoting IMT Judgment, *supra* note 120, at 223)); *see also* Cohen, *supra* note 288, at 53 in *HUMAN RIGHTS IN POLITICAL TRANSITIONS*, *supra* note 129 (“How, then, is individual responsibility to be located, limited, and defined within the vast bureaucratic apparatuses that make possible the pulling of a trigger or the dropping of a gas canister in some far-flung place?”); Drumbl, *supra* note 121, at 570–71 (“International law thereby replaces its traditional subject, the state, with a non-traditional subject, the individual, notwithstanding the fact that the abject criminality of mass violence often is committed at the behest of or in furtherance of the state.”). *See generally* ERIC D. WEITZ, *A CENTURY OF GENOCIDE: UTOPIAS OF RACE AND*

tions often are left untouched in the wake of the atrocity, and progress toward reconciliation is impeded as a result. The use of state institutions to perpetrate mass atrocity perpetuates its own harms, separate from the harm of the atrocity itself. For a genocide committed in the name of a state or using state bureaucracies and institutions—even in the event that every individual perpetrator in a genocide is prosecuted and convicted—a full appreciation of the gravity of state-led atrocity requires more than wide criminal prosecution. This is because the impact of mass atrocity is not limited to the death toll. Beyond the multitudes of individual victims of violence, society as a whole suffers. State involvement in an atrocity contributes to the disruption of a functioning society through its unique impact of poisoning state institutions and preventing the state from using those institutions for acceptable purposes without taint.²⁹²

Historically, states have on occasion acknowledged their own guilty institutions to move toward reconciliation and peace. After the Second World War, for example, the Japanese military was indicted as an institution just as the individual perpetrators were.²⁹³ Rwanda, Yugoslavia, or Sudan would benefit from a similar acknowledgment that government bureaucracy was a factor in atrocity just as the individual perpetrators were. Transitional justice efforts must find a way to address the systematic nature of atrocity, as ignoring the involvement of a state in collective violence prevents the estab-

NATION (2003) (explaining that genocide is organized by states by perpetrated through mass participation).

292. See Rebecca M. Bratspies, *"Organs of Society": A Plea for Human Rights Accountability for Transnational Enterprises and Other Business Entities*, 13 MICH. ST. J. INT'L L. 9, 18 (2005) (noting that "an overarching vision of state responsibility" can help confront systematic state policies in violation of human rights and humanitarian law).

293. The Japanese Constitution states that the "Japanese People forever renounce war as a sovereign right of the nation" and prohibits the Japanese from maintaining "land, sea, and air forces," is an interesting and unique example of a state identifying one of its own institutions as responsible for past harms and seeking to vitiate the root of its own war guilt. JAPAN CONST. art. 9. Professor Fletcher explains: "Entrenching disabilities of this sort in a constitution seems to say to the world: 'There is a bad seed here in this nation, and it is planted from generation to generation.'" Fletcher, *Liberals and Romantics*, *supra* note 255, at 1537.

lishment of a complete and accurate account of what happened.²⁹⁴

In this regard, state responsibility uniquely contributes to the goal of truth-telling. In criminal trials, the law already seeks to capture the systematic, coordinated, state-run nature of an atrocity. These attempts, however, rely on theories of liability and substantive crimes that provoke widespread criticism concerning both their expansion of criminality beyond individual culpability and their reliance on evidence and pronouncements in judgments of historical developments that fall far outside the ordinary standards of relevance for a criminal trial.²⁹⁵ Instead of awkwardly applying the criminal law to accomplish the objective of revealing the complex bureaucracy behind a genocide—and jeopardizing the legitimacy of criminal trials as a result—a state-run atrocity should be addressed through a unique framework that is suited specifically for discussing and determining the responsibility of a government. In a civil action for state responsibility, a detailed construction of the historical origins of the atrocity and the composition of those who perpetrated or facilitated crimes, condoned them, or were harmed by them would be germane to the action at hand and could accomplish the goal of exposing and condemning “administrative massacre” without running afoul of liberal criminal protections and, thus, without threatening reestablishment of the rule of law.²⁹⁶

294. In other contexts in which there has been a transition of power to a new regime, such as the doctrine of odious debt, the international community has encouraged forgiveness for the misdeeds of a previous oppressive regime and has shown a willingness to wipe the slate clean and not ask the new, democratic government to pay for the wrongs of the previous government. See Christiana Ochoa, *From Odious Debt to Odious Finance*, 49 HARV. INT'L L.J. 109, 152–56 (2008). In this context, however, wiping the slate clean is not in the best interest of the new regime. Transition out of a period of atrocity requires acknowledgment of the harms of the past through public recognition of the suffering of victims and of the wrongs committed against them, whether in the form of a judgment awarding reparations or a declaration of responsibility.

