

Too Much of a Good Thing? Freedom of Expression in the Aftermath of Intractable Conflict

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For Joanne: friend, mentor, scone enthusiast.

ABSTRACT

A major weakness of the literature on the regulation of freedom of expression within the field of political science is the assumption of peaceful, liberal democratic conditions. My project seeks to contribute to a better understanding of the legitimate regulation of speech by analyzing disciplinary approaches to freedom of expression through the lens of countries recovering from intractable conflict. I ask: How appropriate are current understandings of freedom of expression to the regulation of speech in post-conflict environments? Relying on insights from the field of social psychology and the case of post-genocide Rwanda, I argue that greater restrictions on freedom of expression could be legitimate in countries recovering from intractable conflict. However, rights derogations must take place within limits so as not to become a tool of authoritarian rule.

Une lacune importante dans la littérature traitant de la réglementation de la liberté d'expression en science politique est la présupposition de conditions de paix et de démocratie libérale. Mon projet cherche à contribuer à une meilleure compréhension de la réglementation légitime de la parole à partir d'une analyse des approches disciplinaires à la liberté d'expression selon une perspective privilégiant l'expérience de pays ayant souffert de conflits. Je pose la question suivante: Les interprétations actuelles de liberté d'expression sont-elles convenables pour la réglementation de la parole dans des pays en période d'après-conflit? En m'appuyant sur le domaine de la psychologie sociale et l'étude du Rwanda post-génocide, j'affirme qu'une plus importante restriction de la liberté d'expression pourrait être légitime en pays en période de reconstruction après les conflits. Cependant, les atteintes à la liberté d'expression, comme à tout autre droit de l'homme, doivent avoir lieu dans un cadre de limites démocratiques pour ne pas devenir un instrument d'autoritarisme.

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LIST OF ACRONYMS

APA	American Psychological Association
CDR	Coalition pour la défense de la république
DSM-IV	Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition
FDU	Forces démocratiques unifiées
ICTR	International Criminal Tribunal for Rwanda
MDR	Mouvement démocratique républicain
MRND	Mouvement révolutionnaire national pour le développement
NGO	Non-governmental organization
NRA	National Resistance Army (Uganda)
NUR	National University of Rwanda
NURC	National Unity and Reconciliation Commission
Parmehutu	Parti du mouvement de l'émancipation des Bahutu
PL	Parti liberal
PSD	Parti social démocratique
PTSD	Post-Traumatic Stress Disorder
RPA	Rwandan Patriotic Army
RPF	Rwandan Patriotic Front
RTLMC	Radio-télévision libre des mille collines
RWF	Rwandan Franc
TJ	Transitional Justice
TRC	Truth and Reconciliation Commission
UN	United Nations
UNAMIR	United Nations Assistance Mission in Rwanda
UNAR	Union nationale rwandaise
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNICEF	United Nations Children's Fund
UNMIK	United Nations Assistance Mission in Kosovo
USAID	United States Agency for International Development

GLOSSARY OF RWANDAN TERMS

<i>akazu</i>	“Little house”, the circle of president Habyarimana’s closest advisors.
<i>gacaca</i>	“Justice on the grass”, a transitional justice mechanism based on traditional forms of community justice.
<i>ibytso</i>	“Accomplices”, a term used to accuse Tutsi (and, to a lesser extent, Hutu) of collaboration with the RPF.
<i>ihahamuka</i>	Loosely translated as “without respiration”, this term refers to the psychological disturbances associated with the genocide.
<i>ingando</i>	Solidarity or re-education camps.
<i>Inkuba</i>	“Thunder”, the youth wing of the MDR party.
<i>Interahamwe</i>	“Those who stand together”, the youth militia associated with the MRND party.
<i>inyenzi</i>	“Cockroaches”, a derogatory term initially used to refer to Tutsi who attacked Rwanda during the 1960s. It was revived in 1990 to refer to the RPF, and, later, to all Tutsi.
<i>Kangura</i>	A Hutu Power propaganda magazine established in 1990 which played an integral role in inciting the Rwandan genocide.
<i>nyumbakumi</i>	A community leader responsible for supervising <i>umuganda</i> .
<i>umuganda</i>	Mandatory labour for the common good. This practice, originally implemented by the colonial administration, was revived under the Habyarimana regime. During the genocide, local officials often told Hutu that slaughtering Tutsi was part of their <i>umuganda</i> , or communal work.
<i>Umurabyo</i>	Defunct Rwandan bi-monthly tabloid newspaper formerly edited by Agnès Uwimana Nkusi, who is currently serving four years in prison for threatening national security, denying the genocide, inciting divisionism, and defaming the president of Rwanda.

INTRODUCTION

On April 27, 2000, the Albanian daily newspaper *Dita* published an article which alleged that Petar Topoljski, a Serbian employee of the United Nations Mission in Kosovo (UNMIK), had been a Serbian paramilitary responsible for ethnic cleansing during the conflict in Kosovo (1998-1999). The article included a photograph of the employee, his home address, and his work schedule. Two weeks after the article ran, Topoljski was abducted and later found stabbed to death in a village outside of Pristina (Palmer 2001, 195).

On June 17, 2000, UNMIK passed two resolutions pertaining to media ethics in Kosovo. “The first, Regulation 2000/36, created the position of Temporary Media Commissioner, an international position which would be responsible for the development and promotion of an independent and professional media in Kosovo and the implementation of a temporary regulatory regime for all media in Kosovo” (Palmer 2001, 195). Regulation 2000/36 made it illegal for media owners, operators, and editors to publish “personal details of any person, including name, address, or place of work, if the broadcast of such details would pose a serious threat to the life, safety, or security of any such person through vigilante violence or otherwise” (UNMIK 2000). The second ordinance, Regulation 2000/37, authorized the Temporary Media Commissioner to issue codes of conduct for media organizations. On the basis of these regulations, Special Representative to the Secretary General Bernard Kouchner shut down the newspaper for eight days (Palmer 2001, 195-196).

Western non-governmental organizations (NGO) and journalist associations acknowledged that the publication of details such as Topoljski’s home address and work schedule did constitute a violation of journalistic ethics. However, they were highly critical

of UNMIK's handling of the situation, decrying the new regulations as intolerable censorship. As Palmer (2001) recounts, the Secretary General of the International Federation of Journalists claimed that Regulation 2000/36 was "replacing the rule of law with a dictatorship that would be a poor message for a region which was striving to adopt democratic principles, professionalism, and tolerance" (196). In a statement, the World Press Freedom Committee maintained that the new regulations "constitute a very dangerous and disturbing precedent for future media controls by official organs of the international community in post-conflict zones" (196).

This example raises important questions about the regulation of free expression in post-conflict environments, and about the legitimacy of government censorship more broadly. If *Dita* had identified Topoljski by name, but had omitted his photo, address, and work schedule, would the newspaper still have put him at risk, given the region's recent experience with conflict and the resulting political and social climate (Palmer 2001)? Should the newspaper be held morally or legally responsible for Topoljski's abduction and murder? Were the regulations implemented by UNMIK legitimate? More generally, when it is legitimate for the state to curtail or suspend an individual's right to freedom of expression? What kinds of censorship are acceptable, and which are unjustified?

Scholars working in a variety of disciplines – philosophy, ethics, political science, law, psychology – have sought to provide answers to these questions. Although these issues are too fundamental for me to address conclusively within the confines of this project (or, perhaps, any project), I seek to contribute to a better understanding of the legitimate regulation of speech by analyzing two disciplinary theories of free expression through the lens of countries recovering from conflict. Specifically, I ask: How appropriate are current

understandings of freedom of expression to the regulation of speech in post-conflict environments? The academic debate on the regulation of freedom of expression within the field of political science is predicated on the assumption of peaceful, liberal democratic conditions. Drawing on insights from the field of social psychology and the case of post-genocide Rwanda, I argue that greater restrictions on freedom of expression could be legitimate in countries recovering from intractable conflict. However, rights derogations must take place within limits so as not to become a tool of authoritarian rule. Further interdisciplinary research is needed in order to determine the nature and scope of these limits.

This thesis blends an understanding of conflict and post-conflict environments drawn from political science with theoretical approaches to the regulation of expression drawn from both liberal philosophy and social psychology. Insights from these disparate fields of study help to overcome the limitations of more disciplinary approaches. For instance, an extensive political science literature on post-conflict democratization calls into question some of liberal philosophy's fundamental assumptions about the relationship between the state and its citizens. Similarly, a psychological understanding of trauma and its effects can help to better contextualize government censorship in countries recovering from intractable conflict. In this project, I ground my theoretical critiques in an empirical discussion of post-genocide Rwanda. This empirical analysis provides meaning and context to my theoretical evaluation of disciplinary approaches to free expression.

Before proceeding to an outline of the subsequent chapters, it is necessary to define and contextualize key terms and concepts. Expression is "any act that is intended by its agent

to communicate to one or more persons some proposition or attitude” (Scanlon 1972, 8).¹ Although legal conceptions of freedom of expression differ between states, according to the International Covenant on Civil and Political Rights, freedom of expression is the “freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media” (UN 1976, Art.19). Intractable conflicts are particularly resistant to resolution. These conflicts, which may also be referred to as ‘deep-rooted’ (Burton 1987), are long lasting and exceptionally violent (Rouhana and Bar-Tal 1998, 761-762).² O’Neil (2010) defines legitimacy as “a value whereby something is recognized and accepted as right and proper” (35). An individual’s understanding of legitimacy is highly dependent on his or her values. In this project, I employ a consequentialist ethical framework, which maintains that “the way to tell whether a particular choice is the right choice for an agent to have made is to look at the relevant consequences of the decision: to look at the relevant effects of the decision on the world” (Pettit 1993, 1). This consequentialist framework allows me to assume that under certain circumstances, the state is justified in limiting freedom of expression.³ This fundamental assumption underpins my work.

This introductory chapter concludes with a history of conflict in Rwanda in order to contextualize the subsequent chapters. In chapter 1, I ask: What are the individual and collective effects of intractable conflict? Why are these effects important to the study of free expression? I argue that a conflictive ethos coupled with weak institutions make speech both more dangerous and more difficult to regulate in post-conflict environments than in peaceful

¹ Although not all expression is spoken, for the purposes of this study, ‘speech’ and ‘expression’ will be used synonymously.

² The characteristics of intractable conflict will be discussed in greater detail in chapter 1.

³ This argument would not be possible according to a deontological ethical framework, which maintains that rights are absolute and may never be legitimately derogated.

societies. Additionally, as these environments are often characterized by authoritarian regimes, the legitimacy of rights derogations is more difficult to determine. The chapter focuses on post-genocide Rwanda as a whole, using examples and statistics to illustrate and support my hypothesis. In chapter 2, I critique philosophical approaches to the regulation of freedom of expression, concentrating specifically on dominant liberal theories as articulated in the works of John Locke, John Stuart Mill, and Thomas Scanlon. At the end of the chapter, I illustrate my critiques with a discussion of the case of Agnès Uwimana Nkusi, a prominent Rwandan journalist who was charged and imprisoned in 2010 on the basis of controversial articles published in the now-defunct bi-monthly tabloid *Umurabyo*. In chapter 3, I address psychological approaches to free expression, focusing my analysis on the work of Ervin Staub and colleagues. The chapter concludes with a critical examination of Rwanda's so-called divisionism law and its application to the case of Victoire Ingabire Umuhuza, an opposition politician who was prosecuted and later imprisoned largely because of contentious comments she made during a genocide memorial service in Kigali in 2010. In the final chapter, I conclude by summarizing the preceding chapters and suggesting avenues for further research.

CASE STUDY

The ancestors of the people now known as Hutu and Tutsi settled Rwanda over a period of several thousand years.⁴ They developed a common language, Kinyarwanda, and founded a common set of philosophical and cultural beliefs. The majority of these early settlers were cultivators, while a small minority based their livelihoods on raising and tending large herds of cattle. For the most part, cultivators and pastoralists lived interspersed throughout the region. By the eighteenth century, when Rwanda emerged as a major state, rulers measured their wealth in the number of cattle they possessed. However, as Des Forges (1999) specifies, “Rwandan institutions were shaped by both pastoralists and cultivators. Although the power of the ruler derived from control over the military and over cattle, his authority was buttressed also by rituals firmly rooted in agricultural practice” (32).

As the Rwandan state continued to develop, the ruling pastoral elite became more clearly defined, and, to a certain degree, began to consider themselves superior to cultivators. The word ‘Tutsi’, which initially meant “a person rich in cattle” and referred to the status of an individual, became the term used to refer to the elite group as a whole. The word ‘Hutu’, which originally meant “a subordinate or follower of a more powerful person”, came to refer to the mass of common people, most of whom were cultivators (32). According to Des Forges, intermarriage between groups was not common during the eighteenth century, so over time, “pastoralists came to look more like other pastoralists – tall, thin and narrow featured – and cultivators like other cultivators – shorter, stronger, and with broader features” (33). The labeling of Tutsi pastoralists as elites and Hutu cultivators as subjects was

⁴ A third social group, the Twa, forms approximately one percent of Rwanda’s population. The Twa were originally forest-dwellers who subsisted through hunting and gathering. The social boundary separating Tutsi and Hutu from the Twa was rigid, even before colonization. Some Twa were killed during the genocide, while others became killers (Des Forges 1999, 34). Data concerning the Twa and their role in the genocide is so limited that they are excluded from most studies, including my own.

becoming generalized when German colonizers first arrived in Rwanda at the turn of the nineteenth century, but was not yet immutable. Rulers of certain sub-states or regions within Rwanda and some power-holders within the main state administration exercised authority even though they were members of the cultivator group (33).

After the First World War, Germany's colonies were distributed among the victors, and Belgium assumed responsibility for Rwanda. Like the Germans before them, the Belgians largely made use of the strong indigenous state to exercise control in the colony, but grew concerned that Rwanda's dense central administration was a drain on resources, and that its relatively autonomous sub-states posed a threat to colonial authority. Thus, in the 1920s, the Belgians began to implement a series of institutional reforms designed to maximize administrative efficiency and minimize potential dissent. Perhaps most relevant to any discussion of genocide in Rwanda is the decision to categorically exclude Hutu from positions of power. The Belgians decreed that only Tutsi could hold administrative office. Hutu were also excluded from higher education, which mostly served as preparation for careers in the public service, virtually guaranteeing a long-term "Tutsi monopoly on public life" (Des Forges 1999, 35). In order to ensure exclusive Tutsi access to positions of authority or to higher education, identity was fixed and formalized through a system of identity cards. Rather than tracing genealogies, which would have yielded the most accurate result, the Belgian colonizers pursued a number of arbitrary policies. Some authors report that each Rwandan was asked to self-declare his or her identity (Des Forges 1999, 37), while others claim that the Belgians relied on pseudo-scientific methods such as counting an individual's cattle (Hintjens 1999, 253) or measuring his or her cranial circumference (Gourevitch 1999, 55). Regardless, by the 1930s, official state records listed 84 percent of

the population as Hutu, 15 percent as Tutsi, and one percent as Twa. Ethnicity was to be conferred and officially registered at birth, according to the paternal line. Each individual was issued an identity card, which adults were required to carry at all times (Des Forges 1999, 37).

Most authors agree that the Belgians were not attempting to implement a strategy of divide and rule, nor were they intending to create conflict among Rwandan social groups. Rather, they were simply implementing the racist value system inherent to early twentieth century Europeans. As Des Forges (1999) explains, the Belgians viewed Tutsi, Hutu, and Twa as three distinct, long-standing, and mutually distinctive ethnicities, descended from the Ethiopid, Bantu, and Pygmoid population groups. “Because Europeans thought that the Tutsi looked more like themselves than did other Rwandans, they found it reasonable to suppose them closer to Europeans in the evolutionary hierarchy and hence closer to them in ability” (36, see also Hintjens 1999, 252-253). As Tutsi were deemed more capable, it seemed logical for them to rule over Hutu and Twa, just as it seemed self-evident for Europeans to rule over Africans. Furthermore, when the Belgians arrived in Rwanda, they found the state and its institutions to be ruled almost exclusively by Tutsi. Unaware of the important role played by Hutu in the foundation of the state, the colonizers assumed that Tutsi were the sole creators of Rwanda’s sophisticated bureaucracy (Des Forges 1999, 36).

The formalization and documentation of identities in Rwanda increased their importance and changed their character. While once group affiliation had been mutable, it became rigid and permanent. Members of the Tutsi elite, who benefitted immensely from colonial identity policies, were heavily influenced by European value systems. They began to believe in and emphasize their superiority over the Hutu masses. For their part, Hutu,

categorically excluded from public life, “began to experience the solidarity of the oppressed” (Des Forges 1999, 38).

Belgian support for the Tutsi elite continued until the 1950s, at which point, facing internal and international pressure for decolonization, the colonial administration began to offer limited possibilities for Hutu participation in political and academic life. These changes likely exacerbated an already tense relationship between the two ethnic groups. As Des Forges (1999) notes, “hardly revolutionary, the changes were enough to frighten the Tutsi, yet not enough to satisfy the Hutu” (38). As independence approached, a conservative faction of Tutsi hoped to oust the Belgians and assume power before majority rule could be imposed. Hutu radicals, on the other hand, considered themselves to be sons of the soil, the only legitimate heirs to political power in Rwanda. They hoped to assume control of the administration before decolonization (38, see also Hintjens 1999, 254-255). As Hintjens (1999) recounts, by the end of the 1950s, it was clear that the Belgians, fearful of Tutsi radicalism and pan-African nationalism, “were prepared to abandon their erstwhile [Tutsi] allies to their fate. The colonizer now championed the case of the ‘little man’, the [Hutu] majority” (255).

In the midst of escalating tensions, King Mutara Rudahigwa, in power since 1931, sought to remain neutral in order to reassure all parties and keep the peace. However, Rudahigwa died suddenly in 1959 and was succeeded by his half-brother, Kigeri Ndahindurwa, who was heavily influenced by the most conservative Tutsi faction. As a result, moderate parties lost ground, while radical ethnic parties such as the Parmehutu (Parti du mouvement de l’émancipation des Bahutu) and the UNAR (Union nationale rwandaise), a royalist Tutsi party, gained strength and followers (Des Forges 1999, 38). In November

1959, several Tutsi attacked a Hutu sub-chief. The situation quickly escalated, with Hutu groups attacking Tutsi officials and Tutsi retaliating. By the time the Belgian authorities intervened and restored order, several hundred people had been killed, and an estimated 10,000 Tutsi refugees had fled the country (39).

In a misguided attempt to defuse tensions, colonial forces replaced half of Rwanda's Tutsi local authorities with Hutu. These local administrators were instrumental in ensuring that the Parmehutu handily won Rwanda's first elections, held in 1960 and 1961. In September 1961, 80 percent of Rwandans voted to end the monarchy, proclaiming a republic governed primarily by members of the Parmehutu party (38-39). The events of 1959-1961 became known as the Hutu Revolution, and played an important role in bolstering Hutu solidarity in the years to come. From 1961 to the early 1970s, Tutsi refugees launched attacks on Rwanda from neighbouring countries. Each time, Hutu officials carried out reprisals on Tutsi civilians living within Rwanda, and used the attacks to strengthen "the myth of the Hutu revolution as a long and courageous struggle against ruthless forces of repression" (39).

By the early 1970s, the Parmehutu leadership, based in the south of the country, was facing increasing challenges from Hutu in the north, who felt excluded from power. In response, the Kayibanda government stepped up its persecution of Tutsi, seeking to unite Hutu against a common enemy. In July 1973, General Juvénal Habyarimana took power in a coup d'état and pledged to restore national unity. In 1975, Habyarimana declared Rwanda to be a single-party state under the Mouvement révolutionnaire national pour le développement (MRND). Habyarimana appointed himself both president of the republic and president of the party, and ruled with the support of the *akazu* ("little house"), a circle of close advisors

consisting primarily of his wife, her relatives, and personal connections from his home region of Gisenyi (40-42).

Despite Habyarimana's authoritarianism, through the 1970s and 1980s, Rwanda received substantial financial support from the international community and was even heralded as a model of development (Des Forges 1999, 45; see also Uvin 1998). The country grew comparatively wealthy, but prosperity was short-lived. In 1987, when world coffee prices fell drastically, Rwanda was particularly hard hit. Hintjens (1999) notes that "receipts from coffee sales tumbled from 14 billion to five billion Rwandan francs in a single year" (256). In the wake of the economic crisis, opponents to the Habyarimana regime began demanding reforms. Their demands were echoed by donor countries and international organizations, which increasingly saw good governance as a necessary condition for economic recovery and development. In September 1990, in an attempt to placate his critics, Habyarimana appointed a committee to evaluate the question of political reform (Des Forges 1999, 47).

By 1990, the number of Rwandan refugees living in surrounding states had grown to nearly 600,000. A faction of these exiles, mostly Tutsi, formed the Rwandan Patriotic Front (RPF), an organization dedicated to the return of Rwandan refugees, the overthrow of the Habyarimana regime, and the establishment of democratic government. The RPF also had an armed force of approximately 7,000 soldiers, the Rwandan Patriotic Army (RPA), led by Paul Kagame, former deputy head of intelligence for the Ugandan National Resistance Army (NRA). On October 1, 1990, the RPA attacked Rwanda from neighbouring Uganda, overpowered a small contingent of soldiers, and marched on Kigali (49).

For Habyarimana, the RPA attack offered an opportunity to shore up flagging support by uniting Rwandans against a common enemy. In the immediate aftermath of the attack, the vast majority of citizens, including Tutsi and Hutu opponents to the regime, declared their support for the government (49). However, according to Des Forges (1999), the president worried that over time, the attack might “embolden the opposition within the country and even lead to its alliance with the enemy. Rather than rely on a spontaneous coalescing of support from all sides, Habyarimana decided to pursue a more forceful strategy, to sacrifice the Tutsi in hopes of uniting all Hutu behind him” (49).

On the night of October 4, the president staged an attack on Kigali, claiming that it had been conducted by the RPA in conjunction with Tutsi *ibytso*, or accomplices. The attack was staged in an attempt to persuade Rwandans of the danger of enemy infiltration and to attract foreign military support. Belgium, France, and the Democratic Republic of Congo (then Zaire) dispatched troops to help quell the insurrection. French forces in particular would become close allies of the Habyarimana regime (50). With the help of foreign troops, the Rwandan army pushed the RPA back to the Ugandan border. In the course of the military operation, between 500 and 1,000 unarmed Tutsi civilians were charged with collaboration and killed by Rwandan armed forces. At the same time, the Habyarimana regime instituted security protocols in an attempt to further convince citizens of the danger posed by the RPF. These included night patrols, roadblocks, and, most significantly, a campaign of mass arrests in which 13,000 people were detained without charge (49-50).

Unfortunately for the regime, these attempts to consolidate support among Hutu at the expense of the Tutsi backfired. The draconian security measures implemented by the regime reinforced the perception of Habyarimana as a repressive ruler and strengthened

bonds between Tutsi and Hutu opposition groups, who called for democratization. Donors, who saw political liberalization as a way to hasten the end of the war, joined in calls for reform (52). Bowing to these pressures, in June 1991, Habyarimana amended the constitution to allow multiple political parties. By the beginning of 1992, over fifteen new parties had been formed, including the Mouvement démocratique républicain (MDR), the main opposition party, and the Coalition pour la défense de la république (CDR), a virulently anti-Tutsi party. These parties pushed for inclusion in government, and in April 1992, Habyarimana agreed to participate in a coalition government with representatives of the major opposition parties (52-53).⁵

Habyarimana and members of his MRND party feared the emergence of political opposition in Rwanda. They used bureaucratic rules and regulations to prevent opposition leaders from travelling to meetings, disrupted demonstrations and public rallies, and, in some cases, openly harassed and assaulted opposition party members, even going so far as to burn their houses (55). As a result, opposition parties increasingly began to use forceful or violent means to recruit supporters and defeat rivals. One of their most significant strategies was the creation of militant youth wings such as the *Inkuba*, an MDR youth group that confronted and even attacked MRND supporters. Habyarimana responded by transforming the MRND youth wing, the *Interahamwe*, into an armed militia whose members were trained by the Rwandan army.