295. See TEITEL, *supra* note 105, at 75 (“Troubling dilemmas arise whenever a punishment policy is undertaken chiefly to establish a historical record, whenever the primary purposes of transitional punishment are external to those associated with the ordinary criminal justice system.”); Danner & Martinez, *supra* note 139, at 143–46, 149–51 (urging revision of JCE in order to uphold principles of legality and the legitimacy of the tribunals).

296. This is not to suggest that state civil responsibility for genocide serves purposes that no other mechanism can accomplish. Truth commissions, of course, can also establish a detailed narrative of both individual cases and an overarching system of government massacre without running afoul of liberal criminal protec-

Moreover, a separate judgment that the state itself has committed genocide carries enormous expressive value that should not be overlooked. Perhaps the threat of an action before the ICJ will not deter state officials from organizing and encouraging mass slaughters, and the risk that a judgment for reparations visited on a future regime will not give pause to genocidaires. Nonetheless, an international court's condemnation of a state for committing the most horrific of acts sends a powerful message.²⁹⁷ Just as the international community uses resolutions of the General Assembly to voice the world's abhorrence of certain acts, a decision by the ICJ that a state committed genocide serves as an important pronouncement that the international community will not turn away in the face of genocide.²⁹⁸ A determination of state responsibility also serves to separate the perpetrator state from the abuses of the past. Both for a state that committed genocide against another state's citizens and for a state that committed genocide against its own people, a regime's acceptance of a legal determination of state responsibility demonstrates an intention to repudiate the state's tainted history and marks a break between the past atrocity and future peace and reconciliation.

A determination that a state has committed genocide serves not only to announce that under international law, state institutions must not be used to perpetrate crimes, but also to give the society an opportunity to acknowledge that its institutions have been abused and tarnished. This amounts to the society showing the world that it rejects the acts of its past. This declaration would allow the perpetrator state and society to move beyond its commission of genocide and become again a functioning member of the international community. This recognition is essential to the healing process. Only once it is acknowledged openly that the state has been abused can the soci-

tions. See TEITEL, *supra* note 105, at 82. State responsibility thus serves as an additional tool in the mechanisms of transitional justice and, like truth commissions and other non-criminal processes, its value and benefits should be recognized and relied upon as the international community attempts to help societies move toward reconciliation and peace.

297. See Diane Marie Amann, *Message as Medium in Sierra Leone*, 7 ILSA J. INT'L & COMP. L. 237, 238 (2001) (explaining that expressivist theories of law "look not so much at whether a law deters or whether a law punishes, but at the message we get from a law").

298. See Diane Marie Amann, *Group Mentality, Expressivism, and Genocide*, 2 INT'L CRIM. L. REV. 93, 118 (2002) (explaining that expressivism considers law as providing insight into "society's values, what it esteems, what it abhors").

ety successfully transition to functioning again in accordance with the rule of law.

This is why state responsibility should apply equally in a situation in which the governing institutions were responsive to the people, as in a democracy, and in a situation in which they were imposed on the people, as in a totalitarian state. This is also why state responsibility remains appropriate in cases in which the government that committed the atrocities in question is different from the government that is legally assigned the responsibility. The burden is appropriately spread both to those who had a part in the criminal undertaking and to those who did not; the act of showing that the formerly criminal state is now rejecting the abuses of its past is one that should be attributed to the entire people of the state. As Professor Walzer explains, "citizenship is common destiny"; when a person who played no part in the atrocities committed by her government continues to be a part of that state, that person shares in the responsibility for the acts of that government by virtue of her continued association with that state.²⁹⁹ But that person also is given the opportunity to share in the acts that can repair that state by acknowledging the past and constructing a new life for state institutions. Instead of imposing unjust burdens on individuals who played no part in the wrongs of their government, state responsibility gives those who are associated with those wrongs the opportunity to break with the past.³⁰⁰

Civil damages raise additional questions concerning state responsibility, as reparations might, in some cases, be a rather blunt tool for achieving the goals of transitional justice. A government ordered to pay reparations would fund its payments from the national treasury and, thus, from the people. Payment of reparations by individuals who were neither perpetrators, bystanders, nor victims who could claim reparations, such as those who actively resisted or sought to protect victims, might not ultimately serve the interests of transition. Profes-

299. See *supra* note 256 and accompanying text.

300. Professor Franck sees hope in state responsibility for genocide, in its potential to "summon persons everywhere to display the courage to oppose criminal activities by their own governments"; to "proclaim that a nation's tolerance of, or complicity in, egregiously illegal conduct cannot be expiated by punishing a few notorious leaders"; and to "ensure that the burdens . . . of reconstituting that which was illegally destroyed is shared and does not come to rest exclusively on the victims." Franck, *supra* note 256, at 572.

sor Drumbl proposes methods to tailor awards of civil damages so that the burdens of reparations are borne by those who were indeed responsible for the abuses. After a court's determination of a state's responsibility for genocide, individuals could be given an opportunity to demonstrate that they should not be required to participate in the collective payment of damages, for example, by showing that they took affirmative action against the atrocity.³⁰¹ Such a framework might better account for situations in which citizens of a state had no ability to influence their government or no control over the composition or actions of their government. Professor Drumbl argues that such a framework could transform the law from operating not only to react to atrocity, but also, perhaps, to prevent it by putting in place incentives for individuals to act when they see "conflict entrepreneurs" making efforts to ignite tensions and move a society toward violence.³⁰² Courts and governments should consider such refinements to damages awards, while bearing in mind that a declaration of a state's responsibility, and the acts required to move a state toward reconciliation and compliance with the rule of law, serve significant value for all citizens of a perpetrator state.

CONCLUSION

How a society can recover after enduring a horror such as genocide is a profoundly difficult question. Of the mechanisms available to achieve the goals of transitional justice, the international community has put its faith primarily in criminal trials, and for good reason. Criminal tribunals establish the guilt of perpetrators, and in doing so they pronounce clearly that the acts that terrorized individuals and destroyed societies are crimes and will not go unpunished—at least for some. They acknowledge the suffering of victims, and they offer redress in hopes that victims will not seek to avenge the atrocities they suffered themselves and that they and their kin will not assign collective guilt to the group to whom the perpetrators of those atrocities belong.

Despite their many successes, however, the international community should be wary of relying exclusively on criminal prosecutions to help societies emerge from mass violence. The

301. See DRUMBL, *supra* note 272, at 204.

302. *Id.* at 202–203.

inadequacies of criminal law have long been acknowledged. In the aftermath of World War II, some individuals, attempting to confront the unparalleled horror of the Holocaust, questioned whether it was possible to conceive of the acts of the Nazis through the lens of criminal law. Writing to Karl Jaspers, her former teacher, in 1946, Hannah Arendt commented on the inadequacy of criminal guilt:

Your definition of Nazi policy as a crime ("criminal guilt") strikes me as questionable. The Nazi crimes, it seems to me, explode the limits of the law; and that is precisely what constitutes their monstrousness. For these crimes, no punishment is severe enough. . . . [T]his guilt, in contrast to all criminal guilt, oversteps and shatters any and all legal systems. . . . [T]he Germans are burdened now with thousands or tens of thousands or hundreds of thousands of people who cannot be adequately punished within the legal system³⁰³

At the time, Jaspers cautioned that "we have to see these things in their total banality, in their prosaic triviality, because that's what truly characterizes them."³⁰⁴ But by the time of the Eichmann trial, fifteen years later, it was Jaspers who saw the criminal law as inadequate, and he argued that the question of Eichmann's guilt was "larger than law."³⁰⁵

More recently, scholars have argued that conventional criminal law is an inadequate paradigm for responding to mass atrocity. These criticisms have taken many forms. Some have argued that in contrast to ordinary crime, the acts that an individual perpetrates as part of a mass atrocity are not deviant in the circumstances under which they are committed. They therefore cannot be reconciled with the framework of criminal law, which characterizes criminal acts as a result of delinquency rather than social conformity.³⁰⁶ Others have taken the position that the international community should take a holistic approach to mass atrocity that considers the range of actors and processes that contributed to the perpetration of mass vio-

303. HANNAH ARENDT-KARL JASPERS CORRESPONDENCE 1926–1969, at 54 (Lotte Kohler & Hans Saner eds., Robert Kimber & Rita Kimber trans., 1992).

304. *Id.* at 62.

305. *Id.* at 413.