From April 1992, opposition parties in the coalition government had been pressuring the MRND to negotiate a settlement with the RPF and end the war. A ceasefire was declared in July, and in August 1992, the RPF and the Rwandan government signed the first of a

⁵ The CDR, which was perceived as a fringe party, was not included in the coalition.

series of agreements known as the Arusha Accords (Des Forges 1999, 60). Members of the Rwandan army deeply resented the Accords. Military officers, fearing that demobilization would leave them jobless and destitute, mutinied in May, June, and October 1992, killing civilians and destroying property. In November, Habyarimana renounced the Arusha Accords, calling them “a scrap of paper”, and declaring that he would not implement their provisions. Intermittent attacks continued throughout 1992 and 1993 – grenades were thrown into homes, bombs were detonated in markets, and mines were planted along roads and paths (60-61). Habyarimana and the MRND blamed these attacks on the RPA, while opposition parties attributed them to agents of the regime. Finally, on August 4, 1993, in response to significant international pressure, Habyarimana signed the final peace treaty with the RPF and the Arusha Accords came into force (124). On October 5, the UN Security Council created the United Nations Assistance Mission in Rwanda (UNAMIR), commanded by General Roméo Dallaire, to oversee the implementation of the peace agreement (132).

The Accords contained provisions concerning the rule of law, the resettlement of internally displaced persons, and the repatriation of refugees. They also created a transitional government, in which Habyarimana would remain president, but would share power with a vice-president representing the RPF and a Council of Ministers drawn from the MRND, the RPF, and opposition parties. Additionally, they addressed the integration of opposing armies, decreeing that the Rwandan government would provide 60 percent of troops but that command posts would be shared equally with the RPF (124). The Rwandan government deeply resented the peace agreement, believing the terms to strongly favour the RPF. The CDR, opposed to the Accords on principle, was completely excluded from the transitional government, which served only to increase their hostility toward the peace process.

Furthermore, a racist social movement known as Hutu Power roundly denounced the agreement. As Des Forges (1999) explains, “radicals found their fears of Tutsi domination confirmed by the terms of the Accords, but even moderate Hutu [...] experienced growing concern that the RPF had gotten more than its fair share of power and might not want to continue cooperating with other parties” (126).

After the peace agreement was signed, members of the Habyarimana regime, in conjunction with Hutu Power leaders, began to seriously draw up plans to exterminate the minority. The MRND increased recruitment and training of the *Interahamwe*, and created civilian self-defence forces that would be responsible for attacking “enemies” in their communities. Members of the Rwandan armed forces, led by Colonel Théoneste Bagosora, began to distribute firearms and machetes to the militias. The RPF responded by recruiting additional supporters and increasing the number of armed soldiers in Kigali, in direct contravention of the Arusha Accords (5). Des Forges notes that “by late March 1994, Hutu Power leaders were determined to slaughter massive numbers of Tutsi and Hutu opposed to Habyarimana, both to rid themselves of these ‘accomplices’ and to shatter the peace agreement” (5). What’s more, they installed soldiers in several regions of Rwanda, ready to execute the order to attack.

On April 6, 1994, a plane carrying president Habyarimana was shot down as it prepared to land in Kigali. Several members of the *akazu* capitalized on the ensuing chaos to execute their genocidal plans. Colonel Bagosora ordered the militias to murder Hutu politicians and opposition leaders in the capital, creating a power vacuum in which he could assume control. Nearly simultaneously, soldiers and militias were dispatched in the regions

to kill Tutsi and Hutu political and community leaders (6). The following day, the RPA openly declared war on government forces.

Des Forges notes that strategies of violence evolved as the genocide progressed. In the first few days of the genocide, militias and soldiers mainly targeted particular individuals, such as politicians and civil society leaders. Near the end of the first week, organizers began to drive Tutsi civilians from their homes and massacring them in public spaces such as churches or schools. Toward the end of April, authorities ceased most large-scale massacres. Instead, they ordered militias to round up suspects and bring them in for “questioning”, instead of killing them in their homes. This strategy was also intended to lure Tutsi out of hiding. Finally, by mid-May, authorities commenced the final phase of genocide, in which surviving Tutsi were tracked down and killed. In this phase, authorities targeted survivors of previous attacks to prevent them from testifying, as well as individuals who had been spared in earlier phases: women, children, priests, or medical workers (10). Although civilian assailants participated in the massacres, Des Forges specifies that soldiers, militias, and police played a larger role in the genocide. “It was only after the military had launched attacks with devastating effect on masses of unarmed Tutsi that civilian assailants, armed with such weapons as machetes, hammers, and clubs, finished the slaughter” (8). Furthermore, military officials threatened civilians who initially refused to participate in the killing.

The media played an integral role in inciting genocide in Rwanda (Chrétien 1995, ARTICLE 19 1996; Des Forges 1999). Prior to 1990, there were only a handful of media outlets in Rwanda, the vast majority of which were state-owned. Following political liberalization in the early 1990s, there was a relative explosion of new media organizations.

Chrétien (1995) notes that in 1991 alone, 42 new journals were founded (45). Although these journals were ostensibly privately owned, in reality, most news outlets were supported by officials or businesspeople linked to the Habyarimana regime. Many of these newly incorporated media outlets began to transmit increasingly hateful and racist messages. One of the most notorious, the magazine *Kangura*, started publishing virulent anti-Tutsi propaganda immediately following the RPF invasion of October 1990. *Kangura* often accompanied its articles with graphic drawings or cartoons in order to spread the message to illiterate Rwandans (Des Forges 1999, 67).

As Des Forges (1999) notes, although print media played an important role in disseminating hateful messages and stoking anti-Tutsi sentiment, “the radio was [...] even more effective in delivering the message of hate directly and simultaneously to a wide audience” (67). In the early 1990s, state-owned *Radio-Rwanda* often broadcast false information warning of imminent RPF attacks in an attempt to provoke violence against Tutsi. In April 1993, Hutu hardliners established Radio télévision libre des mille collines (RTLMC), which began transmitting hateful anti-Tutsi messages. The radio station quickly developed an audience thanks to its popular music and conversational style (70). Although the radio station was nominally private, it was strongly linked to national radio and state agencies. The radio station broadcast on the same frequencies as *Radio-Rwanda*, and had access to an emergency source of power which some claimed was the emergency generator of the presidential residence, which allowed it to broadcast throughout the genocide (69).

The international community failed to intervene to stop the genocide. Despite Dallaire’s repeated appeals for more troops and a strengthened mandate, the UN refused to authorize a more active role for UNAMIR. In fact, in mid-April 1994, the UN reduced

UNAMIR forces from 2,548 to 270 troops, and assigned them the impossible task of securing a ceasefire (Des Forges 1999, 132, 632). By the time the RPA occupied Kigali and ended the genocide on July 4, an estimated 800,000 Tutsi and moderate Hutu had been killed (15-16)⁶. Over two million had sought refuge abroad, and another million were internally displaced (Reyntjens 2004, 178). Although the RPA undoubtedly saved many lives in ending the genocide, it was also complicit in human rights abuses and crimes against humanity before, during, and after the genocide. In a report prepared on behalf of the Office of the United Nations High Commissioner on Refugees (UNHCR), consultant Robert Gersony estimated that between April and August 1994, the RPA had killed between 25,000 and 45,000 people (Des Forges 1999, 728).⁷

The RPF formed a new government on July 19 and promised to re-implement the terms of the Arusha Accords. With the exception of the MRND and the extremist CDR, who were excluded from government, the RPF replicated the power-sharing agreement that had been mandated by Arusha. A Hutu representing the MDR, Faustin Twagiramungu, became prime minister, while the RPF's Pasteur Bizimungu assumed the presidency. Paul Kagame, who had led the RPA to victory, became vice-president. However, Reyntjens (2004) cautions that the RPF had already begun to tighten control on political power, unilaterally amending the constitution to allow a strong executive presidency. He claims that "the amended Fundamental Law was, in effect, a subtle piece of constitutional engineering which attempted to mask the consolidation of the RPF's hold on political power" (178). This authoritarian turn and its effects on freedom of expression will be discussed in chapter 1.

⁶ This figure is disputed. Reyntjens (2004) puts the number of dead at approximately 1.1 million.

⁷ This figure includes those killed in combat as well as civilians targeted in retaliatory violence.

Given the long duration and exceptionally violent nature of the conflict, post-genocide Rwanda is a textbook case of a country recovering from intractable conflict. Additionally, given the important role played by hate media in inciting genocide, the case seems a natural fit for a project pertaining to freedom of expression in post-conflict environments. I use the Rwandan case throughout the project to support my arguments, integrating empirical and theoretical analysis. In the first chapter, I present a holistic, macro-level discussion, explaining the consequences of conflict on Rwandan society and institutions. In chapters 2 and 3, I anchor my critiques with specific, micro-level examples of censored speech.

CHAPTER 1

The Long Shadow: Legacies of Intractable Conflict

Intractable conflicts possess a number of characteristics which make them particularly resistant to peaceful resolution. First, according to Rouhana and Bar-Tal (1998), these conflicts are total and multifaceted, penetrating the social fabric and forcing themselves on individuals and institutions. Second, they are protracted, lasting at least a generation and often many generations. As a result, both parties to the conflict develop deep-rooted animosities and prejudices which are manifested in collective memory. Third, these conflicts are central to society. Citizens, political and intellectual elites, and the media are greatly preoccupied with the conflicts and their developments. Fourth, intractable conflicts are particularly violent and often entail crimes against humanity, including genocide. Finally, groups engaged in such conflicts often perceive them as zero-sum and consider their differences to be irreconcilable (761-762).

In this chapter, I ask: what are the individual and collective effects of intractable conflict? Why are these effects important to the study of free expression? I contend that the attitudinal and institutional consequences of intractable conflict are profound. Specifically, a conflictive ethos combined with weak educational and judicial institutions make speech more dangerous in countries recovering from such conflicts than in peaceful countries. Additionally, as these environments are often characterized by authoritarian regimes, the legitimacy of rights derogations is more difficult to determine. In the first section, I discuss the psychosocial impact of deep-rooted conflict. Focusing on psychological and cultural trauma, I argue that intractable conflict leaves a legacy of mistrust and intolerance both individually and collectively. In the second section, I discuss the effects of conflict on

societal structures. Concentrating on regime type and the educational and judicial sectors, I explain how authoritarian regimes and weak institutions can hinder reconciliation. In the final section, I conclude by explaining how an appreciation of the normative and institutional consequences of intractable conflict can deepen our understanding of free expression in post-conflict states.

I. Attitudinal Legacies

Deep-rooted conflict has significant and long-lasting effects on both individual cognition and social norms and values. In this section, I discuss the ways in which the psychological and cultural traumas associated with such conflicts foster the development of a conflictive ethos, perpetuating intolerance and undermining reconciliation.

A. Psychological Trauma

In the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV) of the American Psychological Association (APA), trauma is defined as “a psychological situation that is 1) characterized by an individual’s overwhelming fear that he (or a family member or close associate) will be involved in a horrendous event, notably injury or death; and 2) the accompanying belief that this event is beyond the individual’s control” (APA 1994, qtd. Meierhenrich 2007, 550). The APA goes on to list a large number of potentially traumatic events, including military combat, violent personal and sexual assault, terrorist attack, torture, and incarceration as a prisoner of war or in a concentration camp. Furthermore, the DSM-IV notes that trauma “may be especially severe or long-lasting when the stressor is of human design (e.g. torture, rape). The likelihood of developing this disorder may increase as the intensity of any physical proximity to the stressor increases” (APA 1994, qtd. Meierhenrich 2007, 551).

Individual psychological trauma is a significant consequence of intractable conflict. Most such conflicts involve deliberate attempts to terrorize and produce psychological injury and entail several, if not all, of the potentially traumatic experiences identified above. Not only do traumatic experiences associated with deep-rooted civil conflict tend to be of human design, but victims and perpetrators also live in close proximity to one another, often in the same community. All of these factors greatly increase the likelihood that individuals in post-conflict countries will experience serious and long-lasting psychological effects such as post-traumatic stress disorder (PTSD), the symptoms of which include sleep disturbance, mood disorders, extreme fatigue, lack of concentration, and memory loss (Summerfield 1991, 160, 170). Crucially, most sufferers continue to experience the effects of trauma long after the initial event or stressor has passed (Lewis Herman 1997, 50; Meierhenrich 2007, 551).

Empirical studies have confirmed a high level of individual psychological trauma in post-genocide Rwanda. According to data compiled by the United Nations Children's Fund (UNICEF) and Rwanda's Ministry of Rehabilitation and Social Integration, approximately 55 percent of the pre-1994 population, estimated at 7.5 million, were directly affected by the genocide (Chauvin et al. 1998, 385). The psychological consequences of the genocide were so significant that a new word – *ihahamuka* – was coined to describe the “universe of psychological disturbances that have come to be associated with the genocide. The neologism resulted from conjoining two existing words: *haha* (which can be translated as lungs or respiration) and *muka* (which means without)” (Meierhenrich 2007, 555). Children and adolescents were the most severely traumatized by the genocide (see Table 1). A study conducted by UNICEF's Psychosocial Trauma Recovery Programme estimated that some 640,000 young people were affected – a figure which excludes the approximately 2.5 million children who witnessed significant traumatic events but did not experience the most

significant psychological effects due to protective factors including family unity, strong social networks, religious consciousness, or individual coping abilities (Chauvin et al. 1998, 385).

Table 1: Exposure to Traumatic Events, Children in Rwanda

Exposure to Traumatic Events	% of children
Witnessed violence	95.9
Believed they would die	90.6
Saw dead bodies or parts of bodies	87.5
Experienced death in the family	79.6
Witnessed someone being killed or injured	69.5
Threatened with death	61.5
Witnessed killings or injuries with a machete	57.7
Witnessed rape or sexual assault	31.4

Source: Chauvin et al. 1998, 387⁸

The children's exposure to traumatic events had significant and far-reaching effects on their cognitive function. The UNICEF study further showed that children continued to have intrusive images, thoughts, and feelings 13-20 months after exposure to traumatic events, despite trying to forget the event and avoid any reminders. Many of the children also reported symptoms of PTSD including an inability to concentrate or pay attention (Dyregrov et al. 2000, 11-14).

A frequently cited study by Pham et al. (2004) correlated exposure to traumatic events with rates of PTSD and other cognitive symptoms among Rwandan adults. Although exposure to trauma was less widespread among adults than among children and adolescents, the vast majority of Rwandan adults did witness or experience traumatic events during the genocide (see Table 2).

⁸ The study was performed by UNICEF's Psychosocial Trauma Recovery Programme, which surveyed 3030 children from ages 8-19. Data was collected between May and December 1995, and was not gender disaggregated.

Table 2: Exposure to Traumatic Events, Adults in Rwanda

Exposure to Traumatic Events	% of adults
Forced to flee home	75.4
Witnessed close family member killed	73.0
Had property destroyed	70.9
Witnessed close family member die from illness	44.5
Contracted serious illness	33.0
Experienced physical injury	18.3
Experienced sexual violence involving self or close family member	11.7

Source: Pham et al. 2004, 607⁹

Moreover, the authors found that 24.8 percent of the participants surveyed displayed sufficient symptoms to be clinically diagnosed with PTSD, and many more individuals displayed one or more symptoms of the disorder. For instance, 56.8 percent of the sample faced “re-experiencing symptoms”, including recurrent nightmares and flashbacks, and 43.2 percent of respondents experienced “avoidance/numbing symptoms” such as loss of interest in daily activities and difficulty connecting with others (606). Crucially, the authors also found that Rwandan adults affected by PTSD were significantly less likely to support reconciliation. Participants who met the symptom criteria for PTSD were less likely to have positive attitudes toward the national trials, were less likely to believe in community, and were less likely to support cooperation with others than those who did not meet the symptom criteria (608).

These studies demonstrate that many survivors of intractable conflict in Rwanda and elsewhere are plagued by severe psychological effects as a result of experiencing or witnessing atrocities, and that severe trauma influences attitudes toward reconciliation. However, as Mollica (2000) cautions, “although only a small percentage of survivors of mass

⁹ The authors surveyed 2091 randomly selected adults in four geographically diverse communes in Rwanda: Buyoga, Mabanza, Mutura, and Ngoma. Data was collected in February 2002, and was not gender disaggregated.

violence suffer serious mental illness requiring acute psychiatric care, the vast majority experience low-grade long-lasting mental health problems. For a society to recover effectively, this majority cannot be overlooked” (qtd. in Meierhenrich 2007, 552).

B. Cultural Trauma

As Summerfield (1991) and others have noted, major conflicts affect both individuals and the society in which they live. Although “physical and psychological distress is experienced individually, it often arises from, and is resolved in, a social context” (168). Social factors including norms and values, family dynamics, and cultural or religious practices help to shape the perception of traumatic events and provide meaning (163). In an attempt to account for the social dimensions of trauma, sociologists have advanced theories of cultural trauma. As opposed to psychological trauma, which refers to individual mental and cognitive disturbances, the concept of cultural trauma is meant to evoke the collective manifestation of individual psychological distress (Meierhenrich 2007, 553). According to Alexander (2004), “cultural trauma occurs when members of a collectivity feel they have been subjected to a horrendous event that leaves indelible marks upon their group consciousness, marking their memories forever and changing their future identity in fundamental and irrevocable ways” (1). Similarly, for Smelser (2004), cultural trauma is “a memory accepted and publicly given credence by a relevant membership group and evoking an event or situation which is a) laden with negative affect, b) represented as indelible, and c) regarded as threatening a society’s existence or violating one or more of its cultural presuppositions” (44). These definitions differ from the medical explanation of trauma in two important ways. First, they emphasize collective rather than individual consciousness. Second, they highlight the importance of perception and representation. For both Alexander

and Smelser, cultural trauma occurs only when group members feel that an event is traumatic and portray it as significant.

As Bar-Tal (2000) explains, society members constantly attempt to understand and cope with the psychological and cultural trauma of intractable conflict. One important strategy is the construction of a “psychological infrastructure, which consists of such elements as devotion to the society and country, high motivation to contribute, persistence, readiness for personal sacrifice, unity, solidarity, determination, courage, and maintenance of the society’s objectives” (353). This infrastructure allows society to adapt to and survive the conflict, as well as struggle successfully with the enemy. The development of this psychological infrastructure necessarily entails the formation of functional societal beliefs, defined as society members’ shared understandings of issues that are of concern to the group and that contribute to a sense of uniqueness. These societal beliefs orient and shape society and constitute its ethos.

Specifically, Bar-Tal contends that countries recovering from intractable conflict are characterized by eight societal beliefs which form a conflictive ethos (353). Beliefs about the *justness of one’s own goals* explain and often justify the reasons for the conflict. Beliefs about *security* reinforce the importance of personal and national survival. Societal beliefs of *positive self-image* result in the ethnocentric tendency to ascribe positive values to one’s own group. Beliefs of *one’s own victimization* draw attention to the evils and atrocities perpetrated by the enemy. Societal beliefs of *delegitimizing the opponent* result in the stereotyping, labeling, and ultimate dehumanization of adversaries. *Patriotism* promotes attachment to the group by emphasizing loyalty and sacrifice. Societal beliefs of *unity* involve transcending inter-group conflict in order to combat an external threat. Finally,

beliefs of *peace* highlight the ultimate objective of the group, though it must be noted that peace is desired only once the enemy has been vanquished.¹⁰ Belief-formation is a natural and inevitable part of all inter-group conflicts, and these beliefs are expressed through official and unofficial communication channels and institutions (354). For true reconciliation to occur, the conflictive ethos must be replaced by a peace ethos, in which “the parties in conflict form new relations of peaceful coexistence based on mutual trust and acceptance, cooperation, and consideration of each others’ needs” (355).

Unfortunately, societal beliefs formed during periods of intractable conflict are particularly resistant to change. According to Rouhana and Bar-Tal (1998), this is because the stressful and threatening conditions of conflict “cause increased motivation for closure, which leads to cognitive freezing. Under cognitive freezing, society members commit themselves to certain beliefs and refrain from challenging them” (766). Cognitive freezing leads to biased selection of information, in which group members seek information that confirms existing beliefs and avoid information which may contradict them; biased interpretation, in which information is perceived as supporting existing beliefs rather than undermining them, and biased elaboration, in which group members form new beliefs which are consistent with their existing views. As the authors note, “in light of these societal beliefs, the past is reconstructed, the present is interpreted, and a future is planned” (766-767). In societies recovering from intractable conflict, the conflictive ethos is a double-edged sword. On the one hand, it fosters the development of successful coping mechanisms which can mitigate the effects of trauma. On the other hand, it perpetuates hostility by rationalizing the conflict and delegitimizing the enemy, leading to fear, anger, and intolerance (767).

¹⁰ Although Bar-Tal (2000) is writing about the Arab-Israeli conflict (essentially an inter-state conflict) I believe his characterization of the conflictive ethos applies equally to situations of intra-state conflict.

In Rwanda, many decades of ethnic violence culminated in the 1994 genocide and fostered the development of a conflictive ethos, the legacy of which continues to be felt to this day. For example, as Kohen, Zanchelli and Drake (2011) note, despite an official policy enacted by the Kagame regime which abolished the Tutsi, Hutu and Twa ethnicities in favour of a universal Rwandan identity, ethnic affiliation continues to be discussed extensively in private. These discussions usually involve demeaning comments or slurs made by one group toward another. In public restrooms, the walls are often scrawled with racial epithets and threats toward members of both groups (101). The authors cite an interview conducted in 2007 with journalist Placide M., who asked in “hushed but heated” tones, “In fifty years, who will we tell our children who killed who [*sic*]?” (103) This would seem to suggest that even more than a decade after the genocide, Rwandans still rely on the charged terms ‘Tutsi’ and ‘Hutu’ to distinguish between victims and perpetrators. In another interview, one woman, Godlives Karangwa, described the state of ethnic relations in post-genocide Rwanda as “putting fire under a table” (101). Thomson (2011) quotes a 2006 interview with ‘Prosper’, an ethnic Twa subsistence farmer, who says he avoids dealing with government authorities because, “My [local official] doesn’t understand that my people [the Twa] died because of the events [of 1994] and that I have new problems that need solutions since they say peace and unity have been restored. It is better to avoid contact than to be forced to reject your ancestry” (449-450). These anecdotes suggest that post-genocide Rwanda is characterized by persisted ethnic tensions and resentment which undermine the possibility of reconciliation. What’s more, although official policies and institutions aim to promote reconciliation and the development of a peace ethos, in reality, they often reify inequalities and perpetuate intolerance between groups. This will be the focus of the subsequent section.

II. Institutional Legacies

Scanlon (2003) defines tolerance as the belief that “all members of society are equally entitled to participate in determining what [...] society is and equally entitled to participate in determining what it will become in the future” (190). A civic tradition of tolerance is crucial to domestic peace as citizens in unprejudiced societies tend to consider violence to be an illegitimate form of social expression (Paris 2004, 170). Although toleration is essentially a social norm, it is not innate and must be supported and nurtured through a series of institutional interventions. For example, it requires that the state enact legislation ensuring equal rights and access to benefits regardless of identity or group affiliation (Scanlon 2003, 190). Generally, in the aftermath of intractable conflict, the physical infrastructure of political and social institutions is destroyed or damaged, and their capacity is significantly weakened. Post-conflict regimes, often in conjunction with the international community, initiate a number of institutional reforms designed to rebuild capacity and promote tolerance and conciliation.

In this section, I address the consequences of conflict on regime type, arguing that the chaos and insecurity of post-conflict countries makes them vulnerable to authoritarianism. Additionally, I examine the effects of deep-rooted conflict on two sectors essential to post-conflict reconciliation: education and justice. The education sector plays a significant role in shaping society’s ethos by transmitting social norms and values to children and youth. The justice sector, on the other hand, can provide mechanisms through which those affected by conflict can achieve closure. I suggest that the loss of physical and human capital due to conflict is a major impediment to reconciliation. Moreover, in many cases, the educational and judicial reforms implemented by post-conflict authorities not only fail to adequately mitigate underlying social tensions, they actually increase intolerance and resentment.

A. Authoritarianism

Although specific circumstances or political arrangements differ between states, one of the most common structural legacies of conflict is authoritarianism. In a majority of cases, peace agreements or negotiated settlements mandate the creation of a transitional administration responsible for re-establishing the rule of law, implementing political, economic, and social reforms, and scheduling elections. In theory, this interim authority cedes power to a democratically elected government through free and fair elections. In reality, countries recovering from intractable conflict rarely make a full transition to democracy. A detailed account of the causes of failed democratic transitions is beyond the scope of this project. However, scholars generally point to two major factors which contribute to the failure of post-conflict democratization. First, the international community often fails to provide adequate support to the transition process (Paris 2004, Grimm 2008). Second, the chaos and instability of post-war environments create conditions ripe for political opportunism. Democratic backsliding is common, as rulers claim that democracy is unable to keep the peace in the aftermath of conflict. In some cases, citizens may even initially support the regime's authoritarian policies as a means of maintaining order in difficult conditions (Costa 1993).

Since assuming power in 1994, Rwanda's regime has become progressively more authoritarian. Initially, a large number of political, community, and military leaders affiliated with the old regime remained in Rwanda and indicated their willingness to work with the RPF. However, as early as 1995, members of the RPA, which had become Rwanda's national army, began to harass, imprison, and even kill Hutu elites (Reyntjens 2004, 180). In August, three prominent Hutu government members, including prime minister

Twagiramungu, resigned, setting off a wave of defections. Government ministers, judges, diplomats, army officers, journalists, and civil society leaders left the country en masse, alleging “concentration and abuse of power, outrages by the army and intelligence services, massive violations of human rights, insecurity and intimidation, discrimination against the Hutu and even against Tutsi genocide survivors” (180). Another wave of departures occurred in early 2000, when the Speaker of the National Assembly – a Tutsi genocide survivor – resigned and fled the country on January 6. Prime minister Pierre-Célestin Rwigema quit his post and went into exile on February 28, and on March 23, president Bizimungu stepped down citing “personal reasons”. Rather than go into exile, he remained in Rwanda. He was arrested and imprisoned a year later (181). Vice-president Kagame assumed the presidency, a position he holds to this day.

In July 1999 the RPF had extended Rwanda’s transitional period by four years. In 2001, the regime began a process of democratization, scheduling local elections for March 6 and 7. These elections, described by international observers as neither free nor fair, seemed largely designed to expand the RPF’s political base in rural regions in advance of presidential and parliamentary elections scheduled for 2003 (183). Reyntjens argues that “the regime crossed the Rubicon in the spring of 2003 and ceased attempting to hide its authoritarian drift” (184). The main opposition party, the MDR, was banned on the charge of inciting divisionism. In addition, on May 26, the regime held a constitutional referendum, despite releasing the text to the public less than two weeks prior. Although opposition groups abroad condemned both the constitutional rewrite and the referendum process, critical voices within Rwanda were stifled, and the constitution was approved by 93 percent of voters (185).

The international community deplored the new constitution, claiming that it curtailed civil and political rights.

On August 25, 2003, after a campaign based on arrests, intimidation, and violence, president Kagame was re-elected by 95 percent of the popular vote. International observers reported numerous irregularities and fraud at polling stations, including ballot stuffing and corrupt counting procedures. The parliamentary elections of September were marred by similar election fraud. The only parties permitted to participate in the election were those which had effectively supported Kagame's presidential bid (186). Reyntjens (2004) argues that although the Parti social démocratique (PSD) and the Parti libéral (PL) won a combined 22 percent of the vote, in effect, "as the latter two supported the RPF's candidate at the presidential poll, all the elected candidates form part of one and the same alliance" (186).

The 2008 parliamentary elections were similarly marred by arrests, disappearances, and election fraud. Independent electoral observation missions witnessed voter intimidation, the manipulation of voter registries, and ballot box stuffing. Electoral observers also documented problems with the secrecy of the vote and the transparency of counting procedures (Reyntjens 2011, 11). Based on an initial evaluation conducted by a European Union observation mission, the RPF obtained over 98 percent of the vote, enough to win every seat in parliament. Reyntjens (2011) argues that "this result [was] seen as too 'Stalinist' and therefore reduced to 78.76 percent when the official result was proclaimed. So the RPF 'offered' 20 percent of the vote and 11 seats to two other parties that were however not opposition parties, but part of the RPF's cartel" (11).

Political opposition began to re-emerge in advance of the 2010 presidential elections. Once again, the RPF government cracked down on dissent. Political parties were disbanded,

and opposition leaders and journalists were intimidated and even assassinated (Reyntjens 2011, 12). For instance, in 2010, the Kagame regime disbanded the Forces démocratiques unifiées (FDU), a coalition of opposition parties expected to pose a serious challenge to the RPF in the elections. The regime claimed that the FDU and its leader, Victoire Ingabire Umuhiza, were inciting divisionism and spreading divisionism (Reyntjens 2011, 12). The elections were basically a one-party contest, as the three candidates permitted to run by the regime were affiliated with parties closely affiliated with the RPF. Kagame was handily re-elected, obtaining 93 percent of the popular vote (Reyntjens 2011, 12).

Since assuming power, the RPF regime has implemented tight controls on freedom of expression. As Pall (2010) notes, the regime controls speech primarily through “statutory, judicial, and political legal structures” including the 2003 constitution, the 2001 divisionism law, the 2003 negationism law, and the 2008 genocide ideology law (18). International advocacy organizations such as ARTICLE 19 (2009), Human Rights Watch (2008), and Amnesty International (2010) have claimed that these laws do not sufficiently protect freedom of expression, and that they are selectively applied in order to persecute critics and silence dissent.¹¹

B. Education

As Bush and Saltarelli (2000) note, formal education is often mistakenly viewed as a neutral or purely technical process of information dissemination (ix). In actuality, “formal education can shape the understandings, attitudes, and ultimately, the behaviour of individuals. If it is true that education can have a socially constructive impact on intergroup relations, then it is equally evident that it can have a socially destructive impact” (9). Deep-

¹¹ The divisionism law and the Ingabire case will be addressed in greater detail in chapter 3.

rooted conflict has serious consequences on schools, teachers and students, and curricula, and the results of post-conflict policies meant to address these issues and promote reconciliation are mixed at best.

1. Schools

School buildings are often deliberately destroyed during civil conflicts because they are perceived as representations of political systems and regimes, or as symbols of peace (Obura 2003, 29; Salmon 2004, 79). Bush and Saltarelli (2000) refer to the destruction of schools as an “intellectual starvation tactic”, and consider it to be a weapon of war. By closing schools or destroying infrastructure, armed groups attempt to demoralize civilian populations and undermine their support for the enemy by making them feel as if the future of their children and their community is at risk (11). During the genocide, 65 percent of schools in Rwanda were damaged or destroyed (Salmon 2004, 83). However, Buckland (2006) points out that education systems are remarkably resilient. Not only do schools rarely cease to function completely in the midst of civil war, they often quickly resume their operations once hostilities have ceased – with or without outside support. The resilience of education systems is both promising and cause for concern. On the one hand, the quick return of students to class can show citizens that life is returning to normal and shore up support for peace (2). On the other hand, as Khan (2000) notes, “education reflects the society around it. The attitudes that flourish beyond the school walls will, inevitably, filter into the classroom” (v). As discussed above, countries recovering from intractable conflict are characterized by a conflictive ethos, especially in the months and years immediately following a ceasefire or negotiated settlement. This ethos is often reflected in the attitudes of teachers and students, and in the official curriculum. When students return to class before the

implementation of significant educational reforms, it is likely that schools will perpetuate intolerance rather than mitigate it.

What's more, in many post-conflict countries, funding shortages can hinder the development and enactment of high quality reforms. Local governments may lack the resources to rebuild schools, and "the 'relief bubble' in international financial support often subsides before a more predictable flow of reconstruction resources can be mobilised" (Buckland 2006, 7). Even when resources exist, they are often spent inequitably or inefficiently. For example, in 2000, the Rwandan government spent over one-third of the education budget on higher education, which served a mere 2 percent of the total population (World Bank 2004, 5). The World Bank is critical of Rwanda's focus on higher education, suggesting that it fosters social inequality. "The best-educated 10 percent in a cohort claims more than 70 percent of the cumulative public spending on education received by that cohort. It is thus no surprise that Rwanda's system is one of the least structurally equitable in Sub-Saharan Africa" (5). By diverting funding from the majority of Rwandan students, the Kagame government's educational spending policies are likely to lead to resentment and anger.¹²

2. Teachers and Students

Deep-rooted conflicts profoundly affect teachers and students. As members – or perceived members – of the elite, educators are often deliberately targeted by armed groups. This was certainly the case during the Rwandan genocide, during which 66 percent of teachers and professors fled the country or were killed (Bush and Saltarelli 2000, 11).

¹² This would be particularly true if one ethnic group enjoyed privileged access to higher education. However, since the Kagame regime officially abolished ethnicity, no record of the ethnicities of Rwandan students enrolled in higher education is available.

According to Bretherton, Weston and Zbar (2003), teachers play a particularly important role in post-conflict countries. Not only must they model peaceful behaviour in their relationship with students, they must also effectively manage an emotionally charged classroom environment in which the vast majority of students were directly or indirectly affected by violence (222). ‘Tom’, a faculty member at the National University of Rwanda, described the difficulties of teaching traumatized students: “Dealing with traumatized students requires perseverance. It is not an easy task because with these students, you can never tell what is going to happen next. They may be quiet in one instance and the next they break down or become disruptive with no clear reason” (Ibuka 2011, 118).

Moreover, it is important to remember that in cases of intractable conflict, the majority of teachers are themselves affected by the conflict. They are likely to have experienced psychological trauma and may suffer from mental or cognitive disorders including depression or PTSD. Ibuka (2011) investigated the impact of trauma on teachers by interviewing a number of students at the National University of Rwanda (NUR) in Butare. The students reported that many lecturers were unable to teach effectively due to their struggles with psychological trauma, and noted that lecturers seemed particularly stricken during the national period of commemoration. ‘Grace’ observed: “Sometimes in class we see the lecturer struggling with trauma. He comes to class sad and talks about what happened in the genocide instead of teaching the lesson” (119). ‘Lauren’ described the effects of trauma on her professors: “Some lecturers who are traumatized sometimes become very disoriented in class. He may be saying one thing and then suddenly starts a different topic that is not relevant. Sometimes these lecturers appear sad, and other times they become easily angered” (119). To varying degrees, teachers are also likely to share underlying social prejudices or

bigotries, and may consciously or subconsciously display negative attitudes toward students from minority or majority groups (Bush and Saltarelli 2000, 14; Cronin 2004, 104).

3. *Curricula*

Recognizing the important role that formal education can play in shaping the perceptions and attitudes of young people, governments almost always undertake curricular reform in the aftermath of intractable conflict. Reforms are necessary because teaching materials and lesson plans which were used before and during the conflict often reflect and promote deep societal divisions. In pre-genocide Rwanda, textbooks contained many negative ethnic stereotypes of Tutsi (Bush and Saltarelli 2000, 13). Bird (2003) reports that a senior official of the Rwandan Ministry of Education told her that “in a [pre-genocide] mathematics lesson it would be common for a teacher to say, ‘You have five Tutsi, you kill three, how many are left?’” (36).

However, in countries recovering from deep-rooted conflict, revising the curriculum is not easy. Efforts to implement reforms, particularly to the history, civics, or social studies curricula, are often stymied by the inability to agree on an official narrative of the conflict. Key stakeholders refuse to approve new official programs of study which contradict or undermine their understanding of the conflict (Sjoberg 2011, 5). Even if these obstacles are overcome and a new curriculum is implemented, reforms are rarely met with unanimous approval. In Kosovo, for example, there was a significant backlash to education reform. In order to undermine Albanian nationalism, the Serbian government “adopted a policy of elimination, eliminating teaching programs in the Albanian language and introducing a unified curriculum and standardized textbooks across the country” (Bush and Saltarelli 2000, 7). In response, Albanian parents refused to send their children to schools which taught the

official curriculum, instead enrolling them in non-accredited parallel schools considered by the Serbian government to be illegal.

In post-genocide Rwanda, the RPF government's refusal to acknowledge that violence was perpetrated against Hutu before and during the genocide was a major impediment to the development and implementation of a new history curriculum. Reconciling the Kagame regime's one-sided perspective with a more historically accurate account of violence carried out by and against both groups proved a nearly impossible task. For over 15 years following the genocide, history was not taught in schools, though it remained hotly debated among Rwandan citizens. It is likely that in many cases, the unofficial histories transmitted to Rwandan students by their parents or peers were highly subjective and reflected biases or bigotries.

The new Rwandan history textbook, *The History of Rwanda: A Participatory Approach – Teacher's Guide for Secondary Schools*, was not published until 2010. Despite the government's official policy of unity and reconciliation which abolished ethnicity, the history textbook does refer to Hutu and Tutsi and Twa throughout. In the book, these terms are consistently put in quotations marks. This syntax reinforces the message that ethnicities are not real and immutable, but rather socially constructed, and allows the government to distance itself from these terms. Additionally, the textbook presents Hutu, Tutsi and Twa as flexible social classes rather than fixed ethnicities, and emphasizes that these social groups lived in harmony prior to colonization. Thus, the textbook reframes the conflictual 'us versus them' relationship which existed primarily between Hutu and Tutsi as a deep animosity between Rwandans and colonizers (Sjoberg 2011, 19, 25).

Sjoberg's (2011) interviews with Rwandan secondary school teachers suggest that many support the portrayal of ethnicity in the new history textbook. For instance, one teacher commented that "in pre-colonial era when you analyze very well you will see that most of the people in Rwanda are tribe groups. They are what you can call social classes. It means for, in Rwanda they have what you call social classes. But during colonial era they called them ethnies" (22). Another noted that "when we are teaching different groups, like Bahutu, Batwa and Batutsi, there is no problem. There were no problem before colonization, problem came with colonization" (22). However, others questioned the validity of the curriculum's approach to ethnicity. One older teacher who had taught prior to the genocide commented:

Now days, the history of Rwanda is complicated because of the integration of politics [and] the history of which Rwanda has. [...] The government did not like that kind of ethnic movements from the past. [...] If you have those ideas in your mind, keep them in your mind. If you have those ideas that people belonged to [ethnic groups], people keep those ideas in their mind (22-23).

Another said that "Now days, they don't talk about ethnic groups, but then it was ethnic groups. But those groups lived in harmony" (22).

The formal curriculum is not the only mechanism used by post-conflict regimes to promote reconciliation. In countries recovering from intractable conflict, school-based learning is often supplemented with extracurricular initiatives. In Rwanda, the most significant of these strategies is the *ingando* project. The initiative was created in 1996 and originally administered by the Ministry of Youth, Culture, and Sports. Initially, the goal was to establish *ingando* (solidarity or re-education camps) for Tutsi returnees. These camps were meant to foster a sense of nationalism and promote the integration of repatriated Rwandans. The National Unity and Reconciliation Commission (NURC) took over management of the program in 1999 and significantly expanded its scope. The NURC planned for every Rwandan over the age of majority to attend *ingando* at some point during his or her lifetime

(Mgbako 2005, 209). *Ingando* solidarity camps cater to politicians, church and civil society leaders, *gacaca* judges, and incoming university students. *Ingando* re-education camps are for ex-soldiers, ex-combattants, confessed *génocidaires*, released prisoners, prostitutes, street children, and the occasional Western academic who runs afoul of the government (Thomson 2011, 333). *Ingando* run from several days to several months, and although the syllabus may vary depending on the audience, all of the camps teach “lessons on unity and reconciliation, history classes that highlight the defects of the genocidal regime, and lessons on present government programs and policies that stress the ‘democratic’ elements of the current government” (Mgbako 2005, 209).

The *ingando* re-education program has been harshly criticized. Thomson (2011) was ordered by the Rwandan government to undergo re-education and subsequently spent a week participating in *ingando* with confessed *génocidaires*. In an article relating her participant observations of the re-education process, she argues that the graduates of the *ingando* camp which she attended “do not believe in the national unity of the re-imagined past or in the reconciliation of a re-engineered future. Rather, they see the camps and their ideological discourse as efforts to exercise social control over adult Hutu men” (339). For Purdekova (2008), although *ingando* claim to be spaces of contestation where Rwandans come together to discuss history and social problems, in actuality they are “spaces of incantation” in which official government ideologies are reproduced without question (511-512). These views are echoed by Rwandan citizens. According to ‘Joseph’, a Hutu man who attended *ingando* in 2002, “I don’t know if Hutu and Tutsi [peasants] like me were unified before the white man came. That is what they taught us. But does it matter? I want to eat every day and I want to send my children to school. If they tell me whites brought division, then of course I agree”

(Thomson 2011, 336-337). According to ‘Anselme’, the nephew of a convicted *génocidaire*: “For adult Hutu like my uncle, *ingando* lessons are just a way for the government to make sure we have no ideas of our own, and to make sure we don’t make more genocide for them. It [genocide] could happen because Hutu are no longer welcome here” (337).

Although most scholars have been equally critical of *ingando* solidarity camps such as those attended by incoming university students, some participants have characterized their experiences as positive. According to ‘Mary’, a student at the National University of Rwanda who was interviewed by Ibuka (2011), participating in *ingando* improved her relationships with her peers:

Before attending *ingando*, I did not like being around people who were not like me; people who did not have the same ethnic background like I am. But when I attended *ingando*, I was told that we all are Rwandans and that our history should not divide us. Since then I have been more accepting and I can be with someone who is different (132).

Nevertheless, the majority of NUR students interviewed believed that *ingando* were tools to promote government ideology. ‘Richard’ categorized *ingando* as a “government strategy of control” and noted that it was used to “magnify the government’s philosophy and instill fear in all those who may want to oppose it” (134). Other students criticized the *ingando* program for being discriminatory, arguing that lessons were designed to elevate the RFP and legitimize Tutsi power and claiming that “you will never hear anything good talked about the Hutu in these camps” (134). Rather than developing a sense of community, both the *ingando* re-education and solidarity camps seem to be fostering resentment among participants and their families who are frustrated by the one-sided portrayal of ethnicity and the lack of space for dialogue or dissent.

C. Justice

Intractable conflict has important consequences on judicial institutions. Not only do post-conflict judicial systems generally suffer from weak capacity due to the destruction of physical and human capital, the institutional reforms and transitional justice mechanisms implemented by post-conflict regimes often fail to promote reconciliation and may even exacerbate tensions between groups.

When court buildings, archives, or documentation centres are not deliberately targeted by armed groups as symbols of the elite, they are destroyed as collateral damage in the fighting. During the Rwandan genocide, judicial infrastructures were almost completely destroyed. Court buildings suffered heavy structural damage and equipment was looted; as a result, the courts were shut down for more than two years following the genocide (Uvin 2001, 181-182; Zorbas 2004, 35; Kohen, Zanchelli and Drake 2011, 86). Although the Kagame regime has achieved remarkable success in rebuilding physical infrastructure, serious problems persist. As Uvin (2001) astutely notes, a perfectly rebuilt justice system may produce no justice, and infrastructures alone cannot guarantee well-functioning institutions capable of producing real results (186). A major challenge pertains to a lack of human capital in the Rwandan judicial system. Prior to the genocide, the legal system was plagued with structural weaknesses: lawyers and judges were politically appointed and often incompetent or corrupt, and there was no Bar Association or similar organization to ensure professional and ethical conduct in the legal profession. These problems persisted following the genocide, and were greatly exacerbated by a significant loss of human resources. Legal professionals were perceived to be members of the elite and intentionally persecuted. The overwhelming majority of those who were unable to flee the country were killed. A 1996

USAID report noted that “the number of judges [in Rwanda] had fallen from 600 before the genocide to 237 by the end of 1994 (other sources report 1,100 and 100 respectively); prosecutors from 75 to 14; criminal investigators and legal staff from 576 to 193” (qtd. in Uvin 2001, 181-182). In the period following the genocide, legal professionals worked with no equipment, low and sometimes no pay, very short training periods and no trial experience, all of which resulted in serious mistakes, delays, and irregularities (Zorbas 2004, 35).

Additionally, the ethnic composition of Rwanda’s post-conflict judicial institutions is overwhelmingly Tutsi. Uvin reports that as of 2001, every single person trained for a position in the post-genocide legal system was Tutsi (Uvin 2001, 183). This ethnic imbalance can threaten reconciliation in two important ways. First, if Hutu feel that they are being discriminated against in access to employment, they may become increasingly resentful of the economic opportunities awarded to the Tutsi minority. Second, if Hutu suspect that a justice system dominated by Tutsi gives preferential treatment to members of the minority group, they are likely to doubt the possibility of a fair trial, and to consider the rulings handed down by the courts to be illegitimate. Judicial institutions are important tools in both the preservation of social order and the maintenance of government authority, and the consequences of a widespread loss of faith in the justice system would be severe.

Transitional justice (TJ) is a process through which societies recovering from conflict attempt to come to terms with past events and abuses in order to achieve reconciliation. Transitional justice mechanisms can largely be classified as restorative and retributive, and include a number of international, national, and/or local initiatives such as international tribunals, criminal trials, amnesties, truth and reconciliation commissions (TRCs), reparation programs, public apologies, and memorials (Mani 2005, 513; Parent 2010, 277). According

to an expansive theoretical literature on TJ, retributive measures, the most common of which are trials, “facilitate reconciliation by, inter alia, dispensing justice”, while restorative measures such as truth and reconciliation commissions “have a fundamental role to play in establishing the truth of what happened, a key prerequisite of reconciliation” (Clark 2010, 137). In the aftermath of genocide, transitional justice in Rwanda occurred on three levels: at the International Criminal Tribunal for Rwanda (ICTR), through formal criminal trials at the national level, and through traditional *gacaca* courts at the local level (Parent 2010, 282). The ICTR and national criminal trials are classic examples of retributive justice, while the *gacaca* process can best be described as a hybrid initiative which prioritizes truth telling, offender accountability, and restitution for victims (Kohen, Zanchelli and Drake 2011, 91). Although a key goal of the *gacaca* courts is to reconstruct what happened during the genocide, they also have the judicial authority to punish (Eramian 2009, 160). Although transitional justice initiatives can have positive effects, they can also undermine reconciliation. Both retributive and restorative strategies are marred by theoretical tensions and practical difficulties.

A major shortcoming of transitional justice in post-genocide Rwanda is ethnic discrimination in both retributive and restorative mechanisms. Despite the Kagame government’s official unity and reconciliation policy which abolished the Hutu, Tutsi, and Twa ethnicities in favour of a unified ‘Rwandan-ness’, only Hutu are being tried for their crimes. In an infamous report, independent American consultant Robert Gersony wrote that the RPF killed between 25,000 and 45,000 people between April and September 1994. Although some Tutsi were targeted, the majority of the victims were Hutu (Clark 2010, 145). However, the government refuses to prosecute members of the RPF or other Tutsi for crimes

against Hutu. In the words of president Kagame, “To try to construct a case of moral equivalency between genocide crimes and isolated crimes committed by rogue RPF members is morally bankrupt and an insult to all Rwandans, especially survivors of the genocide” (Kagame 2008, qtd. in Clark 2010, 145). The government’s policy concerning RPF crimes is fuelling allegations of victors’ justice and undermining the legitimacy of transitional justice processes at the international, national, and local levels.

1. Retributive Justice

First, and perhaps most importantly, trials fail to promote reconciliation because they are fundamentally adversarial. Rather than encouraging a shared understanding between victim and perpetrator, trials reify the divisions between the two parties. The trial process is frequently confrontational and can alienate both perpetrators and victims. Trials put perpetrators on the defensive, decreasing the likelihood that they will express remorse for their crimes and seek to make amends to the victims. Trials also alienate victims through a harrowing and emotionally wrenching cross-examination process, which can re-traumatize sufferers by forcing them to publicly relive painful experiences. Furthermore, as Mani (2005) points out, by focusing exclusively on victim and perpetrator, trials also “alienate the vast majority of the society’s population that suffered directly and indirectly through conflict, but is now left outside the courtroom” (521).

Another problem with trial procedure is the reliance on proxy professionals who represent the offender and the state. Although the reliance on professional legal counsel is imperative to ensure a fair trial, it also contributes to the disenfranchisement of individuals and communities affected by conflict. Both victim and perpetrator are essentially bystanders to the legal process. Moreover, most international and national criminal justice systems

prohibit contact between victims and offenders in order to protect victims from additional harm. These procedures preclude reconciliation as victims and offenders are unable to develop the shared understanding that comes only from interaction and dialogue. As Kohen, Zanchelli and Drake (2011) observe, “because the retributive system either discourages or prevents victims and offenders from interacting with each other, stereotypes are maintained on both sides, offenders need not take responsibility for the harm they have caused, and victims cannot gain access to information that only offenders can provide” (90).

Since the precedent-setting Nuremberg and Tokyo trials following World War II, retributive justice has sought to prioritize accountability. Nevertheless, the ability of trials to hold perpetrators accountable is far from certain. First, as Kohen, Zanchelli and Drake (2011) argue, retributive justice is fundamentally incompatible with political or personal reconciliation because the adversarial nature of trials creates a zero-sum game for defendants. Individuals on trial concentrate on “winning the game against prosecutors” rather than telling the truth about their roles in the conflict and seeking to make amends. The harsh punishments which await those found guilty “discourages honesty from the accused in the dock” (99-100). Knowing that they face significant prison time or even the death penalty, defendants deliberately lie about events or misrepresent rather than admit their role in the violence. This clearly occurred during the trial of Georges Rutaganda by the ICTR, the vice-president of the Hutu paramilitary organization *Interahamwe*. Rutaganda’s attorney went so far as to deny both the genocide and Tutsi victimhood rather than admit his client’s participation, arguing that:

It is not Hutu who are guilty of this so-called genocide. We are convinced there was no genocide. It was a situation of mass killings in a state of war where everyone was killing their enemies. [...] There are a million people dead, but who are they? They are 800,000 Hutu and 200,000 Tutsi. Everyone was killing but the real victims are the Hutu. So they’ve got this so-called genocide all wrong (98).