306. See MARK OSIEL, MASS ATROCITY, COLLECTIVE MEMORY, AND THE LAW 24–44 (1997) (examining role of collective action and conformity in perpetration of mass atrocity); Drumbl, *supra* note 121, at 567–71.

lence.³⁰⁷ Even commentators who do not go so far as to question the role of criminal law in responding to atrocities have voiced concern over recent developments that have been used to extend individual criminal responsibility to a greater number of individuals, including those who may not have been involved directly with the perpetration of a crime.³⁰⁸

The international community would do well to consider the benefits of avenues other than criminal trials, such as civil actions against states.³⁰⁹ Instead of dismissing state responsibility as destructive to the goals of accountability, truth-telling, and, ultimately, reconciliation and peace, holding states accountable for committing genocide should be recognized as an important tool in the framework of transitional justice. As this Article has demonstrated, a determination by the ICJ that a state has committed genocide in violation of the Convention—as distinguished from collective guilt—can help a society establish truth and accountability and ultimately move toward peace and reconciliation after it has endured a genocide. By showing the breadth of participation in an atrocity and acknowledging the inappropriate involvement of state institutions in mass killing, rape, or displacement, a civil action against a state can compensate for some of the shortcomings of criminal trials. Civil actions to declare state responsibility can serve to establish the role that government institutions played in an atrocity and thereby help a society to cleanse its institutions and progress toward renewed functioning of the state in conformity with the law.

This is not to suggest that actions against states in the ICJ should be pursued to the exclusion of criminal prosecutions.³¹⁰

307. See generally Fletcher & Weinstein, *supra* note 267.

308. See generally Danner & Martinez, *supra* note 139.

309. There are a number of open questions regarding actions against states for committing genocide. The question of intent in particular has aroused much discussion, in light of the *dolus specialis* required for genocide. See, e.g., Fletcher & Ohlin, *supra* note 247, at 546 (discussing difficulties of attributing genocidal intent to a collective and noting lack of scholarly discussion of this issue). The inferences a court may draw from the guilt of an individual to the guilt of the collective also deserve further inquiry. See, e.g., Herbert Morris, Propter Honoris Respectum: *George Fletcher and Collective Guilt: A Critical Commentary on the 2001 Storrs Lectures*, 78 NOTRE DAME L. REV. 731, 735–36 (questioning the propriety of making such an inference).

310. See *supra* text accompanying note 89 (describing ICJ discussion on prevalence of dual responsibility of states and individuals under international law). The mechanism for state responsibility under the Genocide Convention, under which one state must file a complaint against another, may be of limited use when

Instead, where appropriate and feasible, criminal actions and civil actions pursued in tandem can serve to complement each other and reinforce progress toward the goals of accountability, truth, and peace that both seek to serve. In responding to a problem as complex as a society's recovery from mass atrocity, we should not unduly limit the instruments we use simply because transitional justice has become so dependent on the criminal law.³¹¹ Instead, a diversity of approaches, including acknowledgment of the benefits of state responsibility, can ensure a nuanced response that takes into account both the demands of the particular situation and the realities of mass atrocity—that masses of individuals perpetrate horrific crimes, that state institutions are abused and tainted by their involvement in the crimes of those individuals, and that transitional justice as it is being pursued today is failing to accomplish its crucial goals.

a state is perpetrating genocide against its own people. Of course, because the prohibition of genocide is an obligation *erga omnes* owed to the international community as a whole, see *Barcelona Traction, Light and Power Co., Ltd.*, Judgment, 1970 I.C.J. 3, 32 (Feb. 5), it is possible that states that are not themselves directly injured by a genocide can still bring the issue of the perpetrator state's responsibility for committing genocide before the ICJ, see CHRISTIAN J. TAMS, ENFORCING OBLIGATIONS *ERGA OMNES* IN INTERNATIONAL LAW 158–97 (2005).

311. See W. Michael Reisman, *Legal Responses to Genocide and Other Massive Violations of Human Rights*, 59 LAW & CONTEMP. PROBS., Autumn 1996, 75, 79–80 (“There is no general institution that can be applied as a paradigm for all circumstances. In each context, an institution appropriate to the protection and reestablishment of public order in the unique circumstances that prevail must be fashioned such that it provides the greatest return on *all* the relevant goals of public order. Thus, these tools may be adapted and used in particular circumstances to fulfill, in the most optimal fashion possible, the fundamental goals of international law: the protection and reestablishment of public order.”).