Furthermore, recognizing that verdicts often hinge on complex legal issues such as establishing premeditation, defendants often rationalize their actions in order to portray them as unintentional or to give the impression that nothing was to be done. In April 1994, Jean Paul Akayesu was the mayor of Taba commune. On April 19, after a member of the *interahamwe* militia was killed in the commune, the mayor “made a public speech in which he declared that he held in his hands information about a Tutsi plan to exterminate Hutu; to emphasize his point, he waved papers in the air” (Benesch 2004, 64). Immediately following the speech, the commune exploded in genocidal violence. Akayesu’s case was brought before the ICTR, and as the trial progressed, the defendant offered a number of rationalizations for his actions. Although the mayor’s attorney acknowledged that a massacre did take place in Taba commune, he denied that Akayesu had intended to incite violence by making his speech. Furthermore, the defense maintained that as soon as the massacre began, the *interahamwe* stripped the mayor of his authority, rendering him incapable of stopping the violence (Kohen, Zanchelli and Drake 2011, 99).

Additionally, retributive justice mechanisms such as trials are often particularly inadequate in the aftermath of intractable conflict and genocide, during which the majority of the population was directly implicated in the violence. International tribunals such as the ICTR deal only with the most high profile defendants, the so-called architects of genocide, and it can be years before a verdict is reached. National courts are unable to handle the volume of trials, especially when judicial institutions and infrastructures have suffered significant damage during the fighting. Nevertheless, in an attempt to project authority and accountability, post-conflict regimes often round up perpetrators in droves. In Rwanda following the genocide, the government arrested more than 125,000 individuals by 1997

(Gourevitch 1998, 242). However, civil society organizations such as Human Rights Watch have harshly criticized the Kagame government for overcrowded prisons and inhumane detention conditions, as well as for the length of time prisoners are detained without trial. In response, the government has occasionally conducted mass releases of prisoners – since 2003, nearly 60,000 inmates have been set free. The stated goals of these mass releases are “to ease overcrowding in the prisons and to foster reconciliation” (Kohen, Zanchelli and Drake 2011, 86). However, the releases have been met with significant outcry from genocide survivors and survivors’ advocacy groups, who argue that those set free have never been held accountable for their crimes. Liberated prisoners are rarely welcomed back into their communities, and often end up being re-arrested for other crimes. Many are apprehended while trying to destroy evidence relating to their alleged complicity in the genocide (86-87). In Rwanda and elsewhere, national and international forms of retributive justice have done little to promote unity and reconciliation.

2. Restorative Justice

Restorative justice mechanisms, the most common of which are truth and reconciliation commissions (TRCs), have been suggested as a means to overcome the problems with retributive justice described above. Proponents of TRCs claim that by publicly discussing wrongs committed during the conflict, victims and perpetrators will reach a shared understanding of events, leading to closure, forgiveness and reconciliation. However, restorative justice mechanisms are based on two flawed assumptions. First, the claim that truth and reconciliation are inextricably linked is deeply problematic. Although for some individuals, the expression and public vindication of grief may bring catharsis, for others, it can lead to re-traumatisation or fuel a desire for revenge (Staub 2004, 27; Mani 2005, 518).

Second, not all victims want or are able to reconcile with those who committed acts of violence against them or their loved ones. The desire to forgive is individual, and cannot be imposed through institutions (Mani 2005, 518). What's more, as Kohen, Zanchelli and Drake (2011) observe, reconciliation may be impossible in cases like Rwanda where many victims and perpetrators did not have a relationship prior to the conflict. "In cases where the parties have only the crime in common, personal reconciliation seems a very lofty goal [...] because there is no prior relationship to establish" (92).

Despite these theoretical tensions, restorative justice is being pursued in post-genocide Rwanda in the form of traditional *gacaca* courts. Often translated as "justice on the grass", *gacaca* is based on a traditional Rwandan justice mechanism. Historically, it was used to address relatively minor non-violent infractions such as robbery or property crimes. In a traditional *gacaca* proceeding, the offender and the victim would relate their version of events to a group of elders, who would listen to both accounts and recommend a solution to the problem. Members of the community served as witnesses to the proceedings. The ultimate goal of the proceedings was to foster personal reconciliation between the two parties, while also restoring the perpetrator to the place he or she occupied in the community prior to the infraction (Kohen, Zanchelli and Drake 2011, 91-92). Personal and community reconciliation was symbolized by the requirement that at the end of the proceedings, both parties share a gourd of banana beer as a sign of renewed friendship. All of the witnesses to the hearing were invited to sip the beer as well, to symbolize the community's reconciliation with the accused (92).

As early as 1998, Rwandan officials began discussing the possibility of repurposing traditional *gacaca* courts to try accused *génocidaires*. Although a major objective was to

alleviate the strain on the official legal system, the government also wanted to show pride in Rwandan traditions and involve the population in transitional justice (Zorbas 2004, 36). The regime passed the *gacaca* law in 2001, which mandated weekly hearings in which the offender would face the victims, a panel of judges, and pre-selected witnesses. Residents of the community were required to attend the hearings, and could participate by asking questions or giving impromptu statements (Kohen, Zanchelli and Drake 2011, 92). To a certain degree, the 2001 law modeled the *gacaca* system on the South African Truth and Reconciliation Commission, though the *gacaca* courts were not given the authority to extend amnesty to those who confessed their crimes (Zorbas 2004, 36). The implementation of *gacaca* began in pilot communities in June 2002, and was rolled out country-wide in March 2004 (Staub 2004, 27).

Although the traditional court system was meant to promote harmony within communities, in reality, *gacaca* has further crystallized societal divisions. As Eramian (2009) recounts, Rwandans expressed the opinion that two “camps” are emerging around *gacaca* – the victims and the accused – and relations between the two groups are often motivated by a desire for vengeance and retribution rather than peace. In some instances, community members collaborate to conceal or destroy evidence so that a guilty person can go free. In other cases, individuals give false statements in order to make suspects appear guilty, or guilty of more serious crimes than those they actually committed. In extreme cases, potential witnesses are pre-emptively killed by the accused or members or their families in order to prevent damning testimony from coming to light. This dissuades other witnesses from coming forward as they fear for their safety or that of their families. Eramian (2009) contends that “in this way, old divisions get reinforced and consolidated, as witnesses tend to

act according to old loyalties” (160). Additionally, the *gacaca* law stipulates that if someone confesses their crimes before being denounced at a hearing, they are eligible for a substantially reduced sentence. Confessions must include all information about the crime committed, an apology to the victims, and the incrimination of all co-conspirators. Not only does this system create an incentive for false confessions, it also encourages vendetta-setting, whereby individuals are falsely labelled as co-conspirators. Some studies have estimated that the confession policy could result in an additional 200,000 people accused and imprisoned for crimes of genocide (Zorbas 2004, 37).

III. Conclusion

In this chapter, I discussed the attitudinal and institutional consequences of intractable conflict. First during these conflicts, the overwhelming majority of individuals are exposed to traumatic events, leading to psychological disorders including PTSD. Psychological trauma also decreases the likelihood that citizens of conflict-affected societies will support reconciliation. Furthermore, psychological trauma is experienced individually but processed and resolved collectively. As a result, societies affected by deep-rooted conflict develop a conflictive ethos which allows them cope with the conflict. This ethos mitigates the effects of trauma, but also perpetuates hostility and intolerance. Second, intractable conflict has serious consequences on educational and judicial institutions. A major problem is the loss of physical and human capital in both sectors: schools, court buildings, teachers, and legal professionals are all deliberately targeted during the fighting. In the aftermath of conflict, the weak capacity of educational institutions can perpetuate intolerance rather than mitigate it, while the poor performance of the judicial system can breed frustration and resentment. Furthermore, government educational and judicial policies intended to encourage

reconciliation are often poorly designed and inconsistently implemented, increasing animosity between groups.

Why are these normative and structural effects of conflict important to the study of free expression? First, public discourse is a reflection of social norms and beliefs. If society is characterized by a conflictive ethos, it is likely that many of the views and opinions communicated in the public sphere will reflect intolerance and resentment. The expression of slurs, racial epithets, and hate speech will be more common in intolerant societies than in tolerant ones. Second, in countries recovering from intractable conflict, hateful speech is more likely to incite violence than in historically peaceful societies. Legacies of conflict create an emotionally charged environment which can be consciously or subconsciously manipulated by speakers. Recall the example of Taba commune, which exploded in genocidal violence following a speech by Mayor Jean Paul Akayesu. Although the mayor did not directly advocate violent action, his speech, in which he gave the impression of having proof of a Tutsi plot to assassinate Hutu, played upon underlying social tensions and fears and indirectly incited violence. Third, in countries recovering from deep-rooted conflict, weak institutions, particularly in the judicial sector, can exacerbate the danger posed by bigoted or hateful speech. In such societies, many citizens are distrustful of a judicial system which they perceive to be incompetent, corrupt, or biased. As a result, they may be less likely to rely on official, non-violent mechanisms to address hate speech, slander, or libel. In peaceful societies, such mechanisms, which include courts and human rights commissions, preclude violent responses to dangerous or offensive speech by giving citizens a peaceful, legitimate means of dispute resolution. In countries recovering from deep-rooted conflict these mechanisms are often unavailable, ineffective, or perceived as illegitimate, which can

result in reprisals or vigilante justice. Finally, it is more difficult to assess the legitimacy of rights derogations in authoritarian regimes. Because authoritarian rulers rely disproportionately on physical and symbolic violence in order to maintain power, their authority is illegitimate. As a result, it is difficult to assess the legitimacy of the restrictions which authoritarian regimes place on freedom of expression as such an assessment requires that a distinction be made between the regime and its policies. These dynamics will be further explored in chapters 2 and 3.

CHAPTER 2

The Harm Principle: Philosophical Approaches to Free Speech

In the previous chapter, I discussed the normative and structural effects of intractable conflict, explaining that these legacies are likely to make speech both more dangerous and more difficult to regulate in post-conflict countries than in peaceful societies. While the focus of chapter 1 was mainly empirical, in the remaining chapters, I turn my attention to more theoretical questions. My objective is to use the empirical analysis of countries recovering from intractable conflict, specifically Rwanda, as a lens through which to better understand theories of freedom of expression. I use these unique environments to highlight theoretical and practical tensions in disciplinary approaches to the regulation of free speech. In this chapter, I concentrate specifically on philosophical approaches to freedom of expression. As a systematic overview of all philosophies pertaining to free speech falls well beyond the scope of this project, I focus instead on liberal theory, as it has significantly influenced approaches to the regulation of freedom of expression in both academic and policy circles.

In the first section, I examine classical liberalism, concentrating on Locke's *The Second Treatise of Government* (1689) and Mill's *On Liberty* (1863). In the second section, I evaluate contemporary liberalism, limiting my analysis to Scanlon's "A Theory of Freedom of Expression" (1972) and "Freedom of Expression and Categories of Expression" (1979). In both sections, I focus my critiques on the ways in which each author answers the question: Under what circumstances is it legitimate for the state to limit rights and freedoms, particularly freedom of expression? In the third section, I ground the preceding theoretical analysis in a discussion of the case of Agnès Uwimana Nkusi, a prominent Rwandan

journalist. In 2010, Nkusi was arrested, charged, and subsequently convicted for crimes of threatening national security, genocide denial, defamation of the president of Rwanda, and incitement to divisionism. This case illustrates several of the issues raised in sections one and two. In the final section, I conclude by offering a critique of the liberal tradition as a whole and proposing an alternative.

I. Classical Liberalism: John Locke and John Stuart Mill

Locke's *Two Treatises of Government* was published in December 1689; *The Second Treatise*, which outlines a theory of political and civil society based on natural rights and the social contract, remains particularly influential. *On Liberty* was first published in 1859¹³. In this important work, Mill formulates a theory of the individual's moral, political, and economic freedom from society. The work was first perceived as radical, given the deeply religious, repressive, and conformist nature of Victorian England. Together, *The Second Treatise* and *On Liberty* articulate a cogent theory of the nature and limits of the state's legitimate power over the individual.

Both Locke and Mill recognize that the individual does not enjoy perfect autonomy. As Locke (1689) explains, the state of nature is a state of perfect liberty in which every individual is free to govern his or her actions and possessions without interference. The Lockean state of nature is a condition in which men live together in peace and equality, governed only by reason. It is a state of good will and mutual assistance. However, the perfect liberty of the state of nature also allows individuals to take advantage of their personal freedoms to exploit or dominate others, leading to persistent insecurity. Locke refers to this exploitation and insecurity as the state of war, and explicitly distinguishes it

¹³ Bibliographic references pertain to the second edition, published in 1863.

from the state of nature (280)¹⁴. In order to avoid the violence and vulnerability of the state of war, man quits the state of nature and forms a society; in the process, the individual forfeits some individual liberty to a sovereign capable of settling disputes and maintaining order (282). This sovereign is responsible for exercising the will of the majority (331-333). Locke is careful to distinguish between society and the state. When individuals choose to quit the state of nature and form society, they also form a government capable of exercising authority and settling disputes. The government is responsible for executing the will of the majority of society; if it fails in or abdicates this charge it must be dissolved and replaced. However, should the members of a community choose to overthrow the government, they remain in society with one another (407).

Mill (1863) does not explicitly discuss the process through which individuals confer authority to the state. However, in the first chapter, he articulates the central theme of the work: “the nature and limits of the power which can legitimately exercised by society over the individual” (4). From this passage, we can safely assume that man has not only formed a society, but that this society exerts legitimate control over the individual. Unlike Locke, Mill also fails to explicitly distinguish between society and the state. He refers to “the struggle between Liberty and Authority” (4), and subsequently identifies the government as the executor of that authority. Throughout the text, “society”, “government”, and “state” are used more or less interchangeably.

How much personal autonomy must an individual relinquish to society? Put another way, when is it legitimate for the state to limit the rights of the individual, and on what grounds? For classical liberals such as Locke and Mill, the state is justified in limiting an

¹⁴ Locke’s understanding of the state of nature is thus fundamentally distinct from Hobbes’. The Hobbesian state of nature more closely resembles Locke’s state of war.

individual's rights under two circumstances: during states of emergency, and in order to prevent harm to others.

First, the state is justified in limiting individual rights during states of emergency. Although Mill (1863) acknowledges that the state may temporarily suspend individual freedoms during periods of “temporary panic” (17), the most eloquent and influential defense of emergency powers is Locke’s prerogative, articulated primarily in Articles 159 to 168 of *The Second Treatise* (1689). For Locke, “this Power to act according to discretion, for the publick good, without the prescription of the Law, and sometimes even against it, *is* that which is called *Prerogative*” (375, emphasis in original). Prerogative is necessary in two instances: either the workings of the state are too slow and cumbersome to address a situation that requires an immediate response, or the existing laws are unable to satisfactorily address a new challenge. Prerogative powers may be unqualified or defined by “positive Laws” (376). Although it is ultimately an arbitrary power, prerogative must always be exercised in accordance with Cicero’s dictum *salus populi suprema lex* [the safety of the people is the supreme law] (373, 375).

The concept of prerogative suffers from two major tensions which make it particularly ill-suited to theorize rights derogations in post-conflict environments. To begin with, Locke assumes that individuals choose to leave the state of nature and form a society. In doing so, they also consent to sacrifice a degree of personal freedom in allocating authority to a sovereign. He writes: “Men being, as has been said, by Nature, all free, equal and independent, no one can be put out of this Estate, and subjected to the Political Power of another, without his own *Consent*” (330, emphasis in original). For Locke, not only do citizens consent to form a community, they also consent to be governed; it is their consent

which grants legitimacy to the state. Thus, Locke's conception of prerogative rests upon the fundamental assumption that underpins his theory of political society more generally: that government authority is directly derived from the will of the people.

This is very rarely the case in countries recovering from intractable conflict. Whether individuals recovering from deep-rooted conflict have consented to form a society is questionable. It seems unlikely that members of long-warring groups would truly assent to live together in a united community. In fact, the mere presence of intractable conflict could be interpreted as a vehement rejection of such a community. Moreover, even assuming that citizens of countries recovering from deep-rooted conflict consent to form a community, they rarely consent to be governed in the way Locke hypothesizes in *The Second Treatise*. As discussed in the previous chapter, one of the most significant structural legacies of conflict is authoritarianism. Even if countries emerging from conflict manage to avoid a descent into full authoritarianism or totalitarianism, they very rarely conform to the Lockean ideal of representative democracy. More often, they are hybrid regimes, transitional authorities, or under international administration.

Post-genocide Rwanda sharply illustrates this dynamic. As discussed in chapter 1, the current regime assumed power through military force, and has largely cemented its control through abuses of political and electoral processes, rights violations, and intimidation. Furthermore, it is unclear whether the Kagame regime truly represents the majority of Rwandans. The ruling RPF party is overwhelmingly dominated by Tutsi, despite the fact that Tutsi form the minority ethnic group. Given the significant role ethnicity has played (and continues to play) in shaping individual and group interests in Rwanda, one could assume that the RPF regime is unable to truly represent the will of the majority by virtue of its ethnic

composition. It could be argued that the majority of Rwandans have not consented to be governed by the Kagame regime, at least not in a Lockean sense. The legitimacy of emergency powers is undermined because the legitimacy of the regime itself is in question.

Additionally, prerogative must be exercised in the public interest and in defense of a liberal society. Locke seems unwilling to fully acknowledge potential abuses of an arbitrary authority which, at best, grants governments powers which are legally indeterminate, and at worst, places rulers beyond the law (Neocleous 2007, 135). Although he does admit that prerogative can be exploited by “weak and ill Princes” Locke trivializes these concerns:

But since a Rational Creature cannot be supposed when free, to put himself into Subjection to another, for his own harm: [...] *Prerogative* can be nothing but the Peoples permitting their Rulers, to do several things of their own free choice, where the Law was silent, and sometimes too against the direct Letter of the Law, for the publick good; and then acquiescing in it when so done. (377)

Unfortunately, that emergency powers will be used in the public interest and in defense of liberal values in post-conflict societies is far from certain. While the security challenges posed by these environments often necessitate that rights be suspended or curtailed in order to maintain stability, a lack of strong democratic institutions can often lead to a slippery slope in which an increasing number of liberties are restricted in the name of security. Frequently, in these countries, governments that claim to be acting in the best interests of their citizens when they limit rights take advantage of weak institutions in order to silence political opposition and maintain their grasp on power. Limiting rights in the name of peace and stability thus becomes a tool of authoritarian legitimation. There is an extensive literature documenting the ways in which the Kagame regime uses discourses of national

unity and security to rationalize attacks on opposition parties, civil society, and the media in Rwanda¹⁵.

Thus, there is a fundamental tension between the theoretical expectation that all governments act in the best interests of their citizens when they exercise prerogative and the practical reality that in many cases, regimes are motivated by personal and political considerations and act against the best interest of society. This tension stems largely from the key assumptions discussed in the previous paragraphs – since Locke assumes that individuals consent to be governed, and since a government acting in contravention of majority rule must and will be deposed, it is largely inconceivable that prerogative powers enacted by a sitting Executive will be used for anything but the public good. Furthermore, Locke offers little in the way of recourse when prerogative is abused. He writes:

Who shall Judge when this Power is made right use of? Surely there must be occasions when the exercise of prerogative might be questioned? And who will then be the judge: the people, a public tribunal, the courts, the Legislative? I Answer: Between an Executive Power in being, with such a Prerogative, and a legislative that depends upon his will for their convening, there can be no Judge on Earth. (379)

As Neocleous (2007) wryly notes, in the face of extra-legal and potentially abusive state power, Locke's advice is to start praying (138).

Second, the state is justified in limiting the rights of the individual when the full exercise of those rights would pose harm to others. Prerogative is implicitly based on this concept. In states of emergency, the sovereign assumes prerogative powers in order to ensure the public good; put another way, the state derogates rights in order to prevent a greater harm from befalling society. However, the harm principle is most often attributed to Mill (1863) who writes: "The only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either

¹⁵ See, for example: Reyntjens 2004, 2011.

physical or moral, is not a sufficient warrant” (11-12).¹⁶ Mill’s utilitarianism is reflected in the harm principle. He rejects a deontological conception of abstract and inviolable rights in favour of an approach grounded in maximizing individual and collective wellbeing. He admits: “I forego any advantage which could be derived to my argument from the idea of abstract right, as a thing independent of utility. I regard utility as the ultimate appeal on all ethical questions; but it must be utility in the largest sense, grounded on the permanent interests of man as a progressive being” (13). Mill’s harm principle is a very useful framework with which to approach rights derogations, as it goes a long way toward reconciling ethical responsibilities with the practical necessities of statecraft. However, it suffers from conceptual difficulties and practical inconsistencies which limit its applicability to countries recovering from intractable conflict.

To begin with, the way in which Mill conceives of harm and appropriate punishment is problematic. In keeping with the principle described in the preceding paragraph, he argues that individual conduct consists “in not injuring the interests of one another; or rather certain interests, which, either by express legal provision or by tacit understanding, ought to be considered as rights” (78). Society is responsible for enforcing this code of conduct “at all costs to those who endeavour to withhold fulfilment” (78). Here, Mill is referring to legal remedies which the state employs against those whose conduct violates the rights of others. Yet he also goes on to state that “the acts of an individual may be hurtful to others, or wanting due consideration of their welfare, without going the length of their constituted rights. The offender may then be punished by opinion, though not by law” (78). Mill

¹⁶ Although Mill’s use of the term ‘civilized’ may raise eyebrows among contemporary readers, I believe he uses the term to refer to the advanced representative democracies of Western Europe. At time of writing, it was common to conceptualize political development and underdevelopment in terms of a civilized/barbaric dichotomy.

conceives of harm quite broadly, listing “encroachment on [the] rights [of others]; infliction on them any loss or damage not justified by his own rights; falsehood or complicity in dealing with them; unfair or ungenerous use of advantages over them; even selfish abstinence from defending them against injury” as “fit objects of moral reprobation”. However, the state is justified in intervening only when an individual’s behaviour directly violates the constitutional rights of others. For Mill, these rights include life, property, conscience (including the right to free expression), pursuit, and association (14).

Mill vehemently rejects state intervention in defense of “social rights”, which he defines as “the absolute social right of every individual, that every other individual shall act in every respect exactly as he ought; that whosoever fails thereof in the smallest particular, violates my social right, and entitles me to demand from the legislature the removal of the grievance” (92-93). Essentially, Mill is cautioning against the potential for state abuse inherent to a broad definition of rights. He illustrates his argument with the example of Prohibition. Mill rejects Prohibition on the grounds that it fails to conform to the harm principle – he considers that drinking liquor is harmful only to the imbiber, and thus falls outside the scope of both social reprobation and state retribution. However, playing devil’s advocate, he makes the case that the traffic of alcohol destroys the individual’s right to security by creating a climate of social disorder. Additionally, it threatens the right to intellectual development by “weakening and demoralizing society, from which I have a right to claim mutual aid and intercourse” (92). Mill categorically rejects these arguments on utilitarian grounds, arguing that the widespread erosion of personal freedoms inherent to a doctrine of social rights is more harmful to society than the consequences of public drunkenness. He argues: “So monstrous a principle is far more dangerous than any single

interference with liberty; there is no violation of liberty which it would not justify; it acknowledges no right to any freedom whatever, except perhaps to that of holding opinions in secret” (93).

Although Mill is correct in arguing that a broader conception of rights can often lead to a misapplication of government authority, and his analysis of Prohibition is persuasive, he goes too far in rejecting social rights outright. Rather, the nature and degree of rights upheld by the state should be determined by the normative and structural characteristics of the society in question, as well as by its history. This more moderate view is in the spirit of a principle discussed in the last chapter of *On Liberty*: precedent. In this chapter, Mill re-examines the example of Prohibition, using it to suggest that state authorities are justified in pre-empting harms to society, even at the cost of individual freedom. Although he acknowledges that the “preventive function of government” carries a high risk of abuse, he maintains that:

I should deem it perfectly legitimate that a person, who had once been convicted of any act of violence to others under the influence of drink, should be placed under a special legal restriction, personal to himself; that if he were afterwards found drunk, he should be liable to a penalty, and that if when in that state he committed another offence, the punishment to which he would be liable for that other offence should increased in severity. The making himself drunk, in a person whom drunkenness excites to do harm to others, is a crime against others. (99, 101)

In Mill’s example, an individual’s past actions – a precedent of harm committed under the influence of alcohol – justify the derogation of his or her rights by the state. The state is not required to prove that future harm is imminent; the mere precedent of damages is sufficient to legitimize exceptional government action.

Additionally, for Mill, this harm need not be direct to justify government intervention. He addresses the contentious issue of punishment of those who counsel others to commit self-harm. He writes: “In cases of personal conduct supposed to be blameable, but which

respect for liberty precludes society from preventing or punishing, because the evil directly falls wholly on the agent; what the agent is free to do, ought other persons be equally free to counsel or instigate?" (102). He uses the examples of fornication and gambling, both of which must be tolerated as they hurt only the individual who engages in them, "but should a person be free to be a pimp, or to keep a gambling-house?" (102) Mill presents arguments on both sides, but finally determines that "the interest, however, of these dealers in promoting intemperance is a real evil, and justifies the State in imposing restrictions and requiring guarantees, which but for that justification would be infringements of legitimate liberty" (104). If Mill can justify restrictions on those who counsel others to commit self-harm, he would almost certainly agree that constraints on those who encourage harm to others are legitimate.

In light of the issues of precedent and indirect harms discussed above, a case can be made for the regulation of freedom of expression. If there is a precedent of harm to individuals or groups caused by the unfettered expression of views, it seems reasonable that the state would enforce more stringent controls on speech, including banning certain types of expression outright. This is not a novel suggestion. The principle is reflected in the constitutional frameworks governing free expression of a number of liberal democracies. For instance, following the Second World War, the German government passed legislation banning the expression of hateful or racist views. Article 86 of the criminal code bans all National Socialist propaganda which seeks to undermine public order, while Article 86a outlaws symbols such as the swastika. The tight restrictions on certain types of expression implemented by the German government in the postwar era reflect the important role played by speeches, written propaganda, and symbols in inciting and sustaining the racist violence

which culminated in the Second World War. Furthermore, as Bleich (2011) notes, in 1960, following a wave of synagogue and cemetery desecrations, the German Parliament unanimously voted to reform Article 130 of the criminal code in order to “make it illegal to incite hatred, to provoke violence, or to insult, ridicule or defame parts of the population in a manner apt to breach the public peace” (920). This example shows how a precedent of damages – synagogue and cemetery desecrations – justifies legislation which curtails freedom of expression. Similarly, given the critical role played by hate media such as *Kangura* and Radio-télévision libre des mille collines (RTLMC) in inciting the Rwandan genocide, the government has since passed a number of laws which criminalize hateful, divisive, or inciteful speech. One such law will be analyzed at length in chapter 3.¹⁷

Mill (1863) would most likely reject this analysis. He categorically excludes freedom of speech from the harm principle by conflating it with freedom of conscience. Because freedom of expression falls outside the scope of the principle, by extension, its corollaries – including the issue of precedent discussed above – are also inapplicable to speech. Mill defines freedom of conscience as “the inward domain of consciousness; demanding liberty of conscience, in the most comprehensive sense; liberty of thought and feeling; absolute freedom of opinion and sentiment on all subjects, practical or speculative, scientific, moral, or theological” (14, 16). This is a fair and comprehensive definition. However, Mill continues: “The liberty of expressing and publishing opinions *may seem to fall under a different principle, since it belongs to that part of the conduct of an individual which concerns other people*; but, being almost of as much importance as the liberty of thought itself, and resting in great part on the same reasons, is practically inseparable from it” (14,

¹⁷ Law No. 47/2001 of 18/12/2001 on Prevention, Suppression and Punishment of Discrimination and Sectarianism (“divisionism law”).

emphasis added). This passage is significant, as it shows that he is aware that the classification of freedom of expression as a subset of freedom of conscience seems to be contradictory. However, his resolution of this apparent inconsistency is unsatisfactory. He defines freedom of expression in such a way as to exclude it from all possible regulation. This is unsurprising given the piety and repression of Victorian society, in which free thinkers were victimized and subject to abuse. Mill worried that if the harm principle was extended to freedom of expression, it could rationalize the persecution of so-called heretics by the Church. Essentially, for Mill, the expression of radical points of view is too important to social development to be consigned to the harm principle, a concept highly vulnerable to misapplication and abuse.

This position, akin to asking a question after learning the answer, is indefensible from a theoretical perspective. Unlike thought, which is a private conviction affecting only the believer, for the most part, the expression of views is a shared act. With the possible exception of an individual speaking aloud in an empty room, all forms of expression are essentially public performances, with effects on actors, audiences, and, in some cases bystanders. The classification of speech as action is an important intellectual contribution of speech act theorists such as Austin (1962) and Searle (1969), and is reflected in the work of many contemporary liberal theorists. For instance, Scanlon's (1972) theory of freedom of expression, which will be discussed in detail in Section Two, pertains to a broad range of "*acts of expression*", including written and verbal communication, symbols, artistic performances, and even certain events such as bombings or self-immolations (8, emphasis added). Recognizing that the consequences of one's actions on others can be both helpful and

harmful, when expression is accurately conceptualized as an act, it becomes legitimate for the state to limit speech when it harms others.

In quite a radical reversal of his previous analysis of speech, Mill acknowledges that it is acceptable for the state to curtail speech in certain instances. He writes: “even opinions lose their immunity, when the circumstances in which they are expressed are such as to constitute their expression a positive instigation to some mischievous act” (57). He uses the example of the opinion “corn-dealers are starvers of the poor”, which should remain protected unless expressed “orally to an excited mob assembled before the house of a corn-dealer, or when handed about among the same mob in the form of a placard” (57). Mill attempts to reconcile this example with his previous position on freedom of expression by defining it as “acting on an opinion”, which falls within the harm principle and is subject to regulation (57). This analysis is unconvincing. The distribution of pamphlets expressing an incendiary or inciteful perspective cannot be accurately described as acting on the opinion “corn-dealers are starvers of the poor”, as this judgement compels no action. Consider a more extreme example. For the sake of argument, assume that the opinion expressed to the mob was “corn-dealers are starvers of the poor and should be put to death”. In this case, the perspective communicated *is* a call to action. However, only the hypothetical murder of a corn-dealer – and not the distribution of the pamphlet or the delivery of the speech – could be considered “acting on the opinion”. A more theoretically consistent approach to the issue of inciteful speech would be to define all speech as action and to base eventual regulation or derogation on a careful analysis of the effects of an actor’s expression on the audience and bystanders. In Mill’s example, the distribution of provocative pamphlets could be

legitimately prohibited because of its potential effects on the audience – the angry mob – and the bystander – the corn-dealer.

Contemporary philosophers, political scientists, and legal scholars owe a debt of gratitude to both Locke and Mill. Their answers to the question of when it is legitimate for the state to curtail the rights of the individual remain highly influential, and underpin a majority of speech policy and jurisprudence. That said, classical liberalism suffers from an important limitation: the failure to address freedom of expression independently. In *The Second Treatise*, Locke treats all civil liberties as a homogenous block. In *On Liberty*, Mill makes an effort to distinguish between certain types of rights, but problematically conflates freedom of expression with freedom of conscience. This limitation is addressed by contemporary liberals such as Scanlon, whose theories of freedom of expression are the focus of the next section.

II. Contemporary Liberalism: Thomas Scanlon

Scanlon's theories of freedom of expression are primarily articulated in two essays. In the first, "A Theory of Freedom of Expression" (1972), Scanlon draws heavily on Mill (1863) in order to develop a holistic approach to governmental regulation of freedom of expression. In the second, "Freedom of Expression and Categories of Expression" (1979), he directly critiques the principles presented in his earlier work, and proposes a more flexible and context-specific theory of expression. This section analyses both the 1972 and 1979 theories in order to tease out theoretical and practical tensions. Because both works share a number of underlying assumptions and raise several of the same issues, they will not be analyzed independently of one another. For purposes of clarity, I will distinguish between the essays where appropriate, either in the text or through citations.

Scanlon's theories of freedom of expression are broad in scope and apply to "acts of expression" writ large. An act of expression is "any act that is intended by its agent to communicate to one or more persons some proposition or attitude" (1972, 8). As mentioned in the previous section, acts of expression include but are not limited to speeches, publications, displays of symbols, musical or artistic performances, as well as events such as demonstrations or bombings (8). Scanlon notes that some authors base their determination of when it is legitimate to derogate freedom of speech on a distinction between "those acts of expression which are instances of 'speech' as opposed to 'action'" (9). For these scholars, speech is deserving of greater protection than are actions. This differentiation between speech and action strongly parallels Mill's contention that holding an opinion is not the same as acting on it, and thus requires a different state response (1863, 57).

For Scanlon (1972), grounding a theory of freedom of expression on the tenuous distinction between speech and action is "a serious mistake" (9). Those who advocate such theories "have generally wanted to include within the class of protected acts some which are not speech in any normal sense of the word (for instance, mime and certain forms of printed communication) and to exclude from it some which clearly are speech in the normal sense (talking in libraries, falsely shouting "fire" in crowded theatres, etc.)" (9). Thus, basing a doctrine of freedom of expression on some definition or categorization of a protected act is "clearly wrong" (9). Rather, Scanlon advocates a theory of expression which applies to acts of expression as a whole – essentially, he proposes that the basis for limiting expression remain consistent, whether the act in question is a newspaper advertisement, a stump speech, or a suicide bombing.

Scanlon does limit the scope of his theory somewhat by distinguishing between public and private expression. In “A Theory of Freedom of Expression” (1972), he critiques the tendency of existing theories of expression to focus only on speech which is “addressed to a large (if not the widest possible) audience”. He contends that a doctrine of free expression should extend to all acts which intend to communicate an opinion to one or more people. In an evocative example, Scanlon maintains that his theory of freedom of expression would apply to “the communication between the average bank robber and the teller he confronts”, even if this communication contained no reference to political motivations or “an exhortation to others to follow his example” (8).

The distinction between public and private is clarified in “Freedom of Expression and Categories of Expression” (1979). Scanlon specifies: “the actions to which freedom of expression applies are actions that aim to bring something to the attention of a wide audience. This intended audience need not be the widest possible audience (“the public at large”), but it must be more than one or two people” (86).¹⁸ He maintains that although private conversations should be protected on the grounds of privacy or personal liberty, they are exempt from the doctrine of freedom of expression. However, he wisely notes that the exclusion of private conversations is based on the particular characteristics of modern liberal societies. He argues: “If telephone trees (or whispering networks) were an important way of spreading the word because we lacked newspapers and there was no way for us to gather to hear speeches, then legal restrictions on personal conversations could infringe freedom of expression as well as being destructive of personal liberty in a more general sense” (86).

¹⁸ Returning to the example of the bank robbery, although only two people are directly involved in the exchange, it seems to me that the note passed from the thief to the teller would still fall within the scope of Scanlon’s 1979 theory of freedom of expression. The teller represents an institution, and although the bank robber is directly communicating with only one person, he or she is sending a message to the bank as a whole.

The doctrine articulated in “A Theory of Freedom of Expression” (1972) is based on the fundamental assumption that “a legitimate government is one whose authority citizens can recognize while still regarding themselves as equal, autonomous, rational agents” (14-15). Scanlon crafts his theory so as to maximize the autonomy of the individual, which he considers to be paramount. In doing so, he appears to draw heavily from Mill (1863), who prioritizes mental freedom and intellectual development in his analysis of freedom of expression (Chapter Two, especially 34-38). For Scanlon (1972), to be autonomous, an individual “must see himself as sovereign in deciding what to believe and in weighing competing reasons for action” (15). The author’s conception of autonomy justifies broad protections for freedom of speech because autonomous citizens “could not regard themselves as being under an ‘obligation’ to believe the decrees of the state to be correct, nor could they concede to the state the right to have its decrees obeyed without deliberation” (17). For Scanlon, open discussion is the foundation of autonomy, which is an essential component of government legitimacy.

The importance which Scanlon accords to individual autonomy is reflected in the core tenet of his 1972 theory of freedom of expression. This fundamental concept, which Scanlon terms the Millian Principle, is an extension of the arguments advanced by Mill (1863) in the second chapter of *On Liberty*. It maintains that:

There are certain harms which, although they would not occur but for certain acts of expression, nonetheless cannot be taken as part of a justification for legal restrictions on these acts. These harms are: (a) harms to certain individuals which consist in their coming to have false beliefs as a result of those acts of expression; (b) harmful consequences of acts performed as a result of those acts of expression, where the connection between the acts of expression and the subsequent harmful act consists merely in the fact that the act of expression led the agents to believe (or increased their tendency to believe) these acts to be worth performing. (Scanlon 1972, 14)

As discussed in the preceding paragraph, Scanlon considers individuals to be equal, rational, and autonomous. As such, they are both able and entitled to evaluate competing propositions.

The Millian Principle protects the right of the individual to make up his or her own mind (21).

Nevertheless, the Millian Principle does not guarantee unlimited freedom of expression. There are certain acts of expression which are so directly related to the commission of harm that the state is justified in limiting them. Scanlon (1972) highlights this dynamic with an example: “If I were to say to you, an adult in full possession of your faculties, ‘What you ought to do is rob a bank’, and you were subsequently to act on this advice, I could not be held legally responsible for your act, nor could my act legitimately be made a separate crime” (13). He considers this to be true even if the speaker offers a plethora of arguments about why banks – or even a certain bank in particular – should be robbed, or why the listener is entitled to commit the robbery. This situation conforms to the second clause of the Millian Principle. The listener, as an autonomous and rational agent, is responsible for evaluating the validity of the speaker’s proposition; by extension, the listener is also responsible for their actions should they choose to follow the speaker’s suggestion. However, Scanlon goes on to note that the expression of the opinion ‘What you ought to do is rob a bank’ could constitute a crime under certain conditions: if the speaker knowingly encouraged a child or someone with diminished mental capacity; if the speaker held a position of power over the listener; if the speaker further contributed to the commission of the robbery by providing tools, aiding in preparations, or relating crucial information (13). In all of these circumstances, there is a deeper connection between the expression of the opinion and the commission of the robbery than in the first case. Here, the speaker does more than simply convince the listener that robbing a bank is an act worth performing.

Scanlon describes the Millian Principle as an “exceptionless restriction on government authority” (15). However, he acknowledges that the Millian Principle, taken alone, is not an adequate theory of freedom of expression and offers three corollary principles. These complementary ideas are essentially questions which must be answered in order to determine whether “governmental policies affecting opportunities for expression, whether by restriction, positive intervention, or failure to intervene” are justified (23). First, does the policy in question reflect an appropriate balancing of the value of the expression relative to other social goods? Second, does the policy assure equitable access to means of expression throughout society? Third, is the policy consistent with the “recognition of certain special rights, particularly political rights”? (23) Although Scanlon acknowledges that this four-part theory is cumbersome, he maintains that the Millian Principle and its three corollaries are essential to a complete account of justifiable limits to expression.

Even taking into account the three mitigating principles above, the 1972 theory allows for only very limited derogations of freedom of expression. This is particularly apparent in Scanlon’s treatment of restrictions placed on speech in times of war or other emergency. The theory accommodates certain limitations of expression in wartime insofar as it permits restrictions on expression *tout court*. For instance, restrictions placed on certain types of scientific publications would be justified if these documents provided information on how to commit a harmful act. Scanlon uses the evocative example of a misanthropic inventor who discovers “a simple method whereby anyone could make nerve gas in his kitchen out of gasoline, table salt, and urine” (12). He maintains that the inventor “could be prohibited by law from passing out his recipe on handbills or broadcasting it on television [just] as he

could be prohibited from passing out free samples of his product in aerosol cans or putting it on sale at Abercrombie & Fitch” (12).

In this case, the state has a legitimate right to censor the inventor according to the second clause of the Millian Principle because the communication of the recipe increases the capacity of citizens to harm one another. Recalling the example of the bank robbery, the publication of the formula for nerve gas is akin to handing out the code to the safe. Scanlon maintains that the derogation of the inventor’s right to freedom of expression would be equally valid under normal circumstances as during wartime (23). However, he goes on to note that governments often invoke emergency powers such as the freedom to suspend political debate on the grounds that such debate threatens to divide the country or render it incapable of responding to a present threat. “The obvious justification for such powers is clearly disallowed by the Millian Principle, and the theory [of freedom of expression] provides for no exceptions of this kind” (23). For Scanlon, restrictions on political speech are unjustified even in cases where such expression is “reliably predicted” to lead to deep cleavages or civil war (12). He maintains that in these cases, rights derogations are illegitimate because they contravene the Millian Principle, but they could apparently also be prohibited because they undermine political rights, thus violating the third corollary principle.

By using phrases like “clearly” or “no exceptions”, Scanlon (1972) gives the impression that his theory of freedom of expression provides a clear framework by which the legitimacy of government intervention can be adjudicated. However, the complementary principles are contradictory, which undermines the comprehensiveness of the theory as a whole. Consider the example of “the publication of a theological tract which would lead to a

schism and a bloody civil war” (12). As explained above, Scanlon considers state restrictions on such expression to be unjustified as they violate the Millian Principle. The restriction of such speech could also contravene the third corollary principle, which protects political rights. However, allowing the publication of the pamphlet could be deemed a violation of the first corollary principle, which maintains that the value of expression is relative to other social goods. In this case, the social goods of personal and national security would be seriously threatened by the publication of the tract. Censorship would be justified on these grounds.

Scanlon gives no indication that certain principles (i.e. the promotion of political rights) should take precedence over others (i.e. the protection of competing social goods). In fact, he describes the various components of his theory as “mutually irreducible” (23), which could reasonably be taken to mean that no principle can be ignored or elevated above another. Yet it seems that the author’s fundamental assumption that a theory of expression should maximize personal autonomy leads him to prioritize individual political rights over collective wellbeing in determining the legitimacy of government intervention. His argument would be strengthened if he acknowledged that the corollary principles can contradict one another, and that the application of the theory is rarely cut and dry.

In 1979, Scanlon published “Freedom of Expression and Categories of Expression”, in which he returns to his original theory of freedom of expression, raising three major critiques and proposing a more context-specific approach to the regulation of speech. First, Scanlon contends that freedom of expression must be responsive to various interests. He distinguishes “those interests we have in being able to speak [participant interests], those interests we have in being exposed to what others have to say [audience interests], and those interests we have

as bystanders who are affected by expression in other ways [bystander interests]” (85). The Millian Principle, which forms the basis of the 1972 theory of freedom of expression, is an audience-related principle which makes no distinction between categories of expression (95). Scanlon acknowledges that his original theory was predicated on the assumption that government intervention is only legitimate insofar as it respects individual autonomy. In order for limitations on freedom of expression to be justified, they “must be compatible with the thesis that citizens are equal, autonomous, rational agents” (97). Autonomy protects central audience interests. By designating these interests as the major constraint on state power, Scanlon’s 1972 doctrine maintains that freedom of expression is superseded by competing interests only on very rare occasions. However, the author raises a forceful and valid critique of this approach: “To build these audience interests into the theory in this way has the effect of assigning them greater and more constant weight than we in fact give them. Moreover, it prevents us from even asking whether these interests might in some cases be better advanced if we could shield ourselves from some influences” (98). He concludes that his original emphasis on autonomy (i.e. audience interests) as a constraint on government intervention was mistaken.

Additionally, while “A Theory of Freedom of Expression” (1972) advocates a universal approach in which all types of speech are treated the same way, in “Categories”, Scanlon suggests that a theory of freedom of expression should give different treatment to certain categories of freedom of expression (1979, 85). He argues that certain types of expression must be tolerated despite high costs to bystanders in order to protect important participant or audience interests. For instance, the government generally permits demonstrations in public places despite the potential nuisance caused by noise, disruption of

traffic patterns, or damage to surrounding businesses. In this case, Scanlon considers the benefits of the demonstration to the participants and audience to outweigh the costs to bystanders. Moreover, once it is determined that certain forms of expression such as public demonstrations are permissible, it must also be determined whether equal protection applies to different categories of expression. For example, although a democratic government must tolerate political protests in its public spaces, must it also tolerate public demonstrations for the purposes of advertising? In other words, is commercial speech deserving of the same protection as political speech?

Although Scanlon recognizes that, in practice, different categories of expression are given different levels of protection, he cautions against relying on categories of acts to justify limits to freedom of expression. Instead, he claims that restrictions on speech should be justified according to categories of interests – participant, audience, and bystander. The purposes and content of acts of expression can be misinterpreted, particularly in situations of conflict or mistrust. This is particularly true of so-called political speech. Scanlon warns that governments are notoriously partisan where political issues are concerned; giving them the authority to determine what is or is not political speech could result in rights violations (98, 103). Rather, limitations on expression such as political speeches, protests and demonstrations, or financial contributions to political campaigns should be assessed in light of varying participant, audience, and bystander interests. Heyman (2008) is strongly critical of this approach:

Unlike rights, interests are defined in largely subjective terms, as desires, needs, claims, or demands. Understood in this way, they have no fixed boundaries but extend as far as the desires or demands they represent. As a result, interests necessarily conflict with one another. Moreover, there is no objective standard by which to resolve such conflicts, other than the rather elusive and indeterminate notion of social utility. (28)

Lastly, Scanlon critiques his original theory of freedom of expression on the grounds that it often results in what he terms “implausible consequences”. He brings up the example of laws against deceptive advertising, which are in contravention of the first clause of the Millian Principle pertaining to harms to individuals which derive from their coming to hold false beliefs. According to his initial theory, laws which prohibit false advertising are justified only in cases where listeners or viewers suffer from diminished mental capacity or are otherwise unable to act rationally. However, he acknowledges that a majority of citizens would support such laws as an example of justified paternalism. Scanlon rightly concludes that a major weakness of his initial theory is its failure to “take into account such factors as the value attached to being able to make one’s own decisions, as well as the costs of so doing and the risks of empowering the government to make them on one’s behalf. [...] These factors vary from case to case even when no general loss of rational capacities has occurred” (97).

The self-reflection which Scanlon demonstrates in “Freedom of Expression and Categories of Expression” (1979) is remarkable, and his three critiques of his early essay are valid. However, more critical attention should be paid to the issue of diminished capacity. In both works, Scanlon maintains that his arguments about the limits of government intervention apply only to adults in full possession of their faculties. State oversight is justified in cases of diminished capacity, which is narrowly defined and applies only to children or to those with mental deficiencies which render them legally incompetent (Scanlon 1972, 13). Mill notably makes a similar argument in *On Liberty* (1863), writing: “Despotism is a legitimate mode of government in dealing with barbarians, provided the end

be their improvement, and the means justified by actually effecting that end” (12)¹⁹. The definition of diminished capacity could be expanded to include situations of extreme psychological or cultural trauma.

As discussed in chapter 1, trauma is a persistent attitudinal legacy of intractable conflict. In Rwanda, 55 percent of the pre-1994 population were directly affected by the genocide. Over 95 percent of children and 75 percent of adults were exposed to traumatic events (Chauvin et al. 1998, 385-387; Pham et al. 2004, 607)²⁰. Furthermore, nearly a quarter of Rwandan adults met the symptom criteria for post-traumatic stress disorder (PTSD), while over half displayed one or more symptoms of the disorder. According to Pham et al. (2004), individuals affected by PTSD were less likely to have positive opinions about national trials, less likely to trust their neighbours and other community members, and less likely to support reconciliation (608). Although the authors’ findings pertain exclusively to those individuals who met the full symptom criteria for the disorder, it seems reasonable to assume that the significant trauma experienced by the majority of Rwandans would affect their outlook and worldview, even if this trauma did not result in a formal diagnosis of PTSD.

Furthermore, although psychological trauma is experienced individually, it is frequently a product of a specific social context (Summerfield 1991, 168). In countries recovering from intractable conflict, psychological and cultural traumas are often inextricably linked. In an attempt to process and cope with these traumas, society members construct a psychological infrastructure which allows them to survive the conflict and successfully face the enemy. The functional societal beliefs which make up this

¹⁹ For a contextual discussion of the term ‘barbarians’, see footnote 17.

²⁰ See Tables 1 and 2 for additional statistics pertaining to psychological trauma in Rwanda.

psychological infrastructure also shape society and create its ethos; countries recovering from deep-rooted conflict are characterized by a conflictive ethos. Although this ethos can mitigate the effects of trauma by fostering the development of coping strategies, it can also perpetuate tensions between groups by rationalizing the conflict or delegitimizing the enemy (Bar-Tal 2000, 353; Rouhana and Bar-Tal 1998, 767). In countries recovering from intractable conflict, psychological and cultural trauma results in intolerance which could conceivably justify a level of government paternalism which would be deemed intolerable in peaceful societies.

I do not make this argument casually, nor am I ignorant of its significant practical and ethical implications. It is nearly impossible to establish an empirical threshold at which levels of trauma are significant enough to justify government intervention. Are rights derogations legitimate in cases where three-quarters of the population is significantly traumatized? Half? One-quarter? What are the indicators of 'significant' trauma? More fundamentally, who decides? This last question is particularly relevant in post-conflict environments, as authoritarian regimes nearly always justify their illegitimate or coercive practices as being in the best interests of society. In countries recovering from intractable conflict, trauma could be exploited as a tool of authoritarian legitimation. A further practical difficulty arises in cases such as post-genocide Rwanda, where nearly every citizen was exposed to traumatic events during the course of the conflict. In these situations, the government officials responsible for assessing levels of trauma may be traumatized themselves. This is especially likely in Rwanda, given the role played by Kagame and the RPF during the civil war and subsequent genocide. These implications must be kept in mind if liberal understandings of diminished capacity are to be expanded.

Scanlon's work, heavily inspired by Mill's *On Liberty* (1863), improves on classical liberal theory by treating freedom of expression independently. Whereas Locke and Mill articulate general theories of rights, Scanlon proposes two specific theories of freedom of expression. The first, published in 1972, suffers from several weaknesses: its corollary principles are often contradictory, it overemphasizes autonomy as a guiding concept, it fails to adequately account for participant and bystander interests, and it accords the same protections to different categories of expression. Scanlon's revised theory of expression, published in 1979, improves on the first by proposing a more context-specific approach. However, a major shortcoming of both theories is an overly narrow conceptualization of diminished capacity which ignores trauma as a potential justification of governmental restrictions on freedom of expression.

III. Liberal Theory in Practice: The Case of Agnès Uwimana Nkusi

The previous sections presented theoretical critiques of classical and contemporary liberalism. This section will ground the preceding discussion by analyzing the case of Agnès Uwimana Nkusi, the editor-in-chief of the bi-monthly tabloid *Umurabyo*²¹ who was arrested in July 2010 and charged with threatening national security (under Article 166 of the penal code of Rwanda), genocide denial (under Article 4 of the genocide ideology law), defaming the president of Rwanda (under Article 391 of the penal code of Rwanda), and incitement to divisionism (under Articles 1, 3 and 8 of the divisionism law). These charges have been roundly condemned by prominent international NGOs, which claim that the Kagame government is stifling legitimate political debate. These organizations have lobbied the Rwandan government on Nkusi's behalf, and some have even contributed to her defense. For

²¹ The Kinyarwanda-language newspaper, with an approximate circulation of 100 copies, ceased publication in 2010 following Nkusi's arrest.

instance, ARTICLE 19, a prominent organization advocating freedom of expression, has submitted an *amicus* brief to the Supreme Court of Rwanda, and the human rights organization Freedom Now, in conjunction with the international law firm Hogan Lovells LLP, has taken on her case *pro bono* (ARTICLE 19 2011; Freedom Now 2010).

Nkusi was charged with threatening national security on the basis of four articles published in *Umurabyo* in 2009 and 2010. In an article entitled “Rwandans Have Been in a Coma for 15 Years”, the journalist sharply criticized the Kagame regime for mandating which crops Rwandan peasants were permitted to grow. Additionally, in the article “Kagame in Hard Times”, she condemned the government’s policy on *gacaca* tribunals. The prosecution claimed that by publishing these articles, Nkusi intended to incite hatred and resentment of the Kagame regime. The journalist was charged with inciting hate against public officials by reporting ethnic discrimination in the job market, and with “spreading rumours with the intent of creating insecurity” by publishing an article which alleged that a high ranking military official colluded in exploding grenades in Kigali. Nkusi was charged with defaming the president of Rwanda on the basis of a photo depicting Kagame and Nazi symbols which ran with an article entitled “Who Shall Kagame Belong to in the Future?” She also claimed that the president colluded with a military officer to steal money from taxi drivers, and shielded that same official from corruption charges. Finally, Nkusi was charged with incitement to divisionism because she wrote an article which claimed that “Rwandans have grown in those hates until they killed reciprocally one another after the death of Kinani²²”. The article “Rwandans Have Been in a Coma for 15 Years” also claimed that every past regime favoured a clan, and that Kagame government favoured the Tutsi

²² The meaning of ‘Kinani’ is unclear. It does not appear to be a common Kinyarwanda term, nor does it seem to refer to a public official.

(ARTICLE 19 2011, 4-5). In February 2011, the High Court of Rwanda found Nkusi guilty of all crimes and sentenced her to 17 years in prison and a fine of RWF 250,000. She was also ordered to pay court fees of RWF 64,200. Nkusi appealed the decision to the Supreme Court of Rwanda, which ruled on the matter in April 2012. The Court dismissed the charges of genocide denial and incitement to divisionism, but upheld the convictions for defaming the president of Rwanda and threatening national security. The sentence was reduced from 17 years to four (ARTICLE 19 2012, 1).²³

First, Locke's concept of prerogative is of little use in determining the legitimacy of the Kagame regime's censorship of Nkusi. To begin with, Rwanda was not under an official state of emergency in 2009 and 2010, when the articles were published. Since assuming power, the Kagame regime has consistently acted as if the country is under threat, using the spectre of divisionism to justify authoritarian tendencies. Nevertheless, that the regime chose not to invoke official emergency powers suggests that it did not consider the state to be in imminent crisis. However, for Locke (1689), prerogative power is not dependent on the declaration of a formal state of emergency, at least in the contemporary sense. Prerogative is to be used in two instances: either normal bureaucratic functions are too cumbersome to address a situation that requires an immediate response, or existing laws are unable to adequately address a new trial (386).

Neither of these situations applies to the Nkusi case. First, it is difficult to imagine that the articles cited above, appearing in a bi-monthly tabloid with a circulation of only 100 copies, could pose an urgent threat requiring the application of emergency powers. As

²³ The subsequent analysis makes no effort to evaluate whether or not Nkusi's punishment is fair or appropriate. This complex legal issue falls outside the scope of my project. Rather, I focus on the more fundamental question of whether or not censorship is justified.

mentioned above, Rwanda was not under martial law during the period of publication. Furthermore, in 2009 and 2010, there were few extenuating circumstances or notable events such as international donor conferences that could have potentially justified a state of exception. Even if Nkusi's articles were considered seditious or otherwise dangerous, they did not pose an immediate threat requiring the supersession of normal state powers. Moreover, Locke's second criterion does not apply to the Nkusi case, as the journalist was charged under several existing laws, including the penal code (1977), the genocide ideology law (2003), and the divisionism law (2001). Therefore, the government's response to Nkusi's articles does not correspond to Locke's conception of prerogative power.

Second, this example highlights several tensions inherent to Mill's (1863) analysis of freedom of expression. Because he problematically conflates freedom of expression and freedom of opinion, Mill would most likely strongly condemn censorship of Nkusi on principle. To a certain degree, he does allow for limitations placed on "acting on an opinion", an example of which is the publication of incendiary pamphlets to an angry mob (57). As discussed in section I, the distinction between expressing an opinion and acting on it is theoretically inconsistent. However, even if one were to accept this distinction, Nkusi's publication of controversial articles would fall outside of Mill's criteria for punishable speech because they were published in the newspaper. He argues: "An opinion that corn-dealers are starvers of the poor, or that private property is robbery, *ought to be unmolested when simply circulated through the press*, but may justly incur punishment when delivered orally to an excited mob assembled before the house of a corn-dealer, or when handed about among the same mob in the form of a placard" (57, emphasis added). In this passage, Mill focuses on the medium rather than the message or the context. He implies that certain means

of expression, such as newspapers, automatically negate the potentially harmful consequences of speech. It seems that for Mill, dangerous means of expression are those that communicate directly with audiences, such as speeches, or the distribution of pamphlets. Therefore, because Nkusi published her critical opinions in *Umurabyo*, rather than, say, expressing them orally at rallies or demonstrations, the Kagame regime was not justified in censoring her.

This does not stand up to careful analysis. The distinction between a newspaper article and a speech seems to be clear, but the difference between an article and a pamphlet is less so, as both are forms of written expression. Mill would most likely consider Nkusi's articles to be harmful if issues of *Umurabyo* were distributed among participants in an anti-regime demonstration. In fact, the opinions published in the tabloid – particularly those charging Kagame of colluding to explode grenades or depicting him with a swastika – are very similar to Mill's "corn-dealers are starvers of the poor". While all of the statements are controversial and likely to provoke an emotional response among the audience, none of them directly incite violence. It seems that what really sets newspapers apart from pamphlets or speeches is the context and the disposition of the audience. In Mill's example, it is the presence of an angry mob picketing in front of the corn-dealer's home which determines whether or not the expression of the opinion is dangerous. In the Nkusi case, one could make the argument that if she knew her readership to be angry with and resentful of the Kagame regime, the publication of critical articles could provoke violent anti-government protest. Similarly, as discussed in chapter 1, ethnic tensions in Rwanda remain unresolved. As a result, the publication of the article 'Rwandans Have Been in a Coma for 15 Years', in which Nkusi claimed that the Kagame regime favours the Tutsi and made allusions to the official

discrimination of previous regimes, could inflame tensions between groups and hinder reconciliation. These are essentially the arguments advanced by the prosecution during Nkusi's trial in the High Court of Rwanda.

Additionally, the Nkusi case serves to illustrate the point I made in section I about Mill's conception of precedent. Using the example of Prohibition, Mill (1863) reasons that a precedent of past harms committed under the influence of alcohol justifies increased government paternalism, despite the potential for abuse (99, 101). I extended this argument to suggest that if there is a precedent of damages caused by the uninhibited expression of views, the state would be justified in applying tighter controls on speech, including banning certain forms of expression. There is such a precedent in Rwanda, where hate media such as RTLMC played an important role in inciting genocidal violence. Furthermore, there is an individual precedent of Nkusi publishing controversial and inflammatory articles. According to a 2007 report by the US State Department, on January 19, 2007, she was arrested and charged with divisionism and genocide denial. In an article published in December 2006, "she equated incidents of revenge killings by Rwanda Patriotic Army (RPA) soldiers at the end of the 1994 genocide with the genocide itself" (446). Several independent journalists encouraged Nkusi to apologize for her article and to issue a retraction, which she initially agreed to do. Instead, in January 2007, she published a follow-up entitled "You Have Problems If You Kill a Tutsi, but You Go Free If You Kill a Hutu", in which "she attacked by name senior members of the government, calling them 'dogs' and 'prostitutes'" (446). These slurs are particularly inflammatory; prior to the outbreak of genocide, Tutsi were dehumanized through comparisons to insects or animals, and Tutsi women were frequently labelled whores or prostitutes (Chrétien 1995). In April 2007, Nkusi pled guilty to the

charges of defamation, divisionism, and passing a bad cheque, and was sentenced to one year in prison (State Department 2007, 446). One could argue that given the historical precedent of free expression contributing to violence in Rwanda, as well as the individual precedent of Nkusi publishing controversial and divisive articles, the Kagame regime was justified in punishing the journalist for the articles which appeared in *Umurabyo* in 2009 and 2010.

Third, Scanlon would most likely consider the Kagame regime's censorship of Nkusi to be unjustified on the basis of both his 1972 and 1979 theories of free expression. Recall that the 1972 theory is based on the Millian Principle, which states that although acts of expression can cause certain harms, these negative consequences do not justify limiting the initial act of expression. Specifically, limits to acts of expression are unjustified when: (a) individuals develop false beliefs as a result of being exposed to opinions; (b) the only connection between the expression and the harmful act is that the expression contributed to the agent's belief in the worthiness of the act (Scanlon 1972, 14). The derogation of Nkusi's right to freedom of expression would be illegitimate on the basis of one or both of these conditions. For example, according to the Millian Principle, if readers of *Umurabyo* were convinced by Nkusi's claim that Kagame colluded to explode grenades in Kigali, government censorship would not be justified, even if that claim was known to be or subsequently proven false. More importantly, suppression of Nkusi's articles is illegitimate according to the Principle because while the articles may increase resentment of the ruling party or contribute to ethnic tensions, they do not increase readers' capacity to overthrow the government or commit violent acts. Returning to the example discussed in section II, although Nkusi may metaphorically suggest that banks are worth robbing, she stops short of providing the code to the safe (Scanlon 1972, 13).

In his 1979 theory of expression, Scanlon explicitly rejects the Millian Principle, instead articulating a doctrine based on balancing the competing interests of participants, audiences, and bystanders. However, Scanlon argues that certain forms of expression must be tolerated despite high costs to bystanders because they are fundamental to the protection of important participant or audience interests. The most notable example of such expression is political speech (85). The opinions expressed in Nkusi's articles, the majority of which criticize Kagame and his policies, can be considered political speech, and would thus remain protected under Scanlon's 1979 theory. Scanlon would likely prioritize the journalist's interest in exercising her right to freedom of expression and her readers' interests in exercising their right to information over potential harms to bystanders. Affected bystanders could include members of ethnic, social, economic, or political groups, who may feel disenfranchised or victimized as a result of the claims published in *Umurabyo*. For instance, the article "Rwandans Have Been in a Coma for 15 Years", which claimed that the Kagame regime favours the Tutsi clan, could stoke feelings of resentment among Hutu, or feelings of persecution among Tutsi.²⁴

In both his 1972 and 1979 essays, Scanlon takes pains to acknowledge that his theories apply only to "adults in full possession of their faculties" (Scanlon 1972, 13). Diminished capacity is essentially a mitigating factor which determines both the applicability of the Millian Principle and the evaluation of participant, audience, and bystander interests. In critiquing Scanlon, I made the argument that situations of extreme psychological or cultural trauma could be considered forms of diminished capacity. Such traumas are likely to

²⁴ It must be noted that, as discussed in chapter 1, Nkusi's claims about Tutsi favouritism appear to be true. This raises the question of whether Nkusi had a responsibility to report the facts, especially given her role as a journalist. This is an ethical dilemma, and although it falls beyond the scope of my project, it is an interesting avenue for future research.

influence the way individuals and groups react to acts of expression; as a result, the same act may have significantly different effects on traumatized and non-traumatized populations. Consider Nkusi's assertion that the RPF government gives preferential treatment to members of its own clan, and that previous regimes pursued similar policies. The claims made in this article directly compare the Kagame regime with previous administrations which oversaw and perpetrated ethnic violence. In the context of Rwandans' individual and collective experiences with genocide and the resulting traumas, it seems reasonable to suggest that Nkusi's article would be particularly inflammatory. The publication of the article could result in increased ethnic tensions, and could potentially contribute to the resumption of physical or symbolic ethnic violence.

In this section, I applied the theories discussed in the previous sections to the specific case of Agnès Uwimana Nkusi. I showed how liberal theorists would likely reject the Kagame regime's censorship of Nkusi. For Locke, the regime's actions would be an illegitimate application of prerogative, as the articles posed no immediate danger to security and existing laws were able to adequately address the potential threat. For Mill, Nkusi's opinions would be deserving of protection largely on the basis of their publication in a newspaper. For Scanlon, initially, the regime's actions would be unfounded on the basis on the Millian Principle, and would remain indefensible due to the political nature of Nkusi's articles. However, I also used the case to underline the theoretical and practical limitations of both classical and contemporary liberalism. In particular, the case challenges Mill's conceptions of "acting on an opinion" and precedent, as well as Scanlon's idea of diminished capacity.

IV. Conclusion

In this chapter, I examined the predominant philosophical approaches to the regulation of free speech. I built on the empirical analysis of chapter 1 by analyzing liberal theories of freedom of expression through the lens of countries recovering from intractable conflict. These unique environments, characterized by psychological and cultural trauma and weak or corrupt institutions, serve to highlight theoretical and practical weaknesses of the liberal tradition. In section I, I focused on the classical liberalism of John Locke and John Stuart Mill, noting that a major shortcoming of the classical school is its failure to address freedom of expression independently from other rights. In section II, I turned my attention to the contemporary approaches proposed by Thomas Scanlon. While these theories improve on early efforts by looking specifically at freedom of expression, they suffer from serious limitations, not least of which is a narrow conceptualization of diminished capacity that ignores the importance of trauma as a potential justification for government paternalism. In section III, I supported my theoretical critiques with an analysis of the case of Agnès Uwimana Nkusi, a prominent Rwandan journalist who, in 2010, was charged with and subsequently convicted of threatening national security, denying the genocide, inciting divisionism, and defaming the president of Rwanda.

The major intellectual legacy of the liberal tradition is the notion of the balance of harms. Essentially, the harm done by allowing the full exercise of free expression must outweigh that done by curtailing it. Though this principle is fundamentally sound, both classical and contemporary liberals define ‘harm’ too narrowly. Locke, Mill, and Scanlon (1972) are primarily concerned with damages to individual constitutional rights such as life, liberty, and property. Scanlon (1979), on the other hand, focuses on threats posed to

participant, audience, and bystander interests. As the Nkusi case suggests, these approaches do not adequately provide for the regulation of freedom of expression in countries recovering from intractable conflict. They fail to account for the fact that an act of expression which poses little threat in a peaceful society could be potentially damaging to a post-conflict environment characterized by psychological and cultural trauma.

Nevertheless, it would be a mistake to discount the balance of harms altogether. Rather, the concept should be expanded to respond to the needs of both peaceful and conflictual societies. The approach proposed by critical legal theorist Stephen Heyman (2008) would be a good place to start. The author describes his approach as liberal humanist – “liberal in its emphasis on the protection of individual rights, [and] humanist in holding that those rights are founded on respect for the intrinsic worth of human beings and are meant to enable them to develop their nature to the fullest extent” (4). I share Heyman’s view that both classical and contemporary liberal understandings of ‘harm’ are too narrow. He suggests that “free speech is an inherent right which is rooted in human dignity and autonomy. But those values also give rise to other fundamental rights, including personal security, privacy, reputation, citizenship, and equality” (37). Unlike more traditional liberal approaches, which primarily consider the instances in which free expression threatens first-order rights (life, liberty, and property), the liberal humanist approach recognizes that free speech can also pose risks to other, equally important rights, such as citizenship or equality. In Heyman’s view, the most basic right of all “is the right to recognition as a human being and as a member of a community” (4). The liberal humanist approach is commensurate with my view that a theory of freedom of expression should account for an individual’s

psychological, emotional, and collective wellbeing, as well as his or her physical security.

This will be addressed in chapter 3.

CHAPTER 3

The Continuum of Destruction: Psychological Approaches to Free Speech

In chapter 2, I analyzed the predominant philosophical approaches to free expression, focusing on classical and contemporary liberal theory. One of the most significant contributions of liberal theorists such as Locke, Mill, and Scanlon is the notion of the balance of harms. I suggested that this concept suffers in its application to countries recovering from intractable conflict, as it pays no attention to the psychological and cultural traumas present in those societies. In this chapter, I focus on the ways in which the field of social psychology contributes to the study of free expression. Psychological approaches serve as an excellent complement to the more mainstream theories discussed in chapter 2, as scholars working in this field consider trauma and speech to be intrinsically linked, particularly in countries recovering from conflict. In this chapter, I concentrate specifically on the theory of Ervin Staub, whose 1989 book *The Roots of Evil* spearheaded psychology's contribution to the study of genocide and mass violence.

In the first section, I analyze Staub's book *The Roots of Evil*, which explains the author's theory of genocide and mass violence and lays the foundation for a discussion of free expression in countries recovering from such conflicts. In the second section, I critique an article published by Staub in conjunction with colleagues from the University of Massachusetts and the Humanitarian Tools Foundation which applies concepts introduced in *The Roots of Evil* to the study of hate speech in the Democratic Republic of Congo (Vollhardt et al. 2007). This article, though considerably less well known than the majority of Staub's work, is extremely pertinent to my analysis. Not only does it explicitly address freedom of expression, it pertains specifically to post-conflict environments. In the third

section, I illustrate my critiques with a discussion of Rwanda's divisionism law and its application to the case of Victoire Ingabire Umuhiza, a high-profile politician who in 2010 was charged under the law and subsequently imprisoned on the basis of controversial statements she made during a genocide memorial service in Kigali. The final section concludes by addressing weaknesses of the psychological approach as a whole.

I. Ervin Staub (1989): *The Roots of Evil*

Staub, a Hungarian Jew, was born in Budapest in 1938. In 1944, when the Nazis occupied Hungary and rounded up nearly 400,000 Jews to be sent to Auschwitz, he and his family escaped to a safe house, where they hid until the end of the war. He credits this deeply traumatic experience with inspiring his academic and professional work in which he explores the origins of cruelty in an "attempt to specify an agenda for creating caring and connection within and between groups" (Staub 1989, xii).

In 1989 Staub published *The Roots of Evil*, widely considered to be his seminal work. In this book, he seeks to answer two fundamental questions: "How can human beings kill multitudes of men and women, children and old people? How does the motivation arise for this in the face of the powerful prohibition against murder that most of us are taught?" (3). Although a detailed analysis of Staub's theory of genocide is not necessary for the purposes of my study, a brief explanation and critique of his approach will provide useful context for the subsequent sections.

The outbreak of genocide or mass violence is a gradual process.²⁵ Staub contends that, “in essence, difficult life conditions and certain cultural characteristics may generate psychological processes and motives that lead a group to turn against another group” (13). Difficult life conditions may be experienced individually or collectively, and can include poverty, political or criminal violence, or rapid changes in culture or society such as those brought on by technological advancement. In every case, difficult life conditions profoundly disrupt social patterns and routines, leading to disorganization (13-14). Although difficult life conditions do not in and of themselves result in genocide, Staub contends that “they carry the potential, the motive force; culture and social organization determine whether the potential is realized by giving rise to devaluation and hostility toward a subgroup (or a nation)” (14). He describes devaluation and hostility as steps along a “continuum of destruction” which ends in genocide (13, 17-18). As they progress along this continuum, perpetrators of violence experience psychological and cultural changes which normalize and perpetuate violence. Bystanders can help or hinder the progression along the continuum of destruction (13).

Staub’s understanding of genocide is informed by what he calls “personal goal theory”, a concept developed in some of his earlier publications (see, for example, Staub 1984). This theory maintains that both individuals and cultures possess a hierarchy of motives, such as the need for personal security or the need to connect with others. The relative importance of each motive will differ from person to person or from culture to culture. As Staub explains, “the combination of difficult life conditions and certain cultural preconditions makes it probable that motives will arise that turn a group against each other” (23). In these situations, perpetrators of acts of mass violence believe that the victims are

²⁵ Staub uses the terms ‘genocide’ and ‘mass violence’ interchangeably throughout his work. Although I recognize that genocide differs from other types of mass violence, following the author, I will also employ them more or less interchangeably.

standing between them and the fulfilment of their needs. For Staub, this perception can be described as the immediate cause of genocide. However, the author is careful to note that “genocide arises from a pattern, or gestalt, rather than from any single source” (23).

The element of Staub’s theory most relevant to my study of free expression is the notion of the continuum of destruction. This continuum largely explains how perpetrators of mass violence commit and rationalize acts which are both socially taboo and legally prohibited (17). As previously mentioned, the presence of difficult conditions is not sufficient to explain the outbreak of mass killing. Individuals and groups living in trying circumstances progress along a continuum of destruction which culminates in the genocide. Staub contends that “small, seemingly insignificant acts can involve a person with a destructive system: for example, accepting benefits provided by the system or even using a required greeting, such as ‘Heil Hitler’” (17). Participation in this system normalizes violence; although initial acts cause only limited harms, they result in psychological and cultural changes within perpetrators, making more serious acts seem permissible.

For Staub, two psychological changes are particularly important in explaining the perpetration of mass violence: the *relinquishment of a feeling of responsibility* for victims, and the *reversal of morality* (83). For the most part, human beings are taught that they bear a degree of responsibility for the life and welfare of others. When individuals begin to commit small acts which precipitate their progression along the continuum of violence, they start to lose this sense of responsibility. As Staub notes, “feelings of responsibility are subverted by excluding certain people from the realm of humanity or defining them as dangers to oneself and one’s way of life and values” (83). When perpetrators no longer feel responsible for their victims, mass killing becomes permissible. To support this claim, Staub cites Milgram’s

experiments on obedience and authority. Milgram (1974) found that ordinary people could be induced to inflict what they thought were painful or even life-threatening electric shocks to subjects, as long as they believed the orders were coming from someone in a position of authority. In another experiment, “teachers” were instructed to administer an electric shock to “learners” each time the learners made an error. Crucially, the experiment showed that the “teachers” tended to increase the intensity of the shocks over time, even without being instructed to do so (Buss 1966 qtd. Staub 1989, 81). These experiments suggest when individuals repeatedly and increasingly harm others, they undergo cognitive changes which lead them to deny responsibility for their actions. This makes it likely that they will commit further acts of violence.

In extreme situations, the relinquishing of feelings of responsibility toward victims may result in a complete reversal of morality, so that murder or genocide is seen as not only permissible, but desirable. Perpetrators see their genocidal acts as service to humanity. Staub uses the example of a Nazi guard employed at Belzec, an extermination camp. During testimony at Nuremberg, the guard recounted a conversation in which he was asked, “Wouldn’t it be more prudent to burn the bodies instead of burying them? Another generation might take a different view of these things.” The guard responded: “Gentlemen, if there is ever a generation after us so cowardly, so soft, that it would not understand our work as good and necessary, then, gentlemen, National Socialism will have been for nothing. On the contrary, we should bury bronze tablets saying that it was we, we who had the courage to carry out this gigantic task!” (Poliakov 1954, 12-13, qtd. in Staub 1989, 84). The guard’s response suggests a complete reversal of morality. Rather than see the extermination of Jews

in the death camp as abhorrent, the guard deems it worthy of celebration and commemoration.

Organizational characteristics such as bureaucratization or specialization can hasten these cognitive and normative changes, though they are not part of Staub's continuum of destruction. Often, political or social leaders explicitly or implicitly assume responsibility for violence, leading to a loss of accountability among perpetrators (18, 28). Institutional arrangements such as strong and compartmentalized bureaucracies can also result in the escalation of violence; in these societies, each person can concentrate on performing a specific task without thinking about the consequences of his or her actions. The most obvious example of this is the Holocaust, in which thousands of individuals denied responsibility for their actions. Even high-level Nazi officials attempted to exonerate themselves by arguing that they were just doing their jobs. For instance, Adolf Eichmann, who, as Head of the Central Office for Jewish Affairs, was responsible for organizing the mass deportation of Jews to ghettos and extermination camps in Eastern Europe, claimed on the witness stand that he was just following orders (Arendt 1963).

In Rwanda, a high degree of social conformism coupled with administrative practices emphasizing community service and forced labour help to explain popular participation in genocide.²⁶ As Hintjens (1999) notes, "Rwanda had a complex and highly stratified social structure, both in terms of class and status. [...] At least until the genocide, individuals continued to demonstrate quite a remarkable degree of internalized social control in relation to their superiors, and domination was considered the order of the day for subordinates"

²⁶ This is not to suggest that these factors are the most significant or direct causes of genocide. As explained in the presentation of the case, genocide in Rwanda was primarily a response to the political and economic crises of the late 1980s and early 1990s.

(248). The architects of the genocide exploited this innate respect for authority, hoping that their calls to arms would be met with minimal resistance. Furthermore, Des Forges (1999) suggests that political elites capitalized on policies implemented by European colonizers in order to compel Hutu participation in the genocide. The most important of these policies was *umuganda*, unpaid, communal labour for the public good. *Umuganda* was “supervised by the *nyumbakumi*, a community leader in charge of a group of ten households, who had the power to fine those who failed to appear for the communal work sessions” (42). The author recounts that that in several regions, local officials told community members that participation in attacks against Tutsi was part of their communal work (89). What’s more, propagandists played on Rwandans’ sense of duty and service by frequently referring to the slaughter of Tutsi as “work” and machetes as “tools” (8, 89). In pre-genocide Rwanda, values of conformity and subservience and policies of collective labour were mutually reinforcing and facilitated the *génocidaires*’ progression along Staub’s continuum of destruction.

Although Staub’s continuum of destruction is a useful framework with which to understand the gradual progression to genocide, it focuses only on the psychological processes experienced by the perpetrators. As such, it overlooks the political and structural factors which contribute to genocide. The author acknowledges as much, writing: “The model presented here, with its emphasis on the psychological roots of group violence, is not always fully applicable. Leaders in nondemocratic states, protecting their power from real or imagined threats, may perpetrate wide-scale violence even when life conditions are not unusually difficult and the group membership of victims is poorly defined” (Staub 1989, 85).

To a certain degree, this was the case in Rwanda, where the 1994 genocide was primarily an attempt by elites to hold onto power in the face of significant political and economic threats.

Stanton (1998), writing on behalf of the international NGO Genocide Watch, offers a more comprehensive account of the outbreak of mass violence. For the author, genocide is a process which unfolds in eight stages. This progression is not linear as all stages continue to operate throughout the violence. However, the author notes that later stages logically follow the earlier stages (1). The first stage is *classification*, in which social groups are classified by ethnicity, race, religion, or nationality and an “us versus them” mentality develops. In the second stage, *symbolization*, names or symbols are ascribed to the classified social groups. For example, Jews living under Nazi rule were forced to wear a yellow star. It is important to note that symbolization includes self-identification such as gang clothing or tribal scarring. In the third stage, *dehumanization*, one group denies the humanity of another, equating its members with animals, vermin, insects or diseases. Hate propaganda is an important tool in dehumanizing the enemy. In stage four, *organization*, the genocide is planned, often by state officials. Militias or specialized military units are trained and armed. In the fifth stage, *polarization*, extremists aim to drive a wedge between social groups through the escalation of polarizing propaganda and the intimidation or extermination of moderates. In the sixth stage, *preparation*, victims are identified and segregated, often in ghettos or concentration camps, and death lists are drawn up. In stage seven, *extermination*, mass killing of target groups begins. In the final stage, *denial*, the perpetrators of genocide deny their crimes, often blaming the victims for violence, and attempt to conceal evidence by digging mass graves or burning bodies (1-2). Stanton’s stages of genocide improve on Staub’s continuum of destruction because they account for political factors, such as organization and preparation,

which are necessary in order to fully account for genocide. Stanton's framework more accurately explains the Rwandan case.

Staub (1989) pays no particular attention to the role played by expression in his theory of mass violence. When he does address speech, it is only to illustrate his more general arguments. For instance, he uses the expression of a required greeting such as 'Heil Hitler' to illustrate the type of small and seemingly inconsequential act which can lead to greater acts of violence. However, he does not adequately explain how the use of the greeting would "involve a person within a destructive system" (17). Stanton's (1998) framework is a useful tool with which to analyze this example. The declaration 'Heil Hitler' corresponds to both the first (classification) and second (symbolization) stages of genocide. The greeting is essentially a pledge of allegiance to a racist leader. In using the expression, group members self-identify as supporters of the Nazi party. This self-identification discursively reinforces in-group/out-group distinctions, and is akin to Stanton's examples of gang clothing or tribal scarring (1). I share the author's view that acts of expression such as labelling, epithets, or hate speech are important steps along the continuum of destruction.

In articulating his theory of mass violence (1989), Staub makes an important contribution to the study of genocide. Although authors such as Stanton improve on the concept by integrating structural or political elements, Staub's continuum of destruction largely explains the psychological transformations undergone by perpetrators of genocide. However, the author ignores the ways in which expression contributes to the development of a destructive system. Vollhardt et al. (2007) address this important lacuna by using Staub's (1989) continuum of destruction as a means of deconstructing hate speech in post-conflict environments. Their approach is the focus of the subsequent section.

II. Vollhardt et al. (2007): “Deconstructing Hate Speech in the DRC”

In 2007, Staub published “Deconstructing Hate Speech in the DRC: A Psychological Media Sensitization Campaign” in conjunction with colleagues from the University of Massachusetts and the Humanitarian Tools Foundation²⁷. In this article, Vollhardt et al. describe a radio campaign initiated by the Foundation and implemented in the DRC in order to counteract hate speech during the presidential election campaign of 2006. The authors describe the project as a tool which supports reconciliation and justice through the use of ‘edutainment’ (education and entertainment) programming. Through fictional soap operas, news, and discussion programs broadcast in local languages, “citizens in these vulnerable societies are provided with information about how to resist manipulation to violence, how to intervene and act as positive bystanders in the presence of violence and injustice, and how to cope with trauma in post-conflict societies” (21). The authors claim that the radio program is based on Staub’s 1989 theory of genocide and mass violence (Vollhardt et al. 2007, 20-21). Although the purpose of the article is primarily to describe the design and results of the media sensitization campaign, the authors also contribute to a more theoretical literature by applying Staub’s (1989) theory of mass violence to hate speech (Vollhardt et al. 2007, 15). Specifically, they seek to determine the “roots and functions of hate speech on the continuum of violence” (23).

The authors begin their discussion by offering two general definitions of hate speech. For Tsesis (2002), “hate speech expresses irrational, unsubstantiated, and unjustified antagonism toward a group or a representative of a group, frequently entailing consistently

²⁷ At time of publication, the lead author, Johanna Vollhardt, was a doctoral candidate under Staub’s supervision. The Humanitarian Tools Foundation is an NGO affiliated with Staub and his wife, Dr. Laurie Anne Pearlman. Its objectives are “to give people (victims, bystanders and perpetrators) insight in how group violence evolves, how they can contribute to prevent this violence and how one can provide emotional support to victims and contribute to reconciliation” (Humanitarian Tools Foundation 2010).

disapproving, hypercritical, and reiterated generalizations” (Vollhardt 2007, 23). According to Boeckmann and Turpin-Petrosino (2002), hate speech is “any form of expression directed at objects of prejudice that perpetrators use to wound and denigrate its recipient” (Vollhardt 2007, 23).

These definitions differ significantly from those offered by legal scholars and jurists. For instance, Wild (2006) defines hate speech as “speech [...] intended to foster hatred against individuals or groups based on race, religion, gender, sexual preference, place of national origin, or other improper classification”. In this legal definition, speech can only be classified as hateful if it inspires animosity in others. The authors cited by Vollhardt et al. (2007), on the other hand, deem speech to be hateful if it denigrates or otherwise wounds the target group. As a result, these definitions encompass a wider range of acts of expression than do legal conceptualizations. Additionally, the Tsesis (2002) and Boeckmann and Turpin-Petrosino (2002) definitions more accurately conform to Stanton’s (1998) stages of genocide. Hate speech is a form of *classification* as it is based on perceived distinctions between “us” and “them”. These dividing lines are named and reified through *symbolization*. Finally, hate speech *dehumanizes* members of the perceived out-group through epithets or slurs (1).

Vollhardt et al. (2007) argue that although hate speech entails discursive stigmatization, it can result in tangible “negative consequences of social categorization”. Citing experiential research in social psychology (for example, Tajfel and Turner 1986; Turner 1987; Brewer 1979; Gaertner and Dovidio 2000), the authors claim that the vilification of perceived enemies through speech results in “increased stereotyping, decreased sharing of resources, and other manifestations of discrimination” (24). By making

the link between the expression of hateful views and more concrete forms of discrimination such as denying access to a shared resource, Vollhardt et al. fill an important gap in Staub's (1989) conceptualization of the continuum of destruction. Recall that, for Staub, the commission of seemingly insignificant acts involve an individual in a destructive system in which violence is increasingly seen permissible. Staub cites high-profile experiments by Milgram (1974) and Buss (1966) in which a group of 'teachers' administered electric shocks to 'students' to show that ordinary people could be compelled to commit increasingly violent acts. Because these studies pertain specifically to situations in which authority figures instructed followers to commit harmful actions, they do not fully explain situations in which individuals commit initial acts of violence without being instructed to do so. The studies cited by Vollhardt et al. (2007) help to fill this gap. "Concrete negative consequences of categorization", such as the refusal to share resources with members of a perceived out-group, can be seen as a step between non-violent, discursive discrimination and the commission of violent acts. Furthermore, this middle ground is not dependent on the actions of a strong authority figure.

For Vollhardt et al. (2007), while hate speech does include the blatant expression of extreme prejudice, it often begins in more gradual, subtle ways. In fact, if the communication of hateful messages is too sudden or too extreme, it can actually alienate many listeners and provoke a backlash against the group transmitting the message. For this reason, hate speech often draws on concepts or images which are already familiar to the intended audience. It frequently exploits a group's existing norms, stereotypes, narratives, or myths in order to manipulate the audience and shore up support (25). For example, in Rwanda, propagandists used the term *inyenzi*, or "cockroaches", to refer to Tutsi in the run-up to genocide. This

hateful epithet had previously been used the 1960s to refer to Tutsi refugees who attacked Rwanda following the Hutu Revolution (Des Forges 1999, 51). In reviving this term, propagandists evoked the myth of the violent Tutsi invader, playing on listeners' collective memory of the insecurity of the 1959 Revolution and its aftermath.

Furthermore, Vollhardt et al. (2007) note that while blatant, extreme forms of hate speech are easy to identify, it is much more difficult to detect the more subtle types of hateful expression. However, they argue that it is essential to discern and counter early forms of hate speech, as "the use of one of these less overt forms can be one of the first steps along a continuum of destruction" (26). The authors identify a wide range of characteristics of hate speech, which are classified in table format, reproduced below (Table 3).

Table 3: The Central Characteristics of Hate Speech

1. The communication contains instigating elements of the continuum of violence.
a. The core element is a distinction between “us” and “them”. Individuals or groups are referred to by using their group membership, and information about their (alleged) origins is used to label them as foreigners. Frequently this is achieved by pointing to their affiliation with a region, nationality, religion, or language group different from that of the majority of listeners. b. These individuals or groups are blamed for the misfortune of the country in terms of historical or present difficulties. c. These individuals or groups are accused of disloyalty, treachery, alliance with other countries (in particular with the enemy) or the previous regime, thereby implying threat and appealing to the listeners’ emotions.
2. The communication is derogatory and violates standards of (argumentative) integrity.
a. Personal insults and attacks on the integrity of an individual are involved, and the communication is defaming and derogatory. b. The arguments are unbalanced and are not objectively verifiable with facts from other sources or standards of a rational argumentative debate. c. The legitimacy and ability of an individual or group to hold political power and influence is questioned, or it is claimed that this person or group has too much power. d. The targeted group of individuals is denied distinct characteristics of human nature. e. An individual or group is threatened, for example with revenge.
3. The suggested strategies do not offer real or constructive solutions to existing problems, and serve self-interests of the speaker and/or his or her group only while harming another group.
a. The speaker attains direct political gain and an increase in power by harming the target. b. There is a focus on individuals or groups instead of on issues. c. By focusing on one alleged source of problems and blaming the targeted group or individual, the accuser offers solutions that are simplistic and do not take into account the complexity and multifaceted nature of societal problems. The promised solutions are therefore not real solutions to the existing situation. d. The offered solutions are destructive rather than constructive in nature, as they are based on the exclusion of certain individuals or groups from political power or the society in general. e. The communicated ideas and suggested solutions for problems are not inclusive of all in society, but instead benefit a specific group while excluding others.

Source: Vollhardt et al. 2007, 29-30

As shown in Table 3, the types of speech which Vollhardt et al. (2007) consider to be hateful are significantly different than those addressed by liberal philosophers. For instance, speech which questions the legitimacy or ability of an individual or group to hold political power or which accuses a person or group of having too much power is deemed potentially hateful by the authors (29). Although this type of expression is, by definition, political, Vollhardt et al. (2007) include it in their categorization of hateful speech. Compare this approach to Scanlon's: the philosopher refuses to accept limitations on political speech in either his 1972 or 1979 theories of freedom of expression, even in cases where the speech is almost certain to lead to the outbreak of violence or civil war.

This example reveals both the biggest strength and the biggest limitation of the psychological approach to free expression. Psychologists such as Staub (1989) and Vollhardt et al. (2007) concern themselves with the effects of speech on individuals and groups. The impacts of speech on institutions and the political consequences of limiting freedom of expression are of little importance to them. Unlike liberal theorists such as Locke, Mill, or Scanlon, psychologists are not bound by internalized normative beliefs about the positive relationship between freedom of expression and deliberative democracy. As a result, they take a more comprehensive view of hate speech than do political philosophers. The psychological approach allows for a critical evaluation of types of expression which most liberal theorists consider to be automatically protected, such as political speech.

However, this ignorance of political considerations is also the biggest weakness of the psychological approach. This perspective glosses over the fact that many regimes, particularly those in countries recovering from intractable conflict, use the so-called hateful or otherwise destabilizing effects of expression as justification for curtailing civil liberties

and cracking down on political opposition. The broad conception of hate speech as articulated by Vollhardt et al. (2007) thus becomes a tool of authoritarian legitimation. Unfortunately, the authors overlook this issue, saying only that “while hate speech often has such instrumental use and value to those who practice it, it can also be an expression of deeply held negative views and feelings toward another” (24). The failure to engage with thorny issues surrounding the political appropriation of the ‘hate speech’ label is a major weakness of the psychological approach.

Although they fail to explicitly address the ways in which authoritarian regimes use charges of hate speech to silence critics, Vollhardt et al. (2007) do briefly touch on another interesting dynamic of the political use of hate speech. They write that “in the political realm, the label ‘foreigner’ is frequently used to discredit opponents and delegitimize political participation. This is among the central functions of hate speech, which is often an instrument to influence and persuade audiences, with the goal of maintaining political power” (24). In this passage, the authors argue that politicians use discursive discrimination in order to rally support and unite potential supporters around a common enemy. As discussed in the introduction to the thesis, Rwandan president Habyarimana frequently employed this strategy in the years preceding the genocide. The president used propaganda in an attempt to unite Hutu against Tutsi *ibytso*, or accomplices. However, following Vollhardt et al. (2007), one could make the argument that president Kagame is also committing acts of hate speech by labelling political opponents ‘divisionists’ or ‘*génocidaires*’. Kagame’s attempts to legitimize his regime by accusing opponents of hateful speech are themselves hateful because they rely on the creation of false dichotomies such as unity/division. This perspective is unique to the psychological approach to free expression.

The authors' political naiveté is perhaps most evident in the conclusion to "Deconstructing Hate Speech in the DRC". In this section, Vollhardt et al. (2007) suggest ways to counteract hate speech. Unsurprisingly, they suggest educational programs and sensitization campaigns in the vein of the media initiative implemented in the Congo in 2006. These interventions focus on communication with members of groups targeted by hate speech, as well as with those who are responsible for the transmission of hateful messaging. The authors pay almost no attention to political or legislative responses to hate speech. They limit their treatment of such interventions to one sentence, writing that "it is evident that hate speech is a destructive political tool that must be fought on the societal level, with legislation and other structural political interventions" (32). Vollhardt et al. (2007) offer no examples of the type of legislation that could be used to combat hate speech, though one could safely assume that such "structural political interventions" would involve suspending or otherwise limiting freedom of expression. Furthermore, the authors provide no insight as to the legitimacy of derogating rights, particularly in (post-) conflict countries such as the DRC or Rwanda.

III. The Psychological Approach in Practice: The Divisionism Law and the Case of Victoire Ingabire Umuhiza

In this section, I illustrate the preceding analysis with a discussion of Rwanda's divisionism law and the specific case of Victoire Ingabire Umuhiza, a prominent Rwandan opposition politician who was charged under the law on the basis of controversial statements she made during a genocide memorial service in Kigali in 2010.

The Rwandan Senate passed Law No. 47/2001 on Prevention, Suppression and Punishment of the Crime of Discrimination and Sectarianism ("divisionism law") on

December 18, 2001. As Pall (2010) notes, the divisionism law was “the first of the laws enacted as part of the Rwandan government’s reconciliation policy” (20). The rationale behind the law is to prevent discrimination which may result in sectarianism, threatening national unity and reconciliation. The preamble of the divisionism law explicitly links discrimination and divisionism with the commission of genocide: “[The practice of sowing divisions and discrimination among citizens] was encouraged until it was abused by those who prepared and perpetrated the genocide and massacres, which befell the country in 1994” (Preamble, qtd. Pall 2010, 21). Additionally, Articles 3, 5, and 6 of the law define divisionism and detail applicable penalties for individuals and political parties.

Article 3

The crime of divisionism occurs when the author makes use of any speech, written statement, or action based on ethnicity, region or country of origin, colour of the skin, physical features, sex, language, religion or ideas with the aim of denying one or a group of persons their human rights provided by Rwandan law and International Conventions to which Rwanda is party.

Article 5

Any person guilty of the crime of divisionism or sectarianism mentioned in Article 3 of this law is sentenced to between three months and two years of imprisonment and fined between fifty thousand (50,000) to three hundred thousand (300,000) Rwandan Francs or only one of these sanctions.

When the offender of the crime of divisionism or sectarianism is a government official, a former government official, a political party official, an official in the private sector, or an official in a non-governmental organization, he/she is sentenced to between one year and five years of imprisonment and fined between five hundred thousand (500,000) to two million (2,000,000) Rwandan Francs or one of those two sanctions.

Article 6

Any association, political party, or non-profit making organization found guilty of offences of divisionism is penalized with a suspension of between six months and one year and fined between five million (5,000,000) and ten million (10,000,000) Rwandan Francs.

Depending on the seriousness of the consequences of that act of discrimination on the population, the court may double the penalty, or decide to dissolve the concerned association, political party or non-profit making organization, according to the law governing the dissolution of associations, political parties, and non-profit making organizations. (Government of Rwanda 2001)

The definition of divisionism provided in Article 3 strongly echoes the definitions of hate speech cited in the psychological literature (Tsesis 2002; Boeckmann and Turpin-Petrosino 2002, qtd. in Vollhardt et al. 2007, 23), as all three conceptualizations hinge on the denigration of out-group members through acts of expression rather than the incitement of hatred within an audience. Nevertheless, Rwanda's divisionism law has been the subject of fierce criticism by academics and civil society organizations that claim that it is being used by the Kagame government as a tool to persecute political opposition and silence dissent.²⁸

For instance, Human Rights Watch argues that the definition of divisionism is vague and is thus vulnerable to abuse. Even the judges responsible for adjudicating cases rarely have an accurate or consistent understanding of the law. The NGO reports that in a series of interviews conducted in 2005, researchers asked Rwandan judges to define divisionism. "Not one judge interviewed by Human Rights Watch researchers was able to do so, despite each having adjudicated and convicted defendants on divisionism charges" (Human Rights Watch 2008, 34). Judges often attempted to define the term by giving examples. However, the NGO notes that this "know it when I see it" approach to criminal law is a violation of the obligation of states to precisely define all criminal offences under Article 15 of the International Covenant on Civil and Political Rights, to which Rwanda is a signatory (34, n. 92). International civil society organizations claim that the Kagame regime deliberately included vague definitions in Article 3 of the divisionism law in order to facilitate its application and extend its reach. As such, the divisionism law becomes a catch-all for speech and activities deemed threatening by the regime. The charges levied by the international community are not without merit – in a 2006 report, the Rwandan Senate acknowledges that

²⁸ See, for example: Amnesty International (2004); Freedom House (2006).

the divisionism law is ambiguous and can be used repressively (Senate of Rwanda 2006, 89, qtd. in Immigration and Refugee Board of Canada 2007).

The Kagame regime has also used the divisionism law to disband political parties. A 2007 Government of Canada report notes that in 2003, the Mouvement démocratique républicain (MDR), a leading opposition party, “was forcibly disbanded following the outcome of a parliamentary commission [...] which identified 46 MDR members as divisionist” (Immigration and Refugee Board of Canada 2007, 1). Additionally, although the Parti libéral (PL) and the Parti social démocrate (PSD) had historically supported the RPF government, they were also charged with divisionism after attempting to run candidates in the 2003 parliamentary elections (1). More recently, the Kagame regime used the divisionism law to silence its chief political rival, Victoire Ingabire Umuhoya, and to disband her political party, the Forces démocratiques unifiées (FDU). Ingabire’s case offers specific insight on the strengths and weaknesses of the psychological approach to free expression.

Ingabire returned to Rwanda in January 2010 after sixteen years in exile in Europe and assumed leadership of the Forces démocratiques unifiées (FDU), a coalition of opposition parties which sought to challenge Kagame’s RPF party in the August 2010 presidential elections. On January 16, she visited the Gisozi Genocide Memorial Centre in order to lay a wreath and deliver a speech on national unity and reconciliation. The full text of the speech is reproduced below.²⁹

I would like to say that today, I came back to my country after 16 years, and there was a tragedy that took place in this country. We know very well that there was a genocide, extermination. Therefore, I could not have returned after 16 years to the same country after such actions took place. They took place when I was not in the country. I could not have fallen asleep without first passing by the place where those actions took place. I had to see the place. I had to visit the place.

²⁹ The full text of Ingabire’s speech was submitted as evidence in her trial.

The flowers I brought with me are a sign of remembrance from the members of my party FDU and its executive committee. They gave me a message to pass by here and tell Rwandans that what we wish for is for us to work together, to make sure that such a tragedy will never take place again. That is one of the reasons why the FDU Party made a decision to return to the country peacefully, without resorting to violence. Some think that the solution to Rwanda's problems is to resort to armed struggle. We do not believe that shedding blood resolves problems. When you shed blood, the blood comes back to haunt you.

Therefore, we in FDU wish that all we Rwandans can work together, join our different ideas so that the tragedy that befell our nation will never happen again. It is clear that the path of reconciliation has a long way to go. It has a long way to go because if you look at the number of people who died in this country, it is not something that you can get over quickly. But then again, if you look around you realize that there is no real political policy to help Rwandans achieve reconciliation. For example, *if we look at this memorial, it only stops at people who died during the Tutsi genocide. It does not look at the other side – at the Hutu who died during the genocide. Hutu who lost their people are also sad and they think about their lost ones and wonder, 'When will our dead ones be remembered?'*

For us to reach reconciliation, we need to empathize with everyone's sadness. It is necessary that for the Tutsi who were killed, those Hutu who killed them understand that they need to be punished for it. It is also necessary that for the Hutu who were killed, those people who killed them understand that they need to be punished for it too. Furthermore, it is important that all of us, Rwandans from different ethnic groups, understand that we need to unite, respect each other and build our country in peace.

What brought us back to the country is for us to start that path of reconciliation together and find a way to stop injustices so that all of us Rwandans can live together with basic freedoms in our country. (Ingabire 2010a)

In April 2010, largely on the basis of her comments about the lack of remembrance for Hutu victims of genocide (in italics), Ingabire was placed under house arrest and the FDU's official status as a political party was revoked. Following a period of extensive questioning, she was eventually released from house arrest in the summer of 2010. However, in October, she was re-arrested and charged under Rwanda's divisionism law. She also faced numerous other charges, including denying the genocide, threatening national security, and supplying arms and ammunitions to Hutu rebel groups operating out of Burundi and the DRC.³⁰ In 2012, the FDU launched an online English-language advocacy campaign on Ingabire's

³⁰ Due to space constraints, my analysis pertains exclusively to the charges of divisionism levelled against Umuhoza on the basis of her remarks at the memorial service.

behalf (www.victore-ingabire.com). The campaign makes extensive use of social media platforms such as Facebook, Twitter, and YouTube.

The trial, which was initially scheduled to begin in the High Court of Kigali in the autumn of 2010, faced numerous delays and postponements. On April 16, 2012, Umuhoza dismissed her court-appointed counsel and withdrew from the trial, announcing that she would boycott the proceedings in protest of abuses of justice including the intimidation of a key defense witness. On April 18, the High Court ruled that the trial would proceed in her absence, and that no new defense counsel would be appointed. The verdict of Umuhoza's trial has been postponed until September 7, 2012, though her supporters expect that she will receive a sentence of life in prison (Twagirimana 2012).

This case sharply illustrates the practical tensions inherent to the approach offered by Vollhardt et al. (2007). Umuhoza's remarks conform to at least two, and perhaps three, of the characteristics of hate speech documented in Table 3. The speech refers to two distinct groups of victims of the genocide – Hutu and Tutsi. As such, it fulfills characteristic 1a, which maintains that: “The core element is a distinction between “us” and “them”. Individuals or groups are referred to by using their group membership” (29). Additionally, in her speech, Umuhoza identifies stalled reconciliation as a problem in Rwanda (“it is clear that the path of reconciliation has a long way to go”), yet the solutions she offers are facile (“work together, join our different ideas together”; “unite, build our country in peace”; “find a way to stop injustices”). Thus, the FDU leader's remarks could be deemed hateful according to characteristic 3b, which cautions against solutions which are “simplistic and do not take into account the complexity and multifaceted nature of societal problems” (Vollhardt et al. 2007, 30). Finally, Umuhoza seems to speak and act in the name of her party

(“the flowers I brought with me are a sign of remembrance from the members of my party the FDU”; “one of the reasons why the FDU party made the decision”; “we in FDU wish”). Assuming that Umuhoza’s remarks are a political speech, one could make the argument that in evoking the difficult and controversial reconciliation project spearheaded by her political rival, she “attains direct political gain and an increase in power” (characteristic 3a, Vollhardt et al. 2007, 30).

There are two significant problems with Vollhardt et al.’s (2007) framework. First, the authors enumerate 13 separate indicators of hate speech (Table 3) yet provide no guidance as to how to apply them to specific acts of expression. Are certain indicators more important than others? Must a speech act display more than one characteristic in order to be classified as hateful? The authors provide no answers to these questions, giving the impression that acts of expression need only conform to one indicator to be deemed hate speech. However, my analysis of Ingabire’s speech reveals this approach to be absurd. For instance, there is nothing hateful about the claim that Rwandans from different ethnic groups must unite in mutual respect to build the country in peace, even if this suggestion is rather simplistic.

Second, and more fundamentally, in order to apply the authors’ framework, acts of expression must be carefully analyzed according to their constituent parts. As the Ingabire example capably shows, this approach robs speech acts of both meaning and context. Vollhardt et al. (2007) argue throughout the article that hate speech in post-conflict environments must be understood in the context of individual and cultural trauma (15-19). Indeed, one of the major objectives of the psychological perspective on free expression is the

integration of contextual and theoretical analysis. Thus, the framework presented in Table 3 is self-defeating.

Although the specific analytical rubric proposed by Vollhardt et al. (2007) is seriously flawed, the psychological approach does offer some valid insights into the legitimacy of the Kagame regime's censorship of Ingabire. Specifically, the emphasis which the authors place on the relationship between trauma and hate speech in post-conflict environments is welcome. As discussed in chapter 1, the Kagame regime's official narrative of genocide has bred resentment in Rwanda. A major source of tension concerns the regime's refusal to acknowledge that Hutu were targeted during the conflict. Therefore, although the tone of Ingabire's remarks is respectful, her subject matter is controversial. Crucially, the politician made her remarks during an official genocide memorial service. Vollhardt et al. (2007) would likely argue that the context of the memorial would influence the effects of Ingabire's remarks on the audience. Memories of genocide would likely be fresh in the minds of those in attendance, and the memorial service could even trigger psychological symptoms of trauma such as flashbacks. Therefore censorship of Ingabire's remarks was legitimate given the time and place of their delivery. However, the regime's use of the divisionism law to disband the FDU was unjustified. Kagame capitalized on Ingabire's ill-timed remarks to effectively neuter its most important political rival.

IV. Conclusion

In this chapter, I discussed the ways in which the field of social psychology contributes to the study of free expression. The psychological perspectives offered by Staub and his colleagues complement the more mainstream philosophical approaches addressed in chapter 2 as they consider trauma and hate speech to be intrinsically linked. In section I, I

analyzed Staub's germinal work, *The Roots of Evil* (1989), in which he lays out a theory of genocide based on the motivations of perpetrators experiencing difficult life conditions. Additionally, in this work, Staub introduces the concept of a continuum of destruction which normalizes conflict and facilitates the escalation of violence, culminating in genocide. In section II, I evaluated a lesser-known article published by Staub in conjunction with colleagues from the University of Massachusetts and the Humanitarian Tools Foundation (Vollhardt et al. 2007). In that article, the authors apply Staub's (1989) theory of the evolution of mass violence to hate speech. They focus specifically on the role played by hateful expression in the continuum of violence. Although this approach is useful as it allows for a broader conception of the characteristics of hate speech, a major weakness is its failure to account for political considerations, particularly in countries recovering from intractable conflict. In these environments, authoritarian regimes often label speech as hateful or dangerous in order to crack down on opposition activities and to justify illegitimate derogations of freedom of expression. In section III, I illustrated this critique through a discussion of Rwanda's divisionism law and its application to the case of Victoire Ingabire Umuhiza, a prominent opposition leader who was charged under the law on the basis of controversial statements she made about Hutu killed during the genocide. Although the psychological approach puts a much-needed emphasis on the relationship between trauma and hate speech, its ignorance of political factors significantly hinders its applicability, particularly in post-conflict authoritarian regimes.

CONCLUSION

A major weakness of the literature on the regulation of freedom of expression within the field of political science is the assumption of peaceful, liberal democratic conditions. The objective of my thesis project was to contribute to a better understanding of the legitimate regulation of speech by analyzing disciplinary approaches to freedom of expression through the lens of countries recovering from intractable conflict. I sought to answer the question: How appropriate are current understandings of freedom of expression to the regulation of speech in post-conflict environments? Relying on insights from the field of social psychology and the case of post-genocide Rwanda, I argued that greater restrictions on freedom of expression could be legitimate in countries recovering from intractable conflict. However, rights derogations must take place within limits so as not to become a tool of authoritarian rule. Further interdisciplinary research is needed in order to determine the nature and scope of these limits.

The study began with a historical overview of ethnic tensions and conflict in Rwanda in order to contextualize the discussion in the subsequent chapters. I explained that although the labels ‘Hutu’ and ‘Tutsi’ existed before European colonization, Belgian colonial administrators formalized ethnic identities through a system of institutional reforms such as the distribution of identity cards. The Belgians also categorically excluded Hutu from political and public life, reifying a hierarchical relationship between Hutu and Tutsi and setting the stage for protracted inter-group conflict. By 1959, relations between groups had turned violent. Several hundred Hutu and Tutsi were killed in the massacres that became known as the Hutu Revolution, and Tutsi refugees launched sporadic attacks on Rwanda throughout the 1960s. Tensions between groups remained high throughout the 1970s and

1980s, and were compounded by the 1987 coffee market crash. In 1990, when the Tutsi-dominated Rwandan Patriotic Army launched an attack on Rwanda, sparking a civil war, the Habyarimana regime attempted to shore up flagging political support by uniting Hutu against a common Tutsi enemy, a strategy which would ultimately lead to genocide.

On April 6, 1994, the plane carrying president Habyarimana was shot down as it prepared to land in Kigali. This event sparked 100 days of genocidal violence in which an estimated 800,000 Tutsi and moderate Hutu were killed and approximately three million were forced to flee their homes. The genocide ended on July 4, when RPA forces occupied the capital and toppled the government. Although the Rwandan Patriotic Front promised to implement a power-sharing agreement and promote democratic reforms, both academics and NGOs have accused the Kagame government of authoritarianism, arguing that the regime's tight restrictions on civil and political rights are hindering reconciliation. This historical section showed that conflict in Rwanda was deep-rooted, prolonged, and exceptionally violent, which helps to explain its long-lasting effects on Rwandan individuals and society, discussed in detail in chapter 1. Furthermore, this historical overview provided a background against which specific censored acts of expression were analyzed in chapters 2 and 3.

In chapter 1, I asked the questions: What are the individual and collective effects of intractable conflict? Why are these effects important to the study of free expression? I argued that intractable conflicts have profound attitudinal and institutional consequences. Specifically, a conflictive ethos combined with authoritarian tendencies and weak educational and judicial institutions make speech both more dangerous and more difficult to regulate in countries recovering from such conflicts than in peaceful, liberal democratic societies. First, I discussed the high levels of individual psychological trauma present in

Rwanda following the genocide. Citing studies that showed that over 95 percent of children and 75 percent of adults had been exposed to traumatic events (Chauvin et al. 1998, 387; Pham et al. 2004, 607), I argued that psychological trauma made individuals less likely to trust the members of their communities and support reconciliation.

Next, I turned my attention to cultural trauma, which can be described as the collective manifestation of individual psychological distress (Meierhenrich 2007, 553). Social factors such as norms and values, family dynamics, or cultural or religious practices help to shape individuals' perceptions of traumatic events and provide meaning. In an attempt to understand and cope with psychological and cultural trauma, group members construct what Bar-Tal (2000) calls a "psychological infrastructure", which consists of societal beliefs including "devotion to society and country, high motivation to contribute, persistence, readiness for personal sacrifice, unity, solidarity, determination, courage, and maintenance of society's objectives" (353). These beliefs shape and orient society, and constitute its ethos. Countries recovering from intractable conflict are characterized by a conflictive ethos. Although this ethos fosters the development of successful coping mechanisms which can mitigate the effects of psychological trauma, it also perpetuates hostility by rationalizing the conflict and stigmatizing the enemy, leading to fear and intolerance. Thus, the conflictive ethos that characterizes most post-conflict societies further hinders reconciliation. Post-genocide Rwanda is still plagued by such an ethos. For example, in private conversations, members of one group often make demeaning comments about another, and racial epithets and slurs are scrawled on the walls of public restrooms (Kohen, Zanchelli and Drake 2011). I concluded that in Rwanda, persistent ethnic tensions and resentment further undermine the possibility of reconciliation.

In the second section of chapter 1, I focused on the major structural legacies of conflict. First, I argued that the insecurity of post-conflict environments often results in democratic backsliding, in which governments claim that limitations on civil and political liberties are necessary to maintain order and avoid a resurgence of conflict. This was the case in Rwanda. Although the RPF government initially committed to a power-sharing agreement following the genocide, it quickly began to harass and imprison political rivals. The Kagame regime violated democratic norms and procedures by rigging elections, banning political parties and NGOs on the charge of inciting divisionism, and legislating tight controls on freedom of expression through the divisionism law (2001), the negationism law (2003), the press law (2008), and the genocide ideology law (2008).

Second, I looked at the ways in which intractable conflict affects state institutions. I focused specifically on education and justice, two sectors which aim to promote reconciliation in post-conflict environments through the development of new curricula or the establishment of transitional justice mechanisms. I argued that a major institutional consequence of intractable conflict is the loss of physical and human capital in both educational and judicial sectors: schools, court buildings, teachers, and legal professionals are often deliberately targeted in the fighting. In the aftermath of conflict, the weak capacity of educational institutions can perpetuate intolerance rather than mitigate it, while the poor performance of the judicial system can result in frustration and resentment. Moreover, government educational and judicial policies designed to encourage reconciliation are often poorly designed and inconsistently implemented, which increases animosity between groups. Two notable examples of such policies are the *ingando* re-education camps and the

“traditional” *gacaca* courts, which have both largely failed to achieve reconciliation, sometimes actually fuelling greater tensions.

Finally, in the conclusion to chapter 1, I explained how the effects of conflict influence the study of free expression. I argued that in post-conflict environments, public discourse reflects society’s conflictive ethos. As a result, the expression of slurs, racial epithets, and hate speech occurs more frequently in countries recovering from conflict than in peaceful societies. Furthermore, hateful speech is more likely to incite violence in post-conflict countries than in peaceful countries, as legacies of conflict create an emotionally charged environment which can be consciously or subconsciously manipulated by speakers. Additionally, in post-conflict countries, weak judicial institutions exacerbate the dangers posed by hate speech. Citizens are unlikely to trust a justice system which they perceive to be incompetent, corrupt, or biased. As a result, they are more likely to reject official, non-violent mechanisms to address hate speech in favour of unofficial strategies such as reprisals or vigilante justice. Finally, the authoritarian tendencies of many post-conflict regimes make it difficult to assess the legitimacy of rights derogations, as these regimes often equate speech that poses a threat to society as a whole with speech that threatens the ruling party’s interests.

In chapter 2, I moved away from the more empirical analysis of the previous chapter, focusing instead on an analysis of political science/philosophical literatures pertaining to the regulation of freedom of expression. I concentrated specifically on liberal theory, which I consider the predominant approach to the regulation of speech in both academic and policy circles. In the first section, I analyzed classical liberal approaches, concentrating on Locke’s *Second Treatise of Government* (1689) and Mill’s *On Liberty* (1863). These two works establish two conditions under which it is legitimate to derogate rights: in the event of an

emergency (Locke 1689), and in order to prevent harm to others (Mill 1863). However, the classical liberal approach to expression is undermined by the failure to consider speech separately from other civil liberties. What's more, neither Locke nor Mill adequately accounts for rights derogations in authoritarian regimes. As a result, their theories are of little use in understanding limitations on freedom of expression in post-conflict environments.

In the second section, I addressed contemporary liberal approaches to the regulation of freedom of expression, concentrating on two works by Scanlon, "A Theory of Freedom of Expression" (1972) and "Freedom of Expression and Categories of Expression" (1979). I argued that although these works improved on classical liberal approaches by specifically analyzing freedom of expression, they still pertained exclusively to liberal democratic conditions, limiting their usefulness in analyzing restricted speech in post-conflict countries. Furthermore, I argued that Scanlon's theories were of limited applicability to countries recovering from intractable conflict as they rely on a narrow definition of diminished capacity, which ignores the importance of trauma as a potential justification for government paternalism.

In section III, I illustrated my theoretical critiques of Locke, Mill, and Scanlon with a discussion of the case of Agnès Uwimana Nkusi, a prominent Rwandan journalist who was arrested in 2010 and charged with threatening national security, denying the genocide, defaming the president of Rwanda, and inciting divisionism on the basis of controversial articles published in the bi-monthly tabloid *Umurabyo*. In February 2011, the High Court of Rwanda found Nkusi guilty of all crimes, sentenced her to 17 years in prison and fined her RWF 250,000. The journalist appealed the decision to the Supreme Court of Rwanda, which dismissed the charges of genocide denial and incitement to divisionism, but upheld the

convictions for defaming the president and threatening national security. It reduced Nkusi's sentence to four years. I showed how Locke, Mill, and Scanlon would likely reject the Kagame regime's punishment of Nkusi, but argued that a case could be made that censorship was legitimate in the context of the significant levels of psychological and cultural trauma present in Rwanda.

In chapter 3, I discussed the ways in which the field of social psychology contributes to the study of free expression. I used the psychological literature to complement the more mainstream political science/philosophical approaches discussed in chapter 2, as psychologists consider trauma and speech to be intrinsically linked, particularly in post-conflict environments. I analyzed two works by Staub and his associates. The first, *The Roots of Evil* (1989), widely considered to be Staub's seminal work, lays out the author's theory of mass violence and establishes a foundation for a discussion of free expression in countries recovering from such conflicts. The second, a journal article published by Staub in conjunction with academic and NGO colleagues, applies core concepts from *The Roots of Evil* (1989) to the study of hate speech in the Democratic Republic of Congo (Vollhardt et al. 2007).

In the first section, I briefly explained and critiqued Staub's theory of genocide. The author contends that "difficult life conditions and certain cultural characteristics may generate psychological processes and motives that lead a group to turn against another group" (Staub 1989, 13). I argued that that element of Staub's theory most relevant to the study of free speech is the continuum of destruction, in which the commission of small and seemingly insignificant acts involve an individual in a destructive system which makes more serious acts, including genocide, seem permissible. I suggested that Staub's conception of the

continuum of violence suffers from a lack of attention paid to political or structural factors such as elite motivations which often significantly contribute to the outbreak of genocide. Furthermore, although Staub implicitly includes hate speech as a step along the continuum of destruction by using examples such as the utterance of 'Heil Hitler', he does not satisfactorily account for the ways in which expression contributes to the development of a destructive system.

In section II, I examined the lesser-known article "Deconstructing Hate Speech in the DRC: A Psychological Media Sensitization Campaign" (Vollhardt et al. 2007). The authors, which include Staub, apply Staub's theory of genocide to hate speech in order to determine "the roots and functions of hate speech on the continuum of violence" (102). They define dangerous speech much more broadly than do Locke, Mill, or Scanlon, arguing that hate speech is not only the blatant expression of extreme prejudice, but also more subtle, gradual forms of expression. These early forms of hate speech can be one of the first steps along a continuum of violence. Because the authors are concerned only with the psychological effects of speech on individuals and groups, rather than the political ramifications of derogating rights, they suggest that it is necessary to limit or counter even subtle forms of hateful expression. I argued that this broad understanding of dangerous speech could be helpful as it allows for the regulation of expression before it can inflame tension. However, the psychological approach glosses over the fact that many regimes, particularly those in countries recovering from intractable conflict, use the perceived destabilizing effects of expression to rationalize curtailing civil liberties and political opposition. The broad understanding of hate speech advanced by Vollhardt et al. (2007) is often used as a tool of authoritarian legitimation.

In the third section, I emphasized my critiques of Staub (1989) and Vollhardt et al. (2007) with a discussion of Rwanda's divisionism law (2001) and the specific example of Victoire Ingabire Umuhiza, a high-profile Rwandan opposition politician who was charged and prosecuted under the law in 2010 on the basis of controversial statements she made during a genocide memorial service. Although Ingabire's trial is still ongoing, her supporters expect her to be sentenced to life in prison. First, I explained that although the definition of divisionism provided in the law mirrors the definitions of hate speech offered by Vollhardt et al. (2007, 23), the law has been condemned by academics and civil society organizations alike. Critics claim that the law is being used by the Kagame regime as a tool to persecute political opposition and silence dissent. Next, I analyzed the speech given by Ingabire at the memorial service, showing how several passages corresponded to indicators of hate speech identified by Vollhardt et al. (2007, 29-30). I used this analysis to show that although psychologists offer valid insights about the importance of context, their conception of hate speech is often too broad. I concluded that censorship of Ingabire was legitimate because of the circumstances under which she made her remarks, but that regime's use of the divisionism law to dissolve the FDU party was unjustified.

In this thesis, I showed that neither mainstream liberal philosophical approaches nor psychological approaches to the regulation of free expression adequately account for rights derogations in countries recovering from intractable conflict. A major problem inherent to both disciplines is the lack of attention paid to the unique characteristics of authoritarian regimes. For political theorists such as Locke, Mill, or Scanlon, this lacuna is likely the result of their attempts to craft ideal theories of the nature and limits of the state's power over the individual. Farrelly (2007) argues that "ideal theory must recognize some moderately strong

feasibility constraints which require it to be realistic in the best of foreseeable conditions”. He goes on to note that “ideal theorists (falsely) assume that a political philosopher can easily determine (or has privileged access to) what constitutes the ‘best foreseeable conditions’” (845-846).³¹ Farrelly’s critiques of ideal theory can be applied to classical and contemporary liberal approaches to the regulation of freedom of expression. Like the economist who prefaces his or her findings with *ceteris paribus*, liberal theorists make assumptions about the existence of peaceful democratic conditions in order to enable the development of comprehensive theories of rights. In authoritarian regimes, social control is largely achieved through coercion and intimidation, democratic norms and processes are frequently violated, there is rarely a true separation of powers, and the judiciary is often weak or corrupt. As I asked in chapter 2, are limitations placed on freedom of expression by authoritarian regimes legitimate if the regime itself is illegitimate? The liberal theories advanced by Locke, Mill, and Scanlon cannot satisfactorily answer this question.

The psychological approaches articulated by Staub (1989) and Vollhardt et al. (2007) also offer little insight on the legitimacy of rights derogations in illiberal regimes. However, unlike political philosophers, who choose to limit their analyses to liberal democracies, the lack of attention paid to authoritarian regimes by social psychologists is due to their disinterest in political institutions, liberal democratic or otherwise. Rather, these scholars focus exclusively on the ways in which hate speech influences individuals and groups. As a result, they, too, offer little insight on the legitimacy of rights derogations in authoritarian regimes.

³¹ Farrelly is critiquing ideal theories of justice associated with Rawls, and, to a lesser extent, Dworkin. However, I believe that his arguments about the limits of ideal theory are applicable to political theory more broadly.

The lack of attention paid by psychologists to political factors such as regime type speaks to what is probably the most important conclusion of my thesis. Specifically, both the philosophical and psychological literatures surrounding the regulation of freedom of expression could be significantly improved by integrating insights gained from one another (though any specific attempt to do lies beyond the scope of this thesis). Liberal philosophical approaches to free speech would benefit from the inclusion of an analysis of trauma. Social psychologists recognize that individual and collective traumas profoundly influence both cognition and social norms, creating or perpetuating a hostile or intolerant environment which renders speech more dangerous in post-conflict environments than in peaceful societies. If political philosophers were to integrate these insights into their work, they would be able to more accurately determine the likelihood that the expression of certain views would result in harm. By extension, they would be better able to comment on the legitimacy of rights derogations in post-conflict environments.

Moreover, the psychological approach to freedom of expression would benefit from an inclusion of political analysis. Currently, social psychology contents itself with naming and defining hate speech so as to develop effective sensitization campaigns, but offers little insight as to when or how to regulate it at state level. As a result, a significant consequence of the application of the psychological approach is the legitimization of authoritarian rule. Were scholars such as Staub (1989) and Vollhardt et al. (2007) to balance their broad conceptions of hate speech with a political scientist's understanding of the mutually constitutive relationship between freedom of expression and democratic development, their approaches of hate speech would be more relevant to countries recovering from conflict and struggling with authoritarianism.

Further interdisciplinary research is needed in order to articulate a non-ideal theory of freedom of expression which applies to both peaceful liberal democracies and countries recovering from intractable conflict – admittedly, a major endeavour, but an important one nonetheless. Not only would such research be intellectually and theoretically fulfilling, it would also serve an important practical purpose. Currently, most post-conflict development initiatives pertaining to the regulation of speech replicate the false assumptions inherent to liberal philosophy’s understanding of free expression. Development practitioners have internalized the false premise that countries recovering from intractable conflict are comparable to peaceful liberal democracies. As a result, international organizations and donors often pressure post-conflict governments to rapidly implement liberal reforms, while civil society organizations pursue highly technical projects aimed to improve the quality of journalism. Unfortunately, these policies and programs often fail to achieve significant results, and may even exacerbate tensions. Interdisciplinary research into the regulation of freedom of expression could contribute to the development of more effective post-conflict interventions.

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